

# Bayan بیان ביאן

The Arabs in Israel הערבים בישראל

Editor: Arik Rudnitzky

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## From the Editor's Desk

The current issue of **Bayan** is being published amidst an emotional public and political controversy over the reform of the judicial system in the State of Israel.

The edition contains two articles on the Arab public's position on the judicial reform. The article by **Dr. Manal Totry Jubran** surveys the proposed changes to the Israeli judicial system and their effect on Arab citizens. The article by **Dr. Maysoun Ershad Shehadeh** deals with the participation of Arab citizens in the public protest against the judicial reform.

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The opinions expressed in MDC publications are the authors' alone.

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We thank Mr. David Simmer for translating and editing the English edition.

## **Manal Totry Jubran\* / The changes in the legal system and their effect on the regime and the Palestinian minority in Israel**

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The new proposed legislation that will be passed as part of the new government's coalition agreements are liable to cause harm to the weakest segments of Israeli society, and in particular Palestinian citizens of Israel.

Laws related to strengthening Jewish settlement, reinforcing Jewish identity in the education system, changing the policy on immigration to Israel and punishment of terrorists, as well as extending the pretexts for disqualifying candidates or lists from Knesset elections will now be protected from judicial review, even if it is found that they discriminate against Palestinian citizens of the State.

The assignment of broad powers to the Minister of National Security in order to deal with so-called "nationalist crime" and the creation of a designated unit that will report directly to him are liable to exacerbate the over-policing suffered by the Arab population for so many years.

Within Arab society, one can identify two basic approaches to the grassroots demonstrations against the changes in the judicial system. The first shows interest in the expected changes and understands that even if the current situation is bad, it could be much worse. In contrast, the other approach is not involved in what is happening – not out of apathy towards the situation but rather a deep feeling of despair and a lack of trust in the State's institutions.

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### **Introduction**

The changes being made to the Israeli Basic Laws, some of which have already passed First Reading in the Knesset, have aroused strong objections and emotions among the Israeli public and primarily the Jewish public. These changes will lead to fundamental changes in Israel's regime and will transform it from a democracy into a regime controlled solely by the government, with no proper checks and balances.

The changes have five main components: (1) Government control of the Judicial appointment Committee and the transformation of the process for appointing judges—and in particular Supreme Court judges—from a professional process to an essentially political one.<sup>1</sup> (2) The restricting of juridical review of Basic Laws and limiting the courts to the review of only regular laws, and even then only in the case of laws that explicitly violate a basic right anchored in a Basic Law. It is worth

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<sup>1</sup> See: Position Paper 7 on The Process for Choosing Judges (February 1, 2023), site of the Israeli Law Professors' Forum for Democracy. <https://bit.ly/3ZlvqgD> [Hebrew]

mentioning in this context that there are several fundamental human rights that are not protected by the Basic Law: Human Dignity and Freedom, which is the basic constitutional arrangement meant to provide protection of human rights in Israel, such as the right to equality, the right to demonstrate and the right to freedom of religion.<sup>2</sup> (3) The passing of an override clause that will make it possible to reapprove a law annulled by the Supreme Court because it violates human rights and is therefore not proportionate.<sup>3</sup> (4) Abolition of the pretext of reasonableness as a basis for invalidating administrative decisions.<sup>4</sup> (5) Changing the status of the legal counsels in the government ministries to positions of trust.<sup>5</sup> The thread that connects these changes is the transfer of decision-making authority in important matters—which affect the day-to-day lives of the country’s citizens and their rights—to the coalition majority, i.e. the government, as reflected in the slogan, “Returning governance to the public”.

Apart from these proposed laws, which focus on changing existing Basic Laws, regular laws are being approved and proposed laws are being submitted that are based on coalition agreements signed by the 37<sup>th</sup> government of Israel, and which also threaten the essence of the Israeli regime. However, and unfortunately, they are not getting the same level of attention as the other changes. What is contained in this legislation has an impact on all disadvantaged and oppressed groups, including women,<sup>6</sup> the LGBT community, Palestinian citizens of Israel and the Palestinian people living under occupation for over than 50 years. However, it appears that the Palestinian minority in Israel is less involved in the weekly demonstration on Saturday nights than the first two groups. Furthermore, representatives of the Arab parties in the Knesset were absent from most of the discussions in the Constitution, Law and Justice Committee, which is involved in approving the aforementioned changes. Nonetheless, it is important to mention that some Arab speakers did participate in demonstrations throughout the country and they made their voice heard in the speeches. In one unfortunate case, at a demonstration in Haifa, the Secretary of the Jewish-Arab Hadash party chose not to speak, in protest against the attempt to rewrite parts of her speech that related to, among other things, the connection between the erosion of democracy and the continuing Israeli occupation.<sup>7</sup>

This article focuses on the influence of some of the proposed and already approved changes on the Palestinian citizens of the State and will suggest explanations for their limited participation in the protest. First, I will present the two main fundamental

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<sup>2</sup> See the Position Paper “The Forum explains – fundamental concerns and the regime revolution: the rule of law and basic rights” (February 16, 2023), site of the Israeli Law Professors’ Forum for Democracy [Hebrew].

<sup>3</sup> See the Position Paper “Juridical Review and Overriding” (January 20, 2023), site of the Israeli Law Professors’ Forum for Democracy [Hebrew].

<sup>4</sup> See Position Paper 6, “Cancellation of the reasonableness pretext as a pretext for juridical review” (January 25, 2023), site of the Israeli Law Professors’ Forum for Democracy [Hebrew].

<sup>5</sup> On the significance of this issue, see: Malkiel Balas, “Instead of competent legal counsels, we will get the most well-connected ones”, *Haaretz*, January 9, 2023 [Hebrew].

<sup>6</sup> See Position Paper 11 “The harm to the rights of women as a result of the regime changes” (February 19, 2023), site of the Israeli Law Professors’ Forum for Democracy [Hebrew].

<sup>7</sup> Jack Khoury and Adi Hashmonai, “The secretary of Hadash in Haifa refused to speak in protest against a request to rewrite his message”, *Haaretz*, February 18, 2023.

principles within the coalition agreement between the Likud party on the one hand and the Religious Zionist and Otzma Yehudit parties on the other, which in my view will have the largest potential impact on the Palestinian minority in many domains. I will then present the laws that have already been passed and the proposed laws that have been tabled in the Knesset or submitted to the Constitution, Law and Justice Committee. Finally, I will address the complexity underlying the limited participation or non-participation of Palestinian citizens in what is happening.

## **The fundamental principles in the coalition agreements**

### **Religion and the state and Jewish identity**

Paragraph 89 of the coalition agreement between the Likud and the Religious Zionist faction states that: “The government will work to strengthen Jewish identity by means of legislation, allocation of resources and various other actions as described in this agreement.” Although this is only a brief statement, it accurately reflects what will be happening in the near future. The strengthening of Jewish identity by means of the allocation of resources and other actions by the government will directly affect the shaping of the Israeli space. This is reflected in the spirit of Paragraph 7 of Basic Law: Israel – the National Home of the Jewish People (“The Nation-State Law”), which specifies that “The State views the development of Jewish settlement as a national value and will operate in order to encourage it and strengthen it.” Although the policy of Judaizing the Galilee and the Negev has always been the policy that determines the character of the Israeli space, it will now appear within binding legislation that will enjoy immunity from judicial review, even if it becomes clear that it leads to discrimination against the Palestinian citizens of Israel. The arrangement is meant to be implemented as part of the decision to establish new Jewish settlements, the marketing of land to those who serve in the military and to reserve soldiers, the provision of various benefits to individuals serving in the security forces, the expansion of the powers of the acceptance committees in community settlements, etc.<sup>8</sup> Moreover, the coalition agreements include an explicit commitment to cancel long-term obligations by the previous government that were part of the “Economic Program to Reduce Gaps in Arab Society by 2026” (Government Decision 550 on October 24, 2021). This will adversely affect Arab municipalities, which are already located at the bottom of the Central Bureau of Statistics’ socioeconomic ranking.

The aforementioned also affects the formulation of policy for the allocation of the education budget to the strengthening of Jewish identity,<sup>9</sup> which includes the provision of benefits for demobilized soldiers (including higher education) and increased scholarships for students and those who complete National Service. Further excess budgeting for the Jewish population will widen the already large gaps between the budgeting of Arab educational institutions and that of Jewish ones. Another related issue that appears in the coalition agreements and which will affect the minority rights of Palestinians relates to the amendment of the Law Prohibiting Discrimination in Goods, Services and Entry into Places of Entertainment and Public

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<sup>8</sup> Paragraphs 99, 100, 109 and 110 of the coalition agreement with the Religious Zionist faction.

<sup>9</sup> Ibid., paragraph 103.

Places, 5760 – 2000. Among other things, the amendment will make it possible to refuse to provide service “based on religious beliefs (mainly Jewish).”<sup>10</sup> Hence, it will also be possible to refuse to provide Palestinian citizens with housing in a Jewish settlement based on protecting the religious beliefs of the settlement’s residents. I would mention that according to that same law, it is currently not permitted to discriminate against an individual on the basis of religion or nationality. Essentially, the proposed amendment will change the current legal situation and will in practice allow exclusion on the basis of religious beliefs, which in Israel align with national identity.

### **Basic Law: Immigration**

Another important fundamental principle that is likely to have an impact on Arab minority rights is paragraph 93 of the coalition agreement with the Religious Zionist faction. It states that “The government will formulate a national and Zionist immigration policy and will work to legislate a basic law for immigration.” Essentially, this paragraph anchors the temporary directive in the Citizenship Law that prohibits family unification between Palestinian citizens of Israel and residents of East Jerusalem on the one hand and their spouses from countries defined as “enemy states”, i.e. the West Bank and Gaza, on the other hand, as a constitutional directive. The Supreme Court has already ruled that the current arrangement violates the right to equality and the right to dignity, even though it is proportionate since it is temporary.<sup>11</sup> The suggested “upgrade” of the directive to a constitutional arrangement combined with the expected changes to restrict judicial review means that this arrangement will not be subject to judicial review.

### **Laws that have been approved and proposed laws that have been tabled in the Knesset**

#### **The law to deprive Arab terrorists of citizenship or residency**

Less than two months after the establishment of the government, a law was approved with 94 votes that authorizes the Minister of the Interior to rescind the citizenship or the residency of anyone who fulfils the following three criteria: (1) he was convicted of a terrorist act; (2) he was sentenced to prison; and (3) he or someone on his behalf received compensation from the Palestinian Authority for the act.<sup>12</sup> The third condition of the law differentiates between Jewish perpetrators and Arab perpetrators. Not only does the law directly contradict the international law that prohibits depriving an individual of his legal status, it is also discriminatory and racist and is aimed exclusively at Palestinian citizens and residents. Alongside the efforts to have this law passed, the coalition is already preparing a legislation for collective

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<sup>10</sup> Ibid., paragraph 133.

<sup>11</sup> Supreme Court 466/97 Galon vs the Attorney General (Nevo January 11, 2012).

<sup>12</sup> The law to rescind the citizenship or residency of a terrorist who receives compensation for carrying out a terrorist act (legislative amendment), 5783 – 2023.



punishment and the rescinding of citizenship and exile for convicted family members who hold Israeli (“blue”) identity cards.<sup>13</sup>

### **A proposed Basic Law: the Knesset (amendment – expanding the pretexts for preventing participation in elections)**

Currently, paragraph 7a of the Basic Law: the Knesset lists three main pretexts for disqualifying a party from the Knesset elections. The first is if the list or one of its candidates is opposed to Israel being a “Jewish and democratic” state. The second is if the list or the candidate supports the armed struggle of enemy states or a terrorist organization against the State of Israel (the “support of terror” pretext). The third is if the list or the candidate incites others to racism.

In January 2023, Member of Knesset Ofir Katz of the Likud tabled a proposed law that expands the pretexts for disqualifying candidates or lists from participating in Knesset elections. The proposed pretexts include: an expanded support of terror pretext, according to which “support for terror” will also apply to a one-time expression of sympathy or support for an armed struggle against Israel; the disqualification of a party even if it joined another list in order to run for the Knesset; and the cancellation of the Supreme Court’s power to confirm or reject a disqualification decision. Furthermore, the proposal states that the status of the court will allow it to only hear appeals of those decisions. Since the Arab lists and candidates have their qualification questioned routinely based on one of the first two already existing pretexts,<sup>14</sup> it is reasonable to assume that this extension will primarily affect Arab candidates and Arab parties.<sup>15</sup>

### **Policing**

One of the most important issues affecting the Palestinian minority is policing, which appears in the coalition agreement with the Otzma Yehudit party in the section, “Zionism, national security and development of the Negev and Galilee”. This section seeks to provide extended powers to the Minister of National Security and makes police policy subject to the (political and not necessarily professional) agenda that the minister wishes to promote. The agreement includes a commitment to set up a designated unit in the General Security Service that will operate among Palestinian citizens and the separation of the Border Guard from the police, which will then report to the Minister of National Security – all this in the spirit of crushing so-called “nationalist crime”.

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<sup>13</sup> Noa Spiegel and Jack Khoury, “The Knesset has approved the law to rescind the status of Arab terrorists”, *Haaretz*, February 15, 2023.

<sup>14</sup> See Manal Totry-Jubran, “Between external clashes and internal conflicts: A new look at the group rights of the Arab-Palestinian minority in Israel”, *Mishpat veMimshal* (2023), Chapter 4.3(a). [Hebrew]

<sup>15</sup> For an in-depth discussion and analysis of the issue, see the important article by Sawsan Zaher, “This is how the government intends to block the participation of the Arab parties in elections”, *Telem* (February 2023). <https://telem.berl.org.il/7370> [Hebrew]

The Palestinian population in Israel has for many years suffered from a policy of over-policing.<sup>16</sup> The creation of another unit and the expansion of the minister's unique policing powers (when he himself has a criminal conviction for interfering with a policeman's fulfillment of his duty and membership in a terrorist organization), which will promote a racist agenda, will only increase the phenomenon of over-policing and infringement of the Palestinian minority's rights.

### **Why has there been only a moderate Arab response to the changes?**

Before I address this question, three observations should be made as a basis for understanding the complexity of the Palestinian minority's reality as citizens of the State and their stand on the current legal changes.

First, similar to other communities within Israeli society, it is impossible to relate to the Palestinian minority as a monolith community. It is composed of a variety of groups with different positions on many issues, including the issue of regime change and its impact on the Palestinian minority. Second, the Palestinian minority in Israel is an integral part of the Palestinian people, part of which is under occupation and another part of which is in the diaspora. All of them share a history that unites them as a people. They experienced the Nakba; some of them became refugees while others lost their property; and some lost their loved ones. The repeated cycle of escalation in the occupied territories makes it difficult to formulate a stable plan of joint action within Palestinian society and in certain cases as part of a Jewish-Arab coalition. It is worth mentioning at this point that it is beyond the scope of this essay to expand on the multiple adverse effects of the coalition agreements and the fundamental principles of the 37<sup>th</sup> government on the Palestinian population, which has been under prolonged occupation for more than five decades. This will further entrench the occupation and will lead to annexation of the occupied territories, in violation of international law, as well as causing further harm to the essence of Israeli democracy.

Third, the Palestinian citizens of the State suffer from discrimination, marginalization and racism in many domains. This underlies the understanding that Israel is an ethnocentric democratic regime that is exclusive to its Jewish citizens and in which Palestinian citizens are already treated as second-class citizens. To this should be added the "Nation-State Law" of 2018, which provided a constitutional anchor for Jewish supremacy and the (mistaken) idea that this space belongs exclusively to the Jewish people. Moreover, the political representatives of the Arab population suffer from prolonged delegitimization of their participation as citizens in the legislature. They are excluded from critical decision-making processes and in certain cases from decisions concerning issues that directly affect the future of the Arab community.<sup>17</sup>

With respect to the opening question of this section, I believe that it is possible to distinguish between two camps (which are further divided into sub-camps) with respect to the issue of regime change, which is currently on the Knesset's agenda. One

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<sup>16</sup> Guy Lurie, *Excessive Arrests and their Violation of Equality under the Law* (Jerusalem: the Israeli Democracy Institute, 2018). [Hebrew]

<sup>17</sup> For further details, see Totri-Gubran, *ibid.* (footnote 14 above).



camp is aware of the changes and seeks to cope with the future judicial reality based on the understanding that even if the Palestinian minority is currently in a bad situation, things could get worse. Some of those in this camp are working to make a contribution—albeit a small one—to the awareness of these changes within Arab society by means of the various Arab media. Others are giving speeches and making their voices heard among the Jewish public, with the goal of motivating it as well as changing the judicial situation with regard to the Arab minority – and there are even those who are involved in both efforts. This camp also includes the welcome protests by women’s coalitions, in which Palestinian women feel confident enough to express a position shared with their Jewish compatriots and to protest together with them. In contrast, the second camp is not involved in what is happening and does not want to be—not based on indifference, but rather surrender, pain, a deep feeling of frustration and distrust of the State’s institutions and on the understanding that the situation could not be any worse.

It should be added that apart from the main demonstration in Tel Aviv, most of the demonstrations take place in Jewish cities that surround the Arab ones and neither the time nor the location of the demonstration is publicized among the Arab public. It may even be the case that they find it difficult to physically get to the demonstrations. More importantly, the demonstrations do not include anything that is shared by both populations, since they occur in a clearly Jewish space, in which the Arab minority feel like outsiders rather than being in a place where they can express a position or protest, particularly in view of the (massive) Israeli flags and the singing of Hatikvah, which creates a very Jewish-Zionist atmosphere. Another point that has an impact on the participation of Palestinian citizens is the issue of over-policing which they suffer from, particularly at demonstrations which often end in the killing of demonstrators (such as the Land Day events in 1976 and the events in October 2000). Therefore, it can be assumed that they are deterred from participating in demonstrations that are not connected to what they view as burning issues that affect their daily lives.

The reality in Israel is highly complex. Explaining or characterizing the behavior of the Arab minority is no less so. In my view, participation in the demonstrations is only one of many ways of protesting and non-participation in the demonstration is not necessarily evidence of a lack of interest in what is going on or indifference. Rather, it is the result of the complexity of the day-to-day reality of Arab citizens, as described above.

In conclusion, the State of Israel is at a critical crossroads that will shape its image in coming decades. It must deal with complicated issues including: the internal conflicts resulting from the tension between religion and state; its attitude towards the Palestinian minority living within it; and its continued status as an occupier that is violating human rights every single day. This crossroads can serve as an opportunity to stop, to reconsider the situation and to map out a new way into the future, one that involves real partnership that can carry out the needed changes in the Israeli regime, one that is more democratic, not tainted by occupation, and provides the anchor for human rights.

## **Maysoun Ershead Shehadeh\* / Without a state, within the State: Arab citizens in Israel and the judicial protests**

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Young Arabs and members of the middle class in Arab society are noticeable in their absence from the weekly mass demonstrations against the judicial reforms. The fact that they are ignoring the protests is not in keeping with the character of this generation, which in general does not take a passive stance but rather tries to influence the trajectory of events in the State.

Arabs in Israel possess a variety of identities, one of which is the “hybrid realistic identity” which emerged following the Nakba. Their identity differs from that of the Palestinians outside of Israel, due to the fact that the building of their identity took place within the Jewish State and due to the influence of Israeli culture on their identity, among other things.

The absence of Arab citizens from the protests against the reform of the judicial system reflects their feeling that the Supreme Court has not fulfilled its obligation towards them. It has never dealt with the issue of defining the State and has protected Israel’s essence as a Jewish state.

There are few cases in which the Supreme Court has promoted legislation for the benefit of the Arabs. In these circumstances, they do not see any reason to get out on the streets and to protect an institution whose motives are tied to the identity of the Jewish majority, which marginalizes the Arabs because of their identity.

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Most of the clauses of the judicial reform are to do with the only institution that has the ability to constrain the power of the government: the Supreme Court. The weakening of this constraint will undermine the position of Israel’s Arab citizens if the Supreme Court loses its power to protect minorities.<sup>18</sup> Even though the Supreme Court is the gatekeeper that prevents the decline of the Arab minority’s sociopolitical status in Israel, only a small group of Arabs have so far participated in the protests against the judicial reform.

It is difficult to identify the presence of Arabs within the massive demonstrations in Tel Aviv and Jerusalem. Ignoring the protest is also characteristic of the Arab towns and the social media, which are not discussing it. Particularly interesting is the absence of the young generation of intellectuals and the members of the new middle class.<sup>19</sup>

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<sup>18</sup> I. Saban, “The Supreme Court and the Arab-Palestinian minority: A picture (and a prediction) that isn’t black and white”, *Mishpat Umimshal* 8 (2005), pp. 23–47. [Hebrew]

<sup>19</sup> The middle class is defined as a group whose gross income ranges from 75% to 125% of the average wage in the economy. For further details, see: “The weight of the middle class and an analysis of how it has changed in recent years”, Knesset Center for Research and Information, May 4, 2021. [Hebrew]

The fact that this generation is ignoring the protest is not in keeping with its character, since in general it tends to adopt strategies of adaptation in response to events and to assimilate within them; or in other words to shift from passivity to political activism in order to influence events and encourage a policy that advances its interest.<sup>20</sup>

Young Arabs therefore are choosing to ignore the protest and not to use the platform that has become available to them. The protest could serve as a golden opportunity to nurture a new young political leadership. They would be able to make their voice heard and to replace the existing political leadership, as well as being able to recruit additional young people who are seeking a leadership that can fulfill their aspirations and which attributes importance to their future. They would be able to take advantage of the protest in order to create a convincing platform that will pave the way to greater influence in the upcoming municipal elections and to build a partnership with groups of young Jews that is based on a shared social and political platform. However, the members of this generation have not done so.

Many have wondered about the absence of Arab hi-tech workers from the hi-tech protest, which stands at the forefront of the opposition to the judicial reform. The hi-tech industry is responsible for one-quarter of income tax revenues and one-half of Israel's exports. There are about 400 thousand workers in the sector, although only about 2 percent of them are Arabs. This tiny proportion explains their limited influence and why they have not been prominent as an ethnic group in the protest. Arab hi-tech workers have not held up signs in Arabic while in contrast their Jewish counterparts have waved signs that say, "If there is no democracy, there is no hi-tech" and "If there is no freedom, there is no hi-tech"; these are threatening slogans that are backed up by power and influence. The young Arab hi-tech workers do not have the same power as their Jewish counterparts – their weight does not justify signs in Arabic. All they can do—even though they are members of a sector that is at the center of Israeli society—is to stand on the sidelines.

The question therefore arises of why the Arabs, and in particular young Arabs, are not participating en masse in the demonstrations? Indeed, signs such as "The Supreme Court protects us as a minority" and "A democratic state" would express their views and would be in line with their aspirations.

### **Realistic citizenship**

The questions at the core of the protest are "Who are we?" and "Where are we headed?" rather than the future of the Supreme Court. In other words, the issues at the core of the protest are the image and character of the State. This question also determines whether Arabs will participate in the protest or not since it determines if they are to be included within the definition of "us". Therefore, who is "us" and who is "them"?

As with other collectives, the identity of Arabs in Israel is characterized by continuity and dynamism and is constructed according to the unique situation of processes in

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<sup>20</sup> A. Haidar, *The new Arab-Palestinian middle class in Israel: An economic, sociocultural and political perspective* (Tel Aviv University: the Walter Leibach Institute and the Tami Steinmetz Center for Peace Studies, 2021). [Hebrew]

time and space.<sup>21</sup> Like anyone else, the Arabs in Israel possess a variety of identities;<sup>22</sup> however, their identity also has a “realistic” nature. In the eyes of the majority of Palestinians that became part of the newly created State of Israel, the Nakba meant separation from their brothers, from their homes, from their land, from their political and national leadership and from their people. The defeated Arabs, who lost everything and feared for their fate, immediately understood the new reality. They adopted a realistic approach and very soon accepted—and even asked for—the Israeli civil identity, in addition to their own. As proof of their acceptance, they participated in the first Knesset elections, which took place already in February 1949, while the conflict still raged between their state and that of their brothers and compatriots.<sup>23</sup> Despite this acceptance, the State of Israel declared a security emergency and imposed a military government on the Arabs (which ended only in 1966), based on special regulations that restricted their movement and their activity. Among other things, the military government allowed the Jewish settlement apparatus to establish new Jewish settlements, to house new immigrants in abandoned Arab homes and to confiscate a large portion of the land that had belonged to Arab residents.<sup>24</sup>

The policy of isolation, separation and inequality towards the Arabs began with the creation of the State of Israel. To this policy was added the prolonged and stubborn conflict with the Palestinians and with the Arab states and its effect on the identity-building of the Arabs in Israel, which is still going on today. A situation in which a national minority is included within a majority state whose national identity is different from that of the minority and which grants citizenship without it being able to influence the minority’s national identification, leads to the creation of an identity as a “stateless minority”. A minority of this type is included within the State but does not feel completely identified with it.<sup>25</sup> The feeling of exploitation and oppression is one of the main factors that drives national movements and stateless national collectives to rise up against the state in which they live and to fight for independence or to demand autonomy. Like any stateless minority, the situation of the Arabs in Israel is influenced to a great extent by their view of the State and its apparatus as a barrier to their socioeconomic development.

Unlike Palestinians in the West Bank and Gaza who are fighting for national independence and territorial sovereignty, the Palestinians in the State of Israel have remained part of State while demanding cultural autonomy accompanied by equal civil rights. Even when their State fought against their people, they have acted according to realistic considerations of survival and security and have adopted a non-violent struggle to establish an independent state for their Palestinian brothers outside of Israel.

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<sup>21</sup> Husamettin Inac and Feyzullah Unal, "The Construction of National Identity in Modern Times: Theoretical Perspective", *International Journal of Humanities and Social Science*, 3:11 (June 2013), pp. 223-232.

<sup>22</sup> C. Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).

<sup>23</sup> Member of Knesset Abdul ‘Aziz Zouabi who belonged to the Mapam party (1965–74) described this as “My state is fighting against my people”.

<sup>24</sup> Y. Bauml, “The discriminatory policy towards the Arabs in Israel: 1948–1968”, *Studies in the Creation of Israel* 16 (2006), pp. 391–413. [Hebrew]

<sup>25</sup> M. Shehadeh Ershead, "The Arabs in Israel – Hybrid Identity of a Stateless National Collectivity", *Mediterranean Studies*, 29:1 (2021), pp. 65-88.

In general, stateless minorities are controlled by two power centers that pull in opposite directions. The first is their national movement (including civil society organizations) and the second is the majority state and the degree of democratic flexibility that it is prepared to grant to the minority group.<sup>26</sup> The greater is the extent of democracy and equality granted to the national minority, the less will be the counter-influence of the national movement that exists among the minority. This is because its power to bring together the members of the minority to oppose the ethno-national majority state is weakened. In other words, to the extent that the minority benefits socioeconomically and has rights equal to those of the majority group, its national struggle and national identity are weakened. This can be seen in particular when the fate of the minority is dependent on the majority group and it lacks the power to threaten the majority group's security situation, its economic status or its culture. This situation embodies the reality of the Arabs in Israel and is reflected in their absence from the protest and the lack of their influence over its direction. The Arab minority is fearful for its socioeconomic security – it does not participate in the protest in order to avoid any threat from the State.

This year, Israel is marking its 75<sup>th</sup> year of independence. The Arabs in its midst are realists with a hybrid identity: it differs from that of the Palestinians outside of Israel due to, among other things, their identity within the Jewish State and the influence of Israeli culture. Recent history, as well as less recent history (such as the massacres of Kfar Kassem (1956), Land Day (1976), October 2000 and May 2021), have taught them to accept the fact that their fate is dependent on the State's decisions and its attitude towards them. The Supreme Court was meant to use its powers in these cases in order to protect the Arab citizens of the State, whose treatment was in violation of the principles of democracy and equality. The absence of the Arabs from the protest reflects their feeling that this body is not fulfilling its role with respect to the Arabs who constitute a significant minority within the State.

### **The Arabs and the Supreme Court**

Someone observing the activity of the Supreme Court over time would quickly understand that it is based on a definition of the Arabs as "citizens without a state". The Supreme Court has never dealt with the question of the definition of the State in a way that takes into consideration the existence of various ethnic groups within it, such as a binational state or a state "for all its citizens."<sup>27</sup> The Supreme Court has also maintained a very narrow space to maneuver within in its decisions with regard to the Arab minority. It has protected the definition and character of the State of Israel as a "Jewish state" and thus has maintained its legitimacy among the Jewish majority in Israel.

In petitions submitted against the Citizenship and Entry into Israel Law (temporary directive), 2022, which is meant to deny any official status to Palestinians married to

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<sup>26</sup> M. Guibernau, *Nations Without States: Political Communities in a Global Age* (Cambridge: Polity Press, 1999).

<sup>27</sup> Aharon Barak, *A Judge in Democratic Society* (Haifa University Publications, Keter and Nevo, 2004), pp. 157–161. [Hebrew]

Israelis, the Supreme Court (headed by Esther Hayut, the current president of the Supreme Court) went no further than requesting that the State explain its position with respect to granting exemptions to Palestinians who are seeking some status in Israel based on their marriage to an Israeli citizen. The judges asked whether the State is prepared to increase the annual quota of permits granted for requests based only on humanitarian grounds, but did not discuss the law itself and they were careful to avoid creating any opening that would lead to a public reaction against it, despite its direct relevance and sensitivity for Arab citizens in Israel.

In dealing with the question of allowing the return of exiles from the Arab village of Ikrit, who had been promised by the government (on July 31, 1951) that they would eventually return to their land, the Supreme Court released the State (on June 26, 2003) from its promise on the basis of a critical public interest. The Supreme Court explained that its ruling is opposed to keeping the promise because of “the need to prevent a precedent that would strengthen the claim regarding the Palestinian right of return.”<sup>28</sup>

Added to the long-held and growing feeling among the Arabs that the Supreme Court has abandoned its role of defending them as a minority are factors that support their non-participation in the judicial protest. Among them are the diminished sociopolitical activism among both Jews and Arabs; the creation of the Joint List (a uni-national Arab political framework that has eroded the Arab-Jewish political partnership); the political polarization and the rise of an extreme-Right government; separate living space for each people and the limited encounters between Jews and Arabs in the workplace, which is controlled by the majority group; the weakened influence of the Supreme Monitoring Committee as a body that leads and directs the political activity of the Arabs; the preference of the Arab parties not to get involved as a result of the political polarization and their inability to choose which side to join; the dispersion of Arab intellectuals and the lack of a broadly based organization that will bring them together and enable them to have an effect on the shaping of Arab identity, on sociopolitical activism and on the relationship between the State apparatus and the civil society organizations; etc.

The aforementioned factors are important but they support the main reason for the low level of participation by Arabs in the protest: the growing feeling that their identity is not protected. There are very few instances in which the Supreme Court has promoted legislation for the benefit of the Arabs. In these circumstances, they do not see any reason to get out onto the streets in order to protect an institution whose motives are tied to the identity of the Jewish majority, which is working to marginalize their own identity. If they join the demonstrations en masse, it will only be because of utilitarian-rational considerations. Until then, the struggle will remain, in the eyes of Arab citizens, a struggle between brothers or between “tribes”, in the words of Reuven Rivlin, the former President of Israel, and the Arabs are still a non-Jewish tribe that has no place among them.<sup>29</sup>

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<sup>28</sup> Supreme Court 97/850 Sabit v. Government of Israel, ruling 67(4)(803). <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C97/400/008/I30&fileName=97008400.I30&type=4> [Hebrew]

<sup>29</sup> Reuven Rivlin, “The Tribes Speech” at the Herzliya Conference, 2015.