

30 September 2021

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

Greetings,

SECOND POSITION PAPER ON THE SUBJECT OF BASIC LAW: EQUALITY – HOW TO PROCEED FROM HERE?

Following the position paper that Zulat for Equality and Human Rights presented to the esteemed members of the Knesset Constitution, Law, and Justice Committee on 13 September 2021, along with a proposal to amend the Knesset Rules of Procedure by stipulating the obligation to address equality in legislative proceedings, and in light of the issues presented in the session of 30 September 2021, Zulat believes that the following points should be discussed and agreed upon in preparing Basic Law: Equality.

Especially after the enactment of Basic Law: Israel-Nation State of the Jewish People (hereinafter: "Nationality Law"), there is an urgent need to anchor the right to equality in a Basic Law. The Supreme Court criticized the fact that the legislature chose not to address equality in the Nationality Law but accepted the Knesset and the government's position that the law can be given a sustainable interpretation consistent with the constitutional right to equality. The constitutional right to equality is the product of a Supreme Court ruling, recognizing it as derived from the constitutional right to human dignity enshrined in Basic Law: Human Dignity and Liberty. Anchoring the constitutional right to equality through the judicial interpretation of the right to dignity, however, instead of explicitly doing so in the Basic Law itself, is materially and systemically deficient. The interpretation of the right to equality and its protection are unstable and subject to future changes as long as they are not explicitly enshrined in a Basic Law. In addition, the fact that the Knesset delegated the protection of the right to equality to the Supreme Court, that it tacitly confirmed the recognition of the right, and that it recently endorsed it explicitly as a respondent in petitions against the Nationality Law, has provided "ammunition" for ceaseless political and media attacks on the Supreme Court, based on the argument that recognition of the right to equality constitutes judicial

activism. These attacks are only likely to intensify as a result of the Nationality Law, especially in the event of a clash between the provisions of this law and equality.

The right to equality must be enshrined in a separate Basic Law and not as an amendment to an existing one. Since the right to equality is a central and key human right and the lifeblood of any democratic regime, it is not enough to add it via an amendment to an existing Basic Law. It is essential to establish a separate chapter in the emerging Israeli constitution that befits the central constitutional status of the right to equality in a democratic regime, a Basic Law that would succeed in calibrating the balance of Israel as a Jewish and democratic state after the enactment of the Nationality Law and that will apply to all other Basic Laws.

The Basic Law: Equality must explicitly address groups that have been historically and systematically discriminated against. At the heart of the right to equality is the prohibition of discrimination on the grounds of group affiliation. The Universal Declaration of Human Rights and international treaties, as well as Israeli court rulings and legislation (Prohibition of Product Discrimination Act, Admissions Committees Law, Equal Employment Opportunity Law, et cetera), explicitly list the groups that have been historically and systematically discriminated against. The future Basic Law: Equality must ensure the elimination, both in law and in society, of discrimination against these groups on the basis of race, religion or religious group, nationality, country of origin, sex, gender, sexual orientation, opinion, party affiliation, age, personal status, and disability. Moreover, "ethnic community" must be added to the list of groups, given that the State of Israel has engaged in historical and systematic discrimination on the basis of belonging to a community, especially the Mizrahi community. The right to equality without discrimination on the grounds of group affiliation is the precondition for the existence of democracy and economic and social justice.

The issue of immigration to Israel will be regulated in separate legislation as it is partly extraconstitutional. In Israel, as in most countries of the world, immigration policy is a complex issue that is subject to controversy and change. In light of its importance to Israel's democracy and international status, the dispute over the issue of immigration must not constitute an obstacle to anchoring the right to equality in a Basic Law. The urgency of enacting Basic Law: Equality increased even more following the enactment of the Nationality Law. Therefore, Zulat proposes that the regulation of immigration be determined in separate legislation at a later stage.

The explanatory notes must clarify that Basic Law: Equality will not apply in the territories held by the State of Israel under "belligerent occupation." Apart from the annexation of East Jerusalem, Israel has never officially decided or declared the annexation of the West Bank to its sovereign territory. On the contrary, the long-standing position of Israeli governments, including in responses to the Supreme Court, has been that the legal framework that applies in the territories is the one set forth in the Law of Belligerent Occupation. An extraterritorial application in these areas of Basic Law: Equality might bear adverse and far-reaching consequences for the Palestinian people and the Palestinian residents defined in international law as "protected residents," given that international law does not at all recognize the legality of the Israeli settlements in the occupied territories. The extraterritorial application of Basic Law: Equality in these areas would not solve the historical and systematic discrimination that the Palestinian population has been suffering from due to the policy of the region's military commander and of Israeli governments and might even lead to a demand to accord Israeli settlers the status of "protected residents" to which they are not entitled under international law.

Basic Law: Equality must be protected, and its amendment must require a majority of at least 61 Knesset members. As Israel has no strict or extraordinary procedure for enacting Basic Laws, these can be enacted by any Knesset majority. For example, Basic Law: Human Dignity and Liberty is in danger of being repealed or substantially changed by any majority in the future. The extra protection is intended to hinder an amendment of Basic Law: Equality after its enactment.

Sincerely yours,

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