

“WHO TOOK MY SEAT?”: THE RIGHT OF PARTICIPATION AND REPRESENTATION FOR MINORITIES AND THE CASE OF ARAB-PALESTINIANS IN ISRAEL

Dr. Yousef T. Jabareen*

ABSTRACT

Minority groups, and particularly national and Indigenous minorities, tend to experience inequality and discrimination in the allocation of coveted resources, along with limitations on their ability to determine matters specific to their identity group such as culture, education, and religion. International law, which initially focused primarily on guaranteeing equality for individuals, increasingly recognizes that such minority groups require special, group-based protections. A crucial tool for granting minorities more power—as outlined in the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Minorities—is guaranteeing their effective participation in decision-making forums regarding matters that affect them. Facilitating such participation requires governments to officially recognize and actively cooperate and consult with these minorities’ representative organizations.

The experience of the Arab-Palestinian minority in Israel is instructive in highlighting major ways in which the Israeli legal system has failed to fulfill international legal standards seeking to ensure that minorities achieve meaningful and impactful participation and representation. Domestic Israeli law reflects a

* S.J.D., Georgetown University Law Center. Senior lecturer at Tel-Hai University of Kiryat Shmona in the Galilee, Israel. The author is a former member of the Parliament in Israel (Knesset) with the Arab Joint List (2015–2021) and was Chairman of the Parliamentary Committee on the Rights of the Child (2020–2021). The author would like to thank Dr. Lisa Richlen for her assistance with this Article; her insights have made a significant contribution to the final product. The author would also like to extend his thanks to the editing staff on the *Columbia Human Rights Law Review* for their work on this piece. Unless otherwise indicated, all translations are the author’s own.

much weaker mandate for minority participation characterized as “appropriate representation.” Yet even this limited mandate has been left unrealized in practice and Israeli courts have consistently failed to provide an effective remedy. Consequently, Arab-Palestinian leadership through their internal representative (yet formally unrecognized) organizations have proposed visionary remedies, including constitutional and other types of structural reform.

This Article claims that in order for minorities to achieve “effective” and “full” participation, as required by international law, a transformative approach to the right to participation and representation must be adopted. This shift should not be limited to remedying formal and current inequalities and discrimination alone; rather, it should also seek to rectify historic and persistent material discrimination. To achieve this more fundamental and deep-rooted reform, minority groups require special, group-based arrangements and protections that guarantee them power sharing in national institutions. Firstly, these arrangements should include formal State recognition of representative minority institutions along with the requirement to consult with them regarding national decision-making processes. Secondly, constitutional and legal reforms should guarantee full and effective minority group participation in the political, social, cultural, and economic life of the State through meaningful community representation in national decision-making forums. At a minimum, this representation should encompass three principles: proportionality to the minority’s percentage of the population, credibility, and effectiveness. This requires inclusion of representatives of the minority group in political decision-making bodies at all levels—not only numerically, but also in a manner that faithfully reflects the minority group’s interests and guarantees their actual influence. These three principles can more effectively guarantee equitable distribution of material, cultural, and symbolic resources and facilitate realization, in practice, of group-based aspirations. Thus, this type of full and effective participation faithfully reflects minorities’ interests, guarantees equitable distribution of resources, and advances realization of their collective aspirations.

TABLE OF CONTENTS

ABSTRACT	1134
TABLE OF CONTENTS.....	1136
INTRODUCTION.....	1138
I. ARAB-PALESTINIANS AS AN INDIGENOUS MINORITY IN ISRAEL: A HISTORICAL OVERVIEW.....	1142
A. The Legal and Socio-Economic Status of Arab-Palestinians	1147
B. Representation in Israel’s Lawmaking Body—the Knesset	1149
II. THE RIGHT TO PARTICIPATION IN INTERNATIONAL LAW	1150
A. First Generation of Human Rights Law	1153
B. Later Instruments of International Law	1159
C. The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	1162
D. The U.N. Declaration on the Rights of Indigenous Peoples	1164
III. THE RIGHT TO REPRESENTATION IN ISRAELI LEGISLATION...	1168
A. Legislation Mandating Appropriate Representation	1170
B. The Nation-State Law	1176
IV. LEGAL ACTION PROMOTING ARAB-PALESTINIAN REPRESENTATION	1181
A. The Land Administration Case	1181
B. The Planning Committee Case	1186
C. The Government Corporations Case	1189
D. Critique of the Rulings	1190
V. REPRESENTATION: BETWEEN REALITY AND ASPIRATION	1193
A. Representation in Government Employment and on Boards of Government Corporations	1194
B. The Arab-Palestinian Community’s Future Vision for Representation.....	1197
C. The Arab-Palestinian Community’s Vision for a Democratic Constitution	1203

VI. LESSONS BASED ON THE ARAB-PALESTINIAN EXPERIENCE: MAKING THE CASE FOR MEANINGFUL REPRESENTATION AND PARTICIPATION	1209
A. Proportional Representation	1209
B. Credible Representation	1211
C. Effective Representation: Constitutional Arrangements for Power-Sharing	1213
VII. REPRESENTATION IN THE SHADOW OF THE WAR ON GAZA ...	1214
CONCLUSION	1219

INTRODUCTION

Majority groups, by virtue of their larger size or their social, political, and economic dominance, are typically able to realize their interests.¹ They tend to dominate the political sphere and decision-making through the possession of majority or exclusive representation in decision-making bodies.² This leaves them well-placed to develop and implement laws and policies that privilege the socio-economic needs and interests of their own group over others. Such dominance manifests in inequitable access to and distribution of resources such as budgets, land, housing, and employment opportunities. In deeply divided societies—and particularly those in which there are substantial national and ethnic minorities—these inequalities can be very significant, resulting in the placement of minority groups in a clearly inferior position. In order to counteract these significant power imbalances and lopsided realities, it is particularly important to place members of minority groups in positions of power and influence. Such positioning can help to ensure that minorities' perspectives are heard, that their needs and interests are represented appropriately in key national forums, and that they can access national resources in practice. Indeed, effective representation and participation in decision-making forums for

1. For discussions on the political, legal, and theoretical dimensions of majority dominance and its impact on minority rights and protections, see generally, WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995) [hereinafter KYMLICKA, *MULTICULTURAL CITIZENSHIP*]; WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* (2007); Asbjørn Eide, *Minority Protection and World Order: Towards a Framework for Law and Policy*, in *UNIVERSAL MINORITY RIGHTS* 87 (Alan Phillips & Allan Rosas eds., 1995); MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT* (2010).

2. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993) (arguing that whites in the United States “have come to expect and rely on [the privileges that accompany the status of being white], and over time these expectations have been affirmed, legitimated, and protected by the law”); Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 7–9 (1999) (arguing that racial equality cannot be achieved unless whites give up the advantages they hold over minorities); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–81 (1987) (examining how structural and unconscious biases reinforce majority dominance in political representation and decision-making); see generally Charles R. Lawrence III, Foreword, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (arguing for a “transformative approach” focused on group-based injustices rather than an individualistic, formal approach to address racial issues).

minorities is a key means of achieving individual and collective equality.³

National and Indigenous minorities, who are often marginalized and excluded from centers of power, require special arrangements to ensure that they and their interests are appropriately represented in national institutions and the decision-making bodies of their countries. Such groups frequently face challenges to achieving basic rights, along with marginalization and discrimination. Appropriate participation and representation in political and administrative bodies can ensure that their special and unique needs and interests are given voice and expression nationally. However, the mere presence of individuals from minority groups in these decision-making forums—that is to say, formal representation—is often itself insufficient to achieve equity and correct historical injustices at the individual and collective levels.⁴ Rather, appropriate representation must be meaningful and substantive; only this type of representation has the potential to influence minorities’ legal and socio-economic status and transform their daily lives. This transformation may require special group-based arrangements and institutional reforms. The fundamental purpose of transformative participation and representation is to ensure that minority groups achieve meaningful equality at the national level, both legally and practically. Where transformative participation and representation occur, they can engender feelings of belonging which contribute to social cohesion and national stability.⁵

Given their importance, international law and norms address rights related to appropriate representation and participation for

3. U.N. Off. of the High Comm’r for Hum. Rts., *Minority Rights: International Standards and Guidance for Implementation*, at 12, U.N. Doc. HR/PUB/10/3 (2010) [hereinafter OHCHR, *Minority Rights*], https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf [https://perma.cc/GA8X-XBWE].

4. *Id.* (“For the participation of persons belonging to minorities to be effective . . . States must also ensure that the participation of representatives of minorities has a substantial influence on the decisions which are taken, so that there is, as far as possible, shared ownership of these decisions.”); *see generally*, ANNE PHILLIPS, *THE POLITICS OF PRESENCE* (1995) (discussing formal political representation for minority groups).

5. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 185–86 (1990) [hereinafter YOUNG, *POLITICS OF DIFFERENCE*]; *see also* Amal Jamal, *Nationalizing States and the Constitution of “Hollow Citizenship”: Israel and Its Palestinian Citizens*, 6 *ETHNOPOLITICS* 471, 477–81 (2007) [hereinafter Jamal, *Hollow Citizenship*] (discussing the political exclusion of Arab-Palestinian communities in the Israeli State).

national and Indigenous minorities. Perhaps the most significant example appears in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶ UNDRIP calls for minorities and their representatives to participate in decision-making processes, and for these processes to align with minorities' group-based interests.⁷ This strong call for Indigenous participation reflects the contributions made by Indigenous peoples globally in drafting the document (at least to a certain extent), and it takes into account the specific challenges and concerns frequently encountered by Indigenous peoples within their countries of citizenship.⁸

This Article will examine the notion of representation for national and Indigenous communities by focusing on the specific case of the Arab-Palestinian minority in Israel. Arab-Palestinians in Israel are a national and Indigenous community that comprises close to 20% of the country's population;⁹ they have significant identity needs and interests, many of which are different from the Jewish majority. Arab-Palestinians have consistently been under-represented—both de jure and de facto—in national institutions since the founding of the State.¹⁰ Their absence from these forums is particularly troubling in light of their disadvantaged socio-economic realities at the individual and collective levels.¹¹ These critical national forums are where

6. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]. For a discussion of UNDRIP's re-empowerment of the world's aboriginal groups, see S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment*, JURIST (Oct. 3, 2007), <https://www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2> [<https://perma.cc/M8Z9-A2TE>].

7. UNDRIP, *supra* note 6, art. 18.

8. Stephen Allen, *The Consequences of Modernity for Indigenous Peoples: An International Appraisal*, 13 INT'L J. MINORITY & GRP. RTS., 315, 320 (2006).

9. Joseph Andraus, *Population of Israel on the Eve of 2023*, CENT. BUREAU OF STAT. (Dec. 28, 2022) (Isr.), <https://www.cbs.gov.il/en/mediarelease/pages/2022/population-of-israel-on-the-eve-of-2023.aspx> [<https://perma.cc/46SU-759A>].

10. Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT'L L. & POL. 885, 972 (2004) [hereinafter Saban, *Minority Rights*].

11. For detailed statistics on these inequalities, see Muhammed Khalaily et al., *Statistical Reports on Arab Society in Israel 2023*, ISR. DEMOCRATIC INST. (2023), <https://en.idi.org.il/media/24717/summary-the-arab-community24-en-web.pdf> [<https://perma.cc/ESE3-JA7J>]; KATIE HESKETH ET AL., ADALAH, THE INEQUALITY REPORT: THE PALESTINIAN ARAB MINORITY IN ISRAEL (2011), https://www.adalah.org/uploads/oldfiles/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf [<https://perma.cc/PT9A-SQ94>]; INT'L CRISIS GRP., IDENTITY CRISIS: ISRAEL AND ITS ARAB CITIZENS (2004) [hereinafter ICG, IDENTITY CRISIS],

decisions about resource allocation and budgets—public assets that belong to all citizens—are made. Such forums are also responsible for shaping the policies and practices that promote identity preservation and influence public life. Therefore, a lack of appropriate representation in these forums impairs the ability of minority groups—including Arab-Palestinians—to obtain collective recognition as a national and Indigenous minority with its own unique identity needs and interests. Furthermore, in deeply divided societies, public resources like language, culture, and State symbols are crucial signifiers of belonging.¹² As such, the lack of appropriate and transformative representation has significant negative implications for marginalized and excluded national minorities such as Arab-Palestinians in Israel.

This Article begins by providing background information on the case study of the Arab-Palestinian Indigenous community in Israel. Part I highlights their marginalized legal and social status in Israel, as well as their inability to wield meaningful influence over their own lives through Israel’s legislature. Part II provides an overview of the relevant instruments of international law that relate to minority rights while highlighting the central role that the right to participation plays in these pivotal legal instruments. Part III outlines Israeli legislation as it relates to the issue of minority representation. Part IV then describes legal actions initiated by the Arab-Palestinian community that aim to engender meaningful representation and participation at the national and regional levels. This Part also provides a critique of the main Israeli Supreme Court rulings in relevant legal cases, demonstrating that while there have been some partial successes in the legal arena, efforts have largely failed to ensure meaningful and transformative representation in practice. It then outlines the reality of representation in practice by documenting the extreme under-representation of Arab-Palestinian citizens.

The Article continues in Part V by discussing the ways in which the Arab-Palestinian community envisions their group-based

<https://www.crisisgroup.org/sites/default/files/25-identity-crisis-israel-and-its-arab-citizens.pdf> [<https://perma.cc/B2JZ-AK5J>]; see generally GAD BARZILAI, COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES (2003) (applying a “critical communitarianism” lens to legal cultures in nonruling, minority communities); Zama Coursen-Neff, *Discrimination Against Palestinian Arab Children in the Israeli Educational System*, 36 N.Y.U. J. INT’L L. & POL. 749 (2004) (considering alternative approaches to liberalism and communitarianism).

12. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 1, at 31–33.

representation as articulated in a series of documents published by community leaders and activists—mainly the Future Vision documents—with a particular focus on proposed constitutional arrangements. Then, based on this Arab-Palestinian case study, Part VI presents a paradigm for promoting meaningful representation and participation for minority groups, arguing that any representation should meet three vital criteria: proportionality, credibility, and effectiveness. Part VII provides an updated perspective on these issues in the wake of the outbreak of the War on Gaza. The Article concludes with some general implications for this case and others.

I. ARAB-PALESTINIANS AS AN INDIGENOUS MINORITY IN ISRAEL: A HISTORICAL OVERVIEW

The Arab-Israeli War of 1948 represents a collective trauma for the Palestinian people—all of whom share the same historical, ethnic, and cultural background.¹³ Palestinians refer to this war as “al-Nakba” (“the catastrophe” in Arabic).¹⁴ It dispossessed them of their lands and dispersed the vast majority of them amongst several neighboring countries as refugees who, today, continue to constitute part of the Palestinian diaspora.¹⁵ Historical memory of the Palestinian Nakba informs contemporary Palestinian outlooks and life experiences and remains an open and unresolved wound despite the passage of time.¹⁶

13. See generally NUR MASALHA, *PALESTINE: A FOUR THOUSAND YEAR HISTORY* (2018) (tracing Palestine’s cultural, historical, and ethnic heritage across several thousand years of recorded history).

14. *About the Nakba*, U.N. INFO. SYS. ON THE QUESTION OF PALESTINE, <https://www.un.org/unispal/about-the-nakba/> [<https://perma.cc/5FUA-UAGL>].

15. The State of Israel prevented the return of the Palestinian refugees to their homeland in defiance of U.N. General Assembly Resolution 194, and successive U.N. resolutions. See generally NUR MASALHA, *THE POLITICS OF DENIAL: ISRAEL AND THE PALESTINIAN REFUGEE PROBLEM* (2003); BARUCH KIMMERLING & JOEL S. MIGDAL, *PALESTINIANS: THE MAKING OF A PEOPLE* (1993); G.A. Res. 194 (III) (Dec. 11, 1948) (discussing the Nakba, the displacement of Palestinians, and the denial of their right to return).

16. For discussions of how Palestinian memory and society is shaped by historical harms and social categorizations, see generally LILA ABU LUGHOD & AHMAN SA’DI, *NAKBA: PALESTINE, 1948 AND THE CLAIMS OF MEMORY* (2007); Nadim Rouhana, *Homeland Nationalism and Guarding Dignity in a Settler Colonial Context: The Palestinian Citizens of Israel Reclaim Their Homeland*, 14 *BORDERLANDS* 1 (2015); Nadim Rouhana & Areej Sabbagh-Khoury, *Settler-Colonial Citizenship: Conceptualizing the Relationship Between Israel and its Palestinian Citizens*, 5 *SETTLER COLONIAL STUD.* 205 (2014); Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish*

Palestinians who remained in historical Palestine—which today encompasses Israel and the 1967 Occupied Palestinian Territories of the West Bank, East Jerusalem, and Gaza¹⁷—can be divided into three broad groups living under three different legal and political systems. The first group includes stateless Palestinians living in the West Bank and Gaza under a combination of Israeli military rule and waning Palestinian self-rule.¹⁸ The second group includes Palestinian residents of Israeli-occupied and -annexed East Jerusalem (Palestinian Jerusalemites) who are legally recognized as residents—but not citizens—of Israel.¹⁹ The third group includes those that are the focus of this Article: Arab-Palestinian minority citizens in the State of Israel who survived the War of 1948 and were subsequently granted Israeli citizenship.²⁰ This community has become a minority in its homeland in the aftermath of war.²¹ While

State, 86 AM. POL. SCI. REV. 432 (1992). See also *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, HUM. RTS. WATCH (Apr. 27, 2021), <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution> [<https://perma.cc/7QAU-YTZU>] (highlighting the crimes of apartheid and persecution of Palestinians in Israeli territory); Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 2024 I.C.J. 189, ¶¶ 103–243 (July 19) (discussing the occupation of Palestinian territories by Israel).

17. See generally Mohammed Haddad & Alia Chughtai, *Israel-Palestinian Conflict: A Brief History in Maps and Charts*, AL JAZEERA (Nov. 27, 2023), <https://www.aljazeera.com/news/2023/11/27/palestine-and-israel-brief-history-maps-and-charts> [<https://perma.cc/X86K-92H4>] (providing a visual guide of the Israel-Palestinian conflict).

18. See Kali Robinson, *Who Governs the Palestinians?*, COUNCIL ON FOREIGN RELS. (May 28, 2024), <https://www.cfr.org/backgrounder/who-governs-palestinians> [<https://perma.cc/L3LX-DCUU>] (discussing the governance of the 5.5 million Palestinians living in Gaza Strip and the West Bank).

19. Kali Robinson, *What to Know About the Arab Citizens of Israel*, COUNCIL ON FOREIGN RELS. (Oct. 26, 2023) [hereinafter Robinson, *Arab Citizens of Israel*], <https://www.cfr.org/backgrounder/what-know-about-arab-citizens-israel> [<https://perma.cc/3PZL-NETK>].

20. For examinations of the legal status, political conditions, and identity struggles of Palestinians in Israel, see generally AS'AD GHANEM, *THE PALESTINIAN-ARAB MINORITY IN ISRAEL, 1948–2000: A POLITICAL STUDY* (2001) [hereinafter GHANEM, *THE PALESTINIAN-ARAB MINORITY*]; NADIM ROUHANA, *PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT* (1997).

21. For example, the Institute for Middle East Understanding estimated that there were 1.9 million Palestinians with Israeli Citizenship as of December 2019, representing approximately 21% of Israel's population. *Fact Sheet*;

the Israeli-Palestinian 1993 Oslo Peace Accords envisioned a Palestinian State in the Palestinian Territories occupied in 1967,²² the Accords failed to include any reference to the status of Arab-Palestinian citizens in Israel who were expected to continue living as an ethnic minority within their homeland.

In the shadow of this history, Arab-Palestinians in Israel view themselves as holding a distinct national and Indigenous identity and as living in their historic homeland. A 2003 report issued by a State commission of inquiry—headed by then-Israeli Supreme Court Justice Theodore Or—referred to the special status of Arabs in Israel as follows:

[T]he Arab minority in Israel is an Indigenous population, which views itself under the hegemony of a majority that is essentially not as such. In the traditional distinction between “Indigenous minorities” and “immigration minorities,” the Arab minority in Israel clearly belongs to the first category. Generally, the Indigenous character of a minority strengthens its self-awareness and the validity of its claims to a large extent beyond those of minorities that emerge, for example, from the integration of immigrants into welfare societies in order to improve their situation.²³

Palestinian Citizens of Israel, INST. FOR MIDDLE E. UNDERSTANDING (Mar. 17, 2021), <https://imeu.org/article/fact-sheet-palestinian-citizens-of-israel> [<https://perma.cc/G3N4-PTFB>].

22. The Oslo Accord, officially called the Declaration of Principles on Interim Self-Government Arrangements, was officially signed at a public ceremony in Washington, D.C., on September 13, 1993, between Israel and the Palestine Liberation Organization (PLO). U.N. Secretary-General, Letter dated Oct. 8, 1993 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, annex, U.N. Doc. A/48/486 (Oct. 11, 1993). According to Article I of the Declaration: “The aim of the Israeli-Palestinian negotiations . . . is . . . to establish a Palestinian Interim Self-Government Authority, the elected Council (the ‘Council’), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement” *Id.* at 4. Article III (titled “Elections”) addresses the holding of general political elections for the Palestinian people in the West Bank and the Gaza Strip. *Id.* at 4–5. Article III (3) provides: “These elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements.” *Id.* at 5.

23. REPORT OF THE STATE COMMISSION OF INQUIRY TO CLARIFY THE CLASHES BETWEEN THE SECURITY FORCES AND ISRAELI CIVILIANS IN OCTOBER 2000, ¶¶ 5–6 (2003).

Despite this strong statement about indigeneity and minority rights, this view is not widely accepted amongst Jewish Israelis.²⁴ Yet the way in which Arab-Palestinian citizens view themselves is consistent with global conceptions of indigeneity.²⁵ This view of indigeneity informs Arab-Palestinians’ perception of themselves within the Israeli State and the collective demands they make on the State.

Arab-Palestinians’ realization of their rights and aspirations as an Indigenous minority are greatly inhibited by their numeric disadvantage within the Israeli State, as well as by discriminatory institutional policies that perpetuate marginalization and exclusion.²⁶ As of 2023, Arab-Palestinian citizens in Israel numbered some 1.6 million people.²⁷ The size of this group has doubled roughly ten times since 1948, but its percentage of the total population in the country

24. See, INT’L CRISIS GRP., BACK TO BASICS: ISRAEL’S ARAB MINORITY AND THE ISRAELI-PALESTINIAN CONFLICT, at ii (2012), <https://www.crisisgroup.org/sites/default/files/119-back-to-basics-israel-s-arab-minority-and-the-israeli-palestinian-conflict.pdf> [<https://perma.cc/6HA7-RHA4>] (“For its part, Israel’s Jewish majority . . . has grown ever more suspicious of a community it views as a potential fifth column. . . . Today, what for most Palestinian citizens is a principled struggle for equal rights is perceived by many Israeli Jews as a dangerous denial of Jewish nationhood.”).

25. For a recent exploration of how Indigenous communities conceive of indigeneity in a globalizing world, see Bronwyn Carlson, *Global Perspectives on Indigeneity: Indigenous Perspectives on Global Indigeneity*, in GLOBAL NETWORKS OF INDIGENEITY: PEOPLES, SOVEREIGNTY AND FUTURES 9 (Bronwyn Carlson et al. eds., 2023).

26. For critiques of the legal status of the Arab minority and the ways in which Arab-Palestinian citizens have been prevented from realizing their rights, see the legal analyses in DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL (1991); Mazen Masri, *Colonial Imprints: Settler-Colonialism as a Fundamental Feature of Israeli Constitutional Law*, 13 INT’L J.L. CONTEXT 388 (2017); Nimer Sultany, *The Legal Structures of Subordination: The Palestinian Minority and Israeli Law*, in ISRAEL AND ITS PALESTINIAN CITIZENS: ETHNIC PRIVILEGES IN THE JEWISH STATE 191, 201–17 (2017); Yousef Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT’L L.J. 345 (2008) [hereinafter Jabareen, *Constitution Building and Equality*]; Yousef Jabareen, *The Arab-Palestinian Community in Israel: A Test Case for Collective Rights Under International Law*, 47 GEO. WASH. INT’L L. REV. 449 (2015); see also Eyal Benvenisti & Dahlia Shaham, *Facially Neutral Discrimination and the Israeli Supreme Court*, 37 N.Y.U. J. INT’L L. & POL. 677, 712–14 (2005) (analyzing the role of the Israeli Supreme Court in protecting the rights of Israel’s Arab citizens).

27. Andraus, *supra* note 9. The two million figure mentioned in the data of the Israeli Central Bureau of Statistics includes about 375,000 Palestinian Jerusalemites mainly in East Jerusalem. *Id.* This means that 1.6 million is a more accurate estimate of the total number of Arab-Palestinians who are citizens in Israel.

has remained constant at about 18%.²⁸ A substantial native, linguistic, and national minority,²⁹ Arab-Palestinians have consistently resided in four main geographical areas within Israel: the Galilee in northern Israel, the Triangle region in the center of the country, the Naqab (Negev) in the south, and in a few coastal cities.³⁰ Approximately 90% of the community lives in over eighty towns and villages that are entirely Arab, while the remainder reside as minority residents in several mixed Arab-Jewish cities mostly located in the coastal region.³¹ These include Haifa, Acre, al-Led/Lydd, Ramleh, and Tel Aviv-Jaffa.³² This geographical distribution reflects historic patterns that enforce and reinforce a kind of social and ethnic segregation in Israel.³³

In the shadow of the ongoing conflict between Israel and its Arab (and specifically Palestinian) neighbors,³⁴ successive Israeli governments have regarded the Arab-Palestinian minority that remained inside the State with a great deal of suspicion. This reflects the perspective of Jewish Israelis more generally who regard Arab-Palestinian citizens with distrust, and who are reluctant to recognize their social and political legitimacy as fully equal citizens.³⁵

28. Robinson, *Arab Citizens of Israel*, *supra* note 19. For a critique of ethnic division and democracy in Israel, see generally As'ad Ghanem, *State and Minority in Israel: The Case of the Ethnic State and the Predicament of its Minority*, 21 ETHNIC & RACIAL STUD. 428 (1998); GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 110–11 (2002).

29. Nadim Rouhana & As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT'L J. MIDDLE E. STUD. 321, 324–26 (1998).

30. Khalaily et al., *supra* note 11, at 4–5.

31. *Id.*

32. *Id.*; see generally GHANEM, THE PALESTINIAN-ARAB MINORITY, *supra* note 20; HUSSEIN ABU HUSSEIN & FIONA MCKAY, ACCESS DENIED: PALESTINIAN ACCESS TO LAND IN ISRAEL (2003) (discussing, inter alia, distribution of the Arab-Palestinian population in Israel).

33. See As'ad Ghanem et al., *Local Authorities and Welfare Services, in AFTER THE RIFT: NEW DIRECTIONS FOR GOVERNMENT POLICY TOWARDS THE ARAB POPULATION IN ISRAEL* 26, 26–32 (Dan Rabinowitz et al. eds., 2000) (discussing the socio-economic subordination of Arab local authorities in Israel).

34. For a general overview of the history of Palestinian statehood, see generally RASHID KHALIDI, THE IRON CAGE: THE STORY OF THE PALESTINIAN STRUGGLE FOR STATEHOOD (2007); RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS (1997). See *infra* Part VII for further discussion on the ongoing War on Gaza.

35. Muhammad Amara, *The Collective Identity of the Arabs in Israel in an Era of Peace*, in THE ISRAELI PALESTINIANS: AN ARAB MINORITY IN THE JEWISH STATE 243, 249–51 (Alexander Bligh ed., 2003); see generally DAN RABINOWITZ &

A. The Legal and Socio-Economic Status of Arab-Palestinians

These tensions find expression in the legal regime of Israel as well as in the socio-economic outcomes of its residents. Arab-Palestinians in Israel face significant legal hurdles to recognition as a unique collective that deserves group-based rights and status. The Knesset, Israel’s legislature, has adopted legislation enshrining the privileged status of Jewish citizens in law while excluding Arab-Palestinian citizens—most significantly the Nation-State Law.³⁶ This legal regime touches on central aspects of life, including land ownership, culture, religious services, and allocation of resources.³⁷ The everyday lived experiences of Arab-Palestinians reflect legal and socio-economic discrimination and marginalization—both of which have resulted in weaker legal, political, economic, and social status for Arab-Palestinians. Indeed, Arab-Palestinian citizens lag far behind their Jewish counterparts by all measurable standards: income, employment, education, infrastructure, housing, and the quality of and access to public services.³⁸ As this Article will demonstrate, Arab-Palestinians are similarly excluded from centers of power and are grossly under-represented in government institutions, as well as in the general public sphere.³⁹ Furthermore, their internally representative political institutions are not granted formal recognition or legitimacy.⁴⁰ This lack of legal recognition and inferior socio-economic status are mutually reinforcing and constitute a vicious cycle of discrimination.

KHAWLA ABU BAKER, *COFFINS ON OUR SHOULDERS: THE EXPERIENCE OF THE PALESTINIAN CITIZENS OF ISRAEL* (2005) (discussing the implementation of “civic nation state” in Western theory).

36. See *Discriminatory Laws in Israel*, ADALAH, <https://www.adalah.org/en/law/index> [<https://perma.cc/8WST-JLWM>] (providing a detailed documentation of these laws). See *infra* Part III for further discussion on the Nation-State Law.

37. For a thorough analysis of these discriminatory laws, see Jabareen, *Constitution Building and Equality*, *supra* note 26, at 360–78.

38. The U.N. Committee on Economic, Social and Cultural Rights wrote in its 1998 Concluding Observations that “the Government of Israel does not accord equal rights to its Arab citizens, although they comprise over 19 per cent of the total population. This discriminatory attitude is apparent in the lower standard of living of Israeli Arabs as a result” of lack of access to housing, water, electricity, health care, and education. U.N. Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations: Israel*, ¶ 236, U.N. Doc. E/C.12/1/Add.27 (Dec. 4, 1998).

39. GHANEM, *THE PALESTINIAN-ARAB MINORITY*, *supra* note 20, at 165.

40. Saban, *Minority Rights*, *supra* note 10, at 976–77.

It is important to note that Israeli law prohibits political activity that challenges the existence of the State of Israel as a Jewish State. Amendment No. 9 to the Basic Law, which the Knesset passed in 1985, stipulates:

A candidates list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset, if the goals or actions of the list or the actions of the person, [including his statements,] expressly or by implication, include . . . negation of the existence of the State of Israel as a Jewish and democratic state⁴¹

Similarly, Article 5(1) of the Parties Law states that “[a] party will not be registered if among its goals or deeds, implicitly or explicitly, is [the d]enial of the existence of the State of Israel as a Jewish and democratic State.”⁴² These prohibitions place significant limitations on the freedoms of Arab and Arab-Jewish political parties; they inhibit their ability to freely engage in political activity and develop their own political agendas.⁴³ It represents a serious obstacle in advocacy towards essential structural changes intended to reform the status of the Arab minority.⁴⁴ Furthermore, under section 75(e) of Knesset Regulations, the chairperson of the Knesset and the deputies are not authorized to approve “a bill that, in their opinion, denies the existence of the State of Israel as the state of the Jewish people or is racist in nature.”⁴⁵ The Arab minority, then, is prevented at the

41. § 7A(1), Basic Law: the Knesset (1958), as amended (Isr.). The bracketed text reflects the latest iteration of this amendment, which is not yet available on the Knesset website.

42. § 5(1), Parties Law (1992) (Isr.).

43. See, e.g., B’TSELEM, NOT A “VIBRANT DEMOCRACY”. THIS IS APARTHEID. 5 (2022) (Isr.) [hereinafter B’TSELEM, NOT A VIBRANT DEMOCRACY], https://www.btselem.org/publications/202210_not_a_vibrant_democracy_this_is_a_parthaid [<https://perma.cc/3PD3-43U8>] (“The message to Palestinians and their candidates is clear: Do not seek full equality and recognition of collective national rights. Demanding equality on matters such as land, immigration and national emblems is perceived as repudiating Israel’s constitutional principles, as it undermines the country’s definition as a Jewish state.”).

44. Saban, *Minority Rights*, *supra* note 10, at 901–02 (“[Israeli law] demarcates ‘taboo territories,’ which prohibit any significant political activity that aims for radical change in the nature of group-differentiated rights granted to the Arab-Palestinian minority. Such prohibitions are evident in the limitations placed on political activity at the party-parliamentary level.”); Amal Jamal, *Political Participation and the Lack of Effective Vote for Arabs in Israel*, in ARABS IN ISRAEL: BARRIERS TO EQUALITY 125, 130–34 (Shlomo Hasson & Michael Karayanni eds., 2006) (Isr.) [hereinafter Jamal, *Political Participation*].

45. § 75(e), Knesset Rules of Procedure (Isr.).

legislative level from seeking the group-based rights that it would be granted were Israel to change from an ethnonational State to an egalitarian or binational State.⁴⁶ These prohibitions represent a substantial obstacle for Arab-Palestinian minority political representatives in their efforts to advance constitutional reform.⁴⁷

B. Representation in Israel’s Lawmaking Body—the Knesset

The inadequate representation of Arab-Palestinians in Israel’s lawmaking body is indicative of these dynamics and creates a lack of influence over legislative decisions that perpetuates the problems described above. Although Arab-Palestinians are entitled to vote for representatives of their choice in the Knesset, their status as a numerical minority means that parties representing their interests invariably hold a minority of seats.⁴⁸ This deeply constrains the decision-making power and influence of Arab-Palestinians. Furthermore, despite any such representation at the formal level, Arab-dominated parties have historically been excluded from ruling coalitions.⁴⁹ This is largely due to ideological disputes, the foremost of which is an unwillingness by successive Israeli governments to guarantee equality for its Arab citizens or to recognize the right of Palestinians to an independent State alongside Israel.⁵⁰ A brief exception occurred during 2021 to 2022 when the Arab United List joined a ruling coalition, but this experience was cut short by a subsequent round of elections.⁵¹ Thus, while Arab-Palestinians’ representation in the Knesset carries political importance for the community, the relatively poor levels of true participation in decision-

46. Saban, *Minority Rights*, *supra* note 10, at 902.

47. *Israeli Supreme Court Refuses to Allow Discussion of Full Equal Rights & ‘State of All Its Citizens’ Bill in Knesset*, ADALAH (Dec. 30, 2018), <https://www.adalah.org/en/content/view/9660> [<https://perma.cc/G3J2-4XZH>].

48. Jamal, *Hollow Citizenship*, *supra* note 5, at 471, 477–81.

49. HESKETH ET AL., *supra* note 11, at 2–11.

50. *Id.* at 52 (noting that “[s]ince 1948, no Arab party has been included in a ruling government coalition” and attributing this exclusion “in part to the unwillingness of other coalition members to invite Arab parties to join them” and in part “to objections on the part of the Arab parties to the policies of these coalitions”).

51. Jack Khoury, *Islamist Party Signed a Coalition Deal, but That Won’t Earn Them a Place in Israeli History*, HAARETZ (May 6, 2021), <https://www.haaretz.com/israel-news/2021-06-05/ty-article/.premium/islamist-party-signed-a-coalition-deal-but-that-wont-earn-them-a-place-in-history/0000017f-e48f-d75c-a7ff-fc8fab210000> [<https://perma.cc/897C-L5RV>].

making mean that this representation is insufficient to make a meaningful difference in the lives of Arab-Palestinian citizens.

Arab-Palestinians' numeric disadvantage in the Knesset is replicated throughout all government institutions in Israel.⁵² Ilan Saban terms this disparity as a "political taboo," which is embedded in the very structure of Israeli political institutions and society. He writes that the Arab-Palestinian minority "does not have a group-differentiated right of participation in societal decision-making institutions, nor does it have special veto powers." Furthermore, he highlights that "there is no right, constitutional practice, or even informal practice of including Arab (or binational) parties in the government; on the contrary, at present at least, there is a political taboo on their inclusion."⁵³

As Saban explains, Israel lacks the structures that could safeguard the rights of minorities, such as constitutional protections or a federated system of government.⁵⁴ Until this changes, the legislative and the executive decision-making branches will fail to serve as effective vehicles for meaningful representation and reform.

II. THE RIGHT TO PARTICIPATION IN INTERNATIONAL LAW

Arab-Palestinians in Israel, along with other Indigenous groups worldwide, experience significant discrimination and disadvantage in law and, consequently, in practice. Initially, instruments of international law focused on discrimination at the individual level.⁵⁵ Over time, and in part due to advocacy by

52. See, e.g., GRACE WERMENBOL, MIDDLE E. INST., THE ONGOING DIVIDE: PALESTINIAN PARTICIPATION IN ISRAELI ELECTIONS 11 (2019), <https://www.mei.edu/publications/ongoing-divide-palestinian-participation-israeli-elections> [<https://perma.cc/NEB3-RG2T>] (noting that the highest percentage of Arab-Palestinian representation in the Israeli executive branch occurred during the government of Prime Minister Rabin when 10% of ministerial and deputy ministerial positions were held by Palestinians).

53. Saban, *Minority Rights*, *supra* note 10, at 972; see also Jamal, *Political Participation*, *supra* note 44, at 127–34 (noting that most of the crucial decisions are made by institutions, representative or administrative, in which there is Jewish hegemony, and, as a result, Arabs are excluded from real and effective participation in determining the political agenda and from defining the possible choices within it).

54. Saban, *Minority Rights*, *supra* note 10.

55. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination art. 2, ¶ 1, *opened for signature* Mar. 7, 1996, 660 U.N.T.S. 195, 216–18 [hereinafter ICERD] ("States Parties condemn racial discrimination

Indigenous and other minority groups, international law has evolved to acknowledge minority groups as collectives, and to recognize corresponding group-based rights.⁵⁶ Indeed, the passage of the 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and the 2007 passage of the U.N. Declaration on the Rights of Indigenous Peoples have served to somewhat “correct” the individualistic bias that had previously dominated international law.⁵⁷ This represents significant strides in addressing the needs of minority and Indigenous groups. Accompanying this development was a recognition that these groups—and their representative institutions—must have a meaningful role in national decision-making institutions about the issues that influence their lives.⁵⁸ This recognition is crucial to realizing two of the fundamental aims of international law: combatting discrimination and achieving equality.

Indigenous peoples and other minorities, as the targets of discrimination and hostility, are acutely aware of the need for participation in decision-making forums which affect their lives, particularly in the realm of national decision-making. This participation is essential for decisions affecting both matters internal to their communities and issues of national importance. Internally, the right to recognition of self-established representative institutions for minority groups is crucial for identity preservation and

and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . .”).

56. See, e.g., UNDRIP, *supra* note 6, art. 4 (“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”).

57. For more legal and practical implications of this shift in international law, see Patrick Thornberry, *An Unfinished Story of Minority Rights, in DIVERSITY IN ACTION: LOCAL PUBLIC MANAGEMENT OF MULTIETHNIC COMMUNITIES IN CENTRAL AND EASTERN EUROPE* 45, 55–56 (2001) [hereinafter Thornberry, *Unfinished Story*]; PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 281–86 (1991) [hereinafter THORNBERRY, *RIGHTS OF MINORITIES*]; Yousef T. Jabareen, *Redefining Minority Rights: Successes and Shortcomings of the UN Declaration on the Rights of Indigenous Peoples*, 18 U.C. DAVIS J. INT’L L. & POL’Y 119, 137 (2011) [hereinafter Jabareen, *Redefining Minority Rights*].

58. See, e.g., UNDRIP, *supra* note 6, art. 18 (“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”)

acknowledgment of their historic and contemporary rights as distinct groups.⁵⁹ Nationally, representative institutions for minority groups must be recognized and granted a mandate to wield meaningful decision-making power within their own communities and national political systems. It is within these systems that State resources—which belong to every citizen—are distributed.⁶⁰ Thus, participation on the national level is also a prerequisite for safeguarding the rights, needs, and interests of minority groups, as well as promoting equality at the individual and collective levels. The right to participation, furthermore, can serve as an important counterweight to the inherent power that majorities often hold nationally, especially when it comes to majorities' tendency to prioritize their own interests over those of minorities.

This Part will outline ways in which the right of participation finds expression in international human rights law and how that right is envisioned to serve as a vehicle for achieving equality for minority collectives. Most prominently, the right of participation appears in the 2007 U.N. Declaration on the Rights of Indigenous Peoples; the 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and other bodies of international law, particularly those developed by the International Labour Organization (ILO). This Part will first present some historical background on minority rights in international law and then will outline ways in which UNDRIP broke new ground on participation and representation for Indigenous persons. It will demonstrate that international law generally provides a strong mandate for the recognition of minority institutions, elements of internal autonomy, and consultation at the national level. Yet, in light of the experience of Arab-Palestinians in Israel, international legal frameworks could be more effective in outlining

59. For instance, Israel's State Education Law of 1953 establishes an autonomous and fully funded pedagogical council which manages religious state education and is comprised mainly of Jewish-religious members who focus on protecting the religious identity of students in this system. §§ 13–15, State Education Law (1953) (Isr.). This is a form of “internal representation”; currently, there is no analogous council for Arab-Palestinian students. Yousef T. Jabareen & Ayman K. Agbaria, *Minority Educational Autonomy Rights: The Case of Arab-Palestinians in Israel*, 24 VA. J. SOC. POL'Y & L. 25, 39–45 (2017).

60. See generally Yousef T. Jabareen, *Toward Participatory Equality: Protecting Minority Rights under International Law*, 41 ISR. L. REV. 635 (2008) [hereinafter Jabareen, *Toward Participatory Equality*] (arguing that institutional recognition and decision-making power is essential to minority political participation and resource allocation).

ways in which minorities and their institutions can meaningfully influence decision-making at the national level within State institutions.

A. First Generation of Human Rights Law

The establishment of the United Nations in 1945 and the passage of the Universal Declaration of Human Rights in 1948 were partly a response to the need for human rights protections in the aftermath of the Second World War.⁶¹ The U.N. Charter prohibits ethnic domination and supremacy by stating that no group has the right to rule over another people, and it gives every nation the right to self-determination.⁶² The European Convention on Human Rights (ECHR) of 1950 echoed these sentiments, although its impact was tempered by its regional approach.⁶³ Though these earlier instruments focused, by and large, on individual rights and freedoms, they laid the groundwork for minority and collective rights protections which appear in subsequent bodies of international and regional law.

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, contains a clear mandate to promote equality for national groups as well as for individuals within nation-States.⁶⁴ Under Article 1(1) of the Covenant, “[a]ll peoples have the right of self-determination. By virtue of this right, they freely determine their political status and pursue their economic, social and cultural development.”⁶⁵ A normative understanding of this Article, as articulated by the U.N. Human Rights Committee, is that peoples

61. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21(1–3) (Dec. 10, 1948) (affirming that everyone has “the right to take part in the government of his country, directly or through freely chosen representatives” and “the right of equal access to public service in his country,” and establishing that “[t]he will of the people should be the basis of the authority of government”); see also KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 1, at 28–38 (discussing the development of international attitudes towards minority rights following the Second World War).

62. U.N. Charter art. 1.

63. Convention on the Protection of Human Rights and Fundamental Freedoms art. 14, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, 232, https://www.echr.coe.int/documents/d/echr/convention_ENG [<https://perma.cc/8Y4A-SF5T>].

64. International Covenant on Civil and Political Rights arts. 1, 2, 26, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171,173–74, 179 [hereinafter ICCPR].

65. *Id.* art. 1, ¶ 1.

have the right “to freely determine their political status and to enjoy the right to choose the form of their constitution or government.”⁶⁶ The ICCPR couples this with a statement outlawing discrimination in Article 2(1), which provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁷

Article 26 further reinforces the principle of equal protection under the law for all persons, stating:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁸

Beyond enjoining States to take positive steps to ensure equality for individuals before the law, the ICCPR also envisions a framework through which individuals can meaningfully influence the political systems under which they live. In particular, Article 25 states that “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions . . . [t]o take part in the conduct of public affairs, directly or through freely chosen representatives”⁶⁹ and “[t]o have access, on general terms of equality, to public service in his country.”⁷⁰ The Human Rights Committee interprets “the conduct of public affairs” as “a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive, and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international,

66. Hum. Rts. Comm., General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1966) [hereinafter General Comment No. 25].

67. ICCPR, *supra* note 64, art. 2, ¶ 1.

68. *Id.* art. 26.

69. *Id.* art. 25(a).

70. *Id.* art. 25(c); General Comment No. 25, *supra* note 66, ¶ 23.

national, regional and local levels."⁷¹ To strengthen this mandate, States are required to submit reports that "describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes" and to "indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent."⁷² Therefore, the ICCPR grants self-determination to "peoples" who, within this context, as individuals, are granted equality under the law and the ability to influence political systems on the national level in order to prevent discrimination.

Yet, the ICCPR goes beyond this individual mandate in a crucial way: in Article 27, it recognizes that in addition to self-determination for specific groups—and in States where minority collectives exist—collectives should be allocated rights as a group.⁷³ This represents the first instance in which minorities were recognized as distinct collectives in international law. Whereas individual rights are granted to each citizen of a given State, group rights are guaranteed to minority groups that are distinct from the majority.⁷⁴ They are generally conferred upon a minority due to its uniqueness as a group.⁷⁵ For a minority group to realize its group rights, the State must establish permanent special arrangements that work to assure appropriate protection of that minority group's unique (and often fragile) collective identity and the minority group's interests.⁷⁶ These protections help minority groups fend off discriminatory actions and pressures to assimilate.⁷⁷ Such rights, including the right to representation and participation, enable minority groups to preserve

71. General Comment No. 25, *supra* note 66, ¶ 5.

72. *Id.* ¶ 24.

73. ICCPR, *supra* note 64, art. 27.

74. Abdulrahim P. Vijapur, *International Protection of Minority Rights*, 43 INT'L STUD. 367, 389 (2006).

75. Saban, *Minority Rights*, *supra* note 10, at 900; *see generally* WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 19 (2001) (examining "the rights and status of ethnocultural groups within Western democracies").

76. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 1, at 37–38; Vijapur, *supra* note 74, at 383.

77. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 1, at 34–35.

their identities, and to grow and develop as a collective on equal footing with the majority group.⁷⁸

The groundbreaking language⁷⁹ of Article 27 states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."⁸⁰ While the phrase "shall not be denied" could be interpreted as a negative right, U.N. institutions and human rights scholars have understood this Article as a positive obligation on States to actively protect minorities from rights violations. For example, in its 1994 General Comment on Article 27, the U.N. Human Rights Committee⁸¹ clarified that:

Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.⁸²

The Human Rights Committee, in a precursor to later developments in international law, also noted that rights protected under Article 27 "may require positive legal measures of protection and measures to ensure the *effective participation* of members of minority communities in decisions which affect them."⁸³ Put differently, States are obligated to grant minority groups and their

78. Asbjørn Eide, *Minority Protection and World Order: Towards a Framework for Law and Policy*, in UNIVERSAL MINORITY RIGHTS 87, 105 (Alan Phillips & Allan Rosas eds., 1995); Jabareen, *Toward Participatory Equality*, *supra* note 60, at 644.

79. Robert Dunbar, *Minority Language Rights in International Law*, 50 INT'L & COMPAR. L. Q. 90, 90–93 (2001).

80. ICCPR, *supra* note 64, art. 27. Article 27 should be read together with Articles 2, 25, and 26 of the ICCPR, as these articles enhance Article 27's vision of equal protection for minorities and the prohibition of discrimination.

81. Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) [hereinafter General Comment No. 23]. General Comment 23 further emphasizes that it is not up to a State to determine who is a minority. *Id.* ¶ 5.2; THORNBERRY, RIGHTS OF MINORITIES, *supra* note 57, at 33.

82. General Comment No. 23, *supra* note 81, ¶ 6.2.

83. *Id.* ¶ 7 (emphasis added).

members both positive and negative—individual and collective—rights based on an understanding that both the positive and negative elements of rights are inseparable and essential to achieving genuine equality. The Human Rights Committee concluded “that Article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole.”⁸⁴ Thus, beyond the mandate to grant equality on an individual basis, Article 27 requires that States create special protective measures to enhance equality for minorities as groups, and that participation serves as a key tool for achieving this.⁸⁵ A more expansive reading of Article 27 indicates that in order for minority group members to enjoy the rights outlined in the Article, they must be sufficiently represented in national institutions and able to participate in decision-making forums;⁸⁶ it implies that such representation and participation may require affirmative action.⁸⁷ Thus, Article 27 lays the groundwork for future developments in international law which emphasize group-based mandates and expand notions of minority participation to be understood as essential to achieving equality.

The ICCPR is joined by other early instruments of international law which also emphasize equality and non-discrimination against minority groups, giving added weight to this mandate as a foundational principle in international law. Article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination obliges States “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of

84. *Id.* ¶ 9.

85. See International Covenant on Economic, Social and Cultural Rights art. 15, *opened for signature* Dec. 19, 1999, 993 U.N.T.S. 3, 9 [hereinafter ICESCR]; ICERD, *supra* note 55, art. 1 (defining “racial discrimination”).

86. Indeed, “the absence of meaningful consultations with the Indigenous community concerned regarding measures that may affect them, normally constitutes a denial of their cultural rights under article 27.” Hum. Rts. Council, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making, ¶ 12, U.N. Doc. A/HRC/15/35 (Aug. 23, 2010) [hereinafter Hum. Rts. Council, Progress Report].

87. For discussions on the positive rights that arising from the text of the General Comment No. 23, and the spirit of the Covenant as a whole, see THORNBERRY, RIGHTS OF MINORITIES, *supra* note 57, at 33; Francesco Capotorti, *Minorities*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 385, 385 (R. Bernhardt ed., 1985).

everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.”⁸⁸ It emphasizes enjoyment of political rights and, in particular, the right “to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.”⁸⁹ The Committee on the Elimination of Racial Discrimination specifically addressed Indigenous peoples in its interpretation of this provision. General Recommendation No. 23 urges States Parties to “[e]nsure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”⁹⁰

Article 2(2) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) also emphasizes non-discrimination, establishing that “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹¹ The U.N. Committee on Economic, Social and Cultural Rights noted that the principle of non-discrimination and equality applies to all of the rights protected by the ICESCR, particularly the right to participate in the economic, social, and cultural life of the State.⁹² The Committee also encouraged States to “allow and encourage the participation of persons belonging to minority groups, Indigenous peoples or to other communities in the design and implementation of laws and policies that affect them” and specifically advised that States Parties “should obtain their free and informed prior consent

88. ICERD, *supra* note 55, art. 5.

89. *Id.* art. 5(c).

90. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, ¶ 4(d), U.N. Doc. A/52/18, annex V (Aug. 18, 1997), https://www.eods.eu/library/UN_International%20Convention%20on%20the%20Elimination%20of%20Racial%20Discrimination_General%20recommendation%2023_1997_EN.pdf [<https://perma.cc/Y9P5-XG77>].

91. ICERD, *supra* note 55, art. 2, ¶ 2.

92. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶¶ 7–14, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter General Comment No. 20]; Comm. on Econ., Soc. & Cultural Rts., General Comment No. 21: Right of Everyone to Take Part in Cultural Life, ¶¶ 7, 21–4, 36–7, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter General Comment No. 21].

when the preservation of their cultural resources . . . are at risk.”⁹³ This indicates that the early framers of international law recognized that non-discrimination at the individual level alone was not sufficient, but that it must also extend to groups, and that participation of such groups in society is a critical tool for achieving this vision.

B. Later Instruments of International Law

Subsequent instruments of international law increasingly focused on collective rights and further strengthened the mandate that minorities, including Indigenous groups, must have the ability to participate in decisions that affect them. For example, Article 30 of the 1989 Convention on the Rights of the Child (CRC) states, in part, that “a child belonging to . . . a minority or who is Indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”⁹⁴ As with ICCPR Article 27, this statement emphasizes the need for group-based equality and rights protections, along with the ability to safeguard their distinct identity by virtue of belonging to a group, including an Indigenous group. Furthermore, and significantly, children under Article 12 of the Convention are granted the right to participation. Indeed, Article 12 “affirms that children, both individually and collectively, have the right to participate in decision-making that may be relevant to their lives and to influence decisions taken in their regard, within the family, school or community.”⁹⁵ Thus, the 1989 Convention builds on and also reinforces earlier instruments of international law.

These same themes—protecting Indigenous peoples as a group and ensuring their participation—are echoed and greatly strengthened in the ILO’s Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.⁹⁶ Article 2

93. General Comment No. 21, *supra* note 92, ¶ 55(e).

94. Convention on the Rights of the Child art. 30, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, 54 [hereinafter CRC].

95. Hum. Rts. Council, Progress Report, *supra* note 86, ¶ 14; *see also* CRC, *supra* note 94, art. 12, ¶ 1 (“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”).

96. Int’l Labour Org., Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, 1650 U.N.T.S. 383, 384

states that “[g]overnments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”⁹⁷ Accordingly, States are required to institutionalize participation of Indigenous peoples with the aim of “ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.”⁹⁸ In other words, participation is directly linked with non-discrimination and equal rights under the ILO Convention. Article 6 strengthens the mandate for participation by obliging States to “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”⁹⁹ This consultation “shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”¹⁰⁰ Article 6 also requires States to “establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them,”¹⁰¹ and to “establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.”¹⁰²

Taken all together, Article 6 establishes several qualitative requirements for ensuring the right of participation for Indigenous peoples. It requires States to establish “representative institutions” that will ideally be included in decision-making at all levels of government through “appropriate procedures,” at least regarding

[hereinafter ILO No. 169]; *see generally* INT’L LAB. STANDARDS DEP’T, INT’L LAB. ORG., INDIGENOUS AND TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169 (2009), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcom/%40publ/documents/publication/wcms_171810.pdf [https://perma.cc/PNL9-UYVU] (providing guidance on the ILO Convention No. 169).

97. ILO No. 169, *supra* note 96, art. 2, ¶ 1.

98. *Id.* art. 2, ¶ 2(a).

99. *Id.* art. 6, ¶ 1(a).

100. *Id.* art. 6, ¶ 2.

101. *Id.* art. 6, ¶ 1(b).

102. *Id.* art. 6, ¶ 1(c).

issues of importance to them.¹⁰³ Acknowledging the tendency to disregard Indigenous peoples and their institutions, it encourages States to conduct consultations “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”¹⁰⁴ Yet, despite these important mandates, the lack of specificity regarding measures which must be taken—and the need for States to opt in—may weaken Article 6’s potential to fully guarantee the right of participation for Indigenous groups.

Article 7 grants Indigenous persons the right to decide their own priorities and to exercise control over their own development—a crucial aspect of internal autonomy and the notion of self-determination.¹⁰⁵ Indeed, ILO Convention 169 represents an important development in international law. Whereas previous documents adopted an integrationist approach, Convention 169 recognizes Indigenous peoples’ distinct ways of life and advocates for their preservation.¹⁰⁶ This is reflected in Article 7, which gives Indigenous peoples the right “to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.”¹⁰⁷ It adds that Indigenous peoples “shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”¹⁰⁸ As such, Article 7 affirms the right of Indigenous peoples to actively influence their life conditions¹⁰⁹ and protect and preserve the environment of the territories they inhabit.¹¹⁰ No less importantly, States are required to ensure their participation in the national forums that make consequential decisions.¹¹¹ The rights of good faith consultation and free participation—on equal footing with other sectors of the population in State institutions which impact their

103. *Id.* art. 6, ¶ 1(a).

104. *Id.* art. 6, ¶ 2.

105. *Id.* art. 7.

106. Jabareen, *Redefining Minority Rights*, *supra* note 57, at 132–33.

107. ILO No. 169, *supra* note 96, art. 7, ¶ 1.

108. *Id.*

109. *Id.* art. 7, ¶¶ 2–3.

110. *Id.* art. 7, ¶ 3.

111. *See supra* text accompanying notes 99–104.

lives—represent the cornerstone of the Convention.¹¹² These Articles were influential in shaping modern perspectives on human rights. Indeed, many of the themes that appear here are echoed in two subsequent U.N. Declarations, which are outlined in greater detail below.

C. The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

While these early instruments of international law emphasize principles of non-discrimination, equality, and integration, they do not address the specific needs of minority groups by virtue of their unique group-based identities. This approach fails to offer protections from assimilation and discrimination that such groups require. The 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in part, acknowledged that lacuna.¹¹³ This document, for the first time in the history of the U.N. system, is devoted to minority rights and establishes minority participation in State institutions as a fundamental right.¹¹⁴ Article 2 states that “[p]ersons belonging to minorities have the right to participate *effectively* in cultural, religious, social, economic and public life”¹¹⁵ and “to participate *effectively* in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.”¹¹⁶

112. For example, Article 15 of the Convention affirms the principle that Indigenous peoples have the right to the natural resources existing on their lands, including the right “to participation in the use, management and conservation of these resources.” ILO No. 169, *supra* note 96, art. 15.

113. G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, at 3 (Dec. 18, 1992) [hereinafter U.N. Declaration on the Rights of Minorities].

114. For a thorough discussion and analysis of how this Declaration changed and built on previous understandings of minority rights, see OHCHR, Minority Rights, *supra* note 3, at 12; see also Patrick Thornberry, *The UN Declaration on the Rights of Minorities: Background, Analysis, Observations, and an Update*, in UNIVERSAL MINORITY RIGHTS 13, 13–76 (Alan Phillips & Allan Rosas eds., 1995) (analyzing the U.N. Declaration on the Rights of Minorities and its establishment of minority participation as a fundamental right).

115. U.N. Declaration on the Rights of Minorities, *supra* note 113, art. 2, ¶ 2 (emphasis added).

116. *Id.* art. 2, ¶ 3 (emphasis added).

Article 4(5) strengthens this mandate by stating: "States should consider appropriate measures so that persons belonging to minorities may participate *fully* in the economic progress and development in their country."¹¹⁷ Toward achieving this effective and full participation, Article 2(3) of the Declaration observes that "[p]ersons belonging to minorities have the right to establish and maintain their own associations."¹¹⁸ In doing so, the 1992 Declaration acknowledges and emphasizes the importance of minority institutions for meaningfully and credibly representing minority groups and for preserving their group identity. Further, it highlights the right of individuals belonging to minority groups to participate in decision-making by outside actors, particularly where such decisions may have an impact on their minority group. The Declaration's mandate that this participation be "effective" and "full" serves as an acknowledgement that minority participation in its current form is often tokenistic and insufficient for achieving equality on the individual and collective levels.¹¹⁹

However, the Declaration's language lacks specific obligations on States vis-à-vis minorities. While the Declaration provides for wide-ranging rights of participation, including the right to establish and maintain minority associations, it does not specify the modalities of participation and mechanisms necessary for effective representation.¹²⁰ For example, it stops short of giving minority institutions meaningful influence over their internal affairs and in national institutions. Such a right is particularly important for Indigenous minorities given majorities' ongoing attempts to force their assimilation, to dispossess Indigenous groups of their land and resources, and to divide them and co-opt them into national systems—to name just a few obstacles.¹²¹ Thus, more specific and stringent mandates for participation are required.

117. *Id.* art. 4, ¶ 5 (emphasis added).

118. *Id.* art. 2, ¶ 4.

119. *Id.*

120. Thornberry, *Unfinished Story*, *supra* note 57, at 55; *see generally* Frances Raday, *Self-Determination and Minority Rights*, 26 *FORDHAM INT'L L.J.* 453, 454–61 (2003) (arguing that the 1992 Declaration is merely persuasive, not authoritative).

121. See JOSÉ R. MARTÍNEZ COBO, SPECIAL RAPPOREUR OF THE SUB-COMM'N ON PREVENTION OF DISCRIMINATION & PROT. OF MINORITIES, *STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS*, at 16, U.N. Doc. E/CN.4/Sub.2/1986/7Add.1-4, U.N. Sales No. E.86/XIV.3 (1986) (arguing that there have often been massive violations of the rights of Indigenous people in relation to their land); Siegfried Wiessner, *Rights and Status of Indigenous*

Soon thereafter, in 1995, a regional convention devoted to national minority rights was adopted in Europe and added to the ECHR: the European Framework Convention for the Protection of National Minorities (FCNM).¹²² Despite the term “framework,” the document is legally binding on its European signatories and is supported by an implementation mechanism under the Committee of Ministers.¹²³ The FCNM outlines the rights that States must grant to national minorities (along with obligations to be respected by member States) including the right to influence public decision-making regarding issues affecting minorities and the right to participate in the cultural, social, and economic life of the State. Article 15 is instructive; it provides that “[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”¹²⁴ Unlike the 1992 Declaration, the phrase “shall create the conditions necessary” imposed on signatories an affirmative obligation to enact policy or legislation to promote minority participation. This is a notable advancement from the 1992 Declaration, which merely recognized the collective right to minority participation without requiring States to take any enforcement action.¹²⁵ While the FCNM is regional rather than international, it serves as a source of reference and is influential in determining matters pertaining to minority rights internationally.¹²⁶

D. The U.N. Declaration on the Rights of Indigenous Peoples

As outlined above, early U.N. instruments were primarily individualistic and did not specifically address collective rights—particularly the collective rights of Indigenous minorities. While early

Peoples: A Global Comparative and International Legal Analysis, 12 HARV. HUM. RTS. J. 57, 98 (1999) (stating that the power dynamic between the conqueror and the conquered is asymmetrical and skewed to the advantage of the conqueror).

122. Council of Europe, Framework Convention for the Protection of National Minorities, *opened for signature on Feb. 1, 1995*, E.T.S. 157 (*entered into force Jan. 2, 1998*).

123. *Id.* arts. 24, 27.

124. *Id.* art. 15.

125. See U.N. Declaration on the Rights of Minorities, *supra* note 113, art. 2 (recognizing myriad rights of persons belonging to minority groups while omitting any obligation to enforce such rights).

126. COUNCIL OF EUR., THE FRAMEWORK CONVENTION: A KEY TOOL TO MANAGING DIVERSITY THROUGH MINORITY RIGHTS 6–7 (2016), <https://rm.coe.int/16806a8fe8> [<https://perma.cc/EA8G-5ZDU>].

instruments recognized that minority collectives have specific needs and interests, the importance of their representative institutions in overseeing their internal affairs and in serving a consultative function within nation-States was left undefined. This oversight was an obstacle to realizing the right to equality and eliminating discrimination experienced by minorities as both individuals and collectives. Passage of the U.N. Declaration on the Rights of Indigenous Peoples made great strides in rectifying these lacunae—in part because Indigenous peoples were instrumental, for the first time, in the formulation of a document central to their rights.¹²⁷ It is much broader in scope than the 1992 Declaration and codifies within the U.N. system many of the mandates outlined in ILO Convention 169. Specifically, it couples many of its rights provisions with strong statements of obligation directed at States and enhances the influence of minority institutions on issues which are internal to them and within decision-making forums that influence their lives nationally and in public life more generally.

A number of articles in UNDRIP address participation, of which Articles 5, 18, and 19 are probably the most significant. Article 5 establishes the main principles of participation, declaring that “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate *fully*, if they so choose, in the political, economic, social and cultural life of the state.”¹²⁸ Article 5 thus establishes two types of protections regarding participation. Firstly, it calls for Indigenous groups to be able to establish and manage their own institutions; these are envisioned as being

127. See generally UNDRIP, *supra* note 6 (articulating many rights and protections specific to Indigenous peoples, as well as reaffirming the application of international human rights law generally to Indigenous peoples); *Participation of Indigenous Peoples in the United Nations: OHCHR and Indigenous Peoples*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/indigenous-peoples/participation-indigenous-peoples-united-nations> (on file with the *Columbia Human Rights Law Review*) (describing UNDRIP as “a result of extensive collaboration and advocacy by Indigenous Peoples”); Lola Ayotunde, *Evaluation of Indigenous Peoples Influence During the Drafting Process of UNDRIP*, in RESEARCH HANDBOOK ON THE INTERNATIONAL LAW OF INDIGENOUS RIGHTS 56 (Dwight Newman ed., 2022) (discussing the influence of Indigenous advocacy and negotiations on the language of UNDRIP, as well as the limitations on that influence). See also Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 543 (2009) (stating that the UNDRIP had an almost world-wide consensus among many countries).

128. UNDRIP, *supra* note 6, art. 5 (emphasis added).

representative institutions which manage issues of internal importance to the community and protect them vis-à-vis the State. Secondly, Article 5 guarantees Indigenous peoples the right to *full* participation in the political, economic, social, and cultural life of the State. Full participation can be interpreted as applying to all of governance and at all levels of authority both internally and nationally. A precondition for full participation is representation in decision-making bodies related to the political, economic, social, and cultural affairs of the State.

Article 5 should be read together with Articles 18 and 19. Article 18 stipulates that Indigenous peoples have “the right to participate in decision-making in matters which would affect their rights.”¹²⁹ This is notable because it implicitly recognizes the importance of guaranteeing participation to Indigenous peoples as particularly vulnerable or disenfranchised groups. Beyond “matters which would affect their rights,” Article 19 requires states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”¹³⁰ This Article places a strong obligation on States; they must cooperate “in good faith” with Indigenous communities and seek their approval prior to adopting legislative and administrative measures that may affect them. This language requires more from States than mere consultation; although the Declaration does not explicitly use the word “veto,” Article 19’s requirement that the State obtain Indigenous approval implicitly grants minority groups the power to block decisions that negatively impact them.¹³¹ Articles 5, 18, and 19 collectively impose a strong and comprehensive mandate to

129. *Id.* art. 18 (“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”).

130. *Id.* art. 19.

131. U.N. Off. of the High Comm’r for Hum. Rts., *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, at 27, U.N. Doc. HR/PUB/13/2. (2013) [hereinafter OHCHR, UNDRIP Manual], <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> [https://perma.cc/XXY7-MVT3] (quoting the Special Rapporteur on the rights of indigenous peoples as saying that “[i]n certain contexts, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent”).

strengthen Indigenous minority participation by enabling civic engagement, thus creating more representative institutions for minority groups in both internal and national affairs. Indeed, for this right of participation—as it is referred to in Article 5—to be genuine and effective, Indigenous minorities and their representative institutions must be guaranteed full and effective participation in national decision-making forums.

Unlike previous international legal documents, UNDRIP is quite specific regarding what areas of control and influence should be granted to Indigenous peoples. In fact, many of UNDRIP’s legal prescriptions are tailored to address the particular human rights violations that Indigenous peoples most often encounter. For example, Article 31 advocates for the protection and development of cultural life of Indigenous groups,¹³² while Article 32 addresses strategies for the development and usage of lands held by Indigenous peoples.¹³³ These particularized protections necessarily reinforce the need for influential Indigenous participation at the national level.¹³⁴

UNDRIP builds on existing instruments of international law and breaks new ground in its recognition of participation as essential to realizing individual and collective rights for Indigenous peoples. The Declaration serves as a paradigm for meaningful representation, as the participation of Indigenous voices in the drafting process led to a document that reflected the interests and concerns of the group for which it is written.¹³⁵ Although UNDRIP builds on existing instruments of international law, it is groundbreaking in its recognition that participation is essential for realization of both

132. UNDRIP, *supra* note 6, art. 31 (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”).

133. *Id.* art. 32 (“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”).

134. Another obvious example comes from Article 6, which establishes that “[e]very indigenous individual has the right to a nationality.” *Id.* art. 6. The right to a nationality is necessarily a right that can only be afforded by States. *See, e.g., OHCHR and the Right to a Nationality*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/nationality-and-statelessness> (on file with the *Columbia Human Rights Law Review*) (“States must comply with their human rights obligations concerning the granting and loss of nationality.”)

135. OHCHR, UNDRIP Manual, *supra* note 131, at ii.

individual and group-based equality on the national level and, in particular, for Indigenous persons.¹³⁶

The United Nations has provided guidance on how to interpret and implement instruments of international law in relation to participation.¹³⁷ In 2010, the U.N. Office of the High Commissioner for Human Rights issued guidance for States which reiterates the importance of participation for minorities.¹³⁸ The guidelines state that “mechanisms are required to ensure that the diversity of society with regard to minority groups is reflected in public institutions, such as national parliaments, the civil service sector” and that minorities must be “adequately represented, consulted and have a voice in decisions which affect them or the territories and regions in which they live.”¹³⁹ It further calls for participation which is “meaningful” and “effective,” and not merely “symbolic.”¹⁴⁰ Again, the document recognizes and emphasizes the challenges that minorities face before concluding that formal participation is insufficient; rather, “States must also ensure that the participation of representatives of minorities has a substantial influence on the decisions which are taken, so that there is, as far as possible, shared ownership of these decisions.”¹⁴¹ Specifically, it points to the importance of “preserving their identity and combating social exclusion.”¹⁴² Thus, beyond the important mandates in the declarations themselves, the United Nation has emphasized that States, operationally, must take steps to integrate these principles into their governance structures.

III. THE RIGHT TO REPRESENTATION IN ISRAELI LEGISLATION

The preceding Part demonstrated the various ways in which international law emphasizes *participation*: both formal participation of Indigenous communities through representative bodies as outlined in UNDRIP, and effective participation in cultural, religious, social, economic, and public life, as emphasized in the 1992 Minorities Declaration.¹⁴³ This Part will explore how domestic Israeli legislation

136. *Id.* at 24–30.

137. OHCHR, *Minority Rights*, *supra* note 3, at 12.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Various scholars advocate for group-based representation, which is believed to be central to advancing minorities' rights and promoting democracy and justice. *See, e.g.*, KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 1, at

has interpreted *representation* in the context of marginalized and/or disadvantaged groups. In several pieces of legislation and government decisions, such as the Civil Service Law and the Government Corporations Law, Israeli law calls for “appropriate representation” of marginalized groups.¹⁴⁴ Yet nowhere is this “appropriateness” standard defined. In other words, Israel has not heeded the international legal command for full and effective participation of minorities as individuals and collectives. Rather, Israeli law seems to assume that having a seat at the table is sufficient on its own to ensure minority voices are heard. This Article argues that achieving full and effective participation—as opposed to merely symbolic representation—requires a detailed, committed, and legally binding mandate. Therefore, in order to comply with international law, Israel’s mandate for “appropriate representation” must require proportionality, credibility, and effective representation.

Despite being a substantial national and Indigenous minority with a distinct identity, Arab-Palestinian citizens are generally not offered group-based protections in Israeli legislation.¹⁴⁵ Indeed, their

131 (arguing that group-based representation is not undemocratic but consistent with democratic systems of representations). Young claims that collective representation promotes just outcomes for marginalized and oppressed groups because it maximizes the social knowledge expressed in discussion and thus furthers practical wisdom. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 33–36 (2002) [hereinafter YOUNG, *INCLUSION AND DEMOCRACY*]; see also YOUNG, *POLITICS OF DIFFERENCE*, *supra* note 5, at 185–86 (arguing similarly that transformative approaches to representation increase feelings of belonging and social cohesion); PHILLIPS, *supra* note 4, at 39 (arguing that a lack of minority representation is antithetical to modern democracy). Browning, Marshall, and Tabb express a similar idea which they term political incorporation in policy-making. RUFUS P. BROWNING ET AL., *PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS* 27 (1984). Incorporation promotes the ability of the minority group to influence allocation of state resources, especially in relation to budgets and land. This influence on the distribution of state resources is part of a broader vision of “participatory equality” for minority groups. For more on this vision, see Jabareen, *Toward Participatory Equality*, *supra* note 60.

144. See, e.g., JOHN HANNA BITAR, INT’L CTR. FOR THE STUDY OF RADICALISATION & POL. VIOLENCE, *ARTICLE 15 OF THE CIVIL SERVICE LAW (APPOINTMENTS) 1959 – HAVE WE REACHED THE INHERITANCE?* 4 & n.3 (2017), <https://icsr.info/wp-content/uploads/2017/07/Article-15-of-the-Civil-Service-Law-Appointments-1959-%E2%80%93-Have-we-reached-the-inheritance.pdf> [https://perma.cc/YD9L-KPQG] (discussing the “appropriate representation” standard within § 15A, Civil Service Law (Appointments) (1959), as amended (Isr.)).

145. Jabareen, *Constitution Building and Equality*, *supra* note 26, at 363; see, e.g., *Exclusion of Arab Citizens of Israel from Civil Service Jobs, Municipalities in*

standing as a distinct minority group—with its own specific needs and interests—is poorly developed and articulated in Israeli legislation. This stands in stark contrast to extensive and detailed legal arrangements which protect and facilitate the collective status of the Jewish majority. For example, most Arab-Palestinians attend school in an Arabic language education system. However, unlike the religious Jewish sector, there is no law enabling this minority to manage its own education through Arab educational institutions and forums established and recognized by Arab-Palestinian leadership.¹⁴⁶ While Israeli law recognizes the Arab minority for purposes of appropriate representation, this recognition is weak in terms of actual protections granted, especially in comparison to other groups in Israel.¹⁴⁷ Thus, the group that is most in need of protection is, in fact, the least protected by relevant legislation. This Part will outline how this relative anomaly came about, situating it within the broader context of representation for “special” groups in Israel.

A. Legislation Mandating Appropriate Representation

In Israel, discrimination and stereotyping of marginalized groups in employment and representation decisions is pervasive at all levels: in national decision-making bodies, in government ministries, in government corporations, and in local government.¹⁴⁸ These job market dynamics have deep historical roots and reflect social

the Mixed Cities and in the Private Sector, ADALAH (June 26, 2011), <https://www.adalah.org/en/content/view/7625> [<https://perma.cc/7VRQ-XBGU>] (discussing the exclusion of Arab-Palestinian citizens as a result of specific pieces of domestic legislation).

146. Jabareen & Agbaria, *supra* note 59, at 43–48; Ayman K. Agbaria et al., *In Your Face? Democracy: Education for Belonging and its Challenges in Israel*, 41 BRIT. EDUC. RSCH. J. 143, 145–51 (2014). For a discussion of the challenges Arab-Palestinian students face in Israeli academia, see Tamar Hager & Yousef Jabareen, *From Marginalization to Integration: Arab-Palestinians in Israeli Academia*, 20 INT’L J. INCLUSIVE EDUC. 455, 460–70 (2016).

147. See discussion *infra* Section III.A (comparing legislative efforts to guarantee appropriate representation of different groups in Israel).

148. See, e.g., Sharon Rabin-Margalioth, *Labor Market Discrimination Against Arab Israeli Citizens: Can Something Be Done?*, 36 N.Y.U. J. INT’L L. & POL. 845, 879 (2004) (discussing discrimination in the labor market); *Government of Israel as a Diverse Employer: The Civil Service Commission 2019 Diversity Report*, TASK FORCE ON ARAB CITIZENS OF ISR. (Aug. 27, 2020) (Isr.) [hereinafter *Israel as a Diverse Employer*], <https://www.acitaskforce.org/resource/government-of-israel-as-a-diverse-employer-the-civil-service-commission-2019-diversity-report> [<https://perma.cc/2BKB-BYN7>] (discussing employment of Arab citizens by governmental agencies).

patterns of behavior which continue to influence current trends in representation in both the public and the private sectors.¹⁴⁹ In attempting to rectify this situation, the government initiated legislation mandating appropriate representation for certain marginalized groups and adopted various governmental programs intended to support and promote such aims.¹⁵⁰ Initially, following advocacy and pressure from women’s rights groups, these efforts focused on the under-representation of women.¹⁵¹ Legal developments for women in the early 1990s established precedents which subsequently opened the door to enhanced representation for other groups, including Arab-Palestinian citizens.¹⁵² This Section outlines the legal framework underlying representation for under-represented groups. It first describes the primary domestic legal bases for appropriate representation for women in Israel: the Civil Service Law and the Governmental Corporations Law. It then describes how these legislative mandates have been expanded to include other under-represented groups. Finally, it outlines ways in which the law has only partially addressed Arab-Palestinian citizens in Israel.

Initially, legislation on appropriate representation in Israel focused exclusively on women, in part due to feminist struggles and increasing social acknowledgment of the historical injustice towards women.¹⁵³ In 1993, the Knesset passed an amendment to the Governmental Corporations Law mandating appropriate representation for women as board members in government-controlled corporations.¹⁵⁴ Soon thereafter, in 1995, the Knesset

149. See Ilan Saban, *Appropriate Representation of Minorities: Canada’s Two Types Structure and the Arab-Palestinian Minority in Israel*, 24 PENN ST. INT’L L. REV. 563, 586–93 (2006) [hereinafter Saban, *Appropriate Representation*] (discussing the social, political, and historical context of inequality for Arab-Palestinians and exploring how it may be resolved, including through lessons from Canada).

150. For more on these programs, see *Israel as a Diverse Employer*, *supra* note 148.

151. Abeer Baker, *On Gender, Nationalism and Universalism: The Legal Issue of Representation for Women in Israel*, 20 ADALAH’S NEWSL. 1, 1–2 (2005).

152. *Id.* at 1.

153. *Id.* at 2.

154. § 18A, Government Corporations Law (1975), as amended (Isr.); see also Baker, *supra* note 151, at 1 (discussing the passage of the amendment that created section 18A). At the time of the passage of this law, men continued to be appointed to the boards of two government corporations, despite the complete absence of women directors on these boards. This precipitated the filing of a legal petition about this matter in 1994. HCJ 453/94 Israel Women’s Network v. Government of Israel, IsrSC 48(5) 501 (1994) (Isr.).

passed section 15A of the Civil Service Law, requiring appropriate representation for women in the civil service.¹⁵⁵ In 2000, the Knesset amended the Women's Equal Rights Law to include section 6C, which likewise addresses appropriate representation.¹⁵⁶ Section 6C is much broader than the two previous laws, which are limited to specific bodies (namely, boards of government corporations and the civil service). As amended, section 6C states that women will have appropriate representation in public bodies in different roles and at different levels of employment, administration, directorship, and management committees,¹⁵⁷ and also in government oversight committees, public committees and other teams appointed by prime minister, minister, deputy minister, or general director of government ministry.¹⁵⁸ In addition to national government ministries, this law encompasses roles in local government, government corporations, municipal corporations, public corporations, and other bodies that have been established according to law.¹⁵⁹ By its deliberately broad terms, section 6C even implicitly extends to committees that will be established by the government in the future.

These legal advances for women set the stage for inclusion of other groups. In 2000, the Civil Service Law was amended to include the Arab minority.¹⁶⁰ The law mandates appropriate representation of employees in all government offices for the "Arab population."¹⁶¹ Additional amendments extend the protections of this law to

155. § 15A, Civil Service Law (Appointments) (1959), as amended (Isr.).

156. § 6C, Women's Equal Rights Law (1951), as amended (Isr.).

157. Titled "Appropriate Representation," section 6C(a) reads: "In public bodies and in tenders and appointing committees of public bodies, appropriate expression will be given, under the relevant circumstances, to representation of women in all positions and various rankings among employees, administration, directorship and management committees." *Id.* § 6C(a).

158. *Id.* § 6C1(b) ("In government oversight committees, public committees, and other teams appointed by a prime minister, a minister, a deputy minister or a general director of government ministry (in this section – the appointing entity), appropriate representation will be given, under the relevant circumstances, to women from various population groups.").

159. *Id.* § 6C(c)(1)–(5).

160. § 15A, Civil Service Law (Appointments) (1959), as amended (Isr.).

161. Bitar translates section 15A as providing in part that "among civil service employees, including all ranks and professions, each transmitter and unit will be given appropriate expression, under the circumstances, the representation of both sexes, people with disabilities, and members of the Arab population, including Druze and Adyghe people, and considering their proportion in the population." BITAR, *supra* note 144, at 4 & n.3 (citing § 15A, Civil Service Law (Appointments) (1959), as amended (Isr.)).

additional groups as well—namely, people with disabilities, Israelis of Ethiopian descent, new immigrants, and Ultra-Orthodox Jews.¹⁶² The legal mandate is identical for each of these groups. Section 15A, which is entitled “Appropriate Representation Among Employees in the Civil Services,” reads:

Within employees in government service, in all ranks and professions, in every [government] ministry and related unit, appropriate expression will be given, under the relevant circumstances, to representation of individuals of both sexes, people with disabilities, people belonging to the Arab population including Druze and Circassians, for individuals who themselves or one of their parents was born in Ethiopia, for the Ultra-Orthodox population and for new immigrants.¹⁶³

This law addresses qualitative representation by mandating that appropriate representation should be inclusive of all hierarchical levels and positions.¹⁶⁴ Section 15A also establishes mechanisms and conditions of enforcement. For example, the State Civil Service Commission must proactively increase and improve representation for the specified groups, and the government is mandated to set goals for achieving appropriate representation.¹⁶⁵ Government agencies are also required to submit regular reports to the relevant parliamentary committees regarding their progress in achieving established goals.¹⁶⁶ However, the absence of a definition for “appropriate representation” in the law means that these mechanisms and goals are essentially made-up targets dependent on the political will of the government.¹⁶⁷

The Government Corporations Law was also amended to require appropriate representation for Arabs on the boards of directors of government corporations. As amended, the law now mandates that “[i]n the board of directors of governmental

162. See generally AMIR PRAGER, KNESSET RSCH. & INFO. CTR., APPROPRIATE REPRESENTATION OF PEOPLE WITH DISABILITIES IN THE CIVIL SERVICE (2020) (Isr.), <https://main.knesset.gov.il/EN/activity/mmm/AppropriateRepresentationPeoplewithDisabilities.pdf> [<https://perma.cc/3SZV-BD5V>] (discussing the scope of the “appropriate representation” requirement).

163. § 15A, Civil Service Law (Appointments) (1959), as amended (Isr.).

164. Saban, *Minority Rights*, *supra* note 10, at 978–82.

165. *Id.* at 978.

166. BITAR, *supra* note 144, at 6.

167. See, e.g., *id.* (“We can argue that the number of Arab representatives considered ‘suitable’ for the principle of fair representation [under section 15A] is subjective.”).

corporations, there should be appropriate expression for the representation of the Arab population.”¹⁶⁸ Like the Civil Service Law, this law has been amended over time to include appropriate representation for four additional groups: people with disabilities, people of Ethiopian descent, new immigrants, and the Ultra-Orthodox.¹⁶⁹ Today, all of these groups are entitled to appropriate representation on both the boards of directors of government corporations and within the ranks of government employees.

This legislation has since been interpreted by the Israeli Supreme Court. In a prominent ruling regarding appropriate representation for women on the boards of government corporations, the Court emphasized two judicial principles.¹⁷⁰ First, it stated that where there are two candidates of equal talent and ability and one candidate is a member of one of the groups specified in the law, the government must hire the candidate from that group as a matter of affirmative action.¹⁷¹ This was meant to neutralize a natural bias for selecting an individual from the dominant group over those from disadvantaged groups.¹⁷² Second, the Court obligated the government to proactively undertake concerted and targeted outreach to these disadvantaged populations in order to identify qualified applicants.¹⁷³

Additional legislation broadened the scope of “appropriate representation” requirements within government corporations, public corporations established by law, and local governments relating to women,¹⁷⁴ Israelis of Ethiopian descent,¹⁷⁵ and people with disabilities.¹⁷⁶ For women, “appropriate representation” has also been

168. § 18A1, Government Corporations Law (1975), as amended (Isr.). Importantly, Government Decision number 735 of 2003 states that there should be at least one Arab on the board of each government company and on the board of directors of each body established by law. Gov’t Decision No. 735, *The Promotion of Equality and the Integration of the Arab Citizens of Israel* (Aug. 19, 2003) (Isr.), https://www.gov.il/he/departments/policies/2003_aug735 [https://perma.cc/FPN3-DVQ4].

169. § 18A1, Government Corporations Law (1975), as amended (Isr.).

170. HCJ 453/94 Women’s Network in Israel v. Government of Israel, 48(5) PD 501, 521 (1994) (Isr.).

171. *Id.* at 528–29, ¶¶ 28–29.

172. *Id.*

173. *Id.* at 529, ¶ 30.

174. *See, e.g.*, The Amendment of the Local Authorities Law (Appropriate Representation) (2004) (Isr.).

175. *See* Expansion of Appropriate Representation for Persons of the Ethiopian Community in the Civil Services (Legislative Amendments) (2011) (Isr.).

176. *See* § 9, Equal Rights for Persons with Disabilities Law (1998) (Isr.).

expanded to include representation in specific key public bodies, such as the Judicial Appointments Committee (requiring that it consist of at least four women out of a total of nine members).¹⁷⁷ For people with disabilities, an entirely separate law requires that they receive appropriate representation in the private sector.¹⁷⁸ Nonetheless, the Arab community’s right to representation has not changed since 2000.¹⁷⁹ Thus, today, Arab-Palestinians only legally enjoy the right to fair representation in the civil services and on boards of government corporations.

Under international human rights law, Arab-Palestinians are entitled to enhanced protections given their status as ethnic and Indigenous minorities. Yet, the current Israeli legislation falls short of ensuring any semblance of equality.¹⁸⁰ The vague mandate for “appropriate representation” of Arab-Palestinians, which is limited to the boards of government corporations and the civil service, stands in stark contrast to the international legal mandate for “full and effective” representation. Not only do Israel’s laws fail to define “appropriate representation,” they also fail to detail any specific implementation measures the State is required to undertake.¹⁸¹ This problem is compounded by Arab-Palestinians’ exclusion from processes to appoint their own representatives.¹⁸² Together, these

177. See Anat Thon Ashkenazy, *The Ramifications of the Judicial Reform for the Status of Women in Israel*, ISR. DEMOCRACY INST. (Mar. 5, 2023), <https://en.idi.org.il/articles/48099> [<https://perma.cc/2A72-BVA5>] (noting that the Basic Law: The Judiciary requires four female members out of nine on the Judicial Appointments Committee).

178. Equal Rights for Persons with Disabilities Law (1998) (Isr.).

179. Legislative initiatives to broaden the legal mandate of appropriate representation for the Arab community—similar to the mandate for women or Ethiopians—were not approved in the Knesset. For an example of this, see the bill presented by the author of this Article, Draft Bill for Government Corporations (Amendment – Appropriate Representation for Arab Population), 5207/20 (Private Member Bill) (Isr.), (on file with the *Columbia Human Rights Law Review*) (proposing inclusion of appropriate representation of Arabs among employees of government corporations); see also *Sikkuy Leads a Campaign for Arab Representation in the Workplace*, NEW ISR. FUND (Nov. 29, 2018), <https://www.nif.org/stories/palestinian-citizens-of-israel/sikkuy-leads-a-campaign-for-arab-representation-in-the-workplace> [<https://perma.cc/LWH5-A4WW>] (discussing the introduction of the proposed legislation).

180. See generally BITAR, *supra* note 144 (examining inequalities associated with a lack of Arab representation and arguing that this is in part because of defects in the current legal regime).

181. Saban, *Appropriate Representation*, *supra* note 149, at 563–94.

182. See, e.g., *Appointment of Only 3 Arab Judges Reflects Deeply Rooted Discrimination Within Israeli Judicial System*, FRIENDS OF MOSSAWA (Jan. 31,

factors virtually guarantee that Arab-Palestinian voices, as a collective, will not enjoy any meaningful influence in decision-making, over both general national policy and decisions which specifically impact them.

B. The Nation-State Law

As discussed in the previous Section, the Israeli legislature has passed legislation promoting the representation of under-represented groups in government bodies. Some legislation aims to enhance Arab-Palestinian representation in forums where decisions are made at the national level; however, these efforts are limited to individuals and do nothing about ensuring group rights under international law.¹⁸³ To date, Israel has categorically refrained from providing Arab-Palestinian citizens with the type of collective or group-based rights that international law mandates for Indigenous and other minority groups. Yet historically, such privileges have been granted to the Jewish majority.¹⁸⁴ In 2018, this blatant inequity was further codified in the passage of a seminal piece of legislation with constitutional status—legislation which undercuts any other government attempt to promote equality for Arab-Palestinians as individuals and as a collective.¹⁸⁵ This Section will outline the significance of that legislation with a focus on the ways in which it privileges the Jewish majority and, consequently, hinders Arab-Palestinian attempts to secure equality, including as it relates to the right of participation.

2025), <https://www.friendsofmossawa.org/post/appoint-of-only-3-arab-judges-reflects-deeply-rooted-discrimination-in-within-israeli-judicial-system> [https://perma.cc/7RA7-MYJA] (criticizing the lack of Arab representation on the Judicial Appointments Committee and arguing that this has perpetuated under-representation of Arabs in the Israeli judiciary).

183. Compare Section III.A (discussing relevant legislation), with Section II.D (discussing the recognition of certain group rights under UNDRIP).

184. CLAUDE KLEIN, ISRAEL AS A NATION-STATE AND THE PROBLEM OF THE ARAB MINORITY: IN SEARCH OF A STATUS 11–15 (1987); see generally KRETZMER, *supra* note 26 (discussing the historical granting of privileges to the Jewish majority); Jabareen, *Constitution Building and Equality*, *supra* note 26 (same).

185. Yousef Jabareen, *Op-Ed: Israel Just Dropped the Pretense of Equality for Palestinian Citizens*, L.A. TIMES (July 20, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-jabareen-israel-nation-state-bill-20180720-story.html> [https://perma.cc/E8UM-T3XX].

Although Israel does not have a constitution, it has passed a series of Basic Laws which carry constitutional status.¹⁸⁶ These Basic Laws generally define Israel as a “Jewish and democratic state.”¹⁸⁷ In July 2018, Israel passed the Basic Law: Israel – the Nation State of the Jewish People (hereinafter “the Nation-State Law”),¹⁸⁸ which represented a radical break from the status quo in Israel’s legal regime vis-à-vis the Arab minority.¹⁸⁹ Section 1 of the Nation-State Law establishes that:

- (a) The Land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established;
- (b) The State of Israel is the nation-state of the Jewish people, in which it realizes its natural, cultural, religious and historical right to self-determination;

186. For a discussion of the legal developments associated with Israel’s Basic Laws, see Aeyal Gross, *The Politics of Rights in Israeli Constitutional Law*, 3 *ISR. STUD.* 80, 80–118 (1998); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 *COLUM. HUM. RTS. L. REV.* 309, 311 (1995).

187. See, e.g., § 1a, Basic Law: Human Dignity and Liberty (1992) (Isr.) (“The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”). The former president of the Israeli Supreme Court, Aharon Barak, in addressing the definition of the state as a state which favors the Jewish national group, wrote:

What, then are the ‘core’ characteristics shaping the minimum definition of the State of Israel as a Jewish state? These characteristics are derived from Zionism and Jewish heritage. At their core stands the right of every Jew to immigrate to the State of Israel, where the Jews will constitute a majority; Hebrew is the official and principal language of the State and most of its holidays and symbols reflect the national revival of the Jewish people. The heritage of the Jewish people is a central component of its religious and cultural legacy.

A.B. 11280/02, *The Central Elections Committee v. Ahmed Tibi*, P.D. 57(4) 1 (2003), at 22 (Isr.).

188. Basic Law: Israel – The Nation State of the Jewish People (2018) (Isr.).

189. Amal Jamal, *Israel’s New Constitutional Imagination: The Nation State Law and Beyond*, 18 *J. HOLY LAND & PALESTINE STUD.* 193, 193–220 (2019) [hereinafter Jamal, *Israel’s New Constitutional Imagination*]; Hassan Jabareen & Suhad Bishara, *The Jewish Nation-State Law*, 48 *J. PALESTINE STUD.* 43, 43–57 (2019).

(c) The realization of the right to national self-determination in the State of Israel is unique to the Jewish people.¹⁹⁰

It is clear that this law creates a hierarchy between collectives, whereby the voice and interests of Jewish citizens are given priority over those of Arab-Palestinians with respect to self-determination. The law defines Israel as the “nation-state of the Jewish people” and formally establishes Jewish national belonging as the basis for group-based privileges in areas of central importance to Arab-Palestinian citizens, such as immigration and citizenship,¹⁹¹ land rights,¹⁹² and culture and religion.¹⁹³ Given the law’s purported purpose of defining the State of Israel, the absence of any reference to democratic principles is particularly jarring.¹⁹⁴ As such, the law violates fundamental standards enshrined in international human rights law, including the prohibition of discrimination and—as is the focus of this Article—the mandate to include minority representative organizations in forums where decisions are made that impact their rights. Even worse, the legislation implies that Jewish majority institutions should be privileged in such realms. By providing rights to one group only, it more deeply embeds and perpetuates ethnic supremacy in Israel’s constitutional regime. This undoubtedly deepens existing formal legal inequalities between Jewish and Arab-Palestinian citizens, while creating new inequalities by giving superior legal recognition to Jewish citizens’ rights and privileges.¹⁹⁵ This national standard will likely have a trickle-down effect, further

190. § 1, Basic Law: Israel – The Nation State of the Jewish People (2018) (Isr.).

191. *Id.* § 5 (“The state will be open to Jewish immigration and to the gathering of the exiled.”).

192. *Id.* § 7 (“The state views Jewish settlement as a national value and will labor to encourage and promote its establishment and development.”).

193. *Id.* §§ 8–9.

194. See, e.g., Amir Fuchs & Suzie Navot, *Nation-State Law Explainer*, ISR. DEMOCRACY INST. (Dec. 11, 2023), <https://en.idi.org.il/articles/24241> [<https://perma.cc/C4GE-EQJF>] (“The problem is what [the Nation-State Law] leaves out: it excludes minorities, omits equality, ignores democracy and the Declaration of Independence, and undermines the fragile balance of Israel as a Jewish and democratic state.”).

195. For a broader critique of the ramification of this law on the status of the Arab-Palestinian minority in Israel, see Yousef Jabareen, *Enshrining Exclusion: The Nation-State Law and the Arab-Palestinian Minority in Israel*, in *DEFINING ISRAEL: THE JEWISH STATE, DEMOCRACY, AND THE LAW* 249, 249–63 (Simon Rabinovitch ed., 2018) [hereinafter Jabareen, *Enshrining Exclusion*]; Jamal, *Israel’s New Constitutional Imagination*, *supra* note 189; Jabareen & Bishara, *supra* note 189.

entrenching inequality in daily life between Jewish and Arab groups nationally.

Some legal challenges to the Nation-State Law occurred soon after it was passed. On August 7, 2018, the internal political leadership of the Arab community in Israel—represented by Adalah – The Legal Center for Arab Minority Rights in Israel (“Adalah”)—filed a petition with the Israeli Supreme Court challenging the law.¹⁹⁶ The petition asked the Court to cancel the law on the grounds that it

196. HCJ 5866/18 The High Follow-up Committee for Arab Citizens in Israel v. The Knesset (2018) (Isr.). In addition to challenging the law by petitioning the Israeli High Court of Justice against the Law, Arab community leadership has approached the international community. It has maintained that the Jewish Nation-State Law contradicts key principles of human rights as enshrined in international treaties, including those in the U.N. Charter. In its concluding observations on the fourth periodic report of Israel in October 2019, the U.N. Committee on Economic, Social and Cultural Rights called on Israel to amend or repeal its Jewish Nation-State Law in order to comply with the ICESCR. U.N. Comm. on Econ., Soc. & Cultural Rts., Concluding Observations on the 4th Periodic Report of Israel, ¶¶ 16–17, U.N. Doc. E/C.12/ISR/CO/4 (Nov. 12, 2019). This recommendation marked the first time that a U.N. monitoring body determined that the Jewish Nation-State Law does not comply with a human rights treaty ratified by Israel. The Committee called on Israel to either amend or repeal the law, raising deep concerns about the discriminatory effect of the law on Israel’s Palestinian community and urging “the State party to review the Basic Law with a view to bringing it in line with the Covenant or repealing it and to step up its efforts to eliminate discrimination faced by non-Jews in enjoying the Covenant rights, particularly rights of self-determination, non-discrimination and cultural rights.” *Id.* ¶ 17. On November 2, 2018, four U.N. Special Rapporteurs sent a communique to Israeli authorities expressing their deep concerns regarding the impact of the law. Joint Communication from the Special Rapporteur in the field of cultural rights et al. to the Government of Israel, OL ISR 12/2018 (Nov. 2, 2018), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24098> [<https://perma.cc/CY4T-WJ28>]. The communique was signed by U.N. Special Rapporteur in the field of cultural rights, Karima Bennouna; Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk; Special Rapporteur on minority issues, Fernand de Varennes; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume. *Id.* at 6. They expressed in their letter “deep concern” that the Israeli Basic Law appears “to be discriminatory in nature and in practice against non-Jewish citizens and other minorities and does not apply the principle of equality between citizens, which is one of the key principles for democratic political systems.” *Id.* at 3. To date, the communique has not received any Israeli response. See *UN Special Rapporteurs Give Israel 60 Days to Respond to ‘Deep Concerns’ Regarding Jewish Nation-State Law*, ADALAH (Nov. 15, 2018), <https://www.adalah.org/en/content/view/9626> [<https://perma.cc/5WBX-BJS9>] (providing a detailed summary on the contents of the communique and a link to the original document).

undermines basic democratic principles, violates fundamental international human rights norms, negates Israeli Supreme Court rulings concerning the right to equality, and constitutes an abuse of power by the majority in the Knesset.¹⁹⁷ The petitioners argued that the Nation-State Law—in violation of international law—does not recognize any collective right of the Arabs as an Indigenous minority while enshrining broad exclusive collective rights for the Jewish population.¹⁹⁸ This petition was bundled together with a number of other petitions filed around the same time, and a joint ruling was issued on all of them some three years later.¹⁹⁹ A majority of justices categorically rejected the petitions, writing that the law does not negate Israel’s character as a democracy; they emphasized that the law’s provisions must be interpreted in light of Israel’s other Basic Laws, including the Basic Law on the Knesset, the Basic Law on Human Dignity and Freedom, and the Basic Law on Freedom of Occupation, which, according to the Court, specifically define Israel as a “Jewish and democratic state.”²⁰⁰ Of the eleven presiding justices who ruled on the case, the only dissenting voice was Justice George Karra, the Court’s sole Arab justice.²⁰¹ In his strong dissenting opinion, Justice Karra emphasized that the Nation-State Law “does not acknowledge in any way the existence of minorities in the state, of which the largest is the Arab minority.”²⁰² Karra argued that this law will intensify preexisting inequality and tensions between the Jewish majority and the Arab-Palestinian minority.²⁰³

197. HCJ 5866/18 *The High Follow-up Committee for Arab Citizens in Israel*.

198. *Id.* at 20–24.

199. HCJ 5555/18 *Hassoun v. Knesset* (July 8, 2021) (Isr.).

200. *Id.* Writing on behalf of the majority, Chief Justice Esther Hayut concluded that this basic law “is but one chapter in our constitution taking shape and it does not negate Israel’s character as a democratic state. As such, I do not believe that the Knesset exceeded the narrow limits of its legislative authority when it enacted into law the Basic Law on Israel as the Nation-State of the Jewish People.” *Id.* ¶ 93. (Hayut, C.J.).

201. *Israel: Supreme Court Affirms Constitutionality of Basic Law: Israel – Nation State of the Jewish People*, GLOB. LEGAL MONITOR (Oct. 4, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-07-27/israel-supreme-court-affirms-constitutionality-of-basic-law-israel-nation-state-of-the-jewish-people/> [<https://perma.cc/A4FQ-KLA6>].

202. HCJ 5555/18 *Hassoun*, ¶ 24 (Karra, J., dissenting).

203. *Id.*

IV. LEGAL ACTION PROMOTING ARAB-PALESTINIAN REPRESENTATION

The international legal mandate for participation and Israel’s own mandate for “appropriate representation” are both weakly embedded in Israeli law. Unsurprisingly, then, implementation of these mandates has been extremely poor.²⁰⁴ Using Israeli law and precedent in addition to international law, civil society groups have engaged in targeted litigation efforts seeking enforcement of the letter and the spirit of the existing mandates. This Section will highlight three leading examples of insufficient representation—particularly as it relates to representation on national decision-making bodies—and assess legal efforts to force change. The issues at stake in these cases also emphasize the key role these bodies play in establishing economic and social policy—as well as cultural practices—and the very real and detrimental impacts on the daily lives of Arab-Palestinians caused by the lack of representation. As these examples demonstrate, neither legislation nor judicial decisions have proven to be effective remedies for the lack of Arab-Palestinian representation. This failure raises serious questions about the limits of the system and the need to reform both the law and the structure of decision-making institutions.

A. The Land Administration Case

The first and leading case—often referred to as the Land Administration case—filed in 1998, relates to representation in decision-making bodies involved in allocation of land, a key issue for Indigenous peoples.²⁰⁵ Indeed, land allocations are a point of very high friction between Arab-Palestinians and Jews in Israel, and access to land is essential to the daily lives and future development of Arab citizens.²⁰⁶ Today, only 2.5% of lands in the country are under the jurisdiction of Arab local authorities; the land owned by Arab-Palestinian citizens within the State of Israel has been halved since

204. See, e.g., BITAR, *supra* note 144, at 3 (finding that Arabs are still under-represented in key areas despite legislative amendments requiring “appropriate representation”).

205. HCJ 6924/98 Association for Civil Rights in Israel v. Israel Land Authority, 55(5) PD 15 (2001) (Isr.). The author of this Article served as one of two attorneys for petitioners.

206. ICG, IDENTITY CRISIS, *supra* note 11, at 14 (“For Palestinian citizens of Israel, the discriminatory aspects of land policy, and in particular land confiscation and disparity in the allocation of state lands, are the most serious material concern and most frequent source of friction with the state.”).

1948 due to land confiscation policies by the State.²⁰⁷ In that same time period, some one thousand Jewish settlements have been established, whereas almost no new Arab communities have been founded, leaving the development and housing needs of the Arab community woefully underserved.²⁰⁸ Furthermore, research demonstrates that Arab citizens are effectively blocked from acquiring or leasing some 80% of Israel's land.²⁰⁹

The Land Administration case arose after the Association for Civil Rights in Israel (ACRI) filed suit against the Israel Land Authority (ILA).²¹⁰ The ACRI petition pointed to the absence of Arab representation within the ILA's decision-making body (the Council),²¹¹ relying on a precedent-setting ruling that addressed fair representation for women in public decision-making bodies in 1994.²¹² In that case, the Supreme Court held that affirmative measures were required to achieve appropriate representation for women in vital public decision-making bodies, including at senior levels.²¹³ The petitioners in the Land Administration case hoped to extend this

207. HESKETH ET AL., *supra* note 11, at 34. As further explained in the report: "Since 1948, the State of Israel has enacted a series of laws that have allowed it to systematically confiscate and transfer Palestinian-owned land to the state and Zionist institutions, including the World Zionist Organization (WZO), the Jewish Agency, and the Jewish National Fund (JNF)." *Id.* at 31. The JNF controls about 13% of the land, which is reserved for the exclusive use of Jewish individuals. Meanwhile, although "Arab citizens constitute about 20% of the population of the state, only 3-3.5% of the land in Israel is now owned by them, as compared to 48% in 1948. As much as 93% of the land in Israel is now under the direct control of the state and of the JNF, a quasi-state entity. This land is officially referred to as 'Israel lands.'" *Id.*

208. *Land and Planning Rights*, ADALAH, <https://www.adalah.org/en/content/index/2007> [<https://perma.cc/6BW4-7DMH>].

209. See HESKETH ET AL., *supra* note 11, at 32 ("Today Palestinian citizens of Israel are, in practice, blocked from purchasing or leasing land on around 80% of the land in Israel on the basis of their national belonging. As a result, the vast majority of state land consists of segregated, Jewish-only areas.").

210. HCJ 6924/98 Association for Civil Rights in Israel v. Israel Land Authority, 55(5) PD 15, ¶ 1 (2001) (Isr.).

211. *Main Arguments in the Petition of the Association for Adequate Representation of Arabs in the Israel Lands Council*, ASS'N. FOR C.R. IN ISR., ¶ 2 (Oct. 1, 1999) (Isr.) [hereinafter *Petitioner's Main Arguments*], <https://law.acri.org.il/he/5546> [<https://perma.cc/93FR-CGAP>].

212. HCJ 453/94, Women's Network in Israel v. Government of Israel, 48(5) PD 501, 521 (Isr.).

213. *Id.* at 528–29.

precedent to achieve judicial recognition of the right for appropriate representation for Arab-Palestinians on the ILA Council.²¹⁴

Established by the Land Administration Law of 1960, the Council is responsible for administering over 93% of all land in Israel.²¹⁵ It determines both land allocation and land use, on behalf of the State.²¹⁶ At the time of filing the petition, the Council consisted of twenty-four seats.²¹⁷ Despite its influential mandate and the critical role it plays in the lives of Arab-Palestinian citizens, no Arab had ever occupied a seat on the Council.²¹⁸ When the petition was first filed, half of the seats were allocated to representatives of Israeli government ministries, while the other half represented the Jewish National Fund (JNF).²¹⁹ The JNF is a quasi-governmental body that

214. See *Petitioner’s Main Arguments*, *supra* note 211, ¶¶ 2, 22 (explaining ACRI’s legal arguments).

215. §§ 1A, 2A, Israel Land Administration Law (1960) (Isr.); HESKETH ET AL., *supra* note 11, at 31.

216. Today, only 7% of all land in Israel is privately owned, and this is divided almost equally between Palestinians and Jews. HESKETH ET AL., *supra* note 11, at 31. The remaining 93% is managed by the Israel Lands Administration, headed by the Israel Lands Administrative Council, which encompasses land originally owned by Palestinians that was subsequently confiscated. *Id.* at 31–32. According to Israel Lands Administration Law, land owned by the state cannot be transferred; it may only be leased for extended periods of time. § 4, Israel Lands Administration Law (1960) (Isr.); see also *About Israel Land Authority*, GOV.IL (Oct. 12, 2023) (Isr.), https://www.gov.il/en/pages/about_rami [<https://perma.cc/K59D-DUP2>] (discussing the basis of the legal principle that “the state’s lands will be offered only be lease and ownership of them shall not be transferred”). Over the years, the Israel Lands Administration has leased significant land holdings for the development of Jewish towns, including the establishment of hundreds of new communities; during the same period no new Palestinian communities were established through similar, or other, arrangements. HESKETH ET AL., *supra* note 11, at 31. For further discussion on how the Israeli government has systematically dispossessed Palestinians of their lands, see generally HUSSEIN & MCKAY, *supra* note 32; Alexandre (Sandy) Kedar & Jeremy Forman, *From Arab Land to “Israel Lands”: The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948*, 22 ENV’T & PLAN. D: SOC’Y & SPACE 809 (2004).

217. See *Petitioner’s Main Arguments*, *supra* note 211, ¶ 14 (explaining ACRI’s legal arguments).

218. HCJ 6924/98 Association for Civil Rights in Israel v. Israel Land Authority, 55(5) PD 15, ¶ 7 (2001) (Isr.).

219. The majority of JNF-controlled land previously belonged to Palestinian refugees and Palestinian citizens of Israel who are internally displaced (around 25% of all Arab-Palestinian citizens of Israel are internally displaced persons). HESKETH ET AL., *supra* note 11, at 34. Importantly, the JNF’s principles prohibits selling or renting land to “non-Jews,” according to its internal regulations. *Id.* The petitioners pointed to the clear over-representation in the Council, given that the

manages settlement of the land exclusively on behalf of Jews;²²⁰ it currently owns approximately 13% of the total land in Israel.²²¹ After the petition was filed, the government sought to mollify the petitioners by appointing a single Arab member to the Council; petitioners rejected this proposed solution as clearly insufficient for achieving the representation they desired.²²²

While the petition was pending, the Knesset passed the 2000 amendments to the Governmental Corporations Law and Civil Service Law, discussed above.²²³ The spirit of this new legislation directly influenced the outcome of the petition. In its final ruling issued in July 2001, the Supreme Court called on the government to give weight to the principle of appropriate representation for Arab citizens on the ILA Council.²²⁴ Operationally, the Court suggested that the government should affirm its recent Arab appointment to the Council and appoint an *additional* Arab member.²²⁵ More generally, the Court emphasized the importance of giving appropriate representation to Arab citizens in decision-making bodies at the

JNF owns 13% of Israel's lands. *Id.*; *Petitioner's Main Arguments*, *supra* note 211, ¶ 15.

220. For a discussion of the legal challenges to the JNF's discriminatory practices and the ILA policy of tenders open only to Jews, see *Challenging ILA Policy Tenders Open Only to Jews for Jewish National Fund Lands*, ADALAH, <https://www.adalah.org/en/content/view/6558> [<https://perma.cc/QRV7-4ULV>]. The JNF argued in response to this petition that, “[a]s the owner of JNF land, the JNF does not have to act with equality towards all citizens of the state.” HESKETH ET AL., *supra* note 11, at 34. While the Attorney General decided in this context that the ILA cannot discriminate against Arab citizens in marketing and allocating JNF-owned land, he also decided that when a non-Jewish citizen wins a tender for a plot of JNF land, the ILA will “compensate” the JNF with an equal amount of land—an arrangement that clearly fails to address land discrimination against Arab citizens. *Id.* After deliberations that lasted almost a decade, Adalah and its co-petitioners agreed to withdraw the petition in early 2016 based on the Attorney General's commitment. *Without Making Principal Changes, Israel Allows Arab Citizens to Bid for Jewish National Fund-Controlled Land*, ADALAH (Feb. 1, 2016), <https://www.adalah.org/en/content/view/8777> [<https://perma.cc/9GC8-2AVN>].

221. HESKETH ET AL., *supra* note 11, at 34.

222. Joseph Algazy, *Arabs Decry Political Postings' to ILA Board*, HAARETZ (Sept. 3, 2001), <https://www.haaretz.com/2001-09-03/ty-article/arabs-decry-political-postings-to-ila-board/0000017f-e3a1-d38f-a57f-e7f339880000> (on file with the *Columbia Human Rights Law Review*).

223. See *supra* Section III.A (discussing a series of legislation amendments expanding the scope of “adequate representation” for Arab-Palestinians and other groups).

224. HCJ 6924/98, *Association for Civil Rights in Israel v. Israel Land Authority*, 55(5) IsrSC 15 (2001).

225. *Id.* ¶ 34 (Zamir, J.).

national level.²²⁶ As such, the Court’s ruling seemed to look beyond the circumstances of this particular case to create a binding judicial principle whereby the State is obligated to consider a standard of appropriate representation for Arab citizens in public bodies, especially those entrusted with pivotal public responsibilities.²²⁷ Consistent with its ruling in the 1994 women’s case, the Court also stressed that ensuring such representation might involve affirmative action.²²⁸ The Court’s decision, written by Justice Zamir, includes a declaratory statement that—for the benefit of Israeli society and for the good of the individuals who comprise it—the principle of equality between Arabs and Jews must be cultivated.²²⁹ While this was an important statement, its impact was limited by its non-binding nature; rather, it only carried the persuasive authority reserved for *dicta*. Furthermore, compared to the 1994 women’s case, the binding, operative aspect of the ruling was weak, which will be discussed in greater detail in the critique below.

Unfortunately, no meaningful reform to the makeup of the ILA Council ever occurred. In 2010, a new Council for the ILA was appointed—which lacked both women and Arabs—and a subsequent petition was filed to redress this violation of the “appropriate representation” rule.²³⁰ While the case was pending, three women were appointed and a new legal amendment was passed, guaranteeing the appointment of at least one Arab member to the Council.²³¹ In 2017, the Court decided that these developments satisfied the demands of the petitioners.²³² In rejecting the petitioners’ argument that appointing one Arab member would not

226. *Id.* ¶¶ 23–29 (Zamir, J.).

227. *Id.* ¶ 29 (Zamir, J.); see Ilan Saban, *After the Storm? The Israeli Supreme Court and the Arab-Palestinian Minority in the Aftermath of October 2000*, 14(4) *ISR. AFFS.* 623, 633–34 (2008) [hereinafter Saban, *After the Storm*]; Saban, *Minority Rights*, *supra* note 10, at 980 (discussing the expansive nature of the Court’s ruling).

228. HCJ 6924/98 *Association for Civil Rights in Israel*, 55(5) *IsrSC* ¶¶ 27–29.

229. *Id.* ¶ 15 (Zamir, J.). Justice Zamir is a former Attorney General and former Constitutional Law Professor.

230. HCJ 8318/10 *Association for Civil Rights in Israel v. Government* (Aug. 24, 2017) (Isr.); see *HCI Orders State to Ensure Equal Representation for Women and Arabs on Israel Land Authority Council*, ASS’N. FOR C.R. IN ISR. (Feb. 27, 2014) (Isr.), <https://law.acri.org.il/en/2014/02/27/equalrepila> [https://perma.cc/CMP6-MC6Q].

231. *Representation of Women and Arabs in the Israel Land Council*, ASS’N. FOR C.R. IN ISR. (Aug. 24, 2017) (Isr.), <https://law.acri.org.il/he/16915> [https://perma.cc/Z35N-UYAU].

232. HCJ 8318/10 *Association for Civil Rights in Israel*, ¶¶ 14–17.

satisfy the right to appropriate representation, the Court claimed that guaranteeing appropriate representation is an ongoing and long-term process, and that the State remains obligated to guarantee representation in the context of the Arab minority consistent with the ruling in the Land Administration case.²³³

The Court's backtracking on its declaration about the importance of equality between Arabs and Jews has pervaded more recent legal challenges to land administration. In 2016, ACRI, Adalah, and other civil society groups filed a second petition seeking to change the terms guiding the composition of the Land Authority Council.²³⁴ In accordance with a legal amendment in 2009, of the fourteen members of the of the newly-established Land Authority Council (which performs essentially the same functions as ILA Council), six of them (43%) were appointed on behalf of the JNF.²³⁵ Given the clearly discriminatory and exclusive mandate of this organization, the petitioners argued that it violated the right to equality, and, in particular, that it was prejudiced against Arab citizens.²³⁶ The petition was rejected in 2018, as the Supreme Court found that the makeup of the Council in and of itself is not discriminatory and it declined to interfere in existing arrangements.²³⁷

B. The Planning Committee Case

The Planning Committee case was filed in 2000 by the National Committee for the Heads of Arab Local Authorities—an

233. *Id.* ¶ 15.

234. HCJ 6411/16 *The National Committee for the Heads of Arab Local Authorities v. The Knesset*, ¶¶ 40–42 (June 19, 2018) (Isr.), https://www.adalah.org/uploads/uploads/JNF_Court_decision_21062018.pdf [<https://perma.cc/JVX8-PMCJ>]; *Cancel the Representation on the National Jewish Fund on the Israel Lands Council*, ASS'N. FOR C.R. IN ISR. (June 19, 2018) (Isr.), <https://law.acri.org.il/he/38510> [<https://perma.cc/3N8C-RS6Y>].

235. Mandated by § 4A(A), Israeli Land Authority Law (1960), as amended (Isr.); see also *Israel Society & Culture: Israel Lands - Privatization or National Ownership?*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/israel-lands-privatization-or-national-ownership> [<https://perma.cc/3DZW-D6P5>] (“The JNF appoints half (less one) of the members of the Council, while the government appoints the other half (plus one).”).

236. *Representation of the National Fund in the Israel Lands Council – Violation of the Right to Equality*, ASS'N. FOR C.R. IN ISR. (Aug. 23, 2016) (Isr.) [hereinafter *Representation of the National Fund in the Israel Lands Council*], <https://law.acri.org.il/he/38512> [<https://perma.cc/S6SL-UEH2>].

237. HCJ 6411/16 *The National Committee for the Heads of Arab Local Authorities*, ¶¶ 40–42.

umbrella group that represents all leaders of Arab local authorities in Israel but is not formally recognized by the Israeli government.²³⁸ The case arose out of the fact that only two Palestinians out of a total of seventeen members served on the northern district of Israel’s Planning and Building Committee despite Palestinian citizens comprising over 50% of the inhabitants of the district.²³⁹ Petitioners argued that this severe under-representation violated the right to equality for Arab citizens residing in the district and for the Arab-Palestinian community in general.²⁴⁰ In their argument, the petitioners relied on the laws of appropriate representation for Arabs and on the precedent-setting ruling in the Land Administration case.²⁴¹

Appropriate representation on the Planning and Building Committee is of exceptional importance to Arab residents of the district.²⁴² Arab-Palestinian citizens suffer from severe discrimination in building and planning, which seriously undermines their basic quality of life.²⁴³ Due to extremely low Arab representation on planning committees, like the one at issue in this case, Arab citizens are constrained in their ability to shape the nature of the plans approved for their localities. Most municipalities are forced to work opposite (and against) statutory planning bodies at the regional and national levels; a much smaller percentage of Arab local authorities than Jewish local authorities have control over their own planning

238. HCJ 9472/00 *The National Committee for the Heads of Arab Local Authorities v. Minister of Interior* (Nov. 15, 2001) (Isr.). The author of this Article served as one of two attorneys for petitioners. *Discussion of the Petition for Adequate Representation of Arabs in the District Committee for Planning and Construction in the North District*, ASS’N. FOR C.R. IN ISR. (Nov. 4, 2001) (Isr.), <https://law.acri.org.il/he/wp-content/uploads/2002/02/Arabs-representation-2000.pdf> [<https://perma.cc/3S7S-VLHH>]. Note that successive Israeli governments have denied any official status for voluntary representative groups of the Arab-Palestinian community, including the National Committee for the Head of Arab Local Authorities. KRETZMER, *supra* note 26, at 121.

239. *Representation of the National Fund in the Israel Lands Council*, *supra* note 236.

240. *Id.*

241. *Id.*

242. For further reading on the land and planning issues facing the Arab community in Israel, see HUSSEIN & MCKAY, *supra* note 32; Rasseem Khamaisi, *Housing Transformation Within Urbanized Indigenous Communities: The Arab Palestinians in Israel*, 33 GEOGRAPHY RSCH. F. 68, 68–86 (2013).

243. For a discussion on discrimination against the Arab community in land and planning, see ICG, *IDENTITY CRISIS*, *supra* note 11, at 14–17; Oren Yiftachel et al., *Land and Planning*, in *AFTER THE RIFT*, *supra* note 33, at 15–25.

committees.²⁴⁴ Accordingly, few of the Arab municipalities' plans are approved, and many Arabs find it exceedingly difficult to acquire building permits, even for land that they own.²⁴⁵ As a result, many Arabs face demolitions of their properties by governmental authorities under the pretext of building without a permit.²⁴⁶ This further contributes to severe overcrowding and housing distress and, as such, is a fundamental point of inequality between the two groups.²⁴⁷

Given these serious systemic problems, the Court issued a disappointing ruling in the Planning Committee case.²⁴⁸ It accepted the government's claim that there were no Arab professionals who qualified for membership on the Committee, in part because of a lack of experienced Arab government employees in the civil services.²⁴⁹ Of course, this is directly related to government reticence to appoint Arabs to high-ranking positions in the first place. The petitioners' argument that the makeup of the Committee should reflect the composition of the population of the northern district was rejected.²⁵⁰ As the Court stated, "[t]he petitioners' argument that appropriate representation should be interpreted that the percentage on the committee must reflect the percentage of Arab population in its area of responsibility is not an argument that we accept."²⁵¹ Rather, as emphasized by the Court, the number of Arab residents in a given area "may be one consideration but should not be regarded as a guiding principle and definitely not as a determining one."²⁵² This ruling contributed to and perpetuated the extreme under-representation of Arabs in the planning committee in northern Israel along with the attendant on-going inequality in outcomes.

244. Ghazi Falah, *Israeli 'Judaization' Policy in Galilee and Its Impact on Local Arab Urbanization*, 8 POL. GEOGRAPHY Q. 229, 229–53 (1989); Ghazi Falah, *Israeli 'Judaization' Policy in Galilee*, 20 J. PALESTINE STUD. 69, 69–85 (1991).

245. INTER-AGENCY TASK FORCE ON ISRAELI ARAB ISSUES, URBAN PLANNING IN ISRAEL'S ARAB COMMUNITIES 6–7 (2020) [hereinafter IATFIAI, URBAN PLANNING], <https://www.iataskforce.org/wp-content/uploads/2024/02/resource-1794.pdf> [<https://perma.cc/4CTG-3RKL>].

246. *Id.* at 18.

247. *Id.* at 1 n.5, 6–7.

248. HCJ 9472/00 *The National Committee for the Heads of Arab Local Authorities v. Minister of Interior* (Nov. 15, 2001) (Isr.).

249. *Id.* ¶ 6.

250. *Id.* ¶ 3.

251. *Id.*

252. *Id.*

C. The Government Corporations Case

This third case—the Government Corporations case—was filed in 2001 by Adalah against the Prime Minister and several other ministers.²⁵³ In this Supreme Court case, Adalah sought enforcement of the 2000 amendment to the Governmental Corporations Law, which states that appropriate representation will be given to the Arab community on the boards of directors of governmental corporations.²⁵⁴ Pointing to both this law and the extreme underrepresentation of Arabs, and particularly of Arab women, Adalah argued that government ministries should make greater efforts to increase representation of Arabs on the boards of directors of governmental corporations.²⁵⁵ The petitioners further asked the court to mandate full and immediate implementation of affirmative action policies in the context of appointments.²⁵⁶ This petition was based on the fact that significant progress had been made in appointing Israeli Jewish women in the aftermath of a comparable amendment to the law, while the same was not true for Arabs.²⁵⁷

Although Adalah provided a list of dozens of qualified Arab professionals, the Court accepted the government’s argument that it is difficult to find suitable Arab candidates for board positions and that the process would require considerable time and effort.²⁵⁸ Chief Justice Barak’s opinion endorsed the government’s statement that it was committed to improving efforts to appoint Arab citizens to the boards of directors of governmental corporations.²⁵⁹ While acknowledging the government’s responsibility to seek out qualified Arab candidates for appointment to said positions,²⁶⁰ the Court

253. HCJ 10026/01, *Adalah v. Prime Minister* (Apr. 2, 2003) (Isr.), <https://www.adalah.org/uploads/oldfiles/features/women/10026decision-heb.pdf> [<https://perma.cc/9Y4F-BMPG>].

254. *See Affirmative Action for Arab Citizens on Governmental Corporate Boards*, ADALAH (Apr. 2, 2003), <https://www.adalah.org/en/content/view/6680> [<https://perma.cc/V92N-YDTW>].

255. *Id.*

256. *Id.*

257. *Id.*

258. HCJ 10026/01 *Adalah*. Interestingly, this decision echoes a U.S. Supreme Court ruling that rejected arguments of discrimination against African Americans. There, the Court reasoned that for purposes of demonstrating discriminatory exclusion “where special qualifications are necessary,” the relevant statistics must be “the number of minorities qualified to undertake the particular task.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501–02 (1989).

259. HCJ 10026/01 *Adalah*, ¶ 26 (Barak, J.).

260. *Id.* ¶ 25.

accepted the government's argument that it is impossible to know precisely how much time would be needed for such a process.²⁶¹ Just like the previous case, this decision undermined the Arab community's efforts to ensure that they wield meaningful influence as board directors of government corporations, and therefore be in positions to establish policy and practice on national economic and societal issues.

D. Critique of the Rulings

Court rulings related to insufficient Arab-Palestinian representation in national decision-making bodies—and, consequently, limited participation in decision-making processes—failed to guarantee crucial rights such as access to land and meaningful control over building and planning, which are of central importance to Indigenous persons. These deficiencies will be analyzed here through a focus on three specific principles: proportionality, credibility, and effective enforcement of representation for the Arab-Palestinian minority.

The first critique relates to the question of quantitatively and/or qualitatively defining “appropriate representation” in Israeli legislation. The threshold question must ask what percentage of minority representation is necessary to engender equality and non-discrimination. International law advocates for consultation with representative Indigenous bodies but is similarly lacking in specificity. The Arab-Palestinian experience in Israel demonstrates that numbers matter.

The cases examined here highlight the importance of numeric representation both in absolute terms and as a percentage of the population. In the Land Administration case, two Arab members were appointed to the Council.²⁶² Yet the ruling was a failure because securing two representatives out of twenty-four members,²⁶³ or 8% of the seats, fails to reflect the composition of Israel in which Arab-Palestinians make up 20% of the population. The Court dismissed the petitioner's argument that adequate representation should roughly match the general percentage of the Palestinian minority in Israel;²⁶⁴

261. *Id.* ¶ 23.

262. Benvenisti & Shaham, *supra* note 26, at 713 & n.212.

263. *Id.* at 689.

264. HCJ 6924/98 Association for Civil Rights in Israel v. Israel Land Authority, 55(5) IsrSC 15, ¶ 31 (2001) (Isr.).

instead, it left the ratio question unresolved.²⁶⁵ In the language of the court, “appropriate representation” depends on “among other things, the nature of the body, including its practical importance for the group entitled to adequate representation.”²⁶⁶ Similarly, in the Planning Committee case, the Court rejected the need for the Committee to reflect the composition of the population it serves.²⁶⁷ Finally, in the Government Corporations case, the extreme under-representation of Arabs, as well as the absence of government plans to increase it, failed to galvanize judicial interference.²⁶⁸

Second, the Court failed to require the Arab-Palestinian community’s involvement in selecting representatives for key roles in national institutions, as mandated by international law.²⁶⁹ Predictably, the appointees were not viewed as being credible by the Arab-Palestinian community they were selected to represent. While two people from the Arab community were appointed to serve on the ILA Council in the Land Administration case, both of these appointees were affiliated with Jewish political parties and, as a consequence, neither were viewed as being credible or professional by community leadership.²⁷⁰ Furthermore, the Court did not suggest consultation with Arab-Palestinian institutions and elected representatives despite the importance of and sensitivity around issues of planning, housing, and land distribution. Even worse, in the Government Corporations case, the Court openly accepted the government’s reasoning that no qualified Arab candidates existed, despite the evidence presented by petitioners that many qualified candidates existed within the Arab-Palestinian community.

Appointing individuals who lack credibility with the Arab-Palestinian community to influential national and regional forums can be more damaging than not appointing them at all. This creates a veneer of legitimacy for the State while harming the Arab-Palestinian population. Rather than engage in genuine efforts to achieve meaningful representation for Arab-Palestinians, the State can point

265. Benvenisti & Shaham, *supra* note 26, at 713.

266. HCJ 6924/98 *Association for Civil Rights in Israel*, ¶ 31.

267. HCJ 9472/00 *The National Committee for the Heads of Arab Local Authorities v. Minister of Interior* (Nov. 15, 2001) (Isr.).

268. HCJ 10026/01, *Adalah v. Prime Minister* (Apr. 2, 2003) (Isr.), <https://www.adalah.org/uploads/oldfiles/features/women/10026decision-heb.pdf> [<https://perma.cc/9Y4F-BMPG>].

269. Saban, *Minority Rights*, *supra* note 10, at 981.

270. Algazy, *supra* note 222; *see also* Saban, *Minority Rights*, *supra* note 10, at 981 (discussing the need for community approval of representatives).

to these “representatives” as evidence of its good faith in promoting equal opportunity for minority groups. The presence of these “representatives” creates the misleading impression that the decision-making process is inclusive of minority perspectives, even though the Arab-Palestinian community itself does not feel adequately represented by the appointees. The State also uses the presence of such individuals to bolster its claim that Israel is a “vibrant democracy” which offers equal opportunity for all of its citizens.²⁷¹ These “representatives” may also be used to argue that discussions which occur in their presence are inclusive and reflect the interests of all who are present. This allows the State to claim that it has satisfied its international legal obligations and thereby improves the image of the State, which in turn reduces the State’s incentive to institute social change measures. Ultimately, such appointments serve to perpetuate the ongoing exclusion of Arab-Palestinians.

Finally, the rulings in these cases lack sufficient specificity, which is particularly troubling in light of the magnitude of the problems they sought to address. While in some cases, the Court made positive declarative statements indicative of potential future advancement, the lack of stringent operational measures to actualize that potential created large loopholes which could be exploited to avoid implementation.²⁷² Even when there was a judicial mandate to appoint Arab citizens, such as in the Land Administration case, over time, the government disregarded this requirement almost entirely.²⁷³ In some ways, the outcome following the ruling was poorer because it allowed the situation of the Arab-Palestinian minority to continue while strengthening the ability of the government to claim that it was being non-discriminatory.

Importantly, none of the rulings addressed the root causes obstructing appropriate representation and participation for minorities; instead, they focused on the specific facts of each case. The situations which precipitated these cases point to the need for intensive structural and transformative remedies to begin to rectify

271. See generally B’TSELEM, NOT A VIBRANT DEMOCRACY, *supra* note 43 (discussing several issues surrounding inadequate representation of Arab-Palestinians despite the Israeli government’s claims to the contrary).

272. See Benvenisti & Shaham, *supra* note 26, at 677, 712–14 (discussing the ineffectiveness of Israel’s adequate representation programs).

273. See *HCJ Orders State to Ensure Equal Representation for Women and Arabs on Israel Land Authority Council*, ASS’N. FOR C.R. IN ISR. (Feb. 27, 2014), <https://law.acri.org.il/en/2014/02/27/equalrepila> [<https://perma.cc/TJK8-H2AR>] (describing ACRI’s petition in 2010).

decades of exclusion and inequality.²⁷⁴ Furthermore, all these rulings were coupled with a predictable lack of political will to actually implement the judicial mandate. Indeed, the government is consistently reluctant to take effective and concerted action when it comes to advancing the rights of the Arab-Palestinian minority.²⁷⁵ The disappointing results of these legal actions testify to a more general lack of public support.²⁷⁶ As such, these cases reflect the limits of the Court in challenging the government.

The Israeli judicial system has not served as a protector of the “appropriate representation” mandated by Israeli law, nor of the “full” and “effective” minority participation mandated by international law. It has not been a vehicle for ensuring that the Israeli government consults with Indigenous representative organizations or includes them when addressing issues of governance in areas of life that are crucial to them, such as allocation of land and planning. The Israeli Supreme Court’s narrow and limited approach to the principle of representation and participation has frustrated Arab-Palestinians’ struggle for meaningful representation and, accordingly, has failed to advance equality and non-discrimination.

V. REPRESENTATION: BETWEEN REALITY AND ASPIRATION

As Part IV established, neither Israeli legislation nor the Israeli judicial system have been effective in realizing the right to representation and participation for Arab-Palestinians. This is reflected in actual outcomes. By and large, Israeli legal discourse has emphasized quantitative rather than qualitative measures: “representatives” are envisioned as being influential by virtue of their mere presence, rather than as appointees of representative organizations or their actual influence in the decision-making

274. A report titled *After the Rift: New Directions for Government Policy towards the Arab Population in Israel* submitted by Arab and Jewish academics and professionals to Israeli Prime Minister Barak in 2000 called on the government to adopt structural reforms with the aim of guaranteeing meaningful representation for the Arab minority in decision-making bodies. Yiftachel et al., *supra* note 243, at 20–25.

275. Yousef T. Jabareen, *The Politics of Equality: The Limits of Collective Rights Litigation and the Case of the Palestinian-Arab Minority in Israel*, 4 COLUM. J. RACE & L. 23, 23–54 (2013); Saban, *After the Storm*, *supra* note 227, at 623–39; *see also* Jabareen & Agbaria, *supra* note 59, at 25–55 (discussing discriminatory policies in the area of education and culture).

276. In fact, the adoption of the Nation-State Basic Law in 2018 testifies to processes that deepen exclusion and alienation of the Arab community. Jabareen, *Enshrining Exclusion*, *supra* note 195, at 249–63.

processes.²⁷⁷ Irrespective, the Israeli government has rarely established for itself numeric targets for appropriate representation mandated by the law.²⁷⁸ But establishing numeric targets is only a starting point; such steps should be taken in the context of a much broader and more robust set of reforms intended to guarantee both credible and influential decision-making. Failure of the Israeli government to take even the first step has further hindered the Arab community's struggle for equality and has perpetuated discrimination. This Part provides an overview of the bleak current state of representation of Arab-Palestinians in Israel. It then outlines ways in which this crucial right to representation is understood, presented, and advocated for by Arab-Palestinian citizens.

A. Representation in Government Employment and on Boards of Government Corporations

The Israeli legislation addressing appropriate representation for Arabs in the civil service and on boards of government corporations adopted in 2000 does not include a specific target number or percentage. Where the government has imposed numeric targets, these targets are often meager. Moreover, the government has consistently failed to achieve targets which could, even minimally, bring about some improvement in the quantity and quality (i.e., level of authority) of Arab-Palestinian representation.

For example, in 2007, the government declared that 10% of government employees should come from the Arab community by 2012.²⁷⁹ At first glance, the government seems to have reached its goal. In 2021, Arabs filled 13.9% of civil service positions (11,360 out of 81,840 employees).²⁸⁰ However, the government's goal appears to be somewhat lackadaisical; this percentage is far lower than the

277. See *supra* Sections IV.B–C (discussing two important judicial cases which implicitly adopted this narrow construction of the term “representatives”).

278. See, e.g., BITAR, *supra* note 144, at 6 (criticizing the Israeli government's approach to representation because of its failure to “check what targets it reaches”).

279. *Adequate Representation of Membership of the Arab, Druze, and Circassian Populations in Civil Service, Government Decision No. 2579 of 11.11.2007*, PRIME MINISTER'S OFF. (Sept. 18, 2017) (Isr.), https://www.gov.il/he/pages/2007_des2579 (on file with the *Columbia Human Rights Law Review*).

280. CIVIL SERV. COMM'N, REPORT ON DIVERSITY AND REPRESENTATION FOR 2021, at 20 (2022) (Isr.) [hereinafter CIVIL SERV. COMM'N, 2021 REPORT], <https://www.gov.il/BlobFolder/reports/diversity-report-2021/he/diversity-report-2021.pdf> [<https://perma.cc/E9NE-9BXZ>].

percentage of Arabs in the labor market (which stood at 20.5% in 2021).²⁸¹ Moreover, while the proportion of Arab government employees is now about two-thirds of the overall percentage of the Arab-Palestinian community within Israel, a closer examination reveals that this representation is not evenly spread throughout the civil service. The Ministry of Health employs a significant portion of Arab civil services employees (Arab-Palestinians constitute 20.5% of the Ministry’s employees), which skews the results.²⁸² Excluding employees of the Ministry of Health, the percentage of Arab civil service employees reaches only 8%.²⁸³ Thus, the vast majority of government ministries lag far behind the modest governmental goal of 10% set in 2007.²⁸⁴

Furthermore, as noted above, the current Israeli law also mandates representation in terms of rank.²⁸⁵ Yet government data indicates that the distribution of these appointments across seniority levels is poor, and these figures get worse the higher up the ladder one goes. In the intermediate ranks, 7.3% of employees are Arab.²⁸⁶ In the senior ranks, only 3.6% of employees are Arab citizens, representing only one-third of the government goal of 10%, and less than one-fifth of their general percentage of the population.²⁸⁷ Currently, there are no Arab-Palestinian directors-general or deputy directors-general serving in government offices, indicating that the vast majority of Arab employees have not been able to advance their professional ranks.²⁸⁸ Even in government offices where issues affecting the Arab population comprise a substantial portion of their work (e.g., the Ministry of Education), Arab employees account for an average of only 8.9% of employees.²⁸⁹ Over two decades after the passage of relevant legislation, these disappointing outcomes indicate a lack of consistent integration of Arab employees across the civil service.

Despite being mandated by law, appropriate representation on the boards of directors for governmental corporations is similarly

281. *Id.* at 25.

282. *Id.* at 30.

283. *Id.*

284. *Id.* at 32.

285. *See supra* Section III.A (discussing the current legislative regime governing appropriate representation in Israel).

286. CIVIL SERV. COMM’N, 2021 REPORT, *supra* note 280, at 32.

287. *Id.* at 30.

288. *Id.* at 28–30.

289. *Id.* at 32.

bleak. In February 2022, the Government Corporations Authority presented a report to the Knesset which revealed that out of 325 serving board members, only nineteen were Arabs—less than 6%.²⁹⁰ Moreover, the same report states that only 2.7% of the total number of employees in these government corporations were Arab.²⁹¹ This reflects extremely poor Arab representation and participation in influential public roles in Israel.

Low numerical representation and placement in the ranks of public administration have wide-ranging and negative implications for individuals and the collective. On the practical level, every 1% increase in Arab employees creates hundreds of new job opportunities for Arab professionals.²⁹² Such positions could be an important source of employment for the Arab minority, which often faces hiring discrimination in other sectors.²⁹³ No less importantly, these are forums where decisions on the allocation of national resources are made.²⁹⁴ On the substantive level, Arab-Palestinians have been challenged in their attempts to meaningfully influence national decision-making.²⁹⁵ Mere presence in some decision-making forums does not ensure influence; some of those in positions of power are not necessarily responsive to or inclusive of minority perspectives. On a normative level, civil service jobs are a national resource that should be divided equitably amongst all citizens in a democracy. Furthermore, the government establishes a norm for the private sector; when the government is a poor example of representation, other sectors are likely to view this conduct as normative and acceptable.²⁹⁶ As such, in the current conditions, Arab-Palestinians

290. GOV'T COS. AUTH., MINISTRY OF FIN., APPROPRIATE REPRESENTATION FOR ARAB COMMUNITY IN GOVERNMENT CORPORATIONS (Feb. 2022) (on file with the *Columbia Human Rights Law Review*).

291. *Id.*

292. In 2021, the Civil Service in Israel consisted of approximately 81,840 employees. CIVIL SERV. COMM'N, 2021 REPORT, *supra* note 280, at 20. Just 1% of this number would be over eight hundred employees.

293. ICG, IDENTITY CRISIS, *supra* note 11, at 11–22.

294. For example, there are numerous governmental and quasi-governmental bodies involved in issues relating to housing and development. For a detailed discussion of such bodies and how they impact Arab-Israeli relations, see IATFIAI, URBAN PLANNING, *supra* note 245.

295. See, e.g., B'TSELEM, NOT A VIBRANT DEMOCRACY, *supra* note 43, at 3–6 (summarizing obstacles and challenges to Arab-Palestinians' exercising influence within national decision-making fora).

296. For example, the National Governors Association in the United States has called on state governments to “become model employers” that can “demonstrate to private sector employers the commitment, viability and

struggle to influence decision-making that would meaningfully advance equality.

B. The Arab-Palestinian Community’s Future Vision for Representation

In light of the failures of successive Israeli governments to fulfill the strong collective mandate set by international law and to even minimally meet its own targets for “appropriate representation,” Arab-Palestinians have taken action to bring about meaningful equality in other ways. They have established national representative institutions that, while not officially recognized by the State, are viewed by the community as legitimate.²⁹⁷ Furthermore, thought leaders from within the community have developed a series of documents outlining their vision for the status of Arab-Palestinians in Israel. These documents are referred to as the Future Vision documents. As this Section will show, these documents generally seek to achieve two different forms of representation and participation—both aligned with and supported by international law. First, they envision full and effective representation of community members within national decision-making institutions. Second, they seek formal government recognition of their own internal representative institutions. These institutions would have two functions: to manage their internal affairs independently, and to serve as consultants for issues influencing this community nationally. One such document, the Democratic Constitution, is particularly pertinent here as it seeks to rectify existing lacunae in Arab-Palestinian representation through specific constitutional reforms.²⁹⁸ This Section will outline relevant initiatives taken by the Arab-Palestinian community with a particular focus on proposed constitutional reform.

effectiveness of educating, training and providing comprehensive support to the current and future workforce.” *10 Transformational Pathways for States: Become a Model Employer*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/futureworkforce/pathways/become-a-model-employer/> [https://perma.cc/K29M-JFVN].

297. Saban, *Minority Rights*, *supra* note 10, at 976–77. Such institutions include the National Committee for the Heads of Arab Local Authorities, the High Follow-Up Committee on Arab Affairs, and the Follow-Up Committee on Arab Education.

298. ADALAH, *THE DEMOCRATIC CONSTITUTION* (2007) [hereinafter *DEMOCRATIC CONSTITUTION*], <http://adalah.org/eng/Articles/1483/The-Democratic-Constitution> [https://perma.cc/Q29P-TKF5].

The Arab-Palestinian community has established for itself a number of internal political and social institutions which, broadly speaking, represent the community's collective interests.²⁹⁹ The leading institution is the National Committee of Arab Mayors, which consists of all of the heads of Arab local authorities and has served as a coordinating body for their public policy positions and actions since 1974.³⁰⁰ The High Follow-Up Committee on Arab Affairs, established in 1982, primarily consists of Arab Members of Knesset, leaders of Arab political parties, and the heads of local authorities.³⁰¹ This extra-parliamentary umbrella organization is the highest-ranking political body representing Palestinian citizens of Israel as an Indigenous, national, and homeland minority.³⁰² The inclusive nature of the Committee—which consists of all of the political parties and elected Arab-Palestinian leaders nationally and locally—reinforces its legitimacy as the authoritative collective voice of the community.³⁰³ The Follow-Up Committee on Arab Education was established in 1974 in order to represent Arab educational interests opposite the Israeli government.³⁰⁴

These institutions are complemented by Arab and Arab-Jewish political parties that compete in both national and local elections. Alongside these more political bodies, voluntary organizations including advocacy groups, religious institutions, and non-profit organizations have been established that spearhead social change within the Arab-Palestinian community (and opposite State authorities).³⁰⁵ Despite this well-structured and credible

299. Saban, *Minority Rights*, *supra* note 10, at 976–77.

300. *Id.* at 976.

301. *Id.*

302. See, e.g., Muhammad Amara, *The Higher Follow-Up Committee for the Arab Citizens in Israel*, in *THE PALESTINIANS IN ISRAEL: READINGS IN HISTORY, POLITICS AND SOCIETY* 90, 94–97 (Nadim N. Rouhana & Areej Sabbagh-Khoury eds., 2011) (discussing how the Higher Follow-Up Committee became a national representative body and noting that some have referred to it as “The Parliament of the Arabs”).

303. See *id.* at 90–99 (discussing the establishment of the Higher Follow-Up Committee, its role, and its political activity); see also *Right-Wing Lawmakers Push Bill to Outlaw Arab Umbrella Committee*, *TIMES OF ISR.* (Oct. 7, 2023), <https://www.timesofisrael.com/right-wing-lawmakers-push-bill-to-outlaw-arab-umbrella-committee> (on file with the *Columbia Human Rights Law Review*).

304. *The Follow-Up Committee on Arab Education*, ARAB EDUC. COUNCIL, <https://arab-education.org> [<https://perma.cc/43AE-FW22>].

305. For a more detailed discussion of some of these organizations, see SHANY PAYES, *PALESTINIAN NGOS IN ISRAEL: THE POLITICS OF CIVIL SOCIETY IN ISRAEL* (2005); Yousef Jabareen & Rebecca Vilkomerson, *Public Policy in Divided*

organizational infrastructure, State authorities have generally refrained from recognizing or legitimizing these organizations—they are not granted any official status or funding, nor do they serve as consultative bodies.³⁰⁶ Yet, they have been instrumental in setting the tone for the Arab-Palestinian community on the local, internal, and national levels.

Central figures in these institutions were involved in formulating the Future Vision documents, including a wide range of Arab-Palestinian politicians, community activists, academics, and legal experts (including the author of this Article).³⁰⁷ Drafting discussions took place between 2006 and 2007, and considered contemporary and future legal and social arrangements defining minority rights within Israel.³⁰⁸ This process culminated in the publication of four documents that outline communal hopes and visions for State-minority relations: *The Future Vision of the Palestinian Arabs in Israel* (hereafter *The Future Vision*),³⁰⁹ *The Equal Constitution for All*,³¹⁰ *The Haifa Declaration*,³¹¹ and *The*

Societies: The Role of Policy Institutes in Advancing Marginalized Groups, 27 INNOVATION 46 (2013).

306. Saban, *Minority Rights*, *supra* note 10, at 976.

307. As'ad Ghanem & Muhanad Mustafa, *Coping with the Nakba: The Palestinians in Israel and the “Future Vision” as a Collective Agenda*, 24 ISR. STUD. REV. 52, 52 (2009); Amal Jamal, *The Political Ethos of Palestinian Citizens of Israel: Critical Readings in the Future Vision Documents*, 23 ISR. STUD. F. 3, 15 (2008) [hereinafter Jamal, *Political Ethos*]; Muhammad Amara & Ayman Aghbaria, *The Role of Language in the Future Vision Documents in Transforming the Socio-Political Context in Israel: Lessons from Bilingual Education*, 4 ISR. STUD. LANGUAGE & SOC'Y 98, 98 (2011); Ayman Aghbaria & Muhanad Mustafa, *Two States for Three Peoples: The ‘Palestinian-Israeli’ in the Future Vision Documents of the Palestinians in Israel*, 35 ETHNIC & RACIAL STUD. 718, 718 (2012).

308. For more on the drafting process and considerations, see generally Jamal, *Political Ethos*, *supra* note 307; Aghbaria & Mustafa, *supra* note 307.

309. This document was released under the auspices of the National Committee for the Heads of Arab Local Authorities in December 2006. NAT'L COMM. FOR THE HEADS OF THE ARAB LOC. AUTH. IN ISR., *THE FUTURE VISION OF THE PALESTINIAN ARABS IN ISRAEL* (2006) [hereinafter FUTURE VISION], <http://www.adalah.org/newsletter/eng/dec06/tasawor-mostaqbali.pdf> [<https://perma.cc/MZ6U-HDHA>].

310. YOUSEF T. JABAREEN, MOSSAWA CTR., *AN EQUAL CONSTITUTION FOR ALL? ON CONSTITUTION AND COLLECTIVE RIGHTS FOR ARAB CITIZENS IN ISRAEL* (2007) [hereinafter JABAREEN, *AN EQUAL CONSTITUTION*], [https://www.mossawa.org/eng/Public/file/02007%20An%20Equal%20Constitution%20For%20All%20\(1\).pdf](https://www.mossawa.org/eng/Public/file/02007%20An%20Equal%20Constitution%20For%20All%20(1).pdf) (on file with the *Columbia Human Rights Law Review*).

Democratic Constitution.³¹² Together, these documents envision representation and participation for Arabs in the legal, political, and social realms, thus achieving the mandate for minority participation and equality established by international law. One of these documents, *The Democratic Constitution*, is particularly relevant here as it seeks to rectify existing lacunae in Arab-Palestinian representation through specific constitutional reforms. The rights detailed in *The Democratic Constitution* are meant to complement, not replace, individual rights to which all persons are entitled.³¹³

The discussions and framing of all four documents was guided by international legal standards, particularly those outlined by UNDRIP and the Minorities Declaration. Perhaps unsurprisingly, the drafting process for *The Future Vision* documents corresponded with the final stages of UNDRIP's formulation.³¹⁴ Indeed, international legal standards have provided legal and moral backing for internal Arab-Palestinian discourse. *The Future Vision* documents were also written in the shadow of pervasive inequality and socio-economic discrimination against Arab-Palestinians as individuals, and to challenges to the realization of their collective rights.³¹⁵ Therefore, these documents advocate for equality for Arab-Palestinians as individuals and for Arab-Palestinian's treatment as a distinct group deserving of full collective minority and Indigenous rights.³¹⁶ The framing also involved an introspection into the contemporary Israeli political and legal realities, specifically taking into account the collective rights and recognition already afforded to the Jewish majority.³¹⁷ Therefore, the documents seek equality between the groups, on the basis of recognition of both groups' distinctive national identities.³¹⁸

311. MADA AL-CARMEL, THE HAIFA DECLARATION (2007) [hereinafter HAIFA DECLARATION], <https://old.mada-research.org/wp-content/uploads/2020/06/haifaenglish.pdf> [<https://perma.cc/W968-7EU6>].

312. DEMOCRATIC CONSTITUTION, *supra* note 298.

313. *See, e.g., id.* art. 18(e) ("The dignity, equality and liberty of a person subject to the decisions of the representative body must be respected.").

314. The 2007 Declaration was adopted by the U.N. General Assembly on September 13, 2007. UNDRIP, *supra* note 6.

315. *See supra* Part I for a discussion of some of this discrimination.

316. Jamal, *Political Ethos*, *supra* note 307, at 15.

317. Jabareen, *Constitution Building and Equality*, *supra* note 26, at 345–401; Jabareen, *Enshrining Exclusion*, *supra* note 195, at 249–63.

318. For a theoretical discussion of political equality between two communities, see LIMOR YEHUDA, COLLECTIVE EQUALITY: HUMAN RIGHTS AND DEMOCRACY IN ETHNO-NATIONAL CONFLICTS 187–226 (2023).

The Future Vision, which was developed under the auspices of the National Committee for the Heads of Arab Local Authorities and the Chairman of the High Follow-Up Committee for the Arabs in Israel, is considered the definitive text. It calls for equal participation for Arab-Palestinians on the collective and individual levels in forums related to the distribution of public resources, decision-making based on consensual arrangements, and power-sharing.³¹⁹ These principles are characterized as “the cornerstone of building an equal and just society.”³²⁰ The document’s premise is that the “state has to acknowledge that Israel is the homeland for both Palestinians and Jews.”³²¹ As such, it emphasizes that relations “between the Palestinians and Jews in Israel should be based on attainment of equal human and citizen rights based on international conventions and the international relative treaties and declarations.”³²² To this end, it seeks “a consensual democratic system”:

Defining the Israeli State as a Jewish State and exploiting democracy in the service of its Jewishness excludes us and creates tension between us and the nature and essence of the State. Therefore, we call for a consensual democratic system that enables us to be fully active in the decision-making process and guarantees our individual and collective civil, historic and national rights.³²³

The document defines a consensual democratic system as “a coalition between the elites of the two groups, equal proportional representation, mutual right to veto and self-administration of issues exclusive to each community.”³²⁴ These principles echo provisions in international law discussed in Part II. The chapter devoted to the legal status of the Palestinian-Arabs in Israel³²⁵ further expands on the document framers’ understanding of “consensual democracy,” seeking “appropriate representation on a collective basis in the State system.”³²⁶ Appropriate representation—including “public positions and appointments”—are meant to achieve “effective representation

319. FUTURE VISION, *supra* note 309, at 10–11.

320. *Id.* at 14–15.

321. *Id.* at 11, ¶ 3.

322. *Id.*

323. *Id.* at 5.

324. *Id.* at 11, ¶ 3.

325. The Legal Chapter is based on the research presented by the author of this Article and discussed by the group that ultimately approved the draft. *Id.* at 12.

326. *Id.* at 15, ¶ 7.

and participation of Arab-Palestinians in decision-making procedures within the official institutes, as well as the activation of the veto right in matters concerning their living.”³²⁷ Thus, *The Future Vision* seeks full cooperation and coordination with representative bodies to facilitate meaningful influence over decision-making as it relates to policy on the national level and the ability of each national group to administer issues internal to their community. This is meant to achieve equitable distribution of national resources which belong to all citizens equally. As such, *The Future Vision* advocates for participation and representation which realizes equality between the majority and minority through effective and equal representation in national institutions, collective representation, and use of veto arrangements.

Other Future Vision documents outline a similar set of demands relating to representation, participation, equality, and, more generally, recognition of Arab-Palestinians’ equal status as a distinct national group within Israel. *The Equal Constitution* emphasizes the importance of representation; it seeks true “appropriate group representation in governmental institutions and decision-making bodies.”³²⁸ The document specifies that this type of representation meets or exceeds the general percentage the minority constitutes of the overall population.³²⁹ It also calls for establishment of institutionalized mechanisms of consultation whereby those representing Arab-Palestinians are credible within their own community.³³⁰ Such mechanisms are meant to ensure meaningful representation whereby such representatives have “real influence,” including “a veto right to the Arab representatives as part of the decision-making process on those matters that have a profound effect on the Arab population.”³³¹ These mandates seek to ensure that such representation effectively achieves equality and equal rights.

The Haifa Declaration similarly reinforces the community’s quest “to create a democratic state founded on equality between the two national groups.”³³² This vision, according to the document’s authors, “would require a change in the constitutional structure and a change in the definition of the State of Israel from a Jewish state to a democratic state established on national and civil equality between

327. *Id.* at 15, ¶ 4.

328. JABAREEN, AN EQUAL CONSTITUTION, *supra* note 310, at 74, ¶ 5.

329. *Id.* at 74, ¶ 5(a).

330. *Id.* at 74, ¶ 5(b).

331. *Id.* at 75, ¶ 5(c).

332. HAIFA DECLARATION, *supra* note 311, at 16.

the two national groups,” thereby “enshrining the principles of banning discrimination and of equality between all of its citizens and residents.”³³³ According to the document, this requires:

[E]nsuring the principle of multiculturalism for all groups; securing the effective participation of the Palestinian minority in government and in decision-making; guaranteeing the Palestinian citizens in Israel the right of veto in all matters that concern their status and rights; guaranteeing their right to cultural autonomy, which includes the rights to develop policies for and to administer their own cultural and educational affairs; and distributing resources in accordance with the principles of distributive and corrective justice.³³⁴

The framers of the document believe that such principles “can guarantee [the community’s] right to self-determination as a homeland minority.”³³⁵ As such, this document reinforces the same themes that appear in other documents, emphasizing the importance of these principles to the community at large.

Taken together, these documents express a consistent set of desired outcomes. They seek equitable distribution of national resources through appropriate representation and effective participation in national decision-making forums. This can be guaranteed through internal autonomous institutions, sufficient numeric representation, consultation, appointment of minority individuals who are considered to be credible within their own communities to positions of national importance, and veto power. These principles roughly correspond to international legal standards for full and effective participation for Indigenous groups.³³⁶

C. The Arab-Palestinian Community’s Vision for a Democratic Constitution

The documents outlined thus far have indicated that broad and serious changes within Israel’s legal and political structure are required to achieve meaningful individual and collective equality for minority groups. The three documents discussed above call for a “consensual democracy” and seek change in Israel’s constitutional

333. *Id.*

334. *Id.*

335. *Id.*

336. For more discussion on the international legal standards for Indigenous communities, see *supra* Part II.

structure and in the definition of the State.³³⁷ This would transform the political system such that both national groups—Jews and Arabs—enjoy equal legal status. The fourth and final document, *The Democratic Constitution*, developed by Adalah,³³⁸ provides a much more detailed blueprint for operationalizing these goals through constitutional protections.

The proposed constitution opens with a vision statement whereby Israel is a “democratic, multicultural and bilingual state.”³³⁹ Similar to the other documents, it calls for appropriate representation and effective participation in all governmental authorities and decision-making bodies in Israel.³⁴⁰ Within this broad mandate, it wants the State to recognize minority institutions as official representative bodies of the Arab community in Israel and to grant them the legitimacy necessary to represent their constituents opposite State authorities. This appears in Article 18, entitled “A Multicultural State.”³⁴¹ Article 18(A) specifies that each national minority deserves its own educational, cultural, and religious institutions.³⁴² Article 18(B) focuses on the operation of these institutions. It provides that “[a]ll the groups mentioned in (A) are entitled to operate their institutions via a representative body chosen by the members of the group”³⁴³ Article 18(C) seeks to ensure “suitable” funding for such institutions, putting them, at minimum, on par with majority institutions.³⁴⁴ Subsections (D) through (G) generally address identity preservation.³⁴⁵ Finally, Article 18(H)

337. See *supra* Section V.B (summarizing *The Future Vision*, *The Equal Constitution*, and *The Haifa Declaration*).

338. DEMOCRATIC CONSTITUTION, *supra* note 298.

339. *Id.* at 5, ¶ 9.

340. *Id.* art. 18(H) (stating that each group that constitutes a national minority is “entitled to appropriate representation in all of the governmental authorities of the state”).

341. *Id.* art. 18.

342. *Id.* art. 18(A) (“Each group that constitutes a national minority is entitled to educational and cultural institutions; each group that constitutes a religious minority is entitled to religious institutions.”).

343. *Id.* art. 18(B).

344. *Id.* art. 18(C) (“The State of Israel will allocate a suitable budget to the representative body for operating the institutions to ensure their existence in good quality and at a level equal to that of the majority’s institutions.”).

345. See *id.* art. 18(D) (“All the historical, cultural and holy sites of all of the groups shall be preserved and protected from any damage or harm to the dignity and sanctity of the site.”); see also *id.* art. 18(E) (“The dignity, equality and liberty of a person subject to the decisions of the representative body must be respected.”); *id.* art. 18(F) (“Every citizen affiliated with one of the aforementioned

makes clear that these separate representative institutions should not come at the expense of appropriate representation and effective participation at the national level. It declares that "[t]hese minority groups are entitled to appropriate representation in all of the governmental authorities of the state."³⁴⁶ Taken together, *The Democratic Constitution* advocates for constitutional recognition of the minority's own representative institutions along with appropriate representation within national governmental institutions.

Arab-Palestinians are a perpetual minority in Israel's national lawmaking body, the Knesset; this greatly hinders their influence. In order to rectify this significant imbalance, Article 20 of *The Democratic Constitution* introduces two constitutionally mandated models for participation and representation in the Knesset. Both are based on the principle of power-sharing by minorities in government, particularly as it relates to homeland, national, or linguistic minorities. Article 20(A) states that "[a] parliamentary committee will be formed that will be called 'the Parliamentary Committee for Bilingual and Multicultural Affairs.' Half of the committee members will be members of parliament from parties that by definition and character are Arab parties or Arab-Jewish parties."³⁴⁷ Article 20(B) grants this committee substantive authority by stating that "[n]o laws will be enacted in the Knesset or statutes approved in parliamentary committees on issues related to the instructions of this Chapter without the prior consent of the Parliamentary Committee for Bilingual and Multicultural Affairs."³⁴⁸ Yet, it gives the Knesset the ability to overrule decisions made by this committee through a two-thirds supermajority (80 out of the 120 members).³⁴⁹ The second model states that "[n]o bill will be approved by the plenum of the Knesset if 75% of the members of the Knesset who belong to parties which by their definition or character are Arab

groups is entitled to maintain his or her identity and culture in public life, and to develop and practice them."); *id.* art. 18(G) ("Every citizen is entitled to establish and maintain his or her family, social, cultural, religious and economic relations with members of his or her people or nation, including the right to freely cross borders to them.").

346. *Id.* art. 18(H).

347. *Id.* art. 20(A) (Model I).

348. *Id.* art. 20(B) (Model I).

349. *See id.* ("However, the Knesset plenum will be authorized to enact or approve such legislation, overruling the committee's decision, by a special majority of no less than two-thirds of the members of the Knesset.").

parties or Arab-Jewish parties vote against it under the reasoning that the bill violates the fundamental rights of the Arab minority.”³⁵⁰

The two models envision veto powers for the Arab minority, enabling them to block decisions that violate their rights and negatively affect their status. Preventing a veto would require ongoing dialogue and negotiation between representatives of the Arab minority and the Jewish majority. Importantly, these constitutional models are not dependent on joining the government’s ruling coalition; rather representatives of Arab or Arab-Jewish parties would be granted political influence by virtue of being elected by their constituency.³⁵¹ This is significant because Arab minority parties have, with only one recent and brief exception referenced above, been in the opposition since Israel’s establishment in 1948.³⁵²

The Democratic Constitution explains that the two models should be regarded as examples of the principle of power-sharing; but they are certainly not the only models that could guarantee this principle.³⁵³ To this end, the document concedes that “[d]efining the type of model is a matter for political agreement between the representatives.”³⁵⁴ Therefore, the document envisions that determining the right set of arrangements in Israel to ensure an appropriate balance of power between Jews and Arabs would be subject to political agreement between representatives of both groups.³⁵⁵

350. *Id.* art. 20(A) (Model II).

351. *See id.* at 10 n.6 (noting that both models of Article 20 rely on “the principle of power-sharing by minorities”).

352. *See id.* (emphasizing that “serious weight was given to the historical fact that the representatives of the Arab minority in the parliament are the only representatives to have been in opposition since 1948”).

353. *Id.*

354. *Id.*

355. *Id.* In addition to outlining two models of power-sharing, *The Democratic Constitution* points to practices and examples of arrangements that have been adopted by other states to accommodate minority groups and their collective rights for participation. It highlights relevant arrangements at the federal level in Canada, Belgium, Macedonia, and Northern Ireland; these are presented as examples of various levels and models of power-sharing. *Id.* These models, by and large, include veto rights in relation to decisions made by the central government along with structures for intra-communal autonomy as it relates to matters such as education, culture, religion and language. For example, in Macedonia, the Albanian minority is granted veto power over constitutional amendments pertaining to culture, language, and major appointments. *Id.* In Northern Ireland, the 1998 Good Friday Agreement establishes a complex system of veto arrangements between Catholics and Protestants. *Id.* In Canada, the province of

The proposals outlined in *The Democratic Constitution* underscore the importance of concrete and detailed constitutional arrangements for minority representation and participation. This is expressed in the document on two levels: at the level of internal autonomy (combined with formal and official recognition of representative bodies),³⁵⁶ and at the national level (including appropriate representation and participation in decision-making institutions of government).³⁵⁷ These types of stringent constitutional arrangements are necessary in the Israeli reality where the State is home to two different national groups and the minority is both a significant percentage of the population and a victim of serious marginalization. In these situations, majorities can easily suppress the minority’s rights of representation and participation. As such, national structures, along with international law, need to mandate clearly defined arrangements that can address the needs of groups such as Palestinians in Israel.

The constitutional outline proposed by the Arab-Palestinian community was influenced by UNDRIP and the Minorities Declaration, adopting their overriding aim of full and effective participation. Generally, the proposed outline advocates for representation and participation in national decision-making bodies—including where these bodies lack a specific mandate in relation to the Arab minority. It further advocates for internal autonomy in relation to education, culture, and religion. Significantly, it seeks the establishment of constitutional arrangements that, similar to UNDRIP’s emphasis on “consultation” and “prior consent,” envision representatives of the community holding veto power in the parliament and in national decision-making bodies more generally. Yet *The Democratic Constitution* goes beyond UNDRIP by outlining two different potential models for power-sharing. Both models attempt to address Arab-Palestinians’ persistent numerical disadvantage and to strengthen their position in overall decision-making on the national level. As such, *The Democratic Constitution*

Quebec is granted the right of veto on the Federal Level as it relates to language. *Id.* The situation is similar in Belgium where linguistic communities are entitled to group veto procedures in Belgium’s federal parliament on certain issues that are liable to affect communal life. *Id.*

356. *See id.* arts. 18(A)–(C) (guaranteeing internally representative educational, cultural, and religious institutions for national minorities).

357. *See id.* arts. 18(H), 20 (Model I), 20 (Model II) (guaranteeing appropriate representation in governmental authorities of the state and offering two models for minority participation in decision making).

represents an important step towards defining the nature of meaningful representation and participation for Indigenous national minorities in order to realize the international mandate for equality.

In an important attempt to challenge official Israeli constitutional norms and practices, a new constitution, based on the principles propounded in the four documents discussed above, was proposed as legislation in the Knesset. Initiated by the author of this Article, the proposed legislation is entitled: “Basic Law: Israel - A Democratic, Multicultural and Egalitarian State.”³⁵⁸ Endorsed by fifteen lawmakers representing Arab parties in the Knesset, the legislative proposal was submitted to the Knesset on April 30, 2018 while the Knesset was also debating the Nation-State Law.³⁵⁹ This proposed Basic Law “aims to anchor the values of Israel as a democratic and multicultural state, treating all its citizens with complete civil, cultural and national equality.”³⁶⁰ Article 3, entitled “Shared State,” reads, “[t]he state is the shared state of all its citizens, and all of its institutions and resources serve in a full and equal manner all citizens of the state.”³⁶¹ Specifically in relation to the right to representation, Article 8 of the bill, entitled “Appropriate and Effective Representation,” states that “the Arab minority in the state is entitled to appropriate and effective representation in all state authorities, in all its institutions and in all centers of decision-making.”³⁶² Article 9, entitled “Special Institutions,” reads in part, “[t]he National Arab Minority is entitled to special institutions in the areas of education, culture and religion and is also entitled to manage those institutions through representative bodies that were elected by Arab citizens.”³⁶³ Article 9(b) continues, “[t]he law will establish arrangements for transferring appropriate state budgets to these

358. Draft Bill Basic Law: A Democratic, Multicultural and Egalitarian State, 5778–2018, HH (Isr.); Lahav Harkov, *Multicultural Israel’ Bill Responds to Jewish Nation-State Proposal*, JERUSALEM POST (Jan. 1, 2018), <https://www.jpost.com/israel-news/politics-and-diplomacy/multicultural-israel-bill-responds-to-jewish-nation-state-proposal-540424> [<https://perma.cc/R6F9-38M7>]; Orly Noy, *Defying Racist Legislation: New Bill Seeks to Turn Israel into a True Democracy*, +972 MAG. (June 2, 2018), <https://www.972mag.com/defying-racist-legislation-new-bill-seeks-to-turn-israel-into-a-true-democracy> [<https://perma.cc/RM8N-YDMC>].

359. See Harkov, *supra* note 358 (noting that this bill was proposed as a response “to the Jewish nation-state bill”).

360. Draft Bill Basic Law: A Democratic, Multicultural and Egalitarian State, 5778–2018, HH, art. 1 (Isr.).

361. *Id.* art. 3.

362. *Id.* art. 8.

363. *Id.* art. 9(a).

representative bodies in order to ensure the existence of these institutions and their management at a level of quality that is equal to those which are managed by the majority.”³⁶⁴ On July 11, 2018, the Knesset rejected this bill in a vote of sixty-six to nine.³⁶⁵ One week later, the Knesset approved the Nation-State Law.

VI. LESSONS BASED ON THE ARAB-PALESTINIAN EXPERIENCE: MAKING THE CASE FOR MEANINGFUL REPRESENTATION AND PARTICIPATION

The preceding discussion has shed light on the inadequacy of Arab-Palestinian representation and participation in decision-making at all levels: in terms of advocacy, legal action, and legislation. In order to ensure the individual and collective rights of the Arab-Palestinian minority in Israel, this Article has argued that three principles are key to meaningful representation and to compliance with international law: proportionality, credibility, and effectiveness. These principles were lacking in the three Supreme Court rulings addressed in Part IV. This absence limited the potential impact of these rulings; they were unable to bring about substantive change regarding the right of participation and appropriate representation for the Arab minority. This Part will explain each principle in more depth.

A. Proportional Representation

International law calls for full and effective participation in national decision-making;³⁶⁶ this implies the existence of a numerical target. Yet Israeli legislation which, generally, seeks “appropriate representation” does not specify numerical targets. The Israeli Supreme Court failed to uphold the principle of proportionality in its rulings. The percentage of Arab appointees to national governmental bodies and in the civil service has consistently been far below the approximately 20% of Arab minority citizens within the overall

364. *Id.* art. 9(b).

365. *Knesset Rejects Bill to Ensure Full Equality Between All Israeli Citizens*, MIDDLE E. MONITOR (Sept. 18, 2020), <https://www.middleeastmonitor.com/20200918-knesset-rejects-bill-to-ensure-full-equality-between-all-israeli-citizens> [<https://perma.cc/D4F6-SLN6>].

366. *See, e.g.*, UNDRIP, *supra* note 6, arts. 18–19 (elucidating Indigenous rights to representation for national-level decision-making).

population.³⁶⁷ According to the principle of proportionality, the number of appointed officials and employees from the targeted community must—in the very least—correspond to their percentage of the population.³⁶⁸ Beyond the legal cases analyzed in this Article, this principle should hold true for all public and governmental bodies, at all levels of employment, and in all appointed positions.³⁶⁹ While international law does not explicitly emphasize this principle, it is clear that in the case of Arab-Palestinians, this proportionality is necessary to achieve full and effective participation.

However, even where this proportionate number is achieved, Arab-Palestinians would still be a numerical minority and may therefore be unable to protect the interests of their group. Furthermore, one individual or a small number of individuals are not capable of faithfully conveying the collective will of a substantial minority. Thus, it would not be sufficient to achieve approximately 20% representation (proportionate representation) given all the institutional barriers outlined here. While proportional representation serves as a basic pre-condition that must be met in order to advance the right to representation and participation, it should be combined with two additional principles: credible representation and effective representation.

367. See AMIR PRAGER, APPROPRIATE REPRESENTATION IN THE CIVIL SERVICE: ARAB SOCIETY 5 (2020), <https://main.knesset.gov.il/EN/activity/mmm/AppropriateRepresentationA.pdf> [<https://perma.cc/PJK9-XGEJ>] (reporting that only 12.2% of civil service employees in Israel were Arabs in 2019).

368. See, e.g., Government Decision No. 1697 (June 8, 2014) (Isr.), https://www.gov.il/he/pages/2014_dec1697 [<https://perma.cc/6SRC-YRFG>] (mandating a goal of a minimum of 50% representation of women in senior roles).

369. Yiftachel et al., *supra* note 243, at 21. In discussing issues of land and planning, Yiftachel and his co-authors note that “Arab citizens must be fairly represented throughout all the systems that make decisions about land, planning, and development. The presence of Arab citizens in those systems must be increased to obtain proportional representation that correlates to their share in the population.” *Id.* They identify “[m]ajor bodies requiring this reform,” including the Israel Land Council, the National Council for Planning and Construction, local and district committees for planning and construction, and other decision-making bodies associated with “entities such as the Nature and Parks Authority, the Committee for Preservation of Agricultural Land, the Development Authorities for the Negev and the Galilee, and the special bodies established to plan and implement Bedouin settlement.” *Id.*

B. Credible Representation

The principle of credible representation refers to the extent to which appointed representatives are perceived as legitimate and credible by their own communities. The right to effective and full participation for minorities requires that their representatives faithfully convey the interests and will of most of the members of their community. International law envisions that this will occur through recognition of and consultation with representative organizations from the affected communities in decision-making.³⁷⁰ Israeli law envisions “appropriate representation” without defining what “appropriate representation” requires. Yet, neither set of laws specifies selection criteria for representatives who are appointed to serve in key decision-making roles.

Organizations representing the interests of the Arab-Palestinian community are not officially recognized by the State of Israel and, consequently, are not given a role in appointing representatives to national or regional bodies nor are they consulted more specifically on policy matters affecting the community. Israeli courts, as the cases in Part IV demonstrate, have also failed to advance this internationally mandated right. In the Land Administration case, the government neglected to consult with Arab community leadership despite the fact that elected leaders of Arab local authorities and their constituents are directly impacted by many of the decisions made by the ILA.³⁷¹ Predictably, and as discussed above, the two individuals selected by the government were not considered to be credible by the community they purported to represent. In the Planning Committee case, the Court also disregarded the notion that Arab elected leaders and Arab local institutions should be integral to the appointment process despite the influential role of this committee in building and planning in Arab localities.³⁷² In the Government Corporations case,³⁷³ the Arab-Palestinian petitioners provided the Court with names of candidates they supported, but the Court accepted the government’s claim that

370. See ILO No. 169, *supra* note 96, art. 6; UNDRIP *supra* note 6, art. 19; see generally Hum. Rts. Council, Progress Report, *supra* note 86, at 4–8.

371. HCJ 6924/98 Association for Civil Rights in Israel v. Israel 55(5) IsrSC 15 (2001) (Isr.).

372. HCJ 9472/00 The National Committee for the Heads of Arab Local Authorities v. Minister of Interior (Nov. 15, 2001) (Isr.).

373. HCJ 10026/01 Adalah v. Prime Minister (Apr. 2, 2003) (Isr.), <https://www.adalah.org/uploads/oldfiles/features/women/10026decision-heb.pdf> [<https://perma.cc/9Y4F-BMPG>].

no qualified candidates could be identified. A review of all three cases begs the question: who determines which representatives are selected, and whether they are authentic and credible representatives of the minority group? This Article argues that individuals who are appointed to decision-making forums must be selected by the same community they are meant to represent.

Credible representation thus requires developing and implementing in-depth and meaningful consultation mechanisms with representatives of minority groups. Consistent with the measures proposed in *The Democratic Constitution*, a representative body should be recognized by national institutions. This body would serve as the representative body of Indigenous communities tasked, *inter alia*, with vetting candidates proposed for appointment in influential national bodies. This process would ensure that such individuals have at least a basic level of credibility from within their larger communities. As mandated by international law, they must be equal partners in designing mechanisms of participation and recognized community leaders must be included in every stage of decision-making processes.³⁷⁴ Indeed, full and effective participation

374. Naturally, such principles have been proposed in relation to the situation of Arab-Palestinians in Israel. For example, in a comparative look at Israel and Canada, Saban and Streiner state that “there is a need to look at the difference between the classical appropriate representation and an appropriate representation with a collective character and consider the adoption of the second type in regard to the appointment of Arab representatives to administrative and decision-making positions.” Ilan Saban & Scott Streiner, *On Two Types of Appropriate Representation Theoretical Framework, the Canadian Case and Initial Comparison with Israel*, 11 LAB. SOC’Y & L. 247, 247–73 (2005) (Isr.). Classical appropriate representation, according to the authors, is individual in nature, is temporary and is based on granting rights on a case-by-case basis without the involvement of the community with which the minority is affiliated. *Id.* at 257–63. Appropriate representation—that which has a collective character—is much more permanent and is very much based on group involvement. In this latter type of representation, all members of the group are represented as a whole. *Id.* at 255–57. Political scientists who research minority rights have made similar arguments. They believe that any representation, including proportional representation as outlined above, is insufficient. Rather one must examine the representatives’ positionality vis-à-vis the communities they are tasked with representing. Young, for example, argues that “representatives could only properly express the ‘will of the people’ if they are present for their constituents, and act as they would act.” YOUNG, INCLUSION AND DEMOCRACY, *supra* note 143, at 126. This is particularly the case for minorities or citizens who are experiencing structural inequalities. Jabareen, *Redefining Minority Rights*, *supra* note 57, at 155–56.

requires that minority groups must be genuinely consulted in relation to the appointment of officials and influential figures.

C. Effective Representation: Constitutional Arrangements for Power-Sharing

Finally, minority participation must be effective. Even where proportionality and credibility are in place, meaningful representation is unlikely to occur in cases where the marginalized group is a numeric minority whose rights are not otherwise safeguarded by the State. International law mandates “consultation” with and “prior consent” of the minority group.³⁷⁵ Therefore, representatives of minority groups must have genuine political power including actual decision-making authority, especially when these decisions are central to the daily life of members of their communities. At a minimum, specific mechanisms must be established to identify decision-making processes that affect minority constituents and to grant minority representatives decision-making authority in those areas. These mechanisms are particularly important in cases where a minority’s status is contested on the national level and a State’s *de jure* and *de facto* arrangements have historically been structured to benefit a specific group.

Effective representation requires establishing group-based arrangements for minority participation. The constitutional arrangements suggested by *The Democratic Constitution* could serve as examples in the Israeli context. For example, the Arab-Jewish Parliamentary Committee exemplifies power-sharing in lawmaking; this committee’s consent would be required prior to approval of decisions that impact the rights of the Arab community. Another group-based arrangement could be a requirement that no decision be approved without the consent of a majority of the Arab-Palestinian-identifying members on the decision-making body. Similarly, a veto mechanism can serve as a crucial safeguard for achieving full and effective participation. Implementing these measures can prevent decisions being made against the will of the minority, while increasing the ability to account for Arab-Palestinian voices, needs, and interests in decision-making nationally.

The Arab-Palestinian case study indicates that participation of marginalized groups should be proportional, credible, and effective. The principle of proportionality means that the percentage of

375. For examples of such language in international instruments, see ILO No. 169, *supra* note 96, art. 6; UNDRIP, *supra* note 6, arts. 5, 18, 19.

minority individuals appointed to decision-making forums must be at least equivalent to that community's percentage of the population as a whole. The credibility principle requires that minority individuals who are appointed to influential national and regional decision-making bodies be viewed by their community as trusted and representative members of that community capable of faithfully conveying the community's collective interests. Third and finally, the principle of effectiveness requires that such appointed individuals be guaranteed an influential role in the forums in which they serve; they must be vested with institutionalized power in decision-making processes, especially on issues which have a direct impact on their own community. This should include the power to veto harmful proposals. Realizing these principles often requires the establishment and implementation of new constitutional mechanisms. But once operationalized, these principles have the potential to greatly advance the principles of equality and non-discrimination for minorities, individually and collectively.

VII. REPRESENTATION IN THE SHADOW OF THE WAR ON GAZA

As this Article was nearing completion, the horrific war on Gaza entered its second year.

At the time of writing, over a thousand Israeli citizens and other nationals were killed or wounded and over two hundred were taken hostage in Gaza on October 7, 2023; meanwhile Israel's prolonged and devastating onslaught on the Gaza Strip has left tens of thousands dead and wounded, wrought disease, hunger, and wholesale destruction on the territory, and has turned hundreds of thousands of Palestinians into refugees once again as they continually move from one unsafe area to another within Gaza.³⁷⁶ Deaths and destruction in Gaza continue to be on the rise. Furthermore, fighting on Israel's northern border has brought further destruction and has left hundreds of thousands of evacuees displaced

376. *See Gaza: Turk Pleads for End to Fighting as Death Toll Passes 40,000*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Aug. 15, 2024), <https://www.ohchr.org/en/statements-and-speeches/2024/08/gaza-turk-pleads-end-fighting-death-toll-passes-40000> [https://perma.cc/67AD-UVRZ]; Press Release, U.N. Off. of the High Comm'r for Hum. Rts., Israeli Authorities, Palestinian Armed Groups Are Responsible for War Crimes, Other Grave Violations of International Law, UN Inquiry Finds (June 12, 2024), <https://www.ohchr.org/en/press-releases/2024/06/israeli-authorities-palestinian-armed-groups-are-responsible-war-crimes> [https://perma.cc/88UU-XLBK].

from villages and towns in both northern Israel and southern Lebanon.³⁷⁷

During this war, three dramatic legal developments in the international arena are still unfolding and will continue to influence future legal and political developments: the Advisory Opinion of the International Court of Justice delivered on July 2024 regarding the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem;³⁷⁸ the case brought by South Africa against Israel before the International Court of Justice on December 2023 under the Convention on the Prevention and Punishment of the Crime of Genocide;³⁷⁹ and the International Criminal Court Pre-trial Chamber issuance in November 2024 of warrants for the arrest of Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant together with former Hamas military commander Mohammed Deif, which followed an investigation of war crimes and crimes against humanity.³⁸⁰ These rulings and actions by the highest international courts attest to the increasing role the international law is playing in the current situation in the region.

In the context of this Article, Hamas’ attack on October 7, 2023, on Israeli towns near Gaza, and Israel’s ensuing devastating war on Gaza and beyond, have undermined the collective and personal sense of security of both Jews and Arab-Palestinians in Israel. The latter have been profoundly impacted. Many have relatives or acquaintances in Gaza who have either been injured or killed or continue to barely survive in light of the ongoing military onslaught at the hands of the Israeli army. Many also have relatives

377. Press Release, U.N. Sec’y-Gen., Avoid ‘All Out War’ in Lebanon, Stop ‘Tit-for-Tat Violence’ Engulfing Middle East, Secretary-General Tells Security Council, U.N. Press Release SG/SM/22400 (Oct. 2, 2024), <https://press.un.org/en/2024/sgsm22400.doc.htm> [<https://perma.cc/KB56-YL8B>].

378. Press Release, Int’l Ct. of Just., Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (July 19, 2024), <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-pre-01-00-en.pdf> [<https://perma.cc/B33R-LC45>].

379. Press Release, Int’l Ct. of Just., Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) (Dec. 29, 2023), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231229-pre-01-00-en.pdf> [<https://perma.cc/8HK6-STRA>].

380. Press Release, Int’l Crim. Ct., Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel’s Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant (Nov. 21, 2024), <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges> [<https://perma.cc/9YZE-6STX>].

or acquaintances in the West Bank, where Israeli military and extremist settlers are displacing Palestinians, destroying their property, and even killing them with impunity.³⁸¹ Within Israel, Palestinian citizens are regularly exposed to rocket fire in the North and South, often without adequate access to the type of protected spaces which Jewish citizens enjoy.³⁸² Many have been injured or killed, or know others who were.

While the consequences of this war are still unfolding, opinion surveys conducted since October 2023 expose a deterioration in relations between Jews and Arab-Palestinians in Israel. Unsurprisingly, current events have greatly exacerbated suspicion and distrust, particularly by Jews toward Palestinian citizens.³⁸³ Fear and hate underly a reticence to be near Arabs.³⁸⁴ This is expressed in increased levels of discrimination and persecution, including layoffs, arrests, and criminal prosecutions, particularly of activists and elected Palestinian political figures.³⁸⁵

381. Press Release, U.N. Off. of the High Comm'r for Hum. Rts., Comment by U.N. Human Rights Spokesperson Ravina Shamdasani on West Bank Violence (Aug. 31, 2023), <https://www.ohchr.org/en/press-releases/2024/08/comment-un-human-rights-spokesperson-ravina-shamdasani-west-bank-violence> [<https://perma.cc/3S5H-9JUZ>].

382. *Who Will Protect Israel's Arab Citizens?*, HAARETZ ED. (Dec. 18, 2023), <https://www.haaretz.com/opinion/editorial/2023-12-18/ty-article-opinion/who-will-protect-israels-arab-citizens/0000018c-7eca-db89-ad8f-fefa1dd00000?ts=1728166651667> (on file with the *Columbia Human Rights Law Review*).

383. For more on the impact of the war on Arab-Palestinians in Israel, see MOSSAWA CTR., 100 DAYS: PALESTINIAN-ARAB CITIZENS IN ISRAEL DURING THE WAR ON GAZA (2024), https://www.mossawa.org/eng//Public/file/1100%20DAYS_%20Report%20on%20the%20Status%20of%20Palestinian-Arab%20Citizens%20of%20Israel%20During%20the%20War%20on%20Gaza.pdf [<https://perma.cc/6G6D-PU4U>].

384. YARA NASER ET AL., TRENDS IN JEWISH ARAB RELATIONS FOLLOWING THE WAR IN OCTOBER 2023 (2024), <https://drive.google.com/file/d/11h04SXZSZ0w4BE3UQkCQqHWS5OTMBohu/view> [<https://perma.cc/8F2M-6UK9>].

385. For relevant examples of this discrimination and persecution, see *Repression of Palestinian Students in Israeli Universities and Colleges*, ADALAH (May 9, 2024), <https://www.adalah.org/en/content/view/11116> [<https://perma.cc/LG6X-HDXX>]; MTANES SHIHADDEH, MADA AL-CARMEL, FRAGILE CITIZENSHIP: RACISM AND OPPRESSION AGAINST ARAB CITIZENS IN ISRAEL DURING THE WAR ON GAZA (2024), <https://mada-research.org/storage/PDF/2024/eng/Mtanes%20Shihadeh%20-Fragile%20Citizenship%2026.6.pdf> [<https://perma.cc/2XKM-KJLX>]; *Israeli Police Continue Unlawful Suppression of Palestinian Protests*, ADALAH (July 16, 2024)

Concurrently, freedom of expression for Arab-Palestinian citizens has taken a catastrophic turn. In October 2023, the Israeli Police Commissioner declared, “anyone who wants to be a citizen of Israel, *ahlan wa sahlan* (Arabic for ‘welcome’). Anyone who wishes to identify with Gaza is welcome to – I will put him on the buses that are heading there now.”³⁸⁶ He continued by saying: “We won’t authorize protests . . . we’re not in a position to let all kinds of people mess with us. It’s zero tolerance treatment of the highest standard and we are more than ready.”³⁸⁷ Indeed, initial attempts to hold anti-war demonstrations in Haifa (mixed Jewish-Arab city) and Umm al-Fahem (an entirely Arab town) were outlawed and some individuals were charged with “sympathizing with terror organizations” and “supporting terrorism.”³⁸⁸ In the academic sphere, Arab-Palestinian students and lecturers, and, to a lesser extent, Jewish students who have voiced opposition to the war, have faced barriers to protest.³⁸⁹ This significant decline in freedom of expression necessarily undermines representation and participation.

Statistics in Israel suggest that these statements are reflective of public opinion: a survey of young people conducted since the war broke out found that 39% of Israeli Jews believe that the right of Arab-Palestinian minority citizens to vote should be

[hereinafter *Israeli Police Continue Unlawful Suppression*], <https://www.adalah.org/en/content/view/11150> [<https://perma.cc/Z5L9-YZBB>]; Nir Hasson & Josh Breiner, *Israeli Court Orders Release of Palestinian Academic Suspected of Incitement to Terror*, HAARETZ (Apr. 20, 2024), <https://www.haaretz.com/israel-news/2024-04-20/ty-article/.premium/israeli-court-orders-release-of-palestinian-academic-suspected-of-incitement-to-terror/0000018e-f760-d79f-a98e-f7e471360000> [<https://perma.cc/G9TV-YDU9>]; Adi Hashmonai, *The Police Dispersed a Silent Protest Against the War in Haifa, Two Were Arrested*, HAARETZ (Dec. 15, 2023), <https://www.haaretz.co.il/news/politics/2023-12-15/ty-article/.premium/0000018c-6e24-d798-adac-eeafc5a10000> [<https://perma.cc/HR9D-EQNL>].

386. Ran Shimoni et al., *Israel Police Commissioner: ‘Those Who Identify with Gaza Can Be Escorted There on Buses’*, HAARETZ (Oct. 19, 2023), <https://www.haaretz.com/israel-news/2023-10-19/ty-article/.premium/israel-police-commissioner-those-who-identify-with-gaza-can-be-escorted-there-on-buses/0000018b-4735-df22-a5eb-4f7dca0c0000> [<https://perma.cc/P7LK-ULYB>].

387. *Id.*

388. Hashmonai, *supra* note 385.

389. *Israeli Police Continue Unlawful Suppression*, *supra* note 385. See also Tamar Hager, Mohammad Khalaile, and Yousef T. Jabareen, *The Role of Academic Institutions in a State of War: The Gaza-Israel Conflict*, HIGHER EDUC. (Feb. 24, 2025), <https://link.springer.com/article/10.1007/s10734-025-01590-1> [<https://perma.cc/5N9B-SWMJ>] (describing the impact of the War on Gaza on academic institutions).

withdrawn (compared to 26% of Palestinian citizens who would support withdrawal of this right from Jewish majority citizens).³⁹⁰ Given that the right to representation and participation in the political system is a fundamental right that is particularly significant for minorities, where these rights are attacked, other, more serious democratic principles are likely to be threatened as well. This suppression of freedom of expression for Arab-Palestinian citizens of Israel and increased expressions of hatred against them may work in favor of the current extreme right-wing government as this becomes an excuse to push them further from arenas of potential influence. This is particularly the case where minority populations are perceived as potential threats, as is the case today. As the majority's patience for views they regard as "threatening" declines, it may try to exclude them from majority-dominated spaces, further eroding democratic principles in Israel.

Given this reality, prospects for improving representation of Arab-Palestinian citizens and for securing a peace deal that creates a sovereign Palestinian State alongside Israel are increasingly grim. This, combined with a general downward spiral in relations, will unquestionably make it more difficult for Arab-Palestinian political leaders in Israel to participate in any governing coalition or decision-making bodies, thus further weakening and diluting their right to participation. Unquestionably, the current situation poses a significant setback to any anticipated or hoped-for gains as it relates to equality, non-discrimination, and self-representation rights for the foreseeable future.

Current events in Israel and Palestine underscore the fragility of the rights of representation and participation. The present moment reinforces the fundamental arguments outlined in this Article: that it is critically incumbent upon States to establish constitutionally-mandated safeguards to minority participation in decision-making and other power-sharing arrangements. These arrangements must be able to withstand political upheaval, crises, emergencies, and other extreme circumstances. From the perspective of the Arab-Palestinian minority today, Israel's current legal system is part of the problem exacerbating tensions between citizens. Hopefully the analysis in this Article can indicate a potential path

390. ACHORD, LOSING THE COMPASS: DEMOCRATIC COMMITMENT IS IN DANGER AMONG YOUTH IN ISRAEL 4 (2024) (Isr.), https://e9f8ab77-00d3-4669-8111-7a9460602555.usrfiles.com/ugd/e9f8ab_b3082554c08a47b3ac4c31b47f87e676.pdf [https://perma.cc/UH9K-Y3V9].

forward for Arab-Palestinians and Israelis and will be applied to other minority and Indigenous groups around the world.

CONCLUSION

International law contains a strong and overriding mandate of equality and non-discrimination. Increasingly, it recognizes that minority groups, and particularly Indigenous minorities, face severe discrimination, inequality, and marginalization on the individual and collective levels. Majorities facilitate and perpetuate their own privilege, in part, by consigning minorities to the fringes of decision-making processes, if not excluding them from such processes altogether. Minorities are rendered voiceless when they are excluded from forums where policies, legislation, and other decisions influencing their lives are made. It is in these national and regional decision-making forums that budgets are allocated, professional opportunities are secured, cultural assets are protected, and institutions are reinforced. These resources belong to all members of society equally and, therefore, the State is obligated to allocate them fairly. For this reason, meaningful and influential participation as a collective in such forums is crucial and a decisive group right for minorities. Therefore, international law has increasingly focused on the right of participation for minorities as a central strategy in the elimination of inequality and discrimination.

International law, and particularly UNDRIP, envisions participation in two primary ways. Generally, minorities are granted the rights to “full” and “effective” participation in national decision-making bodies. International law envisions participation as facilitated through the establishment of representative institutions for minority and Indigenous groups. These institutions are entrusted with the authority to manage certain aspects of their internal affairs. Furthermore, and crucial for the purposes of this Article, such institutions are also viewed as being consultative bodies regarding decision-making on the national level, particularly in decisions that directly impact them. Such group-based arrangements are common in many countries globally and have proven to be an effective tool for rectifying inequality as they help to override the majority’s natural tendency to safeguard its own interests.³⁹¹

391. For a comparative discussion about group arrangements and equality between groups in Northern Ireland, Bosnia and Herzegovina, and Cyprus cases, see YEHUDA, *supra* note 318, at 227–54. For a discussion of group arrangements in Canada, see Saban, *Appropriate Representation*, *supra* note 149, at 574–78. For

Israeli law contains a weak legal mandate for “appropriate representation” for the Arab minority in the civil service and on boards of government corporations. The law is silent with respect to Arab representative institutions and the role of those institutions in influencing the lives of the Arab-Palestinian minority as a distinct identity. Clearly, this reflects a failure to recognize Indigenous minorities as distinct communities that require special group-based rights and have unique group-based needs and interests. In this lacuna, the Jewish majority in Israel has maintained hegemony over State resources, including representation and participation. Jewish Israelis’ numeric advantage has enabled them to structure State institutions in a way that promotes their own interests. This is reflected in the current status of Arab-Palestinian representation in Israel: Arab-Palestinians are not only severely under-represented in central State institutions and decision-making bodies, but also experience ongoing discriminatory legislation (e.g., the Nation-State Law) and a high degree of socio-economic inequality. Furthermore, their rights as a distinct group are constantly under attack. Taken together, this hinders Arab-Palestinians’ ability to overcome historic injustices and achieve current and future equality.

The Israeli case also demonstrates the dangers of a lack of specificity in mechanisms for promoting representation and, in particular, the need for constitutional and legal protections. To this end, the Arab-Palestinian community in Israel has worked to develop constitutional models that could safeguard this right. The Future Vision documents generally and *The Democratic Constitution* specifically propose more profound structural changes. They call for the need to officially recognize representative minority institutions which are vested with decision-making authority on the internal level in areas such as education and culture. On the national level, these documents envision power-sharing, veto power, and other mechanisms intended to overcome the inherent numeric disadvantage and political exclusion faced by this minority group. They indicate that comprehensive constitutional changes are required to truly achieve the collective rights of participation and representation.

a comparative discussion about group arrangements and equality between groups in Canada and Northern Ireland, see generally S.J.R. NOEL, *Making the Transition from Hegemonic Regime to Power-Sharing: Northern Ireland and Canada in Historical Perspective*, in NORTHERN IRELAND AND THE DIVIDED WORLD 209 (John McGarry ed., 2001).

This Article advocates for a transformative understanding of the right to participation and representation. Transformative representation goes beyond formal or symbolic representation to incorporate three key principles: proportionality, credibility, and effectiveness. Realizing these principles requires inclusion of representatives of the minority group in political decision-making bodies at all levels, not only numerically, but also in a manner that faithfully reflects the minority group’s interests and guarantees their actual influence. These principles acknowledge the special group-based needs of minority and Indigenous groups and, taken together, can more effectively guarantee equitable distribution of material, cultural, and symbolic resources and facilitate realization, in practice, of group-based aspirations. Such developments will advance the aspirations of Indigenous peoples and other minorities to create a better future for themselves, individually and collectively, in their homeland.