



## City Research Online

### City, University of London Institutional Repository

---

**Citation:** Masri, M. (2015). The Two-State Model and Israeli Constitutionalism: Impact on the Palestinian Citizens of Israel. *Journal of Palestine Studies*, 44(4), pp. 7-20. doi: 10.1525/jps.2015.44.4.7

This is the published version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <https://openaccess.city.ac.uk/id/eprint/12893/>

**Link to published version:** <https://doi.org/10.1525/jps.2015.44.4.7>

**Copyright:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

**Reuse:** Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

---

---

---

City Research Online:

<http://openaccess.city.ac.uk/>

[publications@city.ac.uk](mailto:publications@city.ac.uk)

---



# The Two-State Model and Israeli Constitutionalism: Impact on the Palestinian Citizens of Israel

MAZEN MASRI

Partitioning historic Palestine into two states is often presented as the most plausible solution to the Israeli-Palestinian conflict. This article examines the potential impact of such a development on the Palestinian citizens of Israel (PCI), primarily from the vantage point of Israel's constitutional regime. The article explores three fundamental aspects of the Israeli constitutional system—its instability, the “Jewish and democratic” definition of the state, and the exclusion of the PCI from “the people” as the unit that holds sovereignty—and argues that the envisaged two-state solution will only reinforce the definition of Israel as a Jewish state and consequently provide further justification for the infringement on the rights of its Palestinian citizens.

A LOT OF INK has been spilled on the topic of the two-state solution. Most of the literature focuses on specific topics such as the economy, water, or security. In discussions of other questions such as citizenship and human rights, attention has largely been directed at possible solutions to the Palestinian refugee problem, often described as one of the most complicated and contentious of all the issues to be settled. The right of Palestinian refugees to return to towns and villages of origin that are now part of Israel would challenge the underlying premise of the two-state model, namely the separation of Palestinians and Israelis into two distinct geographical areas. The quip, “we are here, and they are there,” was a neat summing up of the problem by former Israeli prime minister and defense minister Ehud Barak.<sup>1</sup> But what would be the impact of the two-state solution on the Palestinian citizens of Israel (PCI) who constitute 20 percent of the country's population? By and large, this question has remained peripheral to examinations of the two-state solution and little attention has been devoted to the PCI.

Academics such as philosopher Asa Kasher and sociologist Sammy Smootha have argued that the creation of a Palestinian state will ipso facto eliminate the current discrimination against the PCI.<sup>2</sup> Others, like Nadim Rouhana and Oren Yiftachel, do not share their optimism and anticipate that the PCI's exclusion from Israeli power centers and from the state's character or identity will persist largely unchanged.<sup>3</sup> This article assesses the potential outcome of a two-state solution for the PCI focusing mostly on the effect of such a settlement on the Israeli constitutional regime and, more specifically, the implications of such a solution for the strong ethnic underpinning of that regime. The argument developed here is that the creation of a Palestinian state would actually give

*Journal of Palestine Studies* Vol. XLIV, No. 4 (Summer 2015), p. 7, ISSN: 0377-919X; electronic ISSN: 1533-8614. © 2015 by the Institute for Palestine Studies. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, at <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/jps.2015.44.4.7.

Summer 2015 || 7

Israel more room to assert and emphasize its Jewish character at the expense of the PCI, rendering their citizenship even more flawed, and exacerbating the current state of inequality between Jewish and Palestinian citizens of Israel. The article provides supporting evidence for the argument at hand by referencing both Israeli leaders' statements regarding the future political rights of the PCI and patterns in legislation adopted or under discussion in the Knesset. The conclusion is based on an examination of aspects of the Israeli constitutional system that impact the PCI and their relation to the state directly, as well as the likely repercussions entailed by the creation of a Palestinian state.

## Israel's Constitutional Regime: Problems and Challenges

Israel's constitutional system has a direct impact on the PCI and their relationship to the state, as manifested in the following three arenas: the constitutional system's instability; the constitutional definition of Israel as a "Jewish and democratic" state; and the exclusion of the PCI from "the people," the political unit with the power to shape the constitution. Although they are closely interrelated, these three elements will be analyzed separately in order to shed a clearer light on the implications of a two-state settlement for the PCI.

Constitutional instability in the current context means simply the unwillingness or inability of the various political actors (whether political parties or successive Knessets and governments) to make determinations on key constitutional questions and policy directions, relying instead on temporary arrangements that are meant to maintain the status quo or on compromises that obviate the emergence of winners and losers. This is one of the reasons why Israel has not adopted a formal constitution. This inability or unwillingness to make determinations on key constitutional questions usually results in a lack of clarity and stability.

Constitutional instability can be traced back to the origins of the state. According to the Declaration of the Establishment of the State of Israel, issued on 14 May 1948, an elected Constituent Assembly was to draw up a constitution for the newly formed state. Before the Constituent Assembly was elected in 1949, the Provisional Council of State decided that the Constituent Assembly would act as both constituent assembly *and* legislature. The Constituent Assembly—later renamed the First Knesset—held discussions on the constitution without making any final decisions. Instead, it tasked the Constitution, Law, and Justice Committee of the Knesset with preparing a draft constitution. It also resolved that the constitution would be made up of several chapters, each of which would comprise a separate Basic Law and all of which would subsequently be incorporated into a formal constitution. Before its dissolution in 1951, the First Knesset passed legislation providing for all subsequent Knessets to have the same powers, including the power to act as a constituent assembly. Thus the Knesset preserved its constitution-making powers while simultaneously deferring action on key constitutional issues pertaining to the nature of the state.<sup>4</sup>

Since that time, the Knesset has enacted twelve Basic Laws but Israel remains without a full formal constitution. Historically, the failure to adopt a constitution can be explained by a number of factors, most notably the desire of the ruling elites represented by Mapai (an earlier incarnation of today's Labor Party) to ensure that political power in the hands of the Knesset and the executive remained free of constitutional restrictions.<sup>5</sup> But there were also other reasons, including

the new state's unwillingness or inability to decide on key issues such as the role of religion, its relationship with the Palestinian minority, or its own economic orientation,<sup>6</sup> all highly contentious subjects. Instead, many of these arrangements were determined through temporary measures that mainly aim at maintaining the status quo. While some areas of disagreement (such as the nature of the economy) were later determined, others persist, contributing further to constitutional instability. Today, such disagreements are exemplified by the extreme polarization between religious and more secular forces, especially on the question of "who is a Jew," and the still-unresolved Israeli-Palestinian conflict, which because of its nature as a conflict between a native population and a settler-colonial state has a strong impact on shaping the state and its constitutional order.

There are at least two dimensions of the Israeli-Palestinian conflict that pertain directly to the constitutional order in Israel: the state's very territory, which remains undefined; and the definition and character of Israel as a Jewish state, which, for the Palestinians in Israel, translates into a colonial reality in every aspect of life. In the early 1990s, and after decades of seemingly successful short-term constitutional arrangements, two important events took place. The first was the enactment of Basic Law: Human Dignity and Freedom in 1992 and Basic Law: Freedom of Occupation in 1994, followed by a Supreme Court decision declaring Basic Laws to have constitutional status and establishing the Court's power to strike down legislation that violated any rights under those laws.<sup>7</sup> This process was seen as the culmination of a push for the adoption of a constitution that was triggered by political and social changes in Israel, including the advent of neoliberal economic policies.<sup>8</sup> The second event was the launch of negotiations that culminated in the interim agreements between Israel and the Palestine Liberation Organization (PLO) known as the Oslo accords. This development marked a new era of growing tensions within Israeli society itself: over the competing claims of ethno-nationalism and democracy between supporters of a two-state solution and their opponents who rejected relinquishing control of the occupied Palestinian territories, and on the question of the role of religion, specifically Judaism, in the state.

The increasing tensions, which exacerbated the instability of the Israeli constitutional system, were brought into sharp focus by subsequent attempts to create a formal constitution, especially on the part of civil society organizations such as the Israel Democracy Institute (IDI) and the Institute of Zionist Strategies.<sup>9</sup> The Knesset's Law, Constitution, and Justice Committee also tackled the issue for three years, compiling draft provisions for inclusion in an eventual constitution.<sup>10</sup> All of these attempts have stressed the need for more stability in the Israeli constitutional system as an important reason to adopt a formal constitution. Prominent academics have also asserted that existing constitutional arrangements are inadequate and require greater stability.

A number of Basic Laws define Israel as a "Jewish and democratic" state and the most elaborate discussion of the meaning of the Jewish state is to be found in the Supreme Court's *Tibi* decision.<sup>11</sup> Writing the majority opinion, then Chief Justice Aharon Barak outlined the "core" characteristics that shape the minimum requirements of a Jewish state. He stated that:

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 [the State's] religious and cultural legacy.<sup>12</sup>

In the same decision, the Court stressed that the Jewish definition of the state did not entail discrimination against the Palestinian minority in Israel. Nevertheless, and notwithstanding its protestations, the Court's pronouncement reflected the evident tensions and contradictions in the definition: on the one hand, the democratic notion and its necessary implication of equal treatment for all citizens and, on the other, the Jewish requirement implying exclusivity.

The strong emphasis on the religious and ethnocentric definition of the state in the Basic Laws and other laws has serious implications for the limits and the protection of constitutional rights, and human rights in general. For example, Israel's values as a "Jewish and democratic" state are a relevant factor in determining the constitutionality of legislation. According to Basic Law: Human Dignity and Freedom, legislation can be declared unconstitutional if it infringes on the rights to life, bodily integrity, dignity, property, personal liberty, privacy, and citizens' entry to and exit from the country, as well as other rights derived from these rights. But the same Basic Law provides a set of conditions that, if met, renders eventual rights-infringing legislation constitutional. One of the main conditions prescribed under the law's "limitation clause" (section 8) stipulates that such infringement is acceptable if it befits Israel's values as a "Jewish and democratic state." A similar provision (section 4) exists in the 1994 Basic Law: Freedom of Occupation, which places the Jewishness of the state, and the components attendant to it, at the center of the process for deciding the constitutionality of legislation. The Jewishness of the state also plays a role in the process of interpretation of legislation. As Barak wrote shortly before retiring from the Supreme Court, a proper interpretative approach should be one that assumes "that the general purpose of every legal text is to fulfill Israel's values as a Jewish and Democratic state."<sup>13</sup>

These tensions are especially evident in relation to the question of equal rights. The right to equality was deliberately excluded from Basic Law: Human Dignity and Freedom<sup>14</sup> and is therefore not protected to the same degree as other rights. Under this Basic Law, equality is protected as a derivative of the right to dignity and the only aspects of equality given constitutional protection are those that are recognized as "closely and objectively related" to the right to dignity.<sup>15</sup> Since equality does not stand as a constitutional right on its own and only limited aspects of it are protected, equality enjoys weak constitutional protection.

Although they were enacted to strengthen the protection accorded to human rights, the two Basic Laws under discussion marked the beginning of a growing trend emphasizing the Jewish character of the state, which became the new public ethos and the public agenda's foremost item. Such emphasis on the "Jewish and democratic" formula has created what has been termed a "New Zionist Hegemony" by prominent scholars in the field. Nadim Rouhana and Nimer Sultany describe this as "a new consensus within Israeli society in support of new discriminatory policies and practices toward the Palestinian minority" which has erected boundaries for citizenship and democracy limiting the margins that had hitherto resisted the ethno-religious definition.<sup>16</sup> Paradoxically, then, the advent of a human rights discourse in Israeli constitutionalism did not signal an exception to the ethnic principle but was inherent to it.<sup>17</sup> Thus, what began as a push for constitutionalizing the protection of human rights produced an emphasis on ethnicity, creating an environment and a mindset that, under the cover of

liberal human rights, normalizes and justifies discriminatory practices against the PCI. While there were some developments that could be seen as promoting equality such as *Ka'dan*,<sup>18</sup> these were accompanied by a strong legal emphasis on the Jewish values of the state. A deeper analysis and critical reading of such developments points to the ethnic principle setting the ceiling for the rights PCI can enjoy.<sup>19</sup>

In addition to the problematic question of exclusion, the tensions arising from the “Jewish and democratic” definition of the state also impinge on policy areas such as immigration, land allocation, and the ability to participate in electoral politics, subject areas that are directly related to the “core” characteristics of the Jewish state as identified by Barak. While often denied or downplayed by leading Israeli academics and by the Supreme Court, legal scholars, especially those of the liberal Zionist persuasion, admit to certain tensions in the “Jewish and democratic” definition. To overcome the problem and justify the contradictions, they deploy the principle of the “nation-state,” whereby a state is designated as the embodiment of the right to self-determination of a specific national group as opposed to one where the nation consists of the citizens.<sup>20</sup> Such a state, they argue, is allowed to favor the preferences of the dominant national group, and so long as minority groups living in that state belong to a group that is favored in *any* state, the preferential treatment of the majority citizens is not unjust and does not amount to illegitimate discrimination. Following this line of reasoning, Israel is justified in according Jews favorable treatment congruent with its designation as the Jewish nation-state. For these scholars, this situation would be flawed only if the Palestinians in Israel did not have another place where they could exercise their right to self-determination. Thus, these scholars assert, the creation of such a state, under the putative two-state solution, where Palestinians (including the PCI) could exercise their right to self-determination, would resolve many of the tensions and contradictions inherent in Israel’s definition as a Jewish state.

This is the position that is marshaled in discussions surrounding the Law of Return, a law that favors Jewish immigrants and grants them automatic Israeli citizenship as a matter of right. Although essentially pertaining to immigration policy, the Law of Return is seen as a pillar of Israeli law because of its crucial role in shaping the character of the state. Some, like Barak, see it as part of the constitutional order.<sup>21</sup> The Law of Return essentially provides for a discriminatory immigration policy. Although the discrimination here is against noncitizens who wish to acquire Israeli citizenship (mainly Palestinian refugees), it is still discriminatory toward the PCI in that it favors one national group and disregards the needs and interests of the other.<sup>22</sup> Justifying this discriminatory outcome, some liberal Zionist theorists argue that such legislation is acceptable in nation-states and that the creation of the Palestinian state, which would presumably enact a similar law giving Palestinians favorable treatment comparable to that given to Jews under the Law of Return, would eliminate the discriminatory nature of the Israeli law.<sup>23</sup> Thus, the argument goes, both nations (Jews and Palestinians) can enjoy favorable treatment under the immigration policy of their respective nation-states. This argument is often extended to other arenas, including those of national rights and, to some extent, political rights. There are some who go even further and assert that the PCI should exercise some of their individual rights inside the future Palestinian state: for example, the right to family life, if it entails what is known as family reunification, whereby a Palestinian citizen of Israel cannot legally live with a Palestinian spouse who is not a PCI.<sup>24</sup>

Thus, the justification for restricting rights is based on the argument that Israel is the “nation-state” of the Jewish people and not of the Palestinian people and that Palestinians who are citizens of Israel will potentially be able to exercise those (currently restricted) rights in their own future state. Hence, according to this argument, the future creation of the “nation-state of Palestine” justifies restricting the national and political rights of the PCI presently and will eventually eliminate the tension in the state’s definition. While these observations are mainly based on the theoretical writings of scholars, such a position is no longer confined to the realm of theoretical debate and is making its way into the legal reasoning of the courts. For example, one of the justifications advanced by the Supreme Court for limiting the right of Palestinian citizens to family reunification has been that the constitutional right to enjoy family life does not mean exercising that right *in Israel*. As long as citizens can exercise the right *somewhere*, it is not a violation of the right to family life if they cannot reunify with their family in Israel. While the Court appears to be applying this restrictive understanding of the right to all Israeli citizens, and not just the PCI, it is clear from the reasoning, the context, as well as the constitutional and legislative frameworks, that this restriction applies only to the PCI.<sup>25</sup>

The third aspect of the Israeli constitutional system that is relevant to this discussion is the question of sovereignty (in its internal sense) and constituent power, more specifically, the extent to which the PCI are seen as partners in the “constituent power” of the sovereign people. Many constitutional theorists highlight popular sovereignty as the basis for constitutional regimes that are democratic: in other words, it is “the people” or the nation that is the sovereign. This conception of popular sovereignty as the source of legitimacy for the constitutional order, wherein sovereignty rests in “the people,” is widely accepted among constitutional and political theorists.

This question is especially important in the case under consideration since the Jewish definition is also construed to mean that Israel is the state of the Jewish people and the embodiment of their self-determination (including those Jews who are not in Israel).<sup>26</sup> Thus, the situation arises in which the interests of individuals who are not, and have never been, citizens of the state are taken into consideration while those of a significant proportion (one-fifth) of the state’s citizens—the PCI—are not. If popular sovereignty is one of the manifestations of democracy, and “the people” are the ultimate source of authority—an assertion that is widely accepted by Israel’s constitutional theorists and by its Supreme Court—then who exactly is included in “the people”?<sup>27</sup>

The Supreme Court recognizes that when it enacts Basic Laws the Knesset exercises constituent power and that such power is derived from “the people” in which sovereignty rests. But nowhere is “the people” defined. Whenever the term “the people” is used, it usually refers to “the Jewish people.” Even in case law, exactly what constitutes “the people” remains unclear. On the one hand, former Chief Justice Barak has stated that the “minimal” characteristics of democracy “are based on the recognition of the sovereignty of the people, which is expressed in free and equal elections.”<sup>28</sup> While “the people” in this case might be the collective that has the right to vote, that is, the citizens, the access to citizenship reflected in Israel’s immigration policy and the restrictions on the right to participate in the elections to those who recognize the Jewish nature of the state cast doubt on who “the people” are. On the other hand, Justice Rubenstein asserted in a recent ruling that “the Jewish people has won sovereignty after two thousand years of exile, and [the] Jewish

sovereignty is a deposit that is the most precious in the Jewish history.”<sup>29</sup> He also describes the state as “Jewish and democratic sovereignty.”<sup>30</sup> Furthermore, the courts have ruled on a number of occasions that there is no such thing as an Israeli nation or people.<sup>31</sup>

While the discussion on constituent power and popular sovereignty may remain somewhat theoretical until Israel seriously embarks on the process of adopting a formal constitution, a number of signs already indicate that the PCI will be excluded from the process. To begin with, Palestinian citizens of Israel have been effectively kept out of forums that are working informally to negotiate a constitution. Thus, the drafting committee under the IDI’s initiative included no PCI although a few featured in early discussions.<sup>32</sup> And the Knesset’s Law, Constitution, and Justice Committee, which discussed a draft constitution from 2003 to 2006, included only one Palestinian member of Knesset (MK) who in any case boycotted most of the sessions and did not vote on the final resolution. Also telling is the fact that the special website created for this initiative (with support from the Jewish Agency) was translated into English in order “to appeal to the worldwide Jewish community and invite their input on central constitutional issues.” No word of the initiative appeared in Arabic.<sup>33</sup> The fact that the involvement of Jewish communities worldwide was emphasized also further blurs the contours of “the people.” The insistence on the “Jewish and democratic” definition and Israel’s unwillingness to entertain other options, despite the fact that this definition excludes the PCI, the refusal to adopt a more inclusive and more democratic definition such as the “state for all its citizens,” and painting demands for more inclusionary definitions as a form of “political extremism” all reinforce the notion that the Palestinians are essentially excluded from these debates.<sup>34</sup>

## Two-State Solution: Stabilization of the Constitutional System and Outcome for the PCI

It is difficult to anticipate the exact details of a final two-state settlement—if it ever occurs. Indeed, there are many reasons to believe that such a solution is unlikely for a number of reasons, not least of which is the increasing power of Israel’s nationalist religious right as well as the settler movement in Israel and the occupied territories. Nevertheless, the general contours of such a settlement are fairly clear. For the purposes of this discussion, it is not necessary to get into the minutiae of a potential two-state agreement; what is relevant here are the larger issues of constitutional design and their impact on human rights.

The focus here will be on three points related to an eventual two-state solution: first, the formula of “two states for two peoples,” the main premise of such a settlement; second, Israel’s demand that the Palestinians recognize the Jewish nature of the state; and third, the demand that any agreement must include an “end of conflict” clause.

The “two-state” framework and the formula “two states for two peoples” emphasize the ethnic (and, for Israel, the religious) character of each state. Accordingly, Israel would be the state of the Jewish people—including those Jews who are not Israeli citizens—and would not be the state of Israeli citizens who are not Jewish. Conversely, the future Palestinian state would be “the nation-state” of the Palestinian people, including those Palestinians who are Israeli citizens. Successive Israeli governments have emphasized Israel’s Jewish character in the context of the two-state

settlement, stating at times that such a description is an Israeli demand for any negotiated agreement to be reached.<sup>35</sup>

While the PLO has never officially endorsed the formula of “two states for two peoples,” it seems to have accepted it implicitly. This can be inferred from a number of facts. First, the PLO has never rejected the formula and, in some situations, PLO negotiators have even used it.<sup>36</sup> Second, the PLO has never protested its use by U.S. and other representatives in statements they made in the context of negotiations.<sup>37</sup> Thirdly, the willingness of the Palestinian leadership to demonstrate flexibility on the right of return of Palestinian refugees would indicate that the underlying logic of the formula (that is, separation) has been accepted by the PLO leadership. In any case, even if the eventual agreement does not explicitly mention “two states for two peoples,” in the context of Israel’s domestic politics and constitutional identity, the two-state formula is generally seen as justifying and reinforcing the ethnic/religious identity of Israel.

From a liberal Zionist standpoint, the creation of a Palestinian state would also impact the three aspects of Israeli constitutional order discussed earlier. The kind of settlement that creates a “Palestinian nation-state” alongside its “Jewish equivalent” will provide justifications for accepting Israel exclusively as the “nation-state” of the Jewish people, with all of the negative implications that this would carry for the PCI. It would not only help “legitimize Israel as a Jewish state,” but “would lend a sense of symmetry to the situation.”<sup>38</sup> According to this understanding, since the future Palestinian state would give Palestinians preferential rights in areas such as immigration—and a physical place for Palestinians (including the PCI) to “return to” or “immigrate”—some of the tensions arising from the discriminatory nature of Israel’s Law of Return would be resolved. Additionally, the future Palestinian state would be the proper place for Palestinians to exercise their national rights and, possibly, some political and individual rights, and therefore the restriction of such rights in Israel would be justified. Such an outcome would be particularly problematic because it would essentially equate the Palestinians in Israel, who are an indigenous group, with an immigrant community, disregarding the historic events that led to the displacement and dispossession of the Palestinians in the first place. Following this line of reasoning, then, the two-state formula would neutralize any potential discriminatory effect of the definition of Israel as a Jewish state, justify the exclusion of the Palestinian citizens of Israel from the sovereign “people,” and be used to override their opposition to Israel’s definition. Furthermore, it would help stabilize the constitutional regime since it would resolve some of the reasons for instability, especially the tension between ethno-nationalism and democracy and would go some way to settling the debate between the proponents of a “Greater Israel” and the supporters of the two-state solution. A two-state settlement would, however, have little impact on the tension related to the role of the religion in the state. This will, predictably, continue to be a source of tension and likely instability, especially in light of the growing proportion of religious Jews among Israel’s population. Indeed, the creation of a Palestinian state might even lead to an exacerbation of the problem as it is likely to further radicalize the religious fringe.

An international agreement in which Israel is officially recognized as a Jewish state will also have implications domestically in Israel. It would constitute recognition by the Palestinians’ official representatives (the PLO) that Israel has a right to define itself as a Jewish state, something that might be used to counter the PCIs’ own rejection of the Jewish definition. The Jewish state

recognition might lend further support and weight to the contention that it is not necessary for the PCI to consent to constitutional arrangements regarding the character of the state since the definition has been endorsed in an international agreement by the Palestinians' official representatives, the PLO. The position of the PLO on this matter is not entirely consistent: it ranges from absolute rejection of the idea to expressions of flexibility and willingness to accept whatever official name Israel wishes to confer upon itself, including its self-characterization as "Jewish."

Finally, the inclusion of an "end of claims" clause in any negotiated agreement, as demanded by Israel, would also have grave repercussions for the PCI. Such a clause would block any attempts to seek redress for past injustices that were committed against the Palestinians in Israel, and especially those related to the 1948 war. One example is a distinct group among the Palestinians of Israel, those who were *internally* displaced in 1948 and who continue to demand the right to return to their villages of origin and the restitution of their property. Although this is ostensibly a matter between the state and its citizens, an international agreement containing an "end of claims" clause might constitute an obstacle to addressing such efforts.

If, as discussed above, the mere idea of a hypothetical Palestinian state to mirror the Jewish state is seen as sufficient justification for discriminatory policies and practices in Israel today, what, might one ask, would be the effect of the existence of an actual Palestinian state? The existence of such a state is expected to justify a greater emphasis on the "Jewish" part of the definition of Israel as "Jewish and democratic" and the corollary downplaying of the definition's democratic component. Since the potential and future creation of a Palestinian state is used today to justify current violations of the right to equality and other collective rights of the Palestinians in Israel or at least used to deny that such rights *are* violated, once such a state exists in reality, it can only be expected that the emphasis placed on the Jewish character of Israel at the expense of the non-Jewish Palestinian minority will grow even greater.

Such a development is likely to be resisted, however. Since 1948, the PCI have consistently opposed the racist laws and policies that seek to perpetuate their inferior status. Such opposition and resistance have intensified since 2000, when the Israeli Border Police killed thirteen PCI at the beginning of the second intifada, prompting Israeli observers to warn against the "radicalization" of the PCI. The issue of the Jewish character of the state and associated policies related to equal citizenship, land rights, and cultural autonomy have been at the center of the political debate among political parties and activists ever since. When the Knesset and Israeli civil society organizations debated adopting a constitution that entrenches the Jewish definition of the state, Palestinian civil society organizations responded with several position papers and a proposal for a democratic and pluralistic constitution. In addition to the Israeli legal system, the PCI use international legal fora to counter discriminatory policies and practices, as was evident most recently in the international campaign to oppose the Praver Plan calling for the displacement and dispossession of tens of thousands of bedouin from the Negev and their resettlement in Israeli-designated locations.

Such actions demonstrate that the PCI are by no means passive actors. Growing institutionalized discrimination will undoubtedly cause greater resistance on the part of the PCI and the redoubling of their efforts to internationalize the issue. At the same time, the scope and effectiveness of their opposition, as well as the strategies they might deploy, are hard to predict, as are the position of

the PLO and the role it might play. It would be reasonable to assume that since the status of the PCI is not on the negotiations agenda and it is treated by Israel as an internal/domestic matter, the PLO's ability to influence the PCI's situation will likely remain limited. It is probable that the PLO will sidestep such discussions in order to make headway on other issues.

## Other Indications of Poor Outcome for PCI

In June 2008, Tzipi Livni, then Israel's foreign minister, stated, "once a Palestinian state is established, I can come to the Palestinian citizens, whom we call Israeli Arabs, and say to them 'you are citizens with equal rights, but the national solution for you is elsewhere.'"<sup>39</sup> Similar statements were also attributed to Israeli prime minister Benjamin Netanyahu shortly after the permanent status negotiations were temporarily resumed in September 2010.<sup>40</sup> But it is Avigdor Lieberman, leader of the Yisrael Beytenu party and Israel's former foreign minister, who has made the most direct mention of Israel's Palestinians and their rights in the context of international negotiations. In 2010, he stated that "the question of Israel's [Palestinian] citizens needs to be one of the central issues on the negotiating table, in light of the Palestinian refusal to recognize Israel as a Jewish state."<sup>41</sup> He further likened a potential peace agreement that does not deal with the issue of the PCI to a situation where "someone sells you a flat and then demands that his mother-in-law continues to live there." This statement was issued by a senior minister with no rebuttal or retraction from any other official source.

The idea of land swaps between Israel and the future Palestinian state is often portrayed as an acceptable solution to the problem of West Bank settlement blocs, the assumption being that the future state would get land equal in area to the land on which the settlements are erected, with these being transferred to Israeli sovereignty. A number of voices in Israel have suggested the inclusion in such land swaps of Palestinian towns close to the Green Line that are currently part of Israel "proper." For the inhabitants of those towns, this would mean voluntarily relinquishing their Israeli citizenship, or being stripped of it, and acquiring a (future) Palestinian citizenship. While this kind of thinking is often associated with Lieberman and his party,<sup>42</sup> calls to include inhabited land swaps in a peace agreement are not limited to the extreme right. In negotiations with the PLO as far back as 2008, the centrist Livni raised the same prospect.<sup>43</sup>

"Permanent status negotiations" have been held between Israel and the PLO in the past, and it is expected that these will resume at some point in the event of a negotiated settlement. Israel negotiates as a sovereign state defined as the state of the Jewish people and Israeli leaders have repeatedly declared that their goal is to achieve a two-state agreement which will secure Israel's Jewish character and majority. As explained earlier, this entails restricting some of the rights of the PCI, especially their right to equality. In this context, Israeli interests, defined as those of the Jewish majority, stand at odds with the interests of the PCI. It would be convenient to consider the PCI as being represented by the PLO but in reality, the PLO does not represent them, whether formally or informally, and the current leadership does not claim to do so, leaving the PCI without any representation in international negotiations despite the fact that any future peace agreement will fundamentally impact their rights and lives.

Furthermore, a plethora of bills introduced in the Knesset infringe exceptionally on the PCI's rights. These bills, which are progressively being enacted into legislation, seek to force Palestinians in Israel to accept the Jewish definition and to target those who might actively challenge it. One such example is the 2008 amendment to the Citizenship Law, which expedites the process of revoking the citizenship of any person seen as disloyal to the state.<sup>44</sup> In the explanatory note to the bill before the Knesset, the initiators made clear that the impetus for the measure was to address "expressions of sympathy by Israeli citizens with the enemies of the state and with terror organizations"—at the time, a reference to expressions of solidarity with the Lebanese people during the summer 2006 war.<sup>45</sup> In addition, private members' bills were introduced to make further changes. One bill sought to add acting "against the State of Israel being a Jewish, Zionist and Democratic state" as grounds for revoking citizenship,<sup>46</sup> and another bill provided that a pledge of allegiance to Israel as a "Jewish and Zionist state" must be a condition for naturalization,<sup>47</sup> and even for the acquisition of an official ID card.<sup>48</sup> Legislation has also been enacted to limit the ability to commemorate the Nakba. A 2011 law gives the minister of finance the power to cut funding to any government-funded bodies such as municipalities or schools that contribute to activities that could be seen as challenging Israel's definition as a Jewish state or that mark as a day of mourning the day when Israel was created.<sup>49</sup> Laws have also been enacted to restrict the freedom of PCI to choose their place of residence.<sup>50</sup>

Such fervently ethno-nationalist bills and legislation have been on the rise in recent years and most seek to question the status of the PCI and place further restrictions on them. While many are private members' bills that may never become law, their sheer volume and frequency highlight the trend in Israel's political discourse to constrain the citizenship of a certain group of people and reinforce the ethnic character of Israeli citizenship, whether on the legislative or constitutional level. Such a trend bodes ill for the PCI.

There are other factors that further support the suggestion that a two-state settlement will likely have a negative impact for the PCI. The relocation of settlers is one example. A significant number of West Bank settlers are right-wing extremists who terrorize the surrounding Palestinian villages and towns, making what is called "settler violence" an everyday occurrence. These acts of violence have been expanding beyond the West Bank, and the vigilante groups responsible have been targeting PCI towns as part of what is known as "price-tag" activities—violent actions by settlers "charging" a price for measures taken by the Israeli government against settlements (such as illegal construction, for example).<sup>51</sup>

Relocation of these settlers, if it happens, will be to the Negev and the Galilee, which are designated as priority areas for (Jewish) development and settlement. It is widely expected that settler opposition to the creation of a Palestinian state and their anger at being forced to relocate will translate into violence and harassment of Palestinians in the areas to which they are moved. The city of 'Akka (Acre) is a case in point: when the "Disengagement Plan" of 2005 saw the evacuation of settlers from the Gaza Strip and their relocation to 'Akka, a city with a sizable Palestinian minority, some joined a religious youth school that combines religious studies with military service, known as Yeshivat Hesder.<sup>52</sup> This yeshiva in particular was founded in 2003 "to preserve the city's Jewish majority."<sup>53</sup> The flow of religious extremists to the city, especially to areas with a high proportion of Palestinian residents, aggravated existing tensions and culminated in violent confrontations in 2008.<sup>54</sup>

A settlement based on the two-state model according to the formula of two states for two peoples will not solve the Palestinian-Israeli conflict. If anything, it is likely to intensify the conflict, albeit in a different way. While providing the Israeli constitutional system a degree of stability, such a settlement would emphasize the ethno-religious character of Israel and, from a liberal Zionist point of view, it would absolve the state from seriously considering the will and interests of the PCI in any future constitution-making process. Given the PCI's lack of representation in international negotiations, and in light of recent trends in the Knesset, as well as the increasingly inflammatory statements of Israeli leaders on the subject, it is hard to avoid the conclusion that the two-state model will further infringe on the rights of the PCI.

#### About the Author

Mazen Masri is a lecturer in law at the City Law School, City University London. He has previously practiced law in Israel and has served as a legal advisor to the PLO's Negotiations Affairs Department.

#### ENDNOTES

- 1 Nadav Eyal and Yehuda Golan, "Barak: I Am Running for Election" [in Hebrew], *NRG-Maariv*, 4 November 2004, <http://www.nrg.co.il/online/1/ART/815/211.html>. Unless otherwise noted, all translations are provided by the author.
- 2 Sammy Smooha, "Ethnic Democracy: Israel as an Archetype," *Israel Studies* 2, no. 2 (1997): p. 234; Asa Kasher, "'A Jewish and Democratic State': Present Navigation in the Map of Interpretations," *Israel Affairs* 11, no. 1 (2005): p. 174.
- 3 Nadim N. Rouhana, *Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict* (New Haven and London: Yale University Press, 1997), pp. 219–20; Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (Philadelphia, PA: University of Pennsylvania Press, 2006), p. 280.
- 4 CA 6821/93, Bank Mizrahi Hame'ouhad v. Migdal Kfar Shitofui, IsrSC 49(2) 221 (1995).
- 5 Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge: Cambridge University Press, 2002), p. 261.
- 6 Ruth Gavison, "The Controversy over Israel's Bill of Rights," *Israel Yearbook on Human Rights*, vol. 15 (1985): p. 113.
- 7 *Bank Mizrahi*.
- 8 Shafir and Peled, *Being Israeli*, p. 263.
- 9 Uri Dromi, ed., Efrat Hakak, trans., *Constitution by Consensus: Proposed by the Israel Democracy Institute; Under the Leadership of Justice Meir Shamgar* (Jerusalem: Israel Democracy Institute, 2007), [http://en.idi.org.il/media/1529405/ConstitutionbyConsensus Excerpts pdf.pdf](http://en.idi.org.il/media/1529405/ConstitutionbyConsensus%20Excerpts%20pdf.pdf); "A Constitution for the State of Israel—Introduction," The Institute for Zionist Strategies, accessed 31 July 2012, [http://www.izs.org.il/eng/?father id 114&catid 169](http://www.izs.org.il/eng/?father%20id%20114&catid%20169).
- 10 For details see [www.huka.gov.il](http://www.huka.gov.il).
- 11 See section 1A of Basic Law: Human Dignity Freedom, section 2 of Basic Law: Freedom of Occupation, and section 7A (a) of Basic Law: The Knesset.
- 12 EC 11280/02, Central Election Committee vs. MKs Ahmed Tibi and Bishara, (4)1 (22) (2003), as cited by Yousef Taiseer Jabareen, "Basic Law: Israel as the Nation State of the Jewish People," Dirasat: Arab Center for Law and Policy, <http://www.dirasat-aclp.org/arabic/files/Yousef-Taiseer-Jabareen.pdf>.
- 13 Aharon Barak, *A Judge in a Democratic Society* [in Hebrew] (Jerusalem: Nevo, 2004), p. 83. Although this book was later published in English as *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2008), the quoted text does not appear in the English edition.

- 14 Yehudit Karp, "Basic Law: Human Dignity and Freedom—Biography of Power Struggles" [in Hebrew], *Mishpat Umimshal* 1 (1993): p. 323.
- 15 HCJ 7052/03, Adalah v. Minister of Interior, IsrSC 61(2) 202 (2006).
- 16 Nadim N. Rouhana and Nimer Sultany, "Redrawing the Boundaries of Citizenship: Israel's New Hegemony," *Journal of Palestine Studies (JPS)* 33, no. 1 (2003): pp. 5, 6.
- 17 Aeyal Gross, "Democracy, Ethnicity, and Constitutionalism in Israel: Between 'the Jewish State' and 'the Democratic State'" [in Hebrew], *Sotsyologia Yisraelit* 2, no. 2 (2000): p. 662.
- 18 HCJ 6698/95, 'Adel Ka'dan v. Land Administration of Israel, IsrSC 54 (1) 258 (2000). 'Adel Ka'dan, an Arab citizen of Israel, petitioned the Supreme Court against the refusal of the Israel Land Administration and the Jewish Agency to sell him land in the town of Katzir. The Court decided that the state cannot discriminate in land allocation, and that the values of the Jewish and democratic state do not justify discrimination against non-Jews.
- 19 Hassan Jabareen, "The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place with No Palestinian Memory," in *Challenging Ethnic Citizenship: German and Israeli Perspectives on Immigration*, ed. Daniel Levy and Yfaat Weiss (New York and Oxford: Berghahn Books, 2002), p. 196.
- 20 See for example, Ruth Gavison, "The Jewish State: The Principle Justification and the Desirable Character" [in Hebrew], *Tkhelet* 13 (2002): p. 50; Na'ama Carmi, *The Law of Return: Immigration Rights and Their Limits* [in Hebrew] (Tel Aviv: Tel Aviv University Press, 2003); Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993); Kasher, "Jewish and Democratic," p. 174; Amnon Rubenstein and Alexander Yakobson, *Israel and the Family of Nations: The Jewish Nation-State and Human Rights* (New York: Routledge, 2009), p. 156.
- 21 Barak, *A Judge in a Democratic Society*, p. 88.
- 22 Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press, 2002), p. 141.
- 23 See for example, Amnon Rubenstein and Barak Medina, *Constitutional Law of the State of Israel* [in Hebrew], 6th ed., vol. 1 (Jerusalem and Tel Aviv: Schocken Publishing House, 2005), p. 406; Carmi, *The Law of Return*, p. 54; Rubenstein and Yakobson, *Israel and the Family of Nations*, p. 156; Alan Dowty, *The Jewish State: A Century Later* (Berkeley and Los Angeles: University of California Press, 1998), p. 214. Gans, *The Limits of Nationalism*, p. 136.
- 24 Ruth Gavison, "The Justification for the Citizenship Law" [in Hebrew], Ynet, 5 August 2003, <http://www.ynet.co.il/articles/0,7340,L-2717741,00.html>.
- 25 Mazen Masri, "Love Suspended: Demography, Comparative Law and Palestinian Couples in the Israeli Supreme Court," *Social and Legal Studies* 22, no. 3 (2013): p. 309.
- 26 EA 1/65, Ya'kov Yardor v. Central Election Committee for the Sixth Knesset, IsrSC 19(3) 365 (1965).
- 27 *Bank Mizrahi*.
- 28 *Bank Mizrahi*.
- 29 HCJ 466/07, Galon v. The Attorney General (2012) at para. 3 of Justice Rubenstein's opinion.
- 30 *Galon*, para. 46.
- 31 CA 630/70, Tamarin v. State of Israel, IsrSC 26(1) (1972); CA 8573/08 Ornan v. Ministry of Interior (2013).
- 32 Nadim N. Rouhana, "'Constitution by Consensus': By Whose Consensus?," *Adalah's Newsletter* 7 (November 2004), <http://www.adalah.org/newsletter/eng/nov04/ar1.pdf>.
- 33 "Constitution for Israel," Knesset, [http://knesset.gov.il/constitution/ConstOpening\\_eng.htm](http://knesset.gov.il/constitution/ConstOpening_eng.htm).
- 34 Nadim N. Rouhana, "Jewish and Democratic? The Price of National Self-Deception," *JPS* 35, no. 2 (2006): p. 64.
- 35 Ehud Olmert, "Address by Prime Minister Ehud Olmert at the International Meeting in Annapolis," United Nations Information System on the Question of Palestine (UNISPAL), 27 November 2007, <http://unispal.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/427dc5a73b13100c852573a10073b21e?OpenDocument>.

- 36 Saeb Erakat, "UN Bid Key to Two States for Two Nations,' Says Saeb Erakat," Al-Monitor, 28 November 2012, <http://www.al-monitor.com/pulse/politics/2012/11/why-we-are-seeking-an-upgrade-in.html>.
- 37 See for example, Office of the White House Press Secretary, "President Bush Meets with Leaders of Jordan, Israel and Palestinian Authority," news release, 4 June 2003, U.S. Department of State Archive, <http://2001-2009.state.gov/p/nea/rls/rm/21193.htm>; Office of the White House Press Secretary, "President Bush Attends Annapolis Conference," news release, 27 November 2007, <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071127-2.html>.
- 38 Alan Dowty, *The Jewish State*, p. 214; see also Shlomo Avineri (no title) in *The State of Israel as a Jewish and Democratic State: A Discussion and Related Source* [in Hebrew], ed. Ron Margolin (Jerusalem: International Association for Jewish Studies, 1997), p. 40; Amnon Rubenstein and Liav Orgad, "Human Rights, State Security, and Jewish Majority" [in Hebrew], *Hapraklit* 48, no. 2 (2006): p. 343.
- 39 As quoted in "Livni: National Aspirations of Israel's Arabs Can Be Met by Palestinian Homeland," *Haaretz*, 11 December 2008, <http://www.haaretz.com/news/livni-national-aspirations-of-israel-s-arabs-can-be-met-by-palestinian-homeland-1.259321>.
- 40 Shlomo Tsazna, "Netanyahu Demands: Israeli Arabs—In the Permanent Arrangement" [in Hebrew], *Israel Hayom*, 5 September 2010.
- 41 Barak Ravid, "Lieberman: Peace Talks Must Reassess Israeli-Arabs' Right to Citizenship," *Haaretz*, 19 September 2010, <http://www.haaretz.com/news/diplomacy-defense/lieberman-peace-talks-must-reassess-israeli-arabs-right-to-citizenship-1.314596>.
- 42 "Our Policies in Brief," Yisrael Beytenu, accessed 2 August 2012, <http://www.beytenu.org/content/Our-Policies-in-Brief>.
- 43 See the meeting minutes leaked to Al Jazeera as part of the Palestine Papers, a collection of over sixteen hundred confidential documents related to the Israeli-Palestinian conflict. "Minutes from Plenary Session: Post Annapolis," 21 June 2008, <http://transparency.aljazeera.net/files/3027.pdf>.
- 44 Citizenship Act (Amendment no. 9), 2008.
- 45 While this was clear in the initial private bill that was submitted by MK Gilad Erdan, this motive was not included in the bill that was published in the official gazette of Israel's Ministry of Justice, *Rashomot*. For Erdan's bill see <http://www.knesset.gov.il/privatelaw/data/17/1708.rtf>.
- 46 Bill for Citizenship Act (Amendment-Nullification of Citizenship), 2009, <http://www.knesset.gov.il/privatelaw/data/18/105.rtf>.
- 47 Bill for Citizenship Act (Amendment-Declaration of Loyalty), 2009, <http://www.knesset.gov.il/privatelaw/data/18/102.rtf>.
- 48 Bill for Population Registry (Amendment-Declaration of Loyalty to the State, Flag and Anthem), 2009, <http://www.knesset.gov.il/privatelaw/data/18/811.rtf>.
- 49 Foundations of the Budget Law (Amendment no. 40: Reduction of Budget or Support because of Activity against Principles of the State), 2011.
- 50 The Law to Amend the Communal Societies Ordinance (no. 8), 2011.
- 51 Eli Ashkenazi, "Vandals Slash Tires of 40 Cars in Hate Crime in Northern Israel," *Haaretz*, 3 April 2014, <http://www.haaretz.com/news/national/.premium-1.583546>.
- 52 *Akka: City on the Front; A Review of the Events and Confrontations in Akka during October 2008* (Haifa: Mossawa Center, the Advocacy Center for Arab Citizens in Israel, 2008), [http://www.mossawacenter.org/my\\_documents/publication2/2009%20Akka%20Report.pdf](http://www.mossawacenter.org/my_documents/publication2/2009%20Akka%20Report.pdf).
- 53 "About," Yeshivat Hesder Akko, [http://yakko.co.il/eng/maamar.asp?cat\\_2577](http://yakko.co.il/eng/maamar.asp?cat_2577).
- 54 *Akka: City on the Front*, Mossawa Center, 2008.