

12 September 2017

To:

MK Amir Ohana

Chairperson, Special Committee for the Proposed Basic Law: Israel as the Nation-State of the Jewish People

Dear MK Ohana,

Re.: **Proposed Basic Law: Israel as the Nation-State of the Jewish People (P/20/1989, Revised)**

Ahead of the discussion concerning the Proposed Basic Law: Israel as the Nation-State of the Jewish People, the following is the position of the Association for Civil Rights in Israel (ACRI), which examines the proposal from the perspective protecting democracy and human rights. The paper relates to the revised version of the proposed law as published ahead of the discussions: [http://fs.knesset.gov.il/20/Committees/20\\_cs\\_bg\\_390802.pdf](http://fs.knesset.gov.il/20/Committees/20_cs_bg_390802.pdf)

### **General Remarks**

1. The proposed law, which seeks to redefine Israel's identity, creates significant challenges in terms of democracy and human rights in Israel.
2. In the format as tabled, the law would subordinate Israel's democratic character to its definition in accordance with the proposed law as a Jewish state, in an unprecedented manner. We must emphasize that even the proposed alternative formula, which seeks to maintain the definition of Israel as "Jewish and democratic," does not change the general spirit of the proposed law, according to which the Jewish features of the state are to be emphasized and prioritized over its democratic features. In this state of affairs, there is room for concern that the law will damage the human rights of all citizens of Israel due to erosion it will cause in the status of democracy in Israel.
3. In addition, the proposed law entails grave violations of human rights, and in particular the rights of the Arab minority in Israel, who comprise 20 percent of the citizens of the state. Such violation of the rights of one-fifth of the citizens undermines the right to equality, and causes grave damage to democracy, of which civil equality is a key pillar. The legislation includes numerous discriminatory provisions and even creates the potential for the introduction of additional and broad-based practices of racial discrimination in all fields of life – and not only regarding the Arab minority.

### **Specific Comments on the Sections of the Law**

4. **Prioritization of the Jewish character of the state over its democratic essence (section 2 of the proposed law)** –

As noted, the main problem with the proposed law is that it imposes and prioritizes the Jewish character of the state over its democratic character. We must emphasize that both formulas raised for discussion lead to the same outcome in this respect, as detailed below:

**A. Section 2, first option: defining Israel as “a Jewish state with a democratic system of government” –**

- 1) According to this formula, the intention is clearly and overtly to subjugate the democratic character of Israel to its Jewish character. Israel is defined primarily as a Jewish state, while the term “democratic” is subjugated to the state’s “Jewishness” and of secondary importance. We express our strong reservations about the subjugation of the state’s democratic character to any other attribute.
- 2) The formula goes further still, reducing the already subjugated status of democracy: rather than establishing that Israel is a “democratic state,” it determines that “Israel maintains a democratic regime.” By so doing, the proposed law seeks to eliminate the perception of democracy as a substantive component in the description and definition of the state, with all this entails, and instead confines itself to the use of the term “democratic” as a formal description of the type of regime in Israel – that is to say, one form out of many possible forms.
- 3) This is compounded by the fact that the proposed law does not include any reference to the significance of the fact that Israel is democratic. In particular, references to the fundamental nature of substantive democracy are glaring in their absence, including such aspects as the fact that Israel is a democratic state that guarantees absolute equality of rights to all its citizens, is committed to protect human rights for all, and so forth. The familiar undertaking to ensure the personal rights of all citizens of the state is particularly notable in its absence, and all the more so given that collective rights are reserved solely for the Jewish majority.
- 4) In addition, there is no undertaking to maintain state institutions that can ensure the democratic regime and the separation of powers, nor mechanisms ensuring the rule of law.

**B. Section 2, second option – defining Israel as a “Jewish and democratic state” –**

- 1) At first glance, this appears to be a more worthy proposal that maintains the formula that has been accepted until now for defining the state in the basic laws relating to human rights. However, this definition is not enough to change the overall spirit of the proposal, which clearly prioritizes the Jewish element of the state over its democratic essence.

- 2) As specified in the explanatory notes, the proposal discusses in detail and at length the “practical aspects that reflect the fact that the State of Israel is the nation-state of the Jewish people, some of which are already manifested in existing legislation: national symbols (anthem, flag, emblem), Jerusalem as its capital, its language, the right of return, the ingathering of the exiles, Jewish settlement, the bond with Diaspora Jewry, the Hebrew calendar, and the holy places.” A preference for Jewish law is now added to these in the proposal. All these together emphasize the state’s primary connection to the Jewish people and to Judaism. Indeed, the proposed law emphasizes the state’s obligation to promote all these facets, and specifically these facets, as distinct from other values. Conversely, and as noted above, the proposed law does not include any discussion of the significance of the fact that the state is democratic or any undertaking concerning the fundamental status of substantive democracy.
  - 3) Accordingly, this option, too, when presented as part of the proposed format of the law, does not prevent the erosion of the democratic essence of the state or the threat to the human rights of all the residents of the state.
5. **Complete disregard for the Arab minority and its rights** – in addition to the emphasis on the Jewish character of the state, the proposed law also discusses ways to enshrine the collective rights of the Jewish majority. The Arab minority, comprising 20 percent of the citizens of the state, does not receive any recognition of its collective rights, nor even recognition as a minority group in Israel, including protection of its individual rights. On the contrary: the proposed law implies that anyone who is a resident and/or citizen of Israel and is not part of the Jewish people is a second-class citizen and/or resident. Even the protection of such citizens’ basic rights is minimal and defined as a secondary priority. As if this were not enough, some sections of the proposed law actually seek to worsen the existing situation, as detailed below.
6. **Abolition of Arabic as an official language (section 5 of the proposed law)** – the proposed law calls for the status of the Arabic language to be lowered from that of an official language – a status it has enjoyed since before the establishment of Israel – to that of a language enjoying only a “special status,” relating solely to the realization of linguistic access to state services. Apart from the violation of the status quo, this change damages the basic rights of an indigenous national minority in Israel that comprises 20 percent of the state’s citizens. Language is part of the identity, heritage, and culture of this minority, and enables it to maintain its rights and its equal status in the state. It should be emphasized that the Court has on several occasions ruled concerning the unique status of the Arabic language, as distinct from the other languages used by various groups in Israel, due to the unique status of the Arab minority in Israel and the need to protect its rights. We should emphasize that the proposed addition stating that this section will not impair the status granted to the Arabic language prior to the enactment of the basic law is also inadequate. As is well known, the use of Arabic in the

public domain and by public authorities is extremely limited, and this addition is liable to perpetuate and freeze the current state of affairs.

7. **Formalizing racial discrimination in housing (section 8 of the proposed law)** – this section formalizes in a basic law the possibility to discriminate on the grounds of religion, race, and nationality in the allocation of land and in promoting settlement. The wording does not establish an explicit preference for Jewish settlement, but establishes an improper norm of segregation in housing on the grounds of religion or nationality, creating the potential for the prioritization or discrimination of groups within the population. The law thereby approves, and even imposes as a legislated norm, existing practices of racial discrimination in Israel, and permits action in all fields of life to impose racial segregation on the basis of nationality and religion. It hardly needs to be noted that such racial segregation, imposed against the Arabs in the State of Israel and other minorities, falls under the term “racial discrimination” as defined in the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>1</sup> It should also be noted that a legislative provision permitting the state to discriminate on the grounds of nationality in determining the place of residence, or in the management of state-owned land, is unconstitutional and contrary to the Basic Law: Human Dignity and Liberty, insofar as it violates dignity and equality. On another level, the proposed formula approves the practice of “admission committees” for communities in basic legislation – practice that leads to discrimination against many groups within the population on the grounds of socioeconomic status, gender, sexual orientation, personal status, religion, national affiliation, ethnicity, state of health, disability, and so forth.

### **The Legislative Process of the Basic Law**

8. In conclusion, we also wish to address the legislative process. Defining the character of the state is an important constitutional issue with far-reaching ramifications. On such issues, everything possible should be done to strive to secure broad public agreement, taking into consideration all the rights and interests of different groups in the population.
9. The constitutional issues raised by this proposed law are weighty by any standards: the definition of the state is one that has the most fundamental ramifications for the State of Israel and all its citizens. This is also, of course, an issue that is the subject of a fierce public debate between different sectors of the population. While there is broad public agreement regarding the right of Jews to see the State of Israel as a homeland in which

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<sup>1</sup> “distinction [...] or preference based on [...] national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the [...] economic, social, [...] or any other field of public life.” (Article 1 of the Convention)

they realize their right to national self-determination, this does not imply that such recognition demands the negation of recognition of the rights of the members of the Arab minority, for whom this country is also their homeland.

10. Yet instead of engaging in in-depth discussion, involving the entire public, and attempting to formulate proper and broad agreements, while maintaining the basic principles of substantive democracy – the current proposed law seeks to impose problematic arrangements concerning the definition of the state that are liable to endanger its democratic character, and which threaten the human rights of all citizens and gravely damage the rights of the Arab minority in Israel.

**We urge you not to advance this proposed law, and to ensure the protection of democracy, equality, and human rights in the State of Israel.**

Sincerely,

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Legal Advisor

CC:

Speaker of the Knesset

Members of the Joint Committee

Members of Knesset

Attorney General

Legal Advisor to the Knesset

Legal Advisor to the Constitution Committee