



## ADALAH POSITION PAPER

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### The Illegality of Article 7 of the Jewish Nation-State Law: Promoting Jewish Settlement as a National Value

This position paper details the implications of Article 7 of *The Basic Law: Israel – The Nation State of the Jewish People* (hereinafter: the Law, the Basic Law, the Jewish Nation-State Law), enacted on 19 July 2018, on land and housing policy in two areas: inside Israel and in the 1967 Occupied Territories.

#### Main provisions of the Jewish Nation-State Law<sup>1</sup>

- **Article 1** states that the Land of Israel (“Eretz Yisrael”) is the historic national home of the Jewish people, in which the State of Israel was established; the State of Israel is the national state of the Jewish people, in which it exercises its natural, cultural, and historic right to self-determination. It adds that the right to exercise national self-determination in the State of Israel is unique to the Jewish people.
- **Article 2** sets forth the symbols of the state, all specifically Jewish in character.
- **Article 3** defines the capital of Israel as Jerusalem, which includes occupied East Jerusalem.
- **Article 4** states that the official language of the state is Hebrew, demoting Arabic, which was previously a second official language, to a language with an undefined “special status”.
- **Article 5** establishes that immigration leading to automatic citizenship is exclusive to Jews.
- **Article 6** provides that the state will strengthen ties between the state and Jewish people around the world, and preserve the latter’s cultural, historic, and religious heritage in the Diaspora.
- **Article 7 provides that the state views the development of Jewish settlement as a national value, and will act to encourage and promote its establishment and consolidation.**

#### Background

The Jewish Nation-State Law sets forth the constitutional order of Israel and articulates the ethnic-religious identity of the state as exclusively Jewish. It is the “law of laws”, capable of overriding any ordinary legislation. It alters the constitutional framework of the state, making changes that violate established international norms: there is no democratic constitution in the world that designates the constitutional identity of the state on racial grounds, as serving one ethnic group.<sup>2</sup>

While the state’s policy of discrimination and racism against Palestinians has existed since 1948, there is a major difference between discriminatory and racist practices and the codification of these policies in a new Basic Law with constitutional status. The law lends discriminatory policies against Palestinians greater legitimacy and *requires* the executive, judiciary and other authorities to implement them under

<sup>1</sup> See the translation of the law to English (unofficial) on the website of the Knesset:

<https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>

<sup>2</sup> Adalah petitioned the Israeli Supreme Court on 7 August 2018 to challenge the constitutionality of this new Basic Law, on behalf of the High Follow-Up Committee for Arab Citizens of Israel, the Joint List of Arab political parties, and the National Committee of Arab Mayors. H.CJ 5866/18, *The High Follow-up Committee for Arab Citizens of Israel v. The Knesset* (pending).

the rule of law. The law also reduces the very grounds on which discrimination can be challenged under Israeli law.

The law contains no commitment to democratic norms, or any guarantee of the right to equality, or prohibition of discrimination on the basis of race, nationality, ethnicity or any other category for all people living under Israeli sovereignty. Indeed, it does not even define its citizenry, referring instead to the Jewish people as its subject, and defining sovereignty and democratic self-rule as belonging solely to the Jewish people, wherever they live around the world. Further, the law does not define the borders of the State of Israel, but its implications seemingly extend to the 1967 Occupied Territories and the Jewish settlements located there. For all of these reasons, the law bears distinct characteristics of apartheid.

### **Article 7 – Racial Discrimination in Land and Housing**

Article 7 of the Jewish Nation-State Law provides that, “The State views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation.”

Article 7 constitutionally entrenches racial discrimination and exclusion in relation to matters of “Jewish settlement”, including land allocation, housing policy, planning and construction, funding for local authorities, and land and housing-related financial incentives. Read in conjunction with Article 1 of the Law, which defines the Land of Israel (“Eretz Yisrael”) as the historic national home of the Jewish people, and limits the right to self-determination in the State of Israel to the Jewish people, Article 7 will expand the illegal settlement enterprise in the occupied West Bank, including East Jerusalem, and in the Golan Heights, in violation of international law. In accordance with this article, the State of Israel will now constitutionally act as a settlement movement, similar to the Jewish Agency, the World Zionist Organization and the Jewish National Fund.

### **“Jewish Settlement” in Practice in Israel**

Before the enactment of the Jewish Nation-State Law, the term “Jewish settlement” did not appear in any Israeli legislation. However, the consistent policy of state institutions on land and planning has always been, and remains, discriminatory, racist, exclusionary, and segregationist, and calibrated to promote “Jewish settlement” in practice. The result of this policy has been decades of massive land expropriations from Palestinian citizens of Israel; the designation of this land for the exclusive use of the Jewish population, resulting in the creation of segregated housing, towns and villages; the reduction of the living and development areas allocated to the Arab population and Arab towns; and the emergence of a planning regime that systematically discriminates against Palestinian citizens.

#### **Discriminatory Land Laws and Practices**

**Land Expropriation:** A series of extremely arbitrary, discriminatory laws led to the expropriation of 40 to 60 percent of the land held by Palestinian citizens of the state.<sup>3</sup> These laws include *The Land (Acquisition for Public Purposes) Ordinance, 1943*, used to carry out many of the expropriations that led to the bloody Land Day protests by Arab citizens in 1976, during which six people were killed; *The Absentees’ Property Law (1950)*; *The Land Acquisition (Validation of Acts and Compensation) Law, 1953*; and *The Negev Land Acquisition Law (the Peace Agreement with Egypt), 1980*, pursuant to which tens of thousands of dunams were confiscated, mostly from Arab Bedouin living in the Naqab (Negev) desert in southern Israel.

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<sup>3</sup> Oren Yiftachel and Alexander (Sandy) Kedar, “On Power and Land: The Israeli Land Regime,” 16 *Theory and Criticism* 67, 79 (2000) (hereinafter: Yiftachel and Kedar).

**Segregation:** Most towns and villages in Israel are segregated on the basis of nationality. According to official figures from 2017, there are 928 localities defined as Jewish and 132 as Arab.<sup>4</sup> Of the Jewish localities, 715 are *kibbutzim*, *moshavim* and community towns, entrance to which is restricted by discriminatory ‘admissions’ committees.<sup>5</sup> In practice, therefore, Palestinian citizens of Israel cannot lease or purchase land in hundreds of towns in the state.

**Reduction of Jurisdictional Areas of the Arab towns and villages:** The redrawing of jurisdictional maps following the establishment of Israel in 1948 resulted in a 64% reduction of the jurisdictional area of the existing Arab towns and villages.<sup>6</sup> Today, the jurisdictional areas of Arab towns and villages together cover less than 3% of the state’s land area,<sup>7</sup> while Palestinian citizens constitute around 20% of the population. As a result, population density in Arab localities has skyrocketed eleven-fold since 1948.

The Bedouin in the Naqab are a particularly vulnerable group likely to be particularly affected by the implementation of Article 7 of the Law. The consistent ‘Judaization’ policy adopted by successive Israeli governments towards the Naqab, the ancestral land of Bedouin citizens of Israel, has been manifested in: the forced displacement of thousands of Bedouin living in villages that are “unrecognized” by the state; the reduction of the Bedouins’ living space by forced “urbanization”; the establishment of new, segregated Jewish towns, villages, and “individual farms”; and the implementation of massive so-called ‘development plans’ located in areas so as to further dispossess Bedouin of their land. The net result of this policy is that today, the jurisdictional area of all the currently-recognized Bedouin towns and village in the Naqab constitutes only 1% of the total area of the Be’er Sheva District, despite the fact that Bedouin citizens constitute 35% of the district’s total population (approximately 255,000 people).<sup>8</sup> There are today 127 towns and villages in the Be’er Sheva district that are defined as Jewish, compared to just 18 recognized Bedouin localities.<sup>9</sup>

### **The Implications of Article 7 in Israel**

Article 7 contradicts Israeli Supreme Court case law, notably the *Qa’adan* decision.<sup>10</sup> In *Qa’adan*, the Supreme Court ruled that the state must treat its citizens based on the principle of equality, and prohibited discrimination in land allocation and housing. In this landmark decision, the Court rejected the principle of “Jewish settlement” as a justification for discrimination.<sup>11</sup> Article 7 of the Jewish Nation-State Law, however, **encourages the state to discriminate based on national belonging** in land settlement issues.

Article 7 was enacted in order to circumvent the *Qa’adan* decision and to give the state and public authorities a broad and explicit range of action in order to further ‘Judaize’ the land, and ultimately to realize the Zionist vision of the “Land of Israel”. With this article, the discrimination that currently exists is transformed from an illegal, illegitimate practice into a supreme constitutional value that the state is

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<sup>4</sup> Central Bureau of Statistics Statistical, Abstract of Israel 68 (2017). Table 17 of Chapter 2 is available at the following link: [http://www.cbs.gov.il/reader/shnaton/templ\\_shnaton.html?num\\_tab=st02\\_17&CYear=2017](http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_17&CYear=2017).

<sup>5</sup> *Id.* Table 18 of Chapter 2 is available at the following link:

[http://www.cbs.gov.il/reader/shnaton/templ\\_shnaton.html?num\\_tab=st02\\_18x&CYear=2017](http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_18x&CYear=2017).

<sup>6</sup> Bimkom – Planners for Planning Rights, *Expansion of Jurisdictions in the Arab Sector: Position Paper* (2002), available at the following link: <https://bit.ly/2OPm9jl>.

<sup>7</sup> The Authority for Economic Development of the Arab, Druze and Circassian Sector in the Prime Minister's Office, *Proposal by the Economic Development Authority of the Minority Sector in the Prime Minister's Office for a Solution to Planning and Housing in the Arab Sector: Presented to the Sub-Committee on Housing in the Committee for Economic and Social Change, headed by Prof. Manuel Trajtenberg* (2011). Available at the following link: <https://bit.ly/2dFd5tT>.

<sup>8</sup> The Central Bureau of Statistics, “Annual Data for 2018”, Table 2.19.

<sup>9</sup> The Central Bureau of Statistics, “Annual Data 2018”, Table 2.16.

<sup>10</sup> HCJ 6698/95, *Qa’adan v. The Israel Land Administration*, 54(1) 258 (2000), para. 30 of Justice Barak’s opinion.

<sup>11</sup> HCJ 8036/07, *Ebriq Zubeidat, et al. v. Israel Land Administration (Authority), et al.* (decision delivered on 13 September 2011).

permitted, and indeed obliged, to fulfill. It is therefore likely to lead to: additional segregation in housing; unequal allocation of land for localities and for different groups; discriminatory distribution of financial benefits and incentives to Jewish individuals and towns for the explicit purpose of promoting Jewish settlement and increasing Jewish population distribution; and the further institutionalization of discriminatory land planning. In particular, Article 7 of the Jewish Nation-State Law gives the state further legal authority to continue to pursue its policy of Judaizing the Naqab via segregation, discrimination and dispossession of Bedouin citizens.

Article 7 also renders Palestinian citizens of Israel a spatial and demographic threat and as an obstacle to the constitutional value of 'Judaization', and leaves them unentitled to equal treatment. The only individuals and group considered legitimate constitutional subjects, according to this article, are Jewish citizens and the Jewish people, and the Palestinian citizens and the Palestinians as a whole are an obstacle to the national goal. Article 7 is therefore racist and unconstitutional, regardless of its actual implementation.

### **Jewish Settlement in Practice in the 1967 Occupied Territories**

The concepts of "Jewish settlement" and "Judaization" also drive Israeli land policy in the 1967 Occupied Territories, and have resulted in the massive confiscation of Palestinian and Syrian public and private land for the purpose of establishing Jewish settlements, and the eviction and expulsion of Palestinians from their homes. Today these processes are taking place most visibly in Area C, for example, with the attempts to evacuate the village of Khan al-Ahmar,<sup>12</sup> and in the neighborhood of Silwan in Jerusalem. The Israeli Supreme Court approved the evictions of Palestinians in both cases.<sup>13</sup>

#### **Facts and Figures, New Laws and Proposed Legislation**

Over the past 50 years, Israel has illegally transferred civilians into the OPT to advance the "Judaization" and imposition of Israeli control over the "Land of Israel".

**Settlements:** According to official figures, more than 240 Israeli settlements were established in the West Bank from 1967-2017; 131 settlements are officially recognized by the Interior Ministry and 110 settlements (also known as "illegal outposts") were built without official authorization but with governmental support and assistance (known as "illegal outposts"); 11 settler neighborhoods were established in the areas of the West Bank that Israel annexed to the municipal jurisdiction of Jerusalem in 1967; and several settlement enclaves were built within Palestinian neighborhoods in East Jerusalem and in Hebron. Another 16 settlements were established in Gaza, and were dismantled in 2005 as part of the Disengagement Plan, in addition to four outposts in the northern West Bank.<sup>14</sup>

**Settlers:** More than 620,000 Israeli citizens currently reside in settlements. Over a third of these, almost 210,000 people, live in the parts of the West Bank that Israel annexed to the municipal jurisdiction of Jerusalem (according to Jerusalem Institute for Policy Research figures from late 2016), and over 413,000 live in the rest of the West Bank (according to the Israeli Central Bureau of Statistics, 2017).<sup>15</sup>

**New Legislation:** The Israeli Government has promoted new laws in the Knesset that *de facto* annex Palestinian land in the West Bank, including East Jerusalem, to Israel. These legislative efforts

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<sup>12</sup> See HCJ 5193/18, *Residence Committee of the Village of al-Khan al-Ahmar v. IDF Commander of the West Bank* (decision delivered on 5 September 2018). Regarding this matter see also: [https://www.btselem.org/photoblog/201806\\_khan\\_al\\_ahmar](https://www.btselem.org/photoblog/201806_khan_al_ahmar)

<sup>13</sup> See e.g., HCJ 7446/17, *Maher Sarahan v. The Custodian General and the Official Receiver* (decision delivered on 21 November 2018).

<sup>14</sup> See the website of B'Tselem, updated 19 January 2019: <https://www.btselem.org/settlements>

<sup>15</sup> *Id.*

accelerated rapidly in 2017 and 2018. The most notable new “annexation laws”<sup>16</sup> include *The Settlements Regularization Law (Law for the Regularization of Settlement in Judea and Samaria) – 2017* (discussed below); and a *2018 Amendment to the Basic Law: Jerusalem, Capital of Israel (1980)* that mandates a special majority of 80 of 120 Knesset Members in order to approve the relinquishment of any part of Jerusalem. A slew of annexation bills under consideration by the Knesset include *The Negev Development Authority Bill*, which seeks to give settlements equal legal status to that of communities in the Naqab; and *The Status of the World Zionist Organization and the Jewish Agency for Israel Law (Amendment - Management and Allocation of Land in the Judea and Samaria Area by the Settlement Division) Bill*, which seeks to transfer authority for “state land” in the West Bank to the WZO’s Settlement Division for the purposes of settlement construction. The WZO’s Settlement Division is not authorized by law to operate in the West Bank, and thus the bill seeks to apply Israeli civil law in the West Bank. Further examples are *The “Jerusalem and its Daughters” Bill*, which, if enacted, would annex a ring of settlements to the Jerusalem municipality and impose Israeli civil law in these occupied areas, and bills that would enable the acquisition of land rights by Jewish Israelis in the West Bank, and allow Israeli settlers to return to “outposts” previously evacuated in the northern West Bank.

The enactment of the 2017 Law for the Regulation of Settlement in Judea and Samaria, or “Settlements Regularization Law”, highlights these policies. The Law is intended to expropriate privately-owned Palestinian land and to allocate it to Israeli settlers, thereby “regulating” West Bank settlements built on Palestinian land through Israeli domestic law. The law allows for Palestinians to be dispossessed of their private property, solely on the basis of an ethnic-ideological view that is manifested in the concept of the Judaization of the “Land of Israel”. Indeed, in response to a Supreme Court petition submitted in August 2017,<sup>17</sup> which demanded the cancellation of the Settlements Regulation Law, the government relied on the concept of “Judaization” and made it clear that “Jewish settlement” in the West Bank fulfilled the values of Zionism, and that it was the “natural right” of [Jewish] Israelis to live in the area.<sup>18</sup>

The government also clarified, contrary to international law, that “Israeli settlement in the area [of the West Bank] is a worthy value since Jewish settlement throughout the Land of Israel [including the West Bank] has always [...] been a Zionist value of the highest order [...] The fact that the people of Israel have a deep connection to these parts of the Land of Israel is not under dispute. In any case, the right of Israeli citizens to realize this connection by establishing the center of their life in the area is one of many natural derivatives of this value” (para. 97 of the government’s response). It further states that “Many Israelis – some second and third generation of the Israeli settlement in the area [the West Bank] – have a natural right to establish their homes in the area ...” (para. 3 of the government’s response).

Further, the government claimed in this case that the Knesset had full authority to enact laws that apply in the West Bank, and that it was not subject in any way to the norms of international law in this matter (para. 21 of the government’s response).

### **The Implications of Article 7 in the 1967 Occupied Territories**

If this position, which contravenes international humanitarian law (IHL), continues to direct Israel’s settlement policy in the 1967 Occupied Territories, then Article 7 will certainly have far-reaching

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<sup>16</sup> See Adalah’s NGO submission to the UN Security Council on Implementation of Resolution 2334, 18 June 2018: [https://www.adalah.org/uploads/uploads/UNSC\\_Resolution\\_2334\\_Adalah\\_Final\\_18.06.2018.pdf](https://www.adalah.org/uploads/uploads/UNSC_Resolution_2334_Adalah_Final_18.06.2018.pdf) and Adalah press release, “Adalah opposes bill designed to promote de facto annexation of West Bank lands,” 18 November 2018: <https://www.adalah.org/en/content/view/9631>

<sup>17</sup> HCJ 1308/17, *Silwad v. The Knesset* (pending). The petition in English: [https://www.adalah.org/uploads/uploads/PDF\\_Final\\_English\\_translation\\_Settlements\\_Regularization\\_Petition\\_May\\_2017.pdf](https://www.adalah.org/uploads/uploads/PDF_Final_English_translation_Settlements_Regularization_Petition_May_2017.pdf)

<sup>18</sup> The government’s response, summary in English: [https://www.adalah.org/uploads/uploads/Adalah\\_Responses\\_of\\_the\\_Government\\_and\\_AG\\_to\\_Settlements\\_Law\\_Final\\_English\\_17.1.2018.pdf](https://www.adalah.org/uploads/uploads/Adalah_Responses_of_the_Government_and_AG_to_Settlements_Law_Final_English_17.1.2018.pdf); in Hebrew: [https://www.adalah.org/uploads/uploads/Settlement\\_regulation\\_law\\_state\\_reply\\_23082017.pdf](https://www.adalah.org/uploads/uploads/Settlement_regulation_law_state_reply_23082017.pdf)

ramifications. Article 7 may be used by state authorities to justify the expansion and intensification of the illegal settlement enterprise in the territories occupied since 1967, including the West Bank, East Jerusalem and the Golan Heights, which have been illegally annexed to Israel ever since in contravention of international law.<sup>19</sup> This is especially the case given the combination of Article 7 with Article 1 of the law, which states that “the Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established”.

It further has implications relating to Israel’s non-adherence to basic norms of IHL, and in particular Article 43 of the Hague Convention, which provides that an occupying power must preserve and act on the basis of the law that existed in the area before the occupation, and that the principal consideration is the benefit of the local population.

According to Eyal Benvenisti and Doreen Lustig, “The new law is therefore also part of a series of statutes that have extended the authority of the Knesset to the occupied territories (as exemplified by the ‘Regularization Law’) and thereby attempts to ‘regulate’ the formally temporary and exceptional military rule over the occupied West Bank.”<sup>20</sup>

### **Conclusion: An Apartheid Law**

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

There is no constitution in the world today that contains a provision similar to Article 7, in which the dominant group appropriates public resources, in particular land, by excluding other groups. Provisions similar in substance existed in the Apartheid era in South Africa, and received international condemnation. Similar provisions were given various justifications in the United States during the period of the colonization of Native Americans under names such as “White Settlement”, “White pioneering”, “Civilization”, and “Discovery”, all on the basis of the racist meaning of “We The People”.<sup>21</sup>

The grave implications of the law on both sides of the Green Line have resulted in strong condemnation both in Israel/Palestine and from international bodies. In November 2018, four UN Special Rapporteurs in the fields of cultural rights, on the situation of human rights in the Palestinian territories occupied since 1967, on minority issues, and on racism sent a communique to the Israeli authorities expressing their deep concerns regarding the impact of the new law.<sup>22</sup> They wrote that the law appears “to be discriminatory in nature and in practice against non-Jewish citizens and other minorities and does not apply the principle of equality between citizens, which is one of the key principles for democratic political systems.” Regarding Article 7 in particular, the Special Rapporteurs asked Israel to provide further information on “whether it will or not contribute to potential segregation on the basis of ethnicity or religion, and whether it is an endorsement to develop Jewish settlements, including in the Occupied Palestinian Territory, in direct violation of international law.”

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<sup>19</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ Advisory Opinion), Reports 2004, sections 98-99.

<sup>20</sup> Eyal Benvenisti & Doreen Lustig, *We the Jewish People – A deep Look into Israel’s new law*, Just Security (July 24, 2018): <https://www.justsecurity.org/59632/israel-nationality-jewish-state-law/>.

<sup>21</sup> See the chapter on indigenous Indians in the article: Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (*hereinafter*: Cleveland, *Powers Inherent in Sovereignty*).

<sup>22</sup> See Adalah Press Release, “UN Special Rapporteurs give Israel 60 days to respond to ‘deep concerns’ regarding Jewish Nation-State Law, 15 November 2018: <https://www.adalah.org/en/content/view/9626>