WHEN "ALLAHU AKBAR"[1] BECOMES A CRIME: The Israeli Case

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Abstract

This Article examines the constitutionality of an Israeli bill that criminalizes the use of PA systems in prayer houses, punishable by a fine of 5000–10,000 NIS (the Muezzin Law). The Bill was presented to the Israeli Parliament (the Knesset) as a religiously-neutral environmental law. This Article asserts that a careful reading of the Bill's language reveals that it is specifically tailored to apply precisely to Muslim prayer houses, thus criminalizing the Muslim call for prayer (the *adhan*), especially the call occurring between dawn and sunrise (the *Fajer adhan*). As such, we perceive the Muezzin law as violating the right to equality and the right to dignity of the Muslim minority in Israel, as well as infringing upon its religious feelings. Additionally, we contend that the Muezzin Law is not truly driven by environmental concern, but rather that it represents a conflict with religious dimension (a CRD)—namely, the perception that the adhan, as a Muslim symbol, poses a threat to the identity of Jews in Israel. Examining the constitutionality of the Muezzin Law introduces a crucial question relating to the interplay between constitutional law and criminal law. Our assertion is that in any constitutional democracy, in order for the legislature to validly classify conduct as a crime, such criminalization must befit the values of constitutional democracy, serve a proper purpose, and be proportionate. The requirement for proportionality consists of three subtests: (a) the rational connection test; (b) the necessity test; and (c) the balancing benefits test. It is our contention that the Muezzin Law comprises an unconstitutional criminalization of the *Fajer adhan*. It stands in contrast with the basic values of constitutional democracy, primarily that of tolerance towards a religious minority, particularly, the Muslim community. Additionally, we assert that the Muezzin Law's purpose is improper as it aims at infringing upon the religious feelings of the Muslim minority in Israel, holding that the value of protecting religious feelings is a constitutional value. Finally, we view such criminalization as provided in the

1. "*Allahu Akbar*" means "God is greater." With these words, the Muslim clergy who calls out from the mosque when it is time for prayer, initiates the *adhan* (the call for prayer).

Muezzin Law as being unproportionate. In this latter regard, we hold the view that our CRD analysis provides a more delicate, proper, and proportionate solution to the question at stake.

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Introduction

This Article examines the constitutionality of an Israeli bill criminalizing the use of PA systems in prayer houses,[2] punishable by a fine of 5000–10,000 NIS (the Muezzin Law).[3] The proposed Bill was presented to the Israeli Parliament (the Knesset) as a religiously-neutral environmental law. It was namely introduced as an amendment to the 1961 Hazards Prevention Act,[4] and is entitled, "Prevention of Noise by PA System in a Prayer House." The Bill supposedly applies to all faiths alike.

Although the Knesset has not proceeded in legislating this Bill—chiefly due to political maneuvers of several Arab members of the Knesset (MKs) in collaboration with other leading ultra-Orthodox MKs—we believe that the Bill presents a principle constitutional question, and merits thorough discussion.[5] Furthermore, given the political uncertainty in the State of Israel in the last year, changes in the coalitional composition of the Knesset might soon make this a practical question, as well.

In this Article, we assert that while the Muezzin Law might be plausibly viewed as equally applying to all prayer houses alike, a careful reading of the Bill's language reveals that it is not truly religiously-neutral legislation, but rather it is specifically tailored to apply precisely to mosques, which are Muslim prayer houses. Put more precisely, the Muezzin Law criminalizes the *adhan*, which is the Muslim call for prayer, especially the call the "*Fajer adhan*," which occurs between dawn and sunrise. As such, we perceive the Muezzin Law as

2. PA system stands for "Public Address system."

3. A Muezzin is the Muslim clergy who calls out from the mosque when it is time for prayer, an act which is called in Arabic the adhan. *Consider* Draft Bill for Abatement of Environmental Nuisances (Amendment—Prohibiting the Use of Public Address Systems in Houses of Worship), 5774–2014, No. 19 p. 2915 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=558448 [https://perma.cc/R296-SMCU] (Isr.); Draft Bill for Abatement of Environmental Nuisances (Amendment—Prevention of Noise from Public Address Systems in Houses of Worship), 5777–2016, No. 20 p. 3590 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=2009510 [https://perma.cc/J7L9-ZT49] (Isr.); Draft Bill for Abatement of Environmental Nuisances (Amendment—Prohibiting the Use of Public Address Systems in Houses of Worship), 5776–2015, No. 20 p. 2316 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=571798 [https://perma.cc/C64U-4SPC] (Isr.); *see also* Minutes of the Committee on the Constitution, Law, and Justice, 20th Knesset, Protocol No. 641 (June 19, 2018) (Isr.).

4. Abatement of Environmental Nuisances Law, 5721–1961, § 2, SH No. 332 p. 58 (Isr.).

5. *See for instance* Jeremy Sharon, *MK Yogev alleges Haredi-Arab collusion over Muezzin bill, enlistment law*, Jerusalem Post (June 19, 2018, 6:11 PM), https://www.jpost.com/Israel-News/MK-Yogev-alleges-Haredi-Arab-collusion-over-Muezzin-bill-enlistment-law-560356.

violating the right to equality and the right to dignity of the Muslim minority in Israel, as well as infringing upon its religious feelings.[6]

Additionally, we contend that the Muezzin Law is not truly driven by environmental concern, but rather that it represents a "conflict with religious dimension" (CRD)—namely, the perception that the *adhan*, as a Muslim symbol, poses a threat to the identity of Jews in Israel.

Examining the constitutionality of the Muezzin Law introduces a crucial question relating to the interplay between constitutional law and criminal law. Underlying this question is the understanding that the legislature must provide a strong justification for criminalizing a certain act, as aptly put by Henry Hart:

> [W]e can say readily what a 'crime' is: It is not simply anything which the legislature chooses to call a 'crime.' It is not simply anti-social conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.[7]

Our assertion is that in any constitutional democracy, in order for the legislature to validly classify conduct as a crime, such criminalization must befit the values of constitutional democracy, serve a proper purpose, and be proportionate. The requirement for proportionality consists of three subtests: (a) the rational connection test: the existence of a rational connection between the means chosen and the purpose that the legislature seeks to achieve through this measure; (b) the necessity test: the existence of a means which causes the least harm to the protected basic right; and (c) the balancing benefits test.[8]

It is our contention that the Muezzin law comprises an unconstitutional criminalization of the *Fajer adhan*. It stands in contrast to the basic values of constitutional democracy, primarily that of tolerance towards a religious minority, namely, the Muslim community. Additionally, we assert that the Muezzin Law's purpose is improper as it aims at infringing upon the religious feelings of the Muslim minority in Israel. Finally, we view such criminalization as provided in the Muezzin Law as being unproportionate to the noise hazard concern. In this latter regard, we hold the view that our CRD analysis provides a more delicate, proper, and proportionate solution.

In Part I, we portray the legal discourse on the Muezzin Law, as was developed and established in the Knesset. In Part II, we present a thorough analysis

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6. Under Israel's constitutional law it is possible to limit human rights in order for the State to fulfill a proper purpose. Among the recognized proper purposes, the Court has recognized several public interests, such as protecting religious feelings. The term "religious feelings" has not received a particular clear definition by the Court. However, if could refer to the feelings of a particular group of people, for instance, the feelings of, inter alia, ultra-Orthodox and/or the Christian and/or the Muslim citizens in Israel. *See infra* note 86.

7. Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. AND CONTEMP. PROBS. 401, 404–405 (1958).

8. *See infra* note 76.

of the Muezzin Law, arguing that it is not religiously-neutral. In Part III, we provide a comprehensive theory of constitutional criminalization in order to examine the constitutionality of the criminalization of the *Fajer adhan* within the context of the Muezzin Law.

I. The Muezzin Law

Around the world, the *adhan* takes place five times per day, the earliest being the *Fajer adhan*.[9] Whereas in early days it was the Muezzin's task to sing out loudly from the top of the mosque tower in announcement of the adhan, modern technology in the form of electronic PA systems rendered announcement of the adhan much easier by amplifying the sound beyond what was previously possible.[10] Thus, five times per day, sometimes as early as five a.m., the adhans are played across Israel.

Israel is home to an array of different religious believers—Jews, Christians, Muslims, and others. Mosques are found in almost every major city, as well as in smaller towns adjacent to areas populated by non-Muslims. Therefore, the *adhan* is heard not only by the Muslim community towards whom it is directed, but also by non-Muslim inhabitants of the cities and villages surrounding the mosques.

Between 2011 and 2014, there were several legislative attempts to criminalize the use of PA systems in prayer houses, particularly for the *Fajer adhan*. Before we discuss these legislative attempts, it is of the utmost importance to emphasize that we perceive this as a case of criminal prohibition precisely in light of the explicit language of the relevant bills, which provide that: "He who violates article 2A is subject to a fine of 10,000 NIS; the fine shall not be less than 5000 NIS upon conviction for this article."[11] Monetary fines of this sort fall under the umbrella of criminal law. Having explained this, we proceed to an inquiry of the abovementioned legislative attempts.

In 2011, MKs of *Yisrael Beiteinu* ["Israel Our Home"], a secular nationalistic rightwing political party, first proposed limiting the volume of the *adhan* from mosques.[12] The proposal was not discussed in 2011;[13] it was resubmitted

9. Ayatullah Sayyid Muhammad Taqi al-Mudarrisi Al-Husayni, The Laws of Islam (2016) (detailing and explaining, among other religious duties, the prayer as one of the five pillars of Islam).

10. Bryan Winters, The Bishop, the Mullah, and the Smartphone: The Journey of Two Religions into the Digital Age 69 (2015) (describing the emergence and worldwide spreading of the use of PA systems in mosques).

11. *See* references in About the Authors, *supra*.

12. Draft Bill for Abatement of Environmental Nuisances (Amendment—Prohibiting the Use of Public Address Systems in Houses of Worship), 5771–2011, No. 18 p. 3311 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=411521 [https://perma.cc/U7ND-8Q2Y] (Isr.).

13. *Id.*

in 2013,[14] and later in 2014,[15] but again it was not discussed. It was only in 2016 that these persistent efforts to bring the proposal for preliminary discussion in the Knesset finally bore fruit when the proposal was submitted once again by both MK of the prominent *Ha-Beit Ha-Yehudi* ["Jewish Home"] party and the chairman of the majority coalition, the *Likud* ["Unification"] party.[16] In the same parliamentary hearing, a similar proposal from 2015 was jointly discussed.[17]

The proposed legislation was presented as an amendment to the 1961 Hazards Prevention Act, which was an environmental law.[18] The original Bill lists a series of hazards to be banned, including a prohibition on causing "a considerable or unreasonable noise, from any source whatsoever, if the same disturbs, or is liable to disturb a person in the vicinity or a passerby."[19] The Minister of Environmental Protection is entrusted with the authority to determine what would constitute a "loud or unreasonable noise," and with how to treat such noise.[20]

MKs Mordechai Yogev (of Jewish Home) and David Bittan (of Unification) suggested an additional provision to the law, as follows:

> No person shall operate a PA system in a prayer house located in a residential area from 11 P.M. to 7 A.M. the next day; The Minister [of Environmental Protection], with the agreement of the Minister of the Interior, may prescribe an order, in cases where the use of the PA system at such times is allowed; For this purpose, 'prayer house' means a synagogue,

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14. Draft Bill for Abatement of Environmental Nuisances (Amendment—Prohibiting the Use of Public Address Systems in Houses of Worship), 5774–2013, No. 19 p. 1702 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=488470 [https://perma.cc/PN4K-E4NH] (Isr.).

15. Draft Bill for Abatement of Environmental Nuisances (Amendment—Prohibiting the Use of Public Address Systems in Houses of Worship), 5774–2014, No. 19 p. 2915 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=558448 [https://perma.cc/R296-SMCU] (Isr.). *Note* in saying "to the same Knesset," we mean the Knesset of the same members.

16. Draft Bill for Abatement of Environmental Nuisances (Amendment—Prevention of Noise from Public Address Systems in Houses of Worship), 5777–2016, No. 20 p. 3590 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=2009510 [https://perma.cc/J7L9-ZT49] (Isr.).

17. Draft Bill for Abatement of Environmental Nuisances (Amendment—Prohibiting the Use of Public Address Systems in Houses of Worship), 5776–2015, No. 20 p. 2316 (Private Member Bill), https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=571798 [https://perma.cc/C64U-4SPC] (Isr.); *see also* Minutes of the Committee on the Constitution, Law, and Justice, 20th Knesset, Protocol No. 641 (June 19, 2018) (Isr.).

18. Abatement of Environmental Nuisances Law, 5721–1961, § 2, SH No. 332 p. 58 (Isr.).

19. *Id.*; *see also Pollution and Nuisances*, Isr. Ministry Envtl. Protection, https://www.sviva.gov.il/English/Legislation/Pages/PollutionAndNuisances.aspx (providing an unofficial English translation of this law) (Isr.).

20. Abatement of Environmental Nuisances Law, 5721–1961 §§ 5–7 (Isr.).

> church or mosque and any other indoor place that is regularly used for prayer or religious worship.[21]

The explanatory note attached to the proposal states the following:

> Hundreds of thousands of civilians in Israel, in the Galilee, Negev, Jerusalem and other parts of the country, routinely and daily suffer in their houses from noise caused by prayer systems, which disturb their rest several times a day, including early morning and night. The proposed law offers a world-view that freedom of religion should not harm the sleep and quality of life of citizens and suggests that in prayer houses the use of night-time PA systems be restricted.[22]

At the outset, three points stand out from the proposed language. First, the proposed law is said to apply to all religions, not to Islam specifically. Second, the law refers to the use of a PA system inside a prayer house, not specifically a mosque. Third, the limitation applies to the use of a PA system, not to other soundmaking devices. To what extent do these three points stand true? This is the query that we seek to launch in the next Part.

II. Piercing the Veil: The Truth About the Muezzin Law

At first glance, labeling the amendment as environmental and religiously-neutral seems reasonable. However, as we examine the unique nature of the *adhan* compared to similar practices in other religions, a different picture emerges.

The *Fajer adhan* is performed before seven a.m., since the sun usually rises between five a.m. and six a.m.[23] Although Judaism summons believers for dawn prayers in the last month of the Jewish year (*Slichot*), this call is traditionally done by making door to door calls or by using a portable PA system on a moving vehicle.[24] It does not literally come from a prayer house. Although the call for prayer for Christian believers is done from within a church, it is carried out using bells rather than a PA system.[25]

It thus becomes evident that this so-called religiously-neutral environmental proposal targets a very specific faith. Reviewing the minutes of the legislative proceedings and recorded discussions also reveals the true nature

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21. Draft Bill No. 20 p. 3590 (Isr.).

22. Explanatory Note to Draft Bill (Isr.) (the same text recurs in all explanatory notes of all the above proposals).

23. Taqī al-Mudarrisī al-Ḥusaynī, *supra* note 9 at 170 (detailing the hours of prayer).

24. Harav Yehuda Amital, *Needy and Destitute, We Knock at Your Door*, Yeshivat Har Etzion (1990), https://www.etzion.org.il/en/needy-and-destitute-we-knock-your-door (retrieved Feb. 5, 2020) (explaining the meaning and manner of this tradition).

25. John H. Arnold & Caroline Goodson, *Resounding Community: The History And Meaning Of Medieval Church Bells*, 43 Viator 99 (2012) (describing the role of churchbells in the call for prayer in Christian communities). *Note* In Christianity, the monastic Liturgy of the Hours prayers consist of the "Seven times a day," which includes three prayers before seven a.m., namely, Matins prayer, during the night, at about two a.m.; Dawn prayer, around five a.m.; and Prime prayer, at six a.m. approximately.

of the proposal and the severe reaction to it. The parliamentary hearings were exceptionally emotional,[26] and despite supporters' insistence on the environmental nature of the legislation, MKs from opposing parties—Jews and Arabs alike—declared it "an attack on a traditional Muslim ceremonious act,"[27] and "persecution of Arabs in Israel."[28] The volatile discussions continued in the committee charged to hold hearings and prepare a draft for vote.[29] Accusations flew from all participants: those who insisted on firm noise control and complained about weak enforcement of existing legislation, those who cautioned against an attack on religious feelings (including interestingly, ultra-Orthodox Jewish MKs), and those who accused supporters of racism and anti-Muslim policy.[30]

Thus, in our view, the Muezzin Law cannot be, and shall not be, perceived as a religiously-neutral, environmental law. As we provide in detail in the next Part, it infringes upon the religious feelings of Muslims in Israel—while also violating their right to dignity and to equality—and creates the perception that Israel views their religious practice as a noise hazard.

III. Equality, Dignity, and Religious Feelings

The query at stake concerning the constitutionality of the Muezzin Law touches upon serious legal questions regarding the nature of Israel's democratic regime, including its protection of fundamental constitutional human rights, such as the right to equality and the right to dignity, and constitutional values, such as protecting religious feelings.

A. *Israel as a Constitutional Democracy*

A constitutional democracy is characterized by the fact that legislative consent does not authorize a violation of a constitutional right. Legislation alone is insufficient to establish legality. The violation of a constitutional

26. *The Muezzin Laws Were Pre-Approved*, Knesset (Mar. 8, 2017, 9:15 AM), https://main.knesset.gov.il/News/PressReleases/Pages/press8317t.aspx [https://perma.cc/648E-LTTB] (Isr.).

27. *Id.*

28. *Id.*

29. In the course of negotiations regarding the proposal, a fierce debate was held regarding which committee is authorized to prepare the proposal for legislation. Supporters of the amendment argued for transferring discussions from the Interior Affairs Committee, entrusted with matters of environmental protection, to the Constitutional Committee, since the former delayed deliberations for years. Objectors, in response, declared the law to be an infringement upon the religious feelings of Muslims, otherwise it has no place in the Constitutional committee, which observes human rights legislature. A different committee is responsible for environmental legislature. Minutes of the House Committee, 20th Knesset, Protocol No. 280, at 24–27 (July 24, 2017) (Isr.).

30. *First Discussion of the Muezzin Law at the Constitutional Committee: Torah Judaism Party Objects to Promoting the Legislation*, Knesset (June 19, 2018, 5:10 P.M.), https://main.knesset.gov.il/News/PressReleases/pages/press19.06.18n.aspx# [https://perma.cc/R23E-JNU6] (Isr.).

right must be supported by a material and legitimate justification. In order to satisfy this explicit requirement, the law must uphold a worthy goal and the means used to achieve that goal must not disproportionately impair a constitutional right.

Constitutional rights are so unique, inter alia, for they may only be violated if such violation is necessary to attain an objective of a certain moral significance. The measure of whether the objective in question bears upon a matter of sufficient moral significance is derived from societal values. In the case of Israel, these values are largely derived from its Jewish and democratic identity.[31]

Shortly after its establishment in 1948, Israel failed to establish a full written constitution. After debating the matter of the constitution for two years, a compromise was reached in the Knesset, thus adopting the Harrari Resolution, which states: "The constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset . . . and all the chapters together will form the State Constitution."[32] Thus, Israel's Basic Laws were adopted in an atmosphere in which the Knesset intended to formulate super legal constitutional norms. Indeed, the Basic Laws certainly include elements characteristic of constitutions in constitutional democracies, such as Canada, Germany, South Africa, and to some extent the United States. Further, the Court, through its rulings, has elevated these Basic Laws to a supreme normative status rising above that of other laws, referred to as "ordinary laws." Accordingly, when a legal norm outlined in a Basic Law conflicts with a norm of an ordinary law, the first prevails and the latter yields.[33]

Most of the fundamental rights protected at the constitutional level are grouped within the Basic Law provisions: Human Dignity and Liberty.[34] Nonetheless, the Basic Law does not *accord* explicit protection to all imaginable fundamental rights. Over the years,[35] especially following the adoption of the two 1992 Basic Laws which deal with human rights—namely, Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation[36]—as well as the judgment in the *Mizrachi Bank* case,[37] the Court interpreted the right to

31. Aharon Barak, The Judge in a Democracy 295 (2006).

32. *The Constitution*, The Knesset (2007), https://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm.

33. Amnon Rubinstein & Barak Medina, The Constitutional Law of the State of Israel: Fundamental Principles 98 (5th ed. 2005).

34. Basic Law: Human Dignity and Liberty, Mar. 17, 1992 (Isr.).

35. *See generally* HCJ 355/79 Catalan v. Israel Prisons Service 34(3) PD 294 (1979) (Isr.); CA 294/91 Burial Society "Jerusalem Community" v. Kastenbaum 46(2) PD 464 (1991) (Isr.); HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 (1969) (Isr.); HCJ 73/53 "Kol Ha'am" Ltd. v. Minister of the Interior 7 PD 871 (1953) (Isr.).

36. Basic Law: Freedom of Occupation, Mar. 9, 1994 (Isr.).

37. CA 6821/93 United Mizrachi Bank Ltd. et al. v. Migdal Cooperative Village et al. 49(4) PD 221 (1995) (Isr.).

dignity to include other unlisted constitutional rights and values, such as equality, freedom of expression, and religious feelings.[38]

B. *The Declaration of the Establishment of Israel*

Article 1 of Basic Law: Human Dignity and Liberty provides that human rights in Israel shall be upheld in the spirit of the principles set forth in the Israeli Declaration of Establishment. The Declaration extends a clear and explicit protection of the right to equality and freedom of religion to all citizens alike. It stipulates that:

> The State of Israel will . . . ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.[39]

Such protection applies not only in the individual sense but also in the collective sense. This fact is evident not only in a reading of the Declaration, but also by highlighting Resolution 181(II) of the United Nations General Assembly, which depicts the concept of establishing two independent democratic nation–based states in "Mandatory Palestine," specifically., the Partition Plan, which refers to Arab and Jewish states. Ultimately, the Declaration of Establishment relies, inter alia, on the Partition Plan, promising full and equal citizenship to the Arab-Palestinian residents of the State. This idea was incorporated into the Partition Plan with respect to the remaining Arab minority in the emerging Jewish state, thus including a special chapter that guarantees not only the equal constitutional protection of their individual rights, but also their collective rights, including linguistic, educational, and religious rights as a national indigenous minority.[40]

At this stage, it must be noted that the Declaration of Establishment does not possess statutory or constitutional status. It is an interpretative source only. The Declaration of Establishment does not create binding positive law.[41]

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38. *Cf.* HCJ 5394/92 Hofert v. "Yad Vashem" Holocaust Martyrs and Heroes Remembrance Authority 48(3) PD 353 (1992) (Isr.); HCJ 4674/94 Mitral Ltd. v. The Knesset 50(5) PD 15 (1994) (Isr.).

39. "The Declaration of the Establishment of the State of Israel," May 14, 1948.

40. *See* Mandate for Palestine, League of Nations Doc. C.529M.314 1922 6 (1922), https://web.archive.org/web/20131125014738/http://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB; *See also* Abd al-Wahhab al-Kayyali, Tareekh Falastin al-Hadeeth 37 (al-Mu'assasat al-Arabiyya, 1985); G.A. Res. 181 (II) (Nov. 29, 1947), https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253. *See and compare* Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1995); Will Kymlicka & Raphael Cohen-Almagor, *Ethnocultural Minorities in Liberal Democracies*, *in* Pluralism: The Philosophy and Politics of Diversity 228, 228–250 (Maria Baghramian & Attracta Ingram eds., 2000); Ilan Saban & Mohammad Amara, *The Status of Arabic in Israel: Reflections on the Power to Produce Social Change*, 36 Isr. L. Rev. 5 (2002).

41. HCJ 10/48 Ziv v. Acting Director of the Municipal Area of Tel Aviv (Joshua

It merely reflects the vision and credo of the Israeli People. Consequently, it is necessary to consider the statements made by the Court when interpreting and giving meaning to the laws of the State. This is especially true in light of the explicit reference made to the Declaration of Establishment within the Basic Principles Clause of Basic Law: Human Dignity and Liberty.[42] This clause states that human rights under the Basic Law must be interpreted in the spirit of the principles of the Declaration Establishment of Israel, as provided:

> The basic human rights in Israel are based on the recognition of the value of the human being, the sanctity of his life, and his being a free person, and they shall be upheld in the spirit of the principles set forth in the Proclamation of the Establishment of the State of Israel.

The comments of Justice Dov Levin in the *Clal* case are apposite in this context:

> Although the Declaration of Establishment was not recognized as possessing constitutional validity and in any event did not purport to express binding law, it expressed principles and values, which according to the perception of the People deserved to be our guiding principles, an oracle, when interpreting the law applicable to the state and its citizens. Accordingly, from the early days this Court saw the Proclamation of Independence as a primary source for interpretation of the law. Above all—it is a beacon that illuminates our path when shaping basic civil rights and implementing them in practice.[43]

To conclude on this matter, we argue that the Israeli Declaration of Establishment plays a significant role in the Israeli constitutional legal system, as it serves as an important source of interpretation for the Court in coming to extend its protection to constitutional rights and values.

C. *Equality, Dignity, and Religious Feelings*

The principle of equality is one of the cornerstones of any democracy. This concept of equality essentially holds that all human beings are entitled to equal treatment, and that such treatment is not premised upon the various characteristics of human beings, such as social status, familial affiliation, sex, age, religion, language, or skin color.

One might understand the increasing recognition accorded to the centrality of the principle of equality as part of the transition from a classist society to a contractual society. In the former, the individual is perceived as possessing a status from birth—a status that frames his expectations, rights, and duties within social institutions. In the latter, the individual must achieve his position on the basis of individual initiative. In order to enable real participation and

Gubernik) et al 1 PD 85 (Isr.); HCJ 7/48 al-Karbutali v. Minister of Defense et al. 2 PD 5 (Isr.); CA 450/70 Rogozinski v. State of Israel, 26(1) PD 129 (Isr.).

42. Basic Law: Freedom of Occupation, *supra* note 36, § 1.

43. HCJ 726/94 Clal Insurance Co. Ltd. v. Minister of Finance 48(5) PD 441 (1994) (Isr.), para. 19 of the judgment of Justice Dov Levin.

competition in the political decisionmaking process, the legitimacy of a contractual society depends on ensuring equal opportunities to all its members.[44]

Notwithstanding the recognition in Israeli law of the importance of the principle of equality, particularly following the adoption of the Basic Law: Human Dignity and Liberty, the right to equality was not expressly entrenched at the constitutional level. Accordingly, as detailed below, the constitutional protection in Israeli law of the right to equality is primarily a creature of case law. In its rulings, the Court has referred to the principle of equality as a super principle which is "the heart and soul of our whole constitutional system," the infringement of which creates "a particularly harsh feeling."[45]

Like a number of other democratic principles, the principle of equality has a dual meaning, one formal and the other substantive. The principle of formal equality, also referred to as equality before the law, refers to the operation of the law by the courts in an impartial manner and without distinction between litigants. In contrast, the principle of substantive equality, also referred to as equality in law, does not consider the equal operation of the law but rather equality the law itself. The principle of substantive equality was first recognized in a clear and definitive manner in Article 6 of the French Declaration of Human and Civil Rights, dated August 26, 1789, which states:

> The law . . . must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.

In modern constitutional and liberal thinking, the principle of equality is not merely formal; It is a fundamental concept that embodies fairness, justice, and morality. This conception of equality can reconcile the use of facially unequal methods with these concepts. For example, equality may actually be expressed by giving preference to persons bearing certain characteristics who have suffered discrimination in the past and who are now at an unequal starting point (e.g., affirmative action).

The principle of equality has been recognized in many human rights documents,[46] as well as in the British Mandate for Palestine.[47] Likewise, in the Declaration of Establishment of Israel, the Founding Fathers promised that

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44. Frances Raday, *On Equality*, 24 Mishpatim (The Law) 241, 245 (1994) (in Hebrew).

45. HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 (1969) (Isr.).

46. *See for example* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), § 2 (Dec. 10, 1948).

47. Articles 2 and 15 of the British Mandate of Palestine; Articles 17–19(a) of the Palestine Order-in-Council, 1922 (restriction of the legislative powers of the High Commissioner, in view of the requirement that "no Ordinance may be passed which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language").

"Israel . . . will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race, or sex."[48]

The early days of Israel also witnessed the enactment of various statutes providing protection for equality, such as the Equal Rights for Women Law, 1951; Section 42(A) of the Employment Service Law, 1959; and the Equal Opportunities at Work Law, 1988. This protection may also be found in the judicial presumption whereby the purpose of legislation is inferred to be the promotion and maintenance of equality.[49] Express language is required in order to contradict this presumption. For example, the Equal Rights for Women Law proclaims the existence of a value which should properly encompass our entire legal system: equality between the sexes.[50] Therefore, any statute that does not expressly disavow this form of equality will be interpreted as preferring an implementation that is consistent with the principle of equality of the sexes.[51]

There is no dispute as to the importance, and even critical nature, of the right to equality within a bill of rights, especially in democratic regimes. In the Basic Law: Human Dignity and Liberty, the right to equality was nearly included among the list of rights protected by the Basic Law. However, due to opposition by various religious parties—such as *Shas*, a Haredi ultra-Orthodox religious political party in Israel—the right to equality was omitted from the final version of the Basic Law. This opposition was in large part due to these religious parties' concern that a constitutional right to equality would grant the Court the judicial power to grant equal recognition of women, homosexuals, and the reform movement—a result that was deemed intolerable and inconsistent with religious doctrine. Accordingly, in order to at least formally preserve the status quo vis-à-vis these religious parties, the Knesset deliberately waived the inclusion of the right to equality within the Basic Law. A perusal of the Knesset records indicates that some MKs—in their "constitutional" capacity, namely, in legislating Basic Laws—believed that it was Israel's Supreme Court, the High Court of Justice (HCJ), that should eventually interpret the Basic Law and that this judicial body would hold that human dignity included the right to equality.[52] In other words, the omission of the right to equality in the Basic Law would not negate the protection of this right within the framework of the right to dignity.

48. "The Declaration of the Establishment of the State of Israel," May 14, 1948.

49. Andrew S. Butler, *A Presumption of Statutory Conformity with the Charter*, 19 Queens L.J. 209 (1993); Joseph Eliot Magnet, *The Presumption of Constitutionality*, 18 Osgoode Hall L.J. 87 (1980).

50. The purpose of this law is to stipulate values that guarantee full equality between women and men, in the spirit of the values set forth in the Declaration on the Establishment of the State of Israel.

51. HCJ 104/87 Nevo v. National Labor Court 44(4) PD 749764 (1990) (Isr.).

52. *See* Uriel Lynn, The Birth of a Revolution 213–239 (Yediot Ahronot ed., 2017) (in Hebrew).

It is therefore impossible to deny the existence of constitutional protection of the principle of equality, at least as a value if not as an explicit right. This is particularly true in light of the addition in 1994 of Section 1 to the Basic Law, according to which "fundamental human rights in Israel . . . shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel," and the language and purpose of Section 1A of that provision, according to which the "purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of Israel as a Jewish and democratic state."[53] The approach of this added provision is based on a broad interpretation of the right to "human dignity and liberty," and the reference to the principles of the Declaration of Establishment. This interpretation is because this approach accords *supra* legal normative status to the principle of equality.[54] Perhaps more than anything else, group discrimination illustrates the use of human beings as a tool to achieve other goals, a treatment that results in acute harm to the dignity of man. While the connection between equality and dignity may not appear evident, other constitutional democracies have understood these two concepts as necessarily intertwined. In his analysis of the Canadian Chart of Rights and Freedoms and the Basic Law of the Federal Republic of Germany, Dierk Ullrich notes:

> [T]here is no question that human dignity is an indispensable compass in our continuing journey to promote and protect the rights and freedoms of the individual. We may not always know where it will take us, but the fundamental value of human dignity will always remind us where we are coming from.[55]

Section 4 of Basic Law: Human Dignity and Liberty states: "All persons are entitled to the protection of their life, body and dignity." In the past, dignity was considered to be a framework right. As such, the right to dignity merely provided a source of recognition of other basic rights, for example, the right to freedom of expression. Both the legal literature and the rulings of the HCJ express the view that the constitutional right to dignity also encompasses a constitutional protection of the right to equality. In other words, Section 8 lays out the limitations upon violations of the principle of dignity, and thus an understanding of equality as being part of dignity would require that a violation of equality passes the same test.

The right to equality and the right to dignity are closely related to one another, the latter providing—at a minimum—the means to attain the former. The core meaning of the right to equality is that the law must reflect a recognition of all human beings as equal. The core meaning of the right of dignity is

53. Basic Law: Freedom of Occupation, *supra* note 36.

54. HCJ 453/94 Women's Lobby in Israel v. Government of Israel 48(5) PD 501 (1994) (Isr.).

55. Dierk Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, 3(1) Global Jurist Frontiers 1 (2003).

that which seeks to emphasize the treatment of a person as an end in itself and not as a means to achieve other goals. "Use of a person as a means" is simply more refined language for describing the humiliation and degradation of a man. The terms "degradation," "humiliation," and "dignity" are intertwined with the concept of "equality." It is permissible to contemplate a distinction between two individuals based on considerations relevant to the inquiry but not on irrelevant ones.[56] Infringement upon the right to dignity and the right to equality occurs for instance in the case of differentiation between the ritual habits of believers of one faith over another if it is based on irrelevant criteria.

The HCJ has spilt much ink in its consideration of the question of recognizing the right to dignity as a sort of framework right, or "basket right,"[57]—a right that encompasses within it many other rights that are not expressly referred to in the Basic Law. As outlined above, the right to dignity encompasses equality. Dignity—which under the Basic Law is inviolable and is entitled to protection—does not only embrace a person's good name, but also their status as an equal among equals. One's dignity is violated not only through slander, insults, or abuse; it is also violated by discrimination or treatment of a person in a biased, racist, or demeaning way. Protection of human dignity is also reflected in securing equal rights and preventing any discrimination on grounds of sex, race, political opinion, social affiliation, familial affiliation, marital status, or ethnic origin.

Violation of an individual's fundamental rights is a serious harm. Violation of fundamental rights on a group or collective basis could be perceived as even more severe. Collective injury perpetuates a certain inferiority, one imposed by the discriminatory authority on the discriminated group. Group discrimination perpetuates severe social stigmas and entails the humiliation and degradation of the individual members of the group against whom discrimination is being shown.

In this next Part, we shall explain that unequal treatment of people amounts to unlawful discrimination. There are cases where the difference of treatment denotes a stigma to certain groups of people, especially when the differentiation is based on a collective basis, namely, race, gender, color, religion, etc.

In the preceding Part, we established that the Muezzin Law is not religiously-neutral, but rather is specifically tailored to prohibit the *Fajer* adhan, consequently designating this call to prayer—unlike other religious habits of other religions—as a noise hazard. The Muezzin Law thus infringes upon the right to dignity and the right to equality, as it differentiates between the ritual habits of believers of one faith over another based on irrelevant criteria, for

56. FH 10/69 Boronowsky v. Chief Rabbi of Israel, 25(1) PD 7 (Isr.); HCJ 678/88 Cfar Vradim v. Minister of Fin. 43(2) PD 501 (Isr.) (referring to the language of Justice Or: "unlawful discrimination means different treatment of equals").

57. For instance, the right to free expression, the right to equality, and the right to freedom of religion.

instance time and/or noise. The fact that such discriminatory treatment of the Islamic ritual habit is trickily implemented in the language of the Muezzin Law in itself expresses a sense of humiliation towards the Muslim minority in Israel. The fact that the Muezzin Law examines solely noises affiliated with the ritual habits of Islam, yet disregards other religions, constitutes the kind of unlawful discrimination which is constitutionally prohibited. This is the kind of interplay between the right to dignity and the right to equality that is represented by the Muezzin Law, where a sense of inferiority is expressed by the State towards one religion, by designating it as a source of noise pollution. This is a stigma that the State affixes to the Muslim minority in Israel as a collective, and is precisely the kind of humiliation and discrimination that the right to equality and the right to dignity seek to prevent by prohibition. It is the imposition of this kind of stigma that underlies our assertion that the Muezzin Law is not a religiously-neutral environmental law, but rather unlawfully infringes upon the religious feelings of Muslims in Israel.[58] As outlined above, such an infringement upon the religious feelings of this minority is proscribed by the explicit language of Israel's Declaration of Establishment, which in turn manifests protection of the right to freedom of religion within the scope of Basic-Law: Human Dignity and even before.[59] In Israel, freedom of religion is a constitutional basic right of the individual and of the collective. The freedom of worship constitutes an expression of freedom of religion, and it is an offshoot of freedom of expression. The constitutional protection given to freedom of worship is therefore similar, in principle, to the protection given to freedom of speech and even to the right to dignity.

IV. The Constitutionality of Criminalizing the Adhan

Having established that the Muezzin Law constitutes a violation of the right to equality, the right to dignity, and the religious feelings of Muslims in Israel, the ensuing question is that of the constitutionality of this criminal statute. Assessing the constitutionality of this law requires a discussion of the interplay between criminal law and constitutional law.

A. *A Theory of Constitutional Criminalization*

Constitutional law theory involves an evaluation of individual rights and the scope of such rights; it is a question of the extent of one's individual rights versus the right of other community members to live peacefully. These are the values implicated in the Muezzin Law. For the purpose of this Article, we argue that a right is not simply a highly-valued, legally-protected interest; it is

58. Consideration of religious feelings, close to the hearts of numerous segments of the population, is not an invalid consideration *per se*, provided that the use of the statutory authority is not a guise for attaining a purely religious objective. *See* HCJ 7128/96 The Temple Mount Faithful v. Government of Israel 51(2) 509 (1997) (Isr.).

59. *See* HCJ 1514/01 Gur Aryeh v. Second Television and Radio Authority 55(4) PD 267, 277 (2001) (Isr.).

also the price paid for the freedom to form and pursue one's interests, a right that distinguishes humans as the basis of their dignity.[60]

Human rights are the rights of a person as part of society, and as such they are limited by the rights of others and the interests of society. For a society to exist, there are several important interests that must be protected, such as, national security, public safety, etc. Similarly, the fulfillment of a person's right might constitute the infringement of another person's right.

Both the scope and the limit of human rights are derived from the constitutional dialectic.[61] Constitutional law provides a framework for evaluating legal challenges against laws which restrict human rights, criminalization statutes included. While this constitutional framework does not necessarily reject laws limiting rights and freedom outright, such rights and freedoms cannot be traded off whenever necessary to produce greater overall social value.

Substantive criminal law concerns the definition of crimes and their prescribed punishment.[62] Human beings, including criminals, enjoy fundamental rights, especially the right to dignity. As discussed above, such fundamental human rights are primarily protected by constitutional law. Thus, criminal law, and the punishment involved in such law, is correctly articulated by some as a draconian apparatus given the limitations that it places on human rights. Therefore, criminalizing any act requires strong justification, for it is the basic premise of a constitutional democracy that one is free to act as one wishes unless that conduct is explicitly prohibited. This justification can be found in constitutional law, for constitutional law not only offers protection to human rights, but it primarily delineates the ambit of those rights, thus striking an appropriate balance between protecting rights and other important social interests.[63] In principle, this balance is to be struck by the legislature upon the enactment of any statute that limits human rights, primarily criminal laws. However, where the legislature fails to strike such a balance, or where it strikes a disproportionate balance, it is for the judiciary to intervene in accordance with its power of judicial review.[64]

Criminal law seeks to strike a balance between an offender's rights and the society's interest in public order. Constitutional law cuts straight to the core of the criminal law, where human rights are most likely to be infringed. Therefore, constitutionalizing criminal law[65] is necessary and inevitable. It provides proper justification for attributing the stigma of guilt for certain

60. *See* Alan Brudner, *Guilt Under the Charter: The Lure of Parliamentary Supremacy*, 40 Crim. L.Q. 287, 291 (1998); Otto Lagodny, *Human Dignity and Its Impact on German Substantive Criminal Law and Criminal Procedure*, 33 Isr. L. Rev. 575, 586 (1999).

61. *See* Lorraine E. Weinrib, *Canada's Charter of Rights: Paradigm Lost?*, 6 Rev. Const. Stud. 119, 127–8 (2002); The Queen v. Oakes, [1986] S.C.R. 103, 136 (Can.).

62. *See* George P. Fletcher, Basic Concepts of Criminal Law 7 (1998).

63. For instance, the *adhan versus* peaceful sleep.

64. *See* Marbury v. Madison, 5 U.S. 137 (1803).

65. Particularly substantive criminal law.

actions, and ensures that such attribution is highly supervised, so that arbitrary punishment is avoided.

The constitutional question, then, is what acts may the legislature criminalize, without infringing on inviolable constitutional rights.[66] This question has been largely addressed in the legal literature, and we wish to highlight two primary approaches.[67] The first approach suggests that any criminalization punishable by imprisonment or an aggravation of the punishment for an existing crime, establishes an infringement on the right to liberty.[68] The second approach asserts that substantive criminal law is only rendered lawful under the constitution when the constitution provides a clear permission to so criminalize. The mere fact that a constitution includes a chapter on human rights does not make it self-evident that constitutional scrutiny applies to criminal responsibility (liability).[69] This has been the argument, primarily in the American context, where it was contended that the U.S. Constitution provides no language of substantive criminal law.[70]

In this Article, we endorse the first approach. However, we advocate a broader application of this theory, applying it over all acts of criminalization and not only to those criminal statutes that are punishable by imprisonment.[71] It is our argument that classifying certain types of conduct as criminal wrongs serves to undermine, confine, and infringe upon constitutionally protected rights, most notably the right to dignity, the right to equality, and the right to religious freedom. As soon as such a prohibition is in force, it touches either

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66. Immanuel Kant, The Metaphysics of Morals 125 (1991).

67. For a comprehensive study on the various approaches, s*ee* Ariel Bendor & Hadar Dancig-Rosenberg, *Averout Pliliout v-Zkhoyut Hukatout* [*Criminal Offense and Constitutional Rights*] 17 Mishpat U-Mimshal [L. and Gov't] 325 (2016) (Isr.) (in Hebrew).

68. *See for instance* Ch. J. Aharon Barak, CA 4424, 4713, 4779/98 Selgado v. State of Israel 56(5) PD 529, 539–41 (2002) (Isr.); Kent Roach, *The Primacy of Liberty and Proportionality, Not Human Dignity, When Subjecting Criminal Law to Constitutional Control*, 44 Isr. L. Rev. I 91 (2011). For other approaches in between, *see* Miriam Gur-Arye & Thomas Weigend, *Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives*, 44 Isr. L. Rev. 63, 77–80 (2001).

69. *See for instance* CA 4424, 4713, 4779/98 Selgado v. State of Israel 56(5) PD 529, 551–62 (2002) (Isr.).

70. For instance, The Fourth Amendment, the Fifth Amendment, the Sixth Amendment, and the Eighth Amendment. *See and consider* George P. Fletcher, *The Meaning of Innocence*, 48 U. Toronto L.J. 157, 159 (1998); George P Fletcher, *The Relevance of Law to the Incest Taboo in* Festschrift für Winfried Hassemer 321, 330 (Felix Herzog & Ulfrid Neumann eds., 2010); Daniel Suleiman, *Note: The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 Colum. L. Rev. 426 (2004); William J. Stuntz, *The Uneasy Relation Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 6 (1997); Joshua Dressler & Kent Greenawalt, *Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 Notre Dame L. Rev. 1507, 1532 (1999).

71. *See and compare* Mordechai Kremnitzer, *Constitutional Principles and Criminal Law*, 27 Isr. L. Rev. 84, 86 (1993); James Stribopoulos, *The Constitutionalization of "Fault" in Canada: A Normative Critique*, 42 Crim. L.Q. 227 (1999).

on special guarantees of freedom or on the general freedom to do or not to do what one might otherwise be free to do. As such, a prohibition has to be constitutionally justified regardless of the type of sanction that may be imposed for violating the prohibition.[72]

However, insofar as constitutional law is concerned, it might be asserted that limiting the right to liberty is not the chief concern, but rather the right to dignity, which is relevant in the context of criminalizing a particular conduct, because it renders a person a criminal and involves his condemnation and denouncement by the community.[73] Such condemnation—even without the sanction of imprisonment—still concerns constitutional law in its necessary infringement on the right to dignity. This kind of infringement must be highly scrutinized in order to evaluate its justification. Constitutional scrutiny is the method by which it is possible to strike a balance between the rights of the individual and his punishable wrongs (crimes), and it reflects the inherent nonabsolute nature of constitutional rights.

As for the appropriate formula for constitutional scrutiny of criminal statutes, it is notable that the leading discussion on this matter derives from countries like Germany, Canada, and Israel. These nationstates include in their constitutional systems variations of the Limitation Clause, whereby the conditions for justifying infringements of constitutional rights posit that for a crime to be constitutionally justified, it must meet three cumulative criteria: (1) The criminal prohibition must befit the values of a constitutional democracy; (2) the prohibition must be undertaken for a proper purpose; and (3) the criminalization must be done in proportionality—namely, the legislature must scrutinize and fine-tune even the smallest details of its action and consider the myriad of potential alternatives in order to determine and implement the least offensive means.[74] Underlying this kind of proportionality principle is the promise that rights may not be infringed to a greater degree than is necessary, namely, the protection of the particular public interest.

Criminal prohibition infringes on rights that are otherwise constitutionally protected—rights to freedom, rights to dignity, etc. Such an infringement thus must be highly justified by the fundamental values of constitutional democracy, which justify legal rules and are the reason for changing them.[75] In a constitutional democracy, the constitution is protecting the minority's human rights

72. Otto Langodny, *Basic Rights and Substantive Criminal Law: The Incest Cas*e, 61 U. Toronto L.J. 761, 764–765 (2011).

73. In the book of Genesis, after Cain kills Abel, God curses Cain to a life of toil and wandering. But when Cain laments that his own life is in danger, God promises to protect him: "The Lord put a mark on Cain, so that no one who came upon him would kill him" (Genesis 4:15). *See* Eva Mroczek, *Mark of Cain*, Bible Odyssey, http://www.bibleodyssey.net/people/related-articles/mark-of-cain.aspx; Shlomo Shoham, The Mark of Cain: The Stigma Theory of Crime and Social Deviance 47 (U. of Queensland Press 2nd ed.1970).

74. Suzi Navot, The Constitution of Israel: A Contextual Analysis 228–233 (2014).

75. Barak, *supra* note 31, at 57.

and acting as a safeguard against the majority rule. Constitutional democracy must protect the liberties and autonomy of the individual and guarantee his ability to peacefully exercise his liberties; such protection is the core concern of this political body's existence, namely the legislative and the executive branches alike. The rule of law plays an important role in locating the "values of a constitutional democracy." As observed by Ronald Dworkin, we must not be satisfied with a "rule-book conception" of the rule of law;[76] rather, it must be extended to the "right conception" of the rule of law, which means guaranteeing fundamental values of human rights, with a proper balance between these and the other social values of the state, such as public safety, certainty and stability in interpersonal arrangements, and values of proper conduct.[77]

The values of constitutional democracy require that the legislature may not limit rights except for a proper purpose, thus fulfilling the promise of these values—namely, enabling the individual to exercise his autonomy and liberties in peace. The proper purpose according to which the legislature may criminally prohibit certain conduct may not be articulated arbitrarily, but rather with due process and in an equal manner. Generally speaking, constitutional law is very generous in accepting the purposes articulated by the legislator. Only a very few purposes, particularly those which stand in contrast to the basic pillars of the values of a constitutional democracy, can make a law constitutionally invalid.[78]

The proportionality requirement mandates that a prohibition must be in adequate relation to the special importance of the particular goal at stake.[79] Limitations on rights and freedoms must be proportionate to the specific need on which they are predicated. Proportionality requires that all rights at stake must be considered and balanced against each other and against other proper purposes, and that the least restrictive means available must be adopted.[80] The test of proper proportionality consists of three subtests: (1) rational connection, which requires the existence of a rational link between the means employed and the goal the legislature wishes to accomplish—namely, there must be reasonable grounds for expecting the legislation to be effective in achieving its objective; (2) least coercive means, which requires that of the range of means that may be employed to accomplish the goal, the legislature must employ the least harmful means—namely, the legislature must limit the right no more than is necessary in order to achieve its objective; and (3) relativism, which demands that the damage caused to the individual by the means employed,

76. Ronald Dworkin, A Bill of Rights for Britain 11 (1990).

77. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 8, 10 (1982).

78. For a thorough discussion, *see* Langodny, *supra* note 72, at 766–7.

79. *See for instance* BVerfGE 67 at 151, 173; BVerfGE 76 at 1, 51; Robert Alexy, Theorie der Grundrechte *122ff, 146ff* (Suhrkamp 5th ed. 1994).

80. Alice Donald & Erica Howard, *The right to freedom of religion or belief and its intersection with other rights*, Discussion Paper, ILGA-Europe, 18 (2015).

must be in appropriate proportion to the benefit stemming from it—thus, the costs of the limitation must not exceed the benefits to be gained from achieving the objective.[81]

B. *The Muezzin Law: Unconstitutional Criminalization*

It is our argument in this chapter that the Muezzin Law fails to pass any of the abovementioned criteria for constitutional criminalization. Ultimately, an enlightened society respects the lesser-held beliefs and views of those who devotedly and passionately identify with them. In such a society, understanding the other is more important than self-understanding.

It is our view that the Muezzin Law stands in contrast with the values of a constitutional democracy; its purpose is related to religious conflict rather concerns with the environment, and above all, it fails to meet the proportionality test, as we shall elaborate on by addressing the CRD theory, which differentiates conflicts with religious dimensions from other types of conflicts.

In their recent work, Michelle LeBaron and Maged Senbel developed a theory that differentiates conflicts with religious dimensions (CRDs) from other types of conflicts.[82] CRDs are those with some religious aspects, even if they are not explicitly or exclusively about religion. This religious dimension manifests when some or all of those involved in the conflict "understand, interpret, or respond to the conflict through deep-rooted ontologies."[83] LeBaron and Senbel's working definition of CRDs proceeds from an awareness of indivisibility; CRDs are conflicts in which religion and sacred values shape histories, current narratives and future possibilities in ways that cannot be disentangled for at least one of the individuals or social groups involved in the conflict.[84] The importance of labeling CRDs as a particular type of conflict stems from the unique role that religion plays in conflicts—a role that liberal, rational, and individualist works like *Getting to Yes*[85] fail to address.[86] Since CRDs involve threats or perceived danger to identities and to deeper meanings and values, addressing material or even relational aspects of these conflicts cannot suffice. A more holistic approach is required to avoid escalation, and symbolic aspects

81. *See and compare* The Queen v. Oakes, [1986] S.C.R. 103, 136 (Justice Dickson) (Can.).

82. Michelle LeBaron & Maged Senbel, Conflicts with Religious Dimensions: Why They Matter and How to Engage Them (unpublished manuscript,on file with author).

83. *Id.* at 5.

84. *Id.* at 4.

85. Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In (BrucePatton ed., 2011).

86. Michelle LeBaron, Bridging Troubled Waters: Conflict Resolution from the Heart 191 (2002); Harold Abramson, *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, 9 Pepp. Disp. Resol. L.J. 437, 441–43 (2009) (explaining how interests and identities are intertwined and make "separating people from the problem" impossible, how objective criteria are irrelevant in certain contexts, how individual generation of options is unacceptable is certain communities, and more).

of the conflicts—also insufficiently discussed in the literature[87]—must be considered when examining CRDs. Addressing such conflicts with their unique nature in mind is crucial to limiting the possibility of their violent escalation. CRD theory offers practical tools to apply to all levels of the conflict—material, relational, and especially symbolic—in order to contain the conflict and foster a sustainable resolution.[88]

We argue that criminalizing the *adhan*, particularly the *Fajer adhan*, does not befit the values of a constitutional democracy. This is true especially in regard to the constitutional democracy of Israel, where the equal guarantee of the freedom of religion was promised by the Founding Fathers already in the Declaration of Establishment, and where the Court has held that the value of protecting religious feelings is a constitutional value.[89] Even if it were true that the main concern of the Muezzin Law was protecting the public against environmental noise, the criminalization of an act which constitutes a religious ritual stands in sharp contrast with the value of tolerance which is a crucial value in every constitutional democracy.

Moreover, it is our contention that the Muezzin Law does not serve a proper purpose. Applying CRD theory in our study of the Muezzin Law helps elucidate that, at its essence, the Muezzin Law is not an environmental law, as its initiators label it, but rather a CRD—namely, that the *adhan* as such poses a threat by a Muslim symbol to the identity of Jews in Israel.[90] This cannot be viewed as a proper purpose.

Finally, we assert that the Muezzin Law is disproportionate to its stated goal. We have determined the importance of the nature of the conflict surrounding this legislation. This is a question of genuine inconvenience for non-Muslims (and perhaps also for Muslims who prefer to sleep rather than practice the *Fajer* prayer). However, a less restrictive method of limiting noise disruption than that suggested in the proposed law could ease the discomfort of many, while still protecting the Muslim minority's freedom of religion and right to dignity and equality. By ignoring the symbolic elements that this conflict holds, the means of resolving it are not only very limited, they might even escalate the conflict.

Even if we accept—and we do not—the argument that the purpose of the Muezzin Law is to protect the public against environmental noise, we are of the view that there is no rational link between the criminal liability this law proposes and the goal which it aims to achieve. Ultimately, fining the Muezzin who operates the system or confiscating the PA system itself, would hardly deter a pious believer from their religious duty. To say, they will still perform the *Fajer adhan* Even engaging the relational aspect of interests of the neighboring

87. LeBaron & Senbel, *supra* note 82, at 13.

88. *Id.* at 27–33.

89. *See, e.g.*, HCJ 5016/96 Horev v. Minister of Transportation 51(4) PD 1 (1997) (Isr.); HCJ 5394/92, Huppert v. "Yad Vashem" 48(3) PD 353 (1992) (Isr.).

90. LeBaron & Senbel, *supra* note 82, at 5.

communities holds very little hope for resolution without a thorough understanding of the symbolic role of the Muezzin in Muslim communities on one hand, and of the threat to the identity of Jews in Israel posed by a Muslim public, on the other. Israel, identified by most of its citizens as the national home of the Jewish peoples,[91] is also home to a variety of non-Jewish citizens, composing more that 20 percent of its population. The Jewish majority and many of the non-Jewish minorities self-identify as Israelis, though differing in their religious affiliations. Each—the Jewish and the non-Jewish Israeli citizens—holds conflicting views of the State's role in regulating behaviors that correspond with Jewish practices (such as observing Shabbat or Kosher food) and formal symbols (like the Menorah or the Star of David). This conflict is deeply rooted in values, identities, and a sense of being. These cannot be ignored. How the Muezzin calls the faithful for prayer is not only functional, it also symbolizes religious presence and unity for many Muslims. For many, tampering with a symbol might be conceived as tampering with sacred religious identities. In addition, sounds, including noises, are integral parts of the sensory experience of religion. Interfering with religion's power to generate particular moods and motivations is thus very threatening to the followers of the particular religion.[92] Such an attempt to interfere with the physical sensations and moods arising from the Muezzin's call is understood as an intervention in the religious experience itself. Moreover, from religious perspectives, rituals are sacred as shared symbols which not only reflect but also create meaning;[93] thus, it is quite likely that the Muezzin's call, a longstanding ritual, is a shared sacred practice central to many Muslims' order of existence.[94]

Additionally, as we provide in this paragraph, it is our position that there are alternative means, which are indeed less coercive, compared to criminal law, that can serve in fulfilling the arguable environmental purpose. To say, recognizing the complex interplay of religious dimensions of conflict offers an important perspective for conflict analysis and intervention. This recognition broadens the scope of possible engagements on the one hand, while avoiding landmines on the other.[95] Intervention in this issue thus needs to focus on cosmological language[96] because each side places fundamental value on their narratives, concepts, and institutions as related to core values like

91. Basic Law: Israel—The Nation State of the Jewish People, July 19, 2018 (Isr.).

92. LeBaron & Senbel, *supra* note 82, at 16.

93. *Id.* at 15.

94. The term refers to the accumulated phenomena and experiences that make our being sensible to us. *See* Clifford Geertz, The Interpretation of Cultures (1973).

95. *See id.* at 25–33 (chapter discussing Religion-informed Conflict Analysis and Intervention: Implications for Practice).

96. Cosmological language infers from facts about the universe to the existence of a God. *See* Bruce Reichenbach, *Cosmological Argument*, Stanford Encyclopedia Philosophy (Edward N. Zalta, ed., 2017).

justice, fairness, truth, and duty.[97] Seeing these issues as related to "bedrocks of being"[98] of those involved in the conflict may generate richer dialogue by incorporating elements of respective religious discourse that are spacious enough to encompass all worldviews. Accordingly, dialogue is immediately necessary. A paternalistic legislation is the opposite of dialogue. Dialogue about the Muezzin Law conflict must thus incorporate the narratives and symbolic language used by each side. It must address metaphoric understandings of what it means to be a Jew or a non-Jew in Israel and of how each side experiences the call for prayer. Is it an aesthetic sensation or a noise intrusion? How does each side understand the use of the PA system when calling for the *Fajer* prayer—as an organic evolution of a religious practice or as a mere mechanic addition to it lacking inherent spiritual significance?

Finally, the proportionality requirement demands that the damage caused to the individual by the means employed, must be in appropriate proportion to the benefit stemming from it. This is absolutely not the case insofar as the Muezzin Law is concerned. Ultimately, the issue is not only—and of course, not mainly—the fine imposed by the Muezzin Law, but rather turning the Muslim clergy criminal, thus denoting him as criminal for calling "*Allahu Akbar*." This is a very high and unproportionate price to pay for the sake of protecting the public from an environmental noise, which usually lasts only for a few minutes. Eventually, perceiving the use of PA systems to the *Fajer adhan* as simply a noise hazard may yield only two possible legal solutions, which have already proved to be futile, whether they were undercut by lack of enforcement or by shelving the proposed legislation year after year, even if for good cause; namely, an amendment to the current proposed legislation or stricter enforcement of the Bill for Abatement of Environmental Nuisances currently in place. Thus, a purely legal solution will not suffice. A more holistic treatment must be applied to this conflict. This is not merely a relational dispute. Accordingly, a legal resolution—all the more so, through criminal law means—will not put it to rest; indeed, it might escalate it even further.

Epilogue: Instead of Conclusions

Democracy is not solely a system of rights, but also a system of wrongs. A constitution is a regime of rights and balances, but it is not a system of wrongs. It is for theory to draw the line between right and wrong, and it is for the constitution to draw the line between undesirable behavior and punishable wrong. There are many things that we, as a community, may not like, but not everything we do not like shall be criminalized and punished. Constitutional democracy

97. Oscar Nudler, *On Conflicts & Metaphors: Towards an Extended Reality*, *in* Conflict: Human Needs Theory 177, 197 (John Burton ed., 1990). Differences in what is fair and just could be found in the value attributed by each side to the communal call for prayer versus the protection of privacy and serenity in one's home.

98. Theodore W. Adorno, *Reflections on Metaphysics*, *in* The Frankfurt School on Religion: Key Writings by The Major Thinkers 180 (Eduardo Mendieta ed., 2005).

bears some unique features. Constitutional democracy is not merely a representative system, it is not only the voice of the majority, and it is not solely the voice of the legislature. Constitutional democracy is a balancing system, it is the voice of the majority but also a guard for minorities and their human rights, and it is the voice of the legislature only when it enacts laws in accordance with the fundamental highest principles of the Law, namely, justice, reasonableness, and proportionality.

The Muezzin Law adheres to draconian means, such as criminal law, in order to prohibit a particular conduct, arguably in the name of protecting a neutral public interest, such as protecting the public against environmental noise. It is precisely the sort of legislation that embodies hidden motivations that reflect upon a wider and deeper conflict, like religious conflicts, which would be better resolved if only recognized, comprehended, faced, and tangled with. These are exactly the cases, where constitutional law and other CRD theories are compelled in order to establish very delicate resolutions instead of denoting normative citizens with the Mark of Cain as criminals. Eventually, this is what a constitutional democracy entails, namely, a system of tolerance, not a system of deprivation, suppression, and criminal punishment.[99]

99. Barak, *supra* note 31, at 64.