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Exposing the Glass Ceiling and Social Exclusion of Arabs in the Israeli Labor Market

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EXPOSING THE GLASS CEILING AND SOCIAL EXCLUSION OF ARABS IN THE ISRAELI LABOR MARKET

Neta Nadiv*

ABSTRACT

This article presents the conservative claim that the public sector ought to lead by example to influence social employment patterns, across the public and private sectors. The hypothesis is that affirmative action plans are instrumental in establishing change in employment processes and are additionally essential in advancing the social concept of employment diversity. In the absence of a clear obligation and set requirements for the inclusion of Arab employees in Israel, an under-represented group, it is likely no significant change in employment patterns will be seen. This article details how current affirmative action plans advocate for integration merely on paper and additionally how dedicated tenders aimed for integration, end up establishing an internal organizational glass ceiling. The implemented integration is limited to certain positions, specifically junior or profession-oriented, while throughout the civil service, integration objectives remain general rather than directed at profession or ranking. The data collected for this article, illustrates patterns of employment and auction processes in the civil service and the private sector, while focusing on the limited civil service rather than on government agencies and statutory authorities. The following findings of the study shows a problematic pattern of social exclusion of Arabs, while better results were identified in the private sector, where there is no mandated regulation in respect of the affirmative policy.

Keywords: affirmative action, international law, employment law, Israel, civil service

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I. INTRODUCTION

The affirmative action doctrine was generated by social movements in the United States during the mid-1940s.¹ These movements sought to eradicate the evils of discrimination and prejudice, regularly based on race and ethnic origin from American society.² Clayton and Crosby, who extensively discussed the transition from discrimination prevention to affirmative action implementation, emphasized the passive element of discrimination law.³ They contend that discrimination law is based on a reactive policy that does not require proactive intervention, while affirmative action does require such intervention,⁴ with the goal of empowering disenfranchised groups.

The very concept of affirmative action portrays the recognition that the principle of formal equality fails to achieve equality in practice.⁵ The need for affirmative action implies a positive right of liberty, promoting of, or giving preference to, certain segments of society to

¹ Susan Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 296 (2011).

² Buchan T.A. Love, *Justifying Affirmative Action*, 7 AUCKLAND UNIV. L. REV. 491 (1993); see, e.g., Exec. Order No. 11,246, 3 C.F.R. 339-48 (1964-1965), reprinted in 42 U.S.C. § 2000e (2006) (establishing an affirmative action Order relating to companies bidding for government contracts).

³ See SUSAN D. CLAYTON & FAYE J. CROSBY, JUSTICE, GENDER, AND AFFIRMATIVE ACTION 13 (Univ. Mich. Press 1992) (explaining how Title VII began the shift from discrimination to affirmative action).

⁴ See *id.* at 40 (explaining how affirmative action requires consciousness of race and gender).

⁵ See WILLIAM, G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 13 (Princeton Univ. Press 1998) (demonstrating with race-sensitive policies to show that formal equality fails opposed to affirmative action).

minimize the gaps between the differing starting points.⁶ A given preference to a particular group will always be accompanied by an infringement of the rights of another, ordinarily, one who does not belong to the target group.⁷ Proponents of formal equality believe that affirmative action is justifiable only once the individual has demonstrated that they have suffered from personal and direct discrimination.⁸

Unlike formal equality, which seeks to apply a particular, egalitarian process based on the degree of personal effort that the individual invests, substantive equality seeks to achieve equality of outcome.⁹ This approach adopts the principle of equality as a positive right.¹⁰ Accordingly, it requests that the state take active measures to correct inequality that prevents target groups from achieving equal

⁶ Robert Fullinwider, *Affirmative Action*, Stanford Encyclopedia Phil. (Dec. 28, 2001), <https://plato.stanford.edu/entries/affirmative-action/> (last updated Apr. 9, 2018).

⁷ See generally Samuel Scheffler, *Doing and Allowing*, 114 ETHICS 215, 216 (2004) (noting the ways in which non-target groups can become harmed); see generally Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in ETHICAL THEORY: AN ANTHOLOGY 536, 537 (Russ Shafer-Landau ed., 1980) (exemplifying how the “doctrine of the double effect” can benefit one group of people but harm another).

⁸ See CLAYTON & CROSBY, *supra* note 3, at 40 (establishing that, according to some, affirmative action violates the rules of procedural fairness, and thus, that it should be justified only in the presence of personal and direct discrimination).

⁹ Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. 720, 722-23 (Sept. 13, 2016), <https://tinyurl.com/3x5nb4v7> (establishing that substantive equality aims at achieving equality of outcome).

¹⁰ See Gillian MacNaughton, *Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All*, 11 HEALTH & HUM. RTS. J. 47, 48 (Dec. 2009), <https://sites.sph.harvard.edu/hhrjournal/wp-content/uploads/sites/2469/2013/07/5-MacNaughton.pdf> (theorizing that equality could be interpreted as a positive right).

admission to the civil service.¹¹ These measures are known as “affirmative action.”¹² The justification for an affirmative action program is supported not only by concerns surrounding equality, but also by concerns over justice.¹³ An affirmative action policy, as an element aiming to create equal opportunities, recognizes the differences between target populations and non-target populations.¹⁴ The policy applies a principle of remedial or corrective justice, where priority is given to the target population in order to correct the historical discrimination against it.¹⁵ The concept of affirmative action is based on the assumption that there is pervasive discrimination in all areas of life, and offers a way to ameliorate or neutralize such discrimination.¹⁶ Additionally, affirmative action burdens the majority group with justifying the non-acceptance of a candidate belonging to one of the target groups, on objective grounds of

¹¹ Warwick McKean, *Equality and Discrimination Under International Law*, 82 MICH. L. REV. 908, 908 (1984) (arguing that affirmative action, under the international principles of equality and non-discrimination, is an essential obligation).

¹² See Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L. J. 845, 921 (Jan. 1, 1985).

¹³ *Id.*

¹⁴ See, e.g., Elizabeth Bell, *Deserving to Whom? Investigating Heterogeneity in the Impact of Social Constructions of Target Populations on Support for Affirmative Action*, 49 POL'Y STUD. J. 268, 274 (2021) (exemplifying the ways in which different target populations conceptualize affirmative action).

¹⁵ See *id.* at 276 (explaining how preferential treatment is given to racial minority groups as reparation for historical marginalization).

¹⁶ See Rosenfeld, *supra* note 12, at 850 (explaining how inequality, rooted in our society, is used as a basis for affirmative action).

incompatibility, thus increasing the representation of those target groups, in this case, in the civil service.¹⁷

Affirmative action has already made great advances by allowing the examination of new, and perhaps even marginal groups within the labor force, thereby reflecting on the changing demographics of society.¹⁸ Beyond redressing injustices, affirmative action with respect to new social groups can be justified by encouraging diversity, which, among other things, will benefit the citizenry that the civil service is designed to serve.¹⁹

This article seeks to follow the contribution of the 'Civil Service Law (Appointments) – 1959' to social exclusion. By observing the provisions of the 'Civil Service Law (Appointments) - 1959', the civil service commissioner reports, and the academic literature on the topic, it appears that mandatory adequate representation in the Appointment Act has not facilitated any change in the way public officials are elected with regards to various social groups, creating a social-occupational exclusion problem.²⁰ Referencing English law is a key element in the legal evolution in Israel, especially following the British Mandate, whose laws were used

¹⁷ See *id.* at 896 (showing how attempting to remove the 'disparate racial impact' of underrepresented groups can burden the majority group as they are not getting the same preferential treatment).

¹⁸ See *id.* at 923 (explaining that affirmative action is necessary to create a workforce that is reflective of the general population).

¹⁹ Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 962, 964 (1974).

²⁰ See generally John Hanna Bitar, *Article 15 of the Civil Service Law (Appointments) 1959 – Have We Reached the Inheritance?*, INT'L CTR. STUD. RADICALISATION & POL. VIOLENCE 7 (2017) (stating, "[i]n light of political, social, and . . . legislative changes . . . during recent years in Israel, the Israeli Arab population has been trapped in unequal representation").

as the basis for Israeli law.²¹ Section 15(c) of the Appointments Act of 1959 stipulates that provisions of the law regarding adequate representation shall apply to all measures of admission and promotion in the civil service, whether by tender or otherwise.²² The Israeli legislature selected a number of target populations and explicitly noted the following populations in the provisions of the law: women (as part of the duty to represent both sexes), people with disabilities, Arabs (including Druze and Circassians), ethnic Ethiopians, the ultra-Orthodox community, and new immigrants.²³ An in-depth examination of Civil Service Commission reports, along with the provisions of the law and interpretation of the courts, shows that adequate representation does not address the question of promoting target groups in general, and does not uniformly guarantee adequate representation.²⁴ On the contrary, it seems that even if the civil

²¹ Ch. 4, § 12, Law and Administration Ordinance, 5708-1948 (Isr.).

²² Bitar, *supra* note 20, at 8.

²³ See Comm. on the Elimination of Discrimination Against Women, Fifth Periodic Report of States Parties: Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women (Isr.) at 123, 153, U.N. Doc. CEDAW/C/ISR/5 (Oct. 21, 2009) (discussing HCJ 2671/98, *The Women's Lobby in Israel v. Minister of Labor and Welfare*, and how the duty of adequate representation for non-female target groups is fulfilled through tenders, usually designated especially for those target groups. In regards to female groups, representation must be achieved in tenders on an ongoing basis, without a tender there is no duty of adequate representation).

²⁴ See generally *Government of Israel as a Diverse Employer: The Civil Service Commission 2019 Diversity Report*, INTER-AGENCY TASK FORCE ON ISRAELI ARAB ISSUES (Aug. 27, 2020) [hereinafter 2019 Diversity Report], <https://www.iataskforce.org/activities/view/1079> (describing the uneven representation across minorities).

service adheres to the duty of adequate representation, it focuses only on the lower ranks of the service.²⁵

After examining the latest and sparsely published data, some conclusions were determined. Primarily, Israel has not reached the goals of adequate representation of any target group in the civil service, including the Arabs.²⁶ In addition, there is a large gap of adequate representation across the senior ranks in the civil service, and even laterally in certain positions.²⁷ It can be stated that the majority of Arab assignments are made via dedicated tenders.²⁸ Not only does the Israeli civil service fail to meet the basic goals it set for affirmative action, but the interpretation of the law that the public service has adapted itself to, along with the implementation of affirmative action policies, have led to deeper

²⁵ See *id.* (noting how diversity increases are uneven within different ranks); *contra* Bitar, *supra* note 20, at 5-6 (“Article 15A imposes on the government the duty to promote fair representation of Arab employees in the civil service, at all ranks and professions, in every office and unit. In addition, the law requires the Civil Service Commissioner and all affiliated ministries, each in his own field, to take the measures necessary for the allowance and encouragement of fair representation”).

²⁶ See 2019 Diversity Report, *supra* note 24 (providing that, in the case of the female population, one can argue whether the review of adequate representation is in relation to the civil service as a whole, or to specific jobs or ranks).

²⁷ *Id.*

²⁸ See Information Regarding Certain Preventative Measures Under Chapter II of the United Nations Convention Against Corruption, 45(A) KA 2, 4 (Nov. 2011) (Isr.), https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/worki nggroup4/2011-August-22-24/Replies_to_CU_2011_45/20111109_Israel_English.pdf (describing that recruitment, classification, and selection for Arab employment assignments all are conducted through public tenders).

social exclusion.²⁹ This article may help examine the success of affirmative action in Israeli civil service and enable more efficient future planning regarding the Arab population.

As mentioned above, the limited data available concludes that Israel is not meeting the objectives of adequate representation in the civil service in any of the target groups, including the Arab population.³⁰ While the implementation of affirmative action policies opens the way for integration, it is not paved equally.³¹ This article examines data on the representation and integration of the Arab population into the private labor market, alongside data published regarding the civil service. The combination of data conveys a failed attempt to achieve real social change.³² The study shows that in the civil service, which is expected to become a leader in the field of affirmative action in the Israeli labor market, there has been no real significant development to indicate the success of the legislature.³³

²⁹ See Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. & LIT. 483, 525 (2000) (describing the impact of affirmative action to exclusion in areas such as education compared to the labor market).

³⁰ See *generally* Press Release, U.N. Hum. Rts. Comm., In Dialogue with Israel, Committee on the Elimination of Racial Discrimination Urges Greater Inclusion and Protection of Minorities and All Those Under Israeli Jurisdiction, Including In the Occupied Territories (Dec. 5, 2019) (explaining the attempted efforts of Israel to improve inclusion of minorities in civil service).

³¹ See *id.* (describing how affirmative action policies in an attempt to promote integration but not treating non-Jews equally in the process).

³² See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1134 (2000) (emphasizing how changing circumstances and inactive response leads to inability to achieve effective social change).

³³ See Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RSCH. 788, 800 (2012) (indicating no development in the success of legislature due to ambiguities in the existing legislation); see also Linda Hamilton

The first part of this article will focus on the normative framework that shaped the policy of adequate representation in Israel, in general and with an emphasis on the Arab population. The second part will be based on data collected for this article, focusing on the goals of adequate representation for Arabs in the civil service in Israel over the years, where it will be possible to see the difficulty in setting policy and reaching appropriate results. The third part of this article will seek to critically examine whether the use of designated tenders as a means of affirmative action and obtaining adequate representation for the Arabs, indeed achieves the goal. As part of it, this article will discuss the manner in which the goal of integration is determined, will make a comparison with the behavior of the private market in regards to the integration of Arabs in the labor market, and will refer to the phenomenon of discrimination within discrimination.

II. NORMATIVE REVIEW OF AFFIRMATIVE ACTION FOR ARABS IN ISRAEL

Adequate representation in the civil service under affirmative action policy comes in two different forms (these two forms are a product of observation, not the result of any legislation or provision in the law):

Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1025 (2006) (emphasizing the requirement for legislative amendment to produce development in legislative success); see also Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171, 175 (1993) (urging for a further dimension of law to address the legislative needs related to civil service).

the first being the duty of adequate representation in civil service tenders, and the second being dedicated tenders for target populations (one target population at a time) which will be relayed in detail, later on in the article. It appears that the duty of adequate representation in civil service tenders was intended by the Commission for the female population alone and is based on the tiebreak method.³⁴ This method prefers to accept a candidate belonging to the target group over another despite both candidates possessing similar or identical qualifications.³⁵ The reference to “identical candidates” is measured by the scores of the candidates.³⁶ Both adequate representation and dedicated tenders deal with the quantitative dimension by comparing target group statistics to those of a different group.³⁷ However, adequate representation determines the formal tools for achieving the goal and not clear quantities.³⁸ Adequate representation lays out the formal equality model while dedicated tenders convey the essential consequential equality model, measured by general goals of inclusion.³⁹

³⁴ Bitar, *supra* note 20, at 4.

³⁵ David Kravitz & Stephen Klineberg, *Reactions to Two Versions of Affirmative Action Among Whites, Blacks, and Hispanics*, J. APPLIED PSYCH. 597, 598 (2000).

³⁶ *Id.*

³⁷ *See generally id.* (explaining how an organization compares the percentage of white female employees with ethnic minority employees to enhance opportunities for the underrepresented).

³⁸ Bitar, *supra* note 20, at 7

³⁹ *The Ideas of Equity and Non-Discrimination: Formal and Substantive Equality*, EQUAL RTS. TR. (Nov 8, 2007), <https://lawlibraryguides.neu.edu/c.php?g=628650&p=4387188#22176508>.

The second form of dedicated and closed tenders are intended for the other target groups specified by law: Arabs (including Druze and Circassians), Ethiopians, and people with disabilities.⁴⁰ This is a strong preference treatment method, according to which candidates with certain skills, who lack the proper qualifications, are accepted merely on the basis of their belonging to the target group.⁴¹ In order to reconcile the fundamentals of the dedicated tenders with the meritocratic model basis of qualifications and skills, the dedicated tenders must uphold an identical threshold as the one established in a regular tender, for the same position.⁴² Furthermore, the problematic aspect of setting a closed competition for a particular target group should not be taken lightly. In an attempt to achieve results without infringing upon the rights of other individuals who do not belong to a target group, the civil service uses

⁴⁰ See Gideon Alon & Jack Khoury, *Government Okays Affirmative Action for Minority Groups*, HAARETZ (Mar. 12, 2006), <https://www.haaretz.com/2006-03-12/ty-article/government-okays-affirmative-action-for-minority-groups/0000017f-e2d7-d9aa-aff-fbdfc76c0000> (reporting on the Israeli government's efforts to increase the hiring of Israeli Arabs, Ethiopian immigrants, and the disabled by ten percent).

⁴¹ See Jeremy Sharon, *Government Approves Affirmative Action for Haredi Men and Women in Civil Service*, JERUSALEM POST (Dec. 21, 2015), <https://www.jpost.com/israel-news/government-approves-affirmative-action-for-haredi-men-and-women-in-civil-service-437875> (describing the Israeli government's plan to re-fashioning "suitability and selection tests" so as to ensure employment equality of the Haredi population, a type of "positive discrimination" towards non Haredi men and women).

⁴² See § 2(b), Employment (Equal Opportunities) Law, 5748 (1988), as amended (Isr.), https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—ilo_aids/documents/legaldocument/wcms_127881.pdf (outlawing employment discrimination based on gender, sexual orientation, religion, personal status, age, nationality, views, party, duration of military service or other irrelevant conditions to create identical thresholds for all employees); *but see*, Judith Jarvis Thomson, *Preferential Hiring*, 2 PHIL. & PUB. AFF., 364, 366 (1973) (claiming that race and/or gender are qualifications which set equally qualified candidates apart).

closed, dedicated tenders for lower-level positions.⁴³ These tenders can open up to all candidates later on, but not “until employers reach the employment target that is equal and desirable.”⁴⁴

The dedicated positions, measurable through quotas and allocations, allow the government to predetermine the integration of employees in specific positions, leading to inherent centralization and influencing pre-market elements.⁴⁵ As can be deduced from the Civil Service reports, the majority of the employees belonging to the target population are concentrated in certain positions.⁴⁶ The state prefers dedicated tenders for these professions where there is high demand, where the target population is a majority in the pool of candidates for the position, and where they are an already established majority employed

⁴³ See *Government of Israel as a Diverse Employer: The Civil Service Commission Report # Diversifying Israeli Civil Service*, INTER-AGENCY TASK FORCE ISRAELI ARAB ISSUES (2020) [hereinafter *#Diversifying*], <https://www.iataskforce.org/resources/view/1890> (indicating that while 50.2% of civil service employees in Israel hold entry level positions, Arabs hold 62.6% of those positions yet only 1% of senior level positions).

⁴⁴ *Affirmative Action and Assignment of Positions*, MINISTRY JUST. COMM'N EQUAL RTS. PERSONS WITH DISABILITIES (Dec. 23, 2021), https://www.gov.il/en/departments/general/implementing_affirmative_action (describing incentives for affirmative actions in the Israeli employment sectors and indicating such actions can be discontinued when the targeted employment rates for individuals with disabilities have been achieved).

⁴⁵ See Haim Bior, *Why Can't Israeli Arab Find Jobs in High-Tech?*, HAARETZ (Oct. 30, 2015), <https://www.haaretz.com/israel-news/business/2015-10-30/ty-article/.premium/why-cant-israeli-arabs-find-jobs-in-high-tech/0000017f-e819-da9b-a1ff-ec7f95ea0000> (suggesting that qualified Arab graduates are denied employment in high-tech jobs due to racism and market forces, which tend to concentrate Arabs into particular labor sectors like medicine, pharmacology, and law).

⁴⁶ See *#Diversifying*, *supra* note 43, at 3 (stating that there are specific targeted positions that are reserved exclusively for Arabs, but most of them are entry-level positions).

within the civil service.⁴⁷ In this manner, the state does not encourage integration or inclusion in the civil service and instead offers dedicated tenders where a natural multitude of candidates belong to the target population already.⁴⁸ This way, the concept of a dedicated tender becomes redundant and does not affect the partialities of the decision-makers in the civil service.

Apart from additional groups who try to gain recognition, the existing target groups should also be considered in a less comprehensive way. Such groups include target groups that have been recognized separately, but are made up of two different populations, such as Arab women that suffer underrepresentation. The law treats the duty of adequate representation for Arabs as a homogeneous group (including Druze and Circassians).⁴⁹ There is an unresolved question of whether the

⁴⁷ See Itzik Itzhak Dessie & Shlomo Black, *Non-Enforcement of the Law on Appropriate Representation in Israel: Implications for Social Resilience*, INST. NAT'L SEC. STUD. (Aug. 22, 2022), <https://www.inss.org.il/publication/diversity/> (stating that certain groups in Israel suffer from severe underrepresentation in civil service, and therefore are not partners in the decision-making process on important social issues).

⁴⁸ See generally SAMMY SMOOHA, U.S. INST. OF PEACE, *ARAB-JEWISH RELATIONS IN ISRAEL* 8, 12 (2010) (explaining that while Arabs are exempt from serving in the Israeli military, civil service is not offered as an option instead, and that the government decision to recruit Arabs to senior posts in the civil service never materialized).

⁴⁹ See Eléonore Merza, *The Israeli Circassians: Non-Arab Arabs*, 23 BULL. DU CENTRE DU RECHERCHE FRANÇAIS À JÉRUSALEM [FR. RSCH. CTR. JERUSALEM NEWSL.] 1, 4 (Dec. 2012) (explaining that while separate groups view themselves as different due to a variety of factors, the law tends to treat them as a homogenous group: those born in Israel); Eléonore Merza, *In Search of a Lost Time (Re) Construction of Identity in the Circassian Diaspora in Israel*, BULL. DU CENTRE DU RECHERCHE FRANÇAIS À JÉRUSALEM [FR. RSCH. CTR. JERUSALEM NEWSL.] 1, 4 (Nov. 30, 2008) (noting that there is a very clear distinction made in Israel between Druzes and Circassians, who are seen as a homogenous whole, and Arabs).

duty of adequate representation should apply to subgroups within the Arab population and to Arab women within the female population.⁵⁰

One of the tools for achieving substantive equality is the rule of affirmative action, which is designed to promote equality by curing historical injustices, one of the root causes of inequality between populations.⁵¹ While promoting equality of certain populations, it is essential to recognize historical injustice and the background of gaps and hardships they have suffered due to discrimination. Consideration of this factor is essential in all recruitment and selection procedures in the civil service and fulfills the rule of affirmative action while promoting measures of distributive justice. The Courts in Israel began to examine affirmative action in the case of women after the legislature addressed the matter of adequate female representation in government companies.⁵²

⁵⁰ § 6c, Draft Bill for the Women's Equal Rights Law (Legislative Amendments), 5765-2005, HH 78 151 (Knesset (Isr.) (attempting to deal with female exclusion which is suffered by women in various minority groups, but this clause is not applicable to all job appointments); *see also* HCJ 5660/10 Itach-Ma'aki Women Lawyers for Social Justice v. Prime Minister, 11(8) PD 1, 9 (2010) (Isr.) (not published) (holding that when giving relative representation to each sex a determination should be made of the strength of the required representation); *see generally* Paul W. Taylor, *Reverse Discrimination and Compensatory Justice*, 33 OXFORD UNIV. PRESS 177, 182 (1973) (explaining the concept of compensatory justice in general and how society should be obliged to implement reverse discrimination in favor of a group who has been treated wrongly in the past).

⁵¹ *See* Ofra Bloch, *Hierarchical Inclusion: The Untold History of Israel's Affirmative Action for Arab Citizens (1948-68)*, 39 L. HIST. REV. 29, 35 (2021) [hereinafter Bloch Hierarchical Inclusion] (explaining that the only way to correct the injustices of the past is to give preferential treatment now).

⁵² HCJ 453/94 Isr. Women's Network v. Gov., [1992-4] Isr.L. Repts. 425, 1 (1993) (Isr.).

The law itself did not bring about any actual change, until the judgment in the first petition filed by the Women's Lobby.⁵³ There, it was held that the section in the Government Companies Act does not deal with 'new legislative anchoring of ingrained rights, such as the basic right to equality, but with a new norm whose purpose is to positively enforce and express the adequate representation of both sexes in the composition of boards of directors.'⁵⁴ In 1998, the Court was afforded another opportunity to rule on the issue. In the case of the second petition by the Women's Lobby,⁵⁵ the Court applied the doctrine of affirmative action in a broader sense to entities not subject to it by law.⁵⁶ At the time, there was discussion that this included all but the government companies, and the Court even prescribed a duty to actively search for female candidates.⁵⁷ The Supreme Court was asked to address the issue for the third time, and criticized the government ministries for not acting on the matter and leaving the lacuna for interpretative judicial action.⁵⁸

Amendment No. 11 to the Appointments enshrines the duty of representation for Arabs, but it is noteworthy that even prior to the Amendment, actions were taken aimed at integrating members of the

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 13.

⁵⁵ HCJ 2671/98 The Women's Lobby in *Isr. v. Minister of Labor and Welfare*, 52(3) PD ¶ 1 (1998) (Isr.).

⁵⁶ *Id.* ¶ 26.

⁵⁷ *Id.* ¶ 57.

⁵⁸ HCJ 2754/02 The Women's Lobby in *Isr. v. Gov. of Isr. & Others*, 53 (146) PD (2002) (Isr.).

Arab population.⁵⁹ The report by the Kovarsky Commission (1989), examined the entire structure of the civil service and presented a series of recommendations for the integration and promotion of the Arab, Druze, and Circassian populations in the civil service.⁶⁰ Following the report, on June 16, 1993, the government decided to allocate 100 designated jobs for workers from the Arab sector, and another 30 jobs for workers from the Druze sector.⁶¹

According to Bloch, Israel adopted measures in dealing with its Arab minority during its early decades (1948-1968).⁶² In the late 1950s, while primarily employing the Arabs in unskilled labor jobs, policymakers began working towards integrating the Arab workers into the civil, mainstream Jewish workforce.⁶³ Contrary to the traditional rationale, Bloch defines “affirmative action” as a series of techniques used mainly in Israel to integrate Arabs into the national workforce through the

⁵⁹ § K, Civil Service Bill (Appointments) (Amendment 1) 579-1959, SH 279 2000 (Isr.) [hereinafter *Civil Service Law (Appointments)*].

⁶⁰ See *Accountability*, 1 PUB.-PRO. COMM'N COMPREHENSIVE REV. CIV. SERV. & SUPPORT BODIES STATE BUDGET 107-111 [hereinafter *Kovarsky Report*] (discussing the obstacles and providing recommendations for the advancement of Arab minorities in the civil service).

⁶¹ § A, Government decision TM/78 (Isr.).

⁶² See Bloch *Hierarchical Inclusion*, *supra* note 51, at 30 (“[I]n the late 1950s, Israeli policy makers, motivated by a host of interests, adopted measures to promote the integration of Arab workers into the civil service and other predominantly Jewish institutions and businesses”).

⁶³ *Id.* at 31, 39.

use of quotas, earmarked job openings, job training, and preferential treatment.⁶⁴

Since the 1993 decision, the Civil Service Commission continues to implement government decisions on the subject by holding separate tenders for jobs designated for the various groups entitled to affirmative action.⁶⁵ It should be noted that until 1993, affirmative action was exercised without being legislated.⁶⁶ Rather, the practice of affirmative action was based on the legal position that the principle of substantive equality, as opposed to formal equality, allows and even mandates affirmative action to promote adequate representation (then, of the Arab population) in the civil service.⁶⁷ This is in contrast to the position presented in the Kovarsky report, according to which the Appointments Act and the duty of equality in tenders do not allow jobs to be designated for a specific population.⁶⁸ Past studies have depleted the egalitarian link

⁶⁴ *Id.* at 35.

⁶⁵ *Department of Tenders and Exams*, ISR. GOV'T, https://www.gov.il/en/departments/Units/exams_unit (last visited Feb. 12, 2023) (discussing how the Civil Service Commission created the Department of Tenders and Exams to guarantee equal opportunity and fairness in employee recruitment).

⁶⁶ Dafna Izraeli, *The Paradox of Affirmative Action for Women Directors in Israel*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS* 75, 75 (Ronald J. Burke & Mary C. Mattis eds., 2000) (outlining the first affirmative action legislation in Israel as the 1993 amendment to the Government Companies' Act).

⁶⁷ McKean, *supra* note 9, at 2 (describing how an international interpretation of equality is from a substantive point of view, including affirmative action in its interpretation).

⁶⁸ *Kovarsky Report*, *supra* note 60, § 2 (noting how one of the obstacles to the acceptance of minorities in the civil service is the fact that the law requires the acceptance of the best candidate among the most qualified (Merit), that is, without reference to the characteristics of special populations).

to affirmative action methods in the United States, emphasizing the gradual shift in affirmative action rationale.⁶⁹ These studies demonstrate the positive effect of granting rights on state-building and on the loyalty of citizens.⁷⁰ Therefore, affirmative action can be referred to as a set of administrative tools involving logic and policymaking, and less concerning historical egalitarian battles, which are often associated with the term.⁷¹

Regarding the Arab population, the implementation of early-decade policy by Israeli officials, perceived today as affirmative action, often included conflicting and non-egalitarian motives such as: “ensuring security and social order, advancing economic growth, gaining international legitimacy, and garnering the Arab vote.”⁷² However, despite the enhanced inclusion of the Arabs in the national economy by increased access to higher positions in civil service, higher education, and higher-paying jobs, Arab representation continues to falter.⁷³ Hassan

⁶⁹ Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 682 (2004) (reflecting on how affirmative action has transformed to support diversity in society rather than focus on remedying racially-driven wrongs from the past).

⁷⁰ KAREN M. TAN, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972 23-24 (Sarah B. Gordon et al. eds., 2016) (describing how the language of rights shaped state-building by allowing federal administrators to relate to the poor by using language that resonated with them [i.e. payments as “entitlements” and not “gratuities” and the poor were “claimants” and not “paupers”] which allowed these federal workers to better achieve their goals).

⁷¹ Bloch Hierarchical Inclusion, *supra* note 51, at 35-36 (discussing how affirmative action operates outside of the historical context and can serve as a set of administrative tools encompassing managerial form and logic).

⁷² *Id.* at 52 (stating four types of instrumental rationales for adopting affirmative action measures).

⁷³ *Id.* at 63.

Jabareen challenges the popular belief that Arab Palestinian citizens, a “homeland minority” in Israel, enjoy equal individual rights.⁷⁴ Israel’s initial assimilation of Arab Palestinians and later constitutional development lead Jabareen to believe that although at present, Arab citizens are guaranteed fundamental rights and liberties, their citizenship derives from ethnic hierarchy inherent to discrimination and domination, which is in dire need of readjustment to actualize equal rights.⁷⁵

Section 15 of the Appointment Act uses the term “appropriate expression” to mark the integration goal wished to be pursued.⁷⁶ But how is this goal achieved when there is no clear operative mechanism? The provisions of Section 15A of the Appointments Act do not define what adequate representation is.⁷⁷ In *Civil Rights in Israel v. State of Israel*, the Court highlights the disparity in Arab representation as follows:

The Arab population, including the Druze population and the Circassian population in the state, although it constitutes almost one-fifth of the state’s population, is represented in the civil service only at a rate of about 5% of all civil servants, and amongst senior civil servants, the rate is even lower.⁷⁸

⁷⁴ Hassan Jabareen, *Hobbesian Citizenship: How the Palestinians Became a Minority in Israel*, in *MULTICULTURALISM AND MINORITY RIGHTS IN THE ARAB WORLD* 189, 191–92 (Will Kymlicka & Eva Pförtl eds., 2014) (discussing how Arab Palestinians became a minority group through force).

⁷⁵ *Id.* at 192 (defining colonial citizenship and how it creates institutional discrimination and prevents equality).

⁷⁶ HCJ 6924/98 Ass’n for Civil Rights in Israel v. State of Israel, PD 1, 14, 19 (2001) (Isr.) (stating Section 15A requires appropriate expression).

⁷⁷ *See* Bitar, *supra* note 20, at 4 (pointing to the fact that this source fails to define adequate representation).

⁷⁸ CA 6924/98 Civil Rights in Israel v. State of Israel PD 1, 19 (discussing the basis of the draft proposal to Section 15(a) of civil service in the argument of this case to direct the Government of Israel and others to nullify the appointment of some of the representatives on behalf of the Government in the Israel Lands Council and to appoint in their stead, Arabs as members of the Council).

The legislature authorized the government to act in several ways to promote adequate expression among employees: “[t]o take reasonable measures under the circumstances, which may enable and encourage adequate representation”;⁷⁹ “[t]o designate jobs that will be filled, as much as possible by candidates who are fit for the job, are from a group entitled to adequate representation that is not adequately represented, or as determined by the government”;⁸⁰ and to give “priority to candidates among groups entitled to adequate representation that are not adequately represented, when they have qualifications similar to those of other candidates.”⁸¹ Thus far, the government may determine for itself what adequate representation is, and what its goals are.⁸² The government may designate certain jobs for an eligible group and prefer a candidate with similar qualifications in a regular tender, as done in the case of women.⁸³ Additionally, as stated by Section 15 of the Appointments Act of law, the government may accept qualified candidates only “as far as possible.”⁸⁴

⁷⁹ Civil Service Law (Appointments), *supra* note 59, § 15(b)(1).

⁸⁰ *Id.* § 15(b)(2).

⁸¹ *Id.* § 15(b)(3).

⁸² *See, e.g.,* Bitar, *supra* note 20, at 4 (explaining how the Israeli Knesset implemented an affirmative action doctrine declaring companies to provide adequate representation for gender equality).

⁸³ *See id.* at 4 (explaining how the law authorizes the government to clearly designate qualified job candidates in terms of the Arab population).

⁸⁴ *See id.* at 5-6 (explaining how Article 15A of the Appointments Act imposes on the government the duty to promote fair representation of Arab employees).

Following Amendment No. 11, the Attorney General issued guidelines regarding adequate representation for certain sectors,⁸⁵ emphasizing both the prohibition against discrimination, and the task of taking positive action to achieve substantive equality.⁸⁶ In this context, the duty of adequate representation is a purposeful duty that depends on the nature of the entity, including the practical importance of the entity in terms of the groups entitled to adequate representation.⁸⁷

Customarily, those with merit principles who believe that results should be awarded to the most deserving oppose a policy of affirmative action that violates or infringes upon the merit principle in any way.⁸⁸ Nevertheless, how should affirmative action be viewed in light of existing discrimination other than corrective justice emphasizing historical injustice? It seems that such supporters of merit will express support for eradicating discrimination since discrimination distorts the assessment of talent, and also because recruitment using methods that bypass tenders harm the purity of the civil service, and undermine the success of

⁸⁵ See *id.* at 4 (discussing the amendment that declared state-owned companies provide adequate representation to both sexes on the boards of government within those companies).

⁸⁶ See *id.* (discussing how the prohibition of discrimination is derived from the principle of inequality and it is needed to prevent the furthering of the gap between men and women).

⁸⁷ See *id.* at 4-5 (explaining how appropriate representation “depends on several aspects; the nature of the body, including the importance of a particular group”).

⁸⁸ See generally Debroah Smith Bailey, *Affirmative Action in Focus*, 34 AM. PSYCH. ASS'N 48, 48 (Oct. 2003), <https://www.apa.org/monitor/oct03/affirmative> (addressing the dislike and discomfort affirmative action introduces due to the unfairness of the system and individuals objecting to minorities and women receiving preferential treatment).

affirmative action.⁸⁹ These methods include any tender that deviates from the ordinary or facilitates an unprofessional appointment, and therefore further excludes the underrepresented populations, who from the outset are denied the right to compete for the position.⁹⁰ Even worse, it seems that section 15A(c) of the Appointments Act, which prescribes a duty of adequate representation in all means of appointment, including by way of tender or otherwise, will not succeed in correcting the distortion.⁹¹ The legislated Amendment once again links the duty of adequate representation to merit assessments.⁹² Thus, Section 15A(b)(2) and Subsection (3) require the implementation of adequate representation only amongst the group of candidates who are eligible for the position.⁹³ However, the legislature was unsuccessful, due to its failure to address the reality that merit assessments do not always occur.⁹⁴ According to the letter of the law, in their absence, there is no legal duty of adequate

⁸⁹ See Love, *supra* note 2, at 494, 498, 499 (explaining the unequalness of gender and race-based discrimination in the workplace and how affirmative action helps in reducing this gap by recruiting based on qualifications).

⁹⁰ See Laurent Lamy & Philippe Jehiel, *Discrimination in Public Procurements: A Cost-Reducing Guide*, VOXEU CEPR (Nov. 22, 2016), <https://cepr.org/voxeu/columns/discrimination-public-procurements-cost-reducing-guide> (explaining the discriminatory policies of underrepresented participants who are denied the right to compete).

⁹¹ HCJ 6924/98 Ass'n for Civil Rights in Israel v. State of Israel, PD 1 (2001) (Isr.).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.* at 22 (stating that the duty of appropriate representation is only imposed by statute and not merit).

representation.⁹⁵ Therefore, the problem lies not only in the development of the legal doctrine of affirmative action, if at all, but also in the Civil Service appointment procedures, which for the most part, are biased on and deviate from the original meritocratic principle.⁹⁶ If we do not adhere to proper appointment procedures, we will not reach the state necessary to achieve the affirmative action norm, which exists only in an appointment procedure that examines the qualifications of candidates. The discussions about the scope of adequate representation, its quality, and the way it is implemented are all important. However, such discussions cannot take place in a vacuum and may divert the focus from one of the main barriers to the success of an affirmative action program, which is the appointment process.

It is important to understand that the insistence on merit values is necessary. At least at this stage, it is not subject to a discussion of its advantages or disadvantages. Why is that? Because the State of Israel has chosen the meritocracy model, it is important to examine how, if at all, the model allows for affirmative action in its current form.⁹⁷ Ostensibly, the

⁹⁵ See *id.* at 13 (highlighting that there is no statute that directly expresses a duty to provide adequate representation of Arabs in the Israel Land Council, a government-formed entity).

⁹⁶ See, e.g., Ron Tzur & Nissim Cohen, *The Ongoing Israeli Civil Service Reform: Comparing Current Achievements to Past Attempts*, 168 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE [FRENCH J.PUB. ADMIN.] 943, 946 (2018) <https://doi.org/10.3917/rfap.168.0943> (arguing that since the 1970s, the Israeli Ministry of Finance has exerted dominance in civil service appointments through manipulation and bribery).

⁹⁷ See David Nachmias, *Israel's Bureaucratic Elite: Social Structure and Patronage*, 51 PUB. ADMIN. REV. 413, 416 (Sept. 1991), <https://www.jstor.org/stable/976410> (highlighting that the Israeli government

legislature has created a legal structure that seeks to maintain a policy of affirmative action and a meritocratic method of appointment to the civil service.⁹⁸ This structure has never worked. From the moment the Appointment Act was enacted, there has been an erosion of the meritocratic model.⁹⁹ Moreover, quantitative studies published by the Civil Service Commission show that the attempt to maintain a model of affirmative action under the provisions of the Appointment Act does not allow for adequate representation, due, inter alia, to deviation from the meritocratic model and erosion of the duty to hold a tender.¹⁰⁰

In 2003, following Amendment 11 to the Appointments Law, the Ministerial Committee for Non-Jewish Sector Affairs decided on the following two actions: first, in accordance with Section 15a(b)(3) of the Appointments Act, affirmative action would be established in regular tenders for a period of two years by promoting work admission and giving promotions to members of the Arab population, including the Druze and Circassians, whose qualifications are similar to those of other

attributes the lack of diversity among civil servants to a meritocratic recruitment model that prioritizes “neutral competence”).

⁹⁸ See Amir Prager, *Appropriate Representation in the Civil Service: Arab Society*, KNESSET RSCH. INFO. CTR. 2 (Aug. 4, 2020) (highlighting the Knesset’s intent to ensure representation of several groups, including Arabs, at every rank in civil service).

⁹⁹ See Tzur & Cohen, *supra* note 96, at 946 (stating that the Ministry of Finance’s political influence has stonewalled new reform attempts, thus eroding the Appointment Act’s original intent to limit political influence in civil service appointments).

¹⁰⁰ See CIV. SERV. COMM’N., THE DIVERSITY AND REPRESENTATION REPORT 5 (May 2020), <https://www.gov.il/BlobFolder/reports/diversity-report-2019/en/The-Diversity-and-Representation-Report%202019-Israel.pdf> (holding that the high percentage of representation in the health system compensated for the government ministry’s failure to meet adequate representation targets.)

candidates for the position; and second, in accordance with section 15a(b)(2) of the Appointments Law, 37.5 jobs would be designated annually to members of the Arab population, including Druze and Circassians.¹⁰¹

In 2004, the government set targets for achieving adequate representation for the Arab population.¹⁰² The aim for the next three years was to have the Arab population make up at least 8% of state employees and increase to 10% by 2010.¹⁰³ At the start of 2006, it became clear that government ministries were far from achieving the goals set by the government. The High Court of Justice gave reference to the matter in the case of Yossi Beilin,¹⁰⁴ by stating that the measures taken so far were insufficient in achieving the goals set. Therefore, in March 2006, the Civil Service Commission made two decisions: first, 112.5 positions would be designated between 2006-2008 to Arabs,¹⁰⁵ and second, a joint team of the Civil Service Commission, the Ministry of Justice, and the Budget Department of the Ministry of Finance was to be established to examine additional ways to promote the proper representation of the Arab

¹⁰¹ See DK, 30th Knesset, Session No. 4729 § 1 (2006) (Isr.), https://www.gov.il/he/Departments/policies/2006_des4729 (referring to Section 15a(b)(2) of the Appointments Act).

¹⁰² See DK, 31st Knesset, Session No. 414 §§ 2-2.1 (2006) (Isr.), https://www.gov.il/he/Departments/policies/2006_des414 (referring to government decision no. 1402, dated in 2004, which sought to achieve adequate representation for the Arab population).

¹⁰³ *Id.* § 2.1.

¹⁰⁴ HCJ 10418/05 Yossi Beilin v. The Prime Minister et. al., 1, 2 (2006) (Isr.).

¹⁰⁵ DK, 30th Knesset, Session No. 4729 § 1 (2006) (Isr.), https://www.gov.il/he/Departments/policies/2006_des4729.

population among civil servants.¹⁰⁶ The joint team of the Civil Service Commission recommended, inter alia, an Arab representation target of at least 8% by the end of 2008 and at least a 10% target by the end of 2010 while striving for a 20% target.¹⁰⁷ Not only was the state unsuccessful in reaching these goals by the end of 2010 with the rate of Arab representation in the civil service reaching only 7.52%, but also remained unsuccessful in 2011, according to a 2014 report presenting a rate of only 7.78% Arab representation.¹⁰⁸ Such a percentage was far from the 20% intended to be attained by the government's decision, as will be discussed later in this paper.

Two subsequent government decisions from 2007 and 2009 replaced the targets with absorption targets of 112.5 Arab workers each year until 2009.¹⁰⁹ A total of 800 new positions would be added and by the end of 2010, to be filled by Arabs according to the 8% representation

¹⁰⁶ *Id.* § 2.

¹⁰⁷ *See id.* §§ 2.1-2.2 (explaining that a plan to designate jobs for the Arab population is included in the framework to meet their goal of promoting adequate representation in the workforce).

¹⁰⁸ *See generally Employment*, INTER-AGENCY TASK FORCE 1, 3 (June 2014) (noting the Knesset Committee's findings on the percentage of Arabs employed in the Israeli civil service sector).

¹⁰⁹ *See* DK, 31st Knesset, Session No. 4550 § 2 (2009) (Isr.), https://www.gov.il/he/Departments/policies/2009_des4550 (adopting additional measures after Government Decision 4436 to increase the number of designated positions for the Arab population in the civil service sector); DK, 31st Knesset, Session No. 2579, § § 1, 3 (2007) (Isr.), https://www.gov.il/he/Departments/policies/2007_des2579.

target goal. By the end of 2012, 10% of the total representation in the civil service and 30% of the new positions were to be manned by Arabs.¹¹⁰

It is important to note that the Commission incorporates the Druze and the Circassian into the Arab population as one united group, generally without providing separate data on different members of the population.¹¹¹ The designation of tenders in a comprehensive manner without a separate allocation may create a sub-exclusion within the group.¹¹² Only in special cases, as stipulated in the government decision of 2009, will the Commission, in light of the nature of its role, be authorized to determine a designated position only for one of the sectors.¹¹³ The main goal for that decision was to deal with a relatively low number of candidates for designated tenders, whose publication occasionally failed to bring any candidates at all.¹¹⁴ Moreover, according to certain approaches, expanding the circle of those eligible to run for the

¹¹⁰ See DK, 31st Knesset, Session No. 2579, § § 1, 3 (2007) (Isr.), https://www.gov.il/he/Departments/policies/2007_des2579.

¹¹¹ See Prager, *supra* note 98, at 3 (explaining that Civil Service Law in Israel mandates appropriate representation of certain population groups including the Arab population which includes Circassians and Druze).

¹¹² See *id.* at 5 (noting that the percentage of Druze employees in civil service exceeds their representation in the overall Arab population).

¹¹³ See DK, 31st Knesset, Session No. 4436 § 2 (2009) (Isr.), https://www.gov.il/he/Departments/policies/2009_des4436 (stipulating the amount of jobs designated for members of the Arab community will be increased and, in exceptional cases, the civil service commission may assign positions in another office or unit in order to comply with the obligations of this statute).

¹¹⁴ See Prager, *supra* note 98, at 4 (noting the objective of the January 2009 resolution was to reduce the gap between the rate of Arab civil servants and their rate in the general population).

broader group will enhance the chances of choosing better candidates.¹¹⁵ The concern, of course, is the existing preference of a particular group whose pre-market data is favorable.

The same government decision of 2009 also stated that the civil service must conduct active search activities to locate suitable candidates for the position when not enough Arab candidates have been submitted.¹¹⁶ The government has also provided several ways to deal with the detection of candidates and to encourage ways of coping,¹¹⁷ but there is no indication in verbal or numerical reports regarding candidate locator activities. In fact, the data indicate that as part of affirmative action for Arabs, the government uses only designated tenders while lacking active detection.¹¹⁸

Following the Prime Minister's letter of appointment dated August 10, 2011, Prof. Manuel Trajtenberg submitted a report to the

¹¹⁵ See *id.* at 9 (noting that 63% of applications submitted by Arab candidates for public tenders met the minimum qualifications in).

¹¹⁶ See DK, 31st Knesset, Session No. 4550 § 5 (2009) (Isr.), https://www.gov.il/he/Departments/policies/2009_des4550 (stating the establishment of a database composed of examining members from groups entitled to representation to promote their inclusion as tenders for positions in civil service).

¹¹⁷ See DK, 31st Knesset, Session No. 4436 §§ 1, 8-9 (2009) (Isr.), https://www.gov.il/he/Departments/policies/2009_des4436 (recommending actions such as: connecting with placement agencies; getting assistance from social organizations which promote Arab rights; making adjustments in working conditions; encouraging the Arab population living in the periphery to come work in the center of the country by using measures such as reimbursing travel expenses and assisting with rent).

¹¹⁸ Bitar, *supra* note 20, at 10 (highlighting the failure of the Israeli Government to monitor their affirmative action program).

Committee for Socio-Economic Change (the "Committee"), on August 26, 2011.¹¹⁹ The report, inter alia, dealt with failures in the public sector and encouraging ultra-Orthodox employment.¹²⁰ The Committee pointed out that the civil service in Israel lags behind new trends in public administration.¹²¹ According to the Committee, efforts must be made to adapt the manpower of the management system in the public service to strengthen compliance with service objectives and to maintain its values, moral purity, integrity, and transparency.¹²²

The Committee recommended numerous structural changes including the adoption of market-based norms, which presented the civil service with significant challenges.¹²³ The Committee reinforced the importance of the Commission as a policy-establishing body that enables the transfer of some aspects of supervision, control mechanisms, and policy implementation to the ministries¹²⁴ ensuring that success metrics

¹¹⁹ Jonah Mandel, *The Torah's Take on Social Justice*, JERUSALEM POST (Aug. 26, 2011, 5:48 PM), <https://www.jpost.com/jewish-world/jewish-news/the-torahs-take-on-social-justice>; Press Release, The 32nd Government, Benjamin Netanyahu, Members of the Trajtenberg Committee on Socio-Economic Change Submit their Recommendations to PM Netanyahu (Sept. 26, 2011), <https://www.gov.il/en/departments/news/spoketrach260911>.

¹²⁰ See Mandel, *supra* note 119 (explaining that currently, Judaism does not get involved in the free market and encourages the government's role in supplying land to contractors and withholding taxes from minimum income families).

¹²¹ See *id.* (identifying social issues including the supervision over staple products and limiting the state's gain from sellings lands).

¹²² See *id.* (analogizing the adoption of the management system to the field of medicine, explaining the importance of the state to ensure its minimal existence).

¹²³ See *id.* (providing clarity that adoption of market-based options, including free markets, present different approaches and arguments).

¹²⁴ See Nehemia Shtrasler, *Trajtenberg Recommendations are Good for Israel's Hard-working Middle Class*, HAARETZ (Oct. 10, 2011), <https://www.haaretz.com/2011-10-10/ty-article/trajtenberg-recommendations-are-good-for-israels-hard-working-middle-class/0000017f-e083-d7b2-a77f->

are set in place. In this way, the Committee enabled the delegation of authority from the Commission to the ministries, to be done responsibly, maintaining a supervisory mechanism and clear targets.¹²⁵ The report also recommended reforming the recruitment process, facilitating the recruitment of quality personnel and rewarding excellence.¹²⁶ Finally, the report focused on encouraging ultra-Orthodox employment in the labor market in general.¹²⁷

It is difficult for the ultra-Orthodox population to break through the barriers of entry into the civil service due in part to the threshold conditions. Such conditions favor secular or national religious candidates, academic graduates, and those with training in English and mathematics, notwithstanding the advantages that yeshiva graduates could offer.¹²⁸ To resolve this, adequate representation has the power to deal with both pre-market discrimination and pre-market failures. Over the years, a number

e387cc9c0000 (determining that the Trajtenberg Committee positively impacted Israel's middle class); *see also* Tzur & Cohen, *supra* note 96, at 950 (establishing that the Trajtenberg Committee is successful in its reforms because it delegates certain power to Israeli ministers which in turn ensure the application of the Committee's reforms).

¹²⁵ *See* Tzur & Cohen, *supra* note 96, at 946, 948 (reiterating the importance of the Trajtenberg Committee and its main recommendations to the Israeli's ministries).

¹²⁶ *See id.* at 948 (establishing the importance of the Trajtenberg Committee and its advice to the Israeli's ministries).

¹²⁷ *See* Hila Weisberg, *Measures on Haredim Vanish From Labor Reform*, HAARETZ (Jan. 27, 2012), <https://www.haaretz.com/israel-news/business/2012-01-27/ty-article/measures-on-haredim-vanish-from-labor-reform/0000017f-f87b-d2d5-a9ff-f8ffce10000> (establishing that the Trajtenberg Committee's proposal to increase employment among the ultra-Orthodox population were dropped).

¹²⁸ *See id.* (determining that the Trajtenberg Committee proposal to increase employment among the ultra-Orthodox population was not further implemented by the Israeli government).

of bills have been submitted seeking to recognize the ultra-Orthodox community as a target population for statutory adequate representation while seeking a certain increase in the employment rate of ultra-Orthodox men and women.¹²⁹ This is mainly due to a desire to overcome their state of poverty.¹³⁰ About half of those of working age in the ultra-Orthodox community have integrated into the labor market.¹³¹ Only in 2017 did the government pass a decision to adopt the recommendations of the inter-ministerial team for the integration of the ultra-Orthodox population in the civil service and to offer exposure routes for jobs for the ultra-Orthodox population in appropriate channels.¹³² Even today, enabling the integration of adequate representation must be by way of dedicated tenders.¹³³ The tenders open the door to low-level positions and even change the merit assessment and threshold conditions for these jobs, as

¹²⁹ *Id.*

¹³⁰ See Danny Zaken, *The Israeli Ultra-Orthodox Paradox: Earning Little, Feeling Rich*, *AI-MONITOR* (Dec. 31, 2018), <https://www.al-monitor.com/originals/2018/12/israel-ultra-orthodox-poverty-research-oecd-health-secular.html> (discussing the state of poverty for the ultra-Orthodox population).

¹³¹ Uri Regev, *When Will Israeli Haredi Men Participate in the Workforce?*, *HIDDUSH* (June 16, 2022), https://hiddush.org/article-23562-0-When_Will_Israeli_Haredi_Men_Participate_in_the_Workforce.aspx.

¹³² See generally Zvi Zrahiya, *Israel to Hire Ultra-Orthodox for 7 Percent of All Civil Service Jobs Over the Next Three Years*, *ISR. NEWS* (Dec. 17 2017), <https://www.haaretz.com/israel-news/business/2017-12-17/ty-article/israel-to-hire-ultra-orthodox-for-7-of-all-civil-service-jobs/0000017f-f3f7-d497-a1ff-f3f736fe0000> (discussing the government's efforts to hire more ultra-Orthodox Jews in the civil service sector).

¹³³ #Diversifying, *supra* note 43, at 3.

compared to parallel tenders for the same job addressed to the general population.¹³⁴

In light of the Committee's report, the government adopted a decision to improve human capital management mechanisms in the civil service.¹³⁵ It also established an outline for human capital management reform at the Civil Service Commission aimed at formulating a detailed plan to implement civil service management and development reform.¹³⁶ The committee delivered its recommendations in light of the following principles: strengthening the Commission as a professional body responsible for, inter alia, policy-making, with an emphasis on adequate representation and equal opportunities at work; setting threshold requirements and necessary skills; striving for outputs and result-based evaluation to reward employees; delegating powers from the Commission to the ministries while at the same time strengthening the control mechanism; re-examining which jobs are considered senior staff positions; examining the possibility of creating time-limited employment routes; performing screening tests through external parties; and reviewing a

¹³⁴ See Lauren Frayer, *As Israel's Ultra-Orthodox Enter the Workforce, High-Tech Beckons*, NPR (Nov. 12, 2016), <https://www.npr.org/sections/parallels/2016/11/12/501620376/as-israels-ultra-orthodox-enter-the-workforce-high-tech-beckons> (highlighting the desire of companies to hire members of the ultra-Orthodox community and making accommodations in their workplace and job qualifications for them).

¹³⁵ Nissim Cohen, *Public Administration Reform and Political Will in Cases of Political Instability: Insights from the Israeli Experience*, PUB. POL'Y. & ADMIN. 10, 11 (Jan. 27, 2022) [hereinafter *Insights from the Israeli Experience*], <https://journals.sagepub.com/doi/10.1177/09520767221076059?icid=int.sj-abstract.citing-articles.2>.

¹³⁶ Tzur & Cohen, *supra* note 96, at 950-51.

general reform of the recruitment processes.¹³⁷ Therefore, the government decided to establish a committee headed by the Civil Service Commissioner to formulate a detailed plan for implementing civil service reform, with an emphasis on human capital management.¹³⁸

For this purpose, the Civil Service Human Capital Management Reform Staff Team was established.¹³⁹ On June 25, 2013, the Team presented the committee report to reform the improvement of human capital management mechanisms in the civil service, including the creation of goal-based management.¹⁴⁰ It should be emphasized that the need for comprehensive change in the civil service in Israel and to adapt to global trends is not new. The issue was raised comprehensively by the Kovarsky Commission as far back as 1986, which recommended a re-shaping of human capital in the civil service, while examining all government functions and the independence of the Commission, together with the delegation of powers and authorities to the ministries, recommendations were never adopted.¹⁴¹

Contrary to the perception that the law has the power to direct social behavior, Rosenberg argues that laws that are perceived as

¹³⁷ See *Civil Service Commission Policies*, GOV.IL, <https://www.gov.il/en/Departments/Policies?OfficeId=bfe22d82-2309-43ff-94d7-1eeb873ab368&limit=10&skip=0> (last visited Mar. 3, 2023) (showing the different topics the Committee has delivered decisions on).

¹³⁸ *Insights from the Israeli Experience*, *supra* note 135, at 10-11.

¹³⁹ See Tzur & Nissim Cohen, *supra* note 96, at 951-52 (highlighting the need for human capital management reform).

¹⁴⁰ *Leading Change for the Future*, CIV. SERV. COMM'N (June 23, 2013).

¹⁴¹ See *id.* at 12 (emphasizing the ability of the civil service to shape human capital along with other matters of public administration).

problematic or opposed by strong groups (not necessarily the majority group),¹⁴² do not facilitate real change, and make enforcement more difficult.¹⁴³ Accordingly, non-compliance with the provisions of the law, such as affirmative action, may be seen as an exception to the rule that the law is successful in shaping conduct.¹⁴⁴ Needless to say, the disregard for the provisions of the law and the prescription of affirmative action is not absolute.¹⁴⁵ Rather, it is carried out in the shadows, on a lower scale, in a protracted war, and by changes in the form of affirmative action.¹⁴⁶ However, these actions do not lead to actual results.¹⁴⁷ Instead, administrative efforts to fight reform along with violations of court orders serve to enhance, rather than harm, the legal system on direct behavior.¹⁴⁸

¹⁴² See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (Univ. Chi. Press, 2nd ed., 2008) (indicating the belief that the law has the influence to direct social reform).

¹⁴³ See *id.* at 18 (signifying how the law may create extensive challenges by an opposing party that are burdensome to overcome).

¹⁴⁴ See Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO L.J. 846, 849 (1985) [hereinafter Rosenfeld] (displaying the weakness of affirmative action where it may be subject to successful attack or inability to defend against those unwilling to comply).

¹⁴⁵ See Noriko Amano, *What Are the Effects of Affirmative Action Regulation on Workers' Careers?*, YALE INST. SOC. & POL'Y STUD. (ISPS) (Jan. 12, 2017), <https://isps.yale.edu/news/blog/2017/01/what-are-the-effects-of-affirmative-action-regulation-on-workers%E2%80%99-careers> (disproving disregard for affirmative action by displaying its impact on reducing unemployment rates and wage between minorities).

¹⁴⁶ See Rosenfeld, *supra* note 144, at 862 (expressing the disregard of affirmative action is not from violation of provision but from change of affirmative action in the form of social and historical circumstances).

¹⁴⁷ See Bloch Hierarchical Inclusion, *supra* note 51, at 66 (signifying how affirmative action has advanced a transformation regardless of those against its enforcement).

¹⁴⁸ See ROSENBERG, *supra* note 142, at 311 (indicating the lack of harm in violating legal orders regarding both the legal system and the individual).

An initial examination of the field of affirmative action can lead to the conclusion that the legal situation in Israel is top-level, and that the legislature deals with the matter comprehensively.¹⁴⁹ However the skeptical reader will notice data from the field that displays both gaps in pay and employment for certain populations.¹⁵⁰ Affirmative action programs are of great importance in marking the absorption and social integration of certain populations, especially minorities suffering from under-representation in employment.¹⁵¹ Social exclusion does not operate in a vacuum, and its existence and the question of its success in the face of the affirmative action model must be examined.¹⁵² The affirmative action model did not change a thing.¹⁵³ On the contrary, it exacerbated the phenomenon of discrimination in the labor market, and contributed to deeper exclusion.¹⁵⁴ Not only has the law been insufficiently changed, but within the context of excluding certain populations from the labor market, it has had an adverse effect.¹⁵⁵

¹⁴⁹ See Bloch Hierarchical Inclusion, *supra* note 51, at 63 (expressing the areas in which affirmative action took measure to improve).

¹⁵⁰ See *id.* at 63 (displaying how although improvements were made, the gap in both pay and employment remains evident).

¹⁵¹ See *id.* at 31-32 (signifying the importance behind affirmative action efforts towards inclusion of under-represented minorities).

¹⁵² See *id.* at 36-37 (emphasizing the need to analyze social exclusion of Arab minorities under the impact of affirmative action's practices).

¹⁵³ See Korobkin & Ulen *supra* note 32, at 1134 (displaying how changing discrimination in the labor market may in turn create a more adverse response to counteract this change).

¹⁵⁴ See *generally* Bloch Hierarchical Inclusion, *supra* note 51, at 31 (explaining that Arabs often held low-paying, unskilled jobs).

¹⁵⁵ See *id.* (describing how affirmative action failed to place qualified populations in higher-level positions).

When examining affirmative action laws and their implementation in depth, one can discern that the civil service promotes various decisions and requirements that make it difficult for parts of the population to participate in the public sector labor market, thus having a negative impact on various populations who fail to advance their interest in the labor market.¹⁵⁶ Which group should be assisted in integrating into the public labor market? It is customary to address this issue, primarily employment integration, by measuring the labor market participation rate.¹⁵⁷ This form of examination is limited and provides distorted results.¹⁵⁸ In order to examine the demand of integration, the participation rate must be measured in proportion to the scope and quality of employment.¹⁵⁹ Is the integration horizontal across all civil service jobs and ranks? Does the integration match the professional skills? The higher these metrics, the more successful the employment integration can become.¹⁶⁰

It should be kept in mind that employment gaps in target group populations that are in need of assistance integrating, doubtfully indicate

¹⁵⁶ See *id.* at 42-43 (describing policies that were intended to integrate target populations into the public sector).

¹⁵⁷ See Int'l Labour Org., Discrimination (Employment and Occupation) Convention, No. 111 (1958) (showing that participation rate is used to assess employment integration).

¹⁵⁸ See generally Momi Dahan, *Why has the Labor-Force Participation Rate of Israeli Men Fallen?*, ISR. L. REV. 95, 99 (2007) (explaining that labor participation rate can be distorted).

¹⁵⁹ *Labour Force Statistics*, ILO, <https://ilostat.ilo.org/resources/concepts-and-definitions/description-labour-force-statistics/> (last visited Feb. 28, 2023).

¹⁶⁰ See generally *id.* (explaining how labor participation rate can be used to evaluate employment integration).

discrimination in employment, or a phenomenon that an affirmative action program can remedy.¹⁶¹ It is possibly assumed that at least some members of the target population have lower qualifications in a particular field than the rest of the population; therefore, they are naturally less competitive in relation to a particular job. This diagnosis raises a theoretical question. Should affirmative action solve issues of tastes and preferences at the hiring stage, or should it correct pre-market barriers such as education, culture, language, and more? If we accept the second option, it seems that it is possible to address underrepresentation through the setting of the threshold conditions for a position.¹⁶² Moreover, one of the problems with the existing model is that the solution of dedicated tenders without reference to threshold conditions does not provide a real opportunity to enter the service.¹⁶³ In fact, in practical terms, very few compete for these jobs that subsequently become subject to a regular tender and thus are not staffed by the target population.¹⁶⁴

The transition in Israel from a passive policy of non-discrimination laws to an active policy that ensures equal opportunities

¹⁶¹ See Bloch Hierarchical Inclusion, *supra* note 51, at 59 (describing how employment gaps result from conflicting policies of economic inclusion and social exclusion).

¹⁶² See generally EQUALITY, DIVERSITY, AND INCLUSION AT WORK (Mustafa F. Özbilgin ed., 2009). (showing that on the issue of equality and occupational diversity, authors often examine areas such as cultural conflict, gender inequity and politics, work-life balance, and diversity interventions and change, providing only a narrow discussion of affirmative action).

¹⁶³ See Bloch Hierarchical Inclusion, *supra* note 51, at 31 (providing an example of integration being limited to low-paying, unskilled jobs).

¹⁶⁴ Noga Dagan-Buzaglo, *Non-discriminatory Hiring Practices in Israel Towards Arab Citizens, Ethiopian Israelis, and New Immigrants from Bukhara and the Caucasus*, ADVA CENTER (2008).

and equality in result was accomplished by adopting affirmative action as perceived in a systematic way to combat systemic discrimination.¹⁶⁵ One of its methods is to ensure adequate representation.¹⁶⁶ But what is 'adequate representation'?¹⁶⁷ There are several ways to customarily review the rate of representation in the civil service.¹⁶⁸ One way is to consider the ratio between the group and all employees, compared to the proportion of the group in the general population.¹⁶⁹ Another way is through scoping the representation of the group at various levels in the civil service, especially junior and management positions.¹⁷⁰ Another option is to examine and compare the group representation within the

¹⁶⁵ See Press Release, Committee on the Elimination of Racial Discrimination, In Dialogue with Israel, Committee on the Elimination of Racial Discrimination Urges Greater Inclusion and Protection of Minorities and All Those Under Israeli Jurisdiction, Including in the Occupied Territories, U.N. Press Release (Dec. 5, 2019) (discussing the strengths and shortcomings of Israel's legislation concerning the representation of minorities in Israeli Civil Service).

¹⁶⁶ V. Subramaniam, *Representative Bureaucracy: A Reassessment*, 61 AM. POL. SCI. REV. 1010, 1010 (1967) (defining the term "representative bureaucracy" as the notion that individuals from all areas of society should hold civil service positions).

¹⁶⁷ See *id.* (explaining that a "representative bureaucracy" is likely impossible to establish due to society's varying levels of education, caste membership, differing economic status, gender, race, nationality, and other biases all impeding access to civil service positions).

¹⁶⁸ See Shoshana Neuman, *Job Quality in Segmented Labor Markets: The Israeli Case*, DP 8750 IZA INST. LAB. ECON. (2014) (discussing the fragmented Israeli labor markets and comparing employment of the Israeli minority population to the Jewish population across gender, education, race, disability, immigration status, health and other categories).

¹⁶⁹ See #Diversifying, *supra* note 43, at 2 (reporting that as of 2019 the Israeli Civil Service employed 78,954 personnel across 95 departments, yet only 11.7% of those personnel were Arab).

¹⁷⁰ See *id.* (comparing the Israeli general population to the Arab population across varying levels of seniority).

private labor market.¹⁷¹ Israel has chosen the first option listed while complying with lateral and horizontal splicing within the various jobs and ranks.¹⁷²

This article seeks to examine the group's representation within the civil service in the most advanced way and to compare it with its employment rate in the labor market in general, as well as how it is spliced to senior positions in particular. Similarly, in the United States, the Office of Personnel Management ("OPM") is required to implement a policy of non-discrimination at work, applying similar anti-discrimination laws to those in Israel.¹⁷³ To this end, the OPM, working with the Equal Employment Opportunity Commission, must develop a minority population employment plan within the Federal Government to ensure that individuals from all segments of the population are actively recruited and selected.¹⁷⁴ The United States defines underrepresentation as a situation where the proportion of members of the minority group employed in the civil service is less than the proportion of that group in

¹⁷¹ See Neuman, *supra* note 168 (discussing the Israeli private labor market statistics in which 18-27% of Arab women are employed versus 58.9% of employed Jewish women).

¹⁷² See #Diversifying, *supra* note 43 (reporting on the Israeli government's use of employment statistics concerning minorities and the general Jewish population to increase diversity among civil service personnel).

¹⁷³ See *Equal Employment Opportunity*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/about-us/our-people-organization/support-functions/equal-employment-opportunity/> (last visited Feb. 27, 2023) (noting that the Equal Employment Opportunity Office keeps the OPM in compliance with laws, regulations, and policies that prohibit discrimination in the federal workplace).

¹⁷⁴ See 5 U.S.C. § 7201 (providing that the OPM and the Equal Employment Opportunity Commission will receive demographic data to ensure that a selection procedure does not have an unlawful disparate impact on certain groups).

the general labor force.¹⁷⁵ A different approach than that of the United States, asks if it is enough to have passive representation, or if the meaning of representation is active, requiring an advance in agendas and to hear the voice of the under-represented minority.¹⁷⁶ Although this is an important and interesting distinction, Israel is still focused on passive representation while failing to achieve proper representation in outcomes.¹⁷⁷

According to the provisions of the *Takshir* (Civil Service Bylaws),¹⁷⁸ priority is given to employees from within any given ministry.

¹⁷⁵ See 5 C.F.R. § 720.205(c)-(d) (1979) (explaining that a higher level of representation is needed when the percentage of underrepresented groups in the area of civilian workforce is higher than the percentage of the national labor force).

¹⁷⁶ See SAMUEL KRISLOV, REPRESENTATIVE BUREAUCRACY 129 (Prentice-Hall, Inc. 1974) (differentiating between passive or sociological representation and active representation, where the interest is vigorously pursued); see also FREDERICK C. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE 13 (Roscoe C. Martin ed., Oxford Univ. Press 2nd ed. 1982) (1968) (listing a variety of factors that are considered when promoting someone in public service and explaining that in some societies, active representation is strictly prohibited); see also Pan S. Kim, *A Theoretical Overview of Representative Bureaucracy: Synthesis*, 60 INT'L REV. ADMIN. SCI. 385, 385-97 (1994) (stating that representative bureaucracy models can be used in discussions concerning civil rights and equal employment opportunities).

¹⁷⁷ See Abraham Brichta & Gabriel Ben Dor, *Representation and Misrepresentation of Political Elites: The Case of Israel*, 36 JEWISH SOC. STUD. 234, 236 (1974) (reporting that the results of a study done on passive or sociological misrepresentation in Israel show that despite the huge change in the population make-up of Israel, the composition of political elites has remained the same).

¹⁷⁸ See generally Information Regarding Certain Preventive Measures Under Chapter II of the United Nations against Corruption, Ref. CU 2011/45 (A), State of Israel Ministry of Justice, 2-3 (Nov. 2011), https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workgroup4/2011-August-22-24/Replies_to_CU_2011_45/20111109_Israel_English.pdf; see generally *Civil Service Commission, Takshir*, <https://archive.csc.gov.il/Takshir/Pages/default.aspx> (2007); see also *Civil Service Regulations*, 2007, Kovetz Ha Takanot, ¶ 10.232 [hereinafter *Civil Service Regulations to the Takshir*], <https://archive.csc.gov.il/Takshir/Pages/chap.aspx?chap=342>.

When any position is offered by way of internal tender, the option of appointing an employee from within the ministry will be explored first.¹⁷⁹ Only when no suitable candidate is found within the given ministry, the *Takshir* permits inter-ministerial tender open to employees from among all the civil service ministries.¹⁸⁰ This can result in transferring a civil servant from one ministry to another. If a suitable candidate was not found, the *Takshir* permits public tender, open to all competitors.¹⁸¹ As a last resort, if no suitable candidate is found among civil servants, the *Takshir* permits a public tender to open up to all competitors.¹⁸² Thus, the public tender is not the only way for employees to be recruited to the civil service, but alongside it is a mechanism of internal tenders, including the inter-ministerial kind, designated only for civil servants. The Civil Service Reform Staff Team found that the tender procedure is unreasonably extensive, and that there is no proactive appeal to the potential target audience, inclusive of dedicated tenders or locating women for positions to adhere to adequate representation.¹⁸³ In an effort to refine the procedure, the Staff Team concluded, inter alia, that to increase potential participation in the tender, there should be active recruitment for unique

¹⁷⁹ *Civil Service Regulations to the Takshir*, *supra* note 178, at ¶ 11.231(a).

¹⁸⁰ *Id.* at ¶ 11.421(a), (d).

¹⁸¹ *Id.* at ¶ 12.111(a).

¹⁸² *Id.*

¹⁸³ CIV. SERV. COMM'N, REPORT OF THE REFORM COMMISSION TO IMPROVE CAPITAL MANAGEMENT MECHANISMS THE HUMAN IN CIVIL SERVICE 99 (2013) (Isr.), https://www.gov.il/BlobFolder/reports/reform_report2013_1/he/reformReport2013_0.pdf.

positions and of target populations.¹⁸⁴ The Staff Team further concluded that internal tenders for entry-level positions should be canceled, retaining the possibility for the ministries to decide on an internal tender of any kind prior to a public tender.¹⁸⁵

This is in contrast to the situation developed thus far, by which the Appointments Act stipulates that admission to the civil service will be by public tender.¹⁸⁶ However, the *Takshir* establishes that to fill a vacancy, first the publication of an internal tender is open only to ministry employees, and only when the position is not filled by an internal tender, an inter-ministerial tender may be held for all civil servants, even before the public tender.¹⁸⁷ The policy proposed by the Staff Team to cancel the internal tenders, and go to the public tender, focuses on the lower ranks, due to the fact that the internal tenders are ineffective with respect to them.¹⁸⁸

Comparative research shows a reversed trend around the world. Contrary to the entry level, on intermediate levels and above, cancellation of internal tenders and institution of public tenders permitting all

¹⁸⁴ CIV. SERV. COMM'N, TREE OF KNOWLEDGE PROGRAM 24 [hereinafter KNOWLEDGE PROGRAM], https://www.gov.il/BlobFolder/generalpage/knowledge_tree/en/TreeOfKnowledgeProgram.pdf.

¹⁸⁵ *Id.* at 19.

¹⁸⁶ THE CIV. SERV. INTERNAL AND INTER-MINISTERIAL TENDERS - POL'Y PAPER SUMMARY 3 (2015), https://www.gov.il/BlobFolder/generalpage/knowledge_tree/en/The-Civil-Service-Internal-and-Inter-Ministerial-Tenders.pdf.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 4; KNOWLEDGE PROGRAM, *supra* note 161.

candidacy, including those from the civil service, is encouraged.¹⁸⁹ Two general approaches can be identified: first, a career-based approach that, over time, enables the development of a career within the civil service and maintains promotion opportunities,¹⁹⁰ and second, a role-based approach which provides opportunities for candidates outside the organization with a focus on finding the best candidate.¹⁹¹

Canceling the internal tender will strengthen the glass ceiling from which the target populations suffer, and it is likely that the presence of an inter-ministerial tender will not change this. On the contrary, the slim chance that the target population has of any promotion within the service is due to personal and professional acquaintance with the ministry because this dynamic can bridge the tendencies and attitudes that prevented individuals from being promoted and mobile.¹⁹² The illusion of affirmative action includes the fact that it is a partial preference for portions of the process.¹⁹³ Affirmative action in Israel concentrates on the

¹⁸⁹ See “*Acquiring Capacity*,” ORG. FOR ECON. COOP. AND DEV., <https://www.oecd.org/gov/pem/acquiringcapacity.htm> (last visited Feb. 27, 2023) (referring to graphic, “Type of Recruitment System Used in Central Government (2012),” detailing how several countries prioritize hiring outside of their firms, through the position-based system rather than career-based, to attract the best possible candidate for the position).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; CHRISTOPHER POLLITT & GERT BOUCKAERT, PUBLIC MANAGEMENT REFORM, A COMPARATIVE ANALYSIS 76 (Oxford Univ. Press, 2d ed., 2004).

¹⁹² See Amii Barnard-Bahn, *Promotions Aren't Just About Your Skills – They're About Your Relationships*, HARV. BUS. REV. (Feb. 4, 2021), <https://hbr.org/2021/02/promotions-arent-just-about-your-skills-theyre-about-your-relationships>.

¹⁹³ CIV. SERV. COMM'N, CIVIL REPORT OF THE REFORM COMMISSION TO IMPROVE HUMAN CAPITAL MANAGEMENT MECHANISMS IN THE CIVIL SERVICE 1, 84 (June 25, 2013) (Isr.), https://www.gov.il/BlobFolder/reports/reform_report2013_1/he/reformRepo

early stage of welcoming the target population into the civil service, but the continuation of the process lacks any preferential treatment.¹⁹⁴ In this way, the threshold for entering the service is lowered, as candidates compete against their own group. Yet, later on, in any internal tender in the civil service, there is no preferential treatment to improve their employment status, horizontally or vertically, and they are left to compete with the general population.¹⁹⁵

From my perspective, failure to set the scope of tenders of any type, at the low, intermediate, and higher ranks, with an emphasis on the percentage of designated tenders of all types, will result in failure to meet

rt2013_0.pdf (indicating that among other things, the partial representation is reflected in the lack of representation of women in senior positions).

¹⁹⁴ CIV. SERV. COMM'N, REPORT OF THE REFORM COMMISSION TO IMPROVE CAPITAL MANAGEMENT MECHANISMS THE HUMAN IN CIVIL SERVICE 1, 98 (2013) (Isr.), https://www.gov.il/BlobFolder/reports/reform_report2013_1/he/reformReport2013_0.pdf. (stating the method is designed to ensure the public as a whole will choose the best candidates, operating on equal opportunity, where candidates must pass screening tests based on professional requirements).

¹⁹⁵ §§ 15(a), 15(b)(1), Civil Service (Appointments) Law, 579-1959, SH 279 86 (Isr.) (according to the provisions of the Appointments Law, the Israeli Civil Service works to promote dedicated tenders for different populations, such as persons with disabilities, members of the Arab population, and both genders. However, there is no clear procedure for the existence of dedicated tenders. In the instructions of the Takhsar, there is no reference to special tenders for populations such as Arabs or Ethiopians); *but see* STATE OF ISRAEL CIVIL SERVICE COMMISSION SENIOR STRATEGIC PLANNING AND POLICY DIVISION - OCCUPATIONAL DIVERSITY DIVISION 1, 1 (Nov. 19, 2018), https://www.gov.il/BlobFolder/policy/appropriate_representation_jobs/he/53-2018.pdf (indicating the Civil Service Commission issued guidelines regarding the designation of jobs for the populations entitled to adequate in 2018 stating the duty of the Civil Service Commission to designate jobs for Arab society members in order to meet the goals of adequate representation); *see also* CIV. SERV. COMM'N, CONTROL REPORT SUMMARIZES THE ABSORPTION OF WORKERS BELONGING TO THE POPULATIONS ENTITLED TO ADEQUATE REPRESENTATION 1, 22 (Feb. 2017) (Isr.), https://www.gov.il/BlobFolder/reports/adequate_representation_2017/he/Ad_equateRepresentation2017.pdf (stating during among the 208 tenders designated for special populations, 159 members were minorities and 49 members from the Ethiopian community).

affirmative action and adequate representation targets. Only an orderly plan of the volume of tenders by percentages, will succeed in simultaneously integrating new employees from the private market into the civil service, and encourage internal mobility and job availability, all while maintaining the goal of diversity and inclusion in employment to meet affirmative action targets.¹⁹⁶ Considering how dominant the utilitarian approach to diversity has become, Bloch suggests re-connecting diversity with egalitarian values.¹⁹⁷ She argues that a purely utilitarian approach may weaken battles for racial equality.¹⁹⁸ Rather, the ideal approach when advocating for affirmative action involves acknowledging utilitarian benefits alongside an egalitarian approach.¹⁹⁹

The situation of employment diversity in Israel, or even the state of meeting integration goals, was found to be unsatisfactory.²⁰⁰ The Civil Service Commission recommended that to meet the long-established representation targets, even before re-examination or mapping of barriers, it is necessary to hold a dedicated tender for every third tender in the civil

¹⁹⁶ See Israel Democracy Institute Arab-Jewish Policy Forum, *Employment Among Israeli Arab*, ISRAEL DEMOCRACY INST. (Oct. 31, 2011) [hereinafter *Employment Among Israeli Arab*], <https://en.idi.org.il/articles/10190> (proposing a future policy where the Israeli government should issue a normative statement committing to equal employments, provide operative decisions, and conduct a public relations campaign).

¹⁹⁷ Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry Into the Evolving Meaning of Diversity from Bakke to Fisher*, J. CONST. L. 1145, 1209 (May 2018).

¹⁹⁸ *Id.* at 1203 (discussing how a utilitarian paradigm fails to identify past and present forms of racial inequality and prevents achieving racial justice).

¹⁹⁹ *Id.* at 1152, 1209-10 (suggesting utilitarian and egalitarian perspectives should be balanced).

²⁰⁰ INTERAGENCY TASK FORCE, *supra* note 105 (explaining how the low number of Arabs employed in government service has been a frequent target of criticism).

service.²⁰¹ It should be noted, that this is not a mere recommendation, but rather a quantification necessary for a dedicated tender to close the existing gaps.

III. FROM REPRESENTATION OF OBJECTIVES TO SUBSTANTIAL ABSORPTION: ISRAELI ARABS – INADEQUATE RESULTS

According to data from the Central Bureau of Statistics for 2021, Arabs comprise 21.2% of the Israeli population and experience a 39.5% employment rate, significantly worse than the average 59.1% employment rate of all Israelis.²⁰² However, the employment rate of Arabs in the civil service in 2020 consisted of only 13.2%.²⁰³ This rate is far from equal to the number of Arabs in the general population or in the country's labor force at that time.²⁰⁴ While the data indicate a significant increase in the percentage of representation in the civil service over the past two decades,

²⁰¹ Civ. Serv. Comm'n, *The Civil Service Guidelines for Planning in the Field of Human Capital*, 1, 16 (Dec. 2015) (Isr.).

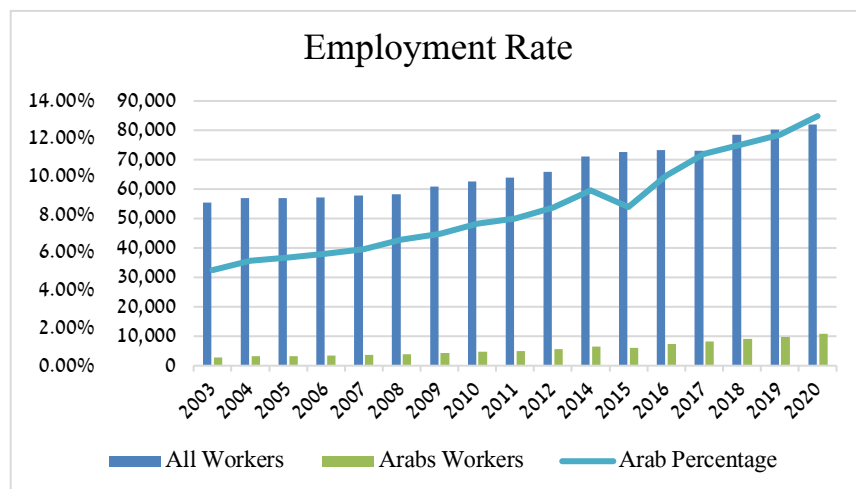
²⁰² *Israel in Figures*, CENT. BUREAU STAT. 1, 7, 14 (2021) [hereinafter *Israel in Figures*].
https://www.cbs.gov.il/he/publications/DocLib/isr_in_n/sr_in_n21e.pdf.

²⁰³ Dr. Nasreen Haddad Haj-Yahya et al., *Statistical Report on Arab Society in Israel: 2021*, ISR. DEMOCRACY INST. (2022), <https://en.idi.org.il/articles/38540>.

²⁰⁴ *See id.* (stating how there have been significant improvements in Arab representation, but they still fall below the relative share of Arabs among the general population).

growing from 5% in 2003 to 13% in 2020, this increase is far from satisfactory.²⁰⁵ Below is the employment rate over the period.²⁰⁶

Chart I: Employment Rate



In 2007, the state declared that it had met the target set by Government Decision 2579, reaching an Arab employee representation

²⁰⁵ See Response to the List of Issues to be Taken Up in Connection with the Consideration of the Third Periodic Report of Israel to the UN Committee on Economic, Social and Cultural Rights, ADALAH THE LEGAL CTR. FOR ARAB MINORITY RTS. IN ISR. (Oct. 18, 2011) (explaining how none of the resolutions have been implemented properly in order to produce satisfactory employment rate growth); see also Haj-Yahya et al., *supra* note 203 (graphing civil service employee percentages by population group from the years of 2000 to 2020).

²⁰⁶ See, e.g., Haj-Yahya et al., *supra* note 203 (noting the employment rate of Arab-Israelis in the civil service sector).

rate of 10.6% of all civil servants.²⁰⁷ Yet since then, the government has not set an updated target.²⁰⁸

In October of 2014, the Civil Service Commissioner published Directive No. 03.22 titled, "The Status of Employment Diversity Supervisors in the Civil Service and Their Position."²⁰⁹ The purpose of the directive was to regulate the position of the Employment Diversity Officer within the meaning of the Civil Service (Appointments) Law, 5719-1959.²¹⁰ In addition, the directive was intended to regulate the implementation of the process defined in article 03.28 of the Civil Service Regulations.²¹¹ In December 2015, Government Decision Plan 922 was first published under the title, "A Five-Year Plan for the Arab Sector."²¹² In this decision, the government requested, among other things, that the Civil Service Commissioner establish a committee responsible for formulating a master

²⁰⁷ See Shelly Mizrahi Simon, *Employment Among Arab Women*, *The Knesset Research and Information Center*, July 2016, at 16 (explaining how in government resolution number 2579, it showed that 10% of public service employees were members of the Arab Society).

²⁰⁸ See generally Amjad Shbita & Ofer Dagan, *Bringing Equitable Budgets to Arab Society*, SIKKUY-AUFOQ ANN. REP., 2021, at 8 (explaining how part of the reason that the number of employees in civil service jobs are so low is because the Civil Service Commission has refrained from setting new targets).

²⁰⁹ See *The GOI's Response to the Questionnaire of the Working Group on the Issue of Discrimination Against Women in Law and Practice*, OFF. OF THE U. N. HIGH COMM'R FOR HUM. RTS., Oct. 2019, at 2 (explaining how in October of 2014 the title of the directive was officially changed to what it is called now).

²¹⁰ See *id.* at 4-5 (explaining the different legislations that the directive was aimed at regulating and how the directive will regulate the provisions).

²¹¹ See 2007 Civil Service Regulations, Civ. Serv. Comm'n (2004) (Isr.), https://www.gov.il/BlobFolder/policy/takshir_full/he/takshir-full.pdf (laying out the provisions of article 3.28 - Commissioner for Occupational Diversity).

²¹² Muhammed Abu Nasra et al., *The Five-Year Economic Plan for Israel's Arab Sector: A Progress Report*, 845 INST. NAT'L SEC. STUD., 1 (Aug. 2016).

plan to close the gaps in appropriate representation between Arab and Jewish societies, and ordered they submit the recommendations to the government within 180 days (about six months).²¹³

In October of the same year, Government Decision No. 550 was published, and titled, "The Economic Plan to Reduce Disparities in Arab Society by 2026."²¹⁴ There, the government noted the necessity to increase action and create tools that would ensure the advancement of diversity and integration processes of the Arab population into society.²¹⁵ Additionally, the decision instructed all government bodies to set clear targets and actions to promote the representation of members of the Arab community, including government ministries.²¹⁶ Moreover, the Civil Service Commissioner announced an intention to obtain approval to promote and adjust the representation of all populations entitled to adequate representation in the civil service, including the Arab sector, in 2022.²¹⁷

In August of 2021, the State Comptroller published Annual Report 72A which mentioned a draft proposal for a governmental decision

²¹³ See *id.* (Discussing how the Israeli government will close the gap between Arab and Jewish societies).

²¹⁴ DK, 36th Knesset, Session No. 550 (2021) (Isr.), https://www.gov.il/he/departments/policies/dec550_2021.

²¹⁵ See *id.* (highlighting the government's goal to promote prosperity and integration by empowering Arab society in economic and social development).

²¹⁶ *Id.* § 9.

²¹⁷ *Id.*

formulated by the Civil Service Commission in 2020.²¹⁸ The proposal regarded raising the target for adequate representation of the Arab society to 15% of all civil servants by the end of 2024.²¹⁹ Yet to the date of the publication of this report, the drafted proposal has not yet been submitted to the government.²²⁰

On October 24, 2021, the 36th Government published Government Decision No. 550, "The Economic Plan to Reduce Gaps in Arab Society by 2026."²²¹ This decision, announced by the Civil Service Commissioner, stated his intentions to receive governmental approval in 2022 of a proposed resolution which would promote and adjust the representation of populations entitled to adequate representation in the civil service, including the Arab sector.²²² These recent actions are positive ideas but do not indicate any active actions to create a change.

²¹⁸ STATE COMPTROLLER'S OFF., ANNUAL AUDIT REPORT 72A - PART ONE 475, 491 (2021) [hereinafter Annual Report 72A], <https://www.mevaker.gov.il/sites/DigitalLibrary/Documents/2021/72A/2021-72A-103-Diversity.pdf?AspxAutoDetectCookieSupport=1>.

²¹⁹ *Id.*

²²⁰ See Annual Report 72A, *supra* note 218 (explaining that the previous target of 10% is low because the overall Arab population is 21%).

²²¹ DK, 36th Knesset, Session No. 550 (2021) (Isr.), https://www.gov.il/he/departments/policies/dec550_2021..

²²² *Id.*; see generally Jerusalem Post Staff, *Israel Approves NIS 3 Billion Plan for Druze, Circassian Communities*, JERUSALEM POST (last updated Nov. 28, 2021, 6:43 PM), <https://www.jpost.com/israel-news/israel-approves-nis-3-billion-plan-for-druze-circassian-communities-687221> (describing the approved plan for social economic empowerment and development in the Druze and Circassian settlements).

This current study had to deal with incomplete data and in some years even missing data.²²³ Thus, the Commission presented data on reaching an absorption target of 983 Arab workers in 2015, which constituted 13% of all employees absorbed into the service that year.²²⁴ No data were published in subsequent years, nor in the year 2013:²²⁵

Table I: Absorption Data

Absorption Data			
	Arab Workers	Other Workers	Percentage of Arabs out of all workers
2006	208	2,953	7%
2007	392	4,514	8.7%
2008	578	4,955	11.66%
2009	457	4,908	9.3%
2010	635	5,725	11.09%
2011	708	5,542	12.77%
2012	832	5,824	14.28%
2014	961	7,706	12.47%
2015	983	7,311	13.44%
Average	639	5,493	11%
Median	635	5,542	11.66%

²²³ See, e.g., Statistics on the Integration of Arab and Druze Citizens Into the Civil Service, Civ. Serv. Comm'n (Dec. 31, 2015) [hereinafter 2015 CSC Statistics], <https://docs.google.com/document/d/1F-gSnsczJ2myxLSBD6CfgYjtOBSIWe24RcgEmtJR0g0/edit> (showing the missing data for 2013, showing fewer columns than years in the table).

²²⁴ *Id.*

²²⁵ See *id.* (depicting the missing 2013 published data).

As for 2021, as mentioned, the Arab population constituted 21.1% of the Jewish and Arab population combined in Israel.²²⁶ In contrast, as of 2015, the absorption rate of Arab and Druze employees, in the civil service relative to the absorption of all employees, both Jews and Arabs, was 13.44%, and in the period between 2006 and 2015, provided an average ratio of 11.19% (median 11.66%).²²⁷ On average, about 639 Arab workers and 5,493 non-Arab workers are accepted in tenders.²²⁸ Therefore, the data presents an insufficient picture of absorption into the civil service. To better understand the integration of Arab workers relative to the non-Arab population, it is necessary to examine the absorption data within the various tenders.

In 2020, 5,815 tenders for civil service positions were published.²²⁹ Of these, only a small portion were designated tenders, and an even smaller portion were for Arabs (the rest were for additional target populations such as Ethiopian immigrants or people with disabilities).²³⁰ Therefore, it is important to observe this data in order to understand the failure of the representation of Arabs whose only way to ensure

²²⁶ See *Population of Israel on the Eve of 2021*, *supra* note 177 (discussing the Arab population in Israel).

²²⁷ See 2015 CSC Statistics, *supra* note 223 (discussing absorption rates of Arab, Druze, and Jewish employees in the civil service sector).

²²⁸ See *id.* (giving the base numbers for the average number statistics).

²²⁹ See CIV. SERV. COMM'N, 2020 STATUS REPORT at ch. 4 (May 2021) [hereinafter 2020 STATUS REPORT] (reporting the percentage of filled and closed tenders).

²³⁰ *Id.*

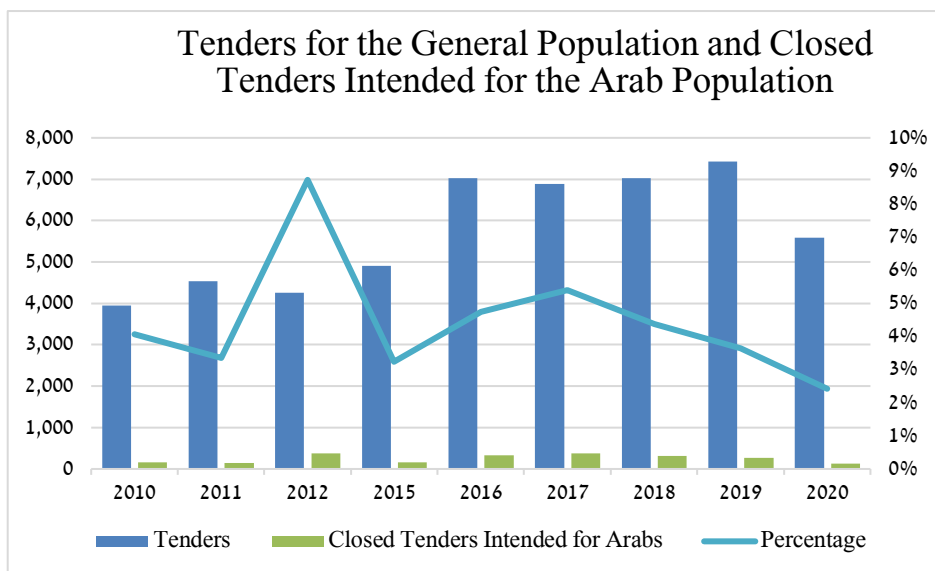
integration is through those designated tenders that currently provide the only expression of affirmative action in the civil service.²³¹

In most years there has been no organized data published relating to the different types of tenders: public tenders, offered to everyone; or internal tenders, offered only to employees from within the civil service.²³² Reviewing the annual reports published by the Civil Service Commission between the years 2010 and 2020, allows for an understanding of the total amount of tenders (public and internal) alongside the number of tenders designated for the Arab population (public or internal):

²³¹ See # *Diversifying*, *supra* note 43 (graphing and noting that the number of Arab employees in the Israeli Civil Service was roughly 11.7% in 2018, increasing from 9.27% in 2014); see also 2020 STATUS REPORT, *supra* note 229, at ch. 3-4 (describing the role and use of recruitment and running tender pools as well as determining that the proportion of the Arabs employed in the civil service is about 2.13% while their proportion in the general population is about 20%).

²³² See, e.g., 2020 STATUS REPORT, *supra* note 231 (noting representation data in non-designated tenders that are published for the entire population compared to tenders that are designated for populations with diverse backgrounds or that require adequate representation).

Chart II: Tenders for the General Population and Closed Tenders Intended for the Arab Population



From the data shown in the chart above, it appears that 5,607 tenders are published annually (median of 5,581), compared to 251 tenders designated for Arabs (a slightly higher median of 270).²³³ Relative to all tenders intended for the general population, only about 5% of them are designated tenders for the Arabs.²³⁴ This is the most interesting figure, which outlines the failed integration of Arabs into the Israeli civil

²³³ See generally *id.* (providing data and numerous graphs on the representation of Arab society in civil service).

²³⁴ Nasreen Haddad Haj-Yahya et al., *Statistical Report on Arab Society in Israel: 2021*, THE ISRAEL DEMOCRACY INST. (Mar. 17, 2022), <https://en.idi.org.il/articles/38540> (explaining that Arab employees constituted 4.8% of civil service employees).

service.²³⁵ This is because only a small number of Arabs apply for general tenders that are not specifically designated for them.²³⁶ In order to examine the manner in which Arabs are competing for positions in the civil service, it is necessary to examine the number of applications for tenders, whether general or dedicated, or whether public tenders for new employees, or internal tenders for those already employed in the civil service who are interested in transitioning to a new position, making a lateral change, or advancing in rank. In 2016, 7,020 tenders were published and in 2017, 6,887 tenders were published.²³⁷ This data distinguishes between public and internal tenders, yet are only accessible from 2016.²³⁸ Such distinguishing data was published with respect to the candidates for those tenders:

²³⁵ See *id.* (demonstrating that the remaining Arab population lives in “unrecognized villages”).

²³⁶ See *id.* (showing that a small percentage work in the information and communication industries).

²³⁷ See CIV. SERV. COMM'N, STATE OF ISRAEL ACTIVITY SUMMARY REPORT (2016) (Isr.) [hereinafter 2016 SUMMARY REPORT], https://www.gov.il/he/departments/publications/reports/full_report2016 (reporting that 7,020 tenders were published in 2016); CIV. SERV. COMM'N, STATE OF ISRAEL ACTIVITY SUMMARY REPORT (2017) (Isr.), https://www.gov.il/he/departments/publications/reports/full_report_csc_2017.

²³⁸ See 2016 SUMMARY REPORT, *supra* note 237, at 149 (distinguishing between various tender groups including public tenders).

Table II: Applicants for Public Tender (General and Arab Population)

Applicants for Public Tender (General and Arab Population)			
	Total number of applicants	Applicants from the Arab population	Percentage
2016	132,727	17,051	13%
2017	123,513	15,862	13%

Table III: Applicants for Inner Tender (General and Arab Population)

Applicants for Inner Tender (General and Arab Population)			
	Total number of applicants	Applicants from the Arab population	Percentage
2016	10,314	1,036	10%
2017	9,604	782	8.1%

By summing up all nominations for tenders and the number of Arab candidates, for both public and internal tenders during 2016 and 2017, it appears that on average, for every tender, about 20 candidates applied, among which only approximately 2/3 were Arab.²³⁹ It can be

²³⁹ See CIV. SERV. COMM'N, 2016 STATUS REPORT at 179 (July 2017) (Isr.); see also CIV. SERV. COMM'N, 2017 STATUS REPORT at 180 (July 2018) (Isr.) [hereinafter 2017 STATUS REPORT] (reporting on the rate of employment among the Arab, Druze, and Circassia minorities from 2016 to 2017).

assumed that in the internal tenders, which allow applicants from within the civil service rather than new employees, the percentage of candidates from the Arab population would be much higher. However, this is not the case.²⁴⁰ The percentage of Arab candidates for general tenders remains low at a mere 13%.²⁴¹ This percentage also represents new candidates for civil service.²⁴² It seems expected that Arabs who are already employed, would feel valued for their skills, thus strengthening their confidence to apply for a general tender without requiring closed tenders intended uniquely for them, even in internal tenders aimed at promoting and transporting employees from within the civil service. However, this is not the case, as the percentage of Arab candidates drops to only about 9% in internal tenders.²⁴³

Since 2018, the Commission has changed the way the data is presented.²⁴⁴ The candidate representation is no longer divided into tender categories, but rather the number of candidates is displayed in regard to tenders in general (public and internal collectively).²⁴⁵ Without a division in tenders, it is difficult to compare the data accurately. Yet as

²⁴⁰ See generally 2017 STATUS REPORT, *supra* note 239, at 180 (reporting the percentage of Arab candidates in the general tender).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See CIV. SERV. COMM'N, 2018 STATUS REPORT at 33 (June 2019) (Isr.) (utilizing a different method to report the rate of employment among the Arab, Druze, and Circassia minorities from 2017 to 2018).

²⁴⁵ *But see Knowledge Tree*, *supra* note 165, at 19 (classifying “public” and “internal” tenders in 2015 and describing the advantages and disadvantages of each).

a whole, no significant change is observed in the percentage of Arab candidates for general tenders over the years, nor has there been a significant change in the average number of candidates for each tender, within the population as a whole and particularly within the Arab population.²⁴⁶

Table IV: Applicants for all Tender (Inner and Public, for General and Arab Population)

Applicants for All Tender (Inner and Public, for General and Arab Population)				
	Total number of applicants	Applicants from the Arab population	Percentage	Numbers of tenders
2018	149,791	19,431	13%	7,031
2019	163,747	16,668	10%	7,432
2020	106,991	12,014	11%	5,581

²⁴⁶ DEP'T OF JUSTICE, *2018 Status Report*, 12 (Dec. 2018) (Isr.) (discussing the lack of significant change in the percentage of Arab candidates and candidates generally within each tender category).

Alongside the general, public, and internal tenders, it is especially important to observe the designated tenders, submittable only by the Arab population. There, the number of candidates for each tender increases significantly to about 17 candidates on average for each tender, all from the Arab population.²⁴⁷

Table V: Applicants for Close Tenders (for Arab Population)

Applicants for Close Tenders (for Arab population)		
	Tenders	Applicants
2016	333	5,296
2017	374	5,436
2018	308	6,193

Older Civil Service Commission reports from 2007 to 2012 offer an in-depth look at the number of those accepted due to general or designated tenders.²⁴⁸ There is no information on the applicants during these years, but there is data on the number of employees.²⁴⁹ This data provide a glimpse into the potential for acceptance:²⁵⁰

²⁴⁷ See generally CIV. SERV. COMM'N, 2020 STATUS REPORT at 16 (May 2021) (demonstrating the increase in candidates from the Arab population).

²⁴⁸ See *id.* at 16 (highlighting the value in the use of older data when discussing the acceptance numbers in general and designated tenders).

²⁴⁹ See generally DEP'T OF JUSTICE, *Equal and Multilateral Employment Status Report 2019-2020*, 11 (May 2021) (Isr.) (highlighting the availability of data on the number of employees).

²⁵⁰ See MINISTRY OF JUSTICE & MINISTRY OF FOREIGN AFFAIRS, *Implementation of the International Covenant on Economic, Social, and Cultural Rights in Israel*, 75 (Sept. 2011) (Isr.) [hereinafter *Implementation of the ICESCR*] (discussing the integration of Arab, Druze and Circassian citizens in 2011).

Table VI: Tender Data (General or Close) and Acceptance of Arabs

Tender Data (General or Close) and Acceptance of Arabs						
	General Tenders			Closed Dedicated Tender		
	Number of tenders	Employment number	Percentage	Number of tenders	Employment number	Percentage
2007	866	28	3%	124	81	65%
2008	1,002	16	2%	182	93	51%
2009	1,075	18	2%	153	99	65%
2010	1,256	21	2%	145	89	61%
2011	1,754	36	2%	137	70	51%
2012	1,586	89	6%	228	145	64%

The data appearing in the table illustrates the potential for Arabs to be accepted into the civil service by displaying a jump from a small percentage employed in the general tenders, to more than 50% employment in tenders designated exclusively for them.²⁵¹ The data indicates the importance of the designated tenders and support the above commentary that such tenders open the door to the civil service, which is designed for target populations, and almost entirely limited to the designated tenders.²⁵² As can be seen in 2008, without an affirmative action program in the form of designated tenders, the absorption rate of Arabs in the Israeli civil service would have remained at an average of 2% relative to all employees absorbed that year and compared to 51% of

²⁵¹ *Id.* at 56.

²⁵² Civ. Serv. Comm'n, *The Civil Service Internal and InterMinisterial Tenders - Policy Paper Summary*, at 6 (July 2015) [hereinafter CSC 2015 Policy Paper].

admission to these positions.²⁵³ However, it is possible that in the absence of designated tenders, we would have seen more Arabs compete for public tenders (non-designated) and consequently, we would have witnessed an increase in their absorption into these tenders.

It should be emphasized that data regarding the acceptance of Arab workers in internal tenders are less relevant and do not affect data regarding Arab employment in the civil service or on representation data. Accepting an employee in an internal tender means moving an employee from one position to another within the service.²⁵⁴ Thus, if one is not already employed in the civil service, entrance can only be made through public tenders.²⁵⁵ The above data in the table reveal that a significant minority of new employees absorbed into the civil service are part of the Arab population.²⁵⁶

As we recall, the government decision from 2009, sought to create 800 new positions occupied by Arabs by 2012.²⁵⁷ These new positions referred to the public, general, and designated tenders.²⁵⁸ The last table displayed shows that between 2009 and 2012, 567 Arab workers were

²⁵³ *Implementation of the ICESCR*, *supra* note 250 at 56.

²⁵⁴ *See, e.g.*, CSC 2015 Policy Paper, *supra* note 252, at 5 (showing the various employment positions within the tenders).

²⁵⁵ *Id.*

²⁵⁶ *See, e.g.*, *Implementation of the ICESCR*, *supra* note 250, at 72 (showing the percentages of the Arab population in the workforce).

²⁵⁷ Adriana Kemp, *Reforming Policies on Foreign Workers in Israel*, ¶ 125 (OECD Soc., Emp. and Migr., Working Paper No. 102, 2010) [hereinafter *OECD*], www.oecd.org/els/workingpapers.

²⁵⁸ *See id.* at ¶ 4 (explaining how the initiative included incorporating Arab residents into employment of areas including the private and public sector).

absorbed into the public, internal, or dedicated tenders.²⁵⁹ These numbers are a far cry from the goal of 800 new positions in the civil service, non-inclusive of the internal tenders.²⁶⁰ The government also stated in the same decision from 2009 that by 2012, 30% of the new positions would be filled by Arabs.²⁶¹ In practice, as of 2012, only about 13% of the general or designated tenders were filled by Arabs.²⁶² This is less than half of the goal set by the government (a total of 1,814 tenders and the absorption of 234 Arabs).²⁶³

IV. SETTING GOALS: DO THE DESIGNATED TENDERS REALLY DO THE JOB?

The data shows that over the years, there has been no improvement in the success rate of Arab submission to non-designated tenders.²⁶⁴ This reinforces the argument regarding the difficulty of competition relative to the general population. In aggregate, the average percentage of acceptance of the general population (Arabs and non-Arabs) to tenders (public and internal), between 2018 and 2020, was 62.6%, of

²⁵⁹ See *infra* Table “Tender data (general or Close) and acceptance of Arabs” p. 45 (displaying the calculated results of employment numbers summed up from 2009 to 2012 among both general and closed dedicated tenders).

²⁶⁰ Cf. *OECD*, *supra* note 257, ¶ 125 (differentiating the expectational goal of Arab employment in comparison to the reality).

²⁶¹ See *id.* ¶ 110 (displaying the reservation placed upon the Arab population in the workforce).

²⁶² See *infra* Table “Tender data (general or Close) and acceptance of Arabs”; Prager, *supra* note 98, at 9.

²⁶³ See *infra* Table “Tender data (general or Close) and acceptance of Arabs”; See Prager, *supra* note 98, at 2 (explaining that the goal was to bring the level of representation to approximately 20%).

²⁶⁴ Prager, *supra* note 98, at 4.

which the average acceptance rate of Arabs in these tenders was only 8.3%.²⁶⁵ This contrasts with the 60% acceptance rate of Arabs in tenders designated for them.²⁶⁶ Thus, the data shows that among the Arab population there is still a preference to compete in the designated tenders. This can be distinguished from the number of applicants in relation to the number of tenders. Bear in mind that not every designated public tender is specifically designated for Arabs, therefore there is larger competition for a smaller number of designated tenders, some of which were intended for other target populations, such as Ethiopian immigrants or people with disabilities.²⁶⁷ As the number of candidates increases, the success rate decreases, but the success rate for the candidate is still significantly higher than the regular tenders.²⁶⁸ The more interesting finding is the percentage of designated tenders that are actually staffed by Arabs. In this category, they have already reached more than 60%.²⁶⁹

A. *Setting Integration Targets*

²⁶⁵ See *id.* at 16 (showing that the acceptance rate for Arabs is lower).

²⁶⁶ See *id.* (showing that Arabs have a higher success rate in tenders that are designated for them).

²⁶⁷ See *id.* (depicting the rates of tenders designated for other minorities).

²⁶⁸ See *id.* at 10-13 (indicating competition exists when out of 449 available designated tender positions in 2019, there were 5,657 applications from target groups such as Arabs, the Ultra-Orthodox community, individuals with disabilities and immigrants. The Arab community comprised 38% of the newly hired in designated tender positions, compared to 1.5% of Arabs hired in regular tender senior level jobs).

²⁶⁹ See D&R Report 2019, *supra* note 155, at 21 (reporting that as of 2019 the Arab community held 62.6% of the designated tender entry level positions in Israel).

The government decision from 2007 was the last to address the goals of integrating Arabs into the Israeli civil service.²⁷⁰ As determined by the government, these targets would be set separately for each government ministry, the advantage being that the setting will be determined by the unique characteristics of each office.²⁷¹ Such characteristics include the number of employees in the office, the percentage of members of the Arab population currently employed, the number of employees absorbed each year, the nature of the work, and more.²⁷² The disadvantage is that the Commission can thereby navigate the integration according to its personal preferences resulting in representation, insofar as it is presented, and not interpreted equally as a whole, both between the ministries, and among the various professions and ranks.²⁷³ The data shown indicates an increase in the integration of Arabs into the civil service,²⁷⁴ particularly in the following six professions:

²⁷⁰ See Annual Report 72A, *supra* note 218, at 65 (finding the Israel government has not updated its target representation goal for the Arab community in the Civil Service for 13 years).

²⁷¹ D&R Report 2019, *supra* note 155, at 25.

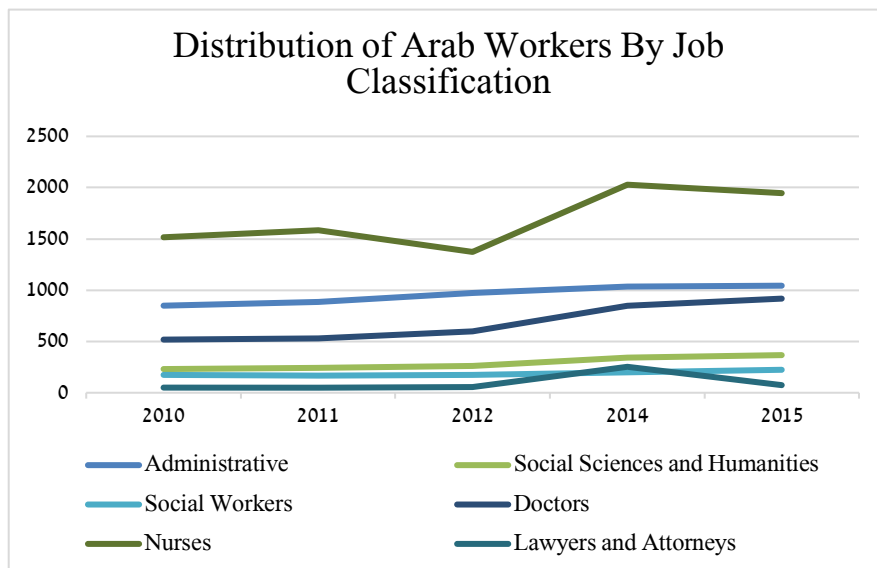
²⁷² See *id.* at 5, 20 (reporting on statistics the Israeli government uses to assess whether it has met its representation targets. For example, in 2019, there were 9,763 Arabs employed in the civil service, 553 of which were new hires. This indicates Arabs comprise 12.2% of all civil service employees. However, only three ministries (Health, Labor, and Interior) meet the government target).

²⁷³ See *id.* at 3, 23 (reporting that the Civil Service's general government target for Arab populations is 10% which has been met by a showing of 12.2% within the Arab population working in the Civil Service, however, this is due to the fact that the health system has a high representation of Arabs at 17.6%, which also shows a preference to recruit Arabs mainly into the health system instead of into all sectors).

²⁷⁴ See *id.* at 6 (stating that representation of Arabs in the Civil Service increased by 0.5% from 2015 to 2019, but that there is an over-representation of Arabs in the entry-level positions of the Civil Service).

administrative (ranking for positions without academic requirements), 'mahar' (sciences, social sciences, and humanities), social workers, doctors, nurses, jurists, and attorneys:²⁷⁵

Chart III: Distribution of Arab Workers by Job Classification



As for 2020, the concentration of Arab workers is limited to three ministries - the Ministry of Labor, Welfare, and Social Services, the Ministry of Health, and the Ministry of Interior.²⁷⁶ The relatively surprising finding is that despite the high number of Arabs in the ranking of jurists and attorneys and integration mainly in the Ministry of Justice,

²⁷⁵ See Prager, *supra* note 98, at 6 (reporting that Arabs comprise 10% or more of the employees in six of the professional grades: inspectors in the Ministry of Education, teachers, social workers, nurses, and public defenders).

²⁷⁶ See THE DIVERSITY & REPRESENTATION REPORT FOR 2020, at 29 [hereinafter D&R REPORT 2020] (explaining that the ratio of Arab employees exceeded the 10% requirement in the Ministry of Interior and the Ministry of Health with 18% of employees from the Arab population, and the Ministry of Labor, Welfare and Social Services with 12% of its employees from the Arab population).

the Arab population still constitutes, as of 2020, only 7 % of the ministry's employees.²⁷⁷ The highest rates of integration into the civil service were found in the Ministry of Health, the Ministry of Interior, and the Ministry of Labour and Social Affairs, comprising over 10%.²⁷⁸ In the other ministries, the percentages are low and range from 1.2% to 8.8% of Arab representation. Bear in mind how the previously discussed representation target set by the government was 10%.²⁷⁹

Before examining in depth the quality of integration within the various professions and ministries, this article will first focus on the clear indication presented by the data: that integration of the Arab population is concentrated in certain professions and ministries while being excluded from others. For example, there is very little Arab representation in the Ministry for the Development of the Negev and the Galilee,²⁸⁰ the Electricity Authority,²⁸¹ the Ministry of Economy,²⁸² the Prime Minister's Office and the Ministry of Foreign Affairs,²⁸³ the Government Advertising Bureau, and the Ministry for Senior Citizens in areas such as the ranking

²⁷⁷ See *id.* at 15 (showing that the ratio of Arabs working within the Ministry of Justice is 7% as of 2020, which does not reach the goal of 10% provided by the Civil Service Appointments Law).

²⁷⁸ D&R REPORT 2020, *supra* note 276, at 29 (explaining results of bar graph).

²⁷⁹ *Id.* (pointing to the government target at 10%, displayed by the red line across the bar graph).

²⁸⁰ *Id.* (pointing to the graph which displays that the Arab representation in the Ministry for the Development of the Negev and Galilee is only 2.7% in 2020).

²⁸¹ See D&R REPORT 2020, *supra* note 278 (pointing to the graph which displays that the Arab representation in the Ministry was only 5.2% in 2020).

²⁸² See *id.* (pointing to the graph which displays that the Arab representation in the Ministry was only 4.2% in 2020).

²⁸³ See *id.* (pointing to the graph which displays that the Arab representation in the Ministry is only 3.4% and 2.8%, respectively).

of registrars, The Foreign Service, journalists, research workers, surveyors, the environment, typists, judges, and more.

The data from 2019 indicates that Arabs prefer to approach tenders for doctors, nurses, and social workers in the registered order.²⁸⁴ These professions constitute the highest percentage of candidates out of the total number of candidates for tenders, and among them, the percentage of representation exceeds the government target of 10%.²⁸⁵ The 2019 ranking of Arab students has also exceeded the 10% target set by the government.²⁸⁶

Beyond the integration data relating to the professions and selected ministries, this article examines the Arab integration into peak and senior positions in the civil service. The data reveals a harsh image where the Arab population is concentrated in the lower ranks of the Ministry.²⁸⁷ The figures above are consistent with a disadvantage of the dedicated tender. Given that the government decides on attaching the designated tender to positions of a certain rank, naturally, an intra-organizational integration ceiling is created, mainly involving low-level

²⁸⁴ See *e.g.*, Prager, *supra* note 98, at 2, 9 (indicating that Arabs made up 30% of public health nurses and 25% of doctors followed by the employment rate of Arab social workers in the Government ministries at 14%).

²⁸⁵ See *id.* at 2, 13-14 (showing that the number of candidates for doctors, nurses, and social workers exceeds the government target of 10%).

²⁸⁶ See D&R REPORT 2019, *supra* note 155, at 23 (showing in a graph that the government target for student positions was met in the government service health system at 17.7%).

²⁸⁷ See Prager, *supra* note 94, at 6 (explaining that 49% of the Arab employees in the government ministry systems are employed at the entry level, with Arabs having a higher rate of entry level workers than other civil servants).

positions.²⁸⁸ In this manner, the Arab worker finds themselves in low-level positions making it difficult for them to pave their way through the service, or to internal or inter-ministerial tenders.

According to the data for the year 2017, only 25 Arab workers out of 73,101 total civil servants were concentrated in peak positions in the various rankings; approximately 0.3% of all Arab workers.²⁸⁹ Between 2017 and 2019, 714 new tenders were published for senior positions, and only 149 of them were public.²⁹⁰ Other types of tenders do not affect the percentage of Arabs represented in the civil service but can affect the percentage of representation in other peak positions. From 2017 to 2019, seven of the tenders for senior positions were designated for the Arab society (six inter-ministerial tenders and one public tender), and only four of them selected a candidate (three inter-ministerial tenders and one public tender).²⁹¹ A total of 21 candidates from within the Arab sector were selected in tenders for senior positions.²⁹² Of the 112 published

²⁸⁸ *Id.* at 11 (demonstrating the limited upward mobility for Arab populations by data depicting that, in 2019, Arabs were selected 38% of the time for designated entry-level tenders, but were not selected for most other tenders).

²⁸⁹ See CIV. SERV. COMM'N, EQUAL AND DIVERSE EMPLOYMENT REPORT FOR 2017 AT 11-12 (Aug. 2018), https://www.gov.il/BlobFolder/reports/employment_diversification_report2017/he/diversity-report-2017.pdf.

²⁹⁰ Annual Report 72A, *supra* note 218, at 510.

²⁹¹ *Id.*

²⁹² *Id.* at 475, 510.

internal tenders for senior positions from 2017 to 2019, not a single tender was intended for the Arab society.²⁹³

B. The Private Market Test: Regulating the Employment of Arab Israelis by the Market

If we would evaluate the affirmative action policy through its success in the public service arena alone, we would be missing out. Customarily, employees in the private sector are subject to market rules, while public servants are traditionally employed by virtue of the law.²⁹⁴ Proponents of the affirmative action policy will argue that although the state has failed to meet the periodic representation goals it set for itself at all levels for target populations, such ambitions are relative to recent policy that should not be judged prematurely. This section will examine the contribution of the private market to the integration of target populations. It will be emphasized that in Israel, there is no obligation of representation in the private market, except for unique programs for people with disabilities.²⁹⁵ Therefore, a conclusion that the private market, lacking the obligation to employ, is more successful in integrating the

²⁹³ *Id.* at 510.

²⁹⁴ Dimple Sunaya Johnson, *Public versus Private Employees: A Perspective on the Characteristics and Implications*, *FIIB BUS. REV.* 9(1), 9-10 (Mar. 2020) (distinguishing the public and private sector).

²⁹⁵ Niv Elis & Lidar Grave-Lazi, *Cabinet Approves Employment Quota for Disabled People in Civil Service*, *THE JERUSALEM POST* (Nov. 30, 2014, 6:13 PM), <https://www.jpost.com/israel-news/cabinet-approves-employment-quota-for-disabled-people-in-civil-service-383248> (stating that the cabinet approved a proposal requiring private sectors to employ persons with disabilities and that representation of such persons be 3% of all employees).

Arab population, will punctuate the failure of affirmative actions within the public service.

In comparing the two sectors of the Israeli labor market, the public and the private sector, this article will use existing studies to demonstrate greater results in Arab integration and representation within the private sector than seen in the public sector, even without the help of the law. To this end, the employment data of the Arab population in the private sector, relative to similar data in the public service, will be reviewed. Ben-Zion Lahav argues in his article that the next evolutionary stage of affirmative action should be the application of the principle of appropriate representation throughout the entire economy, with an emphasis on the private labor market.²⁹⁶ This article disagrees with him on this matter, not because of the belief that there is no place or importance for affirmative action, but because the private labor market operates well on its own and is in no need of regulation.

The public service is expected to act as a role model for other employers, inter alia in adopting the principles of representation and equal opportunities at work.²⁹⁷ Be that as it may, such expectations are

²⁹⁶ See Ben-Zion Lahav, *Review of the Right to Adequate Representation on the Anniversary of the Voice of the People and a Decade of the Principle of Affirmative Action*, 4 KIRIYAT HA-MISHPAT L. REV. 3, 7, 29 (2004-05) (arguing the right to adequate representation should apply to bodies that employ more than 25 workers and all bodies to which the principle of equality applies. Additionally, the allocation of resources must also consider equality).

²⁹⁷ Equal Opportunities Commission, *Key Features of our Strategic Plan 2012-2013*, 1, 4 (2012-2013), <https://employment.molsa.gov.il/About/Units/EqualEmployment/StrategicPlan/StrategicPlan2012-2013eng.pdf> (stating that the Equal Employment

detached from reality. According to data from the Central Bureau of Statistics, the total number of workers in the Israeli labor market stood at about 4.163 million, of which about 10% were in the public sector, including the civil service, in 2021.²⁹⁸ It is important to note that there is an asymmetry in the relied data, regarding the public labor market opposed to the private labor market, the data presented on the public market include employees who do not belong to the civil service and are not subject to the provisions of the relevant law. For example, municipal employees in the state service, as of 2021, was about 84,500, only 2% of the number of employees in the economy.²⁹⁹ The distinction is due, among other things, to data from partially overlapping periods without annual detail and to the lack of detail on the employment mechanism of the population, mainly between direct and triple employment of manpower or service companies.

Data from the Central Bureau of Statistics for 2021, show that the Arab population comprises 21.1% of the Jewish and Arab population combined and 39.5% of the labor force in that same population.³⁰⁰ Yet still,

Opportunities Commission was established to enhance diversity in public service so that the public sector may reflect the population of Israel).

²⁹⁸ CIV. SERV. COMM'N, *Central Bureau of Statistics Statistical Yearbook for Israel 2022*, 205, 210, (Aug. 2022) [hereinafter *The Labor Market- Statistical Yearbook for Israel 2022*],

<https://www.cbs.gov.il/he/publications/doclib/2022/9.shnatonlabourmarket/diagrams9.pdf> (showing that 424,000 out of 4.163 million works is equivalent to about 10% of the public sector, including civil service).

²⁹⁹ CIV. SERV. COMM'N, STATE OF ISRAEL ACTIVITY SUMMARY REPORT FOR THE YEAR 2021, 1, 11 (2021) (Isr.),

https://www.gov.il/he/departments/publications/reports/full_report_csc_2021 (citing the total number of workers in the activity summary report as 84,449).

³⁰⁰ Israel in Figures, *supra* note 177, at 7, 14.

the Arab employment rate in the civil service at the end of 2021 was only 13.9% of all civil servants.³⁰¹ Compared to the statistics of the entire economy, where the proportion of Arab workers stands at 39.4%, and out of 4.163 million workers, there are about 1.6 million Arab workers; Even in a situation where 1.6 Arab workers include the public service and the private sector together, Central Bureau of Statistics and Civil Service Commission data indicates greater success at integrating the Arab population in the private market than in the civil service.³⁰² Here, explanations for the gap can be offered. For example, an attempt to fill a position in civil service tenders which were not successful, and also the employment of Arabs in the private market which is done without tenders and from within the community itself and is therefore not accompanied by barriers to employment.³⁰³ However, this is not the area to explain or justify the gaps presented. It would be appropriate to do so without the existing affirmative action requirement in the civil service. But with the requirement present, the civil service must always observe itself with a

³⁰¹ Haj-Yahya et al., *supra* note 179.

³⁰² See *The Labor Market- Statistical Yearbook for Israel 2022*, *supra* note 297, at 203.

³⁰³ See e.g., Prager, *supra* note 98, at 6 (explaining how there is a gap in Arab civil servant employees in term of their ranks regarding their work-level); see also *Employment Among Israeli Arabs*, *supra* note 196 (introducing the idea that affirmative action in private companies that bid on government tenders and companies that receive grants from the government and officially approved companies); see also Nader Kabbani, *Youth Employment in the Middle East and North Africa: Revisiting and Reframing the Challenge*, BROOKINGS (Feb. 26, 2019), <https://www.brookings.edu/research/youth-employment-in-the-middle-east-and-north-africa-revisiting-and-reframing-the-challenge/> (explaining how skill training in the private sector can help identify the relevant gaps).

critical eye while at the very least reaching the percentage of integration in the private market.

The gap between the public market, where there is legal regulation, and the private market, where the regulation is not legally oriented, stems from two main sources. The first is the gap between a legal determination and its implementation on the ground, considering the existence of the legal rule does not necessarily translate into factual reality. The second is the ability of the labor market players to promote policy without regulation of the law. The results on the ground indicate an important yet limited role of the law in setting legal rules that work towards creating a direct change in the public sector in a vague and non-binding way. However, such laws have not provided real results. Assuming that the rights derived from the labor market are based on an employment agreement, it appears that in the private labor market, there is a basic agreement regarding all involved which allows integration mechanisms and solutions for employing these populations. This agreement is independent of legal incentives or strict legislative enforcement, allowing to serve the common good in a free market without state interference directing the behavior of the actors, without regulation. These results are compatible with the realist conception that a free market is a neutral machine that can freely regulate itself independently of the mechanisms of state intervention. On the issue of affirmative action, the paternalism of the state in the public sector has not been successful. The example from the private sector shows that by a precisely non-

paternalistic approach when the state does not intervene, the results of the market are better and fulfill integration more successfully.³⁰⁴ Imagine the outcomes we could reach if we used the mechanism of the state to create incentives rather than to determine obligation.

It is surprising that the private market is more successful, even without regulation, considering that in the private market the interest is ideological and for the sake of a particular public, as opposed to the private interest or ideology of powerful groups. However, the size of the public sector and its strength as a relatively stable workplace increase its importance for regulating the issue with an emphasis on a consequential test. Becker cautiously argues that over time in a competitive market there will be no room for discrimination and underrepresentation.³⁰⁵ This is while assuming the market is competitive and that most employers have non-discriminatory tastes and attitudes.³⁰⁶ Becker's research seems to characterize how the private labor market succeeded where the public labor market failed.³⁰⁷ Becker determines the success of suppressing discrimination by increasing competition in the private sector while

³⁰⁴ See Laura Kalman, *Legal Realism Now*, 76 CAL. L. REV. 465, 484 (Joseph William Singer ed., 1988) (explaining how paternal enforcement of contracts protects expectations and the market).

³⁰⁵ See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION*, 33, 36 (Univ. Chicago Press, 2d ed. 1957) (explaining how employer discrimination will account for an overall higher net cost of producing goods in a competitive market).

³⁰⁶ *Id.* at 47.

³⁰⁷ See *id.* at 130 (stating unionized markets are less competitive because they are considered synonymous with union behavior).

creating incentives and economic penalties.³⁰⁸ Not only can these elements be imported in the public market in order to ascertain success, insofar as the barrier is behavioral and motivational, but in addition, the private market in Israel behaves as we would expect without any incentives at all.

Beyond the criticism of the affirmative action system in Israel, including its determination and implementation, and the criticized success of integration in the private market, other factors thwart the degree of success the program has in the public service. It is inconceivable that in the private market, where there is no regulation, the success of Arab integration into the labor market is higher. The entire tender system also contributes to the lack of success of affirmative action policies.

C. Discrimination within Discrimination: A Derivative of New Groups

Beyond the shortage of criteria for determining qualification to a target group eligible for affirmative action, the definition of the target group provides internal discrimination and sub-discrimination, as a result

³⁰⁸ See Richard A. Posner, *Gary Becker's Contributions to Law and Economics*, 22 J. LEGAL STUD. 211, 213 (June 1993) (underlying the general principles of Gary Becker's economic theories and how discrimination in the private sectors plays a role in employees' behavior).

of overlap between groups. Nevertheless, the problem is not only in overlapping, as in the case of Arab women who apart from being women are also Arabs, but rather exists within the distribution of resources at the discretion of certain government officials.³⁰⁹ Thus, a government decision from 2007 stipulated tenders designated in a comprehensive manner for members of the Arab population, including the Druze and Circassians.³¹⁰ This is without separately allocating tenders to Arabs, when only in special cases would the Commission be authorized, in light of the nature of the position, to determine that a position is designated for only one of the sectors.³¹¹

Affirmative action has come a long way. However, there is room to examine new, possibly marginalized groups and define them within the workforce, reflecting the changing demographics in society.³¹² Beyond correcting injustices and advocating for justice, new groups can be legitimized by expanding diversity which, among other things, will benefit the citizens whom the civil service serves. However, affirmative action tends to respond almost exclusively to the middle-class population

³⁰⁹ See DEP'T OF JUSTICE, *2017 Status Report* (Dec. 2017) (Isr.) (explaining target groups being subject to discrimination and specifically stating how Arab women are a minority group as government officials).

³¹⁰ DK, 31st Knesset, Session No. 2579, §§ 1-2 (2007) (Isr.), https://www.gov.il/he/Departments/policies/2007_des2579.

³¹¹ See *id.* §§ 7-8 (outlining the procedure for authorizing the Civil Service Commission to separately designate civil service jobs for Arabs).

³¹² See generally Özgür Önday, *Global Workforce Diversity Management and the Challenge of Managing Diversity: Situation on World and in Turkey*, 4 GLOB. J. HUM. RES. MGMT. 31, 40-41 (Feb. 2016) (highlighting that North American employers are more receptive to increasing diversity in the workforce in order to embrace changing demographics).

and rarely addresses the plight of those in need of it.³¹³ Ben-Zion Lahav's argument, that it is possible and appropriate to develop a judicial right to proper representation for groups that are part of more than one group that have been recognized with affirmative action, is supported.³¹⁴ The court in the *Adalah* case chose not to address the matter regarding new populations arising from the intersection of two groups, the population of Arab women in particular.³¹⁵ This creates a problem as seen in the integration outcomes, which is rooted in gender obstacles and prejudicial preferences. The issue is recognized to the extent that the integration of Arab women relative to Arab men is lower than the percentage of general integration within the civil service of women relative to men.³¹⁶ There is room to define Arab women as an independent and separate population group. In practice, this does not mean creating a new target group, but allows forming a demand to set integration targets or designated tenders for these overlapping groups combining more than one population.

As a numerical example, Arab women are excluded twice.³¹⁷ First from Jewish women and second as women, as seen in tenders designated

³¹³ See, e.g., Sigal Alon & Ofer Malamud, *The Impact of Israel's Class-Based Affirmative Action Policy on Admission and Academic Outcomes*, 40 ECON. EDUC. REV. 123, 123-24 (June 2014) (noting that Israel's current affirmative action system emphasizes specific neighborhood socioeconomic status rather than financial status and race)

³¹⁴ Lahav, *supra* note 268, at 85.

³¹⁵ HCJ 10026/01 *Adala Legal Centre for Arab Minority Rights in Israel v. The Prime Minister of Israel*, SC 57(3)31, 26 (2003) (Isr.).

³¹⁶ See Haj-Yahya et al., *supra* note 179 (explaining the employment gap Arab women experience (employed at 36.4%) relative to Arab men (69.3%), Jewish women (82.3%), and Jewish men (83.9%)).

³¹⁷ See generally Mary Elizabeth Powell, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE UNIV. L. REV. 413

for Arabs. The employment rate among Arab women in Israel aged 25-64 was 36.4% in 2020, while the employment rate for Jewish women of the same age group was 82.3%, and 69.3% for Arab men.³¹⁸ Among the prime working age, there was a 37.4% participation rate in the labor market.³¹⁹ Particularly when the main rate of employment is partial, occasionally personal preference is to blame for a smaller potential for competition with Jewish women.³²⁰

V. CONCLUSION

The use of designated tenders perpetuates the gaps and legitimizes the failure to access general tenders to Arabs. This is mainly when the number of designated tenders is insufficient and there is insufficient information about the existence of these tenders in all positions and rankings. The underlying conception of affirmative action is based on equality of opportunity, but this does not necessarily result in equality of outcomes. In *Weber*, the United States Supreme Court defined the pioneer model of affirmative action as a temporary measure that allows preference of one group over another until the population has

(Jan. 1996) (explaining how women of ethnic minorities are prejudiced by both sexism and racism in their respective countries).

³¹⁸ Haj-Yahya et al., *supra* note 179.

³¹⁹ Niri Elman-Capital, *Data on the Employment of Arab Women With an Emphasis on Bedouins in the Negev*, 26 KNESSET RSCH. AND INFO. CTR. 1, 9 (Feb. 27, 2022).

³²⁰ See, e.g., Eran Yashiv & Nitsa Kasir (Kaliner), *Arab Women in the Israeli Labor Market: Characteristics and Policy Proposals*, 10 ISR. ECON. REV. 1, 39 (concluding that there is a widening gap in participation between Jewish women and Arab women in the Israeli labor market despite the presence of conventional factors in Arab women).

assimilated and proven itself.³²¹ Upon reaching that point there will no longer be a need for employment discrimination solutions.

The data indicates a positive development in the absorption of Arab workers in some of the ministries and rankings, however these figures are far from satisfactory and do not meet the goals of representation or extend to the real group representation in the general population.³²² Segmentation by types of tenders in the Israeli civil service indicates that the path of designated tenders may be the correct course, nonetheless the implementation is unsuccessful. The fact that the state determines the number of designated tenders, positions, professions, and ranks in which these tenders will be held, directs and designates the fate of the Arab population in a direction convenient for the state.³²³ Additionally, large gaps were found in the deployment of employees along the length of the service, in varied offices and professions, in the various ranks, especially in peak levels of senior positions.³²⁴

The data publications regarding employment within the civil service indicate that affirmative action helps with employment patterns in general. The general goal is to achieve equality in the integration of Arabs

³²¹ *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208-09 (1979).

³²² *See generally* Prager, *supra* note 98, at 2-5 (providing percentages of Arab workers in the civil sector in Israel in comparison to their overall population).

³²³ *See id.* at 6-7 (discussing the high percentages of Arab workers in entry level jobs in comparison to their minimal presence in senior level jobs).

³²⁴ *See, e.g., id.* at 6-7 (noting that the ratio of Arab employees at senior levels of civil service is smaller in relation to all employees and that gap increases with rank, which is only 3.1% of senior-level employees).

into the workforce; an equality that should be delivered in outcomes.³²⁵ It appears that despite the equal chance opportunities implemented by the civil service at the outset are ineffectual in bridging the gaps created by prolonged discrimination.³²⁶ Looking ahead, the Commission seems hasty to publish data on the annual Arab absorption into the public service, but new employment targets have yet to be set.³²⁷ Similar conclusions concerning deficiencies in the absorption of employees from the Arab population were reached by a State Comptroller Office report.³²⁸ The report found that the Arab rate of employment in the civil service is small compared to their share of the population and that the decisions and objectives set by the government have not been met.³²⁹

The proportion of the Arab population in relation to the general population in Israel is increasing, as is their proportion among university students.³³⁰ The need to regulate their integration in the civil service has

³²⁵ See *id.* at 2 (stating that the goal of the government resolution was to bring the level of Arab representation in the civil service closer to their representation in the general population).

³²⁶ See Bitar, *supra* note 20, at 8 (concluding that the Civil Service Law has failed to resolve the issue of inadequate representation and that it has not produced a sufficient absorption of Arabs into the civil service).

³²⁷ See *id.* at 4 (noting that the government has not updated the target goal of 10% Arab representation in civil service since the resolution was adopted in 2007).

³²⁸ See Annual Report 72A, *supra* note 218, at 65 (discussing the key findings and failures including that the target for adequate representation of Arabs in civil service is low considering their proportion in the general population, that Arab representation decreases in senior positions, and 75% of Arab participants reported some form of racism on part of other employees).

³²⁹ See *id.* (stating the target of 10% representation is low compared to the proportions of Arabs in the general population is 21% and 18% in total labor force and that 77% of government ministries did not meet the target representation).

³³⁰ See Lior Dattel, *Number of Arabs in Israeli Higher Education Grew 79% in Seven Years*, HARRETTZ (Jan. 24, 2018), <https://www.haaretz.com/israel->

existed for many years. The fact that we have not yet reached the representation goals in practice, and that clear long-term goals have not yet been set, is proof of the incompetence of the public service in matters of manpower planning. The lack of regulation also has, apparently, a political aspect that is hard to ignore, and without a long-term plan, the issue is subject to the decision of each new government, according to the ruling ideology at the time.

[news/2018-01-24/ty-article/number-of-arabs-in-israeli-higher-education-grew-79-in-seven-years/0000017f-e01a-d38f-a57f-e65a63b10000](https://www.ynetnews.com/articles/0,7340,ty-article-article/number-of-arabs-in-israeli-higher-education-grew-79-in-seven-years,0000017f-e01a-d38f-a57f-e65a63b10000) (noting that in general terms, the number of Arab students raised roughly 78% over 7 years).