

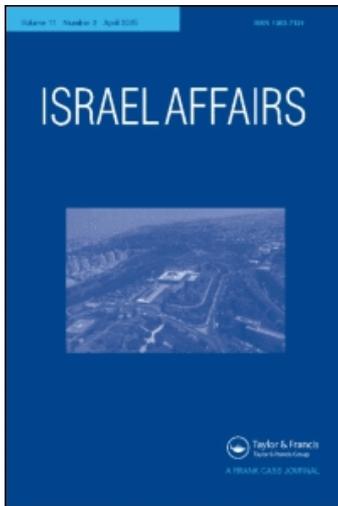
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# After the Storm? The Israeli Supreme Court and the Arab-Palestinian Minority in the Aftermath of October 2000

ILAN SABAN

In late September 2000, the Oslo process collapsed and the second *Intifada* erupted. Soon after that (during the first two weeks of October) something momentous occurred in inter-communal relations in Israel. The Arab-Palestinian citizens of Israel engaged in violent demonstrations. The police reacted with excessive violence and 13 demonstrators were killed. The wave of violent demonstrations within Israel soon receded and ended, but Israeli society has not returned to the same point.<sup>1</sup> The purpose of the article is to analyze major aspects of the performance of the Israeli Supreme Court vis-à-vis the Arab-Palestinian minority since October 2000.

The article will advance three arguments. First, the Supreme Court has truly held the post of guardian of the democratic threshold. Second, the court serves (sometimes unintentionally) as a guide or a mediator demarcating an intermediate path for Israeli society; one which will thread the middle ground between two almost polar options for Israeli society: The bi-national state (an idea which gains popularity with the minority but is rejected outright by the Jewish majority), and the existing status quo (strongly resented by the minority). This intermediate path, or bridging vision, may prove a defence against a violent breakdown of inter-communal relations in Israel proper. The third argument goes in the other direction and criticizes the court. The Supreme Court often evades action corresponding with the direction it has itself signalled, and its reluctance to act in these instances cannot be explained by major legitimization difficulties in standing by the minority. Taken together this two-steps-forward-one-step-back performance paints a somewhat enigmatic picture.<sup>2</sup>

An assessment of the 'margin of appreciation' allowed to the court in recent years and an examination of its action within this margin is at the

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heart of the analysis offered in this article. The margin of appreciation is a term that in legal discourse has mainly served the Supreme Court (and other courts) in its review of other authorities. It refers to the scope of discretion enjoyed by domestic state institutions in the execution of the authority vested in them—the degree of deference the judiciary must exercise in reviewing their performance.<sup>3</sup> This article intends to redirect this ‘scope of discretion issue’ towards the court and use it as the basis of a review of *its* actions and evasions in regard to the Arab minority.

#### THE MARGIN OF APPRECIATION ENJOYED BY THE SUPREME COURT IN RECENT YEARS

The legal and socio-political environment in which the court exercises its authority defines the margin of appreciation under which it functions. This environment is dynamic and susceptible to many variables, and the court is not only an object of its fluctuations but also an agent in creating them. The following is a brief enumeration of seven of the major developments and processes that colour the legal and socio-political environment in recent years. Some of them leave the court at greater liberty to improve the lot of the Arab minority, should it so choose, and others limit this freedom.

- (1) For a long time (especially from the second part of the 1970s onward), the court’s jurisprudence has been marked by the theory of interpretation it has adopted—Purposive Interpretation. This theory provides a very significant interpretive weight to the basic values of Israel as a liberal-democratic ‘Jewish and democratic state’.
- (2) The court has exercised judicial activism in two main ways (a) widening access to it by redefining the thresholds for entry: liberalizing the right of standing and narrowing the doctrine of ‘justiciability’; and (b) augmenting the basis for substantive judicial review by imposing important obligations upon every authority: especially the need for reasonableness and proportionality in the choice of means in the service of legitimate aims.
- (3) In the early 1990s, important elements of constitutionalism became part of the Israeli regime. This included impressive constitutional developments, which came to be known as the ‘constitutional revolution’. There were three such developments: the passing of Basic Law: Human Dignity and Liberty; the passing of Basic Law: Freedom of Occupation; and *Mizrachi Bank v. Migdal Co-operative Village*, perhaps the most important ruling ever in Israeli law, in which the Supreme Court determined the significance of the other two developments.<sup>4</sup> The net outcome has been that new legislation is now deemed valid only if it does not conflict with the Basic Laws. Crucial here are the conditions of the limitation clause, which states

that: 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.'<sup>5</sup>

- (4) An escalating struggle against the Supreme Court is rolling on. The proponents of this move are mainly conservative, religious and right-wing Knesset members. Recently a disturbing occurrence has taken place. Minister of Justice, Professor Daniel Friedman, has been waging a campaign to deeply curtail the changes that followed the constitutional revolution, by proposing inter alia to change the judges' selection process, introducing restrictions on the basis upon which a judicial review of statutes is conducted, and adding a very broad 'overriding mechanism' (to allow the Knesset to revive statutes notwithstanding the finding of the court that they contradict one or more of the Basic Laws).
- (5) However, as a (somewhat) balancing phenomenon, there is a parallel ascendance of an assertive civil society that often addresses the Supreme Court.<sup>6</sup>
- (6) Outside factors are also at play. There is a global phenomenon that affects the environment in which the court operates. In the wake of horrific events of the past two decades in Africa and the Balkans, international civil society has become more vigilant. As it accumulates force this society is creating a 'human rights culture' bent upon closer scrutiny of state abuses of human rights. Monitoring Israel is more frequent nowadays, especially Israel's activities in the occupied territories, but also those within Israel's recognized borders.
- (7) Probably the most important and critical events to our discussion of the court and the Arab-Palestinian minority were already mentioned: the violent shattering of the Oslo euphoria of 1993–1995 and the eruption of the second *Intifada*, in September 2000, and the October events within Israel proper.

These seven developments and processes are crucial to any socio-legal analysis of Israeli reality. However, an understanding of the margin of appreciation enjoyed by the Supreme Court in its dealing with the Arab minority is dependent upon a fuller picture of the fundamental characteristics of Israeli society.

*The Margin of the Court's Freedom—Three Contributing Factors: Zionism's Tenets, the Israeli-Palestinian Conflict and Conceptions Concerning the Minority's Stand in the Conflict*

This article will address only two of the basic facts that colour the socio-political status of the minority and that limit the court's ability to radically alter it (even should it wish to do so).

The first factor is the Jewish majority's fear of the Arab minority. In light of the relative strength of the two national communities this fear seems strange—like some commissioned emotion, the validity of which nobody cares to examine too closely. However unlikely it may seem, the fear is genuine. It is part of its inner discourse, as opposed to arguments which are directed solely to foreign observers. The fear is an outcome of several factors. One—the violent conflict between the nation of the minority and the state of the minority constitutes indeed a potentially inflammable triangle.<sup>7</sup> Two—there is considerable credibility to the common Jewish majority's fear that no sustainable resolution of the Israeli–Palestinian conflict is in sight.

It will probably not be resolved even should the two-state solution be finally adopted and implemented (not even if Israel withdraws fully to the Green Line and the question of Jerusalem is settled). The open issue of the right of return of the Palestinian refugees is likely to continue to fester and wreak havoc. Moreover, the future is clouded by the potential demands of the Arab-Palestinian minority for unification with their people in a bi-national Palestine/Israel. Alternatively, some Arab-Palestinian citizens of Israel will surely strive—even more forcefully than at present—for a bi-national Israel, alongside Palestine. In short, even should a two-state solution be concluded with the majority of the Palestinians some will still seriously challenge Israel's basic framework. What strengthens the (mutual) fear between Arabs and Jews is the presence of a non-constructive vagueness. The deep suspicion between the two peoples results in their tendency to 'fill the gaps', 'resolve' uncertainties, with the more apocalyptic scenarios.

The net outcome is that for many (on all sides) the conclusion is that a choice must be made with only two options to choose from—the bi-national state or the status quo. This dichotomy is dangerous because it produces an 'all or nothing' state of mind. Be that as it may, the majority community in Israel is continuously on guard in its dealings with the minority. This emotion is a disincentive to grant the minority rights to self-government and is partially the motive for ambitious national projects that have taken place such as Judaizing the Galilee.

The second basic fact that contributes to the marginalization of the Arab minority is the Jewish majority's perception of the Zionist project as an ongoing one, its requirements almost as vital today as ever. The Jewish state has defined its *raison d'être* as the ingathering of the Jews and creation of a safe haven for the Jewish people, so even if these goals had not been disputed, they have yet to be completed. This is the psychological mechanism that lends such potency to the Jewish law of return and to the conviction that land reserves must be held in wait for those still to come.

There are other basic factors of the Jewish community that play a role in the marginalization of the Arab-Palestinian minority, but lie outside the

scope of this article. One such factor is the ethnocentricity of a large part of the Jewish community. To discuss this would involve the tough question of whether it is a hard-core, intractable trait or a reaction to the security threat that may fade away in brighter days. Thus, delineated by the perceived existential/security needs and by the perceived ongoing justifications and needs of Zionism, we find in Israeli society a set of strongly held axioms, which are almost impossible to change and are imposed (and self-imposed) on the court. They are the walls it cannot and will not break.

*Another Factor Constructing the Court's Margin of Appreciation: The Need for Legitimacy, both Legal and Socio-political*

The court cannot ignore the axioms of the Jewish state without losing its legitimacy in the eyes of a large portion of the majority community in Israel and will possibly cross, in the process, the lines of legal legitimacy.

From the standpoint of Israeli law this crossing of the lines may happen because the actions of the court are limited to the authority vested in it by Israeli law. The Israeli law's basic values include preserving Israel as a Jewish (and democratic) state—this is 'a constitutional basic fact'.<sup>8</sup> The court is not permitted then to approve petitions and provide remedies aimed at altering Israel's fundamental framework through interpretation or by any other means.

As regards the socio-political legitimacy—the past decade has been very trying for the Supreme Court. True, the constitutional revolution and other judicial processes mentioned above have empowered the court and enabled impressive achievements in the sphere of human rights (within Israel proper). At the same time, however, the court has become much more controversial. It became the object of intense and vociferous objection of the religious and ultra-orthodox parties and the political right.<sup>9</sup>

In the view of this author what dictates this caution is both the court's somewhat waning public legitimacy and its frail constitutional protection, and this frailty and its origins will be expanded on here. As a tool for social change the law is a double-edged sword. Though it may sometimes serve as a lever of change in the hands of the minority and its sympathizers, it is also a system mobilized by the majority to further its interests vis-à-vis the minority—to empower itself, gloss over its wrongdoings, etc. What we find is that whereas for the marginalized minority the court is an essential medium for translating the domestic law into social change, the majority community is much less dependent upon it. Moreover, when, and if, the majority comes to think of the court as a nuisance it can simply change the norms that the court interprets and enforces, or even use majority power to restrict the court's powers.

The question that arises is whether, after the constitutional revolution that introduced judicial review of legislation and set constitutional limits to majority rule, the majority can still exercise such overriding power. The answer is that the effect of the constitutional revolution should not be exaggerated. Majority rule has been circumscribed but not seriously enough. The Basic Laws are not entrenched. Change and annulment of the basic laws is an easy process under the current constitutional regime. For example, Basic Law: Freedom of Occupation has been changed three times since it was promulgated in the 1990s. With a few exceptions, all that it takes to change a basic law under the present conditions—even Basic Law: Human Dignity and Freedom and, indeed even Basic Law: The Judiciary—is an ordinary majority in the Knesset.<sup>10</sup> The easy formal procedure for amending the Israeli constitution is of course not equivalent to the practical possibility to do so; nevertheless the formal state of affairs marks the frailty of the constitutional safeguards on civil rights in Israel and on the Supreme Court itself. The court is apparently aware of its own vulnerability. A clarifying example may attest to that, it is the court decision regarding the painful issue of the displaced Arab citizens of the village of Ikrit.<sup>11</sup>

In the Ikrit case the court acknowledged that the government had made a promise to allow the displaced persons of Ikrit to return to their land, but freed it of the obligation on the basis of the Discharge Doctrine: the power of the authority to repudiate obligations it took when a vital public interest is at stake. So says the court:

In the case under review, the Libai Committee has based its recommendations [to return the displaced persons to part of the Ikrit lands] among other things upon political changes that have occurred in the region, including the peace agreement with the Palestinian Authority (the Oslo Accord). However, as has been said, the political situation has since changed and the Prime Minister believes that in view of these changes, and at this time—when the demand for a Right of Return is again being voiced—the precedent of returning the villagers of Ikrit may be detrimental to the vital interests of the State. This position relates to a political matter in which the government has wide scope for discretion. Under such circumstances there is no legal basis for holding the State to the Governmental promise to resettle the displaced persons in Ikrit.<sup>12</sup>

The important point is that the compelling legal force of the displaced villagers' claim and the outcome of their petition cannot be reconciled from a legal point of view.

There is no real basis to the right-of-return precedent kind of argument, since the case of the displaced persons in Israel is markedly different from the Palestinian refugees' case. First, the displaced persons in Israel are its own citizens—allowing them to resettle has no bearing whatsoever on the demographic makeup of the Jewish state. Second, the displacement of the

inhabitants of Ikrit and Biram (and a few other places) took place under a certain set of circumstances which bears a certain uniqueness. Indeed, when an Arab populace acted peacefully during war, left its hamlet when ordered and with the official promise of return after a short period, and when its return does not uproot others (who may have now lived there for decades), the obvious obligation is to respect the promise. In short, there is a strong case against linking the fate of the Ikrit villagers and their descendants to the demand for the right of return. The threat of precedence waved about by the government is simply false or at least utterly unsubstantiated. The governmental decision to break its promise falls then outside the bounds of reasonableness and should therefore not have been upheld by the court.

This is why this case is revealing. The court's choice to defer to the governmental decision illustrates its sense of vulnerability and its wariness of taking steps that could be construed as crossing axiomatic taboos (such as the Palestinian right of return). In other words, under the conditions of current Israeli political culture (and a weak constitutional safeguarding of its own status) the court probably found it hard to trust the public to follow such 'niceties' as the difference between displaced Arab-Palestinian citizens and the Palestinian refugees.

This example somewhat clarifies the margin of appreciation under which the court operates, or perceives itself to operate. To reiterate—this margin may somewhat widen but it is not unbounded nor is it determined by the court alone. It is not decided only on the basis of the legal legitimacy of a court decision but takes into account the socio-political legitimacy of it as well, i.e., we are led to consider what may erode the court's status to breaking point. Security and demography are the great popular fears which the court is wary of interfering with. On the other hand, and as a balance, the court's margin of appreciation should not be underestimated. After all Israel is a professed democratic as well as a Jewish state, and its democratic commitments also sketch its axioms and red lines and they too must not be crossed.

Moreover, Israel and its courts are monitored by the international community which helps recognize these red lines. If the Israeli Supreme Court is the local watchman, the international community is its bigger counterpart, there to back it up and bolster it.<sup>13</sup> Moreover, the court's margin of appreciation is deeply affected by the legal environment in which it operates, and to which it is also partially responsible. The court has consolidated some impressive tools: purposive interpretation, additional means of judicial activism and helping to bring about (moderate) judicial review of legislation. With this composite portrayal it is now possible to decide the central question of this article—how do we assess the court's activity vis-à-vis the Arab-Palestinian minority? This article will point to two real achievements and one major failure.

## ANALYSIS OF THE COURT'S FUNCTION IN LIGHT OF ITS MARGIN OF APPRECIATION

*Guard of the Democratic Threshold (within Israel Proper) and a Major Aid to the Establishment of an Arab-Palestinian Civil Society in Israel*

The role of the Supreme Court as a guardian of the Arab-Palestinian minority's civil and political rights has come into sharp relief since the October 2000 events. View the following examples. The court reversed the decision of the Central Elections Committee to disqualify the candidacy of two Arab members of the Knesset running for re-election (MKs Bishara and Tibi) and the candidacy of a central Arab party (Balad) that advocates a radical agenda with regard to Israel.<sup>14</sup>

The court invalidated a decision of the chairperson of the Central Elections Committee who instructed against broadcasting an election campaign film which made use of the Palestinian flag. The court ruled that the use of the flag comes under the protection of freedom of expression.<sup>15</sup>

The Supreme Court revoked the decision of the Israeli Censorship Board to disallow the screening of the film *Jenin-Jenin*. Through the film the Israeli Arab director Muhammad Bakri gave voice to the narrative of the Jenin refugee camp population regarding the events that took place in the course of the Israeli army operation 'Defensive Shield' in March–April 2002.<sup>16</sup>

There is another, earlier, case, from March 2000, that is worthy of note—the *Kaadan* case. The direct result of the ruling was the limitation of the state's ability to discriminate against Arabs in the allocation of state-owned land, either directly or through a third party. A second result, to which this article will return below, is the highlighting, at least in the rhetoric of the court, of the need to regard public policy towards the Arab minority with due suspicion and strict scrutiny. 'Differential treatment due to religion or nationality is "suspect" and seemingly discriminatory.'<sup>17</sup>

Now, in addition to the provision of essential protection to the democratic threshold, the court has been instrumental in setting up extra-legal instruments for the benefit of the minority. I refer mainly to its contribution to the establishment and nurturing of Arab-Palestinian civil society. The court's contribution lies in the protection it vouchsafed over the years to the freedom of association, expression and information,<sup>18</sup> but even more so in the judicial developments enumerated above—purposive interpretation, judicial activism and the judicial review of legislation. These undertakings have empowered the legally oriented civil society associations. Once established within the minority, these organizations joined forces with Arab parties and other minority leadership bodies for a more systematic and thorough discussion of the aims of the minority and the methods by which they may be achieved. The result was that for the first time the minority presented the state with a developed, transformative agenda.<sup>19</sup> This agenda is expressed, among other means, by these civil

society organizations constantly seeking recourse to the Supreme Court. They bring before the court matters never before discussed there and at an unprecedented rate.<sup>20</sup>

*An Inter-Communal Bridge and Catalyst of the Public Debate in Israel*

Besides its role as keeper of the red lines and in addition to its contribution to the evolution of an Arab-Palestinian civil society inside Israel, the court fulfils another less recognized role. As suggested above, one of the severe problems in the Israeli–Palestinian conflict and the relationship between Jews and Arabs in Israel is that most of those involved view it as a win all-lose-all type battle. All sides feel cornered.

These conceptions are based upon an assumption of a binary reality. It holds only two possible options for the adversaries—either a continuation of the current status quo abhorred by Palestinians in the occupied territories and in Israel, or the bi-national state solution that is rejected outright by Israeli Jews. The outstanding step that the court has been taking is to help break up this polar view of things. It is offering, albeit implicitly, a third way—a bridging vision: Israel will remain Jewish in a few important respects, but it will become much more democratic, by being genuinely committed to upholding the equality of the common citizenship rights (civil, political, social and economic rights), and expanding certain minority (group-differentiated) rights.<sup>21</sup>

The court decision discussed above, in which the Supreme Court ruled for Balad, Bishara and Tibi against the central elections committee, which wished to disqualify their candidacy for the Knesset, contains two bridging or anti-dichotomous aspects. First, as regards the relationship between the minority and its people—the court insisted on the right of the Arab minority to give a complex answer to the thorny question posed by a large portion of the Jewish public—are you for us or against us? The court rejected the yes–no ultimatum and sanctioned a fair middle road for the minority. It allowed the minority to voice clear and loud solidarity with its own and to object to the policy its state was executing against its brethren, while at the same time prohibiting it from joining forces with its people in the armed struggle against its state. Secondly, and importantly, in the Tibi decision the court sketched a ‘thin version’ of the Jewish state’s taboos. See especially the following:

What, then, are the ‘core’ characteristics that constitute the minimum definition of the State of Israel as a Jewish state? These characteristics have both a Zionist and a heritage aspect . . . At their centre stands the right of every Jew to immigrate to the State of Israel, in which Jews will constitute a majority; Hebrew is the main official language of the state and most of its holidays and symbols reflect the national revival of the

Jewish people; the Jewish heritage is a major element of its religious and cultural heritage.<sup>22</sup>

This is a 'thin' formulation of the axiomatic national characteristics of Israel, in the name of which the minority's right to attempt to change Israel's national character is restricted. The 'thinness' of the court's definition is twofold. First, while the synthesis 'Jewish and Democratic' guarantees the protection of the Jewish right of return as well as the dominance ('most') of the Jewish symbols in the symbolic order of Israel, it does not envision Jewish *exclusivity* in this realm of the cultural and national symbols. This may allow expansion of the presence of the minority in the images and symbols that represent 'Israeliness'.<sup>23</sup> Second, as regards all other public goods (apart from the symbolic ones and from immigration quotas) this understanding of the Jewish and Democratic synthesis led the court to assert that the state cannot discriminate against the minority in the allocation of any material public goods including in the sensitive sphere of land allocation.<sup>24</sup>

The second court case to be discussed has to do with the complicated and sensitive issue of group-differentiated rights (sometimes called, somewhat inaccurately, collective rights). It is usually assumed that the commitment to equality undertaken by the Jewish and democratic state relates only to the common citizenship rights (civil, political, social and economic rights, including the prohibition to discriminate on the basis of group affiliation), but that there is no obligation to equality in the realm of group-differentiated rights extended to the two national communities in Israel. This state of affairs has not changed. However, the court has clarified that the minority does enjoy various group-differentiated rights (linguistic rights, in this case) and Chief Justice Barak even found a way of extending the linguistic rights beyond what is granted in Article 82 of the Palestine Order in Council, 1922, that regulates this subject. I refer to the case of *Adalah and the Association for Civil Rights in Israel v. the Municipality of Tel-Aviv Jaffa et al.*<sup>25</sup> The court decision addressed the issue of the language(s) of the municipal signs in mixed towns—Tel Aviv Jaffa, Ramla, Lod and Nazareth Illit (in the mixed towns of Acre, Haifa and Jerusalem a previous arrangement regarding bilingual municipal signs was already in practice). The ruling is rather complex; I will only underline the development seen in the majority ruling of Chief Justice Barak. He seems there to take a step of real importance. He draws a distinction between the Arab minority and other minority groups in Israeli society, as a basis for the allocation of a group-differentiated right to the former and to no other minority. A central paragraph in the ruling states:

Against this background the following question may arise: What distinguishes the Arabic language, and why is its status different from that of several other languages—in addition to Hebrew—that Israelis

speak? Does our approach not imply that residents of different towns in which there are minority groups of speakers of various languages, will now be able to demand that the signs in their towns will be in their language as well? My response is negative, *since none of those languages are the same as Arabic*. The uniqueness of the Arabic language is twofold. First, Arabic is the language of the largest minority in Israel, *who has been living here for ages*. This is a language that is linked to cultural, historical, and religious attributes of the Arab minority group in Israel. This is the language of citizens who, notwithstanding the Arab–Israeli conflict, wish to live in Israel as loyal citizens with equal rights, amid respect for their language and culture. The desire to ensure dignified coexistence between the descendants of our forefather Abraham, in mutual tolerance and equality, justifies recognizing the use of the Arabic language in urban signs—in those cities in which there is a substantial Arab minority (6%–19% of the population)—alongside its senior sister, Hebrew.<sup>26</sup>

In short, the court is here expanding minority linguistic rights, based on a crucial distinction between homeland minorities and immigrant groups. For the first time, the Arab-Palestinian minority's distinctness as a 'homeland (national) minority' is recognized (albeit thus far only by the president of the court). In addition, the need for peaceful co-existence is not being used here to justify limitations on the minority (to safeguard public order, prevent incitement etc.) but rather as a source from which emanate duties of the state towards the minority.<sup>27</sup>

The third and last court decision the article will review is the ruling given in *The Association for Civil Rights in Israel v. The Government of Israel*.<sup>28</sup> It deals with the composition of the Council of the Israel Lands Administration, and the issue of nominating Arab members to it. The court ruled that an obligation of appropriate representation is in order in the context of the minority and the Council, and directed the government, giving basic guidelines, to realize this obligation. A significant point is that the decision was not based on existing legislation (the statutory obligations in the sphere of appropriate representation do not apply to the Council). It was a jurisprudential leap to fill a lacuna by drawing an analogy in light of Israel's basic values. However, this ruling in the present context is mentioned for another reason. The decision adds two distinctions to the one mentioned above (between a native minority and an immigrant group), and together they serve to counter a simplistic analogy present in the Israeli public discourse between the Arab minority and other marginalized groups. The first of these two additional distinctions is simply that the causes of discrimination of Arabs in Israeli society is a great deal more complex and harder to eradicate; the second is that the weight of communal needs of the Arab minority corresponds to a heavier claim for

representation in various societal institutions. See, for example, the following extract from the court ruling:

The question of what is appropriate representation in a particular body depends, among other things, on the nature of the body, and on its practical importance from the standpoint of the group that is entitled to appropriate representation. Accordingly, it appears that the importance of the representation and the extent of the representation in the Israel Lands Administration are greater for members of the Arab population than, for example, for people with disabilities.<sup>29</sup>

In short, in this series of rulings carrying significant remedies the court is fertilizing the Israeli discourse regarding Arab–Jewish relations in Israeli society. It argues convincingly against superficial symmetry; it outlines attributes that single out the Arab-Palestinian minority and its circumstances in Israeli society. On the basis of its singularity the court points out the fair claim of the Arab-Palestinian minority for group-differentiated rights (linguistic and participatory, in the concrete cases) and the need for more vigilance on behalf of the court with regard to the protection of the minority from discrimination (land allocation, in the concrete case of *Kaadán*).<sup>30</sup> By these moves the court might be seen as offering Israeli society a different pattern of inter-communal relations—the bridging vision mentioned above.

*The Complementary Dimension: The Court is Not Doing Enough to Bring Israeli Society Closer to the Bridging Vision that it has Marked Out*

A portrayal of the court's performance and function vis-à-vis the national minority in Israel would be incomplete without demarcating its shortcomings. To put things concisely but accurately, the court does not sufficiently practise what it preaches.

Most of the petitions brought before the court by human rights organizations on behalf of the Arab minority are not jurisprudentially innovative. They do not for the most part force the court to collide with the political branches, as would remedies of social rights (often linked to priorities in budgeting) or remedial historic justice (as was conceived to be involved in the *Ikrit* case). Most petitions led by the minority aim at civil and political rights or the allocation of material public goods. The latter kind of petition is founded on a quite simple legal claim—a demand that the state fulfil its most mundane obligation towards its citizens—that gives minority members the same as others. Moreover, there is no real argument regarding the facts—the persistent discrimination of the Arab-Palestinian minority, its scope and duration.<sup>31</sup>

Here one sees the gap between the rhetoric and practice of the court itself. In practice the court usually avoids strict scrutiny of governmental policy in petitions regarding discrimination of Arabs, whereas in other contexts such scrutiny has been implemented.<sup>32</sup> The following are a few examples.

First, in several cases, despite hard data presented by the litigants, the court has chosen not to shift the burden onto the government to explain away this data. See, for example, the following court rulings—the allocation of land for ‘lonely farms’ in undeveloped regions (‘Hityashvut Bodedeem’) only to Jews;<sup>33</sup> the Religious Affairs Ministry budget;<sup>34</sup> representation of Arab women in the directorate of government corporations;<sup>35</sup> kindergartens for the under-fives in unrecognized Bedouin villages in the Negev.<sup>36</sup> One may assert that as regards the burden of proof the Israeli Supreme Court is behaving very differently towards the Arab population than towards most other petitioners claiming group discrimination and differently too from other judicial systems bent upon eliminating discrimination. In the USA discrimination on the basis of race or national affiliation is perceived as particularly suspect and therefore requires the State to pass demanding tests of proof. The litigants in such cases have an initial relatively light burden of proof after which the burden of proof lies with the respondents (the authorities) and they have to prove the reverse is true.<sup>37</sup>

Secondly, a court that aspires to put an end to discrimination would be expected to provide suitable remedies. Among other things it is expected to instruct the discriminating authority to undo the wrong already committed in the disproportionate allocation of assets by allocation to the wronged party of at least part of its due to the past and longstanding discrimination. Failing to do so is tantamount to rewarding the culprit (all the discriminator has to fear is an injunction to cease discrimination from the time of judicial intervention). The court thus fails to adopt the appropriate remedy with regard to the Arab-Palestinian minority.<sup>38</sup>

Thirdly, a court that wishes to eradicate discrimination would be expected to intervene forthwith once such cases are brought to its knowledge. Such is not the case here. Petitions of this type often drag on for years and more often than not the court is satisfied with promises by the discriminating authority to ‘make an effort’ or to ‘amend in the course of a few years’. So, for example, in the petition concerning the budgeting of a programme in aid of underperforming school children, the court issued its ruling three years after the petition was filed, and it deferred to the state’s plan to eradicate the discrimination gradually over five more years.<sup>39</sup> Another case in point is the petition concerning discrimination against Arab municipalities in the allocation of equalizing budgets by the Interior Ministry that was filed in 2001 and was decided only in 2006.<sup>40</sup> This is a very partial list.<sup>41</sup>

All that can be said is that the ‘bridging vision’ that the court offers Israeli society through a few landmark cases is losing its credibility and its potential to become a real alternative, due to the court’s own treatment of many of the petitions brought before it on behalf of the minority. As mentioned above, these petitions do not carry a heavy challenge—demanding only what seems to be indisputably the minority due, and in complete agreement with the moral rhetoric of the state. No judicial

difficulty attends them and still they are dragged out over time and even if concluded in favour of the litigants they are often diluted in their remedies. Why should the Arab minority put its faith in the bridging vision that the court offers if the court itself behaves as if it is ambivalent about it?<sup>42</sup>

### CONCLUSIONS

The three dimensions that make up the picture of the court's performance towards the Arab minority are all clearly defined but not so the resulting picture.

First, the Supreme Court has not tried, and is not likely to try, to urge Israel to replace the current paradigm ('a Jewish and democratic state') with a bi-national one. The minority may as well give up trying to challenge it into doing so. The reason is that the court would probably find such a transformation both legally insurmountable and not called for morally (or even morally improper).<sup>43</sup>

Second and inversely, the court is simultaneously aware of its own vulnerability and the frailty of Israeli society. It is therefore seeking a path for society that might alleviate the pressure upon its weak links a little. This quest has led it to guard seriously the democratic threshold of Israeli democracy within Israel proper (mainly in terms of the Arab citizens' civil and political rights), and occasionally it has led the court to mark out distinctions and take steps that break the dichotomy of status quo versus bi-nationalism without overriding the Zionist paradigm. It demarcated an option in which none of what the Israeli-Jewish community sanctifies is demolished but some of its sacred cows are slimmed down to allow more room for fairness in the inter-communal relationship vis-à-vis the Arab-Palestinian minority.

The last of the three dimensions that make up the picture throws shadows over the court's achievements. The court seems neither consistent nor determined enough. This is especially apparent in cases where the court rejects or offers inadequate remedies when petitions over discrimination in allocation of material public goods are brought before it, despite the fact that these claims are neither challenging from a legal point of view nor too sensitive politically.

There is no real explanation for this rather bewildering performance. Perhaps the court is tired of its role as the keeper of the moat. That would be understandable—it is a lonely and thankless mission, accompanied by censure more often than appreciation. However, neither the court nor anyone else may indulge in fatigue or in make-believe peace and quiet. This will only lead us to bad decisions at the fateful crossroad(s) that Israeli society has reached.

## NOTES

1. Several points need to be stressed with respect to these grave incidents, known as the 'October events'. First, the Arab-Palestinian violence within Israel was limited to stone-throwing (in rare instances firebombs were also thrown). Second, to the discredit of some demonstrators, policemen were not the only target of their violence; occasionally stone-throwing was also directed at Jewish civilians, and in one incident a Jewish civilian was in fact killed. Third, in some cases, particularly in mixed cities, civil violence was perpetrated in the opposite direction, with Jewish demonstrators attacking Arabs and Arab property. Fourth, and most important, these violent events produced a deep distrust between the two communities within Israel. Israeli Palestinians, for their part, experienced a confluence of external repression (of their brethren in the occupied territories) and internal repression. The Jewish majority's experience, however, mirrored that of Israeli Palestinians: They were assaulted both externally (in the territories) and internally. Most of these points are lucidly set out in the report of the official Commission of Inquiry into the October 2000 events (*The Or Commission Report*, 2003) available [Hebrew] at: [http://elyon1.court.gov.il/heb/veadot/or/inside\\_index.htm](http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm).
2. Another, fourth, role of the Supreme Court will not be dealt with here. It concerns the distinction between the performance of the court in a given context and its impact in that context. Addressing the latter would involve examination of what might be termed 'peripheral radiation'—the influence of the court upon the Arab minority emanating from the significance of general norms that the court defines in contexts other than the minority. This is too wide a question for the present analysis to accommodate. Suffice to say that due to the generic nature of legal norms, it is difficult to design or apply them in a selective fashion. Thus, the norms that were crystallized in cases involving individuals (or groups) versus the state in matters of religion and state, or political, economic, factional or gender-linked strife within the majority community, often have almost inevitable ramifications for individuals outside this community—i.e., Arab citizens. For a discussion of the court's impact via 'peripheral radiation', see Ilan Saban, 'The Impact of the Supreme Court on the Status of the Arabs in Israel', *Mishpat uMimshal*, Vol. 3 (1996), p. 541–569 (in Hebrew), especially pp. 551, 557–566. Only in one instance in the present article will I refer to the indirect impact of the court—its contribution to the ascendance of a civil society within the minority. Otherwise I will deal only with the court's performance.
3. The modern origin of the term 'margin of appreciation' is probably the jurisprudence of the European Court of Human Rights. The deference it implies varies according to the relevant institution function and status. So, for example, the Israeli Supreme Court has marked the parliament, the Knesset, in its legislative function, for special deference.
4. See C.A. 6821/93, *Mizrachi Bank v. Migdal Co-operative Village*, 49(4) P.D. 221.
5. Article 8 of Basic Law: Human Dignity and Liberty. A similar provision appears in Article 4 of Basic Law: Freedom of Occupation.
6. For an updated discussion see for example see Yoav Dotan and Menachem Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements', *Law and Policy*, Vol. 23, No. 1 (2001), pp. 1–27.
7. Some familiar analogies would seem to validate the Jewish majority fear of this 'loaded triangle'-type situation. See, for example, the 1960s–70s violence between the Greek majority and Turkish minority in Cyprus that corresponded with the tension between Greece and Turkey; or the Albanian minorities in the Balkans and the Kosovo and Macedonia clashes of recent years. In many of these instances the problems arise from a situation of a 'double minority': the instability is engendered by some 'manic-depressive' factor in the make-up of each side, as they feel at the same time a minority and majority. The minority, by definition is such in its own state of citizenship, but the majority is often a minority on the regional level and feels besieged.
8. Chief Justice Agranat, E.A. 1/65 *Yardor v. Chairman of the Central Elections Committee*, P.D. 19(3) 367, p. 385; David Kretzmer, *The Legal Status of the Arabs in Israel*, Boulder, CO, 1990, pp. 22–31.
9. Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship*, Cambridge, 2002, pp. 276–277; Gad Barzilai, *Communities and Law: Politics and Cultures of Legal Identities*, Ann Arbor, MI, 2003, pp. 235–239, 243–245.

10. Compared to the long and arduous path to constitutional amendment in the US. Think for example of the poor chances of altering the Supreme Court decisions on abortions, freedom of expression, etc. So, in parenthesis I will comment on the problem of importing into the Israeli discourse the American constitutional debate around Judicial Review as if the two constitutional regimes are identical in this respect.
11. H.C. 840/97 *Sbeit v. Government of Israel*, P.D. 57(4) 803.
12. *Ibid.*, pp. 814–815.
13. The distinct recent example, however, regards the occupied territories and not Israel proper—the case of the Fence/Wall. See the almost simultaneous opinions of the supreme judicial bodies of the international community and of Israel—the Israeli Supreme Court decision: H.C. 2056/04, *Village Council Beit Sureik v. Government of Israel*, P.D. 58(5) 807; and the International Court of Justice advisory opinion of 9 July 2004, [www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4](http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4). One can assume that the rather mild official reactions in Israel to the Supreme Court decision to order substantial relocation of the fence should be attributed to the pending and much harsher opinion of the ICJ.
14. Election Appeal 11280/02 *Central Elections Committee for the 16th Knesset v. MK Tibi and MK Bishara*, P.D. 57(4) 1 (hereafter, ‘*Tibi*’).
15. H.C. 651/03 *Association for Civil Rights v. Chairman of the Central Elections Committee*, P.D. 57(2) 62.
16. H.C. 316/03 *Bakri v. Israeli Censorship Board*, P.D. 58(1) 249; F.H. 10480/03 *Bosidon v. Bakri*, P.D. 59(1) 625.
17. H.C. 6698/95 *Kaadan v. Israel Lands Administration and Katzir*, 54(1) P.D. 258, 276.
18. See for example C.A.4531/91 *Nasser v. Associations Registrar*, P.D. 48(3) 294, see too the rulings that shielded the Arab parties, inter alia—E.A. 2/84 *Naiman v. Chairman of the Central Elections Committee for the 11th Knesset*, P.D. 39(2) 225; E.A. 2/88 *Ben Shalom v. Chairman of the Central Elections Committee for the 12th Knesset*, P.D. 43(4) 221, 250; L.C.A. 2316/96 *Isaacson v. Parties Registrar*, P.D. 50(2) 529; and the *Tibi* ruling.
19. See mainly As’ad Ghanem, *The Palestinian-Arab Minority in Israel, 1948–2000*, Albany, NY, 2001, esp. pp. 170–174; Shafir and Peled, *Being Israeli*, especially chapters 4 and 10; Shany Payes, ‘Palestinian NGOs in Israel: A Campaign for Civic Equality in a Non-Civic State’, *Israel Studies*, Vol. 8 (2003), p. 60–90; Barzilai, *Communities and Law*, especially chapter 3.
20. I find here an interesting case of reciprocal empowerment: the court blazes a trail for the empowerment of organizations and they, in their turn, by bringing before it issues of great moment that had not come its way before, endow the court with greater socio-political significance.
21. For a seminal elaboration of the issue of minority rights (and the distinction between them and equal citizenship rights), see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1995, esp. chapters 2 and 3.
22. *Tibi* ruling, p. 22.
23. This point was highlighted in the concluding paragraphs of the Or Commission Report: part 6, sections 40–43 and see a wider discussion of this point also in Ilan Saban, ‘Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel’, *New York University Journal of International Law and Politics*, Vol. 36 (2004), pp. 885–1003.
24. *Kaadan*.
25. H.C. 4112/99 *Adalah et al. v. Municipality of Tel-Aviv-Jaffa et al.* 56(5) P.D. 393.
26. *Ibid.*, p. 418 (emphasis added).
27. For a further discussion of the status of Arabic in Israel, see inter alia, Ilan Saban and Muhammad Amara, ‘The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change’, *Israel Law Review*, Vol. 36, No. 2 (2002), p. 5–39.
28. H.C. 6924/98 *Association for Civil Rights in Israel v. Government of Israel*, P.D. 55(5), 15.
29. *Ibid.*, para. 31 of the ruling.
30. See the court’s comment in *Kaadan* case.
31. See the Or Commission Report, part 1, chapter A, section 19 and part 6 section 12.
32. Compare with petition claiming gender discrimination: H.C. 4541/94 *Miller v. Minister of Defence*, P.D. 59(4) 94; H.C. 453/94 *Women’s Network in Israel v. Government of Israel*, P.D. 48(5) 501; H.C.5325/01 *Society for the Promotion of Women’s Basketball League v. Local Council of Ramat haSharon*, P.D. 58(5) 79. Compare too with petitions against irregular

- funding of the ultra-orthodox, as in H.C. 7142/97 *The Israeli Youth Movement Council v. Minister for Education, Culture and Sport*, P.D. 52(3) 433.
33. H.C. 6532/94 *Abu-kaf v. Minister of Agriculture*, P.D. 50(4), 391.
  34. H.C. 240/98 *Adalah v. Ministry for Religious Affairs*, P.D. 52(5) 167 but compare with H.C. 1113/99 *Adalah v. Ministry for Religious Affairs*, P.D. 54(2), 164.
  35. H.C. 10026/01 *Adalah v. Government of Israel et al.*, P.D. 57(3) 31.
  36. H.C. 5108/04 *Abu-Guda v. Minister of Education*, P.D. 59(2) 241.
  37. Moshe Cohen (Elia), 'To Whom the Burden of Proof?', *Adalah Report*, Vol. 1 (1999) pp. 37–39 (Hebrew); Yousef Taiseer Jabareen, 'Constitutional Protection of Minorities in Comparative Perspective: Palestinians in Israel and African-Americans in the United States', PhD thesis, Georgetown University, 2003; Eyal Benvenisti and Dalia Shaham, 'Facially Neutral Discrimination and the Israeli Supreme Court', *New York University Journal of International Law and Politics*, Vol. 36 (2004), pp. 677–716.
  38. Compare with H.C. 1438/98 *Conservative Movement v. Ministry for Religious Affairs*, P.D. 53(5) 337, where the court instructed that the petitioner be recompensed for funding it had not received in the fiscal year 1997 from the budgets of 1999 and 2000.
  39. H.C. 2814/97 *Supreme Follow Up Committee v. Ministry of Education, Culture and Sport*, P.D. 54(3) 233.
  40. H.C. 11163/03 *National Committee of Heads of Arab Authorities in Israel v. The Ministry of the Interior* (yet to be published).
  41. There is another, important and very controversial, decision of the court (reached in May 2006) that deserves a separate analysis which I will not provide here. It concerns an attack against the constitutionality of a new statute: The Citizenship and Entrance to Israel Act (Temporary Order) 2003. The Act (with only very few exceptions) prevents Palestinians from the occupied territories married to Israeli citizens (i.e. Arab citizens of Israel) from uniting to live in Israel. The official reasons for the legislation were security reasons, but demographic overtones appeared as well (the court generally did not treat them). Six of the 11 judges in the case decided that the statute was not proportional, and therefore unconstitutional. However, the sixth judge sided with the other five judges in declining to provide a remedy against the statute. Thus, by a bare majority, this extremely problematic statute remained valid. It went through slight modifications and a new petition against it is pending. For analysis of the court decision, see, inter alia, Yoav Peled, 'Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime', *Theo. Inq. L.*, Vol. 8 (2007), pp. 603–628; Daphne Barak-Erez, 'Israel: Citizenship and Immigration Law in the Vice of Security, Nationality, and Human Rights', *Int'l J. of Constitutional. L.*, Vol. 6 (2008), pp. 184–192.
  42. One reader of a previous draft gently questioned my criticism, since the Israeli court's approach 'is certainly at one with the approach adopted in other jurisdictions; for instance, a time-honoured tradition in the UK is for courts to suffice themselves with declarations in difficult cases, for instance those concerning matters of resource allocation'. Let me lay out three points that 'drove my tone' here: First, there is a special need for the court to be the guardian of 'discrete and insular minorities' since these minorities 'may be [in] a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry' (*US v. Carolene Products Co.*, 304 U.S. 144 (1938), n. 4). The call for an activist court is thus more persuasive in cases such as Israel, Northern Ireland, Sri Lanka, Macedonia and the like (as opposed to, say, Britain proper or Austria). Second, the argument for involving the court in budgetary considerations is less problematic when group X demands the allocation that was provided to group Y (when no substantive distinction appears), as opposed to asking the court to intervene in the standard of allocation to a social right of one kind or another. Many cases advanced by the Arab minority are of the first kind. Third, since, as explained above, 'the final word' is quite clearly in the hands of the Knesset (because most of the Basic Laws are not entrenched), should not the court have more of a 'margin of appreciation' than less? Let us compare the relative finality of the Supreme Court in Israel with say the US Supreme Court. The latter's decision is almost 'eternal' (unless changed by the court itself). Should we advance then the same pros and cons for judicial review in the case of the US Supreme Court as we do in the case of its Israeli counterpart?
  43. See, inter alia, Aharon Barak, *Judge in a Democratic Society*, Haifa, 2004, especially pp. 157–161.