

12 September 2021

To: MK Gilad Kariv, Chairman of the Knesset Constitution, Law, and Justice Committee
Committee Members

Greetings,

POSITION PAPER: ANCHORING THE RIGHT TO EQUALITY IN BASIC LAWS AND THE OBLIGATION TO ADDRESS THE RIGHT TO EQUALITY IN KNESSET LEGISLATION

I write to you ahead of the discussion to be held tomorrow by the Knesset Constitution, Law, and Justice Committee on the subject of "Anchoring the Principle of Equality in the Basic Laws of the State of Israel." The Zulat institute supports anchoring the right to equality in a Basic Law and believes this is essential and imperative for the existence of a democratic regime in the State of Israel.

In parallel with the discussions regarding the enactment of Basic Law: Equality, we request that the Committee adopt our initiative to reinforce the right to equality in legislation as follows: All explanatory notes attached to draft bills, whether submitted by the Knesset or by the government, will be required to address the impact of legislation on the equality of specific groups (according to race, sex, language, national origin, or religion). In addition, all Knesset committees drafting a bill will be required to procure an evaluation regarding its effect on equality, and should the bill be found to violate equality, this will be stated in the explanatory notes.

Background

The right to equality is recognized as a fundamental and "first among equals" right, since without it there is no point or *raison d'être* for all other human rights. The State of Israel is committed to guaranteeing the right to equality of all individuals within its boundaries and subject to its jurisdiction and to prevent discrimination against them on grounds such as race, sex, language, national origin, or religion. Equality protects the public from the arbitrariness of government, and no regime can be considered democratic without it.

As Justice Yitzhak Zamir argued in one of his rulings, if there is no equality for the minority, neither is there democracy for the majority.

Equality is a basic universal principle. The first article of the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, states that all human beings are born free and equal in dignity and rights. Later on, the principle of equality and the prohibition of discrimination were anchored in a series of international treaties, such as the International Covenant on Civil and Political Rights (1966); the International Covenant on Social, Economic, and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (1981); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949); and more. Although Israel's Declaration of Independence affirms the state's commitment to the principle of equality, the State of Israel is the only democratic country in the world where the right to equality does not explicitly appear in its constitution or Basic Laws. This is not due to oversight or absentmindedness but owing to persistent political disagreement.

Three Main Points Conflicting with the Principle of Equality

Three constant points of conflict with the principle of equality (as recognized in international treaties and in the constitutions and Basic Laws of democratic states) have hounded the State of Israel since its establishment:

- A) inequality resulting from the absence of separation of religion and state, in particular gender inequality and blatant discrimination against women stemming from the powers conferred on religious institutions with regard to matrimonial life;
- B) inequality resulting from the very definition of Israel as a Jewish state amid nonrecognition of the right to constitutional equality of non-Jews at a time when nearly one-quarter of its citizens are non-Jews who belong mostly to the Arab minority;
- C) inequality resulting from the occupation of the West Bank and Jewish settlement in the Palestinian territories, with the State of Israel controlling millions of citizens who have no right to vote and are not awarded the same human and civil rights as Israeli citizens.

These three constant points of conflict notwithstanding, 13 Basic Laws have been enacted to date that make no reference to the right to equality, with the exception of the principle

of equal choice under Basic Law: The Knesset. The omission of the principle of equality from Basic Laws enabled broad consensus about their enactment but damaged the core of Israel's regime system. Moreover, the provision under Basic Law: Human Dignity and Liberty preserving the validity of previous legislation upheld the powers conferred on religious institutions regarding matrimonial life, thus leaving women without protection of their constitutional human rights in matters of personal status.

Recognizing that this was a conscious choice of the Knesset, the Supreme Court rejected the interpretation anchoring equality as an independent constitutional principle. Recognizing that there can be no democratic regime without equality, however, the Court partially enshrined the right to equality as the right to human dignity anchored in Basic Law: Human Dignity and Liberty. It further ruled that any violation of equality amounts to the violation of a constitutional right when the discrimination substantively and closely impacts on human dignity, such as physical and mental bodily harm, humiliation, degradation, and the like.

It should also be noted that other ordinary provisions of the law (not Basic Laws) anchor the principle of equality and the prohibition of discrimination, such as the Women's Equal Rights Law-1951, amended in 2000, which enshrines gender equality in Israeli law except for personal status; Article 3a of the Budgetary Principles Law-1985, which stipulates that support for public institutions shall be provided only "according to equitable tests;" and the Prohibition of Discrimination in Products, Services, and Entry Into Entertainment and Public Places Law-2000.

Limited Constitutional Protection of the Right to Equality

The extent of the constitutional protection of the right to equality remains limited, unclear, and unstable, despite the Supreme Court's ruling that any violation of equality amounts to the violation of a constitutional right. The constitutional protection depends on whether the panel of judges before whom a specific petition has been adjudicated believes that at stake is one of the exceptions where the violation of equality substantively and closely impacts on human dignity, which is subject to interpretation. In addition, the Supreme Court's anchoring of the right to equality under human dignity has provided ammunition to opponents of reinforced human rights to wage ceaseless

political and media attacks on the Supreme Court on the grounds that recognition of the right to equality constitutes judicial activism.

The uncertainty regarding the extent of the constitutional protection allows the Knesset to repeatedly "stretch the limits," thereby eroding the status of the right to equality in the State of Israel without full constitutional review. Here are some examples: Basic Law: Israel-Nation State of the Jewish People (aka "Nationality Law"); Amendment No. 8 of the Cooperative Societies Ordinance-2011 (aka "Admissions Committees Law"); Amendment No. 120 of the Penal Code-2015 (denying social benefits to the parents of a minor convicted of security offenses); Military Draft Law-2002 (deferring army service to yeshiva students); Citizenship and Entry Into Israel Law-2003 (preventing family reunifications of Palestinians); Law Regulating Settlement in Judea and Samaria-2017.

The uncertainty about the extent of protection and the status of the right to equality is relevant not only in the context of Knesset legislation but also affects the application of the principle of equality to policies and decisions by public authorities and government ministries. For example, in April 2021, the Supreme Court rejected an appeal by Arab parents and children in Nof Hagalil (previously known as Upper Nazareth) and ruled against ordering the establishment of a public school where the language of instruction would be Arabic, even though 25% of the city's residents and more than a third of its students are Arabs. Another Supreme Court ruling in July 2021 allowed the Higher Education Council to set gender-segregated study programs in order to increase the enrollment of the ultra-Orthodox public in universities. Other examples include the policy of harassment of asylum seekers pursued by Israeli governments (partially endorsed by the Supreme Court) and the government's incompetence in dealing with the serious problems of poverty and economic inequality, as a result of which the State of Israel is rated negatively in OECD indices.

Zulat's Proposal on the Obligation to Address the Right to Equality in Knesset Legislation

Zulat supports anchoring the right to equality in a Basic Law and believes this is essential and imperative for the existence of a democratic regime in the State of Israel. At the same time, since dozens of bills to enshrine the principle of equality in a Basic Law have already been rejected or not advanced, Zulat proposes to strengthen the right to equality in Knesset legislation through an obligation to address it in legislative proceedings by

The Right to Equality in Basic Laws and Legislation

requiring all explanatory notes attached to draft bills submitted by the Knesset and/or the government to address the impact of legislation on the equality of specific groups (according to race, sex, language, national origin, or religion). And, when a Knesset committee drafts a bill, it will be required to solicit an evaluation of its impact on equality. To the extent that the draft bill is found to violate equality, this will be noted in the explanatory notes, as is currently the practice with budgetary estimates.

Sincerely yours,

Einat Ovadia, Zulat Executive Director

Legal advice: Prof. Frances Raday, Adv. Itay Mack