

FACIALLY NEUTRAL DISCRIMINATION AND THE ISRAELI SUPREME COURT

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I. INTRODUCTION

In multi-ethnic societies, many inter-group conflicts are relegated to the courts. These courts are called upon to interfere with legislative or administrative measures either because some well-organized minority groups capture the political process, or because the majority uses its numerical superiority to discriminate against other, discrete and insular, minorities. In the latter case, courts share the responsibility of protecting the rights of minority group members. The Supreme Court of Israel, sitting as the High Court of Justice, has the opportunity to fulfill this function, by monitoring decisions of the political branches that allocate public resources among Israel's citizens.

This Article evaluates the Court's accomplishments and failings in preventing discrimination against the Arab citizens of Israel, suggesting that the Court has professed to respect the principle of equality by adopting a color-blind approach, while allowing the Israeli bureaucracy to allocate public resources with little accountability.

II. COURTS AND MINORITIES

The possible failure of the democratic political process to represent minority interests was recognized by the framers of the U.S. Constitution. James Madison, in *The Federalist*, had in mind property owners as the probable endangered minority.¹ Madison could not have foreseen the rise of nationalism that sharpened the rift between different ethnic and national groups in many countries. Since that time, what has often proven to be the group most likely to be adversely affected by the political process is the ethnic, national or religious minor-

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1. See THE FEDERALIST NO. 10, at 56, 59-65 (James Madison) (Jacob E. Cooke ed., 1961).

ity. When ethnic cleavages exist, voting tends to reflect group affiliation, and elections results often reflect the relative size of the various societal groups.²

Thus, small minorities often exert little political influence. Even relatively large minorities may also fail to influence the outcomes obtained through the democratic process. In many countries, the ethnic rift between the communities prevents any political give and take. In some instances, a majority group can monopolize political power with little more than half of the votes. In such situations, the majority often tends to use the democratic process as a means to secure its interests at the expense of the minority.³

The Federalist suggested two basic responses to the failures of the democratic process to protect minority interests. First, political structures and procedures could be designed to create conflicts of interest within the majority.⁴ Second, the courts could serve as a counter-majoritarian organ.⁵

The first response was embodied in the federal system of the United States. However, it was soon discovered that this response is worthless without the second response. It was only

2. This also depends on the electoral system. Where a proportional system is adopted, the election will tend to follow ethnic lines. If the system is based on "first past the post" in districts, only two major parties will emerge, and minorities will vote for minority representatives in the major parties, on the condition that their voice is not diluted by gerrymandering. See *infra* note 6).

3. See DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 83-86 (1985). For an interesting examination of the political options in constructing the new South African political system, see DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 124-49 (1991).

4. See *THE FEDERALIST* NO. 51, at 347, 351 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority."); see also *THE FEDERALIST* NO. 10, *supra* note 1, at 56. For a different view—i.e., that the lawmaking procedure in the U.S. Congress entails sufficient internal safeguards for minorities—see Terrance Sandalow, *Judicial Protection of Minorities*, 75 *MICH. L. REV.* 1162, 1190-93 (1977).

5. See *THE FEDERALIST* NO. 78, at 521, 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society [which] sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.").

the court that could prevent the majority from further diluting the voting power of African-Americans.⁶

The United States Supreme Court acknowledged its role in protecting minorities. In the famous footnote four of *United States v. Carolene Products Co.*,⁷ the Court announced the possibility of a closer review of “statutes directed at particular religious, national, or racial minorities,”⁸ and of examining “whether prejudice against discrete and insular minorities may . . . call for a correspondingly more searching judicial inquiry.”⁹

Footnote four of *Carolene Products* was conceived in 1938, no doubt as a reaction to the changing status of the Jews in what used to be democratic Germany,¹⁰ at a time when the international systems for protecting minority rights in Europe, established in the wake of World War I, were in the process of

6. On the various ways in which the minority’s voice has been diluted in U.S. history, and the judicial responses thereto, see the essays contained in *MINORITY VOTE DILUTION* (Chandler Davidson ed., 1984).

7. 304 U.S. 144, 152 n.4 (1938).

8. *Id.* at 153 n.4.

9. *Id.* Paragraphs two and three of the footnote state:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than most other types of legislation

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (internal citation omitted). This statement put forward a novel justification for judicial review in the aftermath of the *Lochner* Era. For the history of the footnote, see Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 *COLUM. L. REV.* 1093, 1093-1100 (1982); see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 *HARV. L. REV.* 713, 713-14 (1985); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *MICH. L. REV.* 213, 223-26 (1991).

10. See Ackerman, *supra* note 9, at 741-42.

disintegration.¹¹ Another backdrop was the fact that America's melting-pot accommodated primarily white people.

The *Carolene Products* footnote influenced the jurisprudence of the U.S. Supreme Court with respect to a number of issues, most notably with respect to claims of religious minorities to exemptions from certain laws that infringed on their free exercise of religion.¹² Such judicial review was also justified, supported, and advanced by the legal literature.¹³ It nurtured the adoption of the strict scrutiny test whenever public resources were allocated along ethnic or racial boundaries.¹⁴

However, the footnote's rationale downplays other inherent failures of the political process in multi-ethnic societies. It does not address the opposite problem, namely of minorities who gain disproportionate leverage by using their key role in political power struggles. The Jewish religious community in

11. On the possible impact of this international system on *Carolene Products'* footnote, see Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287, 1289, 1293 n.17, 1296 (1982).

12. On the footnote's influence on the jurisprudence of the U.S. Supreme Court, see Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087-88 & n.4, 1091 (1982); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748-68 (1991). See also *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (recognizing religious minorities' exemptions). For a similar recognition by the German Constitutional Court of the religious minority's right to be exempted from the generally applicable law, see *Blood Transfusion Case*, 32 BVerfGE 98 (1971), translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 451, 453-54 (1989).

13. On the issue of judicial protection of minorities, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-77, 135-37, 148-55 (1980). See also Cover, *supra* note 11, at 1294, 1297, 1298 n.32; Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6-10 (1979). But see Ackerman, *supra* note 9, at 717, 745 (refuting judicial review as applied to the *Carolene Products* paradigm, but not as applied to a "cruder case" of overt political exclusion).

14. See *Bush v. Vera*, 517 U.S. 952, 958 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Miller v. Johnson*, 515 U.S. 900, 920 (1995); see also *Comfort v. Lynn Sch. Comm.*, 263 F.Supp. 2d 209, 244-53 (D. Mass. 2003) (a review of the doctrines on strict and intermediate scrutiny), *superseded by* WL222034155 (D. Mass. 2003) (applying intermediate scrutiny in place of strict scrutiny); *City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1128 (2d Cir. 1994) (articulating the premise of strict scrutiny), *rev'd* 517 U.S. 1 (1996) (holding that the facts in *City of New York* required application of intermediate scrutiny and not strict scrutiny).

Israel, or the Amish communities in certain states in the United States,¹⁵ are examples of minorities that manage to attain such political leverage. This disproportionate leverage sometimes rewards the minority with more than its fair share of public resources. At times, the minority can use its leverage to gain for its members exemption from otherwise applicable duties, such as the exemption for the prohibition of using certain drugs. The minority may even succeed in obtaining authority as a group to manage the lives of the individual members of that group, such as in the context of personal status or education.

This may be the reason why, in recent years, the U.S. Supreme Court seems to have abandoned its earlier concern with discrete and insular minorities and, instead, relegated intergroup conflicts to the political process. For example, in 1988, the Supreme Court refused to overturn a decision to pave a road that would severely obstruct the exercise of religion by Native Americans,¹⁶ stating:

The Constitution does not, and the courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.¹⁷

Justice Scalia was even more blunt in the *Smith* case, rejecting the claim that the Free Exercise Clause of the First Amendment exempted Navajo Indians, who use the peyote drug during religious ceremonies, from a state law prohibiting the use of drugs,¹⁸ stating:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely en-

15. Brian Barry argues: “[A]lmost all of the many exemptions from generally applicable laws that Amish communities have acquired over the years have been won in legislatures and government agencies as a result of remarkably sophisticated and effective political campaigns.” BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 173 (2001).

16. *Lyng v. N.W. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988).

17. *Id.* at 452 (citing *The Federalist* No. 10.).

18. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

gaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹⁹

Admittedly, judicial intervention in political decision-making in multi-ethnic societies raises difficult substantive and institutional questions. There are basically two different strategies for such judicial intervention. The first strategy focuses on the substance of the petitions brought to the court's attention.²⁰ Under this strategy, the court examines whether the petitions demonstrate either group-based allocations or kinds of decisions—such as taking for public use—that affect minorities disproportionately more than majorities. The court determines, in such cases, whether such allocations were justifiable.

The second strategy avoids direct intervention in such decisions and, instead, focuses on the decision-making procedures.²¹ Courts examine the process through which the majority came to its decision. The inquiry focuses on whether minority representatives were consulted in the process and in what manner. This second strategy suggests that the court's reaction to political process failures does not necessarily transform the court into the ultimate policy-maker whenever minority interests are at stake. Recognizing the merit of inter-group negotiations,²² the court can focus on the procedure of the decision-making process, design procedural doctrines and rules that promote fair bargaining, and ensure that the voice of the minority is given sincere consideration.

19. *Id.*

20. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 553 (1964) (striking down legislative apportionments in the Alabama legislature and noting that the same result could not have been achieved through the political process).

21. *See, e.g.*, *United States v. Virginia*, 518 U.S. 513, 532-35 (1996) (finding that a state's gender classification was subject to heightened scrutiny by the courts); *Adarand*, 515 U.S. at 227 (requiring "searching judicial inquiry" into justifications for race-based measures).

22. *See* BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 239-57, 261-63 (2000) (providing examples of how inter-group information exchange and cultural instruction are useful in negotiating disputes arising from cultural differences).

Both strategies require the court to elaborate doctrines and rules. The strict scrutiny test of ethnic or racially based decisions²³ and the disparate impact doctrine²⁴ are examples of the first strategy, enabling the court to intervene directly. Doctrines on fair representation of minorities enable the court to promote equality indirectly, following the second, procedural strategy.

The above discussion highlights two complementary judicial strategies that can protect discrete and insular minorities against the democratic majority. The first strategy is sensitivity to outcomes that adversely affect minorities. The second strategy is paying close attention to the decision-making procedure. This Article suggests that the Israeli Court has not adopted either of these strategies. Instead of sensitivity to ethnicity as a factor in the process of allocating limited resources, the Court favors a color-blind approach. Instead of focusing on the manner in which the decision-making process is carried out, the Court allows the bureaucracy to allocate public resources with little accountability. As a result, the Court can profess to respect the principle of equality, while avoiding its actual implementation.

This Article focuses on the allocation in Israel of public resources, such as state lands, education, and financial support, in which inter-group discrimination is prevalent. The Article explains how inter-group discrimination occurs through seemingly benign distinctions adopted by the government and other state agencies and condoned by the Court. The Article is based on the premise that allocating resources on a group basis, rather than an individual basis, may be preferred in order to accommodate specific group needs, including minority groups' wishes to remain insular.²⁵ By identifying the bureau-

23. *See, e.g.*, *Miller v. Johnson*, 515 U.S. at 920-21 (1995).

24. *See, e.g.*, *Wright v. Nat'l Archives & Records Servs.*, 609 F.2d 702, 712-13 (4th Cir. 1979) (defining "disparate impact doctrine" as "designed to ensure more perfect realization of the beneficent purposes of Title VII by making plain that intent . . . [falls] under the ban of this remedial legislation").

25. This interest has been recognized as a legitimate one by the Supreme Court in the context of the Bedouin and the Ultra-Orthodox communities. *See* H.C. 528/88, *Avitan v. Minhal Mekarka-ey Yisra-el* [Israel Lands Administration], 43(4) P.D. 297, 299; H.C. 4906/98, *Amutat Am Khofshi v. Misrad Ha-Binuy V'Ha-Shikun* ["Free Nation" NGO v. Ministry of Construction and Housing], May 30, 2000 (unpublished).

cratic opportunities for inter-group discrimination, the Article seeks to suggest a number of judicial responses that could reduce discrimination even among geographically separated communities.

III. INTER-GROUP ALLOCATION OF PUBLIC RESOURCES IN ISRAEL

This Part outlines the main tasks facing the Supreme Court of Israel in monitoring the political branches' allocations of public resources along ethnic lines, and it displays the different modalities that allow facially neutral discrimination. The findings in this Part are based predominantly on the yearly reports of the Israel State Comptroller and on court findings.

The impression that one gets, after reading the different official reports published on this issue, is that only a very thorough investigation relying on inside information could provide a comprehensive account of the magnitude of inter-group discrimination in the allocation of public resources in Israel.²⁶ However, this Part does not aim to present a comprehensive or historical account of inter-group discrimination. For the purposes of this Article, it suffices to explore the bureaucratic means that shape the processes of allocating limited resources.

In the past, the main vehicle for discrimination in Israel was the criterion of army service. Since Arabs are not drafted, while all Jews are (including the exempted Ultra-Orthodox, who officially have their draft deferred), army service had become a convenient proxy for ethnic discrimination.²⁷ Prefer-

26. For systematic accounts of the extent of discrimination against the Arab minority, see DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 98-107 (1990) [hereinafter KRETZMER 1990]; see also DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* (2d ed. 2002); RUT GAVIZON [RUTH GAVISON] & 'ISAM ABU-RAYA [GASSAM ABU-RIA], HA-SHESHA' HA-YEHUDI-'ARVI BE-YISRA'EL: ME'AFYENIM VE-ETGARIM [THE JEWISH-ARAB RIFT IN ISRAEL: CHARACTERISTICS AND CHALLENGES] (1999); ASS'N FOR CIVIL RIGHTS IN ISRAEL, *ISRAEL HUMAN RIGHTS FOCUS: 1996* (1996, in Hebrew) [hereinafter ACRI Report]; ADALAH THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL, *LEGAL VIOLATIONS OF ARAB MINORITY RIGHTS IN ISRAEL* (1998) [hereinafter ADALAH].

27. For the various uses of this criterion in decisions involving the allocation of limited resources, see KRETZMER 1990, *supra* note 26, at 99-100.

ences in housing, housing assistance, employment, etc., were all predicated on this criterion.²⁸

A petition to the Court in 1983²⁹ prompted the Attorney General to abandon this criterion in the context of awarding National Security funding for children. In recent years, there has been a noticeable trend away from using this criterion, but direct assistance for released soldiers to facilitate their reentrance into civilian life (rather than indefinite assistance to soldiers' families) has been maintained.³⁰

The criterion resurfaced as the basis of support to families of released soldiers when cuts in the National Security allowance for children whose parents did not serve in the army were planned. This time, the use of such a criterion would have affected not only Arab families but, also, Ultra-Orthodox Jewish families. But, the government retreated and abandoned this plan in the face of the Supreme Court's decision to hear a petition against the law that would have promulgated this cut before an extraordinary panel of thirteen justices.³¹

Instead of the obvious criterion of army service, there are a number of other seemingly benign distinctions that facilitate evading the non-discrimination rule in the context of allocating public resources. These distinctions draw on apparently neutral criteria, such as different places of residence or the different cultural needs and interests of the groups in question.³²

Minority groups in Israel form rather homogenous territorial enclaves. Their children attend different schools, and their cultural interests are not the same. These differences provide opportunities for the state to adopt seemingly benign

28. See *id.* at 104-05; Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89, 123 (2001); Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 261-62 (1999).

29. H.C. 200/83, *Wattad v. Sar-Ha-Otzar* [*Wattad v. Minister of Finance*], 38(3) P.D. 113.

30. See *Discharged Soldiers Law* (1994) (offering specific benefits to soldiers upon their release from army service).

31. See H.C. 4822/02, *Vaad Rashei Ha-Rashuiot Ha-Mekomiot Ha-Arviot Be-Israel v. Hamossad Le-Bituach Leumi* [The Committee of Heads of Arab Municipalities in Israel v. National Insurance Institute], July 31, 2003 (unpublished).

32. See, e.g., KRETZMER 1990, *supra* note 26, at 107-08.

distinctions that discriminate in favor of, or against, specific minority groups. Hence, in the context of public resource allocation, most discrimination is facially neutral.

The following account focuses on the seemingly benign criteria used by the allocating authorities, namely the distinctions based on place of residence, and on different educational, religious, and cultural needs.

A. *Distinctions Based on Place of Residence*

1. *Tax and Investments Benefits*

The periphery of Israel is composed of small and medium-sized homogeneous settlements. Jews and Arabs rarely share the same village or township. Governmental policies offer preferential treatment for residents of some of the settlements.³³ This criterion has been used to distinguish among Jews and non-Jews, and among religious, Ultra-Orthodox, and secular Jews.

The main vehicle for the allocation of public funds for different localities is the government's long-standing practice of adopting preferential schemes for regions it categorizes as development areas. This authority is derived mainly from the Encouragement of Investment Act of 1959.³⁴ However, the government often operates outside of the confines of this law, using its so-called "residual authority," a vaguely defined source of enlarged governmental authority.³⁵

Under this authority, the government decides on two lists of settlements referred to as "national preferential areas."³⁶ One list consists of type A settlements, and the other consists of type B settlements.³⁷ Governmental support in the form of

33. *See, e.g.*, Tzav L'Idud Haska-ot Hon (Kvi-at Ezorim L'inyan Ha-Tosefet La-Khok) [Encouragement of Capital Investment Ordinance (Determination of Areas Regarding the Addition to the Act)], 1993.

34. Khok L'Idud Hashka-ot Hon [Encouragement of Capital Investment Act], 1959, S.H. 234.

35. Article 40 of Khok Yesod: Ha-Memshala [Basic Law: The Government], 1968, S.H. 229, provides: "Subject to the law, the government has the power to do whatever the law does not assign to other authorities." Despite more than fifty years of practice, the scope of governmental authority under this concept remains unclear. *See, e.g.*, H.C. 5128/94, Federman v. Sar Ha-Mishtara [Minister of Police], 48(5) P.D. 647, 651.

36. *See* Encouragement of Capital Investment Act, 1959, S.H. 234.

37. *Id.*

subsidies, tax benefits, and investment incentives are given to both lists, with some preference given to type A over type B.³⁸

Such targeting of specific settlements offers an opportunity to couch discriminatory measures under seemingly benign distinctions based on local needs, distance from occupational centers, and other seemingly neutral grounds. Historically, Arab towns and villages were excluded from these lists.³⁹ On the other hand, Ultra-Orthodox settlements—a relatively recent phenomenon—receive preferential treatment.⁴⁰ For example, before the elections in 1996, the Labor government led by Prime-Minister Peres approved the transfer of funds for the development of new settlements earmarked for the ultra-religious community.⁴¹ Declared national preferential area type A, the government undertook to substantially reduce the housing costs of its residents. Nearby settlements did not enjoy similar policies.⁴²

In addition, the Ministry of Finance offers reduced income tax rates to residents of settlements that are close to the Lebanese border, based on the Minister's authority under the Income Tax Ordinance.⁴³ Initially, only one Arab village was included in the list of 65 settlements to be given a tax reduction under this scheme.⁴⁴ Following a petition to the Court, and the firing of shells on an Arab village, four Arab villages were added to the list.⁴⁵

2. *Land Development*

The Ministry of Interior is authorized to draw the boundaries of municipalities.⁴⁶ This enables the Ministry to deter-

38. *Id.*

39. KRETZMER 1990, *supra* note 26, at 107-08.

40. *See* Encouragement of Capital Investment Act, 1959, S.H. 234.

41. DOAKH SHNATI 48 LISHNAT 1997 V'L'KHESHBONOT SHNAT HA-KSAFIM 1996 [ISRAEL STATE COMPTROLLER REPORT (SCR) No. 48] 124 (1998), at <http://www.mevaker.gov.il> [hereinafter SCR 1997].

42. *Id.* at 128-29.

43. *See* KRETZMER 1990, *supra* note 26, at 108; *see also* ISRAEL TAX ORDINANCE: A CONSOLIDATED ENGLISH TRANSLATION INCORPORATING ALL AMENDMENTS TO-DATE UP TO AND INCLUDING AMENDMENT No. 110 (Aryeh Greenfield ed., 8th ed. 1996).

44. *See* KRETZMER 1990, *supra* note 26, at 108.

45. *See id.*

46. *See* Arie Wiernik, *Law of Real Property*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE 93, 98 (Alon Kaplan et al. eds., rev. ed. 1999); M. Dennis

mine the opportunities for development in every municipality. The Ministry of Interior can also establish new municipalities in order to ensure the homogeneity of their population.⁴⁷

The 1998 report of Adalah—a human rights organization that advocates the rights of Arabs in Israel—gives as an example a comparison of the municipal boundaries of the predominantly Arab town of Nazareth, and its immediate neighbor, the predominantly Jewish town of Upper-Nazareth.⁴⁸ Nazareth, with 60,000 residents, has jurisdiction over an area of 16,000 dunums, while Upper-Nazareth, with 40,000 residents, controls an area of 40,000 dunums.⁴⁹

The State Comptroller has also criticized the Ministry of Interior's method of allocating regular development budgets.⁵⁰ These are budgets that are designated for maintenance and development of infrastructure in existing municipalities. They are distributed separately to Arab, Druze, and Jewish municipalities. The Comptroller has found that the funds are distributed without taking into consideration the current level of development in the respective municipalities.⁵¹ This results in discrimination between the groups as this policy maintains the disparity between the relatively developed Jewish municipalities and the less prosperous Druze and Arab municipalities.

Throughout the country, the Israeli Land Administration (ILA) controls land development for residential and other purposes.⁵² The ILA is a statutory agency established to administer state-owned lands.⁵³ These lands comprise about 93

Gouldman, *Law of Planning and Building*, in ISRAELI BUSINESS LAW: AN ESSENTIAL GUIDE, *supra*, at 103, 104.

47. Pekudat ha-iriot [Nosak Ha-Dash] [Municipalities Act [New Version]], § 2.

48. See ADALAH, *supra* note 26, at 59.

49. *Id.*

50. DOAKH SHNATI 53 LISHNAT 2002 V'L'KHESHBONOT SHNAT HA-KSAFIM 2001 [ISRAEL STATE COMPTROLLER REPORT (SCR) NO. 53] 89-90 (2003), at <http://www.mevaker.gov.il> [hereinafter SCR 2002].

51. *Id.*

52. Rachel Alterman, *Mi Yemalel Gvurot Mekarka-ey Israel? Behina shel Hazdakot Le-Hemshech Ha-Baalut Hamekomit Al Mekarkein* [Who will Utter the Greatness of Israel's Land? Analysis of the Justification for Local Ownership of Land], 21 IYUNEY MISHPAT [TEL-AVIV U. L. REV.] 535 (1998).

53. Khok Minhal Mekearka-ey Yisra-el [Israel Lands Administration Law], 1960, 14 L.S.I. 50.

percent of the land in Israel.⁵⁴ The relevant law from 1960 establishes a council, the Council of Israel Lands (CIL), and vests it with the authority to set policy goals for the ILA to follow.⁵⁵ The CIL is composed of between 18 and 24 members, half of which are appointed by the Jewish National Fund, an organ of the World Zionist Organization, and half of which are appointed by the government.⁵⁶

The CIL has not been very active, and has been even less independent. A 1996 study demonstrated that policy decisions were actually taken at the government level, by ministers in charge of the ILA and by the Ministry of Housing.⁵⁷ The decisions were heavily slanted to cater towards the interests of the Jewish agricultural sector, a group that is over-represented in the CIL.⁵⁸ Neither the law nor CIL resolutions set any guidelines for allocating state lands.⁵⁹

The ILA and the Ministry of Housing determine the allocation of lands for the development of residential areas.⁶⁰ Both use private associations in the allocation process. Instead of directly dealing with individual applications, the ILA and the Ministry of Housing delegate authority to these private associations that assume responsibility for distributing those lands to individual applicants.⁶¹ These private associations filter out individuals whom they find undesirable.⁶² Thus, private associations of secular Jews refuse Arab and religious applicants, while private associations of ultra-religious Jews admit only members of their group.⁶³ The authors of this Article do

54. See Alterman, *supra* note 52.

55. See Israel Lands Administration Law, 1960, 14 L.S.I. 50.

56. See Ass'n for Civil Rts. in Isr. (ACRI), *Comments on the Israeli Government's Report to the UN Human Rights Committee*, 28 J. PALESTINE STUD. 141, 153 (1998).

57. Eyal Benvenisti, "Nifrad Aval Shaveh" *B'Haktza-at Mekarka-ey Yisra-el L'Megurim* ["Separate but Equal" in the Allocation of State Land for Housing], 21 IYUNEY MISHPAT UNIVERSITAT TEL-AVIV [TEL-AVIV U. L. REV.] 769, 793-96 (1998).

58. *Id.*

59. See Khok Yesod : Mekarka-ey Yisra-el [Basic Law: Israel Lands], 1960, 14 L.S.I. 48-50.

60. See Israel Lands Administration Law, 1960, 14 L.S.I. 50.

61. H.C. 6698/95, Kaadan v. Minhal Mekarke'ey Yisra-el [Kaadan v. The Israel Lands Administration], 54 (1) P.D. 258, 282-83.

62. *Id.* at 264, 279-80.

63. *Id.* at 279-80, 282-83.

not know of any private associations of Arabs that have applied for a land allocation.

In terms of total allocation of land for housing, there is discrimination against the Arab population. In 1995, for example, 32,259 apartments were allocated for Jewish communities, compared to 2,377 for Arabs.⁶⁴

By contrast, the Ultra-Orthodox community benefits from a disproportional allocation in its favor. In 1998, the State Comptroller Report found numerous irregularities in the decision-making process of the Ministry of Housing that led to the excessive allocation of land for housing to Ultra-Orthodox Jews.⁶⁵ According to the report, the Ministry did not base its decisions on a survey of the needs of this community.⁶⁶ The supply of housing for the ultra-religious community far exceeded the estimated demand.⁶⁷ According to the information available at the Ministry of Housing, at the relevant time, supplies met the projected demands for the next seventeen years!⁶⁸ The Ministry, nevertheless, went ahead with plans for more housing projects despite the apparent lack of demand.⁶⁹

In a widely criticized move,⁷⁰ the ILA decided, in a series of decisions during the 1990s,⁷¹ to allow Jewish settlements to transform the state lands they had been using for agricultural purposes into residential areas. Most criticism focused on the distributive effects of a policy that, practically, meant the diversion of a significant part of an extremely scarce national resource to one sector of private individuals, namely, the Jewish

64. ADALAH, *supra* note 26, at 60.

65. DOAKH SHNATI 49 LISHNAT 1998 V'L'KHESHBONOT SHNAT HA-KSAFIM 1997 [ISRAEL STATE COMPTROLLER REPORT (SCR) No. 49] 123-131 (1999), at <http://www.mevaker.gov.il> [hereinafter SCR 1998].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. DOAKH SHNATI 44 LISHNAT 1993 V'L'KHESHBONOT SHNAT HA-KSAFIM 1992 [ISRAEL STATE COMPTROLLER REPORT (SCR) No. 44] 221 (1994), at <http://www.mevaker.gov.il> [hereinafter SCR 1993]; see also Oren Yiftachel, *Mediniut "Hafratat" Karka Haklait Beisrael [The Policy of "Privatizing" Agricultural Land in Israel]* (2000), <http://hakeshet.tripod.com/articles2/land3.htm>.

71. *Hachlatot Minhal Mekearka-ey Israel [Decisions of the ILA]* No. 533, 611, 717, 727, 737 (1993-1995), at: <http://www.mmi.gov.il> (last visited Apr. 4, 2005).

agricultural sector.⁷² However, as the development projects took shape, an altogether different distributive effect became apparent, namely, the opportunity to exclude Arabs and religious Jews from the fruits of this scarce national resource. Marketing their newly acquired resources, these *kibutzim* and *moshavim*—the different settlers' associations—adopted selection processes that enabled them to filter out applicants at their discretion. A petition is still pending before the Court that tells the story of an Arab couple who requested entry to a housing project developed by *Kibutz Alonim*, but was refused on the basis of their ethnicity.⁷³

The practice of allocating state lands to private associations took center stage in the case of the *Katzir* settlement.⁷⁴ The private association assigned with the task of receiving applications of prospective settlers turned down an Arab family on the basis of its ethnicity.⁷⁵ The case was pending in court for almost five years before the Court found that the practice was discriminatory and, hence, illegal.⁷⁶

The *Katzir* decision is careful not to close the door on all practices of private exclusion based on benign or seemingly benign criteria, such as security considerations or unique cultural affinities. For example, in the earlier-mentioned case of *Kibbutz Alonim*, the kibbutz distinguished itself from the *Katzir* case by contending that the *Katzir* precedent does not apply to residential areas that are designed to become an integral part of the more socially cohesive *kibutzim*.⁷⁷

3. *Unrecognized Villages*

In addition to lack of support, the state also systematically refuses to recognize Arab villages and settlements as entities that are entitled to basic services, such as electricity, water, telephone, access roads, and governmental support for public education and health facilities. The legal basis for this governmental policy of ignoring these unrecognized villages is found

72. See Yiftachel, *supra* note 70.

73. H.C. 5601/00, *Dweri v. Minhah Mekarka-ey Yisra-el* [*Dweri v. Israel Lands Administration*] (pending).

74. *Kaadon*, 54 (1) P.D. at 264.

75. *Id.* at 265.

76. *Id.* at 264, 286.

77. See H.C. 5601/00, *Dweri* (pending).

in the Planning and Building Act of 1965.⁷⁸ Under this law, buildings that are built without proper permits must not be connected to the electricity, water, and telephone systems, and may even be demolished.⁷⁹ The buildings in these unrecognized villages have no permits because the lands they occupy are not designated for housing in accordance with the existing building plans.

Most of the inhabitants of the unrecognized villages are Bedouins. Approximately 35,000 of them reside in about a hundred villages in the south of the country, and 40,000 others live in about forty villages in the north.⁸⁰ The illegal status of these villages makes them ineligible to receive other governmental services that are, officially, given equally to all citizens.

During the past few years, the government has consented to provide some of these services, in response to petitions that were submitted dealing with this issue. For example, until 1997, there were no mother and child preventive health services in these villages. Following a petition against the Ministry

78. Khok Ha-Tikhnun V'Ha-Bniya [Planning and Building Law], 1965, 19 L.S.I. 330, (1964-65).

79. *Id.* at 373-84.

80. ACRI Report, *supra* note 26, at 59-61. The situation of the Bedouin Population has to be considered in view of the urbanization policy that has been conducted by the government since the 1960s, and in view of continuing unsettled land ownership disputes between the Bedouins and the government. Since 1966, the government has established seven urban settlements for the Bedouins in the *Negev* desert region of the country. See Avinoam Meir, *Nomads, Development and Health: Delivering Public Health Services to the Bedouin in Israel*, 69 GEOGRAFISKA ANNALER, SERIES B, HUM. GEOGRAPHY 115, 117 (1987). These urban settlements were planned without consulting the intended Bedouin inhabitants, and do not accord with the Bedouin traditional way of life. See Kurt Goering, *Israel and the Bedouin of the Negev*, J. PALESTINE STUD., Autumn 1979, at 3, 3-8. Today, about half the Bedouin population resides in these settlements, which are poverty-stricken and lack basic infrastructure. See Meir, *supra*, at 117. The other half refuses to move to these settlements and, instead, either continues with the tradition nomad life, or lives in what the State Comptroller calls "*unplanned clusters*"—i.e. the unrecognized villages. See SCR 2002, *supra* note 50, at 95-97; Meir, *supra*, at 117. For a critical view of the government's policy toward the Bedouin minority, see generally Ronen Shamir, *Suspended in Space: The Bedouins and the Legal Regime in Israel*, in LAW AND HISTORY (D. Gottwin & M. Mautner eds., 1999).

of Health, the government agreed to establish six such clinics that would be accessible to Bedouin women and children.⁸¹

In 1998, in response to a similar petition against the Bedouin Education Authority, the High Court ordered the Ministry of Education to connect eleven elementary schools to the electricity system.⁸² The submission of additional petitions to the Court resulted in the renewal of social services in 2000,⁸³ and in the connection of some villages to drinking water sources in 2003.⁸⁴

4. Ministerial Development Budgets

The discrimination against the Arab minority is also evident in the allocation of the separate development budgets of the different government ministries. The Ministry for Industry and Commerce encourages the establishment of industrial areas by subsidizing the construction of industrial infrastructure.⁸⁵ The industrial areas in the Arab municipalities are much smaller than the ones in other municipalities.⁸⁶ Furthermore, most of the industrial areas in Arab municipalities lack basic infrastructure.⁸⁷

In spite of a governmental decision to allocate 120 million new Israeli shekels (NIS) to improve Arab municipalities within a four-year plan,⁸⁸ the ministry has never allocated the

81. H.C. 7115/97, *Adala v. Misrad Ha-Bri-ut* [*Adala v. Ministry of Health*], Dec. 19, 2001 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=97&case_nbr=7115.

82. H.C. 4671/98, *Dr. Awad Abu-Freih v. Reshut Ha-Khinukh L'Bedu-im Ba-Negev* [*Dr. Awad Abu Freih v. Bedouin Education Authority*], Jan. 17, 1999 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=98&case_nbr=4671.

83. H.C. 5838/99, *Ha-Mo-atza Ha-Ezorit L'Kfarim Ha-Bilti Mukarim Ba-Negev v. Sar Ha-Avoda V'Ha-R'vakha* [Regional Council for the Unrecognized Villages in the Negev v. Minister of Labor and Social Affairs], Sept. 11, 2000 (unpublished), at <http://62.90.71.124/files/99/380/058/e08/99058380.e08.HTM>.

84. H.C. 3586/01, *Ha-Mo-atza Ha-Ezorit L'Kfarim Ha-Bilti Mukarim Ba-Negev v. Sar Ha-Tashtiyot Ha-Le-umiyot* [Regional Council for Unrecognized Villages in the Negev, et. al., v. Minister of National Infrastructure], Feb. 16, 2003 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=01&case_nbr=3586.

85. See SCR 2002, *supra* note 50, at 5-78.

86. *Id.*

87. *Id.* at 51-52.

88. *Id.* at 5-78

necessary funds. The shortage of industrial activity creates a vicious cycle of poverty and negligence. Taxes on industrial activity constitute a major part of the municipal budget.⁸⁹ The lack of ability to collect such taxes affects the municipality's ability to receive governmental loans that are traditionally used for the building of residential infrastructure, such as sewage.⁹⁰

This odd link between industrial development and residential infrastructure is one of the reasons that, in 2001, about 70 percent of the municipalities in minority sectors did not have complete sewage systems.⁹¹

5. *Support for Schools and Kindergartens*

The budget of the Ministry of Education offers the easiest opportunity to differentiate among settlements. The Ministry of Education and the municipalities share the costs of public education.⁹² As a result, the public schools' budget is composed of the amount transferred from the Ministry of Education, together with the amount earmarked for education in the municipality's own budget,⁹³ which is derived from local taxation.⁹⁴

The State Budget offers numerous opportunities to route funds from the Ministry of Education to the municipalities. There are virtually no mechanisms that exist to monitor the routing process. Thus, the State Comptroller found that, in 1996, the Ministry of Education transferred funds through approximately 255 different budgetary items. Since there were so many budgetary items, there were also many Education Ministry officials who took part in an uncoordinated process of unequal transfers.

89. *Id.*

90. *Id.*

91. *Id.* at 33-34, 40-42.

92. See DALIA SPRINZAK ET AL., *ECON. & BUDGETING ADMIN., STATE OF ISR., Educational Legislation and the Structure of the Education System*, in MINISTRY OF EDUCATION: FACTS AND FIGURES 7, 7 (2001), available at http://www.education.gov.il/minhal_calcala/download/facts1.pdf.

93. See HUMAN RIGHTS WATCH, *SECOND CLASS: DISCRIMINATION AGAINST PALESTINIAN ARAB CHILDREN IN ISRAEL'S SCHOOLS* 46 (2001) (noting that, in addition to the Ministry of Education and local governments, some funding also comes from contributions from private organizations and parents).

94. See *id.*

There does not exist any clear and transparent criteria for allocation or mechanisms to monitor the needs at the receiving end. As a result, while the actual average per-student payment was 601 NIS, the payments allocated ranged between 74 NIS and 3,638 NIS per-student. The Arab municipalities constituted the least paid municipalities—forty-one out of the fifty least paid municipalities were Arab.⁹⁵

Such discrimination is also evident in the Education Ministry's programs for students with learning difficulties. The Ministry of Education allots special tutoring hours for students with special educational needs.⁹⁶ The funds for the tutoring hours are distributed within each sector separately, after the tutoring quotas have been allocated on the national level according to the sectors' relative proportion of the population.⁹⁷ As a result of this process, the students in the Arab sector receive educational support only according to their relative proportion in the population. This proportion does not correspond with their real share of students that are in need of tutoring within the national student population. A petition regarding this issue is now pending before the High Court.⁹⁸

In addition, the Ministry of Education adopted a number of plans designed to assist needy communities. In 1996, there were ten such plans. However, some municipalities, although defined as needy, did not get any funds under any of the plans. The State Comptroller mentions a number of Arab municipalities who did not receive any allocation under this program.⁹⁹

At the same time, a number of Jewish municipalities enjoyed funds from virtually all of the plans.¹⁰⁰ In 1997, after a petition regarding such plans was submitted against the Ministry of Education,¹⁰¹ the government declared that it intended

95. SCR 1998, *supra* note 65, at 313.

96. See HUMAN RIGHTS WATCH, *supra* note 93, at 129.

97. Cf. SHLOMO SWIRSKI ET AL., LOOKING AT THE ISRAELI MINISTRY OF EDUCATION BUDGET 1990-1996: MAJOR FINDINGS 1, 5, 8, 10 (Adva Center 1996).

98. H.C. 7677/02, *Va-adat Ha-Ma-akav L'Inyaney Ha-Khinukh Ha-Aravi v. Misrad Ha-Khinukh* [Follow-Up Committee on Arab Education, et. al., v. Ministry of Education] (decision still pending).

99. SCR 1998, *supra* note 65, at 321-22.

100. *Id.*

101. H.C. 2814/97, *Va-adat Ha-Ma-akav Ha-Elyona L'Inyaney Ha-Khinkh Ha-Aravi B'Yisra-el v. Misrad Ha-Khinukh* [High Surveillance Commission

to include the Arab sector in the projects. After almost 20 percent of the department's budget was allocated to Arab schools and institutions, the Supreme Court petition was withdrawn.¹⁰²

In 1987 and in 1991, the government decided to increase the resources available to Druze municipalities to the level allocated to Jewish municipalities.¹⁰³ In 1992, the Ministry for Education adopted a five-year plan for this purpose.¹⁰⁴ The Ministry of Housing joined in this effort. The State Comptroller Report for 1996 found that the plan was only partially implemented, and that funds continued to be allocated unequally.¹⁰⁵ According to the State Comptroller's report: "Despite the harsh educational-social condition of the Druze sector, it almost does not participate in the welfare and rehabilitation projects through which the Ministry [of Education] divests the compensatory funds."¹⁰⁶

In 1991, the Ministry of Education adopted a five-year plan designed to improve the education system in the Arab sector to a level that would enable it to function in "a satisfactory way."¹⁰⁷ State Comptroller reports for the years 1992, 1996, and 2002 indicate that the Ministry has not done enough to reach that goal.¹⁰⁸

for Matters of Arab Education in Israel v. Ministry of Education], 53(3) P.D. 233.

102. High Surveillance Commission for Matters of Arab Education in Israel v. Ministry of Education, 53(3) P.D. at 238.

103. DOAKH SHNATI 46 LISHNAT 1995 V'L'KHESHBONOT SHNAT HA-KSAFIM 1994 [ISRAEL STATE COMPTROLLER REPORT (SCR) No. 46] 347 (1996), at <http://www.mevaker.gov.il> [hereinafter SCR 1995].

104. *Id.*

105. *See generally* DOAKH SHNATI 47 LISHNAT 1996 V'L'KHESHBONOT SHNAT HA-KSAFIM 1995 [ISRAEL STATE COMPTROLLER REPORT (SCR) No. 47] (1997), at <http://www.mevaker.gov.il> [hereinafter SCR 1996].

106. *Id.* at 355.

107. Adva Center, *Israel's Budget for the Year 2000—The Education System*, April 2004, at <http://www.adva.org/ivrit/Budget2000IdkunEd.htm>.

108. DOAKH SHNATI 43 LISHNAT 1992 V'L'KHESHBONOT SHNAT HA-KSAFIM 1991 [ISRAEL STATE COMPTROLLER REPORT (SCR) No. 43] 390 (1993), at <http://www.mevaker.gov.il> [hereinafter SCR 1992]; SCR 1996, *supra* note 105, at 365-67; SCR 2002, *supra* note 50, at 11.

B. *Distinctions Based on Different Educational Needs*

The different ethnic and religious groups in Israel attend different schools. The curriculum is different, and some of the educational needs are different. Hence, there is another opportunity for inter-group discrimination predicated on seemingly benign characteristics.

The Ministry of Education funds the two types of state-sponsored schools: secular schools (*mamlachti*, or national), and Jewish religious schools (*mamlachti-dati*, or national-religious).¹⁰⁹ In addition, the Education Ministry funds schools of two private organizations of Ultra-Orthodox Jews: *Agudat Yisrael* and *Ma'ayan Hakhinuch Hatorani*.¹¹⁰

The State Comptroller repeatedly reports on irregularities in the funding of the institutions of *Mayan Hakhinuch Hatorani*, one branch of the Ultra-Orthodox school system.¹¹¹ The State Comptroller also noted that boarding schools in the national religious and Ultra-Orthodox sectors enjoyed funding from the Ministry of Education, the Ministry for Labor and Social Welfare, and the Ministry of Religious Affairs (before the latter was dismantled). The State Comptroller found that there was no coordination among the three ministries in this respect and, as a result, some boarding schools were overpaid.¹¹² The Ministry for Religious Affairs was also involved in funding various religious activities, primarily Jewish, until it was dismantled and absorbed into the Ministry of Internal Affairs, which carried on with the same policies.¹¹³

109. See Khok Khinukh Mamlakhti [State Education Law], 1953, 7 L.S.I. 5713 (1952-53).

110. See Ministry of Education, *Statistical Data on Budget and Funding* (2004) at <http://cms.education.gov.il/NR/rdonlyres/C72270A4-171F-4E3C-95BC-0D4D5C5EE87F/18118/M8.pdf>.

111. SCR 1996, *supra* note 105, at 156; see also VARDA SHIFFER, THE HAREDI EDUCATION SYSTEM, ALLOCATION, REGULATION AND CONTROL (1998, in Hebrew); AMNON DEH-HARTOCH [AMNON DE-HARTOG], TEMICHAH HA-MEDINAH BE-MOSDOT TZIBUR: CHAKIKAH MUL METZUIT, HATZAAT MEDINIUT [GOVERNMENT SUPPORT OF PUBLIC INSTITUTIONS: LEGISLATION VERSUS REALITY, A POLICY PROPOSAL] 16-18 (1999).

112. SCR 1996, *supra* note 105, at 344-45.

113. On the transfer of the authorities of the Ministry of Religious Affairs to the Ministry of Internal Affairs, see the Protocol of the Knesset Committee of Internal Affairs and Environment Protection (March 7, 2005), <http://www.Knesset.gov.il/protocol/data/html/pnim/2005-03-07-01.html> (discuss-

In addition, the Ministry of Religious Affairs (before being absorbed by the Ministry of Internal Affairs) supported institutions devoted to Jewish religious studies for male adults. The amount of money that was transferred comprised approximately half of the Ministry's entire budget.¹¹⁴

The State Comptroller found an increase in the number of students supposedly attending such schools, which exceeds the general growth rate of students attending higher education institutions.¹¹⁵ The State Comptroller also found numerous irregularities suggesting that the number of students reported exceeds the number of students actually attending the institutions.¹¹⁶ These irregularities persisted despite previous reports describing the same phenomenon.¹¹⁷

C. *Distinctions Based on Different Cultural and Religious Services*

In accordance with the Jewish Religious Services Act of 1971,¹¹⁸ the Minister of Religious Affairs transferred funds to religious councils established in every Jewish municipality. The Chief Rabbinate, established under the Chief Rabbinate Act of 1980,¹¹⁹ was also financed from this budget.

In 1998, the non-Jewish sector received only 1.86 percent of this Ministry's budget.¹²⁰ A general petition that was submitted against this budget, alleging discrimination against the Arab minority,¹²¹ failed for being too general. A subsequent petition was submitted and upheld against the discriminatory

ing complaints about lack of governmental support for religious services to the Moslem community in Israel).

114. SCR 1998, *supra* note 65, at 245.

115. *Id.* at 243.

116. *Id.*

117. DOAKH SHNATI 45 LISHNAT 1994 V'L'KHESHBONOT SHNAT HA-KSAFIM 1993 [ISRAEL STATE COMPTROLLER REPORT (SCR) NO. 45] 345-361 (1995), at <http://www.mevaker.gov.il> [hereinafter SCR 1994]; SCR 1995, *supra* note 103, at 236-261.

118. Jewish Religious Services (Consolidated Version) Law, 1971, 25 L.S.I. 125.

119. Chief Rabbinate of Israel Law, 1980, 34 L.S.I. 97.

120. H.C. 240/98, *Adalah v. Ha-Sar L'Inyaney Datot* [*Adalah v. Minister of Religious Affairs*], 52(5) P.D. 167, 187.

121. *Id.*

allocation of funds for the maintenance of cemeteries.¹²² Another petition was submitted against the Ministry of Religious Affairs, addressing the discriminatory allocation of funds for the maintenance and preservation of religious buildings.¹²³ The petition was withdrawn after the Government agreed to allocate approximately 20 percent of the budget to religious Arab communities.

The Ministry for Religious Affairs also supported religious youth movements.¹²⁴ A petition submitted in 1997 reveals irregularities and favoritism in the disbursement of funds amongst such movements.¹²⁵

The Ministry for Religious Affairs also supports institutions that are active in the promotion of Jewish religious and Ultra-Orthodox cultural events.¹²⁶ Among these activities are bible studies. The State Comptroller Reports describe numerous irregularities in the disbursement of these funds.¹²⁷

IV. THE COURT'S RESPONSES

No one can accuse the Supreme Court of Israel of disregarding the principle of equality. The Court has long recognized the principle of equality as one of the basic tenets of Israeli law, and has also applied it in the context of the Arab/Jewish divide. Some of the Court's most impressive decisions develop this principle in a number of contexts. This is especially true in the context of gender and sexual orientation.¹²⁸

It is well known, however, that it is not a simple task to apply a *seemingly* straightforward principle such as non-discrim-

122. H.C. 1113/99, *Adalah v. Ha-Sar L'Inyaney Datot* [*Adalah v. Minister of Religious Affairs*], 54(2) P.D. 164, 168. See also discussion, *infra*, in Part IV.B.

123. H.C. 1399/00, *Ittijah v. Ha-Sar L'Inyaney Datot* [*Ittijah v. Minister for Religious Affairs*], Mar. 25, 2001 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=00&case_nbr=1399.

124. H.C. 5290/97, *Ezra v. Ha-Sar L'Inyaney Datot* [*Ezra v. Minister of Religious Affairs*], 51(5) P.D. 410, 415.

125. *Id.*

126. SCR 1997, *supra* note 41, at 294-310.

127. *Id.*

128. See, e.g., H.C. 453/94, 454/94, *Shdulat Ha-Nashim B'Yisra-el v. Mem-shelet Yisra-el* [*Israel Women's Network v. The Government of Israel*], 48(5) P.D. 501 (English translation available at <http://62.90.71.124/eng/verdict/framesetSrch.html>).

ination. The simple *color-blind* application of the non-discrimination principle proves insufficient mainly in two contexts: (1) in protecting minority interests against facially neutral discrimination; and (2) in recognizing special needs of certain minorities that require positive measures, such as public funding of cultural institutions and educational programs.

A. *The Blindness of the Color-Blind Approach*

The sad account set forth in Part III demonstrates that ample opportunities exist for those who want to avoid the implementation of the principle of inter-group equality in Israel. The question, then, is how the Israeli Court should respond to such attempts.

An examination of the Court's jurisprudence in discrimination cases involving the Arab-Jewish divide reveals that the Court has adopted an attitude that is diametrically opposed to the U.S. strict scrutiny analysis designed to protect discrete and insular minorities. According to the strict scrutiny test doctrine, when courts are faced with a governmental or legislative classification that disadvantages such a minority, the burden is on the state to show that the classification has been narrowly tailored to serve a compelling government interest.¹²⁹

The Supreme Court of Israel, on the other hand, has adopted a color-blind approach. If discriminatory policies can be explained on any seemingly neutral grounds other than grounds of group-based bias, they are upheld. The petitioner has the almost unattainable burden of proving in court that group membership, rather than seemingly neutral criteria, forms the basis of the challenged policy. Since there are abundant neutral criteria upon which to explain group-based discrimination, judicial scrutiny of pro-Jewish discriminatory policies has failed the Arab minority in the opinion of the authors of this Article.

The first case to adopt the color-blind approach related to the expropriation of lands near the Arab town of Nazareth in 1952.¹³⁰ The Court ruled that the fact that all the lands in question belonged to Arabs was not enough to establish dis-

129. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

130. H.C. 30/55, *Va-ada Le-Hagana Al Admot Nazrat Ha-Mufkaot v. Sar Ha-Ozar* [Committee for the Defense of the Expropriated Lands of Nazareth v. Minister of Finance], 9 P.D. 1261.

crimination.¹³¹ The Court found that those lands were expropriated because of their location, not because of their ownership.¹³² For the petitioners to prevail, they would have had to establish an intention to discriminate on the basis of the identity of the owners.¹³³

The second landmark case to utilize the color-blind approach is the case of *Wattad v. Ministry of Finance*.¹³⁴ This case involved governmental efforts to legalize the practice of providing “discharged soldiers’ benefits” only to Jews.¹³⁵ Both Jews who actually served as soldiers, and those exempted from service (the Ultra-Orthodox), were to receive such benefits.¹³⁶ After the petition was submitted, it became clear to the Attorney General that this practice would not withstand judicial scrutiny because there was no way of explaining why exempted Jews benefited from the scheme, while exempted *non-Jews* did not. Thus, a new basis for paying such money to exempted Jews was found. Those Jews had been exempted from service because, as devout Ultra-Orthodox Jews, they spent all their time studying Bible and did not work.¹³⁷ The new basis for paying them such money was, therefore, the fact that they devoted all their time to Torah studies.¹³⁸ The Court readily accepted this new ground: The State of Israel, the judges said, had a clear interest in preserving the Ultra-Orthodox culture, whose existence had been threatened during the Holocaust and, later, by secularism and modernity.¹³⁹ In any case, the Court found no showing of an intention to discriminate on a group-biased basis.¹⁴⁰

131. *Id.* at 1265.

132. *Id.* at 1265-66.

133. *Id.* at 1266.

134. H.C. 200/83, *Wattad v. Sar Ha-Otzar* [*Wattad v. Minister of Finance*], 38(3) P.D. 113.

135. *Id.* at 115-117.

136. *Id.*

137. *Id.*

138. *Id.* at 121.

139. *Id.* at 122-23.

140. *Id.* at 123.

The use of the color-blindness analysis also prevailed in a number of petitions involving the decision to extend after-hours education disproportionately to Jewish settlements.¹⁴¹

The Court opened up its eyes to see group based discrimination only in the *Katzir* case discussed in Part III.A.2.¹⁴² The Court ruled that the exclusion of an Arab family from the settlement was illegal.¹⁴³ In this case, it was virtually impossible to apply color-blindness because the association openly acknowledged that it rejected the family because of its Arab ethnicity.¹⁴⁴ The association did not even accept for consideration the application forms filled out by the Arab family.¹⁴⁵

A significant development was the introduction of what may be called a “demographic equality” presumption. Given the fact that group-based allocations are prevalent, the Court reverted to a presumption that such allocations should be based on the percentage of the relevant communities in the general population. Thus, in a decision involving an allocation of public funds for cemeteries to the different religious groups, the Court ruled that funding must be allocated according to the percentage of each religious denomination within the general population.¹⁴⁶

In a subsequent decision from December 2001, the Court rejected a petition of Arab municipalities regarding the Ministry of Housing’s program to rehabilitate poor towns, settlements, and neighborhoods.¹⁴⁷ Candidates for rehabilitation were supposedly selected on the basis of facially neutral criteria that, nevertheless, resulted in the exclusion of forty-three out of forty-eight Arab settlements recognized as poor by the Central Bureau of Statistics, whereas all of the Jewish settlements were included.¹⁴⁸ The Ministry of Housing acknowl-

141. H.C. 3954/91, *Agbariah v. Sar Ha-Khinukh* [*Agbariah v. Minister of Education*], 45(5) P.D. 472, 478; H.C. 3491/90, *Agbariah v. Sar Ha-Khinukh* [*Agbariah v. Minister of Education*], 45(1) P.D. 221.

142. *Kaadan*, 54(1) P.D. at 286.

143. *Id.* at 278.

144. *Id.*

145. *Id.* at 265.

146. *Adalah v. Minister of Religious Affairs*, 54(2) P.D. at 165.

147. H.C. 727/00, *Va-ad Rashey Ha-Rashuyot Ha-Mekomiyot Ha-Araviyot B'Yisra-el v. Sar Ha-Binuy V'Ha-Shikun* [*The National Committee of Arab Mayors v. Ministry of Housing*], 56(2) P.D. 79.

148. *Id.* at 83.

edged the discriminatory effect of past policies and told the Court that the entire program was under reconsideration.¹⁴⁹ The Court decided that if the program were to be continued, it should allocate to the Arab sector 20 percent of the budget to reflect the Arab percentage of the population in Israel.¹⁵⁰

This percentage may seem arbitrary for a number of reasons, such as because the percentage of poor Arab towns and villages is much higher than 20 percent and because past discrimination would seem to entitle them to an additional compensatory allocation. Nevertheless, as a general rule, this benchmark of 20 percent of government budgets is a welcome change in judicial attitude. In a territorially divided society, with distinct cultural and religious needs, a general policy of allocating resources based upon the rule of thumb of 20 percent/80 percent—or a breakdown based on the demographic mix of the different religious denominations when allocating funds for religion-based services—seems the best strategy to address an allocation system that is rife with opportunities to discriminate through the adoption of facially neutral criteria.¹⁵¹ To complement this rule of thumb, what is still needed is a judicial indication that any modification of this ratio will be subjected to strict scrutiny.

B. *Enhancing Judicial Review of Allocation Procedures*

1. *Institutional and structural deficiencies*

Informational deficiencies, some of which are described in Part III, reduce the effectiveness of judicial intervention. Lack of sufficient information prevents potentially aggrieved parties from initiating litigation or from presenting sufficient evidence to support their cases. When information finally becomes available, judicial intervention may already be too late to prevent illegalities from taking place.

When decisions regarding the allocation of limited resources are the focus of judicial attention, timing is essential. For example, late information is meaningless when the allotment of residential units or the disbursement of funds is at

149. *Id.* at 84-86.

150. *Id.* at 95.

151. As it turns out, in the particular case, the decision was ineffectual because the Ministry decided to abandon the program entirely.

stake. The limited resource is depleted before potential litigants know about their legal rights. At that late stage, it is virtually impossible to affect the return of distributed funds to the state's coffers, or to evict persons already occupying the residential units under dispute. Moreover, recipients of these resources are often *bona fide* third parties that acted in good faith reliance when they received the limited resources in question. The Court usually refrains from frustrating such expectations.

Take, for example, the case of *Poraz v. Ministry of Housing*,¹⁵² involving the Ministry's decision to allocate state lands to private associations that would, in turn, distribute them to individual purchasers.¹⁵³ The associations were related to specific religious political parties, and the land was allocated on the basis of the relative political strength of these parties at the time.¹⁵⁴ The Court found that this allocation decision infringed upon the equality principle and, hence, declared it illegal.¹⁵⁵

Nevertheless, the Court stopped short of eliminating the project altogether. By the time the petition was brought, development was already under way.¹⁵⁶ The Court refused to upset the legitimate expectations of the individuals who had already purchased units in the different projects.¹⁵⁷ Of the illegal allotment of 2,300 residential units, only the remaining, unassigned 850 units were still available for distribution.¹⁵⁸ Given the fact that the initial illegal allocation already determined the social character of these projects, one can safely assume that the remaining 850 units also went to members of religious and ultra-religious groups.

Another more recent example that timing is truly of the essence in such allocation cases is the Supreme Court's decision concerning the allocation of scarce land resources.¹⁵⁹ A

152. H.C. 5023/91, *Poraz v. Sar Ha-Binuy V'Ha-Shikun* [*Poraz v. Minister of Housing*], 46(2) P.D. 793.

153. *Id.* at 796.

154. *Id.* at 799.

155. *Id.* at 801.

156. *Id.* at 803.

157. *Id.* at 804.

158. *Id.* at 805.

159. *Free Nation NGO v. Ministry of Construction and Housing*, May 30, 2000 (unpublished).

prime area was established for an Ultra-Orthodox township, El'ad. It was given the designation of type A settlement, and generous financial funding was extended by the government to attract prospective residents.¹⁶⁰ Despite finding these policies both discriminatory and illegal, the Court decided against upsetting the residents' expectations.¹⁶¹

Even when information is available in a timely manner, it still proves difficult to use the information in court. For example, what is often clear to readers of newspapers becomes unclear in court, when the affidavit presented by the state agency in response to the petition presents an innocuous story.¹⁶² The fact-finding process, in response to petitions submitted for judicial review of administrative action in Israel, is far from satisfactory. The long-standing judicial policy of not allowing cross-examination with respect to submitted affidavits¹⁶³ significantly reduces the possibility of exposing untrue statements.

This practice contrasts sharply with the practice in other judicial review procedures. Low-level administrative judges in continental legal systems receive the actual administrative dossier and, consequently, they can and must ascertain the facts directly.¹⁶⁴ By contrast, the Israeli judges at the High Court have no more than the story that is presented to them after the fact, by the authority whose decisions are being reviewed,¹⁶⁵ and without the benefit of cross-examination. Sitting at the apex of the judicial system, burdened with a torrent of pressing petitions, the Israeli High Court has neither the tools nor the patience to examine the minute facts that can expose the veracity of the particular agency's explanations.

As a result, the Israeli High Court of Justice is not the place for examining complex issues of fact. This precludes a

160. *Id.*

161. *Id.*

162. See H.C. 581/87, Zucker v. Sar Ha-Panim [Zucker v. Minister of Interior], 42(4) P.D. 529, 535-36 (finding that refusal to build soccer stadium was explained solely by planning considerations, although real motivation was to favor religious groups).

163. See Itzhak Zamir, *Administrative Law*, in THE LAW OF ISRAEL: GENERAL SURVEYS 52, 79-80 (Itzhak Zamir & Sylviane Colombo eds., 1995).

164. See, e.g., Fritz Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion*, 87 U. PA. L. REV. 954, 962 (1938-1939); Roger Warren Evans, *French and German Administrative Law with Some English Comparisons*, 14 INT'L & COMP. L.Q. 1104, 1119 (1965).

165. See Zamir, *supra* note 163, at 68.

thorough review of decisions concerning budget allocation. As was made clear in recent litigation, the court is not the forum to ascertain whether the budget of a certain ministry allocates resources fairly between different groups.

In the case of *High Surveillance Commission for Matters of Arab Education in Israel v. Ministry of Education*,¹⁶⁶ the Court declared that it was only capable of examining specific claims of discrimination.¹⁶⁷ The Court refused to examine the more general claim that the governmental project on rehabilitation of neighborhoods discriminated against needy Arab communities.¹⁶⁸ The Court reasoned that such an examination would require an assessment of a wide spectrum of considerations that were beyond the scope of the submitted petition.¹⁶⁹

In the case of *Adalah v. Ministry of Religious Affairs*,¹⁷⁰ the Court refused to examine the general claim that a budget allocating less than 2 percent to Arab religious institutions discriminated against the Arab minority.¹⁷¹ Quite understandably, the Court refused to perform a general review of the national budget and its priorities.¹⁷² A subsequent, more narrowly focused petition, also submitted by Adalah, proved more successful. In the latter case, the Court intervened after the petitioner was able to show that the amount allocated in the Ministry of Religious Affairs' budget for maintenance of cemeteries benefited only Jewish cemeteries.¹⁷³

In addition to informational deficiencies, judicial intervention in administrative allocation decisions with respect to limited public resources also suffers from the Court's inability to oversee the implementation of its decisions. Take, for example, the last mentioned case with respect to the budget for maintenance of cemeteries. After finding an absence of funding for minority cemeteries, the Court had to decide what remedy to offer. It was trite to rule that the Ministry for Religious Affairs should allocate its available resources equally.

166. *High Surveillance Commission for Matters of Arab Education in Israel v. Ministry of Education*, 53(3) P.D. 233.

167. *Id.* at 239.

168. *Id.* at 240.

169. *Id.* at 239.

170. *Adalah v. Minister of Religious Affairs*, 52(5) P.D. 167.

171. *Id.* at 187-88.

172. *Id.*

173. *Adalah v. Minister of Religious Affairs*, 54(2) P.D. at 177-79.

More concrete measures had to be offered in order to effect actual equality. The Court, however, could not intervene in the actual disbursement of funds and, hence, could not determine which transfers were legal and which were not. At the end of a rather long section of the opinion discussing remedies, the Court settled on an order to allocate that year's budgetary provisions related to maintenance of cemeteries on an equal footing.¹⁷⁴ The Court added instructions for the preparation of future budgets, although no assurance could be given that these instructions—essentially a rehearsal of the duty not to discriminate—would have any impact on the future budgetary decisions of these government officials.¹⁷⁵

The other interrelated deficiency is the lack of available sanctions for the court to impose on bureaucrats and politicians. This problem is also highlighted by the cemeteries case. From the perspective of the Ministry of Religious Affairs, the Court's decision mattered very little. Subsequent refusal by the Ministry to respect the Court's decision, or foot dragging in the Ministry's method of implementation, could attract no judicial or other sanctions. The submission of a new petition would yield little more than the recurring and ineffective judicial rebukes.

Indeed, another unique phenomenon of judicial review of administrative action is the fact that the reviewed agencies have little to fear from the outcome of judicial review. At most, the court will require them to act in accordance with the law. In the meantime—and efforts are always made to extend that time—discrimination can continue with personal and institutional impunity.¹⁷⁶

When faced with such a predicament, the *rational* attitude of many adversely affected individuals is to avoid litigation altogether and, instead, to cultivate good personal relations with the incumbent bureaucracy, in the hope of gaining *something*, rather than nothing.

174. *Id.* at 181-82.

175. *Id.* at 183-84.

176. On both informational deficiencies and lack of sanctions in petitions regarding discrimination against the Arab minority in Israel, see YORAM RABIN & MICHAL LUTZKY, *THE CONTINUING BUDGETARY DISCRIMINATION AGAINST THE ARAB SECTOR* (2002, in Hebrew).

2. *Possible Institutional Responses*

a. Procedural Review

While the above-mentioned institutional deficiencies are real, one could create some method of overcoming them, or of compensating those harmed as a result of their existence. Judges who are resolute to prevent rampant discrimination against minorities can reduce opportunities for discrimination by developing decision-making procedures within the administrative agencies that will be capable of ensuring accountability and reduce the opportunities for officials to channel funds illegally.

In Israel, the administrative process is hardly constrained by legislation. In fact, due to the political leverage the government has over Knesset members, the legislators have no institutional interest in controlling the government, or in reducing bureaucratic slack.¹⁷⁷ Thus, in Israel it has been the court's role to develop doctrines with respect to administrative process, such as the right to a fair hearing. With an uninterested Knesset, however, the Court did not move much beyond these doctrines. It stopped short, for example, of recognizing a right of free access to information for every individual, and not just for the adversely affected party. The Court also shied away from recognizing an individual's full right to information from public offices and from recognizing a general duty to resort to public tenders before negotiating government contracts.

The promise of judicial focus on the allocation process is demonstrated in a case decided in 2000 that involved a decision of a municipality to lease, free of charge, a plot of land to a private association.¹⁷⁸ The association intended to build an ultra-religious cultural center, on a plot that was situated within a secular neighborhood.¹⁷⁹ The allocation process in this case followed the typical, improper practice that has been prevalent in so many similar cases. The sound of drilling and construction work was the first indication for the neighbor-

177. See Eyal Benvenisti, *Party Primaries as Collective Action with Constitutional Ramifications: Israel as a Case Study*, 4 THEORETICAL INQUIRIES IN LAW 175 (2002) (analyzing the relationship between Knesset Members and the government).

178. H.C. 3638/99, Blumenthal v. Iryat Rekhovot [Blumenthal v. Municipality of Rehovot], 54(4) P.D. 220.

179. *Id.* at 224.

hood's residents that the project was underway.¹⁸⁰ By the time the neighborhood residents petitioned the Court and the Court issued an injunction, a structure of two and a half stories high was already in place.¹⁸¹ Nevertheless, in a rather exceptional decision, the Court stood firm and annulled the allocation.¹⁸² Justice Strassberg-Cohen expressed deep concerns regarding the lack of administrative guidelines for the allocation of public lands.¹⁸³ She acknowledged the fact that the Attorney General had begun, as a result of the petition, to form such guidelines.¹⁸⁴ Nevertheless, the Court decided not to wait for the Attorney General's guidelines, but instead, itself issued the necessary guidelines.¹⁸⁵

This decision includes a number of novel developments in the doctrine of administrative law. First, allocation procedures must, henceforth, include publication of the intention to allocate lands.¹⁸⁶ Second, they must provide hearing opportunities for the potentially affected residents.¹⁸⁷ Third, they must ensure open deliberation in the municipal council that is reflected in written protocols.¹⁸⁸ Finally, they must provide for consultation with relevant experts.¹⁸⁹ All these newly declared requirements, being an extension of existing principles, were applied retroactively, despite the association's assertion that it lost an investment of \$560,000.¹⁹⁰ Justice Strassberg-Cohen hinted at the possibility of the association bringing a damages suit against the municipality.¹⁹¹

180. *Id.* at 234.

181. *Id.* at 237.

182. *Id.*

183. *Id.*

184. *Id.* at 235.

185. *Id.* at 236-37.

186. *Id.* at 230.

187. *Id.*

188. *Id.* at 231.

189. *Id.* Note that these requirements add to the requirements of publication and hearing under the *Planning and Building Law*. The latter procedure is more limited in terms of its scope as it does not question the purpose of the allocation.

190. *Blumenthal*, 54(4) P.D. at 231.

191. *Id.* at 239. Such a suit is well-based in Israeli law. See C.A. 324/82, *Iriyat Bney-Brak v. Rotbard* [Municipality of Bney-Brak v. Rotbard], 45(4) P.D. 102, 110 (1982).

Readers of this Article should appreciate the strong tone of this recent decision, compared with the timidity of previous ones. While this court ruling focuses on a municipality's decision, the Court's rationale can be applied with equal if not greater force to decisions concerning the allocation of state lands by the ILA and by the Ministry of Housing. The decision implies its potential relevance to ILA allocations through its constant reference to the *Poraz* case¹⁹² and to critical literature concerning the processes of land allocation by the ILA. It remains to be seen whether this decision is a harbinger of a new attitude and whether the Court would prove as resolute in applying the same rules in the context of allocating state lands.

Instead of focusing on efforts to clear up the bureaucratic hurdles responsible for the dismal situation of the "unrecognized villages," the Court opts for an ad hoc, "fire control" method of dealing with this troublesome issue. The Court opts, for example, to resolve sporadic cases of misallocating basic services such as access to water, electricity, health services, and schools. These petitions prompt, in many instances, out-of-court settlements. In those cases, it seems that the Court prefers to supervise the actual allocation, instead of simply upholding the petition (which would put an end to its opportunity to supervise). In the petition for the establishment of preventive health clinics in the unrecognized villages,¹⁹³ for example, the Court dismissed the petition only after overseeing, during a period of four years, the establishment of all six clinics the government committed itself to establishing.

In a similar manner, the Court oversaw that Bedouin elementary schools were connected to the electricity network,¹⁹⁴ that other elementary schools were established,¹⁹⁵ and that a committee followed through in connecting the unrecognized

192. *Poraz*, 46(2) P.D. 793.

193. *Adalah v. Ministry of Health*, Dec. 19, 2001 (unpublished).

194. H.C. 4671/98, *Dr. Awad Abu Freih v. Bedouin Education Authority*, Jan. 17, 1999 (unpublished).

195. H.C. 5221/00, *Dakhlala Abu Ghardud v. Ha-Mo-atza Ha-Ezorit Ramat Ha-Negev* [*Dakhlala Abu Ghardud v. Ramat Ha-Negev Regional Council*], Nov. 26, 2002 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=00&case_nbr=5221.

villages to a clean water system¹⁹⁶ before dismissing the petitions.

The Court's tendency to encourage out-of-court settlements is not limited to the issue of the unrecognized villages. The Court has also encouraged the government to accede to petitioners' claims in cases regarding equal distribution of holiday charity funds to poor families of all religions.¹⁹⁷ Furthermore, the Court has encouraged the government to settle claims with respect to allocating funds for the maintenance and preservation of religious buildings,¹⁹⁸ establishing nurseries and kindergartens in the Bedouin urban settlement of *Segev Shalom*,¹⁹⁹ and stipulating that military service is a condition for housing benefits.²⁰⁰

On the one hand, it seems that this approach bears fruit in the sense that changes are made on the ground and resources are allocated in a less discriminatory fashion. However, this ad-hoc strategy, so long as it is not accompanied by decisions having declarative value, does not provide any systematic protection against a wide range of discrimination on a national, religious, and cultural basis. Moreover, this ad hoc method does not necessarily result in a swift and just settlement of disputes. A petition that was submitted in 2000, alleging discrimination in the allocation of certain budgets to Arab municipalities, was withdrawn after the government appointed a special committee to examine the situation and to offer solutions.²⁰¹ In 2001, after the same discriminatory criteria were

196. Regional Council for Unrecognized Villages in the Negev, et. al., v. Minister of National Infrastructure, Feb. 16, 2003 (unpublished).

197. H.C. 2422/98, *Adalah v. Sar Ha-Avoda V'Ha-R'yakha* [*Adalah v. Minister of Labor and Social Affairs*], May 11, 1998, at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=98&case_nbr=2422.

198. *Ittajah*, Mar. 25, 2001 (unpublished).

199. H.C. 8534/99, *Va-ad Ha-Horim B'Yeshuv Segev Shalom v. Rosh Ha-Mo-atza Ha-Mekomit Ha-Memuneh B'Segev Shalom* [*Segev Shalom Parents Committee v. Appointed Local Council Chairman of Segev Shalom*], Jan. 19, 2000 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=99&case_nbr=8534.

200. H.C. 3114/01, *Bahjat Heil v. Misrad Ha-Binuy V'Ha-Shikun* [*Bahjat Heil v. Ministry of Housing*], at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=01&case_nbr=3114

201. The unfolding events are described in a petition to the High Court filed in 2001. H.C. 6223/01, *Ha-Va-ad Ha-Artzi Shel Rashey Ha-Rashuyot v.*

again used in the annual budget, the petition was re-filed, and is currently pending.²⁰²

b. Adequate Representation

Another necessary component in the procedural promotion of inter-group equality is the participation of minority representatives in decision-making bodies. The very presence of such representatives, even though they are in the minority, provides opportunities to monitor the decision-making processes on a first-hand basis. Rubber-stamping opportunities are reduced, and information asymmetries are minimized. Both ad hoc and long-term coalitions of representatives from different groups can form and include minority interests in the general logrolling process. Majority groups may, of course, seek subtle ways in which to render such minority representation ineffective. The only effect of participation—usually of token representatives appointed by the government—would then be to legitimize the majority groups' discriminatory actions. It would then, however, fall to the Court to ensure adequate representation by minority groups in the decision-making process.²⁰³

The right of minority groups to participate effectively in the political process has been recognized by the U.N. Human Rights Committee, which acknowledged the duty of member states to take "measures to ensure the effective participation of members of minority communities in decisions which affect them."²⁰⁴ The "right to participate effectively" in public life and in matters concerning the minority has been recognized in the 1992 U.N. Minorities Declaration,²⁰⁵ and in the 1995

Misrad Ha-Pnim [National Committee of Arab Mayors v. Ministry of the Interior] (pending).

202. *Id.*

203. Cf. Iris Marion Young, *Deferring Group Representation*, in ETHNICITY AND GROUP RIGHTS 349 (Ian Shapiro & Will Kymlicka eds., 1997) (arguing for adequate group representation).

204. *General Comment No.23 (5) on Article 27 / Minority Rights*, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), *reprinted in* 15 HUM. RTS. L.J. 234, 234-36 (1994).

205. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Agenda Item 97(b), Annex, art. 2(2)-(3) (1993).

European Framework Convention for the Protection of National Minorities.²⁰⁶

Realizing this promise for minorities, the Association for Civil Rights in Israel petitioned the Court in 1998 to appoint Arab members to the twenty-four-member CIL of the ILA.²⁰⁷ While this case was pending, the government appointed an Arab citizen, whose main credential appeared to be his affiliation with the Jewish Ultra-Orthodox *Shass* party.²⁰⁸ As the Attorney General insisted, the law did not mandate this appointment.²⁰⁹ The Court, however, did recognize a general duty derived from the general principle of equality in Israeli constitutional law, to ensure “adequate representation” of Arabs in the CIL.²¹⁰ The Court did not elaborate on the meaning of the term “adequate representation.” The Court rejected the suggestion that the ratio would be 1:5 and, instead, suggested an open-ended balancing test that takes into consideration the nature of the decision-making body, and its impact on the group seeking representation.²¹¹

The Court’s ultimate ruling suggested that the government *consider* abiding by the principle of adequate representation and appoint one more Arab representative.²¹² If one compares this subtle appeal to the much stronger demand to appoint women as part of the duty to ensure adequate representation of women in public service,²¹³ one can sense the Court’s hesitation.

206. EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, art. 15 (1995), available at http://www.ecmi.de/doc/CoE_Project/download/Article%2015%20FCNM.pdf.

207. H.C. 6924/98, Ha-Aguda L’Z’Khuyot Ha-Ezrakh v. Memshelet Yisrael [Association for Civil Rights in Israel v. The Government of Israel], 55(5) P.D. 15, 19.

208. See Interview with Hadas Tagary, ACRI Lawyer (March 30, 2003).

209. Elyakim Rubinstein, *On Equality For Arabs in Israel*, 1 KYRIAT HAMISHPAT 17, 23 (2001, in Hebrew).

210. Association for Civil Rights in Israel, 55(5) P.D. at 39.

211. *Id.* at 40.

212. *Id.* at 40-41. The government complied, and appointed another Arab to the CIL. See Interview with Hadas Tagary, ACRI Lawyer (March 30, 2003).

213. Israel Women’s Network v. The Government of Israel, 48(5) P.D. 501; H.C. 2671/98, Shdulat Ha-Nashim B’Yisra-el v. Sar Ha-Avoda V’Ha-R’vakha [Israel Women’s Network v. Minister of Labor and Social Affairs], 52(3) P.D. 630.

In a subsequent case, the Court rejected a petition seeking the appointment of more than two Arabs to the seventeen-member Planning and Building Commission in the Northern District, a region in which more than 50 percent of the inhabitants are Arabs.²¹⁴ The Court refused to accept the suggestion that the Commission should reflect the composition of the population in the area under its authority.²¹⁵ Instead, the Court was satisfied with the government's allegation that no suitable Arab candidates were qualified for the task.²¹⁶

The Court has also recently rejected a petition regarding adequate representation of Arab men and women on boards of directors of government-owned companies.²¹⁷ Although the Court acknowledged the government's responsibility to seek out qualified Arab candidates for appointment to the boards of directors, the Court agreed with the state's contention that such candidates are difficult to find, and that it has made sincere efforts to increase the number of Arab board members.²¹⁸

V. CONCLUSION

Inter-group equality, in a country where societies live, by and large, apart from each other, requires reliable mechanisms that can safeguard against the tendency of decision-makers from majority groups to discriminate on a group-biased basis. The Israeli Court has offered protection for minority group members in specific, proven cases of discrimination. However, in general, the Court has failed to develop effective procedural mechanisms, such as by ensuring representation and, in particular, elected minority representation.

Had the Court developed such effective, procedural mechanisms, it could have offered more systematic protection against inter-group discrimination. In fact, the Court never hinted that such mechanisms were required, or even desired.

214. H.C. 9472/00, *Ha-Va-ad Ha-Artzi Shel Rashey Ha-Rashuyot v. Misrad Ha-Pnim* [The National Committee of Arab Mayors v. Ministry of Interior], Nov. 15, 2001 (unpublished), at http://62.90.71.124/heb/verdict/search/verdict_by_case_rslt.asp?case_year=00&case_nbr=9472 .

215. *Id.*

216. *Id.*

217. H.C. 10026/01, *Adalah v. Rosh Memshet Yisra-el* [*Adalah v. Prime Minister of Israel*], 57(3) P.D. 31.

218. *Id.*

This Article argues that the Court's main contribution in preventing discrimination could be accomplished indirectly, by developing procedural safeguards, as opposed to intervening directly in allocation decisions. The Court can still play a significant role by developing and supporting such mechanisms.

VI. POSTSCRIPT

The time that elapsed between the submission of this Article and its preparation for publication saw the publication of the Report of the Official Commission of Inquiry Appointed to Investigate the Clashes between the Security Forces and Israeli Citizens in October 2000 (the so-called Orr Commission Report.²¹⁹ The three-member Commission was set up to examine the events that led to the shooting to death of twelve Palestinian Citizens of Israel and one Palestinian during demonstrations.²²⁰ The Report recommended a number of measures related to the activities of the security forces, including a few criminal prosecutions.²²¹ But the Report goes beyond the specific clashes to explore the underlying climate that led to the intense demonstrations and the violent reaction. The Report concludes that the "government handling of the Arab sector has been primarily neglectful and discriminatory."²²² The government "did not show sufficient sensitivity to the needs of the Arab population, and did not take enough action to allocate state resources in an equal manner."²²³ As a result, "serious distress prevailed in the Arab sector in various areas. Evidence of distress included poverty, unemployment, a shortage of land, serious problems in the education system, and sub-

219. DOCH VA'ADAT HACHAKIRA HAMAMLACHTIT LEBERUR HA-HITNAGSHUIOT BEIN SHERUTEI HABITACHON LEVEIN EZRACHEIM ISRAELIM BE-OCTOBER 2000 [THE REPORT OF THE OFFICIAL COMMISSION OF INQUIRY INTO THE OCTOBER 2000 EVENTS] (2003), available at http://or.barak.net.il/inside_index.htm.

220. See U.S. Department of State, *Israel and the Occupied Territories, Country Reports on Human Rights Practices—2004*, 1-2, 12-13, <http://www.state.gov/g/drl/rls/hrrpt/2004/41723.htm> (last visited Feb. 28, 2005) [hereinafter *Country Report*].

221. *Id.* at 2.

222. *Id.* at 12

223. *Id.*

stantially defective infrastructure.”²²⁴ Although the government has adopted the Report and decided to implement its proposals, they are yet to be implemented,²²⁵ and little has been done so far to ameliorate the situation.²²⁶ The Orr Commission—two of whose members were judges, with Justice Orr a member of the Supreme Court—did not address the responsibility of the Court for this situation. In light of the Report, and in view of the dismissive reaction to it by the government, it remains to be seen whether the Israeli Court will begin to seriously reexamine their approach to reviewing governmental policies that continue to adversely affect the Arab population, and allocate state resources in an unequal manner.

224. *Id.*

225. *Id.*

226. *Id.* at 12-13.