

## CONSTITUTION BUILDING AND EQUALITY IN DEEPLY-DIVIDED SOCIETIES: THE CASE OF THE PALESTINIAN-ARAB MINORITY IN ISRAEL

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### I. INTRODUCTION

Issues surrounding the principles and practices required to accommodate minorities in national systems have risen to the top of the human agenda. This is likely due to escalating internal tensions in nations throughout the world that threaten to endanger the stability of these states and, consequently, peaceful inter-communal coexistence. In many instances, if it is not already the case, it may be only a matter of time before these tensions erupt into violent conflicts.<sup>1</sup>

However, the objective of accommodation is not merely peace and stability. Universal morals and values must also be applied. Assuming that justice, equality, and well-being for all human beings are the ultimate goals of humanity, developing a favorable and constructive system for the accommodation of racial, ethnic, religious, and cultural minorities in national and international systems is an indispensable means of promoting these goals. Moreover, such developments play a significant role in humanity's journey toward peace, stability, and the creation of a just and fair society.<sup>2</sup>

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<sup>1</sup> See generally CLIVE BALDWIN, CHRIS CHAPMAN & ZOË GRAY, MINORITY RIGHTS GROUP INT'L, MINORITY RIGHTS: THE KEY TO CONFLICT PREVENTION (2007), available at [http://reliefweb.int/rw/lib.nsf/db900SID/AMMF-74JK2X/\\$FILE/mrg-humanrights-jun2007.pdf?OpenElement](http://reliefweb.int/rw/lib.nsf/db900SID/AMMF-74JK2X/$FILE/mrg-humanrights-jun2007.pdf?OpenElement) (discussing the role of conflict in the development of minority rights).

<sup>2</sup> See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, at 210, U.N. Doc A/47/49 (Feb. 3, 1993); see generally NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (2d ed. 2003);

Contemporary political and legal order does not allow, at least as a practical matter, complete political self-determination for every racial or ethnic minority group. At the same time, the legitimate interests of minority groups are normally no less important than those of dominant groups. Thus, whereas the dominant group in a democratic state is typically able to freely determine its collective political, social, and cultural development, a fair balance must be attained in order to protect the weaker side's interests and identity and avoid potential rivalry.<sup>3</sup>

The principal theory proffered by this article is that the alternative to a lack of the collective right to political self-determination for ethnic and racial minorities must not be partial collective rights. Instead, an optimal constitutional arrangement ensuring "participatory equality" must be invoked—one that maintains due respect for minority concerns and yet assures internal stability in a multi-ethnic state.<sup>4</sup> Legal frameworks for minority rights speak directly to this point. What is more, moral, philosophical, practical, and policy justifications support the recognition of the collective experience of minority groups; however, meaningful inclusion and participation of minority groups in the constitution-making process are equally essential to the delivery and sustainability of collective rights as are the resulting document and its content.<sup>5</sup>

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JAY A. SIGLER, *MINORITY RIGHTS: A COMPARATIVE ANALYSIS* (1983); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991); Patrick Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update*, in *UNIVERSAL MINORITY RIGHTS* 13 (Alan Phillips & Allan Rosas eds., 1995).

<sup>3</sup> See generally WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* (2001); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 12 (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

<sup>4</sup> Asbjørn Eide, *New Approaches to Minority Protection*, in *HUM. RTS. GROUP INT'L, NEW APPROACHES TO MINORITY PROTECTION* 9, 9 (1993).

<sup>5</sup> In fact, there is much discussion in the international human rights community of an "emerging right" to equal participation in constitution making. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 58-64 (1992). This right also gains legal strength from the general meaning of "democratic participation" in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Universal Declaration of Human Rights art. 21, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171. The Office of the High Commissioner for Human Rights has stated that constitution making is central to a democratic government and that "citizens also participate directly in the conduct of public affairs when they choose or change their constitution." Office of the High Commissioner for Human Rights, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public*

As this paper will suggest, a prerequisite to achieving substantial equality is the participatory sharing in a society's resources in three primary domains: the public domain, the internal domain, and the historical domain. It is under this theory that this article aims to offer a desirable constitutional framework that could fairly govern the national relationship between dominant and disadvantaged groups, and guarantee substantive equality and due respect for majority and minority concerns, both in law and in practice. This theory of participatory equality is grounded in the universal concepts of human rights, justice, dignity and inclusion for all on the one hand, while celebrating the history and continued development of the unique identity of each group within society on the other.

The test case that will be examined herein is the case of the Palestinian-Arab minority in Israel.<sup>6</sup> The discussion will focus primarily on the status of the Palestinian-Arab citizens of Israel in a future constitution and will propose a constitutional framework under which Palestinian-Arab minority rights in Israel would be protected. In order to provide contextual background for this discussion, Part II will briefly describe the historical and present-day status of the Palestinian-Arab community in Israel, its special ties to the land, and a summary of the

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*Service*, ¶ 6, CCPR/C/21/Rev.1/Add.7 (July 12, 1996). Regional conventions and declarations that combat race and gender discrimination and defend minority rights play a role in supporting the right to democratic participation. See, e.g., Organization of African Unity, Banjul Charter on Human and Peoples' Rights art. 13.1, June 27, 1981, 21 I.L.M. 58; Asian Human Rights Commission, Asian Human Rights Charter art. 5.2, Mar. 30, 1998, available at <http://material.ahrchk.net/charter/pdf/charter-final.pdf>; Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, available at [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm). See generally VIVIEN HART, U.S. INST. FOR PEACE, DEMOCRATIC CONSTITUTION MAKING I (2003), available at <http://www.usip.org/pubs/specialreports/sr107.pdf> (discussing the right to participate in constitution making).

<sup>6</sup> It should be noted that there are some variations in terminology when discussing this minority group. Sometimes its members are referred to as "Israeli Arabs" or "Arab Israelis." At other times, they are called "Palestinian citizens of Israel" or "Palestinian Israelis." The term "Arab Israeli" was coined by the Israeli government, whereas the community typically self-identifies as both Arab and Palestinian citizens/minority in Israel. These issues have been addressed in depth by many scholars. See, e.g., IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY (1980); DAVID KRETZMER, THE LEGAL STATUS OF ARABS IN ISRAEL (1990); INT'L CRISIS GROUP, IDENTITY CRISIS: ISRAEL AND ITS ARAB CITIZENS (2004), [http://www.crisisgroup.org/library/documents/middle\\_east\\_\\_north\\_africa/arab\\_israeli\\_conflict/25\\_identity\\_crisis\\_israel\\_arab\\_citz.pdf](http://www.crisisgroup.org/library/documents/middle_east__north_africa/arab_israeli_conflict/25_identity_crisis_israel_arab_citz.pdf); AS'AD GHANEM, THE PALESTINIAN-ARAB MINORITY IN ISRAEL 1948-2000 (2001); Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389 (1990); SABRI JIRYIS, THE ARABS IN ISRAEL (1976). In this paper, members of this minority will be referred to interchangeably as the "Palestinian-Arab citizens/minority/community in Israel." Using the latter terms of self-identification reinforces the perception of the group as a national minority (rather than separate sub-identities).

current constitution-drafting process. Part III will describe the importance of entrenching minority rights protections within a constitution, as well as the need for full and meaningful inclusion of the minority in public deliberations over the constitution's language, terms, and provisions.

Next, Part IV will provide a detailed analysis of Israeli law, highlighting the key laws containing ethnic classifications and exclusions, from the definition of the state's character, to state symbols, to land and housing rights, to immigration and citizenship laws. This section will also suggest how these *de jure* exclusions, on the "formal plane," have influenced—and in many cases justified—the perpetuation of discrimination on the "material plane," through socio-economic and performance indicators. Having surveyed the legal and social landscape of the Palestinian-Arab minority in Israel, Part V will track the principle questions raised by the Israeli draft constitution over the definition of the State and the status of this minority, examining specific provisions. Finally, Part VI will suggest a theoretical framework for the creation of a constitutional arrangement that guarantees both the collective and individual rights of substantial minority groups under systems that cater to the majority, based on the experience of the Palestinian-Arab community in Israel. In conclusion, Part VII will ask whether the proposed Israeli constitution holds the potential to improve the situation of the Palestinian-Arab minority, or whether it threatens to merely embed exclusivity and inequality in a single document of paramount legal status.

## **II. BACKGROUND ON THE PALESTINIAN-ARAB MINORITY AND THE CONSTITUTIONAL DRAFTING PROCESS IN ISRAEL**

### **A. THE PALESTINIAN-ARAB COMMUNITY IN ISRAEL**

Israel is defined officially as a Jewish and democratic state; yet, alongside the Jewish majority exists a Palestinian-Arab minority, comprising close to one-fifth of the state's population.<sup>7</sup> Reaching over

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<sup>7</sup> CENT. BUREAU OF STATISTICS, ISRAEL IN FIGURES 10 (2007), available at [http://www.cbs.gov.il/www/publications/isr\\_in\\_n07e.pdf](http://www.cbs.gov.il/www/publications/isr_in_n07e.pdf).

one million, the Palestinian-Arab citizens of Israel can be viewed as a distinct national, cultural, religious, and linguistic minority. Since Israel's inception, the relationship between Palestinian-Arab citizens and the state has been highly contested. Their unique status as Israelis by citizenship, and Palestinian-Arabs by nationality, has led successive Israeli governments to view this minority group with great suspicion.<sup>8</sup> Jewish-Israeli society questions Palestinian-Arab status in Israel, while the latter continually reconsiders its role within Israeli society and politics.<sup>9</sup>

In the shadow of the ongoing Israeli-Arab conflict, a great deal of hostility has shaped these attitudes, as the Jewish majority views the Palestinians, who remained in the state as part of the Arab world, as a potential fifth column, and often simply as enemies of the state. The key consequences of these attitudes have been that, by every measurable standard—such as income, education, infrastructure, employment, the criminal justice system, and the level of social services—Palestinian-Arab citizens continue to lag far behind Jewish citizens.<sup>10</sup> Palestinian-Arabs continue to be excluded from the centers of power and are extremely underrepresented in government institutions, as well as in the general public sphere.<sup>11</sup>

## B. THE PALESTINIAN-ARAB MINORITY AS AN INDIGENOUS COMMUNITY

As a point of clarification, while historically and culturally all Palestinians share the same ethnic background, those Palestinians

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<sup>8</sup> Muhammad Amara, *The Collective Identity of the Arabs in Israel in an Era of Peace*, in *THE ISRAELI PALESTINIANS: AN ARAB MINORITY IN THE JEWISH STATE* 249, 250-51 (Alexander Bligh ed., 2003); see generally As'ad Ghanem, *State and Minority in Israel: The Case of the Ethnic State and the Predicament of its Minority*, 21 *ETHNIC & RACIAL STUD.* 428 (1998); Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 *AM. POL. SCI. REV.* 432 (1992).

<sup>9</sup> DAN RABINOWITZ & KHAWLA ABU-BAKER, *COFFINS ON OUR SHOULDERS: THE EXPERIENCE OF THE PALESTINIAN CITIZENS OF ISRAEL passim* (2005).

<sup>10</sup> See ASS'N FOR CIVIL RIGHTS IN ISR., *COMMENTS ON THE COMBINED INITIAL AND FIRST PERIODIC REPORT CONCERNING THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) passim* (1998); see generally ARYE RATNER & GIDEON FISHMAN, *JUSTICE FOR ALL?: JEWS AND ARABS IN THE ISRAELI CRIMINAL JUSTICE SYSTEM* (1998).

<sup>11</sup> See GHANEM, *supra* note 6, at 165. Historically, the Palestinian political parties in the Israeli Parliament played the role of a permanent opposition. They are seen as representatives of a "hostile" constituency, which cannot be accepted as part of any government coalition. ASS'N FOR CIVIL RIGHTS IN ISR., *supra* note 10, art. 1.

currently living in the historical Palestine region (today: Israel and the Occupied Territories of the West Bank and Gaza) may be divided for the sake of this article's discussion into three general groups, as they live under three different legal and political systems: the stateless Palestinians living in the West Bank and Gaza under a mix of Israeli military rule and waning self-rule; the Palestinian residents of Israeli annexed East Jerusalem (Palestinian Jerusalemites); and, both populations' relatives, the Palestinian-Arabs in Israel, who remained after the war in 1948 and became minority citizens in Israel. It is this third group's *de jure* and *de facto* legal status that constitutes the heart of this article's discussion.

A major element of any discussion on the status and rights of the Palestinian-Arab minority is the group's uniqueness in the Israeli context. The Palestinian-Arab population is not just another weakened minority group within Israeli society; rather, this minority group constitutes an indigenous, original community, living in its homeland much before the inception of the State of Israel when it was part of the majority group together with the rest of the Palestinian people.<sup>12</sup> The State of Israel was established in 1948 on the ruins of the native Palestinian people, for whom this event was a national tragedy—known in Arabic as the “*Nakba*,” or catastrophe.<sup>13</sup> The indigenesness of the Palestinian-Arab population, therefore, with national, linguistic, cultural, and religious characteristics distinguishing it from the majority group, is an integral part of the way in which it experiences its condition/standing

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<sup>12</sup> See EDWARD SAID, *THE QUESTION OF PALESTINE* (Vintage Books 1992) (1979); see also BARUCH KIMMERLING & JOEL S. MIGDAL, *PALESTINIANS: THE MAKING OF A PEOPLE* 162-63 (2003).

<sup>13</sup> “An-Nakba” (the Catastrophe) is the term used by Palestinians and Arabs referring to the exodus and displacement of Palestinians from their land in the immediate aftermath of the founding of Israel in 1948. It is estimated that nearly 780,000 Palestinian were driven from their homes into exile (either forcibly or in search of temporary refuge), and they became refugees in the West Bank, the Gaza Strip, and the neighboring Arab countries. Palestinian society and the Palestinian way of life were largely destroyed. The tragic consequences of an-Nakba still reverberate today and fuel the Palestinian struggle for an independent state in the West Bank and Gaza. See ILAN PAPPÉ, *THE MAKING OF THE ARAB-ISRAELI CONFLICT 1947-51* (1994) (examining essential diplomatic and military battles, with special focus on the creation of the Palestinian refugee problem and the failure of international mediation to achieve peace); BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949* (1987) (providing a detailed account of the origins of the Palestinian refugee problem, challenging conventional wisdom in Israeli discourse about the causes of the Palestinian flight). Nearly 160,000 Palestinians remained in Israel. They were stunned by the Arab defeat, weak, and without a national political leadership. Their number has grown today to more than one million. See GHANEM, *supra* note 6, at 13-14.

in Israel, and informs the most central rift in Israeli society—the national-ethnic divide.<sup>14</sup>

Interestingly, around the start of the constitution drafting initiative, an official state report by the “Or Commission”<sup>15</sup> that investigated the deadly events of October 2000 acknowledged the need to recognize the distinct character of the indigenous Palestinian-Arab minority.<sup>16</sup> The Commission pointed out that:

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 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 . . . . 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 . . . . Perhaps the time has come to give expression in public life, as well, to the common denominator of the population as a whole . . . . It would be

<sup>14</sup> See generally GHANEM, *supra* note 6; Peled, *supra* note 8; Nadim Rouhana & As’ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT’L J. MIDDLE E. STUD. 321 (1998).

<sup>15</sup> The “Or Commission,” or the “State Commission of Inquiry into the Clashes Between Security Forces and Israeli Civilians,” was appointed on November 15, 2000, by then Israeli Supreme Court President Aharon Barak, one month after the tragic October 2000 events in which twelve Arab citizens and one resident of the Gaza Strip were killed at the hands of Israeli security forces. The public hearings, headed by then Israeli Supreme Court Justice Theodor Or, lasted two and a half years, from February 2001 to August 2002. The Commission’s report was released on September 2, 2003. Generally, the report acknowledged the status of Palestinian-Arab minority and critiqued the State’s approach, but it failed to hold State officials explicitly accountable for the killings. Although no English translation of the Or Commission Report exists, a summary in English, prepared by the Israeli newspaper *Ha’aretz*, may be found on the Sikkuy website. See OFFICIAL SUMMARY OF THE OR COMMISSION REPORT, FIRST OR WATCH CONFERENCE PROCEEDINGS (2004), <http://www.sikkuy.org.il/english/2004/OfficialSummary.pdf> [hereinafter OR COMM’N SUMMARY]. Recently, on January 27, 2008, Attorney General Menachem Mazuz released a final report reviewing the Commission and the incidents. The report declared the investigatory files and the matter closed. See Yuval Yoaz & Yoav Stern, *AG: No Cops will be Indicted for Involvement in October 2000 Riot Deaths*, HA’ARETZ, Jan. 28, 2008, available at <http://www.haaretz.com/hasen/spages/948535.html>; see also Ze’ev Segel, *An Extremely Grave Enforcement Failure*, HA’ARETZ, Jan. 29, 2008, available at <http://www.haaretz.com/hasen/spages/948999.html>.

<sup>16</sup> The events of October 2000 came as a result of protests mainly in Northern Israel by Arab citizens in Israel at the start of the second Intifada and resulted in the deaths of twelve Arab citizens and one Palestinian from the Gaza Strip. See OR COMM’N SUMMARY, *supra* note 15.

appropriate to find ways to reinforce the Arab citizens' sense of belonging to the State, without detracting from their sense of culture and community.<sup>17</sup>

Despite the Or Commission's findings, the indignity of the Palestinian-Arab minority is hardly acknowledged in Israeli public life or in public discourse on a formal constitution in Israel.<sup>18</sup> This oversight is in absolute contradiction with 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) renders the collective rights of the group doubly valid both legally and morally.<sup>19</sup>

### C. BACKGROUND ON THE ISRAELI CONSTITUTION PROCESS

Israel lacks a formal written constitution and a bill of rights. Although the May 1948 Israeli Declaration of Independence ("Declaration of the Establishment of the State of Israel") proclaimed that by October of the same year a constituent assembly would prepare a formal constitution, internal political disagreements over the definition and character of the State resulted in an indefinite postponement of its drafting.<sup>20</sup> Currently, Israel boasts neither a formal constitution nor legal provisions guaranteeing all of the rights enumerated in its Declaration of Independence.<sup>21</sup> Since the establishment of the Israeli Parliament (Knesset), eleven "Basic Laws" have been enacted with the aim of forming the foundations of a future constitution.<sup>22</sup> Only two of these

<sup>17</sup> OR COMM'N, THE STATE INVESTIGATIVE COMMITTEE FOR THE CLASHES BETWEEN THE SECURITY FORCES AND ISRAELI CITIZENS IN OCTOBER 2000, at ch. 1, § 3, ch. 6, § 42 (2003) (translation by author) (on file with author).

<sup>18</sup> Amal Jamal, *On the Morality of Arab Collective Rights in Israel* (Adalah Newsletter, Shafa'mir, Isr.), Apr. 2005, available at <http://www.adalah.org/newsletter/eng/apr05/ar2.pdf>.

<sup>19</sup> 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. See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 95-215 (2004); Thornberry, *supra* note 2, at 331-82; see also United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/L.67, U.N. Doc. A/61/L.67 (Sept. 7, 2007).

<sup>20</sup> The text of the Declaration is available in English, among other places, on the Ministry of Foreign Affairs website. DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (Isr. 1948), available at <http://www.israel-mfa.gov.il/MFA/Facts+About+Israel/State/The+State.htm> [hereinafter DECLARATION].

<sup>21</sup> See generally HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY: ISRAEL 1917-1967 (Ron Harris et al. eds., 2002).

<sup>22</sup> See Knesset, Basic Laws, [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod1.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm) (providing the full text of all eleven basic law as well as background information).

Basic Laws, enacted in the early 1990s, address limited human rights concerns—The Basic Law: Human Dignity and Liberty (1992) and The Basic Law: Freedom of Occupation (Profession) (1994)—and there is no specific language contained in any Basic Law that guarantees the paramount legal principle of equality for all citizens without discrimination on the basis of national origin, ethnicity, or religion.<sup>23</sup> Israel's legal system, therefore, does not provide comprehensive legal protection for civil rights.

Moreover, even the constitutional power of judicial review is limited under the Basic Law system. In a seminal Israeli Supreme Court case dealing with property rights as protected under the then newly enacted Basic Laws, the Court ruled for the first time that the Basic Law: Human Dignity and Liberty (1992) has constitutional status and, therefore, grants the Court the power to judicially review acts of the Knesset (Parliament).<sup>24</sup> And where those acts include the passage of a law that contravenes a right protected by this Basic Law, this decision enabled the Court to strike laws as unconstitutional.<sup>25</sup> However, the Basic Law's provisions limit the power of the Court to strike down Knesset acts in two ways. First, the Basic Law does not affect the validity of any law in force prior to its enactment.<sup>26</sup> Second, the Basic Law allows for the violation of the rights protected therein via a law that: (a) "befit[s] the values of the State of Israel;" (b) is "enacted for a proper purpose;" and (c) infringes the rights granted by the Basic Law "to an extent no greater than is required."<sup>27</sup> It must not be underemphasized that the law itself stipulates that the "values of the State of Israel" are its values as a "Jewish and democratic state."<sup>28</sup>

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<sup>23</sup> Dan Avnon, *The Israeli Basic Laws' (Potentially) Fatal Flaw*, 32 ISR. L. REV. 535, 539, 547 (1998). See, *infra* note 48 for further readings on the status of the principle of equality in Israeli law.

<sup>24</sup> CA 6821/93, 1908/94, 3363/94 United Mizrahi Bank v. Migdal Cooperative Village [1995] IsrSC 49(4) 221.

<sup>25</sup> See AMNON RUBINSTEIN, HA-MISHPAT HA-HOKATI SHEL MEDINAT YIŚRA'EL [THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL] 98-109 (6TH ED. 2005) (ISR.). (on file with author).

<sup>26</sup> Basic Law: Human Dignity and Liberty art. 10, 1992, S.H. 1391, amended by 1994, S.H. 1454, available at <http://www.ces.es/TRESMED/docum/israel-lb-9.pdf>.

<sup>27</sup> *Id.* art. 8.

<sup>28</sup> *Id.* art. 1 ("The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.") (emphasis added). See generally Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 311 (1995) (discussing the enactment of formal constitutional guarantees of civil rights in Israel); Ran Hirschl, *Israel's "Constitutional Revolution": The Legal Interpretation of*

In a recent legal breakthrough, the Israeli Knesset Committee on Constitution, Law, and Justice proposed a draft for a comprehensive formal constitution.<sup>29</sup> On February 13, 2006, the Committee presented a report including its drafts for a full constitution, the contents of which will be analyzed below in Part V.<sup>30</sup> These developments placed Palestinian-Arab citizens in Israel at a crossroads: they found themselves faced with the pressing challenge of both avoiding sanctioning what will likely result in a unilaterally approved constitutional document that excludes them, while satisfying their need, as a collective, to define their group status and, thus, promote a desirable constitutional arrangement.<sup>31</sup>

The example of the Palestinian-Arab community in Israel presents a rich experience of invaluable lessons on the role that law can play in either creating a fair constitutional framework, or in perpetuating a hierarchical system. Likewise, it presents the salient question of to what extent law can change existing vertical group relations between dominant and disadvantaged groups in a society. Indeed, multi-ethnic societies face continual challenges in integrating the rights of minority groups, identifying appropriate roles for ethnicity, religion, and culture, and respecting group identities. Naturally, these same challenges plague the constitution-making process and will present virtually insurmountable obstacles if the process itself is insufficiently inclusive and attentive to these concerns.

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*Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 428 (1998) (discussing the dual character of Israel as both a Jewish and a democratic state).

<sup>29</sup> See Israeli Knesset Comm. on Constitution, Law, & Justice, Constitution for Israel, <http://huka.gov.il/wiki/index.php/English> (providing an English-language portal to the Constitution Drafting Project).

<sup>30</sup> See COMM. FOR THE PREPARATION OF A CONSTITUTION BY BROAD CONSENSUS, SIXTEENTH KNESSET, PROPOSALS FOR A CONSTITUTION (Constitution for Isr. Office trans., 2006), available at <http://experts.cfishrael.org:81/~admin/proposals.pdf>.

<sup>31</sup> Jonathan Cook, *Israeli Constitutional Committee Faces Double Bind*, MIDDLE E. REP., Summer, 2004, reprinted in ADALAH'S NEWSL. (Adalah, Shafa'mir, Isr.), Aug. 2004, available at <http://www.adalah.org/newsletter/eng/apr05/ar2.pdf>; Yousef T. Jabareen, *An Equal Constitution for All?: On Constitution and Collective Rights of Arab Citizens in Israel* (Mossawa Ctr., Position Paper, 2006), available at <http://www.mossawacenter.org/files/files/File/An%20Equal%20Constitution%20For%20All.pdf>; See also ADALAH, THE LEGAL CTR. FOR ARAB MINORITY RIGHTS IN ISR., THE DEMOCRATIC CONSTITUTION (2007), available at [http://www.adalah.org/eng/democratic\\_constitution-e.pdf](http://www.adalah.org/eng/democratic_constitution-e.pdf) (proposing constitutional changes based on the concept of a democratic, bilingual, multicultural state).

### **III. OVERVIEW OF CONSTITUTIONAL PROTECTIONS FOR MINORITIES**

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 many 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 further into focus when one considers the multifaceted reciprocities between the Palestinian-Arab minority and the Jewish majority, and between the Palestinian-Arab community in Israel and the region. The question therefore becomes: what type of constitutional arrangement will be able to fairly anticipate and address these relationships for future generations?

From the point of view of the Palestinian-Arab minority in Israel—seeking to protect its human and civil rights—it is first necessary to examine any future constitution according to the manner in which it outlines the basic character of these relationships. It is critical to identify both the obvious and subtle ways in which an Israeli constitution could either serve to codify and enforce meaningful equality and inclusion for this minority population, or, alternatively, drive the nail into the coffin of an inferior national status for the group. Those directly participating in shaping the Israeli constitution are therefore required to give its contents full and careful consideration, out of both a historic and moral responsibility.

Therefore, several fundamental concepts must be examined. First, what justifications exist for infusing the constitution with mechanisms that protect minority groups over protecting the individual rights of group members? Next, what is the significance of including the minority group in the constitution drafting process in dictating the level of social, political, and cultural inclusion of the minority in that society's future? Lastly, how and to what degree does the unique national and indigenous character of the minority population influence the group's rights within a constitutional framework?

#### **A. MAJORITY, MINORITY, AND LEGAL PROTECTION**

It is the minority group in any given society that is most in need of constitutional protections in order to assure that its members enjoy the same rights as the majority. Human history shows that the minority group is often exposed to significant 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 derive mainly from the labor market, the public bureaucratic system, the political system, consumer forces, and the language of mass media.<sup>32</sup>

Against this backdrop, international discourse has reached a consensus that the minority requires special legal protection of its status in society in order to enable its members to resist pressures exerted on it by the majority.<sup>33</sup> According to this theory, 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 to assure substantial equality for the minority.<sup>34</sup>

The minority's mother tongue is considered, in this context, the central object of pressure on the part of the majority group.<sup>35</sup> 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 recognition in Israeli society. The fact that the Jewish majority therefore enjoys absolute protection of its language rights stems from the fact that the dominance of Hebrew is the will of the majority; thus, the right 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 legacy of Zionism. Therefore, the

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<sup>32</sup> See, e.g., Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 63, 63-73 (Asbjørn Eide et al. eds., 1995).

<sup>33</sup> Ann-Christine Bloch, *Minorities and Indigenous Peoples*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 309, 309 (Asbjørn Eide et al. eds., 1995); Natan Lerner, *The Evolution of Minority Rights in International Law*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77, 77 (Cathrine Brolmann et al. eds., 1993); UN Human Rights Committee, *General Comment No. 23 (50) on Article 27/Minority Rights*, 15 HUMAN RTS. L.J. 234, 234-36 (1994).

<sup>34</sup> See generally Asbjørn Eide, *Minority Protection and World Order: Towards a Framework for Law and Policy*, in UNIVERSAL MINORITY RIGHTS 87, 105 (Alan Phillips & Allan Rosas eds., 1995); Will Kymlicka, *The Internalization of Minority Rights*, 6 INT'L J. CONST. L. 1, 1 (2008).

<sup>35</sup> See KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 3, 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."

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*.<sup>36</sup>

### B. BETWEEN AN INCLUSIVE AND AN EXCLUSIVE CONSTITUTION

A principal question facing any society when establishing a constitution is whether it intends to formulate a constitutional document that is unifying, participatory, and mutual in nature. A society holding an appropriate fundamental position and striving toward equality will strive to create a basic document containing a vision for all its members. In such a society, the constitution will be based on a bridging narrative, rather than on the legacy and aspirations of the dominant group alone.

Moreover, there should be no distinction drawn between the process of drafting a constitution and its eventual content. The aspiration for a democratic constitution based on the genuine social consent of a state's citizens requires true and full participation in the constitution-making process by all citizens. In the case of the Palestinian-Arab minority in Israel, formulating a constitution by social consent would constitute a turning point in the attitude of the State toward including that community.<sup>37</sup> The question is whether the constitutional definition of the

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<sup>36</sup> It must be emphasized that cultural pressures exerted by the majority and directed toward the minority occur naturally in any society, and it is reasonable to assume that the provisions of a law—however equal it may be—have no power to neutralize these pressures completely, particularly when the majority is a decisive one. Eighty percent of the population of a state (as in Israel) is a decisive majority, and therefore legal norms in and of themselves cannot be expected to neutralize the socio-political dominance of the majority group. At the same time, it is possible to rely on the law to achieve optimal normative protections for the minority and reduce significantly the pressures exerted by the majority. Such pressures will not be alleviated, however, unless the law is cleansed of all bias in favor of the majority. As long as a society's legal norms contain formal biases in favor of the majority, there will be no chance of achieving substantial equality between the two groups in any society. See Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, in *MULTI-CULTURALISM IN A DEMOCRATIC JEWISH STATE: BOOK IN MEMORY OF THE LATE ARIEL ROSEN-ZVI* 93, 94 (Menachem Mautner et al. eds., 1998) (Isr.) (on file with author)

[A] liberal state may not be neutral with respect to the cultures of minorities, especially those in danger of dwindling or even disappearing. The state is obligated to abjure its neutrality, in our view, not for the sake of the good of the majority, but in order to make it possible for members of minority groups to retain their identity.

<sup>37</sup> Compare this with the statement of Professor Baruch Kimmerling, who wrote:

[T]he 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 [enacting a constitution], 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

State will describe an inclusive, universal-democratic entity, encompassing all of its citizens and residents, or an exclusive one, which does not include an integral part of them.

A successful democratic constitution process requires the facilitation of a public debate that is able to overcome the power differentials between majority and minority groups. The normative socio-political situation in Israel today affirms that the power gaps between Jewish and Palestinian-Arab citizens are enormous, and failure to neutralize them at the formulating stage of the constitution will mean negating the basis for any attempt to reach a true consensus reflecting the minority position. Likewise, a constitutional process that preserves the profound inequality between the two populations will lead to a constitution that subjects the will of the Palestinian-Arab minority to the interests of the Jewish majority. At the very least, such a constitution would be only quasi-democratic, as it would lack the consent of a significant proportion of Israel's citizens.<sup>38</sup>

Furthermore, the issue of content raises the following ontological questions at the outset: Does the discussion of the constitutional status of the Palestinian-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 means of achieving true equality for the Palestinian-Arab minority in Israeli society, or will it be a limited, pre-defined dialogue, dealing only with improving the status of the Palestinian-Arab minority in Israeli law? In other words, is the purpose of the anticipated constitution to substantially equalize the status of Palestinian-Arab citizens with that of Jewish citizens, or will the constitution settle only for improving the position of minority citizens? Will it be a constitution of full equality, or only of "improvement"?

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it presently stands, make the legislation of an enlightened and truly liberal constitution impossible.

Baruch Kimmerling, *Constitution or Prostitution?*, ADALAH NEWSL. (Adalah, Shafa'mir, Isr.), Jan. 2005, available at <http://www.adalah.org/newsletter/eng/jan05/ar1.pdf>; see also Hassan Jabareen, *Collective Rights and Reconciliation in the Constitutional Process: The Case of Israel*, ADALAH NEWSL. (Adalah, Shafa'mir, Isr.), Jan. 2005, available at <http://www.adalah.org/newsletter/eng/apr05/ar3.pdf> (noting that the "Constitution by Consensus" asserts ethnic-religious values).

<sup>38</sup> 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. See Aeyal Gross, *The Constitution, Reconciliation, and Transnational Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47 (2004) (comparing South Africa with Israel and discussing the insights arising from the South African experience in establishing a new democratic constitution).

The appropriate schematic for a substantive constitutional discussion must, first and foremost, leave all issues open to deliberation and appeal. And indeed, a philosophy of social consensus requires that all aspects of the constitution—all its headings and principles—remain open to debate under 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 may be deemed to hold a monopoly on truth, justice, or on the definition of the common good that all citizens of a state aspire to entrench in the constitution.

Thus far, there has been no real inclusion of the Palestinian-Arab minority in the process of establishing the future constitution.<sup>39</sup> This is the case despite the fact that the collective interests of Palestinian-Arab citizens, in general, are represented by an umbrella organization of Palestinian-Arab elected leadership: the “High Follow-Up Committee for Arab Citizens in Israel.”<sup>40</sup> All elected representatives of the Palestinian-Arab community, including the heads of local authorities, Knesset (Israel’s parliament) members, and representatives of Palestinian-Arab political organizations and parties not elected to the Knesset, are presently incorporated under this representative framework.<sup>41</sup> The Follow-Up Committee should be the natural intermediary through which to launch a serious dialogue with this minority population over its position in the future constitution; however, no such dialogue has been initiated to date.<sup>42</sup>

The following section will provide an overview of the ways in which Israeli institutions, both formally and informally, addresses its Palestinian-Arab minority citizens, shedding light on the gravity of the obstacles standing in the path toward an inclusive constitution.

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<sup>39</sup> Jabareen, *supra* note 31, at 11; see Nadim N. Rouhana, “*Constitution by Consensus: By Whose Consensus?*,” ADALAH NEWSL. (Adalah, Shafa’mir, Isr.), Nov. 2004, available at <http://www.adalah.org/newsletter/eng/nov04/ar1.pdf> (critiquing the development of the “Constitution by Consensus”).

<sup>40</sup> Jabareen, *supra* note 31, at 11.

<sup>41</sup> *Id.* at 11-12; see also GHANEM, *supra* note 6, at 166; HENRY ROSENFELD & MAJID AL-HAJ, ARAB LOCAL GOVERNMENT IN ISRAEL 28 (1990).

<sup>42</sup> Jabareen, *supra* note 31, at 12. Ironically, the Knesset Committee on Constitution, Law and Justice launched a special English website in cooperation with the Jewish Agency to appeal “to the worldwide Jewish community and invite their input on central constitutional issues, particularly regarding those questions which involve the relationship between Israel and the Jewish people.” Knesset & Jewish Agency for Isr., Constitution for Israel—Overview, <http://www.cfisrael.org/about.html> (last visited March 16, 2008).

#### IV. THE PALESTINIAN-ARAB MINORITY IN ISRAEL: BETWEEN FORMAL DISCRIMINATION IN LAW AND SOCIO-ECONOMIC DISCRIMINATION IN PRACTICE

The social reality of the Palestinian-Arab minority in Israel exposes two levels in the State's attitude toward this population—one formal-symbolic, and the other socio-economic—both of which are intertwined. Formal discrimination has been secured in the law since the establishment of the State, and socio-economic discrimination exists in practice due to the living conditions and legal discrimination of the Palestinian-Arab population.<sup>43</sup> Both directly contribute to the collective experience of the Palestinian-Arab citizens of Israel.<sup>44</sup>

##### A. *DE JURE* DISCRIMINATION

Israeli law includes many provisions that openly and expressly create and formalize inequality between Jews and Arabs in Israel. Under these circumstances, the legal norms themselves are biased in favor of the majority group. This bias is not solely symbolic, it also exists in areas on which the legal status of the minority in any 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 creates formal discrimination which erodes the status of the Arab citizens.

Ironically, the discriminating laws, on which shall be elaborated 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,<sup>45</sup> entry to public places,<sup>46</sup> as well as state

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<sup>43</sup> KRETZMER, *supra* note 6, *passim*.

<sup>44</sup> See, e.g., GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP (2002); Yousef T. Jabareen, *Law, Minority and Transformation: A Critique and Rethinking of Civil Rights Doctrines*, 46 SANTA CLARA L. REV. 513, 513-14 (2006).

<sup>45</sup> See Equality of Opportunities at Work Law, 5748-1988, available at <http://www.tamas.gov.il/NR/exeres/82CF3999-915B-4D33-BE32-48D61416302D.htm>; Employment Service Law § 42, 5719-1959, 13 LSI 29 (1958-59). Section 2 of the Equality of Opportunities at Work Law forbids an employer to discriminate among his employees or those seeking employment “due to . . . race, religion, nationality.” Equality of Opportunities at Work Law § 2, 1988 (translation by author). However, Section 2(c) of the 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.” *Id.* § 2(c). In December of 2005, 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

allocation of funds to public institutions.<sup>47</sup> The discriminatory legal norms are in place despite the legal obligation of equality, shaped and reinforced by the rulings of the Supreme Court, on a wealth of issues—including those connected directly to equality between Jews and Arabs.<sup>48</sup>

Israeli law relates to Palestinian-Arab citizens with remarkable normative duality: many unequal laws exist distinguishing between Jews and Arabs in favor of the former, alongside few 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

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discrimination in the work place. Under the law, the Commission was to be established on January 1, 2007, but to date has not commenced operation.

<sup>46</sup> See Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000, available at <http://www.tamas.gov.il/NR/exeres/A4587F25-5F3F-4FBA-8A90-818960801A9E.htm>. According to the law, “[a]nyone 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.” *Id.* § 3(a) (translation by author).

<sup>47</sup> Section 3(a) of the Foundations of the Budget Law, 5745-1985, stipulates that allocations to public institutions shall be made on the basis of equal criteria, available at <http://www.btl.gov.il/NR/exeres/D5CE1CB2-BE5D-4434-86E0-BB504446211A.htm?lawid=20183>. Additionally, the Council for Higher Education (Recognition of Institutions) Rules, 1964 stipulate 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.” Council for Higher Education (Recognition of Institutions) Rules § 9, 1964 (translation by author), available at <http://www.che.org.il/template/default.asp?PagelD=46&parentId=51&catId=27&maincat=11>; see also Patient’s Rights Law § 4, 1996.

<sup>48</sup> See Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT’L L. & POL. 885, 891 (2004); Eyal Benvenisti & Dahlia Shaham, *Facially Neutral Discrimination and the Israeli Supreme Court*, 36 N.Y.U. J. INT’L L. & POL. 677 (2004). For a discussion of the status of the principle of equality, see YITZHAQ ZAMIR, HASAMCHOT HAMENHALIT [ADMINISTRATIVE AUTHORITY] (1996) (Isr.) (on file with author). 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.” *Id.* at 44 (translation by author). For a broader discussion on the status of the right to equality in Israeli law, see generally Yoav Peled, *Citizenship Betrayed: Israel’s Emerging Immigration and Citizenship Regime*, 8 THEORETICAL INQUIRES L. 603 (2007); Na’ama Carmi, *The Nationality and Entry to Israel Case Before the Supreme Court of Israel*, ISR. STUD. F., Summer 2007, at 26; Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT’L J. CONST. L. 184 (2008). Note also the following statement made by former Chief Justice Aharon Barak:

Equality is among the fundamental principles of the State of Israel. Every authority in Israel, beginning with the State of Israel, its institutions and employees, must treat the various elements in the state equally. This is requisite from the Jewish and democratic character of the state and it is a function of the principle of rule of law, which is in force here. Thus, the state must honor and protect the fundamental right of every individual in the state to equal treatment.

HCIJ 6698/95 Qa’adan v. Israel Land Administration [2000] IsrSC 54(1) 258 (translation by author).

all possible to establish true equality for Palestinian-Arab citizens even in areas where the anti-discrimination laws apply, such as in employment or provision of public services?

In fact, facially discriminatory Israeli laws influence the entire legal system. These laws 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.<sup>49</sup> These unequal laws cloud the entire Israeli normative system, making it difficult to understand the function of the anti-discrimination laws and their application without first understanding the dominant effect of these unequal laws.

### 1. THE LEGAL DEFINITION OF THE STATE AS A JEWISH STATE

Israeli constitutional law clearly grants priority to Jewish over Arab citizens. Of Israel's eleven Basic Laws—considered to have interim constitutional status—all eleven express a fundamental desire to preserve the Jewish character of the state and/or protect the interests and institutions of the Jewish people.<sup>50</sup> This language instills an “ethnic affiliation” in the core of these laws, resulting in a legal arrangement in which the interests of the Jewish people trump those of Israeli citizens at large, and Palestinian-Arab minority citizens in particular.<sup>51</sup> For instance, a number of Israeli laws expressly define the State as “Jewish and democratic” (in that order), or as “the State of the Jewish People.”<sup>52</sup>

<sup>49</sup> Yousef T. Jabareen, *Law and Education: Critical Perspectives on Arab Palestinian Education in Israel*, 49 AM. BEHAV. SCIENTIST 1052 (2006); see also Arnon Bar-On, *Citizenship, Social Rights and the Ethnic State: The Case of Structural Discrimination Against Arab Children in Israel*, 23 J. SOC. POL'Y 1 (1994).

<sup>50</sup> See Avnon, *supra* note 23, at 539.

<sup>51</sup> See generally NADIM N. ROUHANA, *PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT* (1997).

<sup>52</sup> Currently, this language can be found in several Basic Laws. The opening section of the Basic Law: Human Dignity and Liberty states: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and Democratic State.” Basic Law: Human Dignity and Liberty § 1, 1992, S.H. 1391, amended by 1994, S.H. 1454. The State Education Law 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 its values as a Jewish and democratic state.” State Education Law §2(2), 5713-1953, 7 LSI 113 (1952-53) (amended), available at <http://cms.education.gov.il/EducationCMS/Units/Zchuyot> (translation by author). The Basic Law: The Knesset 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 person's purposes or actions expressly or impliedly include “the negation of the existence of the State of Israel as the state of the Jewish

In the whole of this legislative system, Palestinian-Arab citizens are not defined as part of the State, neither expressly as Arab citizens, nor impliedly as “non-Jewish” Israeli citizens.

From a democratic perspective, defining the character of the State according to ethnicity is clearly problematic in a country in which one-fifth of its citizens hold a different ethnicity.<sup>53</sup> The sense of belonging by Palestinian-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 the state does not ultimately belong to them. The significance and implications of the definition of the State will be discussed in greater detail below.

The words of Chief Justice Aharon Barak on the core characteristics of the definition of the State as Jewish create a clear, normative advantage in the State’s attitude toward 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.<sup>54</sup>

In spite of its recognition of the collective experience of the Palestinian-Arab minority, the Or Commission also made sure to state in the concluding section of its report:

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people” or “the negation of the democratic character of the State.” Basic Law: The Knesset §7A, 1958, S.H. 244, *amended by* Amendment No. 9, 1985, S.H. 1155, *available at* [http://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm). The Political Parties Law of 1992 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.” Political Parties Law, 1992, S.H. 190 (translation by author). Under article 134(C) of the Knesset Rules of Procedure, “The Speaker and the Deputy Speakers shall not approve a bill which is, in their opinion, racist in its essence, or rejects the existence of the State of Israel as the State of the Jewish People.” *available at* <http://www.knesset.gov.il/rules/eng/bchap8.htm>. Compare this to the Amutot Law of 1980, stipulating that “a society shall not be registered if any of its purposes denies the existence of the State of Israel or its democratic character.” Amutot (Nonprofit Societies) Law, 1980, S.H. 210 (translation by author). *See infra* Part V (discussing the language of the proposed Israeli constitution).

<sup>53</sup> *See* JABAREEN *supra* note 31; ROUHANA, *supra* note 51.

<sup>54</sup> H CJ 11280/02 Central Elections Committee v. Ahmed Tibi [2003] IsrSC PD 57(4) 1, 22 (translation by author) (on file with author).

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.<sup>55</sup>

The question of the legal-formal definition of the State of Israel is central to any discussion of the legal status of the Palestinian-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 liberal-Jewish Israeli approach today on the future constitution—at least within the bounds of the public dialogue—is one that seeks to reinforce the definition of the State as “Jewish and democratic” and to improve in parallel the socio-political status of the Palestinian-Arab citizens by securing their collective rights in one way or another.<sup>56</sup> This approach holds the potential to raise the status of the Palestinian-Arab minority to some extent, but it cannot achieve full equality between Jews and Arabs in Israel.

Even some who support, at least 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.<sup>57</sup>

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<sup>55</sup> OR COMM'N, *supra* note 17 (translation by author); *see also* OR COMM'N SUMMARY, *supra* note 15.

<sup>56</sup> *See* Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 *NATIONS & NATIONALISM* 475, 486 (2002). In contrast, egalitarian definitions of the State proposed by members of the Arab community in Israel include “The Multi-Cultural and Democratic State,” “The State of All its Citizens,” “The State of all its Nationalities,” along with “The Jewish, Arab, and Democratic State,” and “The Binational and Bilingual State.” *See* Saban, *supra* note 48 (discussing the collective rights of the Arab minority within the framework of the Jewish State in depth).

<sup>57</sup> For instance, Prof. Ruth Gavison states 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.

Ruth Gavison, *Legislative Changes*, Sept. 14, 1999, <http://www.idi.org.il/hebrew/conflict.asp?id=1633> (translation by author). Likewise, Prof. Baruch Kimmerling believes that such a clause is absolutely superfluous, and that if an “addition to this definition bothers many Jews, the simplest solution would be to delete from the statute books and the constitution the restrictive and *a priori* discriminating definition.” Kimmerling, *supra* note 37.

Indeed, any legal-formal definition of the character of the State that is expressly biased in favor of the majority ethnicity, whether in the constitution or in any other law, creates a fundamental and ideological obstruction to achieving material equality for the minority ethnicity. Furthermore, any such definition is patently discriminatory against the minority group and paves the way for discrimination in other arenas of life;<sup>58</sup> thus perpetuating the inferior, or second-class, status of the minority citizens. The severe socio-economic implications that accompany such a status will be explored further below.<sup>59</sup>

A similar position was recently expressed by the Association for Civil Rights in Israel (“ACRI”), the leading civil rights organization in Israel, which reasoned that defining Israel as “a Jewish state in a binding provision of a constitution is problematic, both in principle and in practice.”<sup>60</sup> In a letter from ACRI to the head of the Knesset Constitution Committee, from March 19, 2007, the organization states: “the definition of the State in the constitution as a Jewish state creates a hierarchy between Jewish citizens of the State, those who supposedly belong, and non-Jewish citizens, those who supposedly do not belong. [Such a definition] therefore excludes the non-Jewish population and maliciously discriminates against it in a declarative manner.”<sup>61</sup>

The classification of Palestinian-Arab citizens of Israel as inferior is even sharper in light of the extensive discriminatory legislation that will be described below, giving real expression to the definition of the State as a Jewish State by granting many privileges in central areas of life to Jewish citizens alone. The following analysis examines the salient assertions of formal discrimination against the Palestinian-Arab citizens of Israel, addressing mainly the laws that expressly define national (Jewish) origin as the basis for the benefit derived from the law.

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<sup>58</sup> See, e.g., Zama Coursen-Neff, *Discrimination Against Palestinian Arab Children in the Israeli Educational System*, 36 N.Y.U. J. INT’L L. & POL. 749, 750 (2004); see also Yousef Jabareen, *Unwanted Neighbors: The Story of Three Palestinian Women*, ADALAH’S REV., Summer 2002, at 80, 81 (describing a law created to compensate victims of hostile activities, which was used only for Jews attacked by Arabs, and not the reverse. After the State claimed that this discrepancy was justified by Israel’s definition as a Jewish state, the District Court approved the creation of a committee to review Jewish attacks against Palestinian-Arab citizens. The law’s creation and subsequent legal dispute serve as an example of the broad ramifications of a biased legal-formal definition of a character of the state).

<sup>59</sup> See discussion *infra* Part IV.B.

<sup>60</sup> The Association for Civil Rights In Israel, <http://www.acri.org.il/> (last visited March 13, 2008) (translation by author).

<sup>61</sup> Letter from the Association for Civil Rights in Israel to the Head of the Knesset Constitution Committee (Mar. 19, 2007), available at <http://www.acri.org.il/hebrew-acri/engine/story.asp?id=1487> (translation by author).

## 2. 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.<sup>62</sup> This system consists mainly of the State's Flag, Emblem, and Anthem Law 1949, and the State Seal Law 1949.<sup>63</sup> These laws grant formal legal status to the flag, symbol and anthem of the State, and the State Seal. All of these symbols derive from Jewish national heritage and religious symbols.<sup>64</sup> For instance, the State anthem, according to law, is "*Hatikva*," or "the hope." The following text is the wording included in the law:

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. <sup>65</sup>

Needless to say, this is an exclusive Jewish-Zionist anthem, and it is clear to all that it cannot serve as the anthem for Palestinian-Arab citizens.<sup>66</sup> After nearly sixty years of its existence, the State of Israel has not adopted any alternative text that might also serve as the anthem for

<sup>62</sup> Note that the proposed constitution's Section 6, "State Symbols," Alternative A perpetuates the existing situation. Alternative A stipulates that, "[t]he State flag is white, with azure stripes adjacent to the edges, and an azure Star of David in the center." PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, § 6(A). It further stipulates that, "[t]he State symbol is a seven-branched Menorah, with olive branches on its sides, and the word 'Israel' [Version B: In Hebrew and Arabic] at the bottom." *Id.* §6(B). Finally, Alternative A stipulates that "[t]he national anthem is 'Hatikva.'" *Id.* § 6(C). Version C adds section 6(D), stipulating that "[t]he State may adopt [additional] common civil symbols." *Id.* § 6. Alternative B proposes "[t]o omit this section or any one or combination of its subsections from the constitution." *Id.* See, *infra* Part V (discussing the language of the proposed Israeli constitution).

<sup>63</sup> Flag and Emblem Law, 5709-1949, 3 LSI 26 (1949) (Isr.); State Seal Law, 5710-1950, 4 LSI 13 (1949-50) (Isr.).

<sup>64</sup> The Flag and Emblem Law adopts the First Zionist Congress and the Zionist movement as the official flag of the state. Flag and Emblem Law, 5709-1949, 3 LSI 26 (1949). The flag is inspired by the Jewish prayer shawl and the shield of David. The emblem is a candelabra—a symbol of the temple era in Jewish history. The State Seal Law states that the State Seal shall be placed on all official documents. The State Seal includes the same symbols as the State's emblem. State Seal Law, 5710-1950, 4 LSI 13 (1949-50).

<sup>65</sup> Following a 2005 amendment, this text appears under the heading "The State Anthem" in the addendum to the Flag, and Emblem and Anthem Law, 1949.

<sup>66</sup> ADALAH, LEGAL VIOLATION 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 63-64 (1998).

the Palestinian-Arab citizens in the State, or as the common anthem for all citizens in Israel.

Additionally, Israeli law sometimes forces the Palestinian-Arab minority to display these Jewish-national symbols. For instance, the State's Flag, Emblem, and Anthem 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,"<sup>67</sup> as well as "on the main building or at the front of the main building of a recognized educational institution."<sup>68</sup> Given that Palestinian-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 where the office of the head of the local Arab authorities is located.

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,"<sup>69</sup> and that the session "shall be closed by singing the national anthem, 'Hatikva.'"<sup>70</sup> The sections of the Declaration presented in the addendum to the law emphasizing the exclusive link between the State and the Jewish people include:

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.<sup>71</sup>

Furthermore, a general bias exists in the Israeli legal system in that whenever a new question of law arises in the courts for which there is no applicable statute, precedent, or means of analogy, the Foundations of Law 1980 stipulates in Section 1 that "[the court] shall make the decision in light of the principles of liberty, justice, integrity, and peace

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<sup>67</sup> Flag and Emblem Law, 5709-1949 (1949), 3 LSI 26 art. 2A(2) (amended 1986).

<sup>68</sup> *Id.* art. 2A(3A).

<sup>69</sup> Knesset Law art. 1(b), 1994 (translation by author).

<sup>70</sup> *Id.* art. 1(d) (translation by author).

<sup>71</sup> 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." DECLARATION, *supra* note 20; *see also* Jabareen, *supra* note 37, at 2. 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.

found in Jewish heritage.”<sup>72</sup> In addition, Section 13(b)(2) of the Penal Law 1977 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.<sup>73</sup> A parallel application for offenses against Arab citizens does not exist.<sup>74</sup>

Again, the normative discrimination experienced by the Palestinian-Arab minority is not restricted to the definition of the State and its symbols. The discrimination reaches vital levels of daily life, giving a legal-practical expression to the national-religious “Jewishness” of the State at the expense of the civil-democratic concept. This expression can be seen in the immigration and citizenship spheres, land and residential accommodation, participation in the political process, language and culture, as well as religion and ceremony, all of which will be described below.

### 3. IMMIGRATION AND CITIZENSHIP

Formal discrimination exists in Israeli law with respect to immigration and citizenship, as established in the Law of Return 1950,<sup>75</sup> in the Citizenship Law 1952,<sup>76</sup> and in the Entry into Israel Law 1952.<sup>77</sup>

<sup>72</sup> It should be noted that the proposed constitution alters this concept slightly by stating instead that “[t]he State of Israel will be founded on the principles of freedom, justice and peace, of the Jewish heritage.” PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, § 2(A). See, *infra* Part V (discussing the language of the proposed Israeli constitution).

<sup>73</sup> Penal Law 5737-1997 (1977), amended by (626/1996) art. 13(b)(2), translated in 30 ISR. L. REV. 5, 5-27 (1996).

<sup>74</sup> However, Arab citizens are theoretically covered by Section 13(b)(1) of the Penal Law, which extends its application to offenses committed against Israeli citizens or residents, as such. *Id.* art. 13(b)(1).

<sup>75</sup> The opening Section of the Law of Return stipulates that every Jew is entitled to immigrate to Israel. See Law of Return, 5710-1950, 51 S.H. 159, translated in Isr. Ministry of Foreign Affairs, Law of Return 5710-1950, [http://www.mfa.gov.il/MFA/MFAArchive/1950\\_1959/Law+of+Return+5710-1950.htm](http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law+of+Return+5710-1950.htm); see also PROPOSALS FOR A CONSTITUTION, *supra* note 30, § 5(B) (stating 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. Prof. Kimmerling states, “[A]s 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.’” Kimmerling, *supra* note 37, at 2.

<sup>76</sup> Nationality Law art. 2(a), 5712-1952, 6 LSI 50 (1951-52) (“Every [immigrant] under the Law of Return, 5710-1950, shall become an Israel national.”). Note that the proposed constitution maintains this right of citizenship upon “repatriation” for Jews only. PROPOSALS FOR A CONSTITUTION, *supra* note 30, § 5(D).

<sup>77</sup> Entry into Israel Law, 5712-1952, 6 LSI 159 (1951-52). The opening section of the law states, “The entry of a person, other than an Israel national or an [immigrant] under the Law of the

Under these laws, Jews and their families may obtain Israeli citizenship virtually automatically by virtue of the principle of “return.”<sup>78</sup> This is a sweeping entitlement, covering Jews and their children, grandchildren, and spouses, Jewish or otherwise.<sup>79</sup> The entitlement applies to Jews and non-Jewish relatives regardless of whether they have been persecuted as Jews or for being relatives thereof. This immigration process also bears significant economic benefits, to which only Jewish (and non-Jewish relatives) immigrants are entitled (as compared to Palestinian-Arab citizens, Jewish Israeli-born natives, and other established residents), including tax breaks, housing subsidies, special mortgage rates, free higher education, and subsidized vocational studies.<sup>80</sup> In order to support Jewish immigration to Israel, a special government ministry was established for the absorption of immigrants as well as a special permanent Knesset committee.<sup>81</sup>

Moreover, although they must undergo a long and difficult citizenship process, non-Jewish spouses of Israeli citizens may also

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Return . . . into Israel shall be by visa, and his residence in Israel shall be by permit of residence, under this Law.” *Id.* § 1. Given that citizenship rights favor Jews, Arab (and other non-Jewish) family, friends, colleagues, and tourists alike are not afforded the same preference as Jews. Thus, this law, taken with the citizenship laws, creates a discriminatory entry policy.

<sup>78</sup> Parallel to the enactment of the aforementioned immigration and citizenship laws, a number of laws were enacted with the aim of obstructing any possibility of entry/return by Palestinians to Israel. See, e.g., Prevention of Infiltration (Offenses and Jurisdiction) Law 1954, 8 LSI 133 (1953-54); Absentees’ Property Law 5710-1950, 4 LSI 68 (1949-50); Registration of Inhabitants Ordinance, 5709-1949, 2 LSI 103 (1948-49) (replaced by the Registration of the Population Law, 1965).

<sup>79</sup> “The rights of a Jew under this law . . . are also vested in a child and grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.” Law of Return art. 4A(a), 5710-1950, 51 S.H. 159, amended by Law of Return, 5730-1970, 586 S.H. 34, translated in Isr. Ministry of Foreign Affairs, Law of Return 5710-1950, [http://www.mfa.gov.il/MFA/MFAArchive/1950\\_1959/Law+of+Return+5710-1950.htm](http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law+of+Return+5710-1950.htm); see also REBECCA B. KOOK, THE LOGIC OF DEMOCRATIC EXCLUSION: AFRICAN AMERICANS IN THE UNITED STATES AND PALESTINIAN CITIZENS IN ISRAEL 87 (2002) (“[E]ntire families whose Judaism was determined by the religious identity of a distant relative passed the immigration criteria and immigrated under the Law of Return.”). It is worth mentioning that the proposed constitution maintains this arrangement and stipulates that the right to immigrate into Israel and the rights deriving therein under any other legislation are conferred to spouses and minor children. PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, § 5(C).

<sup>80</sup> See Ministry of Immigrant Absorption, Home Page, [http://www.moia.gov.il/Moia\\_en/ReturningHomeProject/Explanation.htm](http://www.moia.gov.il/Moia_en/ReturningHomeProject/Explanation.htm) (listing the benefits provided by Israel’s Ministry of Immigrant Absorption, including national health insurance, employment integration, etc.) (last visited June 20, 2008).

<sup>81</sup> Knesset Rules of Procedure § 13(a)(7); see also Ministry of Immigrant Absorption, Home Page, [http://www.moia.gov.il/Moia\\_en/](http://www.moia.gov.il/Moia_en/) (last visited June 20, 2008).

receive Israeli citizenship.<sup>82</sup> However, since the 2003 amendment to the Citizenship Law, if the non-Jewish spouses of Israeli citizens are Palestinian-Arab residents of the West Bank or Gaza, their legal residence in Israel, not to mention citizenship, is next to impossible to obtain.<sup>83</sup>

Thus, under law the majority group maintains exclusive control of the State's immigration and citizenship resources with the declared objective of retaining numerical, or demographic superiority. The legal system grants the majority group a monopoly over the immigration and citizenship processes in the State, and confers upon Jewish immigrants rights from which the Palestinian-Arab citizens, an indigenous community, do not benefit.

#### 4. LAND AND RESIDENTIAL ACCOMMODATION: THE SPECIAL STATUS OF JEWISH NATIONAL INSTITUTIONS

The World Zionist Organization–Jewish Agency (Status) Law 1952 and the Jewish National Fund Law (1953) established the special status of the Jewish Agency and the Jewish National Fund (*Keren*

<sup>82</sup> Article 5(a) of the Nationality Law governs the process of naturalization. Under the article, the applicant must be in Israel; must have been in Israel for three of the five years prior to his/her application; must be entitled to settle in Israel as a permanent resident; must have settled in Israel or intends to do so; must have some knowledge of Hebrew; and must have renounced his/her foreign citizenship. Nationality Law art. 5(a), 5712-1952, 6 LSI 255 (1951-52). If the applicant has fulfilled these conditions, the Minister of Interior will grant him/her citizenship if the Minister chooses. *Id.* art. 5(b). It is worth mentioning the Minister of Interior has absolute discretion to grant or deny permits to enter Israel. Entry into Israel Law § 4(A), 5712-1952, 6 LSI 159 (1952) (amended).

<sup>83</sup> As a result, the law denies Palestinian-Arab citizens the right to acquire residency or citizenship status in Israel for their Palestinian spouses from the West Bank or Gaza. *See* The Citizenship and Entry into Israel Law (Temporary Order) 5703-2003, *translated in* Isr. Ministry of Foreign Affairs, The Citizenship and Entry into Israel Law, <http://www.mfa.gov.il/MFA/Government/Law/Selected+legislation/Citizenship+and+Entry+into+Israel+Law+2003.htm>; *see generally* B'TSELEM & HAMOKED, FORBIDDEN FAMILIES: FAMILY UNIFICATION AND CHILD REGISTRATION IN EAST JERUSALEM (2004), *available at* [http://www.btselem.org/English/Publications/Summaries/200401\\_Forbidden\\_Families.asp](http://www.btselem.org/English/Publications/Summaries/200401_Forbidden_Families.asp) (discussing harmful effects of the law). The Israeli Supreme Court recently ruled this law constitutional. HCJ 7052/03 Adalah et al. v. Minister of Interior [delivered on May 14, 2006] (not yet published), *summarized in* Adalah, Supreme Court Ruling on Nationality Law—HCJ 7052/03, 2006, <http://www.adalah.org/newsletter/eng/may06/fet.pdf>, *summarized in* Adalah, Supreme Court Ruling on Nationality Law—HCJ 7052/03, 2006, <http://www.adalah.org/newsletter/eng/may06/fet.pdf>. Since the judgment, petitioners have re-filed and await the Court's decision. *See* U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Comm. on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, U.N. Doc. CERD/C/ISR/CO/13, (June 14, 2007).

*Kayamet LeIsrael*) in Israel, through which a treaty was signed between these two institutions and the Government of Israel.<sup>84</sup> The two institutions fulfill government functions, including the establishment of new residential areas.<sup>85</sup> The activities of both entities are declared solely for the benefit of the Jewish population.<sup>86</sup> Section 3 of the Law states that “[t]he World Zionist Organization, which is also the Jewish Agency, takes care as before of immigration and directs absorption and settlement projects in the State.”<sup>87</sup> Section 4 stipulates that:

The State of Israel recognizes the World Zionist Organization as the authorized agency which will continue to operate in the State of Israel for the development and settlement of the country, the absorption of immigrants from the Diaspora<sup>88</sup> and the coordination of the activities in Israel of Jewish institutions and organizations active in those fields.<sup>89</sup>

Additional laws reinforce the status of the Jewish Agency by assuring a place for its representatives in general social entities in the State, such as the Planning and Construction Law 1965 (composition of the National Board for Planning and Building),<sup>90</sup> and the Broadcasting Authority Law 1965 (composition of the Authority’s plenum).<sup>91</sup> Similar arrangements

<sup>84</sup> HUSSEIN ABU HUSSEIN & FIONA MCKAY, *ACCESS DENIED: PALESTINIAN LAND RIGHTS IN ISRAEL* 151-52 (2003).

<sup>85</sup> *Id.* at 157. Information on the Jewish Agency and Jewish National Fund is available on the organizations’ websites. See Jewish Agency for Israel, Homepage, <http://www.jewishagency.org/JewishAgency/English/Home> (last visited June 20, 2008); Jewish National Fund, <http://www.jnf.org/> (last visited June 20, 2008). For further discussion on the problematic special function of these institutions, see KRETZMER, *supra* note 6, at 61-69.

<sup>86</sup> 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 residential areas in the State. See KRETZMER, *supra* note 6, at 49; see also H CJ 6698/95 Qa’adan v. Israel Land Administration [2000] IsrSC 54(1) 258 para. 36

The Jewish Agency fulfilled the highest role concerning the realization of the Zionist vision, in gathering 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.

(translation by author).

<sup>87</sup> World Zionist Organization—Jewish Agency (Status) Law § 3, 5713-1952, 7 LSI 3 (1952-53).

<sup>88</sup> The Diaspora is a term used to describe all Jews living outside Israel. *THE NEW OXFORD AMERICAN DICTIONARY* 472 (Elizabeth J. Jewell & Frank Abate eds., 2001).

<sup>89</sup> World Zionist Organization – Jewish Agency (Status) Law § 4, 5713-1952, 7 LSI 3 (1952-53).

<sup>90</sup> See Planning and Building Law, 5725-1965, 19 LSI 330 (1964-65) (stating that the National Board for Planning and Building shall include “a representative of the settlement institutions, appointed by the Minister of the Interior upon the recommendation of the Jewish Agency”).

<sup>91</sup> The Broadcasting Authority Law of 1965 stipulates that the Authority’s plenum shall include “one representative of the Jewish Agency recommended by it.” Broadcasting Authority Law § 7(a)(2), 5725-1965, 19 LSI 103 (1964-65).

also exist with respect to the Jewish National Fund, whose representatives constitute, under the Israel Land Administration Law 1960, half of the members of the Israel Land Council, which oversees land administration in Israel.<sup>92</sup>

Given that the Jewish national institutions in Israel, as per their definition, operate for the benefit of Jews alone, the legislation pertaining to them grants clear advantages to the Jewish majority, as the sole beneficiary of their services.<sup>93</sup> In fact, in certain cases, Palestinian-Arab citizens' applications to enter residential areas were denied on the basis of their ethnicity or national origin.<sup>94</sup> For Palestinian-Arab citizens there

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<sup>92</sup> The Israel Lands Administration Law 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." Israel Lands Administration Law § 4 A(a)(1), 5720-1960, 14 LSI 50 (1960) (amended) (translation by author). It also stipulates that the Israel Land Council "shall lay down the land policy in accordance with which the Administration shall act, shall supervise the activities of the Administration and shall approve the draft of its budget, which shall be fixed by law." *Id.* § 3.

<sup>93</sup> The Jewish National Fund ("JNF") Law of 1953 confers on the JNF the power to expropriate land (similar to the local authority)—a government power usually reserved for the state and those authorities operating in its name. Keren Kayemet Le-Israel Law § 6, 5714-1953, 8 LSI 35 (1953-54). The Law also confers on the JNF specific economic benefits. *See id.* §§ 7-10; *see also* World Zionist Organization—Jewish Agency (Status) Law § 12, 5713-1952, 7 LSI 3 (1952-53) (exempting the JNF from taxes and compulsory government payments). What is more, under section 107 of the Land Law of 1969, the JNF lands are included as "public land." As such, the special provisions concerning "public land" extend over JNF lands in such a way as to prevent any claim of easement or ownership of that land. Land Law § 107, 5729-1969, *reprinted in* 5 ISR. L. REV. 292, 311 (1970). The opening section of the Basic Law: Israel Lands stipulates that all land in Israel belongs to the State, the Development Authority, or the Jewish National Fund, and that ownership thereof shall not be transferred, whether by sale or otherwise. Basic Law: Israel Lands, 1960, S.H. 312, *available at* [http://www.knesset.gov.il/laws/special/eng/basic13\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic13_eng.htm). However, the Israel Land Administration Law specifies 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. Israel Lands Administration Law § 2(6), 5720-1960, 14 LSI 50 (1960) (amended) (translation by author). 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 generally* Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT'L L. & POL. 923 (2000-01); KRETZMER, *supra* note 6, at 49; JIRYIS, *supra* note 6.

<sup>94</sup> The seminal case before the High Court of Justice in which some of these policies were challenged is the Qa'adan case, decided in 2000. HCJ 6698/95 Qa'adan v. Israel Land Administration [2000] IsrSC 54(1) 258. The petition was filed on behalf of the Qa'adan family after the town of Katzir forbade them from leasing land due to their national origin (Palestine-Arab), and expressly informed the family that the town was designated for Jews. The respondents construed the term "the Jewish State" in a manner that justified excluding Palestinian-Arab citizens. Although the Court ultimately rejected the State's interpretation, one must not take lightly the problem inherent in both the State's position and the Court's approach, which here and in similar discrimination cases has gone to great lengths to limit its decisions to a case-by-case basis, refusing to set a binding precedent. Thus, in each case, the Court is free to

are no national institutions in Israel that enjoy similar legal status.<sup>95</sup> On the contrary, popular-voluntary institutions established by the Palestinian-Arab community, such as the Committee for the Protection of Arab Lands, have encountered a hostile attitude on the part of State authorities.<sup>96</sup>

#### 5. CONDITIONAL PARTICIPATION IN THE CENTRAL REPRESENTATIVE ORGAN (THE LEGISLATURE)

The bias in Israeli law surpasses even the mainstay of every democratic society—free participation in the political process. In 1985, the Basic Law, The Knesset, was amended for the first time to include a prohibition on participation in elections to the Knesset by any political party, list of candidates, or individual who denies the existence of the State of Israel as a “Jewish democratic state.”<sup>97</sup> Below is the full text of amendment Section 7A of the Basic Law, whose passage marked the first time any piece of Israeli legislation explicitly established the definition of the State:<sup>98</sup>

A candidates' list shall not participate in the elections to the Knesset if its objects or actions, expressly or by implication, include one of the following:

1. negation of the existence of the State of Israel as the state of the Jewish people;
2. negation of the democratic character of the state;
3. incitement to racism.<sup>99</sup>

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grant a new interpretation to the weight and relevance of the “Jewish and democratic state” in decisions about the limits of the ILA’s mandate and practices and other similar state institutions operating with a preference to Jewish citizens. Moreover, the case demonstrates the lack of enforcement in these matters. Only this year, more than eight years since the decision was handed down, and over thirteen years since the Qa’adan family submitted its residency application to the town of Katzir, is the decision finally being enforced and the family moving to Katzir. For more discussion on the Qa’adan case, see Alexander (Sandy) Kedar, *A First Step in a Difficult and Sensitive Road: Preliminary Observations on Qaadan v. Katzir*, 16 ISR. STUD. BULL. 3, 3-18 (2000).

<sup>95</sup> HUSSEIN & MCKAY, *supra* note 84, at 157.

<sup>96</sup> See generally EMIL TOMA, AL-TARIQ AL-KIFAH LEL-JAMAHEER AL-ARABIYYA FI ISRAEIL [THE PATH OF THE STRUGGLE OF THE ARAB POPULATION IN ISRAEL] (1982) (on file with author).

<sup>97</sup> Basic Law § 7A(1)-(2), 1958, available at Knesset, Basic Law, [http://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm).

<sup>98</sup> Interestingly, until 1985, the definition of Israel as a “Jewish and democratic state” was only established in Israeli legal system by reference to the Declaration of the Establishment of the State of Israel and Supreme Court rulings.

<sup>99</sup> Basic Law § 7A, 1958.

The 1985 amendment renders a party in Israel at risk of disqualification from parliamentary elections should it aspire to alter the definition of the State as aforesaid, or promote a political agenda that calls for absolute equality between Jews and Arabs under a liberal-civil state, even if that party wishes to promote its agenda by peaceful and legal means.<sup>100</sup> This prohibition is detrimental mainly to parties representing the Palestinian-Arab public, particularly those who espouse a constitutional definition of the State based on a fully equal status for the Palestinian-Arab minority.

## 6. LANGUAGE, CULTURE, AND HERITAGE

Although one could spend years in Israel and never read or hear a word of Arabic, Arabic and Hebrew are the two official languages of the state.<sup>101</sup> Arabic, along with English and Hebrew, has held an official status since the early years of the British Mandate over Palestine.<sup>102</sup> However, the use of Arabic in Israel remains, for all practical purposes, confined to Palestinian-Arab population centers. Many official government forms and applications are available exclusively in Hebrew.<sup>103</sup> Major Supreme Court opinions are often translated from Hebrew into English but not into Arabic.<sup>104</sup> For example, on the Knesset floor one would almost never hear Arabic uttered: while all Palestinian-Arab Knesset members speak, read, and write fluent Hebrew, only a handful of Jewish Knesset members understand, much less read, Arabic.<sup>105</sup>

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<sup>100</sup> The proposed constitution suggests incorporating Section 7(a) in virtually identical wording to the Basic Law. See *infra* Part V (discussing the language of the proposed Israeli constitution).

<sup>101</sup> Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, ISR. L. REV., Summer 2002, at 5, 5.

<sup>102</sup> The Palestine Order-in-Council of 1922 stipulates under the sub-heading "Official Languages" that "[a]ll ordinances, official notices and official forms of the government and all official notices of local authorities and municipalities in the areas to be prescribed by order [of the government] shall be published in English, Arabic, and Hebrew. The three languages may be used in debates and discussions in the Legislative Council, and, subject to any regulations [enacted by the government], in the government offices and the Law Courts." Palestine Order-in-Council art. 82 (1922), reprinted in 3 LAWS OF PALESTINE 2569, 2588 (Robert Harry Drayton ed., rev. ed. 1934).

<sup>103</sup> See Saban & Amara, *supra* note 101, at 22-23.

<sup>104</sup> *Id.* at 22.

<sup>105</sup> On the other hand, there are few examples of laws regulating use of Arabic in, for example, official announcements and state elections. See, e.g., Regulation 15(b) of the Mandatory Tenders Regulations 1993 (under the Mandatory Tenders Law, 1992, S.H. 114) (imposing a duty to publish notices in the press on behalf of government ministries in Arabic as well pursuant to a

Despite Arabic's legal status since the foundation of the state, later legislation granted public assistance only to the development of the Hebrew language and culture, with no similar arrangements for the Arabic language and heritage. For instance, the Supreme Institute of the Hebrew Language Law 1953 approved the establishment of the Supreme Institute for the Science of Hebrew (the "Hebrew Language Academy"),<sup>106</sup> but until very recently established no equivalent institution for Arabic.<sup>107</sup> Additional legislation has granted public assistance to other languages spoken in Israel, including Yiddish, but despite its official status under the law, Arabic was not one of those languages.<sup>108</sup> Clear preference for the Hebrew language also exists in Section 5(a)(4) of the Nationality Law 1952; it requires "some knowledge of the Hebrew language" as a condition for citizenship.<sup>109</sup> Furthermore, the law, Use of the Hebrew Calendar 1998, designated the official state calendar as that of the majority culture/religion.<sup>110</sup> In addition, the Yitzhak Ben-Zvi Memorial Law 1969 established a state institution to study the history of

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1995 amendment); Amutot (Nonprofit Societies) Law § 46(b), 1980, S.H. 210 (imposing a 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") (translation by author). The Planning and Building Law of 1965 contains a similar provision regarding notices of new plans and construction. See Planning and Building Law art. 1(A)(b), 5748-1988 19 LSI 330 (1964-65) (amended). The Knesset Elections Law stipulates that voting tickets for Knesset elections shall be in Hebrew and Arabic. Knesset Elections Law § 76, 5729-1969, 23 LSI 127 (1968-69).

<sup>106</sup> Supreme Institute of the Hebrew Language Law, 5713-1953, 7 LSI 140 (1952-52). The function of this institution is "to guide the development of the Hebrew language on the basis of research in the language and its various periods and branches." *Id.* § 2.

<sup>107</sup> Supreme Institute for the Arab Language Law, 2007 S.H. 2092 (establishing for the first time an equivalent institution in Israel for Arabic); see also Muhammad Amara, *Words and Peace*, JERUSALEM REP., Feb. 19, 2007, at 46, 46 (discussing the potential positive developments, as well as ongoing challenges, associated with the establishment of an Arabic language academy in Israel).

<sup>108</sup> See National Authority for Yiddish Culture Law, 1996 (establishing The National Authority for Yiddish Culture in Israel in order to assist and encourage creativity in Yiddish); National Authority for Ladino Culture Law, 1996 (establishing the National Authority for Ladino Culture in Israel for the same purposes as the Yiddish Authority), <http://www.ladinoautoridad.com/vgs/index.html>.

<sup>109</sup> Nationality Law art. 5(a)(4), 5712-1952, 6 LSI 255 (1951-52).

<sup>110</sup> Use of the Hebrew Calendar Law, 1998, available at <http://www.hilan.co.il/calcul/Legislation.aspx?type=law&id=33>. 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." *Id.* § 2 (translation by author). However, the law also 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. *Id.* § 5. Note that Alternative A of Section 9 of the proposed constitution stipulates that "[t]he Hebrew calendar is an official calendar of the State of Israel," whereas Alternative B proposes "[n]ot to include this section in the constitution." PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1 § 9.

Jewish settlement in Israel, but neglected to add a parallel state institution for the history of Palestinian-Arabs in Israel.<sup>111</sup> This normative system, among others, has created an official unequivocal language and heritage hierarchy in favor of Hebrew.<sup>112</sup>

Expressions of formal bias in favor of the majority in the cultural-heritage context also emerge in public education and media channels, important areas from which societies derive their senses of popular culture and national identity. For instance, the opening sections of the State Education Law 1953,<sup>113</sup> the Broadcasting Authority Law 1965,<sup>114</sup> and the Second Authority for Television and Radio Law 1990,<sup>115</sup> express, in various ways, a requirement to reinforce and instill Jewish values and heritage and to reflect contemporary Jewish culture. The same laws refer only in passing to Arab culture and language.<sup>116</sup> Within the Jewish- Israeli sector, there are both state secular and state religious school systems, while for the Palestinian-Arab minority the state only

<sup>111</sup> Yad Yitzhak Ben-Zvi Law, 5729-1969, 23 LSI 206 (1968-69). The law establishes the Yitzhak Ben-Zvi Memorial as a statutory institution, the purposes of which are, *inter alia*, “to deepen the people’s consciousness of the continuity of Jewish settlement in [the land of Israel] and for that purpose to foster research on the history of that settlement,” as well as “to further research on the history of the Jewish communities in Eastern countries.” *Id.* §§ 2(1), (3).

<sup>112</sup> *See, e.g.*, Interpretation Law § 24, 5741-1981, 35 LSI 370 (1980-81) (stipulating that the binding version of any legislation in Israel is the Hebrew version, excluding laws enacted prior to the establishment of the State in English, where no new version has been published in Hebrew); Chamber of Advocates Law § 26(2), 5721-1961, 15 LSI 196 (1960-61) (requiring knowledge of the Hebrew language in order to register as an articling clerk with the Israel Bar Association).

<sup>113</sup> For instance, the law states 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.” State Education Law §2(2), 5713-1953, 7 LSI 113 (1952-53) (amended), available at <http://cms.education.gov.il/EducationCMS/Units/Zchuyot/> (translation by author); *see also* Yousef T. Jabareen, *supra* note 49, at 1061 (discussing the limitations of the State Education Law); *see generally* MAJED AL-HAJ, EDUCATION, EMPOWERMENT, AND CONTROL: THE CASE OF THE ARABS IN ISRAEL (1995).

<sup>114</sup> Broadcasting Authority Law, 5725-1965, 19 LSI 103 (1964-65). For instance, the law sets forth functions to be fulfilled by the Authority, including “strengthening the ties with, and deepening the knowledge of, the Jewish heritage and its values;” “reflecting the life and cultural assets of all sections of the people from their different countries of origin;” and “reflecting the life of Diaspora Jewry.” *Id.* § 3(1)(c), (d), (f).

<sup>115</sup> Second Television and Radio Authority Law, 5750-1990, 45 LSI 60 (5750-1989-90). The law stipulates that in fulfilling its functions the Authority shall act with the aim, *inter alia*, “to promote Israeli Hebrew creations;” and “to give expressions to the Jewish heritage and its values and the values of Zionism.” *Id.* § 5(b).

<sup>116</sup> Both the Broadcasting Authority Law of 1965 and the Second Authority for Television and Radio Law of 1990 contain language referring to Arab programming, stipulating that the Authorities’ aim in their broadcasts should be meeting “the requirements of the Arabic-speaking population and broadcasts for the promotion of understanding and peace with the neighboring states in accordance with the basic tendencies of the State.” *Id.* § 3(3); Second Television and Radio Authority Law art. 5(b)(5), 5750-1990, 45 LSI 60 (1989-90).

sponsors one general education system.<sup>117</sup> As for higher education, of the seven universities in Israel, all teach exclusively in Hebrew.<sup>118</sup>

## 7. RELIGION AND CEREMONY

In accordance with the Jewish Religious Services Law (Combined Version) 1971, a Religious Council was set up in each local authority, authorized to provide religious services to Jewish residents.<sup>119</sup> Each council consists of representatives of the Ministry for Religious Affairs, the local authority, and the local Rabbinat in the region.<sup>120</sup> There are no state-sponsored religious councils serving the Arab communities, in general, or the Muslim community in particular.<sup>121</sup> Additionally, the Chief Rabbinat Law 1980 established the powers and functions of the Chief Rabbinat in Israel.<sup>122</sup> Again, no equivalent law exists awarding official status to religious institutions in the Palestinian-Arab community.<sup>123</sup>

Furthermore, Israeli law formally recognizes Jewish holy sites, but there is no equivalent recognition of the holy sites of the Palestinian-Arab communities.<sup>124</sup> The Protection of Holy Sites Law 1967 stipulates that “The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.”<sup>125</sup> Section 4 of the Law authorizes the Minister of Religious Affairs, “after consultation with, or upon the proposal of, representatives of the religions concerned” to enact

<sup>117</sup> Compare State Education Law §§ 13-18, 5713-1953, 7 LSI 113 (1952-53) (conferring significant management powers on the religious public in the State religious education system), with State Education Regulations (Advisory Council for the Arab Education), 1996 K.T. 1407 (restricting the management powers of the Arab public). See also Ruth Gavison, *Does Equality Require Integration? A Case Study*, DEMOCRATIC CULTURE 2000, at 37.

<sup>118</sup> In the higher education context, it is left to each professor’s individual preferences, based on her language abilities, whether to allow students to submit papers in languages other than Hebrew, including Arabic.

<sup>119</sup> Jewish Religious Services (Consolidated Version) Law, 5731-1971, 25 LSI 125 (1970-71).

<sup>120</sup> *Id.* art. 3(a).

<sup>121</sup> It should be noted that while the State grants significant assistance to studies in “*Yeshivot*” (Jewish religious institutions), it does not grant similar funding for religious studies among the Arab communities. KRETZMER, *supra* note 6, *passim*.

<sup>122</sup> Chief Rabbinat of Israel Law, 5740-1980, 34 LSI 97 (1979-80).

<sup>123</sup> ADALAH, *supra* note 66, at 84.

<sup>124</sup> *Id.* at 83-84.

<sup>125</sup> The Protection of Holy Places Law § 1, 5727-1967, 21 LSI 76 (1966-67).

regulations with respect to execution of the Law.<sup>126</sup> Although the Law relates to all holy places, in 1981, after consulting with the Chief Rabbinate, the Minister of Religious Affairs used his Section 4 powers to enact regulations preserving only the Jewish holy places.<sup>127</sup> Whether parallel regulations will be enacted for the other communities in the country remains to be seen. Currently, a petition is pending on this matter.<sup>128</sup> In the meantime, numerous Muslim holy sites suffer from neglect and desecration.<sup>129</sup>

Official discrimination also exists with regard to state holidays. Section 18A of the Administration of Rule and Justice Ordinance 5708-1948 stipulates that:

Saturdays and Jewish religious holidays—the two days of Rosh Hashana, Yom Kippur, the first and last days of Succoth, the first and last days of Passover 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. 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.<sup>130</sup>

#### 8. BRIEF COMPARISON TO THE DISCOURSE OF THE AMERICAN CIVIL RIGHTS MOVEMENT

It is worth noting that a similar discussion over separate rights for majority and minority took place in the United States concerning the status of the African-American minority<sup>131</sup> in the period preceding the

<sup>126</sup> *Id.* § 4.

<sup>127</sup> Protection of the Jewish Holy Sites Regulations, 1981.

<sup>128</sup> See HCJ 10532/04 Sheikh Abdalla Nimr Darwish et al v. the Minister of Religious Affairs et. al. (petitioning for a requirement that the Minister of Religious Affairs enact regulations for the preservation of Muslim holy places in Israel) (on file with author). As of the writing of this article, the petition is still pending.

<sup>129</sup> See, e.g., ARAB ASS'N FOR HUMAN RIGHTS, SANCTITY DENIED: THE DESTRUCTION AND ABUSE OF MUSLIM AND CHRISTIAN HOLY PLACES IN ISRAEL (2004), available at <http://www.arabhra.org/HRA/Pages/PopupTemplatePage.aspx?PopupTemplate=139>.

<sup>130</sup> Similarly, the proposed constitution stipulates, “The established days of rest in the State of Israel are the Sabbath and the Jewish festivals. Non-Jews may rest on their holidays.” PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, § 8(A). See, *infra* Part V (discussing the language of the proposed Israeli constitution).

<sup>131</sup> The African-American minority comprises today approximately thirteen percent of the US population. JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000, at 3 tbl.1 (2001).

Civil Rights Movement, in the 1950s and 1960s. Many laws enacted during the racial segregation period in the United States, mainly in the southern states, bore formal racial classifications that differentiated between white and black citizens.<sup>132</sup> In practice, these formal classifications served to exclude the African-American minority from the centers of social, economic, and cultural power in American society.<sup>133</sup>

Today, there is a consensus among almost all members of the legal profession in the United States that formal classifications that favor the majority group are not only unconstitutional but also morally repugnant.<sup>134</sup> Their central claim is that *de jure* exclusion establishes a racist ideology according to which black citizens are inferior to their white counterparts and are not part of the American vision of an egalitarian society,<sup>135</sup> and that this type of exclusion is inherently unequal.<sup>136</sup> From an American contemporary legal perspective, legislation that distinguishes between citizens on the basis of race or national origin is a formal exclusion which violates the constitution and the fundamental principle of equality enshrined therein.<sup>137</sup>

In the shadow of the formal exclusion within Israeli law, as was explained above, it thus appears that the American legal argument against racial classification is relevant, *mutatis mutandis*, with regard to the status of the Palestinian-Arab minority. This claim goes to the root of the paradox that exists today in Israeli law—the dualist approach of Israeli law toward the Palestinian-Arab minority, which upholds discriminatory laws alongside the principle of equality. From this

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<sup>132</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 68 (1976); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965*, at 2 (1987); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 6-7 (2d rev. ed. 1966); Jabareen, *supra* note 44, at 513-14.

<sup>133</sup> For an in-depth analysis, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988) (claiming that formal social exclusion “reinforced a racial ideology that Blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals”).

<sup>134</sup> DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 115 (5th ed. 2004).

<sup>135</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 137 (1980) (arguing that it is “inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics”).

<sup>136</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

<sup>137</sup> See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (“[T]he central purpose of the Fourteen Amendment was to eliminate racial discrimination emanating from official sources in the states.”); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 151 (1989) (“When a legislature deliberately stigmatizes a racial group, nowadays such a denial of formal equality is easily seen as a caste mark, a badge of inferiority.”).

perspective, it can be argued that the current legal status of the Palestinian-Arab minority in Israel is not unlike the legal status given to African-Americans prior to the Civil Rights Movement, under the principle of “separate but equal.”<sup>138</sup> Similar to the experience of the Palestinian-Arab minority in Israel today, the goals of racial separation in the United States were not just physical separation, but also social and political exclusion.<sup>139</sup> The 1954 decision of the U.S. Supreme Court in *Brown v. Board of Education*<sup>140</sup> marked the beginning of a change in American public opinion, not just in the area of education, but in all arenas of American life. Just a decade later, the enactment of the Civil Rights Act of 1964<sup>141</sup> crystallized a consensus that the Constitution, and particularly the Equal Protection Clause of the Fourteenth Amendment, could no more tolerate discrimination in education than it could in all spheres of public and private life—from places of public accommodation, to private employment, to the distribution of public benefits. Arguably, African-Americans and other similarly situated minority groups in the United States are still excluded, *de facto*, from the power centers of American life;<sup>142</sup> however, the American national consensus, dating back more than four decades, that separate is not equal—but rather is immoral and blatantly violates the principles on which the nation was founded—still far exceeds Israeli public opinion.<sup>143</sup> To date, Israel has neither enacted extensive legal protections for minority groups, nor developed effective enforcement mechanisms for existing civil rights laws.<sup>144</sup>

<sup>138</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

<sup>139</sup> See Charles R. Lawrence III, *Segregation “Misunderstood:” The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15, 24-25 (1977)

[*Brown*] makes the most sense if it is understood as a recognition of the fact that racial segregation by definition is an invidious labeling device and therefore must violate the equal protection clause . . . . The institution of segregation and the injury it inflicts on blacks are necessarily misunderstood until one recognizes that its chief purpose is to *define*, not to separate.

<sup>140</sup> 347 U.S. 483.

<sup>141</sup> 42 U.S.C. § 2000a (2000).

<sup>142</sup> See BELL, *supra* note 134, at xx; DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 26-50 (1987); Eduardo Bonilla-Silva, *The New Racism: Racial Structure in the United States, 1960s-1990s*, in RACE, ETHNICITY AND NATIONALITY IN THE UNITED STATES 55, 55-56 (Paul Wong ed., 1999); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2-4 (1987).

<sup>143</sup> See KOOK, *supra* note 79, at 184-85.

<sup>144</sup> See generally Yousef T. Jabareen, *Legal Protection of Minorities in Comparative Perspective: The Case of Palestinians in Israel and African-Americans in the United States* (2003) (unpublished Ph.D. dissertation, Georgetown University Law Center) (on file with author).

## B. SOCIO-ECONOMIC DISCRIMINATION IN PRACTICE

Alongside the normative discrimination outlined above, the socio-economic reality of Palestinian-Arab citizens in Israel demonstrates ongoing historic discrimination, including areas in which the relevant legal norm is facially neutral and egalitarian.<sup>145</sup> Numerous state reports document the ongoing *de facto* discrimination against the Palestinian-Arab minority, as well as the government's failure to fulfill repeated promises to improve the situation of the Palestinian-Arabs.<sup>146</sup> In addition to institutionalized discrimination, Palestinian-Arabs in Israel encounter informal discrimination and a generally skeptical, if not offensive, attitude in civilian social life.<sup>147</sup>

Socio-economic discrimination manifests itself in particular with respect to the allocation and distribution of government funds. The absence of budgetary investments suited to the needs of the Palestinian-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 income levels, unemployment, poverty rates, the extent of infrastructure, environmental conditions, crowded housing conditions, life expectancy and infant mortality rates, drop-out rates from state educational institutions, success rates in matriculation examinations, rates of incarceration, and more.<sup>148</sup> "Unequal allocation of resources," in

<sup>145</sup> See KRETZMER, *supra* note 6, *passim*; Jabareen, *supra* note 49, at 1057-63; see generally IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY (1980).

<sup>146</sup> 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 Israeli Supreme Court. OR COMM'N, *supra* note 17, §§ 1-67

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.

*Id.* § 19 (translation by author).

<sup>147</sup> Recent Research at Haifa University revealed that seventy-five percent of Jewish pupils think that Arabs are uneducated people, and are uncivilized and unclean. Press Release, Haifa University, Study Reveals Negative Stereotypes, [http://media.haifa.ac.il/index.php?option=com\\_content&task=view&id=1450&Itemid=60](http://media.haifa.ac.il/index.php?option=com_content&task=view&id=1450&Itemid=60); see also ARAB ASS'N FOR HUMAN RIGHTS, ON THE MARGINS: ANNUAL REVIEW OF HUMAN RIGHTS VIOLATIONS OF THE ARAB PALESTINIAN MINORITY IN ISRAEL 2006 (2006).

<sup>148</sup> For extensive documentation, see ASS'N FOR CIVIL RIGHTS IN ISR, *supra* note 10; ADALAH, *supra* note 66; ARAB ASS'N FOR HUMAN RIGHTS, THE PALESTINIAN MINORITY IN ISRAEL: ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1998); INT'L CRISIS GROUP, *supra* note 6; HUMAN

the words of the Or Commission, “has changed from a question of quantity to a material question of status and rights.”<sup>149</sup> Needless to say, these gaps cannot be bridged today without enormous economic investment, including comprehensive affirmative action programs and compensation for past discrimination.

One of the major signs of material discrimination suffered by the Palestinian-Arab population is the dramatically poor socio-economic situation of Arab towns and villages, reflected consistently in the Central Statistics Bureau reports.<sup>150</sup> Each year the Bureau grades Israel’s local authorities in ten groups (“clusters”) according to their socio-economic levels, with cluster number one ranked in the lowest place, and cluster ten in the highest.<sup>151</sup> This grading system ranks the overall condition of the region assigned to each local authority according to an extensive set of variables, including demographic data, education and schooling performance levels, standards of living and income, features of the work force, and pensions.<sup>152</sup> The data for 2004 shows that the state of Arab towns and villages is especially grave: approximately 45 percent of them are located in the two lowest clusters; 97 percent rank in the four lowest clusters; and Arab towns and villages as a whole constitute more than 80 percent of the total towns and villages among the three lowest clusters.<sup>153</sup> The concentration of Arab villages and towns at the bottom of the socio-economic rankings means that Arab residents suffer disproportionately from severe socio-economic distress relative to all other residents of the State.<sup>154</sup>

Additional indicators of the relatively low socio-economic status of the Palestinian-Arab minority, when compared to the Jewish majority, include the disproportionate rates of poverty found among Palestinian-

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RIGHTS WATCH, *SECOND CLASS: DISCRIMINATION AGAINST PALESTINIAN ARAB CHILDREN IN ISRAEL’S SCHOOLS* (2001), <http://www.hrw.org/reports/2001/israel2/ISRAEL0901.pdf>; MOSSAWA CTR., *THE PALESTINIAN-ARAB CITIZENS OF ISRAEL: STATUS, OPPORTUNITIES AND CHALLENGES FOR AN ISRAELI-PALESTINIAN PEACE* (2006), <http://mossawacenter.org/default.php?lng=3&pg=3&dp=2&fl=3> (select hyperlink under “June”).

<sup>149</sup> OR COMM’N, *supra* note 17, ch. 1, § 16 (translation by author). The Commission emphasized that this question has become “a profound and critical problem” that contributes to “an atmosphere of resentment and unrest.” *Id.*

<sup>150</sup> MOSSAWA CTR., *supra* note 148, at 35.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 30-42; *see also* SIKKUY, *THE SIKKUY REPORT 2006: THE EQUALITY INDEX OF JEWISH AND ARAB CITIZENS IN ISRAEL 65-67* (2006), available at [http://www.sikkuy.org.il/english/en2006/sikkuy\\_english.pdf](http://www.sikkuy.org.il/english/en2006/sikkuy_english.pdf).

Arab citizens.<sup>155</sup> The Report on Poverty, published by the National Insurance Institute in 2003, shows that the extent of poverty among Arab families is 3.2 times that of Jewish families:<sup>156</sup> the percentage of poor Arab families is about 50 percent of the total number of Arab families in Israel, compared with about 15 percent of Jewish families.<sup>157</sup> The extent of poverty among Palestinian-Arab children—the next generation in their population—is especially severe. Poor Arab children constitute about 50 percent of the total poor children in the country, although they number less than 30 percent of the total child population in the State.<sup>158</sup> The percentage of poor Arab children amounts to about 58 percent of all Arab children, while the total number of poor children among all children in the country is about 31 percent.<sup>159</sup> What is more, these figures are worsening rapidly.<sup>160</sup>

In other words, these figures demonstrate that the inferior legal status of the Palestinian-Arab minority is accompanied by socio-economic inferiority in its living conditions. The range of laws discussed 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 from which Israeli law approaches the two major ethnic groups in the State: a broad collective approach toward the Jewish majority, contrasted with a narrow individual approach toward Palestinian-Arab (“non-Jewish”) citizens.<sup>161</sup>

<sup>155</sup> SIKKUY, *supra* note 154, at 66.

<sup>156</sup> MOSSAWA CTR., *supra* note 148, at 31.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 32.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 31-33.

<sup>161</sup> Arguably, the only exception to this duality—in which the Arab citizens are viewed as a collective—is perhaps the normative arrangement concerning the Arabic language. *See* discussion *supra* Part IV, § 6

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.

OR COMM'N, *supra* note 17, § 64 (translation by author). The reference to Arab citizens as a group—the “Arab population”—first appeared in the Israeli book of laws in 2000, when the Knesset adopted an amendment to the State Education Law § 2(11) (as amended in 2000), as well as amendments to the Government Corporations Law § 18A (as amended in 2000) and Civil Service Law (Appointments) § 15A (as amended in 2000) (concerning appropriate representation for the Arab population in government corporations and the public service). *See generally* Ilan

The words of Professor Ruth Gavison, a leading constitutional law scholar on the exclusion of the Palestinian-Arab citizens in Israel, are particularly relevant to this discussion:

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.<sup>162</sup>

In this context, it would appear that discrimination against Palestinian-Arab students in Israeli schools derives not only from the fact that the State invests less in their education than in that of their Jewish colleagues,<sup>163</sup> or because the State denies their right to cultivate their identity and national heritage in the educational system,<sup>164</sup> but because they learn in an educational environment that views them as inferior citizens.<sup>165</sup> Equality translated to the public education context would mean that Arab students in their schools could feel that the State is no less theirs than their Jewish peers in Jewish schools. Arab students definitely feel this way today about their homeland, but under the present legal and cultural framework in Israel, Palestinian-Arab students in Israel cannot make this statement about their state.<sup>166</sup>

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Saban, *Appropriate Representation of Minorities: Canada's Two Types Structure and the Arab-Palestinian Minority in Israel*, 24 PENN ST. INT'L L. REV. 563 (2006).

<sup>162</sup> Ruth Gavison, *Hamdina Hayuhudit: Hatzdaka Ekrunit Udmota Harizuya* [*The Jewish State: Justification in Principle and its Desired Image*], 13 TECHLET 50, 58 (2002) (Isr.) (translation by author).

<sup>163</sup> Daphna Golan-Agnon, *Separate but Not Equal: Discrimination Against Palestinian Arab Students in Israel*, 49 AM. BEHAV. SCIENTIST 1075, 1075-79 (2006).

<sup>164</sup> AL-HAJ, *supra* note 113, *passim*; see Mohammed Abu-Nimer, *Education for Coexistence in Israel: Potential and Challenges*, in RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE 235, 235-36 (Mohammed Abu-Nimer ed., 2001).

<sup>165</sup> Jabareen, *supra* note 31, at 57-60.

<sup>166</sup> Jabareen, *supra* note 31, at 65; see also Cook, *supra* note 31, at 6-7.

## V. THE PROPOSED ISRAELI CONSTITUTION: MEANINGFUL REFORM OR PERPETUATION OF THE STATUS QUO?

Having surveyed the present legal status of the Palestinian-Arab minority and presented the principle questions that arise in consideration of a constitutional document, this section will briefly examine several central articles of the draft Israeli constitution presently on the table.

The opening article of Chapter One: Basic Principles, “The Character of the State,” proposes two alternative phrasings. Alternative A of Article 1 stipulates that:

- (A) Israel is a Jewish and democratic state.
- (B) The State of Israel respects the human rights of all its residents.
- (C) The State of Israel will enable all its residents to act to preserve their identity, language, religion, and heritage, based on their outlook and in accordance with the laws of the State.<sup>167</sup>

Although this proposed wording preserves the current definition of the Jewish-democratic state, the language of sub-article (C) suggests a special protection given to minority groups; however, it must be noted that the article provides only for the safeguarding of minority rights as they are currently protected under the existing Israeli legal framework. In other words, in order for the proposed framing of sub-article (C) to be considered a substantial protection clause, extensive reform of existing legal norms in accordance with the spirit of this protection would be required.

Alternative B of Article 1 proposes the following language instead:

- (A) Israel is the State of the Jewish people<sup>168</sup> [Version B – the state in which the Jewish nation realizes its right to self determination].
- (B) The State of Israel is a democracy [Version B – The basis of sovereignty in Israel is the consent of the citizens of the State, without discrimination between race, religion, or ethnicity].
- (C) The State of Israel respects the human rights of all its residents.
- (D) The State of Israel will enable all its residents to act to preserve their identity, language, religion, and heritage, based on their outlook and in accordance with the laws of the State.<sup>169</sup>

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<sup>167</sup> PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, § 1.

<sup>168</sup> The original Hebrew word “*leum*” is translated as “people;” it can also mean “nation.”

<sup>169</sup> PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, § 1.

The significance of separating clauses (A) and (B) in Alternative B must not be overlooked. The separate clause stating that “Israel is the State of the Jewish people” even more deeply anchors the current legal definition of the state of Israel. It sharpens the “Jewishness” of the state and makes clear that Jewish nationality is the key factor in determining the definition and purpose of the state.<sup>170</sup>

In fact, the proposed constitutional definition of the state—under which Israel is either a “Jewish and democratic state”<sup>171</sup> or “the state of the Jewish people/nation,”<sup>172</sup>—does not present a change in the present constitutional legal status of the Palestinian-Arab minority. When taken together with Chapter Two, Article 6, in which “everybody is equal before the law” and “there shall be no discriminating against a person” on the basis of, *inter alia*, religion, country of origin, nationality, or race, the new constitution seems to simply collect Israel’s present constitutional minority protections and state definitions and enshrine them in one single document.<sup>173</sup> After all, Israel’s current constitutional law incorporates the same statements about the state’s definition and anti-discrimination principles via the Basic Laws, and yet even today these proclamations hold little weight with respect to fully protecting the Palestinian-Arab minority.<sup>174</sup>

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<sup>170</sup> Compare each of Israel’s proposed constitutional wordings on the definition of the State with the introduction to the South African Freedom Charter, which states: “We, the people of South Africa, declare for all our country and the world to know: [T]hat South Africa belongs to all who live in it, black and white . . . . [T]hat our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities[.]” FREEDOM CHARTER OF SOUTH AFRICA 1955. 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 Congress of the People (a coalition which united all the black groups in the country, as well as the progressive white forces), and it outlined the principles on which the struggle for the new South Africa was based as well as the constitution of the new state. See, e.g., RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994, (1995); Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 6 S. AFR. J. ON HUM. RTS. 9, 9-10 (1990).

<sup>171</sup> PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1 § 1 (alternative A).

<sup>172</sup> *Id.* (alternative B).

<sup>173</sup> *Id.* ch. 2, art. 6 (“Everybody is equal before the law; there shall be no discriminating against a person for reasons of sex, religion, country of origin, nationality, sect, race, age, disability or sexual tendency, [Version B: or for any other reason].”)

<sup>174</sup> See also The Declaration of the Establishment of the State of Israel, *supra* note 20, para. 13. The Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation both contain the following language: “The purpose of this Basic Law is to protect [‘human dignity and liberty’ or ‘freedom of occupation,’ respectively], in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.” Basic Law: Human Dignity and Liberty § 10, 1992, S.H. 1391, amended by 1994, S.H. 1454; Basic Law: Freedom of

It should be noted that Alternative C of Article 1 instead offers the exclusion of this section in its entirety.<sup>175</sup>

However, the proposed document's Chapter One: Basic Principles contains various other clauses that add to the definition of the state by emphasizing and strengthening its Jewish character. For instance, Article 5, "Return," exclusively awards Jews the automatic right to become citizens of the state through the wording:

Every Jew [Version B: "Every member of the Jewish nation"] has the right to immigrate to Israel, unless there is a high probability that such an individual will endanger the public peace, health or safety, or will work to undermine the State or the Jewish nation.<sup>176</sup>

Additionally, Article 11, "External Ties," includes sub-article 11(A), which declares that "[t]he State of Israel shall strive for the well-being of its citizens and of all members of the Jewish nation, wherever they may be."<sup>177</sup> Article 11 goes on in sub-article 11(B) to confirm that "[t]he State of Israel shall act to preserve and strengthen Jewish heritage within Israel and abroad."<sup>178</sup> Section 11(C) states that "[t]he State of Israel shall maintain connections with Jewish communities throughout the world."<sup>179</sup>

Article 6, "State Symbols," maintains the national symbols as they appear in current Israeli law, all of which, as discussed in the previous section, are symbols from Jewish heritage.<sup>180</sup> Article 7, "Language," names Hebrew as the official state language, stripping the Arabic language of its official status and instead granting Arabic a "special status" as the language of "Israel's Palestinian-Arab residents."<sup>181</sup> Furthermore, sub-article 8(A) of the proposed constitution stipulates that "[t]he established days of rest in the State of Israel are the Sabbath and the Jewish festivals. Non-Jews may rest on their holidays."<sup>182</sup> As to land ownership and land use, Article 14 of the

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Occupation, 1994, S.H. 1454, translated in <http://www.ces.es/TRESMED/docum/israel-lb-10.pdf>.

<sup>175</sup> PROPOSALS FOR A CONSTITUTION, *supra* note 30, ch. 1, art. 1 (alternative C).

<sup>176</sup> *Id.* ch. 1, § 5(B). Note that Article 5 also grants exclusive rights to Jews who immigrate to Israel and become citizens: "One who makes "Aliyah" (immigrates to Israel under this section) has the right to bring his spouse and minor children." *Id.* ch. 1, § 5(C).

<sup>177</sup> *Id.* ch. 1, § 11(A).

<sup>178</sup> *Id.* ch. 1, § 11(B).

<sup>179</sup> *Id.* ch. 1, § 11(C).

<sup>180</sup> *Id.* ch. 1, § 6.

<sup>181</sup> *Id.* ch. 1, § 7 (alternative A). Section 7 also contains a proposed alternative, which suggests excluding this section altogether. *Id.* ch. 1, § 7 (alternative B).

<sup>182</sup> *Id.* ch. 1, § 8(A).

proposed constitution seems to reinforce the existing discriminatory legal arrangement, detailed above.

The proposed constitution also reinforces the political exclusion described in the previous section. For instance, draft constitution Chapter Four: The Knesset, Article 4, describes the conditions for the establishment and activity of political parties in Israel.<sup>183</sup> The proposed article is worded as follows:

4. Parties [New and also 5A]:

(A) A list of candidates for the Knesset shall only be presented by a party.

(B) A party will be free to exist and to act for the promotion of its objectives and its representation in the Knesset [via its elected members], except for a party which has in its objectives or actions, either explicitly or implicitly, one of the following:

- (1) The negation of the existence of the State of Israel as a Jewish and democratic state;
- (2) Incitement to racism;
- (3) Support for armed struggle by a hostile state or a terrorist organization against the State of Israel;
- (4) [Version B: A cover for illegal activities].<sup>184</sup>

As such, the proposed constitution has the effect of adopting amendment clause 7A of Basic Law: The Knesset, in its current phrasing, in all respects relating to the disqualification of a political party from running for election, as discussed previously. As a result, proposed Article 4 perpetuates the same Jewish character-focused regulations on political parties.

The remainder of the draft constitution contains the normative provisions of any representative democratic constitution, regarding the terms and duties of each of the branches of government, the military, and the state comptroller.<sup>185</sup> It also includes rules regarding the legislative process, the treatment of bodies of international law and treaties, and declarations of war and state of emergency; fundamental due process norms such as privacy, freedom of expression and association, religion, movement and place of residence; and basic social rights including health, education, housing and welfare.<sup>186</sup> Generally speaking, these

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<sup>183</sup> *Id.* ch. 4.

<sup>184</sup> *Id.* ch. 4, §§ 4(A)-(B).

<sup>185</sup> *Id.* chs. 1-14.

<sup>186</sup> *Id.*

provisions do not facially distinguish between races, religions, national origins, or otherwise.

It should be further noted that in all of the various wording proposals of a preamble to the Israeli constitution, the “Jewishness” of the state of Israel is emphasized to a lesser or greater degree.<sup>187</sup> Even without the inclusion of one of the proposed preambles, however, it is safe to conclude that any constitution that results from this draft’s various alternative texts will codify and adopt into one overarching text the same dualism with which Israel has approached its Palestinian-Arab citizens until today. Arguably by definition, the emphasis—if not preference—placed on Israel’s Jewish character, its Jewish citizens, and its Jewish potential citizens around the world, presents a legal dualism in which the majority is endowed with guaranteed collective rights, and the minority is granted civil rights on a case-by-case, or individual, basis. Most importantly, the proposed constitution does not stand to alter the inferior legal or socio-economic status of the Palestinian-Arab minority, nor does it duly guarantee any of their collective rights.<sup>188</sup> The following section will attempt to provide a constitutional framework in which minority rights may be guaranteed under any democratic constitutional arrangement and, in particular, within the Israeli legal context.

## **VI. A CONSTITUTIONAL FRAMEWORK FOR DELIVERING COLLECTIVE RIGHTS: THE EXAMPLE OF THE PALESTINIAN-ARAB MINORITY IN ISRAEL**

Before commencing a discussion on the subject of collective rights, it should be emphasized that the Palestinian-Arab minority in Israel—like similarly situated minority groups in other countries—has a vital interest in attaining full constitutional protection of its members’ individual rights (equal citizenship rights).<sup>189</sup> Individual rights are the universal rights to which every person is entitled by virtue of her citizenship in a state.<sup>190</sup> These rights are divided, generally speaking, into two types. The first is basic liberties, also known as civil and political

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<sup>187</sup> See *id.* pmb., § A. The draft also contains a discussion on the various text proposals and the debate surrounding them.

<sup>188</sup> See generally Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 2; see also THORNBERRY, *supra* note 2, at 20-25.

<sup>189</sup> Saban, *supra* note 48, at 905-06.

<sup>190</sup> *Id.* at 904.

rights, and include a citizen's right to engage in her private life without unnecessary intervention or disturbance on the part of the state (e.g., freedom of expression, association, movement, religion, and conscience), as well as the right to participate in decisions made about the future of the nation (by voting, etc.).<sup>191</sup> The second type is referred to as "claim rights," the majority of which belong to the category known as "social, economic and cultural rights," which assure the citizen basic conditions of existence, including the rights to housing, education, health care, occupation, and the like.<sup>192</sup>

Citizens' rights must be implemented equally, and when the criteria for granting these rights are based on belonging to a particular group, the system is invalid.<sup>193</sup> Both Israel's current constitutional legal arrangement and the proposed constitutional document appear facially neutral in guaranteeing both categories of individual rights to all citizens without differentiating between ethnicities or national origins. However, as the previous two sections demonstrate, these constitutional rights are hampered both *de jure*, by a number of ethnically classified laws, and *de facto*, in the way that public and private institutions use the State's definition and purpose to justify exclusion of the Palestinian-Arab minority.

Collective rights, as distinct from individual rights, derive from group differentiation, distinguishing the minority group from the majority group.<sup>194</sup> 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.<sup>195</sup> These rights depend on the nature of the group and represent an inherent right conferred on the minority due to its

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<sup>191</sup> See International Covenant on Civil and Political Rights, *supra* note 5, at 52.

<sup>192</sup> See International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp., at 49, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>193</sup> See International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), 20 U.N. GAOR Supp., at 47, U.N. Doc. A.6014 (Dec. 21, 1966). 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.

<sup>194</sup> KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 3, *passim*; LERNER, *supra* note 2, at 23-24.

<sup>195</sup> See KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 3, at 126, 129; KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 3, *passim*.

uniqueness as a group.<sup>196</sup> Their aim is to achieve material equality for the group's members and to grant them appropriate legal protection, both on individual and collective levels.<sup>197</sup> These rights are the precondition for achieving overall equality between majority and minority groups.<sup>198</sup>

When examining the collective rights of the Palestinian-Arab minority in Israel, it is necessary to underscore the essential, historical, and value-based grounds on which the claim for granting comprehensive collective rights is founded, as they were presented in the first three parts of this article. First, the fact that the Palestinian population is indigenous and bears a special historical, emotional, national, religious, and cultural relationship with its native land—in other words, the “nativity” of the community is critical to formulating the status and rights of the Palestinian-Arab minority in Israel, from both a moral and international legal perspective. Secondly, one must not discount the significance of the size of the Palestinian-Arab minority, which represents roughly one-fifth of the population of Israel, rendering it a “substantial minority” within the constellation of the society in Israel.<sup>199</sup>

This section seeks to outline three principles of equal allocation that form a framework for the delivery of full collective rights via an egalitarian constitutional arrangement in Israel, based on participatory equality: the public domain, the internal domain, and the historical domain. These principles are interrelated and therefore their divisions are not absolute; however, for the sake of clarity, the discussion below will address each principle as a separate entity. It is important to note that the following theoretical framework may be applied to many substantial minority groups in similar contexts, but the analysis will naturally draw from the examples of the Israeli context and the experience of the Palestinian-Arab minority within it.

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<sup>196</sup> See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 3, at 149-50; KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 3, *passim*. *But see* SUSAN M. OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 14-15 (Joshua Cohen, Matthew Howard, & Martha Nussbaum eds., 1999) (discussing the profound tension that is often present between women's rights and collective rights of conservative groups who discriminate against them).

<sup>197</sup> Eide, *supra* note 34, at 88, 91-92.

<sup>198</sup> LERNER, *supra* note 33, at 100-01; BLOCH, *supra* note 33, at 309, 320-21; UN Human Rights Committee, *supra* note 33, at 234-36.

<sup>199</sup> GHANEM, *supra* note 6, at 1.

### A. THE PUBLIC DOMAIN: DISTRIBUTIVE JUSTICE

Guaranteeing equality to a substantial minority requires first and foremost that the minority share in the public domain by enjoying equal and participatory allocation of all public resources on both a civil-individual and a national-collective basis.<sup>200</sup> This principle is based on the notion that the state assumes the role, in essence, of a “trustee” of the nation’s public assets, which belong to all of its citizens equally. Therefore, in its capacity as trustee, the state assumes an inherent duty to divide those assets fairly and equally, and this duty must be explicitly recognized in a constitutional framework.

These assets, or public resources, may be divided into five general categories, bearing equal importance: material resources, national symbols, cultural resources, political resources, and immigration and citizenship.

#### 1. MATERIAL RESOURCES

The first resource is material, namely the national budget and land. The national budget must be divided at least proportionality amongst the state’s groups.<sup>201</sup> However, it is often the case that minority groups are disproportionately socio-economically disadvantaged and thus may require more than their raw population percentage of the budget.<sup>202</sup>

As previously mentioned, Palestinian-Arab citizens constitute approximately one-fifth of Israel’s population. But due to long-standing historical and institutionalized discrimination, their socio-economic needs have increased and exceeded their ratio of the population.<sup>203</sup> Special allocation of material resources should respond appropriately to these needs. The theory behind special allocation is similar to that of

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<sup>200</sup> For a discussion of the Northern Ireland experience, see ANTONY ALCOCK, *From Conflict to Agreement in Northern Ireland: Lessons from Europe*, in NORTHERN IRELAND AND THE DIVIDED WORLD 159, 159 (John McGarry ed., 2001); Brian Thompson, *Transcending Territory: Towards an Agreed Northern Ireland?*, 6 INT’L J. ON MINORITY & GROUP RTS. 235, 235 (1999).

<sup>201</sup> U.N. ECON. & SOC. COUNCIL [ECOSOC], Sub-Comm. On Prevention of Discrimination & Prot. of Minorities, Working Group on Minorities, *Working Paper: Commentary to the Declaration on the Rights of Persons Belonging to the National or Ethnic, Religious and Linguistic Minorities*, art. 4.5, 5.1, U.N. Doc. E/CN.4/Sub.2/AC.5/1998/WP.1 (May 13, 1998) [hereinafter *Commentary to the Declaration*] (prepared by Asbjørn Eide), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/348e33bda7671678c1256962003a7c2b?Opendocument>.

<sup>202</sup> INT’L CRISIS GROUP, *supra* note 6; HUMAN RIGHTS WATCH, *supra* note 148, at 32-33, 42.

<sup>203</sup> INT’L CRISIS GROUP, *supra* note 6; HUMAN RIGHTS WATCH, *supra* note 148, at 33, 40, 42.

affirmative action or distributive justice policies, which further guarantee the compensation of a minority group for extended past discrimination. The aim of special material allocation is naturally to drastically improve the living conditions of the Palestinian-Arab citizens in Israel in order to at least bring them closer to equal socio-economic status. In other words, the state must change its system of allocating material resources in accordance with the requirements of both distributive and corrective justice.<sup>204</sup>

Equal distribution of material resources also applies to the realm of land and housing. In Israel, over 90 percent of the land is state-owned.<sup>205</sup> What is more, the specific organizations assigned to administer the state land are run jointly by government agencies and private Jewish organizations, to the exclusion of Palestinian-Arab citizens or representatives.<sup>206</sup> As it stands, Palestinian-Arab citizens are virtually blocked from acquiring or leasing land in some 80 percent of the state land.<sup>207</sup> Today, less than half of the remaining privately-owned several percents land in Israel is under Arab ownership.<sup>208</sup> Thus, the almost 20 percent Palestinian-Arab minority population today owns far less than its percentage of the land resources available. Ensuring equal allocation of the public resource of land and housing in the country would mean constitutionally enshrining the right of all citizens in Israel to acquire land and housing free of ethnic limitations. It would also require altering the function, mandate, and structure of the Israel Land Administration (“ILA”) to serve all citizens in Israel equally.

## 2. NATIONAL SYMBOLS

The second public resource involves the state’s respect for, and recognition of, the variety of collective historical and cultural

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<sup>204</sup> Jabareen, *supra* note 44, at 534.

<sup>205</sup> HUSSEIN & MCKAY, *supra* note 84, at 143; KOOK, *supra* note 79, at 91.

<sup>206</sup> HUSSEIN & MCKAY, *supra* note 84, at 172-73; KOOK, *supra* note 79, at 90-95; *see also* discussion *supra* Part IV.a.iv (discussing the Israel Land Authority and its mandate).

<sup>207</sup> For a discussion on the laws and discriminatory practices that cause this block, see generally AFTER THE RIFT: NEW DIRECTIONS FOR GOVERNMENT POLICY TOWARDS THE ARAB POPULATION IN ISRAEL (Dan Rabinowitz et al. eds., 2000). This emergency report was submitted in November 2000 to Mr. Ehud Barak, then Prime Minister of Israel, by an inter-university research team. The report was written following the October 2000 events and details the systematic discrimination against Palestinian citizens in almost all areas of life in Israel.

<sup>208</sup> Palestinian municipalities in Israel include around two percent of all lands controlled by municipalities in Israel. KOOK, *supra* note 79, at 91; *see also* HUSSEIN & MCKAY, *supra* note 84, at 134.

experiences of its citizens. The state's symbols (such as the flag and anthem), national ceremonies, and official holidays are emotionally charged public resources and have a special impact on the status of the minority community. Therefore, it is necessary to strictly preserve the principles of equality and fairness in the state's system of symbols and allocate them on partnership basis.

Sharing national symbols in Israel demands the State give appropriate expression to the presence of Palestinian-Arab citizens in the country and their historic place in the region. The system of symbols adopted by the State should reflect the equality of its attitude towards both its Jewish and Palestinian-Arab citizens, rather than promote and commemorate Jewish heritage to the exclusion of Palestinian-Arab heritage. This equality may be also achieved through the adoption of neutral civic symbols - equally representing all citizens.

### 3. CULTURAL RESOURCES

Central to virtually every minority group's unique cultural identity is language.<sup>209</sup> The importance of language is doubly important when it comes to the language of an indigenous population.<sup>210</sup> Equal allocation of a state's cultural resources demands bilingualism, such that the substantial minority group shares the public view equally. True bilingualism in Israel would require equality between Hebrew and Arabic, as official languages in both law and practice, in all areas of the public sector including, but not limited to, governmental documents and forms, mass media, courts of law, educational material, Arabic language universities and university courses, naming of road signs and buildings, recognition of cultural icons, and so forth.<sup>211</sup> Ensuring meaningful access to public forums for all citizens in Israel also means providing equal quality of services in Arabic and Hebrew, rather than simply incorporating the former as a gesture. The bilingual status of English and French enshrined in the Canadian constitution and expressed in

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<sup>209</sup> See *Commentary to the Declaration*, *supra* note 201, art. 4.2, 4.3; see also THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES*, *supra* note 2, at 197.

<sup>210</sup> See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 18, arts. 13-14, 16.

<sup>211</sup> Interestingly, the opposite point was made in the June 20, 2004 session of the Knesset Constitution, Law and Justice Committee concerning "The Jewish State and Minority Rights." A Jewish member of the committee, Nissim Zeiev, claimed that "[t]he majority feels that it belongs less to the State when it sees the writing [on signs, etc.] in Arabic." Jabareen, *supra* note 31, at 49 n.57.

practice in Canada today provides a worthy example for the desirable situation in Israel.<sup>212</sup>

#### 4. POLITICAL RESOURCES

In order for political resources to be adequately shared, representation of the substantial minority group in all civic institutions and decision-making bodies must be effective, authentic, and (at least) proportionate. In other words, representation must amount to more than a “token” presence of minority group representatives. The purpose of appropriate representation of a minority group is to assure their full democratic participation as a whole in the state’s administrative functions and in determining the content and principles of social justice implemented within it, both in the present and future. Such appropriate representation must prevail over any establishment exclusion or preference.<sup>213</sup>

Specifically, appropriate and fair representation in Israel should include ensuring that the number of Palestinian-Arab representatives in any public institution will be no less than the general percentage of the Palestinian-Arab population in Israel on the whole in national bodies, and within a particular region in regional and local bodies. Furthermore, public institutions, especially those including senior management positions, must institute mechanisms of consultation with members of the Palestinian-Arab leadership in order to guarantee that Palestinian-Arab representatives in these institutions truly represent the interests of the Palestinian-Arab public (authentic representation rather than token representation). As a general matter, it is necessary to guarantee official recognition of the special status of Palestinian-Arab representative entities and their collective institutions. Finally, as Palestinian-Arab representatives in public institutions will almost always constitute a numerical minority, and therefore might often find themselves on the losing side, meaningful influence must be awarded to Palestinian-Arab representatives in voting bodies. Such influence may be enabled by

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<sup>212</sup> See CANADIAN CHARTER OF RIGHTS AND FREEDOMS arts. 16-23 (1998). Article 16(1) stipulates 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.” *Id.* art. 16(1). In the 1970s and 80s, Canada undertook a comprehensive conversion to bilingualism, including all governmental and public service authorities. See generally JOSEPH ELLIOT MAGNET, OFFICIAL LANGUAGES OF CANADA (1995); BELONGING?: DIVERSITY, RECOGNITION AND SHARED CITIZENSHIP IN CANADA (Keith G. Banting et al. eds., 2007).

<sup>213</sup> IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 141, 144, 148 (2000).

granting a “veto” right to the Palestinian-Arab representatives as part of the decision-making process on matters that have effects on the Palestinian-Arab community.<sup>214</sup>

## 5. IMMIGRATION AND CITIZENSHIP

Granting rights to immigrate into a state and obtain the full breadth rights and privileges of citizenship are one of any state’s primary resources, and they have a significant effect on the status of the Palestinian-Arab minority in Israel. This is particularly so given that Palestinian-Arabs in Israel have their own people in the diaspora and refugees, yet their family members and fellow Palestinians who have resided outside of Israel since the aftermath of 1948 are barred from obtaining citizenship.<sup>215</sup> The vastly disproportionate allocation of citizenship rights between Jewish and Arab applicants, including family members and spouses of Palestinian-Arab citizens, renders this public resource wholly imbalanced and unequally distributed. Granting rights for immigration and citizenship in the state expresses the state’s strength, and it must exercise this strength fairly, justly, and equally. Moreover, these principles must be anchored in the constitutional framework.

### B. THE INTERNAL DOMAIN

Guaranteeing the collective rights of substantial minorities also involves establishing constitutional protection of the group’s right to self-administer its internal affairs.<sup>216</sup> A minority group must be allowed to steer its cultural, religious, and educational institutions in order to ensure the comprehensive and unlimited development of its unique identity and collective experience.<sup>217</sup>

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<sup>214</sup> For an interesting comparative discussion on what has been done in this field in Canada, see Ilan Saban, *supra* note 161, at 575-77. For a discussion on the dynamics of Quebec’s veto power in Canada, see PETER W. HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED 13 (1988); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 21, 73 (1st ed. 1977).

<sup>215</sup> See *supra* Part IV.a.iii; KRETZMER, *supra* note 6, *passim*.

<sup>216</sup> Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT’L L.J. 307, 308 (2002); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 53, 70, 114 (1990). *But see* OKIN, *supra* note 196, at 11, 20.

<sup>217</sup> The Declaration on the Rights of Indigenous Peoples, adopted in 2007, patently recognizes the need for indigenous minority groups to steer their own institutions. Article 3 grants indigenous minorities the right to “self-determination,” and Article 4 explains that “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in

Internal arenas in particular need of self-administration by the Palestinian-Arab minority in Israel include education, religion, culture, mass media, and urban planning. In the field of education, self-steering would mean that minority educators and administrators would be given the authority to provide curricular content, priorities, and foci, including the ability to teach Palestinian history, culture and heritage.<sup>218</sup> In the religious sphere, delivering collective rights to the Palestinian-Arab minority requires allowing Arab religious groups (Christians, Druze, and especially Muslims) to control their religious institutions and affairs.<sup>219</sup>

Granting cultural self-administration to the Palestinian-Arab minority would ensure that the government recognize, support, and fund public cultural activities organized and directed by the Palestinian-Arab community, such as theater, music performance, libraries, museums, youth groups, and the like. Mass media administration is equally essential to sharing the internal domain, and substantial minorities require not only access to public channels, but the ability to direct their own radio and television programs free of state censorship.<sup>220</sup> These rights would enable the cultivation and enhancement of Palestinian-Arab identity in Israel. Additionally, the Palestinian-Arab minority must be granted the right to self-administer urban plans and welfare services where the Palestinian-Arab population is the dominant residential group in the region.

As it stands, the Jewish majority in Israel enjoys these very rights almost exclusively as a result of the integral role of Hebrew culture in the majority's political self-determination. The status of Jewish heritage and culture is manifested in the public educational system,

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matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 18, arts. 3, 4. Article 14 grants indigenous peoples the right to establish and run their own educational systems in their own languages and "in a manner appropriate to their cultural methods of teaching and learning." *Id.* art. 14. It should be noted that Article 5 clarifies that the right of indigenous peoples to maintain their own "political, legal, economic, social and cultural institutions" does not affect their right to participate fully and effectively in the same institutions of the state at large. *Id.* art. 5.

<sup>218</sup> Jabareen, *supra* note 49, at 1060; Frances Raday, *Self-Determination and Minority Rights*, 26 *FORDHAM INT'L L.J.* 453, 490, 492 (2003); CLAUDE KLEIN, *ISRAEL AS A NATION-STATE AND THE PROBLEM OF THE ARAB MINORITY: IN SEARCH OF A STATUS* (1987) (Isr.) (on file with author); Gavison, *supra* note 117.

<sup>219</sup> The particular need of Muslims for an autonomy over their religious institutions derives from the fact that Christian and Druze institutions remained mostly within the hands of their respective leaders; whereas, in contrast, Muslim institutions were most over transferred into the hands of the government.

<sup>220</sup> ABU-NIMER, *supra* note 164, at 249-52; AL-HAJ, *supra* note 113.

Orthodox education system, Jewish cultural and religious institutions, and public funding for Jewish historical television programs, youth movements, and museum exhibitions, among other areas.<sup>221</sup>

Furthermore, the rights of the Palestinian-Arab community in Israel to maintain its connection to world Palestinians and Arabs are essential, as they aid in the preservation of the special relationship between the Palestinian community and the greater Arab world.<sup>222</sup> A constitution in Israel therefore must guarantee the right of the Palestinian minority to voluntarily and freely maintain and cultivate special relationships on familial, cultural, social, and economic levels.<sup>223</sup>

### C. THE HISTORICAL DOMAIN: CORRECTIVE JUSTICE

The third principle that must guide the assurance of collective rights to substantial minority groups, particularly one that is indigenous to the region, is that of corrective justice and a fair stake in the historical domain. In the case of the Palestinian-Arab community in Israel, this entails an official recognition within the constitution and state structures of the distinct collective identity of the Palestinian community, as well as developing mechanisms to address past injustices that continue to affect this minority group. The constitution must also expressly recognize the indigeneity and special relationship of the Palestinian community to its native land, and the historical rights therein.<sup>224</sup> Current Israeli laws provide such aspects only for Jews.<sup>225</sup>

Additionally, the principles of corrective justice in the context of the Palestinian-Arab citizens in Israel require that a response be given to the policy of disinheritance from land instituted against the Palestinian-Arab community since the establishment of the state in 1948, the results

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<sup>221</sup> ABU-NIMER, *supra* note 164, at 249-51; AL-HAJ, *supra* note 113.

<sup>222</sup> *See Commentary to the Declaration*, *supra* note 201, art. 2.5. Article 2.5 provides:

Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties.

*Id.*

<sup>223</sup> *See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* *supra* note 2, art. 2.

<sup>224</sup> JAMAL, *supra* note 18, at 1-2.

<sup>225</sup> *See discussion* *supra* Part.IV(a) (regarding *de jure* discrimination in Israel).

of which continue to weaken its status to this day.<sup>226</sup> Under this principle, the State must respect the rights of some 25 percent of the Palestinian-Arab citizens who became internally displaced persons in their land after the 1948 war and have since remained within Israel,<sup>227</sup> including their right to return to their original communities and be compensated for their losses.<sup>228</sup> Additionally the state must recognize and provide restitution and preparation for the mass confiscation of over fifty percent of Palestinian-Arab land under Israeli military rule from 1948 to 1966,<sup>229</sup> and of “religious real estate,” or “*waqf*,”<sup>230</sup> which was converted for Jewish-owned business and government use especially in the mixed Jewish-Arab cities.<sup>231</sup> Moreover, even today, nearly 10 percent of the Palestinian-Arab citizens in Israel live in “unrecognized villages,” denied official status, and thus basic government services and infrastructure.<sup>232</sup> An appropriate deliberation on the historic rights of the Palestinian-Arab minority must also guarantee these citizens an official place on the map and ownership over their historical lands.

Finally, in addition to distributing concrete remedies for human rights violations, the State must acknowledge that disinheritance of the Palestinian-Arab residents of their land is an open wound still borne by the Palestinian-Arab community. Therefore, the State must provide a formal historical apology in the name of all past governments for the injustice and systematic discrimination suffered by the Palestinian-Arab community, as well as an official recognition of the lasting impact of these injustices on the Palestinian-Arab community today. Without these acknowledgements, which form the basis of healing historical wounds and promoting substantial equality in the historical domain, the overall equality realized by any minority group that has suffered past injustice

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<sup>226</sup> Kedar, *supra* note 93, at 993-995; HUSSEIN & MCKAY, *supra* note 84, at 134-37.

<sup>227</sup> ARAB ASS'N FOR HUMAN RIGHTS, *supra* note 148, at 7.

<sup>228</sup> HUSSEIN & MCKAY, *supra* note 84, at 37; ALL THAT REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948 (Walid Khalidi ed., 1992).

<sup>229</sup> See AFTER THE RIFT, *supra* note 207, at 16; see generally Jeremy Forman & Sandy Kedar, *From Arab Land to "Israel Lands": The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV'T & PLAN. D: SOC'Y & SPACE 809, 812 (2004).

<sup>230</sup> “*Waqf*” refers in Arabic to religious properties. Those confiscated in Israel were typically mosques, cemeteries, or Muslim places of worship.

<sup>231</sup> See ARAB ASS'N FOR HUMAN RIGHTS, *supra* note 129.

<sup>232</sup> ARAB ASS'N FOR HUMAN RIGHTS, *supra* note 148, at 7. These villages, mainly Arab-Bedouins in Israel's southern region, became illegal following the enactment of the National Planning and Building Law, 1965, when the lands on which they historically sit were retroactively re-zoned as non-residential and partial ownership was claimed by the state. *Id.* For a broader treatment of the unrecognized villages, see PENNY MADDRELL, *THE BEDUIN OF THE NEGEV* (1990); HUSSEIN & MCKAY, *supra* note 84, at 255.

will remain incomplete. This is true of the Palestinian-Arab community, who will not otherwise realize full equality in Israel as a collective group or as individuals.

Naturally, a comprehensive historical reconciliation in the Palestinian-Israeli context goes beyond the relationship between the Palestinian-Arab minority citizens and their state, which has been the focus of this article. Such reconciliation should address a just arrangement for Palestinian refugees through bilateral deliberations, based on international law and UN resolutions, either under the framework of a permanent internal arrangement between the two parties or via a broader regional/international peace agreement.

## VII. CONCLUSION

Ensuring collective and individual minority rights requires both full equality and true recognition of all of a state's citizens, deriving first and foremost from its foundational legal structure. The presence or absence of a fair and balanced constitutional document, in and of itself, neither necessarily thwarts nor guarantees such equality. However, a fundamental legal arrangement that grants preference to a state's dominant population can never ensure equality either in law or in practice.

As this article demonstrates, the mere definition of a state's ethos and purpose as serving the majority's needs alone engenders exclusion and discrimination in all realms of political, social, and economic life within a society.<sup>233</sup> In order for a substantial minority group to thrive and enjoy the full extent of its civil and human rights—and ultimately avoid conflict with the dominant majority—the state must design a legal framework that responds appropriately and mutually/equivalently to the diversity of its citizens.

Neither the present nor proposed Israeli constitutional arrangements adequately address the ethnic and national reality of the state. Although facially neutral rights guaranteed to all citizens

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<sup>233</sup> See U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations of Various UN Bodies Concerning the Arab Community in Israel*, ¶¶ 9-10, 12-13, 28, *consideration of reports submitted by states parties under Articles 16 and 17 of the Covenant*, U.N. Doc. E/C.12/1/Add.27 (Dec. 4, 1998); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee*, ¶¶ 9-10, 12-13, 28, *consideration of reports submitted by states parties under Article 40 of the Covenant*, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

constitute the majority of their contents, the present and proposed bodies of constitutional law espouse ethnically biased definitions and contain ethnic restrictions *de jure* that deepen already existing tensions between the Jewish and Arab populations of Israel and diminish the integrity of the entirety of the rights enshrined therein. In practice, the laws containing ethnic classifications justify implying such distinctions in law and policy implementation in general and simply perpetuate the second- (or third-) class status of the Palestinian-Arab minority.

The collective rights principles outlined in the last section provide the basis of an alternative framework in which to create an appropriate constitutional arrangement in Israel and could be transferred to many similar multinational and multicultural states. They are founded on the basic principle of full and equal participation of substantial minority citizens in the state's public resources, both as individuals and as a group. The exercise of these rights requires an involved process of rebuilding the state's political, social and economic institutions, but will ultimately ensure a sense of belonging for both majority and minority and provide equal opportunity for all. Moreover, only a material and comprehensive partnership between Jewish and Palestinian-Arab counterparts throughout that process will engender a cornerstone for creating the type of inclusive constitution, and ultimately the equal and fair relationship to which any society should aspire.