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# Activism and Legitimation in Israel's Jurisprudence of Occupation

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## Abstract

Colonial law need not exclude the colonized in order to subordinate them, and ‘activist’ courts can advance the effect of subordination no less than ‘passive’ courts. As a case study, this article examines the jurisprudential legacy of the Israeli Supreme Court in the context of the prolonged Israeli occupation of Palestine. Applying insights from legal realist, law and society, and critical legal studies scholarship, the article questions the utility of using the activist and passive labels. It illustrates how the Israeli activist court, through multiple legal and discursive moves, has advanced and legitimated the colonization of Palestine; that the court is aware of its role; and that arguments that focus on the court’s informal role do not mitigate this legitimating effect. Unlike other scholars, the article shows that the Israeli court’s role—by extending the power of judicial review to the military’s actions in the occupied areas—is neither novel nor unique or benevolent, as the British colonization of India and the US colonization of Puerto Rico show.

## Keywords

Activism, colonialism, Israel, judicial review, legitimation, Palestine, shadow of the court

Many consider Israel’s Supreme Court (ISC) to be an ‘activist’ court. This is evident in the belief—especially in the United States—that Aharon Barak, the former Chief Justice of the ISC and the most influential judge in Israel’s history, is an activist

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judge. For progressives he is a counter-majoritarian hero who defends human rights and constrains the executive and who found the right balance between security and human rights (Fiss, 2007; Goldstone, 2007). For conservatives, however, he is an activist in a pejorative sense because he usurps political power and violates the separation of powers (Posner, 2008: 368).

In this article, I argue that this activist image is false since it is both oblivious to the actual record of the ISC and to the lessons of critical scholarship about the nature of 'judicial activism'. My case study will be the rulings of the ISC with respect to the occupied Palestinian territories (OPT), even though similar critiques can be directed at the ISC's role in issues that are not related to the occupation or the military (Barak-Erez, 2002; Benvenisti and Shoham, 2004; Holtzman-Gazit, 2007; Jabareen, 2002; Kedar, 2001; Sultany, 2014). As my discussion of the jurisprudence of the ISC and its effects in the OPT unfolds, I will show that the differences between the so-called 'passive judge' and the so-called 'activist judge' may be more perceived than real and that, *contra* Dyzenhaus (1991), purposive interpretation may be—no less than 'positivism' or 'mechanical jurisprudence'—liable to advancing injustice and rationalizing oppression.

The article is organized as follows. Part I discusses some of the critiques of activism focusing on structural injustice; indeterminacy of rights; and the gap between law-in-the-books and law-in-action, between short-term and long-term effects, and between symptoms and root causes. In light of these critiques, Part II examines the ISC's record and its effects. I specifically focus on torture because it is considered to be the primary example for the ISC's activism. Against the backdrop of the legitimation argument developed in Part II, Part III enumerates the key argumentative and discursive moves of the 'oppression-blind jurisprudence' by which the ISC obtains the legitimation effect. These moves include: escaping international legal scrutiny; selectivity; submission to 'security'; lack of timely remedies; de-contextualization; and re-contextualization. The effect of these moves is to depoliticize the Palestinian question and address it through 'humanitarianism' and security. Part IV provides evidence for the ISC's awareness of its legitimating role. As many scholars seek to salvage the activist view of the ISC and mitigate the legitimation role by pointing out the informal role that the ISC plays (Davidov and Reichman, 2010; Dotan, 1999; Kretzmer, 2002), Part V shows the weaknesses of the 'bargaining in the shadow of the court' argument. Finally, the Conclusion shows that Israel's inclusion of the Palestinians in its legal system by allowing them access to the Supreme Court—shortly after the occupation on 1967—is not exceptional in the history of colonial powers. Nor is the legal inclusion of the natives clearly advantageous to the colonized. Indeed, as Samera Esmeir shows in her study of the British colonial occupation of Egypt, the natives' inclusion in colonial law by granting them rights can be as oppressive as excluding them and humanizing them can be as violent and disciplinary as dehumanizing them (Esmeir, 2012; see also Fitzpatrick, 1992). Similarly, a review of more than four decades of an elaborate jurisprudence developed in thousands of ISC rulings on the OPT shows that the legitimation effects outweigh the benefits of inclusion. The jurisprudence of occupation is one of inclusive subordination.

## Critiques of Judicial Activism

A growing body of scholarship challenges the perception of courts and adjudication as vehicles for significant sociopolitical change and thus diminishes the perception of gap between an interventionist approach ('activism') and a deferential approach ('passivism'/'restraint') (e.g. Rosenberg, 2008). Once the effects of judicial intervention are realistically assessed, the stakes of having an activist court or a passive court become less significant. Some of these writings are empirical studies that show that supreme courts never stray very far from mainstream public opinion (Friedman, 2010); historical research that shows that judicial rulings may de-radicalize demands for social change and may also produce a backlash from conservative actors (Forbath, 1991; Klarman, 1996, 2006); and comparative inquiry that shows the gap between law and reality and the inefficacy of judicial activism as in the case of some rulings of the Indian Supreme Court (Cassels, 1989; Krishnan, 2003) or the weak status of socioeconomic rights (Hirschl, 2004b).

Other writings challenge the validity of the conceptual distinction itself. Passivism and activism are different postures of judicial and legal politics (Seidman, 2001: 184–185; Tribe, 2000: xvi). A passive court is always already an activist court and vice versa. They differ only in the visibility of their intervention. Likewise, a 'proceduralist' or 'formalist' court is always already a substantive court and vice versa (because they have to make a substantive judgment on how and when to deploy their proceduralism). Even the so-called substantive courts often claim that the focus in their review is on processes and procedures and distinguish between 'legality' and 'merits'. Thus, arguably, they generally produce a limited and ineffective protection of rights (Galligan, 1982: 266). Needless to say, the distinction between legality and merits, or process and substance, requires a substantive, normative judgment (Michelman, 2003). Ultimately, the attempt to draw a consensual line between activism and restraint is futile given the essential contestability of these concepts (Sultany, 2012). Therefore, the political valence of these labels is indeterminate: Progressive courts can be as restrained as conservative courts, and conservative courts can be as activist as progressive courts (in the United States, for instance, both the progressive Warren Court and the conservative Rehnquist Court are considered activist). Courts can advance their progressive or conservative objectives under any of these labels.

Following these writings, as well as the earlier insights of legal realism and the critical legal studies movement (Kennedy, 1997), I offer six reasons why courts like the ISC are not likely to significantly constrain power and to produce sociopolitical change as the activist model suggests. Evidently, this set of reasons can apply to any court anywhere. Yet, it has a particular significance in cases of colonial occupation because the state in these cases is not treating the subjects under its control as citizens to whom the regime is politically and democratically accountable.

### *Structural Injustice*

De Certeau (1988) distinguishes between strategy and tactics. The latter is characterized by the lack of power, while the former is made possible by the existence of power. In

other words, strategy is the art of the powerful, while tactic is the weapon of the weak. Strategy is the ability to delimit one's own place, while choosing tactic is an agreement to play in the field created by the other: 'it must play on and with a terrain imposed on it and organized by the law of foreign power . . . it is a maneuver . . . within enemy territory' (p. 37). A tactic lacks a 'view of the whole' and is 'limited by the possibilities of the moment' (p. 38). While a strategy is spatially oriented and hopes to resist changes over time, a tactic is oriented toward the temporal as it hopes that different times will present different possibilities that will open the door for 'play' in 'the foundations of power' (p. 39).

Following de Certeau, Sarat writes:

[t]he hegemony of liberal legality is measured in the extent to which it can induce its most disadvantaged citizens to fight their battles on the terrain of liberal legality itself. Although going to court may be one way of resisting existing structures of power, it assures those who exercise political power that the resistance will remain inscribed within . . . a strategic domain defined by those against whom the resistance is directed. ([1982]/1998: 110; for the conflation of strategy and tactics in international law see Knox, 2010)

The inclusion of the oppressed in colonial legality does not merely channel some of the opposition to the legal means. It also effectively limits the kinds of grievances and demands that can be successfully articulated in the language of rights. These demands might be dismissed as political or nonjusticiable because they are 'general' claims and thus cannot be offered appropriate legal remedies. By drawing a line between law and politics, the legal system evades structural questions: A court under the slavery regime is not likely to abolish slavery (Cover, 1975); an apartheid court is not likely to abolish the apartheid regime. Although in theory incremental achievements may lead to dismantling the oppressive system—as we shall see below—that has not been the case, thus far, in the case of Palestine.

### *Indeterminacy of Rights*

Even if many grievances can be articulated as rights claims, their success is not guaranteed given the abstract and indeterminate nature of the language of rights and thus the ability to manipulate it to advance competing positions by different parties (Kennedy, 1997). While indeterminacy is not an inherent or necessary feature of rights, it may nevertheless be produced by the work of the legal actor given all the circumstances (Kennedy, 2008). Rights, then, can be a weapon in the hands of the strong party no less than in the hands of the weak (Mutua, 1997). Equal protection, for instance, justified the desegregation of the US school system and then justified striking down attempts at introducing affirmative action for historically disadvantaged minorities.

### *Limitations of Judicial Rulings*

Even if the mobilization of the language of rights is successful in allowing one to achieve a positive result, judicial rulings are often limited in nature: They might come

late; are generally forward-looking and thus are not necessarily consequential for past suffering and injustice and hence ignore its effects in the present (West, 1990); courts may accept general petitions laying down standards but subsequently reject specific petitions that seek to concretize the general ruling; and rulings might impose general procedural requirements but these requirements are not always enforced by the Court (Kretzmer, 2002: 189).

### *Gaps Between Law/Reality*

Even if one wins in the court—and it is not a symbolic victory—there remains an obvious gap between law in the books and in reality (Pound, 1910). To begin with, courts often lack the ability to implement their own rulings (as in Israel and the United Kingdom). Thus, they will have to rely on other branches and these branches might—as we shall see below—obstruct, delay, ignore, and violate the ruling. Furthermore, the law is what judges and lawyers do and legal actors can exploit an ambiguity, a gap, or a contradiction in the legal materials (as the loophole of the ‘necessity defense’ in the torture case discussed below shows). Indeed, legal victory is one thing and influencing reality is another thing altogether.

### *Gap Between Short-Term and Long-Term Effects*

Even if one wins in the court and the state implements the ruling within reasonable time, there are some possible long-term negative effects of these supposedly good and effective rulings. To begin with, the court at the very time it sides with the petitioners in a specific case it may also facilitate their disempowerment in similar future cases. For example, while the ISC ruled against the specific settlement in the case of the Elon Moreh colony (Dweikat, 1979), the Court noted that settlements can be legalized if they were established on ‘state land’ rather than private land. Consequently, it paved the way for successive Israeli governments to use a wide variety of techniques to declare Palestinian land as state land, later to be used for Israeli settlements rather than for the benefit of Palestinians. Likewise, in the separation wall cases after the ruling in Beit Surik in which the Court ordered the rerouting of portions of the wall, the Court indicated that the state had to show that a reasonable proportionality analysis would yield the desired result for the wall’s route (Beit Sureik, 2004). In both cases, the ISC legitimated the overall project while making minor reformist rulings against the egregious parts of the project. Finally, the practice of torture post-1999 could be legally permissible once the situation has been defined by the security apparatus as falling under the category of ‘ticking bomb situation’ and thus the interrogator who resorts to torture in these conditions is protected by the ‘necessity defense’.

At the time the ISC provides petitioners with a partial victory, it justifies their loss and thus the victory of the state in all the other issues presented in a particular case: When the ISC reroutes one portion of the separation wall, it justifies all the other portions of the wall that have not been rerouted; and when it returns some lands in this rerouting, it also justifies leaving the other lands that are still behind the wall. It also justifies the very existence of the wall inside the OPT in the first place.

The Court's reasoning may also be damaging as it introduces factors or devices that can be used against the petitioners next time even if the factual or legal situation is somewhat similar: The separation wall cases and the Abu Safiya case (that canceled the Jewish-only movement on road 443) introduced the rights of the settlers to the 'balancing' and 'proportionality' analysis despite the fact that their very presence is illegal under international law (Abu Safiya, 2009; Gross, 2006; Harpaz and Shany, 2010).

Finally, the victories' exceptionality seems to be deployed against the oppressed by undermining the argument that the system as a whole is on some grounds flawed. The fact that petitioners can win simultaneously legitimates all the other cases in which they constantly lose. The more limited the victory is and the more grave the losses are, the higher the chances that one would think that the deal (of inclusion in colonial law) is not worth it.

### *Symptoms Rather Than Root Cause*

Even if one wins and the ruling is effective and the judicial reasoning is not damaging to the petitioners and it is likely that they will win all the similar cases in the future—that does not seem to get the colonized any closer to the structural issues that are off the juridical table. Hence, one is likely to infinitely and hopelessly chase the proliferation of symptoms rather than address the root cause of the issues (e.g. Cover, 1975: 198, shows that even well-intentioned judges will be exhausted in secondary legal and technical 'sidetracks' rather than facing slavery or segregation directly). And the more important the issues that are off the table (say, demanding freedom and self-determination for the Palestinians), the more likely one would question the worthiness of the deal (i.e. accepting the legal system's authority for the opportunity to challenge some of its injustices using the tools it provides).

### **The Jurisprudence of Occupation**

Against this backdrop, this part assesses the ISC's activism in the OPT. The fact that law influences the occupation's reality is not a matter of dispute. The question is not whether but how the law influences the reality of occupation. Does judicial intervention advance self-determination or approximate justice? And to what extent did the ISC tie the hands of the military? Many scholars quote Barak's statement that 'democracy must sometimes fight with one hand tied behind its back' (Public Committee Against Torture in Israel, 1999: para 39). This metaphor suggests an impressive constraint on military power. The record, however, is inconsistent with Barak's metaphor. The ISC did not significantly constrain the military in the highlight of its practices in the OPT.

The record shows that the Court has overall justified the highlight of the practices of the occupation and advanced colonization, for example, bypass roads (Dir Istiya, 2001; Shah, 1998); checkpoints (Al-'Adreh, 2001; Physicians for Human Rights, 2001); massive home demolitions during military operations (Adalah, 2005); punitive home demolitions (Kretzmer, 2002; Simon, 1994); uprooting olive groves (El-Saka, 2001); closure of schools (The Association for Civil Rights in Israel, 2000); dismantling family units

through family unification policies (B'Tselem and Hamoked, 1999; Kretzmer, 2002); extrajudicial executions policy (Ben-Naftali and Michaeli, 2004); individual deportations (Ajuri, 2002; Kretzmer, 2002); mass deportation without due process (The Association for Civil Rights in Israel, 1992); colonies inside the OPT and inside the Sinai peninsula (when the latter was under Israeli control) (Ayyub, 1979; Kretzmer, 2002); torture, up to 1999 ruling and then again after 1999 (Public Committee against Torture in Israel, 2003); fuel and electricity cuts in Gaza as a political pressure on the population (Ahmed, 2008); the secret prison known as Facility 1391 (MK Zahava Gal-on, 2011); and, finally, the extraction of the West Bank's natural resources (quarries) by Israeli corporations (Yesh Din, 2011).

The torture ruling—considered to be the main example of the ISC's activism—is worthy of some discussion. In 1999, the ISC outlawed four physical interrogation practices because there was no explicit authorization in Israeli law for the General Security Service (GSS) to employ these interrogation methods. Yet it legitimated these very practices by carving out a vast loophole, known as the 'necessity defense', that can be invoked *postfactum* by the interrogator in alleged cases of the so-called 'ticking bombs'. Contrary to international law, which recognizes no exceptions to an absolute prohibition on torture, the Court not only validated the legal maneuvers by which torture continues but also ensured that torturers are granted immunity.

Initially, torture diminished. According to official numbers reported by the press, after the ruling and up to July 2002 the GSS used 'exceptional interrogation methods' in 90 cases that were considered ticking bomb situations (Public Committee Against Torture in Israel, 2003: 17). But as the second intifada continued, Israeli interrogators returned with increasing frequency to torture, knowing they had a legal 'out' with the 'necessity defense'. Ticking bombs became a security blanket, a calculated and well-regulated torture scheme that included obtaining confessions even in situations lacking claims of urgency (Mann and Shatz, 2010; Public Committee Against Torture in Israel, 2007). The Israeli experience confirms Luban's claim that the ticking bomb argument justifying torture is based on a false 'set of assumptions that amount to intellectual fraud' (2005: 1427). Specifically, it falsely assumes a certainty that it will produce life-saving information and it misrepresents torture as 'a desperate improvisation in an emergency' rather than as a practice (p. 1445).

Notably, no Israeli torturer has ever faced prosecution despite the fact that Palestinian detainees filed more than 645 complaints between 2001 and 2010 against GSS interrogators. The State Attorney's office contributed to the impunity granted to torturers by dismissing all the complaints with no criminal indictments (Hamoked and B'Tselem, 2010).

The ISC's complicity in post-1999 torture practices is a striking example of its practice of nonintervention in the practices of the security apparatus and its deference to 'security' considerations. The Public Committee Against Torture in Israel petitioned the Court hundreds of times since 1999 concerning prolonged incommunicado detention, which is a common practice in GSS interrogations (The Public Committee Against Torture in Israel and Nadi Al-Asir: Palestinian Prisoner Society, 2010). For example, it filed 376 petitions between 2002 and 2005. In none of them did the ISC intervene to allow the detainee to meet an attorney or to investigate torture claims (World Organization Against Torture and Public Committee Against Torture in Israel, 2009). Indeed, as Luban writes,

‘Once we create a torture culture, only the naive would suppose that judges will provide a safeguard’ (Luban, 2005: 1452).

Despite the 1999 ruling, cruel, inhumane, and degrading interrogation techniques are routinely practiced and sanctioned in Israel. A 2009 submission by the Public Committee Against Torture in Israel and the World Organization Against Torture to the UN Committee Against Torture exposes some of these practices: sleep deprivation by incessant interrogation, bending the detainee’s back forcibly backwards, slapping and blows, coerced and prolonged crouching in a frog-like position, prolonged shackling, the use of dogs to attack and intimidate detainees, and torture and ill-treatment of minors.

Accordingly, systematic torture—which was practiced before 1999—continued unabated and no less systematically after 1999. The main difference between the pre-1999 and post-1999 situations—and this is the legacy of the ISC’s ruling—is the higher degree of regulation of torture in the period that followed judicial intervention (Mann and Shatz, 2010). The approach of the ISC regarding torture, then, is far from being an activist example of challenging the security apparatus and it does not ‘mark a step towards compliance with human rights, international law and Israel’s obligations under international agreements’ (Navut, 2001: 360). It is in fact an example of a general pattern of affirming state power. Indeed, scholars have demonstrated that less than 1% of the petitions to the ISC on behalf of Palestinians in the OPT were successful (between 1967 and 1986). And even in these cases the victory was largely symbolic and the Court legitimated the overall system of occupation (Shamir, 1990; Sheleff, 1993; cf. Salzberger, 2008). It comes as no surprise, then, that informed observers call the Court’s attitude ‘blatantly government-minded’ (Kretzmer, 2002: 188) and that human rights organizations call it a ‘rubber stamp’ with respect to torture (B’Tselem and Hamoked, 2007). But denying the activist label does not mean that the Court is a passive court as it was obvious that the Court did intervene and its intervention had some effect on the operations of power and the evolution of colonial practices. The dichotomy between activism and passivism is not helpful then, as the record of the ISC does not fit neatly in any of the categories.

This record has implications for two other theoretical questions: First, is there a principled connection between judicial review and rights protection? This question cannot be answered in an abstract and categorical manner. Rather, it calls for a contextual and comparative inquiry (Sadurski, 2002; Waldron, 2001: 287–288). The case of the ISC and the Israeli occupation suggests so far a negative answer. Palestinian life under occupation has not been significantly and positively transformed after judicial intervention; quite the contrary. The rise of judicial review, the increase of value-based judicial examination, and the expansion of *locus standi* coincided and coexisted with the consolidation of the occupation, the greater sophistication of the oppressive practices, the increase in settlements, and the fragmentation of the territories (Ben-Naftali et al., 2005; Farsakh, 2003). Indeed, the ‘Court’s jurisprudence has . . . adjusted to accommodate occupation more than the occupation has adjusted to accommodate legal restraints’ (Harpaz and Shany, 2010: 516). In the extraction of natural resources case, the ISC stated explicitly that ‘the traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of economic relations between the two authorities—the occupier and the occupied’ (Yesh Din,

2011: para 10). Hence, this expansion of judicial review did not lead to higher levels of rights' protection, let alone an approximation of justice. The percentage of cases in which Palestinian claims are accepted witnessed no drastic increase compared with previous decades.

Another question concerns the debate regarding theories of judicial review: Is there an interpretive theory that would ensure the protection of rights and approximation of justice (while also constraining judges from imposing their own subjective values)? Many authors blame positivism given the separation of law and morality (Dyzenhaus, 1991). This charge is tenuous because positivists are not a monolithic group nor is positivism committed to a theory of interpretation or obedience; in fact, it may lead to a radical rejection of the law as Cover's discussion of the abolitionist Garrisonians—who advocated the resignation of judges rather than the application of unjust slavery laws—shows (Cover, 1975). Muller (1992) also shows that positivism is not the primary culprit in Nazi judges' acquiescence as many used creative interpretation to advance Nazi goals. In addition, there are different options within legal argument/interpretation and hence judicial intervention cannot be reduced to a mere application of the law. Indeed, former Chief Justice Barak himself sees judges as crafters, not just mechanical appliers of law (Barak, 2002). But even if one accepted this view of judges as mechanical appliers, this would open the door to the question of whether and when it is politically—ethically justifiable to be a judge if one has to, as a matter of institutional role, 'simply apply' laws that reflect, fashion, and consolidate an unjust regime.

Many scholars claim that the best hope lies in a purposive theory that protects the underlying political morality of the community and works out law's inner morality or coherence and integrity (Dworkin, 1986). However, this is exactly the theory that Barak popularized in the ISC, and yet that did not prevent him and the ISC under his leadership from justifying oppressive military practices (Sultany, 2007). Of course one can, in a Dworkinian fashion, claim that cases that failed to protect rights are 'mistakes'. But such an argument would render the rule an exception and thus misrepresent judicial practice in this context. In addition, unlike ideal theory of judicial and legal practice, the Court is not necessarily committed to one theory and in a consistent manner, especially when its record is reviewed over time. As we shall see in what follows, the Court might shift between different theories or arguments depending on the question at hand, the specific context at the time, and the desired result.

## Discourses of Legitimation

Against this backdrop, the interesting examination is not whether the court legitimates the occupation but the ways in which it achieves the effect of legitimation. There are six primary legal and rhetorical moves that the ISC has used to justify and advance the occupation. These moves constitute what I consider to be an 'oppression-blind jurisprudence' that depoliticizes the colonial occupation and transforms it into either a humanitarian issue or a security concern; both of which normalize suffering yet prevent excessive colonial violence and both of which pave the way for a legalist approach.

### *A Narrative of Absolution to Escape the Scrutiny of International Law*

The ISC accepts the state's argument that the West Bank and Gaza are *not* occupied territories; rather they are disputed areas that are administered by Israel (a position rejected by the International Court of Justice, 2004). Indeed, the Court never mentions the word occupation in Hebrew (Sultany, 2002). The Court also accepts the state's argument that only the 'humanitarian provisions' of the Geneva Conventions apply as a gesture of good will rather than as an international law obligation. Thus, it transforms the question of Palestine from a political into a humanitarian question. Like British colonial law's treatment of its Egyptian subjects (Esmeir, 2012), Israel's jurisprudence of occupation humanizes the Palestinians (by its concern over their livelihood) at the very time it denies them their political agency (and hence effectively de-humanizes them because they are treated as bare bodies).

### *The Selectivity and Inconsistency in Employing Legal Methods and Arguments*

One example of inconsistency is the politics of justiciability: Whereas the Court declared the question of the settlements' legality nonjusticiable given its 'political sensitivity' (Kretzmer, 2002: 22), it did not shy away in its 'domestic' rulings from the 'nitty-gritty' politics (as in political appointments, allocation of funds, and coalition agreements) (Barak-Erez, 2002: 614). This selectivity is apparent on the interpretive level as well. In some cases, the Court found textualism sufficient, as was the case in transferring Palestinian detainees to Israeli prisons in violation of Article 76 of the Fourth Geneva Convention (Sajedia, 1988). In other cases, the Court moved beyond textualism and used creative and counter-textual interpretation to justify the army's practices, as in the deportation cases in violation of Article 49 of the Fourth Geneva Convention, which prohibits both individual and mass deportations from the occupied territory (Sfard, 2005). This selectivity contributes to the indeterminacy of rights claims and undermines the legalist judicial claim that outcomes of specific cases are grounded in the legal materials and devoid of ideological and political influences.

### *The Practice of 'Nonintervention' and Submission to 'Security'*

The Court in general refuses to investigate the sincerity of security considerations. The ISC intervenes primarily when there is an 'excess' of military power but not in its normal operation. This explains the focus on procedural constraints (Kretzmer, 2002: 163). This focus on excess and violations of procedures renders the oppressive background normal. The focus is not on colonial occupation per se as a form of systemic violence and systemic violation of rights. Rather the focus is on excessive oppression. As Esmeir (2012) and Halder (2007) show in the case of British colonial law in Egypt and India, colonial law may seek to prevent excessive suffering, disproportional violence, and unproductive cruelty. Moreover, this nonintervention is a form of intervention and hence is not an indication of restraint or passivism because the Court has to exercise *political* judgment on whether to intervene in security assertions, or whether the issue is justiciable, or whether it is premature/general/political, and so on.

### *Declining to Provide a Timely Legal Remedy*

In cases like the torture case or the extrajudicial executions policy case, the Court waited for years before it delivered its ruling while the practice continued in reality unabated. In other cases, the Court rejected urgent petitions on the formalistic grounds that they are premature and that the petitioners did not wait for the authorities' reply and thus did not exhaust the remedies before petitioning the Court (Sultany, 2002). In other cases, the ISC claimed that the petitioners chose an inadequate procedure and found the factual basis lacking (Public Committee Against Torture in Israel, 2009).

### *De-Contextualization: Concealment of the General Context and Fragmentation of Reality*

The Court refuses to rule regarding what it considers to be general questions: The question of the legality of colonies is a general question; the question of the legality of checkpoints is a general question (hence the ISC dismissed the first two petitions challenging the policy of checkpoints); the question of the legality of the separation wall is a general question. Now, one needs to talk about one checkpoint out of the hundreds of checkpoints rather than the policy of checkpoints; one portion of the wall rather than the wall; and one settlement rather than the project of colonization. The effect of the Court's rulings is to marginalize the overall picture. It also forces Palestinians and lawyers representing them to de-radicalize their demands. The rulings of the Court suggest a correlation between the generality of oppression and the generality of petitions brought before it. Instead of dealing with the general system that produces oppression, the Court deals only with the symptoms: specific instances of oppression. The generality of oppression is obscured and stripped from its political and historical context.

Compare and contrast the International Court of Justice (ICJ) ruling on the wall (that outlawed the wall insofar it is built inside the OPT) and ISC's ruling in Beit Sureik (that rejected some of the first portions of the wall and then the ISC approved many of the other portions in later rulings) (see e.g. the cases of Beer Nabalah, 2006; Maamon Kayed, 2006). The difference between the rulings is striking: It is the difference between the general and the particular, the diachronic and the synchronic, the forest and the trees (Gross, 2006). The ISC in Mara'abeh (2005) tries to downplay the significance of the difference by suggesting that it is a difference in the factual basis available before the two courts. The difference, however, is better described as one of framing. Different framings have different effects.

### *Re-Contextualization: Constructing Alternative Frameworks*

This rhetorical move goes in an opposite direction to the fragmentation and de-generalization move; yet it complements it. In their contextualization of the cases that are brought before them and their narration of the facts the judges construct an alternative general framework that reflects their embedded position in their society and culture and their acceptance of its hegemonic ideology. They present a narrative of a defensive democracy and a well-meaning occupier that is faced by incomprehensible and irrational

violence. This violence is incomprehensible and irrational precisely because it has been stripped from its political and historical context (in the previous move). This re-contextualization explains the normalization of the oppressive background under the guise of security claims in the above-mentioned move. It also shows that—the legalist posture notwithstanding—the judges exercise political judgment and advance a political worldview.

## Court's Awareness of Its Legitimizing Role

The judge who follows substantive, purposive jurisprudence—like former Chief Justice Barak—cannot locate the blame exclusively in external political will of other branches because, unlike the ‘mechanical application of the law’ approach, he claims that he is able to play a larger role in shaping the legal system by teasing out society’s fundamental commitments and working out the law’s coherence or integrity. Indeed, he considers himself to be a partner of the legislature in lawmaking (Barak, 2002: 25). The complicity of Israeli judges in the occupation is apparent not only in their jurisprudence and the deployment of legal and rhetorical techniques but also in the way the state uses the judges and their awareness of this role, that is, their contribution to Israel’s standing in the world.

Attitudinal theories seek to explain judicial decisions according to judges’ antecedent ideological orientation. Thus, it is argued in the US context that judges who are appointed by Republican presidents are likely to produce conservative decisions (Segal and Spaeth, 2002). These theories do not produce a satisfactory explanation and prediction of judicial rulings (Posner, 2008). In addition, Israeli judges are appointed in a less bluntly political way (they are appointed by a parliamentary committee in which there is a slight majority for professionals—lawyers representing the Israel Bar and ISC judges—over politicians). Nevertheless, it cannot be denied that judges’ background and professional career prior to their appointment to the Supreme Court influences their judicial orientation to a significant degree. In fact, some judges at the ISC came from the ranks of Military Advocate General serving as legal counselors for the military (as was the case with the security-minded Justice Meir Shamgar who served as Chief Justice of the ISC between 1983 and 1995) or the Attorney General’s office providing legal advice for the government (as was the case with Aharon Barak who served as Chief Justice between 1995 and 2006 and who took a leave from the ISC to join the Israeli negotiators in the Camp David negotiations with Egypt).

But judges are also aware of their institutional role. Courts do not operate in an institutional and political vacuum. Instead, they tend to be strategic actors who seek to preserve or improve their institutional position within the balance of power (e.g. Hirschl, 2004a: 1858–1860). This strategic calculation includes *inter alia*, taking into account the reaction of other branches to judicial rulings and the likelihood that they will abide by them, or public reactions to these rulings and consequently the effect on the court’s image and legitimacy. It is unsurprising, then, that constitutional courts do not steer very far from mainstream public opinion (e.g. Friedman, 2010).

Indeed, it seems that ISC judges' background and their strategic calculations influence their rulings and conduct. Here are six examples of judges' awareness of their legitimating role:

First, the liberal rhetoric of the ISC is used by the state in its submissions to the human rights bodies in the United Nations and thus judges (especially Barak) became the main public defenders of Israel abroad (Jabareen, 2005). This is what I call the 'diplomat judge' (Sultany, 2007).

Second, in 2003, Barak claimed that the ISC's power of judicial review helps Israeli soldiers by shielding them from potential prosecution before the International Criminal Court (Gorali, 2003). Whether this position is correct as a matter of international law is beside the point. I mention it here given what it reflects as a matter of motivation or justification.

Third, Justice Hanan Melzer made a similar explicit statement to Barak's in his concurrence in the Abu Rahmeh ruling on July 2009. This case dealt with the decision of the Military Advocate General to indict a soldier—who shot from close range a handcuffed and blindfolded Palestinian—for 'inappropriate behavior'. The judge's rationale to intervene in the military prosecution's decision (by asking for a harsher indictment that fits the severity of the crime) is to preempt legal intervention against members of the military in the international arena (Abu Rahmeh, 2009: para 7).

Fourth, in July 2004, following the ISC's ruling in Beit Sureik on the separation wall and before the ICJ's advisory opinion, Prime Minister Ariel Sharon declared that the stature of the ISC and its Chief Justice Barak will help Israel at The Hague and would provide a legal rejoinder (Bechur-Nir, 2004). In this context, the Mara'abeh ruling, which was delivered after the ICJ's ruling, is a detailed straightforward response to the ICJ.

Fifth, not all the rulings of the ISC are translated into English and when they are translated it usually takes some time after the delivery of the ruling. However, the Beit Sureik ruling on the separation wall—that was delivered a week before the ICJ's ruling—was translated immediately. Apparently, the hope was that it will influence international opinion.

Sixth, in October 24, 2004, in a hearing discussing the Adalah case—which dealt with mass demolitions during military operations—Barak criticized the Attorney General for not taking the human rights reports regarding home demolitions seriously. These, he suggested, should be thoroughly examined in order to introduce the Israeli perspective. Otherwise, Barak warned, history will be written according to the critical human rights reports (Adalah, 2004). So, Barak according to these comments is interested in state image and standing rather than being exclusively concerned with the rights of the petitioners before him as the activist model of judicial intervention presumes.

These examples do not explain the outcomes of specific judicial rulings as the product of an 'intent' on the judges' part to legitimate the occupation. Nevertheless, they show the judiciary's awareness of the legitimization effects of their work despite their legalism (by rationalizing their decisions as the product of legal materials rather than politics or ideology). Moreover, these examples show that the so-called activist judge or activist court becomes effectively an activist of the oppressive system, and the empowering liberal, human rights-minded rhetoric may also empower the oppressive system and thus legitimate oppression. The activist judge can be no less integral to the political will of

the state than the passive judge. However, the former's legitimation effects might be greater and more credible because he/she claims to be—and is perceived by outsiders as—more 'independent' and more willing to 'intervene' in the authorities' decisions than the passive and restrained judge who merely 'applies' legislative/political will.

## Evaluating the 'Shadow of the Court'

Despite these examples of judges' complicity in the occupation, there are at least five systematic ways to exaggerate the role of the Court and to rescue the activist model. In order to be able to claim that the ISC and the legal system in general tied the hands of the military, one may follow one of the following five discursive and argumentative moves: First, a Supreme Court centrism in which scholars emphasize the ISC rulings rather than the military court system (Hajjar, 2005; Yesh Din, 2007); second, to emphasize the rhetoric of the ISC rather than the outcome and the effect of its rulings; third, to emphasize and exaggerate the exceptions among these rulings rather than the rule, the 'landmark' cases rather than the daily operation of the Court (indeed, these are normally the cases that get publicized and shape the public image of the Court); fourth, to misread the rulings of the ISC; and finally, fifth, to shift the focus to the 'shadow of the court' rather than its rulings. In what follows I focus on the last argument.

The argument here is that the Court ties the hands of the state and military in informal ways. Accordingly, one should not focus exclusively on the formal rulings in assessing the Court's impact. The state enters out-of-court settlements given the fear of losing in the Court and thus the ISC plays a constraining role on power. For Kretzmer, this expansion of the inquiry mitigates the admittedly dominant legitimating function of the ISC (Kretzmer, 2002: 190):

I asked which function of the Court has been dominant: its legitimizing or restraining function. I suggest that the answer rests on a distinction between the Court's decisions and the influence of its shadow. If we restrict our attention to actual Court decisions, the focus of this study, it is difficult to escape the conclusion that the Court's legitimizing function has dominated. But when the overall picture is considered, the picture is far less clear, since the Court's shadow has played a significant role in restraining the authorities.

One cannot deny that the ISC influences the reality of the occupation and that it may be the case that its informal intervention had 'positive effects'. Yet, *contra* Kretzmer, this informal intervention cannot overshadow the overall picture of the ISC's role in the OPT. There are several interrelated reasons why this shadow-of-the-court argument is unconvincing:

### *First, the Effect of the Court's Shadow Is Not Unidirectional*

If the argument is at all correct it goes both ways in a contradictory manner. That is, it is not only risk-averse state lawyers who think they should compromise to avoid a ruling by the Court and the prospect of losing. It is also the human rights lawyers who might feel constrained given the prediction that they will lose a certain case (and set a bad

precedent) and thus avoid bringing the case altogether, or downgrade their demands from the state *ab initio*. In other words, if one wants to take into account the constraints on the state given the Court's shadow, one should also take into account the other side as exemplified by actions and choices by Palestinians or by lawyers representing Palestinians. Hence, it seems that the effect of whatever is considered to be a Palestinian achievement and a constraint on the state might be annulled by the counter-movement of the effect of whatever is an achievement to the state and a constraint on claims made on behalf of Palestinians.

### *Second, It Is Never a Binary Freedom/Constraint Situation*

When one states that the ISC constrains or does not constrain the military, the yardstick is not that of complete freedom and zero constraint. The opposition is not between freedom (when the Court is absent or is following the policy of judicial restraint) and constraint (when the Court exercises judicial review and follows activism). Rather, there is a spectrum of different situations of constraint. The Court might be or might not be one of these constraining factors that the military should calculate (e.g. internal structure and rules, availability of state budgets, availability of forces and certain kinds of weaponry, army's public image, potential reactions by international or local actors, disagreements inside the army or between the army and the defense ministry or other security organizations about different courses of action, etc.). Hence, the claim cannot be that the Court is responsible for moving the military from a world of freedom to a world of constraint. The military is always already constrained by different factors. Take for example the question of deportation and punitive home demolitions. In both cases, the Court allowed the practice to continue unhindered and yet the military decided to discontinue the practice (Gross, 2006: 434). Hence, it does not necessarily follow from the absence of judicial constraint that the state is not constrained or that higher levels of violations of rights will ensue.

### *Third, When and How Should We Attribute a Certain Constrained Action to the Court's Presence and Previous Rulings?*

We have two options: either one considers the legal question indeterminate or considers it clear. Indeterminacy and unpredictability seem to be part of our modern life and our experience of the law. We can witness this in the law, for instance, when legal actors appearing before the Court are in the business of distinguishing new cases from previous ones, and courts might actually overrule previous rulings (the ISC is not constrained by its own precedents), or different judges and different panels of judges are likely to offer different outcomes, or the application of highly general tests like 'balancing' and 'proportionality' on different factual situations might produce different outcomes. This shows that there is a high degree of uncertainty in the field of legal action. In addition, the legal system is not a gapless system and there may be gaps, ambiguities, and contradictions. Most lawyers know that and try to exploit it to the advantage of their clients or their cause by producing the effect of indeterminacy.

But even if the case is determinate and the legal case is clear, as was the torture case (as the Court itself said: Public Committee Against Torture in Israel, 1999: para 40), which might not be a constraint for a long time, it took years before the Court delivered its ruling in 1999. Of course, there are other options to escape predicted constraints: to cause delays, to lie to the Court, to hide facts from the Court, or to ignore the rulings of the Court. Consider the following examples: The case of Facility 1391 is probably the most striking example of hiding facts; the state concealed the Facility from the public and the Court for years before the press and human rights groups exposed its existence (McGreal, 2003). This secret prison continued to work for years after the torture ruling in 1999. It took the Court more than 7 years to deliver its judgment in which it upheld the legality of the secret prison (HaMoked, 2011).

The military and security establishment may lie to the Court in some situations in order to circumvent the supposed constraint. To what extent this occurs might not be an easily verifiable question, but we know that it did occur on several occasions. For example, the Brudett committee that was in charge of examining the defense budget highlighted a pervasive attitude in the military of lies to policy makers (Pedhazur, 2007). Other reports indicated that the army violated orders by the minister of defense (Hass, 2007) and falsely announced the removal of checkpoints and hence contravened public statements made by the government (Issacharoff, 2007). The main internal intelligence organ, the GSS, was involved in lies and cover-ups in the Bus 300 affair (Barzilai, 1986; Segal, 2010). We also know that the Court was outraged when it discovered that it has been deceived. In one of the separation wall cases, the Court writes, 'In the petition before us a grave phenomenon has occurred. In the first petition the Supreme Court was not presented with the complete picture. The Court dismissed the first petition on the basis of information only partially correct' (Head of the Azzun Town Council, 2006, para 7).

The military might also choose for some time to ignore the Court's ruling on certain issues. For example, the state continued the establishment of a portion of the separation wall in the West Bank on road 317 despite the fact that the Court canceled that portion (Haaretz, 2007, calling it 'military coup'; Rapoport, 2007), or, that despite a previous ruling on June 2006 to reroute a portion of the wall near the villages Azzun and Nabi Elias, the petitioners had to repetition the Court after the passage of 2 years and 3 months from the ruling citing lack of implementation. Only more than 3 years after the original ruling did the state start implementing the decision (Head of the Azzun Town Council, 2009). A similar situation is exemplified by Bilin's case: only after 2.5 years and upon filing a contempt of court motion did the military start rerouting the wall (Lazaroff and Izenberg, 2010). Likewise, the classified military documents exposed by Anat Kamm and published by *Haaretz* has shown that the army deliberately violated the Court's instructions regarding extrajudicial killings, according to which there should be an initial attempt to arrest suspects before executing them (Public Committee Against Torture in Israel, 2006). That is, the army executed Palestinian activists although they could have been arrested and in situations that lacked the supposed urgency of ticking bomb situations (Blau 2008a, 2008b).

In addition, contrary to the ISC's instruction in the case of the Elon Moreh colony (Dweikat, 1979) counseling against establishing settlements on private land, the state

allowed the establishment and expansion of settlements on lands that are not state lands. According to reports, about 40% of the settlements' lands in the West Bank are a private property of Palestinians (Erangler, 2006).

To conclude this point, if the case is indeterminate, then the shadow of the Court is not necessarily constraining; and if it is legally clear, then it is not clear whether there is a shadow of the Court because it does not necessarily follow from the clarity of the legal case that the military will be *de facto* constrained.

#### *Fourth, the Distinction Between Objective Constraints and Subjective Constraints*

The foregoing notwithstanding, some actors do and might feel constrained. Yet, one should be careful not to conflate between two meanings of constraint. Objective constraints exist outside one's will and cannot be wished away. But when one predicts that something might happen, and this will make her reconsider her options of action, this is a subjective constraint. When one imposes a feeling of necessity on the legal materials, one might be inadvertently contributing to the sense of determinacy instead of doing the required work to produce a different result. If this predicted outcome happens it becomes an objective constraint. If the Court actually hands down a ruling then one will have to deal with it. But so long as the Court has not ruled on the specific issue the constraint cannot be confidently attributed to the Court alone.

#### *Fifth, We Need To Be Clear About the Short-Term Effects of Constraints Versus Long-Term Effects*

As we saw above (e.g. in the torture case), some constraints are only short term and after a while the actors learn how to deal with the constraint and circumvent it ultimately rendering it less effective. Thus, in the long term they might cease to be meaningful constraints. Thus, 'bargaining in the shadow of the Court' might mean very little in the long term.

#### *Finally, Some Alleged Constraints Are Also Simultaneously Empowering and Are Actually Needed for That Very Purpose*

Constraints imposed by reason or law are essential even for dictators in order to allow them to achieve their goals more effectively (Holmes, 1995). Likewise, an army imposes on its soldiers and commanders certain rules and codes of conduct in order to be effective in attaining its goals in situations of combat. Similarly, some legal constraints imposed on the military, as in procedural requirements, might also be seen as more empowering than constraining. Hence, the shadow of the Court may be also empowering to the oppressive regime.

## **Conclusions**

Seeking to bolster the activist image of the ISC, some scholars assert that Israel's extension of judicial review to the occupied territories is novel, a precedent, and an

exceptional practice (Kretzmer, 2002: 196). This unsupported assertion, however, is factually incorrect. Here are two brief examples.

After the American–Spanish war and the treaty of Paris in 1898, the US Supreme Court in the ‘insular cases’ of 1901–1905 and onward extended limited constitutional rights to residents of the so-called ‘unincorporated’ areas, like Puerto Rico, Guam, and the Philippines. Puerto Ricans became citizens only in 1917 in the Jones Act (Torruella, 1985). Thus, the US Supreme Court discussed Puerto Rican rights long before they became citizens. However, as in Israel’s case, through this inclusion the US Supreme Court legitimated and advanced American colonial expansion (Ramos, 2001). The United States—which initially colonized Puerto Rico for ideological, strategic, and economic reasons—continues to treat Puerto Rico effectively as a colony and Puerto Ricans continue to have an inferior status (Roman, 1997).

A second example is the centuries’-long history of the writ of habeas corpus in common law. Habeas corpus was originally conceived to consolidate governmental power but evolved to be a protection for jailed individuals even when those were noncitizen residents of colonies. The British extended the writ to many territories including Barbados, Jamaica, and India. Specifically, they established a court system in India to insure that the East India Company complied with the common law, including the Supreme Court at Calcutta, which heard many cases of habeas corpus (Brief of Legal Historians, 2007).

Thus, Israeli judicial review of the occupation is neither novel nor unprecedented. Nevertheless, what might be remarkable about the ISC’s jurisprudence in the OPT is the discrepancy between the activist and liberal rhetoric and image, on the one hand, and the actual role the Court has played in advancing the occupation, on the other hand. The ISC has reproduced the occupation and its practices as legitimate and overall it advanced the occupation. By rationalizing the practices of the occupation, the Court lends these practices a legitimacy that they would not otherwise have. Given judicial intervention, they look more natural and necessary (Kennedy, 1997: 236). By giving reasons to practices through rational devices that are understood as normatively constraining (like balancing, reasonableness, and proportionality)—while approving most of these practices most of the time—the Court represents political decision making as a rational and reasonable exercise of human faculties. The professional, apolitical, and nonpartisan image of the Court grants the rationalized practice an aura of normative justifiability. In addition, by justifying these practices as legal and constitutional, the Court obscures the fact that they are the product of asymmetrical power relations. The parties standing before the Court are seemingly equal in the courtroom. But, in fact, these parties are not equal in power outside the courtroom and the Court reproduces this asymmetry in its decisions (Sultany, 2002).

Evidently, the ISC is not the only legitimating institution in Israeli society and may not be the most influential. Moreover, the legitimation effects of the ISC are limited (e.g. the world still considers the settlements illegal despite the ISC jurisprudence). Nevertheless, the law is heavily implicated in the colonization of Palestine; not as a constraint on power but, mostly, as a subservient to power. The effects of this legitimation may be both domestic (where the ISC enjoys high levels of confidence amongst the Israeli public) and international (where the ISC is often viewed with respect, especially given the false image of

activism). The longest military occupation in recent modern history since World War II is presented by the ISC as being ‘under the rule of law’. The potential effect of all this is, on the one hand, to reconcile the powerful with the fact of domination while preserving the self-perception of ‘democracy’, ‘rule of law’, and ‘justice’. And, on the other hand, it may pacify the weak (Tushnet, 1977). Whether this is the actual empirical outcome is doubtful. Different individuals or groups have varying degrees of investment in, and knowledge of, legal processes and they react differently to judicial legitimation. Despite thousands of petitions by Palestinians to the ISC, the Palestinians had two intifadas and practiced different forms of resistance. It does not then seem likely that the colonized would be entirely pacified through the colonial legal nomenclature (though some of them might). Nor should they: the picture portrayed in this article provides no reason for the colonized to have faith in the colonial rule of law institutions. Far from an adversarial relationship between law and power, the ISC’s activist intervention in the OPT have joined law and power into a productive and evolving relationship that includes the Palestinians only to subordinate them to a project of colonization.

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