

April 1, 2012

To:

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**Re: Memorandum of Law on the Regulation of Bedouin Settlement in the Negev, 5772-2012**

Our two organizations, Adalah – the Legal Center for Arab Minority Rights in Israel – and ACRI – the Association for Civil Rights in Israel, are writing to you regarding the constitutional issues raised by the draft bill for the Regulation of Bedouin Settlement in the Negev, 5772-2012 (henceforth: “the bill”) as follows:

1. The bill declares that its purpose is to “regulate land ownership in the Negev regarding ownership claims filed by the Negev Bedouin population” and also “to facilitate the development of the Negev for the benefit of all of its inhabitants, including making possible a solution for settling the Negev Bedouin population” (article 2). In practice, the draft bill outlines a framework to expedite procedures to enforce government policies regarding the Bedouin Arab population in the Negev on two parallel issues. The first issue is the evacuation of the unrecognized villages in the Negev, with the draft bill founded on the assumption that the residents of the unrecognized villages are squatters lacking any rights to the land, and therefore must be evicted. The framework contained within the draft bill aspires to evacuate the majority of the unrecognized villages – 36 in number – home to

approximately 70,000 residents. The second issue is the topic of land ownership in the Negev. The underlying premise of the draft bill is that there is no Bedouin land ownership at all in the Negev. Therefore, the arrangement it proposes is *ex gratia* (page 44 of the explanatory notes); and therefore, the “arrangement” and “compensation” – both monetary and land – proposed in the draft bill are based on the complete negation of the Bedouin population’s rights to property and historic affinity to the land as detailed below. The draft bill promotes the principle of segregation along the lines of ethnic affiliation and labeling, according to which the residence of the Bedouin population and the land “compensation” that it will receive are delineated by a narrow geographical area identified in advance, according to the map that appeared in the first Addendum to the law.

2. The draft bill comprises ethnic labeling and is based on sweeping generalizations that have no real factual basis. There is no examination of the specific conditions of any of the unrecognized villages; rather, the bill relates to the Bedouin population as a single entity. This generalization does not serve any proper purpose and is contrary to the rulings of the Supreme Court of Israel, which has rejected sweeping limitations of rights that are not based on individual considerations.
3. The draft bill relies on mistaken assumptions that have no basis in historical or current reality in the Negev and are even contrary to clear judicial statements on the issue. This reliance on mistaken assumptions is especially serious considering that this law could seal the fate of thousands of families and lead to the destruction of their homes, livelihood, and community life.
4. Furthermore, the draft bill proposes establishing a mechanism to impose an “arrangement,” which will be carried out primarily through administrative authorities that will suspend application of constitutional law, administrative law, land and property laws and land-use planning laws. Thus, it adopts a formula of emergency law which also undermines the principles of the rule of law and equality before the law, separation of powers, due process, and judicial independence.
5. The draft bill undermines constitutional rights to equality, property, and dignity with no worthy purpose in a disproportional manner both because of the sweeping and

generalizing character of the draft bill and also in light of the fact that the draft bill presents evacuation as the only option for the residents of the unrecognized villages. This is proposed without carefully investigating other options, particularly the option of recognizing the unrecognized villages and the Arab Bedouin population's right to property.

In this appeal, we will detail our argument in favour of shelving the bill, as follows:

### **Evacuation of the unrecognized villages in the Negev**

6. The draft bill implies that the Bedouin population should be concentrated in recognized settlements through forced evacuation of the unrecognized villages and demolition of their homes. This conclusion arose for a number of reasons: the lack of an explicit statement in the law regarding the principle of recognizing the unrecognized villages; the lack of a detailed list of settlements to be recognized; and also because of the application of prior master plans, virtually all of which, along with various government decisions (such as the "Partial Regional Master Plan" for the Be'er Sheva Metropolitan Area, Master Plan 14/4, Amendment 2; Government Decision 2265 dated 21 July 2002, "Establishing new settlements and recognizing existing ones"; Government Decision 3782, 30 October 2011, "Establishment of new settlements in the area of Mevo'ot Arad") not only do not allow for recognition, but also deny this possibility by zoning the lands on which the unrecognized villages are located for forestation, industrial zones, infrastructure, army bases and Jewish settlements.
7. The evacuation of unrecognized villages significantly undermines the basic constitutional rights to dignity, equality, and property of the Bedouin population living in these communities, and as stated above, rests on the mistaken assumption that labels all the residents of the unrecognized villages as squatters and does not allow for a detailed examination of each and every incidence. All of these things undermine the purpose of the draft bill.
8. Most of the unrecognized villages in the Negev are located in the northeast Negev in the region between Be'er Sheva, Arad, Dimona and Yeruham, known as the *siyag* ("fence") area. Most of the unrecognized villages existed before the establishment of the State of

Israel. The residents of these villages have been living on their lands and have maintained and cultivated these lands for decades and even centuries. A small number of the villages were created following expulsion orders received from the military governor, who sought to concentrate them in the “siyag”<sup>1</sup> area against their will. At the same time, the lands outside of the “siyag” area, including lands of the villages, were declared closed military areas which the evicted residents were forbidden from entering for any reason in order to prevent them from returning to their lands.<sup>2</sup>

9. The forced eviction and concentration of the Bedouin population were part of a government policy aimed at limiting the living area of the Arab population in the Negev, monitoring it and controlling it while attempting to force the Bedouins into giving up their way of life, their culture and their traditional economy based on raising cattle and farming. All this was so that large areas of the Negev could be emptied and handed over for the purpose of building and expanding Jewish settlements within regional councils which control in practice the decisive majority of land reserves in the Negev. Through this process, some 95% of the Negev territory outside the area of the siyag was cleared of Arab residents.
10. Despite the situation described above, for decades the State did not recognize these villages and by default, caused and is still causing great suffering amongst the residents. Today, approximately 70,000 Bedouins live in approximately 36 unrecognized villages without infrastructure for water, electricity, education, health services, etc. The remainder live in the recognized settlements (the seven towns and the settlements in the Abu Basma

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<sup>1</sup> See the report of the Council for Proposing Policy to Arrange Bedouin Settlement in the Negev (2008), page 9. See also: Swirski, Shlomo and Hasson, Yael, *Transparent Citizens: Government Policy Toward the Bedouin in the Negev*. Tel Aviv: The Adva Center (2005) at: <http://www.adva.org/uploaded/NegevEnglishSummary.pdf>; Meir, Lucy, *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages*. Human Rights Watch at: <http://www.hrw.org/en/node/62284/section/7>

<sup>2</sup> A document from the IDF Archives classified as “top secret” and constituting a report on the Bedouin situation, which was submitted to military governor of Be’er Sheva on 17 March 1952, contains the following: “The continued implementation of the transfer is conditional upon several factors, last year’s transfer was implemented primarily through persuasion and financial pressure. We had no legal basis and there was even an explicit directive to not use force, therefore it was necessary to act carefully in implementation without becoming entrenched in legal problems. There were several attempts at communication with lawyers and appeals to the Knesset. We duly sought for the northern area to be declared a security area. I do not see a practical possibility for implementation and full completion of the transfer without this being implemented.” See also Swirski and Hasson, page 4.

The State of Israel later expropriated a significant portion of these lands through various laws, such as the Absentees’ Property Law, 5710-1950; the State Property Law, 5711-1951; the Land Acquisition Law (Validation of Acts and Compensation) 5713-1953; the Negev Land Acquisition Law (Peace Treaty with Egypt), 5740-1980.

Regional Council), most of which suffer from a lack of proper planning, over-crowding, sub-standard infrastructure, the absence of various services and high unemployment and poverty rates.

11. From the above, it is clear that the determination according to which the residents of the unrecognized villages are considered trespassers squatting on land without authorization is simply untrue. In a number of court rulings relating to the villages created following the evacuation orders described above (internally displaced persons), it was ruled that they are indeed authorized residents transferred to the areas in which they are living today by the above-described orders. Thus, for example, in the el-Kalab ruling<sup>3</sup> the Supreme Court of Israel ruled, in the context of the policy of transfer of the Bedouin population to the siyag area during the 1950s:

“The appellants, 11 Bedouins, were residents of the central Negev until 1959, when they were transferred by the military administration to the Nahal Secher area of the Negev and were forbidden from returning to their previous lands.”

12. Accordingly, the court also ruled on the Al-Kalab case that they have irrevocable authorization to their residence and cannot be evicted.
13. On the matter of Ibrahim Farhoud Abu al-Qi'an,<sup>4</sup> the Be'er Sheva Magistrates' Court and District Court ruled that the residents of the unrecognized village Atir/Umm al-Hieran have authorization to the land on which they have been living since 1956 because they moved to the land at the request of and with the agreement of the State of Israel. The Be'er Sheva District Court even sharply criticized the conduct of the State of Israel and the manner in which the statements of claim (evacuation) against the village residents were formulated:

“The facts show the family being moved to the specified site decades ago with the authorization of, and even at the demand of, the proper authorities. Later, based on different considerations, it was decided to cancel the permission and to evacuate the area.

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<sup>3</sup> Civil Appeal (CA) 496/89, *El-Kalab vs. Ben-Gurion University*, IscrSC 45(4) 343 (345).

<sup>4</sup> Civil Appeal (CA) 1165/09, *Ibrahim Farhoud Abu al-Qi'an v. The State of Israel*, unpublished, decision dated 28 February 2011.

"Given these facts, which the previous ruling mentions and rules as indisputable, it results that from the beginning, the statement of claim filed in response presenting the cause of "standard" squatting, and the perception of possession without any permission whatsoever, does not accord with the set of facts as they are and does not reflect the complex reality and unusual circumstances that the previous ruling determined [...] The presentation of the issue in an incomplete and imprecise manner in the statement of claim is regrettable."<sup>5</sup>

14. Even the Goldberg Commission dealt with this issue and determined that "the forced migration of some of them [Bedouin tribes] to the siyag area after the establishment of the State, and the many years of others' holding land in the siyag area cannot be ignored. One cannot say of the tribes that were there, or of those that were transferred there, that they invaded the siyag area..."<sup>6</sup>
15. It follows that the draft bill is based on mistaken factual assumptions and generalizations in that it does not clearly indicate the need to recognize unrecognized villages, at the same time that governing authorities are working to advance master plans which will lead to the evacuation of these villages.

### **Negation of land ownership rights**

16. As stated, the "arrangement" and "compensation" – both monetary and land – proposed in the draft bill are based on the complete negation of the Bedouin population's rights to property and its historical affinity to the land as will be detailed below. The draft bill's explanatory notes clarify that those claiming ownership "have no legal right to the land claimed by them," and therefore, as said above, the arrangement is *ex gratia* (page 42 of the explanatory notes).

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<sup>5</sup> Ibid. Judge Ariel Ago's words on p. 7 of the ruling. Today, this case is in front of the Supreme Court in the framework of a motion for permission to appeal to the Supreme Court filed by the residents against the ruling by the District Court that the authorization given to them is revocable. *Motion for Permission to Appeal (MPA) 3094/11, Ibrahim Farhoud Abu al-Qi'an v. The State of Israel*.

<sup>6</sup> Report of the Goldberg Commission for policy proposals to regulate Bedouin settlement in the Negev headed by retired Judge Eliezer Goldberg, 2008, p.27, (Hebrew):  
[http://www.moch.gov.il/SiteCollectionDocuments/odot/doch\\_goldberg/Doch\\_Vaada\\_Shofet\\_Goldberg.pdf](http://www.moch.gov.il/SiteCollectionDocuments/odot/doch_goldberg/Doch_Vaada_Shofet_Goldberg.pdf)

17. This arrangement callously ignores clear, proven facts regarding the traditional and historic Bedouin ownership structure of Negev land and the circumstances behind these lands not being registered in the Israeli Land Registry books. Ignoring these facts severely harms the constitutional right to property as will be detailed below.
18. Bedouin ownership and possession of land in the Negev is the result of inheritance, purchase, acquisition of collateral, possession, etc. Land ownership among the Bedouin passed from generation to generation according to tribal laws and customs which were recognized and respected by mandate regimes – the British and the Turkish – until the end of the British Mandate for Palestine.<sup>7</sup> The Ottomans, and afterwards also the British, accepted the Bedouin land ownership system and relied on the internal land transfer records, which are based on the traditional tribal laws and customs, as written proof of land ownership and transactions.<sup>8</sup>
19. The aforementioned recognition of the traditional ownership structure is clearly demonstrated by archival documents from the 1950s and 1960s. From these documents it becomes clear that Jewish institutions and individuals used this form of recognition in order to purchase land from the Bedouins. This is demonstrated, for example, in a "secret" letter from "[the] Select Committee for Resolving the Matter of Bedouin Land Ownership in the Negev" from 20.10.1952 to the Justice Minister, in which it was written:

"It is a known fact that even during the period of Turkish rule the Bedouin tribes refrained from, and in many cases opposed, the registration of their land in governmental Land Registry books, because they feared that the registration of lands would sooner or later lead to their being drafted into military service, which the Bedouins strongly opposed.

"With the conquest of the country by the British, it was found – with the exception of a small number of cases – that Bedouin lands were not listed in Registry books.

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<sup>7</sup> Oren Yiftachel, *Expert Opinion (response to expert opinion by Prof. Ruth Kark) on the claim of the heirs of Suleiman al-Uqbi to ownership of plots in al-Araqib and Zahilqiya*, in Civil Case (CC) 7161/06, February 2010, p. 13-14 (Hebrew), available at: [http://toibillboard.info/Yiftah\\_3.pdf](http://toibillboard.info/Yiftah_3.pdf)

<sup>8</sup> Oren Yiftachel, *Expert Opinion* in Civil Case (CC) 7161/06, August 2009, p. 6, (Hebrew), available at: [http://toibillboard.info/Yiftah\\_1.pdf](http://toibillboard.info/Yiftah_1.pdf)

"Nevertheless, the Bedouins considered themselves the owners of all of the areas that they cultivated, and despite their lacking registration certificates, both the Turkish and British authorities recognized this fact.

[...]

"[...] Indeed it is a known fact that during the period of Mandate rule, very substantial areas were registered in the name of the Bedouins, based on proof that they had cultivated these areas for a period exceeding the period of limitations. An important part of these lands were then transferred, after their registration, to the Jewish National Fund, and to other Jewish companies, as well as to private Jewish individuals. Thus there are hundreds of precedents with regards to this issue, and we are convinced that the Government of Israel will not be able to and need not ignore them."<sup>9</sup>

20. This is also demonstrated by a July 1966 letter from Sasson Bar Tzvi, military governor of the Negev to the Operations Branch Superintendent regarding "the Negev Bedouin land problem", which explained that:

"The land in the Negev, unlike that in the rest of the country, was not registered by the Mandate government in the Land Registry books. The Bedouin, who refrained from registering their land, did not especially suffer from the land's non-registration because the authorities recognized the Bedouin and their rights to the land, a matter which was expressed in the registration of all the land in tax records and the agreement of the authorities to recognize the transfer of land from one Bedouin to another Bedouin, or to any other person, as in a legal lease agreement, and in their agreement to register the land in the Registry books under the name of the buyer (in which manner the Jewish National Fund purchased thousands of dunams of land and registered them in its name)"<sup>10</sup>.

21. There are a number of reasons why the ownership rights of the majority of Bedouins in the Negev were not listed in the Land Registry books. The process of regulating land

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<sup>9</sup> A letter from the members of "[the] Select Committee for Resolving the Matter of Bedouin Land Ownership in the Negev". Y. Witz, Y. Feldman and B. Fishman to the Justice Minister on 20.10.1952, document from the State Archives.

<sup>10</sup> A letter from Sasson Bar Tzvi, military governor of the Negev, in July 1966 to the Operations Branch Superintendent regarding "the Negev Bedouin land problem". Document from the IDF Archives.



ownership during the British Mandate period, through which many of the landholders in the north and center of the country were officially registered, was not carried out in the Negev. As a result of this, the land registration mechanism was distant and inaccessible to Negev residents.<sup>11</sup>

22. Another major reason that the Bedouins did not record their ownership in the Land Registry stems from the existence of their own traditional system of property acquisition, which for years had been used to settle matters of property ownership among the Bedouins. This mechanism divided the land into territories split amongst the various groups in the Negev. Within each territory, land was divided among families, either by historical status or by a traditional sales agreement, which the ruling Ottoman and British authorities both upheld. The Ottoman and British recognition of this ownership mechanism created the impression among the Bedouins that registration in the government Land Registry was unnecessary for the recognition and preservation of their land rights. Thus the non-registry of lands cannot be used as grounds for classifying them as *mawat* (uncultivated state lands), and cannot negate the historical rights of the Bedouins to these lands, upon which they had lived and worked for generations.<sup>12</sup>
23. In light of this reality, the draft bill is based, as stated above, on the assumption that there is no Bedouin ownership of any land in the Negev region, and that the framework of the "arrangement" is offered *ex gratia*. This exploits the fact of the non-registration of lands and ignores the historical circumstances that led to this situation, as described above. In the explanatory notes within the draft bill it is stated that "in general, and in accordance with set legal precedents regarding this matter, it can be said that claimants to land ownership have no such right by law (Israel Land Law 5729-1969, or other land laws) to the lands which they claim. Consequently, the compensation is offered purely '*ex gratia*'" (page 42 of the draft bill). Accordingly, the draft bill offers to grant monetary compensation for claimed land that was not held by the claimant of ownership during the "determined period" (according to Article 1 of the draft bill, the period from 2.5.1971 to 24.10.1979). Regarding ownership claimants who held their land during the "determined

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<sup>11</sup> Yiftachel, Oren, "Towards recognition of Bedouin villages? Plan for the Be'er Sheva Metropolis versus the Goldberg Committee" (in Hebrew), Tichnun, Vol. 6:1, p. 165, 172 (2009).

<sup>12</sup> Ibid., 173.

period" the draft bill offers compensation for the land ranging from 20%-50% of the land area held during the "determined period" (Tables 1-8 in the third appendix to the draft bill).

24. Additionally, the draft bill, with the aim of forcibly imposing the arrangements it contains, determines that an ownership claimant who did not validate his/her claim and request compensation according to the process proposed in the draft bill, and did not request the resolution of his/her claim according to the defined arrangement, and for whom the court did not rule on his/her claim by the end of the arrangement period defined in the draft bill, shall not be the owner of the land by virtue of the ownership claim clarified in the arrangement's procedures, even if s/he proved ownership of the land. A land owner, as stated above, shall be entitled to monetary compensation for his/her ownership (Article 69 of the draft bill).
25. First it shall be noted that the arrangement upon which the draft bill is founded rests on a mistaken assumption that the ownership claims of Bedouins on their land in the Negev are not legitimate. This is despite the fact that the majority of these claims have not yet been resolved and that no ruling of any kind has been made with regards to them. The non-resolution of the claims over the course of many years derives from the failures of the State of Israel, as shall be described henceforth.
26. At the beginning of the 1970s the State of Israel enacted a policy regulating land ownership in the Negev. During that same period, Bedouins submitted some 3,200 ownership claims for approximately one million dunams of land. As a strategic political move, the State of Israel refused to recognize these claims and began submitting counterclaims to register Negev lands in its name, in contrast to the situation which was extant during the British Mandate period as stated above. During the decades that have passed since the beginning of the process of regulation and the freezing of that process, government authorities have initiated various moves aimed at reaching an "arrangement" with the Bedouin population regarding the land ownership issue. These initiatives have failed due to the fact that they sought to almost entirely dispossess the Bedouin population of its rights to the land and that the different formulas for compensation that were offered within their framework were not acceptable on principle by the population.

27. Therefore the State is now seeking to build off of its failure to resolve the ownership claims over the course of years (while causing evident, irreversible damage to the Bedouins who submitted the claims) in order to unilaterally impose an unjust land "arrangement", while employing destructive coercive measures towards the Bedouin population.
28. **To sum up what has been said thus far, the draft bill's two components, evacuation of villages and non-recognition of ownership rights to Negev land, are sweeping generalizations and ethnic labeling, which lack any proper factual basis. The draft bill relies on incorrect assumptions which have no basis in the historical or current reality in the Negev and no basis in legal developments which were applied in court rulings on this matter. The failure of the bill's drafters – the lack of proper examination of the set of facts on which the draft bill is based – is extremely severe, especially given that such a law will determine the fate of thousands of families, leading to the destruction of their homes, financial interests, community life and tribal life while completely undermining their property rights, dignity and equality. The failure is especially clear in the non-examination of the circumstances of each specific unrecognized village and the treatment of all of these villages as a single entity, without examining in each specific instance what the relevant facts are. This generalization does not serve any proper purpose and is contrary to the rulings of the Supreme Court of Israel, which has rejected sweeping limitations of rights that are not based on individual consideration<sup>13</sup>, as will be described henceforth.**

**A coercion mechanism that suspends application of the existing law:**

29. The draft bill suspends application of constitutional and administrative law and grants wide-ranging and sweeping administrative powers, similar in format to declaring a state of emergency in wartime. This absolutely undermines the principle of equality for all before the law.

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<sup>13</sup> See on this matter: High Court of Justice 7052/03 **Adalah – The Legal Center For Arab Minority Rights in Israel v the Minister of Interior** ruling SA(2) 202, (2006); High Court of Justice 8276/05 **Adalah v the Minister of Defense**, (not yet published, ruling from 12.12.06).

30. Chapter 8 – Enforcement and Punishment in the draft bill grants wide- ranging administrative powers for the enforcement and imposition of the bill’s arrangements on the entire Arab Bedouin population of the Negev. The draft bill grants authority to appointees to issue administrative expulsion orders to be enacted within 30 days against anyone who does not accept the "arrangement" framework proposed in the bill, and against anyone who received the legal instruction but did not implement the conditions determined to fulfill it by the deadline, etc. (article 71 (a)) of the draft bill. Article 72 (a) of the draft bill even grants authority to issue such an eviction order 15 days after the initial order is issued.
31. Moreover, the eviction orders as proposed in the draft bill will be issued without granting the right to a hearing. Although the option will be offered to appeal to the courts to revoke the orders (article 71 (g) of the draft bill), the authority of the court to interfere in the matter is limited to only examining the existence or lack thereof of the technical conditions that form the basis for the eviction order’s issuance. The bill also imposes actual prison sentences on residents who do not comply with the eviction orders (article 73 of the draft bill).
32. In practice, residents of unrecognized villages that have existed since time immemorial, as well as those built decades ago following the orders of the Negev military governor, will be evacuated according to administrative orders. Bedouin residents of the Negev will no longer be able to claim any kind of usage rights to the lands on which they live or ownership rights to the land. As such, they will not be able to fight the decision to evict them under the principles of administrative law or constitutional law, will not be able to defend themselves from eviction under real estate law and will not be able to defend against the destruction of their homes under the equitable defense doctrine.
33. In other words the draft bill will legally prevent the Bedouin residents of the Negev from defending their rights and hence undermines the basic constitutional right to due process. The bill creates a new land mechanism, different from the regulations applying to all other regions and all other citizens in the State, and thus undermines the principle of the rule of law, which is based on the axiom of equality for all under the law.

34. Residents of unrecognized villages have rights under the law, and have the right to defend those rights according to the law. Thus, for instance, two examples cited above in the matter of **El-Kalab and Abu al-Qi'an** established factual determinations that completely contradicted the claims made by the state as to the defendant's alleged squatting. Given this situation, the draft bill changes the existing legal conditions, effectively declaring all the residents of unrecognized villages to be breaking the law by the very fact that they are not prepared to accept the "arrangement" in the draft bill. Administrative eviction orders in accordance with the draft bill are not connected to the question of whether or not the residents are squatters. They are only connected to the question of whether or not they accept upon themselves the "arrangement" in the draft bill. The formulation of the draft bill undermines the rule of law because it ignores the existence of legal defenses according to other laws and it suspends the right of equality for all under the law, and even revokes the right to due process.
35. Moreover, as described above, in some of the cases, even defendants who have proved their ownership of the land and received such a ruling will not be eligible to register their lands according to the ruling in their name, but will be obligated to receive financial compensation for their land.
36. The established rule is that the obligations of administrative law and principles of constitutional law apply to all statutory actions of the ruling authority as is stated: there are many courts but there is only one administrative law. "These obligations [of administrative law] are imposed upon the authority when it exercises statutory authority, in which it is possible to see principles that restrict – according to the presumed intention of the legislation – the authority itself."<sup>14</sup> The rule of law includes the fundamental aspect of protecting the rights of man and of the fulfillment of the values of justice. Thus, the constitutional principles apply to every action of the state, including the act of the legislation itself (HCJ 428/86 **Barzilai v. Government of Israel**, IsrSC 40m(3) 505, 622 (1986); HCJ 6163/92 **Eisenberg v. Minister of Building**, IsrSc 47(2) 229 (1993); HCJ 1993/03 **The Movement for Quality Government in Israel v. The Prime Minister**, IsrSC 57(6) 817, 834 (2003); Aharon Barak, **Midatiyut Bamishpat – Hapgi'a bizhut hahukatit vehegbloteha**

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<sup>14</sup> HCJ 840/79 **Association of Contractors and Builders in Israel v The Government of Israel**, IsrSC 34(3) 725, 746 (1980).

[**Proportionality: Constitutional Rights and their Limitations**] Nevo (2010), pp. 280-283); Aharon Barak, **Shofet b'hevra demokratit [The Judge In a Democratic Society]**, University of Haifa Press, Keter Publishing House, Nevo (2004).

37. The above ruling raises the importance of the issue of the principles of fairness in the actions of the public administration and state authorities in light of the power given into the hands of said authorities which place them in a position above the citizen or individual (see on this matter: HCJ 164/97 **Conterm Ltd. v. Finance Ministry, Customs and VAT Division**, IsrSC 52(1) 289, 366-367 (1998).
38. Therefore the attempt to create a special ruling for a specific group severely undermines not just the principle of the rule of law but also the principle of equality under the law. Consequently, the State cannot legislate arrangements that, in effect, suspend the application of administrative and constitutional law regarding actions and authorities granted to the state according to that same law. The State also cannot legislate arrangements that suspend real estate law for the Bedouin population of the Negev when they are valid and apply to all other citizens of the State.

### **Violation of Basic Constitutional Rights:**

39. The draft bill constitutes a grave violation of the rights of Bedouin residents of the Negev to property, dignity, and equality.<sup>15</sup> Retrospectively rendering the entire Bedouin population as “criminal,” imposing upon them a regime of segregation, imposing a legal framework of emergency regulations that rests in the hands of administrative authorities, failing to recognize the property rights of the Arab Bedouin population, and the eviction of tens of thousands from their homes and villages – all clearly violate the rights of the Negev Bedouins to property, dignity, and equality, as will be detailed below:

#### **A. The Constitutional Right to Property:**

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<sup>15</sup> Regarding the right to equality, see HCJ 11163/03, **High Follow-Up Committee for Arab Citizens of Israel v. The Prime Minister of Israel** (not yet published, granted on 17 June 2007); HCJ 1113/99, **Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Religious Services**, verdict 54(2) 160, 170 (2000).

40. The right of the Negev Bedouins to acquire full ownership of their lands is a property right of the utmost degree. The traditional Bedouin system of property and settlement was formulated under the framework of Bedouin governmental and cultural autonomy, which was in place until the beginning of the twentieth century, after which it was granted the protection of the Ottoman regime, the British regime – as can be seen in the archival documents that were mentioned above, and partly even the protection of the Israeli regime in its first years.<sup>16</sup> The State of Israel classified the lands that were under Bedouin ownership until 1948 as *mawat* lands (uncultivated, unallocated, and uninhabited), which are supposed to be listed as state lands, among other reasons because it claimed that these lands were not registered with the Land Registry (*tabu*) under the names of their Bedouin owners.<sup>17</sup>
41. As stated above, this approach by the State of Israel, which seeks to use the lack of registration of the majority of Negev lands in the Land Registry's books, wholly differs from that of the British mandate and the Ottoman regime. This approach denies the bond between the Bedouins and their lands and completely disregards the traditional property system of the Bedouin population, thereby denying and utterly violating the property rights of the Negev Bedouins. This approach further places the Bedouin population in a far inferior position in terms of evidence, with state authorities standing opposite and gaining the upper hand.
42. A second aspect of the Bedouins' right to property is manifested in the right of the residents of the unrecognized villages of both kinds (the historical and uprooted) to make use of the lands that have been serving them for residence for many decades. Such a lengthy period of possession creates a constitutional right to property under Article 3 of Israel's Basic Law: Human Dignity and Liberty.
43. As stated above, the fact that some of the residents of the unrecognized villages moved to a location that became their village following the State's directive and under its exclusive

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<sup>16</sup> See also: Oren Yiftachel, **Expert Opinion regarding the Successors of Sliman al-Uqabi for Ownership of the Lot Known as "Araqib 1"** – this opinion was submitted in the course of a legal proceeding that is still standing before the Be'er Sheva District Court (2010).

<sup>17</sup> *Ibid.* The State's claim is that, since the Bedouin did not register their lands in 1921 in response to the British Land Order, and since – according to their claim – there were no villages in the area at the time, all these lands are *mawat* and should therefore be registered as state lands.

supervision, their investment in their villages, building their houses and developing their lives, as well as the expectation and reliance that this is their home and this land is granted to their continuous use, all these enhance a constitutional property right, which deserves full protection. No monetary compensation could heal such a severe and sweeping injury to this right, as is desired in the draft bill. And the aforementioned statement is all the more valid when dealing with historical villages, which existed even before the State of Israel was founded on lands owned by the Bedouins. Regarding the significance and essence of the right to property, see: HCJ 1661/05, **Gaza Shore Regional Council v. Knesset**, verdict 59(2) 481, 583 (2005); HCJ 2739/95, **Makhoul v. Minister of Finance**, verdict 50(1) 309, 317 (1996); CA 6821/93 **United Mizrahi Bank LTD v. Migdal Cooperative Village**, 49(4) 221 (1995); HCJ 7862/04 **Abu Daher v. Commander of the IDF Forces in Judea and Samaria**, 59(5) 368 (2005); HCJ 2390/96, **Kersik v. State of Israel**, verdict 55(2) 625 (2001).

#### **B. The Constitutional Right to Dignity:**

44. The ethnic labelling of the Bedouin population of the Negev and the generalized arrangement concerning them, as well as the eviction of the residents of the unrecognized villages from their villages under the circumstances detailed above, also constitute a severe violation of their constitutional right to dignity. This is because eviction under such circumstances and without individual review of each and every case, will deny their right to housing, deny any value of their family and social lives, and deny any value of their humanity, their culture, and their customs. The policy that is at the foundation of this draft bill gives the residents of these villages the feeling that they are treated like objects that can be easily transferred from one place to another, without any consideration for their affinity and their strong ties to that place, the social, familial, and economic consequences of the transfer, and the unique circumstances of each and every village or each and every resident. On this matter, see: HCJ 1661/05 **Gaza Shore Regional Council v. Knesset**, verdict 59(2) 481, 561-562 (2005); RCA 4905/98 **Gamzo v. Yeshayahu**, verdict 55(3) 360, 375 (2001); Aharon Barak, **Interpretation in Law**, vol. 3 422-423 (1994).

#### **C. The Right to Equality:**



45. Evicting the residents of the unrecognized villages under these circumstances while ethnically labelling them, constitutes a violation of the constitutional right to equality, which is a component of human dignity. The draft bill in this context does not grant equal weight – or more accurately any weight – to the interests of the native Bedouin population that has been residing in the Negev area since time immemorial.
46. Moreover, at the same time that Israel refuses to recognize the Bedouin villages, it continues to treat their residents as intruders and applies towards them a discriminatory policy of concentration, evicting and severing them from their rural lifestyle whilst denying their rights to the land. At the same time the State has established and continues to establish Jewish communities in the Negev in a variety of settlement types. There are currently over a hundred Jewish settlements in the Be'er Sheva Region, with an average population of approximately 300 people per community.<sup>18</sup> This is in addition to dozens of lone farms, which were established without a permit but the government worked to grant some of them retroactive recognition.<sup>19</sup> In this context, it should also be noted that the government only recently made a decision to found a new settlement strip in the Mevo'ot Arad area, which includes dozens of Jewish settlements (Government Decision No. 3782, dated 30 October 2011). This is in addition to the recognition of many Jewish “settlements” in the Negev region, which exist without any master plans or legal permits but with full government backing.
47. Furthermore, the principle of separating residences and restricting the living areas of the Bedouin population also constitutes a severe violation of the right to equality.

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<sup>18</sup> These figures are based on an analysis of figures published by the CBS and Ministry of Interior, performed by planner Nili Baruch of the organization Bimkom – Planners for Planning Rights. The figures were published on Ynet in an article titled “Negev Bedouin? Not Recognizing.” <http://www.ynet.co.il/articles/0,7340,L-3562139,00.html> (Hebrew).

<sup>19</sup> The Negev Development Authority Law (Amendment 4) 2010, which was approved by the Knesset on 12 July 2010, authorized the Negev Development Authority to establish rules and criteria for the recognition of these farms and to allow them to use Negev lands for agricultural and touristic purposes, including building permits for the housing of the holders of these farms. As for the existing farms, the law established transitional regulations that will enable their continued settlement on the land and their retrospective recognition. Arranging the status of these farms expresses the government's official policy, which can be seen, for example, in the Cabinet Secretary's announcement from 15 July 2007, regarding the appointment of an inter-ministerial committee “**that will work to arrange that status of existing lone farms** and recommend to the government a procedure for the establishment of additional lone farms in the Negev and Galilee.” The complete announcement can be read here: <http://www.pmo.gov.il/PMO/Templates/Spokesman.aspx?NRMODE=Published&NRNODEGUID=%7b16DD00E0-A664-4B66-9F15-3D3DCDAEEEB%7d&NRORIGINALURL=%2fPMO%2fArchive%2fmazkir%2f2007%2f07%2fgovmes150707%2ehm&NRCACHEHINT=Guest#six>

48. The obligation of public authorities, including the Knesset of course, to treat all the citizens of Israel equally, is extensive and spreads to all areas of life, especially everything that concerns the allocation of resources at its disposal. The authority's obligation for equal treatment in all areas of its activity is all the more important in relation with the State's Arab population (HCJ 11163/03, **High Follow-Up Committee for Arab Citizens of Israel v. The Prime Minister of Israel** [not yet published, granted on 17 June 2007]; HCJ 1113/99, **Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Religious Services**, verdict 54(2) 160, 170 [2000]).

**An Inappropriate Purpose:**

49. Under the circumstances detailed above, the draft bill, which does not recognize the land ownership claims of the Bedouin population and suggests the uprooting of dozens of villages, cannot be considered an appropriate purpose. This is particularly so as it does not serve a clear public interest, but only aims to clear Negev lands for the benefit of a Jewish population or for other interests, none of which cannot be balanced with such a severe and concrete violation of the human and civil rights of the tens of thousands of Bedouin residents that it seeks to evict and deport.

50. In order to clarify matters, we shall review a few examples: the unrecognized village Umm al-Hiran, whose eviction is requested for the purpose of building a Jewish settlement by the name of Hiram on its ruins; the unrecognized villages Atir and Araqib, whose eviction is requested for the purpose of planting forests; the unrecognized village Alsara, whose eviction is requested for the purpose of building an employment center in the area; and the unrecognized villages Maqiman and Ujan, whose eviction is requested for the purpose of constructing a military intelligence center.

51. Israeli court rulings established that a purpose which does not grant proper weight to human rights is an inappropriate purpose. The same goes for a purpose that ignores constitutional rights or does not establish an appropriate balance between different conflicting interests (HCJ 1661/05, **Gaza Shore Regional Council v. Knesset**, verdict 59(2) 481, 570 [2005]; RCrA 5086/97 **Ben-Hur v. Tel-Aviv-Jaffa Municipality**, verdict 51(4) 625

[1997]; CA 524/88 **Pri HaEmek – Cooperative Agricultural Association LTD v. Sdeh Ya'acov – Workers' Village of HaPoel HaMizrahi for Settlement**, verdict 45(4) 529 [1991]; Aharon Barak, **Purposive Interpretation in Law** [2003]).

52. The purpose of evicting and concentrating the Arab Bedouin population of the Negev cannot be a purpose that stands on its own, since we are dealing with the allocation of land resources for all citizens of the State, which is supposed to be founded on the principles of justice and fairness, as were defined in the matter of **Siah Hadash Association**.<sup>20</sup>
53. The backbone of this draft bill is the principle of segregation. On one hand, the bill establishes a special rule based on ethnic attributes, contrary to the right to equality before the law, and on the other hand it establishes forced residence and “changes” in land rights on the basis of these attributes. This is contrary to the State's obligation not to discriminate on the basis of nationality when allocating land resources, an obligation that was explicitly stated in the Supreme Court Ruling in the case of **Qaadan**.<sup>21</sup>
54. As stated above, the bill memorandum treats all unrecognized villages and the entire Negev Bedouin population as one mass and rules out the specific and individual review of each case by itself and according to its circumstances. This generalizing approach cannot serve any appropriate purpose and contravenes the Supreme Court ruling, which disqualified the sweeping restriction of rights that is not based on individual review.<sup>22</sup>
55. The draft bill does not serve an appropriate purpose since it also contravenes the basic principles of international law. The violation of the rights of Negev Bedouin contradicts international norms of human rights, which through different treaties enshrine the rights of minorities in general and indigenous minorities in particular. In a series of treaties and declarations, to which Israel is obliged, the rights that were enshrined in this context are the

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<sup>20</sup> HCJ 244/00 **Siah Hadash Association v. Minister of National Infrastructures**, verdict 56(6) 25 (2002).

<sup>21</sup> HCJ 6698/95 **Qaadan v. Israel Land Administration**, verdict 54(1) 258 (2000).

<sup>22</sup> For this matter, see: HCJ 7052/03, **Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Interior**, verdict 61(2) 202 (2006); HCJ 8276/05 **Adalah v. Minister of Defense** (not yet published, granted on 12 December 2006); HCJ 10662/04 **Saleh Hassan v. National Insurance Institute** (not yet published, granted on 28 February 2012).

right to equality,<sup>23</sup> property,<sup>24</sup> housing,<sup>25</sup> and the right to maintain cultural characteristics.<sup>26</sup>

56. Indigenous minorities were granted special protection under international human rights law because of their vulnerability, and these norms were entrenched in the United Nations Declaration on the Rights of Indigenous Peoples (hereafter: The Declaration).<sup>27</sup> Under international law and various treaties, an indigenous minority entitled to these protections is any distinct population, with unique religious and cultural characteristics, which is united by traditional social structures and whose way of living is linked to the place and land, and who is subjected to the new regime of a modern state that is threatening its culture and its assets.<sup>28</sup> It is clear, therefore, that the Bedouin population of the Negev, which falls under this definition, is entitled to the protections that were established by international norms for the protection of indigenous minorities.

57. It should be stressed that these norms, as enshrined in The Declaration, include the obligation not to forcefully remove an indigenous population from its land or its territory and not to resettle this population without its free, prior, and informed consent, and after agreement on fair and just compensation.<sup>29</sup> Furthermore, the indigenous population has the right to own, use, develop, and control the lands, territories, and resources that it possess by reason of traditional ownership, as well as the right to get back land and resources taken from it.<sup>30</sup> It was further established that states must recognize the lands,

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<sup>23</sup> The right to equality is one of the most basic principles of human rights. The prohibition on discrimination appears in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights (1966), which in Article 2.1 enshrines the right to equality and in Article 26 the obligation to guarantee equal protection of the law.

<sup>24</sup> The Committee on the Elimination of Racial Discrimination dedicated its General Recommendation No. 23 to the rights of indigenous peoples, and particularly to property rights and the affinity of these peoples to the land.

<sup>25</sup> Article 11 of the International Covenant on Economic, Social, and Cultural Rights enshrines the right of every human being to an adequate standard of living, including the right to housing.

<sup>26</sup> Article 27 of the International Covenant on Civil and Political Rights obligates states in which ethnic, religious, or linguistic minorities exist to enable such minorities the right “to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The International Convention on the Elimination of All Forms of Racial Discrimination extended the protection of the right of different minorities, and first and foremost indigenous minorities, to the protection of their culture as a collective. General Recommendation No. 23 of the committee grants great importance to the protection of the culture of indigenous peoples and sees special importance in the bond between these minorities and the land and a connection between this bond and their right to maintain their culture and their lifestyle.

<sup>27</sup> The Declaration on the Rights of Indigenous Peoples, which was approved by the United Nations General Assembly on 13 September 2007.

<sup>28</sup> *Ibid.*

<sup>29</sup> Article 10 of The Declaration.

<sup>30</sup> Articles 1, 2, and 26 of The Declaration.

territories, and resources belonging to the indigenous population or held by it and to afford them legal protection. Such recognition shall be granted with due respect to the customs, traditions, and land tenure systems of the indigenous population. The Declaration further notes that states are required to provide indigenous peoples with effective mechanisms for the prevention of any form of forced population transfer which has the effect of violating or undermining any of their rights as a community.<sup>31</sup>

58. The Committee's General Recommendation No. 23, published in 1997, which interprets the International Convention on the Elimination of All Forms of Racial Discrimination, was entirely dedicated to the rights of indigenous peoples and stated that racial discrimination against indigenous peoples is particularly common, because they have lost their land and resources, and their culture and their historical identity is jeopardized.<sup>32</sup>

59. In addition to that, several United Nations committees have previously related to the issue of the rights of the Negev Bedouin community and provided recommendations for full recognition of this community's rights. Thus, for example, on 22 August 2011, Prof. James Anaya, the UN *Special Rapporteur* on the Rights of Indigenous Peoples, published his annual report on his activities and discussions with different governments. Article 23 of the sixth annex of the report deals with the unrecognized villages in the Negev. It discusses the connection between maintaining cultural characteristics and the removal of residents from their land:

“While in general, removals of people from their traditional lands have serious implications for a wide range of human rights, these implications are greater for groups like the Bedouin, who hold bonds of deep historical and cultural significance to the lands in which they live.”

60. The UN Committee on Economic, Social, and Cultural Rights also related to this issue. On 8 December 2011, in its recommendations following the filing of Israel's report regarding its implementation of the International Covenant on Economic, Social, and Cultural Rights, the Committee stated that:

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<sup>31</sup> Article 8(2)(c) of The Declaration.

<sup>32</sup> Article 3 of the CERD's General Recommendation No. 23, published on 18 August 1997.

“The Committee is concerned that the measures adopted by the State party to relocate the Arab-Bedouin villages in new settlements will negatively affect their cultural rights and links with their traditional and ancestral lands” (CESCR, 47<sup>th</sup> Session, Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Israel, E/C.12/ISR/CO/3, par. 38).”

The Committee raised concern about the Praver Plan and recommended that Israel **“ensure that the implementation of the Plan does not result in the forceful eviction of Bedouins [...] The Committee recommends the State party to officially regulate the unrecognized villages, cease the demolition of buildings in those villages, and ensure the enjoyment of the right to adequate housing”** (paragraph 27).

61. The United Nations Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), also referred in its concluding observations dated 29 July 2010 to the property rights of the Negev Bedouin. Its observations included explicit reference to the issue of the Negev Bedouin (Article 24 of the concluding observations).<sup>33</sup> The Committee expressed concern following incidents of forced removal of Bedouin population and over the disregard for the traditional needs and lifestyle of this population in planning and developing the Negev. The Committee called upon Israel, among other things, to respect the right of the Arab Bedouin citizens to their ancestral lands and to ensure their access to health and education services and to water and electricity, regardless of their place of residence and including the unrecognized villages.
62. The United Nations Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, also voiced harsh criticism of Israel in its concluding observations dated 9 March 2012. The Committee called upon the Israeli government to withdraw the draft bill for the Regulation of Bedouin Settlement in the Negev, claiming

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<sup>33</sup> To read the Committee's concluding observations:  
<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.ISR.CO.3.doc>

that this bill will discriminate against the Bedouin population and will anchor racist processes in legislation:

"[T]he State party should withdraw the 2012 discriminatory proposed *Law for the Regulation of the Bedouin Settlement in the Negev*, which would legalize the ongoing policy of home demolitions and forced displacement of the indigenous Bedouin communities" (Article 20 of the concluding observations).<sup>34</sup>

63. In this context, we will note that it is possible to gain knowledge about the matter at hand from the experience of many countries around the world, which decided to implement affirmative policies with regards to indigenous populations in their territories that were historically disinherited from their rights to the land. Countries like Australia, Canada, and New Zealand sought to correct historical wrongs and decided to acknowledge the rights of indigenous groups to use and ownership of their lands on the basis of historical bonds.

#### **Disproportionate Violation of Rights:**

64. The draft bill violates the constitutional rights of the Bedouin residents of the Negev in a disproportionate manner. This disproportionality is manifested, among other things, in the sweeping "arrangements" the bill establishes, which are applied, as stated above, to the entire Bedouin population as ethnically and negatively labelled by the memorandum.

65. Court rulings dictate that basic constitutional rights cannot be violated by the suspension of general law on the basis of ethnic identity or in a generalizing and sweeping manner. Thus, for example, on December 2006 the Supreme Court ruled on the matter of the constitutionality of a law that denied the eligibility of residents of the Occupied Territories to file for damages due to harm caused to their body or property by security forces. The respondents attempted to justify the violation of rights on the basis of the victims' ethnic identity, as belonging to an enemy entity (HCJ 8276/05 **Adalah v. Minister of Defense** [not yet published, granted on 12 December 2006]). The ruling established that the law is

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<sup>34</sup> To read the Committee's concluding observations:  
<http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf>

unconstitutional, as there is no place for the application of unique damage laws instead of the general damage laws that are supposed to be binding laws that apply to everyone, and because the law is sweeping and generalizing. Additionally, in the case of **Anonymous** the High Court of Justice overturned legislation that sought to establish a special law in criminal proceedings for bringing a security detainee before a judge. The legislation was overturned because it was deemed as generalizing, violating due process, and violating the principle of equality before that law that was established in criminal procedures. Recently, the **Hassan** ruling overturned a law that denies the eligibility for income support benefits on the basis of the conclusive assumption that “any case of ownership or use shall be viewed as though the owner or user of the car had a regular income high enough to exclude them from the circle of those eligible for benefits.” This presumption, states the ruling, “ignores the specific details of each and every case and leads to the denial of benefits without any distinction, even from those who without it could not have a minimal level of dignified human existence” (Paragraph 47 of the ruling, HCJ 10662/04 **Hassan v. National Insurance Institute** [not yet published, granted on 28 February 2012]).

For more on this matter, see also: HCJ 7052/03, **Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Interior**, verdict 61(2) 202 (2006); FCrH 7048/97 **Anonymous v. Minister of Defense**, verdict 54(1) 721.

66. The disproportionality is further manifested in the fact that the alternative of recognizing the rights of the Negev Bedouin population was not considered, neither in the aspect of recognizing their villages nor in the aspect of acknowledging their property rights. It is unclear why it is not possible to achieve the bill's stated objectives while recognizing the unrecognized villages and acknowledging the property rights of the Bedouin residents of the Negev. The lack of proportionality is also evident in suggesting the eviction of the villages and denial of the property rights of the Bedouin population as the only option for arranging the issue of land ownership and Negev settlement, despite the existence of other alternatives as stated above – of recognizing the villages and the rights. It appears that these alternatives were not reviewed in the draft bill. Regarding the obligation to review options that do not harm or are less harmful to constitutional rights, see: HCJ 2056/04 **Beit Surik Village Council v. Government of Israel**, verdict 58(5) 807, 850-851 (2004); HCJ 2577/04 **al-Khawaja v. Prime Minister** (not yet published, granted on 19 July 2007); HCJ



9593/04 **Morar v. IDF Commander in Judaea and Samaria** (not yet published, granted on 26 June 2006); HCJ 2887/04 **Abu-Madigam v. Israel Land Administration** (not yet published, granted on 15 April 2007).

In light of all of the above and in light of the aforementioned undeniable historical facts, you are hereby requested to act in order to stop the promotion of this draft bill and to remove it from the Knesset's agenda. You are further requested to acknowledge the rights of the residents of the unrecognized villages to tenure and use of the land on which they have been living for decades, as well as to acknowledge the ownership rights of the Bedouin over their lands in the Negev – as a necessary step towards bringing historical justice to this population.

Respectfully yours,

**Rawia Aburabia, Attorney**

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