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Article’s Information

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<td>Apartheid; Constitution; Israel; Myanmar; South Africa</td>
<td>This paper is a critical examination of constitutional provisions that enable apartheid systems, with a focus on how they allow segregation and discrimination to be established and perpetuated. Despite the global condemnation of apartheid following its horrors in South Africa, similar traits are still visible across a number of jurisdictions today, notably in Israel’s treatment of Palestinians and Myanmar’s oppression of the Rohingya. This study investigates three of such highest laws of the land, analyzing the roles they play in legitimizing such regimes and how they are instrumentalized to sustain segregation by design. Employing a substantive and structural comparative analytical approach, the research scrutinizes the constitutions of South Africa, Israel, and Myanmar, unearthing common denominators that facilitate apartheid practices. These include the creation of identity-based citizenship conditions, provisions allowing discriminatory treatment, constraints on the political participation of marginalized groups, and the entrenchment of power that hinders reformatory action. The findings reveal that apartheid-enabling provisions do not necessarily explicitly endorse segregation. Instead, they often afford broad legislative powers that can be exploited to this end.</td>
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as was the case in Apartheid South Africa. Similarly, the constitutions of Israel and Myanmar offer constitutional protection to selected ethnic groups, legitimizing and institutionalizing segregation. The research concludes with the identification of at least four key elements common across the studied constitutions that contribute to the maintenance of apartheid systems: differentiated citizenship status, legitimized segregationist practices, limited political participation for certain demographics, and entrenched power structures resistant to change.

A. Introduction

Apartheid—the act of imposing inhuman actions done to establish and maintain dominance by one racial group over another as well as oppressing them—is an act which the global community has condemned for decades ever since the collective realization of the horrors the South Africans faced in the up until the mid-nineteenth century.¹ Multiple international legal instruments have been constituted as responses to this rambunctious matter and frameworks to ensure its permanent abolition, from the adoption of a 1973 suppression convention to its inclusion as a crime against humanity in the Rome Statute.² Provided the timeline of the latter’s adoption, the mere existence of a provision has raised eyebrows.³ One would be right to question whether humankind has successfully passed its dark days.

It would not be hard to see that in many parts of the world today, traits of apartheid can still be found. For example, Israel’s occupation of Palestine which began not long after the Second World War as marked by the Nakba remains a heated topic due to its unique features that are quite distinct from the conventional definition of apartheid.⁴ On the other side of the globe, a similarly disturbing conflict has persisted for at least a decade. The Rohingya situation in Myanmar has become a regional issue in South and Southeast Asia, causing a prolonged refugee crisis affecting neighboring states.⁵ These instances are likely just the tip of the iceberg and symptoms of a global pandemic that has never found a cure. Like a resistant disease, apartheid—or, more appropriately, the conduct of its perpetrators—evolves in form over time to legitimize itself.⁶

This article looks into how nations help perpetuate the crime of apartheid at the core through the content of their foundational instrument. Starting with an inspection of the roles played by constitutions in warranting such grave acts, it then dives deep into three different countries as case studies by utilizing a mix of substantive and structural comparative analytical approaches, starting with the classical example of South Africa and continuing with two

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³ Lingaas, supra n 2.
⁶ Momberg, supra n 4.
regimes that still stand today: Israel and Myanmar. For a better understanding of the substance and structure of these constitutions, historical facts are also presented and perused. It should first be noted that the term ‘constitution’ in this article is understood loosely as to encompass quasi-constitutions such as in Israel’s case. Key features pinpointed are thereupon synthesized to determine how segregation is established by design.

B. Discussion

1. Role of Constitutions in Enabling Apartheid

The constitution, which is the written set of rules that delineates the powers of the rulers, and its general content is familiar to both the institutions and the population, can act as a tool to legitimize the actions of power by both rulers and the state as a whole, enabling a range of actions within its provisions. These actions can vary from promoting the welfare of the people to more controversial practices, such as the creation of apartheid systems and the implementation of authoritarianism orchestrated by a state's government. This assertion is not without foundation; according to David Beetham in his seminal work that continues to influence constitutional thoughts to this day, several conditions are necessary to legitimize the authority to act in such a formidable action within a state. Firstly, there is a need for a written law, in this case, a constitution, to the acknowledge ruler's authority in every action undertaken or already taken. Secondly, there is the necessity of fairness, signifying that the written rules must be accepted within the social context to ensure their legitimacy and acceptance. Thirdly, explicit consent to the establishment of legitimate authority is crucial, implying that in formulating the rules, every idea and aspiration at every social level must be incorporated. These conditions ensure that there are no actions that undermine the legitimacy of the rules, even when the ruler acts fairly in accordance with the content of the written rule. Hence, the fulfillment of these cumulative conditions will render an authority legitimate within a country. Indeed, constitutional legitimation plays a pivotal role in shaping the legitimacy of a political regime at two crucial moments: during the adoption of the constitution and its subsequent implementation. This dual function enhances its potency as a source of legitimate authority. According to a concept first posited by Locke, during the constitution's adoption, political leaders secure an initial consent from a group of individuals affirming the existence of the political regime, and this influence could extend to contexts of enabling systems and practices proximate to the mainstream definition of apartheid.

Nevertheless, cruel practices like apartheid can be eradicated within a governmental system established by a constitution, serving as the initial gateway to legitimize a regime's authority through duly recognized avenues such as elections. This is tied to the conditions delineated by Beetham, emphasizing the importance of fairness and explicit consent. Consequently, given the dynamic nature of social and community conditions, particularly when contemplating future

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10 Ibid, 1–2.
11 Ibid.
12 Ibid, 1–3.
13 Ibid, 2.
15 Fournier, supra n 9, 2–3.
generations, it's plausible that society might be divided in its response to the exercised power of a regime.\textsuperscript{18} These circumstances within society can potentially offer an avenue for the community to formally challenge the authority and actions of a state, perhaps through constitutional amendments.\textsuperscript{19} However, contrary to theoretical expectations, amending the constitution is a complex undertaking as it necessitates considering the imperative for change and challenging the ruling regime. When formal methods prove unattainable, these divided societies may opt to reject prevailing rules and authority, turning to revolution as an alternative to instigate changes within the written rules, specifically the constitution.\textsuperscript{20}

This type of constitution can significantly impact basic human rights, which should be safeguarded by the state through constitutional guarantees. In the context of apartheid practices, the presence of such a constitution can undermine the societal system, leading to direct divisions based on identity differences, including ethnicity, race, and other backgrounds such as social and religious affiliations. The separation is perpetuated by the primary community groups who act as the "actors" in the formulation of the country's highest legal foundation. As a result, discriminatory practices against minority groups can occur freely and become commonplace if the constitution explicitly only acknowledges certain ethnicities, as is the case in countries like Israel and Myanmar.\textsuperscript{21} Moreover, the absence of recognition of ethnicity in certain constitutions can lead to a compromised system of law enforcement and human rights within the country. The failure to acknowledge ethnicity or community groups in a state constitution can result in the erosion of constitutional rights for individuals within the community who face discrimination, as their avenues for recourse through the legal system are impeded, constituting a form of institutionalized/designated discrimination.

2. Deep Dive into Case Studies

1) Apartheid South Africa

a) South Africa Act, 1909

The practice of legally sanctioned racial segregation in South Africa more commonly known as apartheid, has been present since South Africa was a British colony.\textsuperscript{22} South Africa prior to 1909 was split into four separate British colonies namely Cape Colony, Natal Transvaal and the Orange Free State. Through the enactment of the South Africa Act by the British parliament which was South Africa’s first constitution, South Africa officially became the Union of South Africa. The South Africa Act was only discussed by white South Africans named the “National Convention” and excluded any participation of indigenous black Africans or colored individuals.\textsuperscript{23}

The Union of South Africa was inherently formed to be a state which protected only the interests of white South Africans. The South Africa Act was designed to disenfranchise the black and colored population by only accounting for the white male electorate of the four provinces in South Africa. Those who eligible to vote in elections were males of European descent. Section 35 (1) of the act provided an exemption for the province Cape of Good Hope which allowed wealthy black and colored males to vote.\textsuperscript{24} However, these exemptions were subsequently prohibited by amendments to the South Africa Act.\textsuperscript{25} Section 44c of the act

\textsuperscript{18} Fournier, supra n 9.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid, 2–3.
\textsuperscript{22} The Editors of Encyclopaedia Britannica, supra n 16.
\textsuperscript{24} South Africa Act (1909), Sec. 35 (1).
\textsuperscript{25} The Editors of Encyclopaedia Britannica, supra n 23.
provides that in order to qualify to become a member of the House of Assembly, one must be of European descent.\textsuperscript{26} Section 24 (ii) provided that the Governor-General may appoint eight senators. Four of these senators may be those we “\textit{shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the colored races in South Africa},” which meant that said senators must still be of European descent yet be able to voice the interests of colored South Africans in the senate.\textsuperscript{27} This provision was intended to remain in place only 10 years after the enactment of the South Africa Act after which parliament may modify the mechanisms of the appointment of a senator.\textsuperscript{28}

A further sign of how the Union of South Africa was intended to be a state which protected the interests of white South Africans, was that the Union of South Africa would have only two official languages namely Afrikaans and English, the language of a small minority of the population according to Section 137.\textsuperscript{29} A far outcry from modern-day South Africa which recognizes 12 official languages in its modern constitution.\textsuperscript{30} This provision was procedurally entrenched into the South Africa Act as it required a two-thirds vote in parliament for the provision to be amended.\textsuperscript{31}

The South Africa Act has undoubtedly placed very little restrictions for parliament’s powers to laws compared to the British parliament which has more restrictions placed.\textsuperscript{32} Section 59 of the Act contains very vague wording that parliament has full power to make laws to maintain peace, and preserve public order and good government.\textsuperscript{33} Such wording is open to interpretation and has resulted in parliament making heavily racialized legislation. Any sort of restriction in parliament’s powers to legislate such as the procedural entrenchment of Section 137 of the Act was intended to preserve the grip that white South Africans had over all aspects of life in South Africa.

The vague wording which empowered the South African parliament to basically have extremely broad and unchecked powers to legislate resulted in a slew of legislation, which promoted racial segregation. Physical segregation of black South Africans was done through the enactment of the Land Act and the Native Trust Act which limited black South Africans to inhabiting so-called “reserves” and may not acquire land which is owned by a white South African or land that is adjoining to land owned by a white South African.\textsuperscript{34} Besides physical separation, the government also enacted the Population Registration Act of 1950 which required all South Africans to register themselves and obtain an identification card which would separate them into four racial groups namely, Colored, Indian, Black and White.\textsuperscript{35}

The South Africa Act of 1909 upon its enactment resulted in a state which legally sanctioned the separation of the South African population based upon racial lines. During the drafting of the Act, Jan Smuts, colonial secretary of Transvaal believed that all power should be concentrated on the whites-only parliament while forcing the blacks and colored to be

\textsuperscript{26} South Africa Act, Sec. 44c.  
\textsuperscript{27} Ibid, Sec. 24 (ii).  
\textsuperscript{29} South Africa Act, Sec. 137.  
\textsuperscript{31} Loveland, supra n 28, 126.  
\textsuperscript{32} Ibid, 128.  
\textsuperscript{33} South Africa Act, Ch. IV.  
subordinate to the will of the white minority which favored racial segregation. As discussed above, the Act severely omitted provisions that would have protected the rights of the black and colored majority in South Africa and instead gave the minority white South Africans powers to legally legislate laws to ensure white dominance over South Africa.

b) Republic of South Africa Constitution Act, 1961

In 1960, South Africa’s then-Prime Minister Hendrik Verwoerd proposed that South Africa become a republic abolishing the system of which South Africa was formally under the rule of the British monarchy. The referendum was conducted on the October 5th, 1960 and unsurprisingly only included white South Africans excluding any participation from the coloreds, Indians and Blacks. The decision to become a republic was not a landslide. Despite not receiving an overwhelming majority Verwoerd pushed for South Africa to become a republic.

Upon the decision that South Africa would become a republic, parliament debated the new draft constitution which would be the basis of the Republic of South Africa. Astonishingly, the proposed constitution bore similar resemblance to that of the South Africa Act. The office of Queen and Governor General was replaced by the State President and provisions such as the protection of the Afrikaans and English language were maintained. While at the same time maintaining the grip that white South Africans had over both houses of parliament.

Evidently, the formation of the Republic of South Africa did not result in any meaningful change for a large majority of the South African population. Racial segregation still remained an everyday reality for most South Africans as the status quo was maintained. The Republic of South Africa Constitution Act, 1961 came into force on the 31st of May 1961 as the republic’s new constitution and was amended several times, however its intent in keeping South Africa as an apartheid state remained.

2) State of Israel

Neo-colonialism is the most fitting term to describe the socio-political conditions of the Arab Palestinian ethnic in their very own land. This harsh reality began with the establishment and expansion of Israeli settlements in the West Bank, East Jerusalem, and the Gaza Strip following the 1967 Six-Day War. Over time, Israel has constructed residential communities for its citizens, resulting in the displacement of Palestinian communities and significant changes to the demographic, social, cultural, and political landscape. This form of neo-colonialism has blatantly infringed upon the inherent rights of Palestinians, who find themselves constrained with plenty of restrictions due to ethnic and racial differences. Israel's intensifying colonization process is only justified through the pretext of ‘self-defense’, aimed at preserving the state’s sovereignty and protecting its people, who were originally responsible for appropriating land rights from another ethnicity.

Israel's actions bear striking resemblances to the reprehensible acts of racial segregation perpetrated by the British colonial government through white South Africans against the indigenous population in South Africa. This parallel is evident in the experiences of Palestinians, who encounter restrictions on their movement, limited access to resources, and

37 Ibid, 416.
38 Ibid, 417.
39 The event and its pivotal—or rather detrimental—repercussions in Middle Eastern and world history have made it one of the most discussed topics in the region’s modern history literature. See, among many others, Edward Said, The Question of Palestine (Vintage, 1992); Rashid Khalidi, The Hundred Years’ War on Palestine: A History of Settler Colonialism and Resistance, 1917–2017 (Metropolitan Books, 2020); Michael Oren, Six Days of War: June 1967 and the Making of the Modern Middle East (Oxford University Press, 2002).
40 The Editors of Encyclopaedia Britannica, supra n 23.
separate legal systems compared to Israeli settlers in the occupied Palestinian territories. The system implemented by Israel creates a separation barrier, resulting in a structure reminiscent of apartheid, wherein a specific group is systematically privileged over another. The occupation of Israel in Palestine, apartheid actions and policies are observable in several discriminatory practices related to citizenship rights, cultural and language rights, land and housing rights, and religious rights in all areas of historical Palestine where both Jews and Palestinians reside through the enactment of Israel’s Basic Law.

When examined more profoundly within the context of Israel’s Basic Law, the colonial nature of the regime becomes apparent and gains legitimacy within Israel's legal system through the imposition of a Jewish-Israeli constitutional identity on all Palestinians. This involves severing their connection to their homeland and reinforcing Jewish ethnic supremacy and dominance, as evidenced in Article 7A of The Basic Law: Israel – The Nation-State of the Jewish People. This law, which serves as one of Israel's legal bases, underscores the value of supremacy applied to the Israeli ethnicity without consideration for the existence of other ethnicities living in Israel. The constitutional identity proclaimed by the Jewish Nation-State Law establishes a regime that exhibits characteristics of apartheid across all spheres to which it is applied. The law explicitly states that the two groups, Jews and Arabs, residing in areas under Israeli control, are not constitutionally equal. As seen in the experiences of other communities, a constitutional foundation based on ethnic exclusion of this nature gives rise to a system of segregation that diffuses in all aspects of life.

To be more specific, one of the Israeli settlers' practice of apartheid against the Palestinians is evident in the legal framework they've established, known as the Nakba Law. The term “Nakba” was first introduced by Constantine Zurayk who defined “al-Nakba” to describe catastrophe and the defeat of Arab Palestinian in 1948. This regulation unmistakably symbolizes a profound and enduring animosity. The term "Nakba Law" started to emerge in April 2009 when it was initially introduced as the Independence Day Law which was presented during the sessions of the 18th Knesset. The Nakba Law provides a “unique” yet biased article to discriminate against the one and only Palestinians.

As per the 2009 version of the law, any activity or event commemorating the establishment of the State of Israel as a day of mourning or sorrow was prohibited. Those found in violation of the law would face a penalty of up to three years of imprisonment. Despite receiving support from the Israeli government, public criticism emerged, particularly targeting the criminal liability clause. On March 30th, 2011, despite public protest, the Budget Principles Law (Amendment No. 40) on reduction of financial allocations or support due to activity against the principles of the state was officially published in the Reshumot (official registry). This amendment introduced section 3(B) to the Budget Principles Law of 1985, granting the Minister of Finance the authority to decrease financial

42 The Basic Law: Israel – The Nation-State of the Jewish People, Art. 7A.
43 Jabareen and Bishara, supra n 41, 52–53.
44 Ibid.
46 ACRI and Adalah, “ACRI and Adalah Petition against the ‘Nakba Law’: Overview and Excerpts from the High Court Petition,” 2011.
47 Ibid.
48 Ibid.
49 Ibid.
allocations or support provided to any organization or entity receiving state funding if it is
involved in any of the five activities specified by the law.\(^\text{50}\)

Based on the law, the Ministry of Finance is authorized to impose financial penalties on
any organization or entity that observes Israeli Independence Day as a day of mourning, and it
has the power to withdraw its funding or support from the state.\(^\text{51}\) The initiator of the Nakba
Law, former Member of Knesset (MK) Alex Miller, has stated that the law is primarily a
symbolic measure intended as a response to activities like the return marches and memorial
events for the Nakba that occur annually at universities around Independence Day.\(^\text{52}\) This
legislation, exemplified by the Nakba Law, unmistakably reflects the Israeli government's
explicit intention to limit the space for expression and aspirations of Palestinians who wish to
commemorate the day as a reminder of the grim history they endured when Israeli settlers
ruthlessly denied Palestinian Arabs their fundamental rights to life and live in their own land.
The Nakba Law is thought to be designed with the purpose of humiliating and erasing the
identity of the Palestinian population in Israel. The argument asserts that the intention behind
the Nakba Law and similar laws is part of a systematic process aimed at diminishing the
Palestinian minority and suppressing their perspectives across various domains.\(^\text{53}\)

The Nakba Law serves as a distinctive illustration of the normalization of colonial and
apartheid practices implemented by Israel in Palestine, specifically in Gaza Strip, West Bank,
and East Jerusalem. The unfolding events within the Palestinian Arab community serve as clear
evidence that a range of practices linked to colonialism and apartheid is undeniably taking place
in Palestine. These recent developments emphasize the persistent challenges and struggles
faced by the Palestinian population in light of systematic policies that unmistakably echo the
characteristics of both colonialism and apartheid.

3) Republic of the Union of Myanmar

a) A Highly Racialized Citizenship System

To understand why Myanmar’s constitution enables a form of apartheid, we first must
understand the way in which Myanmar segregates its society. Myanmar employs the ethno-
political idea of the “national races” or in Burmese \textit{taingyintha}, which to this date is used by
politicians in Myanmar to shape national policy.\(^\text{54}\) According to Myanmar’s Interpretation of
Expressions Law, the eight ethnicities that constitute Myanmar’s national races are the
Arakanese, Bamar, Chin, Kachin, Karen, Kayah, Mon and Shan. Outside of the major eight
ethnicities Myanmar’s government recognizes an additional 135 ethnicities, yet to this date how
the government came up with such figures are not clearly explained and remain obscure.\(^\text{55}\)

Myanmar’s deeply entrenched idea of the national races, has appeared in the preamble of
its 2008 constitution. The first paragraph of the preamble states that “We, the National people,

\(^{50}\) The section reads as follows: “3(B) If the Minister of Finance sees that an entity has made an expenditure that, in essence, constitutes one of those specified below (in this section—an unsupported expenditure), he is entitled, with the authorization of the minister responsible for the budget item under which this entity is budgeted or supported, after hearing the entity, to reduce the sums earmarked to be transferred from the state budget to this entity under any law: (1) Rejecting the existence of the State of Israel as a Jewish and democratic state; (2) Incitement to racism, violence or terrorism; (3) Support for an armed struggle or act of terror by an enemy state or a terrorist organization against the State of Israel; (4) Commemorating Independence Day or the day of the establishment of the state as a day of mourning; and (5) An act of vandalism or physical desecration that dishonors the state’s flag or symbol.”


\(^{52}\) ACRI and Adalah, \textit{supra} n 46.

\(^{53}\) Ibid, 317–19.


\(^{55}\) Ibid, 468–69.
have been living in unity and oneness.”

What is meant by the “National people” is the national races which could be understood as Myanmar’s refusal to accept ethnic diversity which is universal and not designated to a specific list of ethnicities that the Burmese government has decided to include.

Myanmar’s concept of national races has shaped how an individual may acquire Burmese citizenship. Being a member of a national race that is recognized by the Burmese government has become the primary path for an individual to have the right to claim that they are a Burmese citizen. Birthright citizenship is only conferred to those who are born to parents who are already a member of one of the national races recognized by the government, while those who do not belong to a non-recognized ethnic community must provide extensive genealogy to prove their claims. While denial of citizenship to those who belong to a non-recognized ethnic community is rare, the granting of citizenship is continuously deferred by the relevant authorities leaving some in a perpetual state of limbo as they seek to become a Burmese citizen.

The highly racialized citizenship process in Myanmar, has resulted in discrimination against non-recognized racial groups. The most prominent of these groups are the Rohingya, who are predominantly a Muslim ethnic group. The Rohingya have been subject to a systematic attempt to render many of them stateless. Members of the Rohingya community have been refused to be issued a Citizenship Scrutiny Card or “Pink Card” which certifies that an individual is indeed a Burmese citizen. The refusal stems from the relevant authorities refusing to issue such documentation. Instead, many are given Temporary Registration Cards or “white cards” which results in an individual becoming a non-citizen. Rendering many members of the Rohingya community as stateless de facto.

The question of the Rohingya’s right to Burmese citizenship has not only rendered them stateless, but also has resulted in their disenfranchisement. The Constitutional Tribunal of Myanmar has determined that due to the fact that the Rohingya are not citizens of Myanmar but white card holders, they are disqualified from participating in elections as the tribunal ruled that holders of the white cards are not entitled to the right to vote. The tribunal’s decision to make such an argument was that affording the white card holders the right to vote and be voted had gone past the constitution’s scope of who can be entitled to such democratic rights. This decision by the tribunal effectively disenfranchised approximately one million individuals with a majority being Rohingya. This can also be understood as the tribunal’s support for the national race idea which is so ingrained in Myanmar’s political landscape.

This highlights how the current constitution of Myanmar seeks to protect the interests of the national races and does not provide any real protection to those who belong to an ethnic community unrecognized by the Burmese state even though they alongside with the national races have inhabited Myanmar for centuries. It seems that what the constitution means by “people” are those who fall under an obscure list of ethnicities that the politicians in Myanmar deem to be a part of the national races. The state apparatus that functions within Myanmar also

56 Constitution of the Republic of the Union of Myanmar, preamble.
57 Cheesman, supra n 54, 470.
59 Rhoads, supra n 58, 51.
60 Cheesman, supra n 54, 473.
62 Ibid.
plays a part in further promoting the agenda of excluding certain ethnicities from participating and existing in Myanmar.

b) Legal Denial through Constitutional Reform

The system of national races in Myanmar has not only affected the way an individual acquires citizenship, it has also impacted how the regions in Myanmar are divided. The Rakhine State formally known as Arakan State was created despite very vocal opposition from the Rohingya Muslim community. The short lived Mayu Frontier Administration Area which is inhabited by a large number of Rohingyas was created to alleviate the fears of the Rohingya community of having to live under Rakhine Buddhist control. However, in 1964 the area was eliminated by the military junta that had seized power two years prior.65

The 1974 Constitution recognized the Arakan State, which eliminated the hopes of the Rohingya community for a region which is majority Rohingya. The Rohingyas were forced to live under Rakhine Buddhist rule. The 1974 Constitution gave the major national races a region named after their respective ethnicities. The granting of special regions to each major national race in Myanmar was retained in the 2008 Constitution.66

The idea of Myanmar’s national races is so deeply rooted in its society and politics, that the constitution and laws of Myanmar are only beneficial for those who belong to the list of national races recognized by the Burmese Government. Minority communities such as the Rohingyas have suffered through the constant legal denial from the government as they are not a part of the national races and therefore are not entitled to have any real protection from the Burmese government.

3. Identified Common Denominators

The three aforementioned countries each have a unique history which sets them apart from one another, even in terms of how segregation is materialized. Alas, some fundamental features remain true for all of these cases. These common denominators include primarily provisions within their constitutions, but there are also patterns beyond them which should be highlighted as they influence how societies in these countries prolong segregation.

First, these constitutions provide not just one universal set of terms for citizenship but instead create identity-based conditions which automatically render some ineligible for such status. This is seen in the disenfranchisement of the non-white population in South Africa,67 the prioritization of rights for the Jewish people in Israel,68 and the tying of citizenship with national races that is not exhaustive of all the ethnic groups in Myanmar.69 Second, these constitutions subsequently exacerbate the differentiated treatment by creating a legitimate platform for apartheid practices. In the case of South Africa, this is done by affording unchecked powers to the racially motivated legislature.70 On the other hand, the Basic Law of Israel and the Myanmar Constitution allow for more favorable treatment of certain identity groups in society.71

Third, the governance systems are made such that the subjected groups of people are not able to fully realize their intrinsic rights of participation, especially in politics. South Africa and Myanmar, for example, fully strip away these rights to such subjects.72 What is more is that

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65 Ibid.
66 Ibid.
67 The Editors of Encyclopaedia Britannica, supra n 23.
68 Jabareen and Bishara, “The Jewish Nation-State Law.”
69 Cheesman, supra n 54.
70 South Africa Act, Ch. IV.
71 The Basic Law: Israel – The Nation-State of the Jewish People, Art. 7A; Crouch, supra n 64.
72 South Africa Act (1909), Sec. 35 (1); Crouch, supra n 61.
fourth, these structures are built in a way that practically makes change a herculean task that would take years (if at all possible) to pull off. This is again done usually by a combination of discriminative acknowledgement of rights and silencing of dissent by those who are subjected. The combination of said factors is what then allows racist actions to be committed against select members of society, even to atrocious extents.

C. Conclusion

It has become apparent that the constitutions examined—South Africa, Israel and Myanmar—have all led to the enabling of racial segregation. The cases presented show that segregation may not explicitly be written into the constitution, yet it could be seen by the constitution enabling the parliament to have broad legislative powers as seen in Apartheid South Africa or through the constitutional protection of certain ethnic groups as seen in the constitutions of Israel and Myanmar. In that regard, this research has identified at least four common denominators of what constitutes apartheid-enabling provisions: 1) differentiating citizenship status, 2) legitimizing segregationist practices, 3) limiting political participation of certain groups, and 4) entrenching power to prevent changes.

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References

A. Book


73 Loveland, supra n 28; ACRI and Adalah, supra n 46.
B. Journal


C. Internet


