

Expanding Scope of Basic Law: Referendum to Occupied Territories: Apartheid Policy

This policy paper was written ahead of a meeting of the Law, Constitution, and Justice Committee scheduled for 25 December 2024 to discuss an amendment of Basic Law: Referendum. The debate will be held at the request of the Land of Israel Lobby in the Knesset, endorsed by a large number of MKs from the Religious Zionist Party, Likud, Otzma Yehudit, Shas, Tikva Hadasha, and Yisrael Beiteinu,¹ with the stated purpose of "changing the territorial scope" of Basic Law: Referendum to apply also to the ceding of territory in the West Bank.

Zulat's position is that such an amendment, whose substance and nature contradicts the accepted conceptual and ethical framework of a constitution (or its equivalent Basic Laws) in democratic countries, should be categorically rejected. Moreover, Zulat proposes to totally repeal Basic Law: Referendum, which even without the proposed amendment substantially threatens to weaken Israel's democracy and harming equality, as will be elaborated below.

Spearheaded by the 23rd government and the Jewish Home Party, Basic Law: Referendum was enacted by the 19th Knesset in 2014. It is one of two Basic Laws enacted under Netanyahu's tenure as prime minister, after a nearly 20-year hiatus (the other one is the Nation-State Law enacted in 2018). The Basic Law in question stipulates that any agreement or government decision to cease applying the law, jurisprudence, and administration of the State of Israel to an area where these are already in force must be approved in a referendum or by a majority of 80 MKs.² Its purpose was to undermine the possibility of mustering a majority of MKs in favor of a future peace treaty that would include ceding territory.

Basic Law: Referendum combines constitutional and regime-related difficulties with a serious violation of the equality and rights of Palestinian citizens and residents to equal political participation. The current version of the law states that only citizens eligible to vote in the general elections in Israel may participate in a referendum, and therefore excludes Palestinian permanent residents of East Jerusalem. The proposed amendment

¹ [Request for Law, Constitution, and Justice Committee Discussion on Amendment to Basic Law: Referendum](#), Knesset's Land of Israel Lobby, 17 December 2024.

² [Basic Law: Referendum](#), Nevo, updated to 18 September 2023.

further exacerbates the existing violation contained in the current version of the law, since it entails a serious infringement upon the fundamental right of 2.5 million Palestinians in the West Bank under de facto Israeli rule but deprived of political rights.³ Just as they cannot vote in general elections, they will not be able to participate in a referendum on an issue that directly concerns the identity of the sovereign in their place of residence.

It should be noted that a similar amendment, submitted in August 2020 by former MK Zvi Hauser, was approved by the plenum in a preliminary reading.⁴ Zulat came out against it in a policy paper published at that time, which showed how the existing version of the Basic Law and the proposed amendment disproportionately expanded the violation of the right to vote because it denied it from Palestinians in the West Bank on a question that directly concerned their future.⁵ What was true then is truer many times over in the reality at the end of 2024: Since its inception, the 37th Israeli Government has been promoting a regime revolution, undermining the delicate checks and balances of the Israeli democratic system, and consistently inciting against minorities and political opponents. Moreover, it has been going to great lengths to solidify Israeli sovereignty in the West Bank, almost to the point of annexation, in order to entrench Jewish supremacy in the area amid oppression of its Palestinian inhabitants. The two moves are intricately connected, with the government taking advantage of the state of war since the October 7th Hamas attack to accelerate them. Against this background, the use of a referendum would inevitably serve to further undermine democracy and consolidate the government's power.

Following are the main reasons why the aforementioned proposal should be rejected outright:

Violation of Checks and Balances of Israeli Democratic Regime

Basic Law: Referendum contains a number of major constitutional and regime-related problems even before the amendment proposing to extend its application to the Occupied Territories:

³ Unattributed publication, [*Not a 'Vibrant Democracy'. This Is Apartheid](#), B'tselem, October 2022.

⁴ [Bill on Basic Law: Referendum \(Amendment: Settlements in Judea and Samaria\)](#), Knesset's National Legislation Repository, 10 August 2020.

⁵ Eyal Luria-Pardes and Einat Ovadia, [*Expansion of 'Basic Law: Referendum' With Regard to a Withdrawal From the West Bank: The Palestinians Will Take No Part in Determining Their Future](#), Zulat, 28 July 2020.

- **Knesset Bypassed:** Israel is a parliamentary democracy where the Knesset represents the sovereign. In a proportional electoral system, citizens elect their representatives and entrust them with the management of the state, which is why the elected representatives are expected to have an in-depth understanding of complex issues, such as political-security matters, in order to reach the best final decision. Denying the parliament of the authority to make decisions will further weaken the Knesset, which the executive branch controls almost completely as it is.
- **Government Evades Accountability:** The government may not submit complex diplomatic agreements or strategic security decisions to the Knesset for discussion and approval and evade political responsibility for the final outcome, since a referendum is the "decision of the majority."
- **Greater 'Tyranny of the Majority':** In a reality where the government is constantly trying to shore up its position and that of the prime minister by such measures as seizing control of the media and inciting against minorities, self-identifies with the "will of the majority," and narrowly interprets democracy as "majority rule," otherwise known as "tyranny of the majority," a referendum becomes yet another tool to buttress its power. The use of a referendum neutralizes the relative influence that Israel's Palestinian citizens wield in general elections and favors the decision of the majority, even if it violates the fundamental rights of the minority (never mind that democracy is supposed to protect the rights of minorities from the tyranny of the majority).
- **Referendum's Topic Politically Biased and Not Subject to Choice:** The existing Basic Law does not include a fixed, balanced, and public mechanism for deciding the issues to be addressed in a referendum or its format. This contrasts with the situation in many countries, where such a mechanism allows, for example, for submitting a bill to parliament that gains a sufficiently large majority to trigger a referendum on a specific topic or for collecting enough signatures from citizens on a particular issue to mandate a referendum. In Israel's case, however, the issue (ceding control over the Occupied Territories) is predetermined and the public has no option to influence it.

Apartheid Policy: Right to Vote for Settlers and No Political Rights for Palestinians

In addition to the constitutional and regime-related complexities of a referendum in general, and of Basic Law: Referendum in particular, the proposal to "change its territorial

scope” entails an even more serious violation of the right of the Palestinian permanent inhabitants living under Israeli occupation to voice their position on an issue fundamentally affecting their lives and future. This is an inevitable in a reality where Israel is the sovereign and the Palestinians are subjects of a military regime, if they live in the West Bank, or are permanent residents deprived of the right to full political participation, if they live in East Jerusalem. However, the law in question is intended to allow the use of an ostensibly democratic tool to determine the people’s choice about sovereignty in a certain territory, and simultaneously deny that right to the inhabitants of that same territory. This is more than blatant disregard for the existence of the Palestinians (as implied by the very proposal to apply the law to a territory, as if it were an uninhabited piece of real estate): It is in every sense a policy of apartheid, which denies political participation from the Palestinian residents of the territories and enables any Israeli living in those same territories to participate in a referendum.

- **Denial of Right to Vote:** The right to vote is protected by international treaties signed and ratified by Israel, including the Covenant on Civil and Political Rights (signed in 1966 and ratified in 1991). Article 25 of this treaty states that every citizen must be allowed to vote and participate in political life. The interpretation given to this article by various UN human rights committees emphasizes that it is not just about giving citizens the opportunity to participate in the political process, but about protecting the right of every individual to participate in the processes through which their public life is shaped. Even in its current form, Basic Law: Referendum disproportionately violates the right to vote in a referendum about a withdrawal from East Jerusalem, which was annexed to Israel. According to Article 2 of Basic Law: Referendum, which stipulates that only those eligible to vote in general elections will be entitled to participate, residents of East Jerusalem are excluded since the vast majority of them are only permanent residents and not citizens. The fact that East Jerusalemites are not granted a more permanent status recognizing that they are natives of the place and their political rights is in itself problematic, but denying them the opportunity to participate in a decision that primarily concerns their place of residence and the political body that will govern it constitutes a serious violation of the right to vote and of the international treaty to which Israel is a signatory.
- **Use of Apartheid Rule Practices:** Clearly, the ongoing occupation barring the Palestinians from electing the political body responsible for most of the decisions affecting their lives is problematic from a democratic perspective and under human

rights laws. The proposed amendment would further expand the potential violation of the fundamental right to vote, as more than 2.5 million Palestinians in the West Bank would be denied the opportunity to take part in a referendum on the future of the territory where they live. To determine the future of the area without hearing them out and without any official standing under Israeli law, is an unreasonable abuse of authority on the part of the government that denigrates their status as protected residents under international occupation laws. At the same time, the aforementioned amendment is set to deliberately and openly benefit the Jews living in the territories at the expense of the Palestinian residents.

- **Deepening Annexation Amid Oppression of the Palestinians:** A document published by Zulat in August 2023 showed that the regime revolution not only reflects the spillover of authoritarian concepts and practices from the Occupied Territories into Israel, but is also being used to unleash an authoritarian regime there as well.⁶ Through a variety of steps concerning its rule in the West Bank, such as appointments, shifts of ministerial authority, administrative directives, and budget allocations, the government entrenched Israeli sovereignty in the territories and transferred responsibility for administering the Occupied Territories to civilian hands (mainly to Minister Bezalel Smotrich, in his capacity as an additional minister in the Defense Ministry). Reinforced control over the territory, its resources, and its administration by Jews amid oppression of its Palestinian residents underlie the proposed amendment and are the obvious outcome of its implementation: a referendum on the future of the Occupied Territories where Israel's Jewish majority determines the future of the entire area from the Mediterranean Sea to the Jordan River that not only adopts but also perpetuates the practices of an apartheid regime.
- **Distorted and Exceptional Use of Accepted Democratic Decision-Making Tool:** Referendums on territorial and sovereign issues are relatively common in liberal-democratic countries around the world. In all cases, the right to vote on the future of the territory in question is given first and foremost to all residents therein. In other cases, alongside the latter's right, all citizens are allowed to vote. In this respect, Basic Law: Referendum constitutes an anti-democratic exception.

⁶ Tamar Feldman, [*Maximum Authority, Minimum Responsibility: Implications of Israel's 37th Government's Policy on Palestinian Human Rights in the Occupied Territories](#), Zulat, 24 July 2023.

Zulat's Proposal

In light of the constitutional difficulties contained in the current version of the law and the fact that the proposed amendment to expand its scope would significantly increase the serious violation of the human rights of the Palestinians, Zulat proposes to altogether repeal Basic Law: Referendum. Given the nature of the Israeli democratic regime and its present state in particular, with the government advancing a regime revolution and the Knesset losing many of its powers, it is inconceivable that the executive branch should be given carte blanche to bypass the Knesset. Moreover, there is no room for a Basic Law that dictates a referendum on a single specific issue that is clearly politically biased, while completely ignoring the voice of a major part of the population of the area and their fundamental right to political participation.