
The Legal Structures of Subordination

The Palestinian Minority and Israeli Law

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The law is a potential site for socio-political contestation. Legal systems may be open to competing interpretations and applications, because they are not necessarily coherent, and abstract legal concepts are not necessarily determinate. Nevertheless, the ability of legal actors to destabilize (or stabilize) legal categories and expose the incoherence of the legal system (or to present it as coherent) depends on the availability of maneuvering space and on the actors' willingness and ability to do the necessary work to achieve these effects (Kennedy 2008). Therefore, in order to examine the law's role in a particular country, one has to take into account not only the letter of the law, but also its judicial interpretations and applications as well as its effects in a particular context.

Israeli law, the subject of this chapter, is not monolithic. Zionist ideology influences Israeli law, but ideologies are rarely homogenous, and different actors within legal systems strive to advance their own conceptions and interests. Yet, an examination of the role of the legal system since Israel's inception reveals that far from significantly challenging power structures, Israeli law effectively created a hierarchy among Israeli citizens. As I show here, it generally advanced, justified, and perpetuated a separate and inferior status for the Palestinian citizens in Israel. At the same time, it granted the Israeli regime an aura of legitimacy by containing its practices under the "rule of law." Ultimately, although the legal system has a moderating effect – because it often pushes the political system toward the political center – this center itself has been moving toward the right-wing continuum of the Zionist movement.

The chapter is organized as follows: Part I examines the conventional story about the rise of constitutionalism and judicial activism in Israel. I question the analytical utility of this story in evaluating the role of law in Israeli society. The chapter shows that, at

least with respect to the Palestinian citizens, the Supreme Court was far from the counter-majoritarian hero who stood in defense of basic rights. Part II examines three primary areas in which the legal system, and the Court in particular, contributed to the “subordination” – that is, systematic disadvantaging – of the Palestinian citizens. Israeli legal structures have facilitated the dispossession of Palestinian land, the establishment of inferior and differentiated citizenship, and the segregation of Arabs from Jews in housing and education. I use the word “structures” to convey that this injustice is a result of resilient institutional practices (as opposed to a moral failing on the part of few individuals). I use “structures” in the plural to convey that these practices are irreducible to an overarching “function” of a “coherent” legal system. I show how the legal and judicial deployment of seemingly neutral and technical legal categories effectively obscures this subordination while simultaneously justifying, shaping, and advancing it. Part III discusses some of the rhetorical and legal tools the Court deploys to justify its deferential attitude toward state power and oppressive practices: security, thin rulings, political questions, general questions, delay, ripeness, and facially neutral jurisprudence. This by no means suggests that the Court’s performance has been uniform and monolithic. Part IV mentions three examples of cases in which the Court moderated excessive or peripheral cases of discrimination: political participation, free speech, and state subsidies. Yet even in these cases, the Court affirmed the state’s Zionist ideology, and its rulings were often ineffective given the delay in delivering rulings, the Court’s dependency on other branches to enforce its rulings, and the lack of implementation by these branches.

The Conventional Story: The Rise of Judicial Activism?

Constitutionalism is often understood as the “rule of law” rather than the arbitrary “rule of men” and requires the imposition of constraints on politics (Sultany 2012a). The conventional story in Israeli legal history is one of ascendance from an absence of a written, codified constitution to the rise of constitutionalism and the increasing influence of the discourse of rights. These were achieved through a stronger role played by the Israeli judiciary, which started to exercise the power of judicial review – that is, the power to review the conformity of legislation and state policies with supra-political norms. Supporters of this activist

judiciary consider this activism as necessary for the protection and vindication of rights and the separation of powers. Yet detractors consider this activism a form of usurpation of power from the hands of popularly elected branches of government.

The Absence of a Written Constitution

Israel failed to enact a constitution, despite the fact that both the UN Partition Resolution 181 and the Israeli Declaration of Independence required such an enactment. Following this requirement, an interesting debate took place in which the opponents of promulgating a comprehensive, formal constitution prevailed. David Ben-Gurion – the founder of the state and leader of the ruling party Mapai – and the religious parties were the main opponents. Consequently, on June 13, 1950, the Knesset adopted the “Harari resolution” compromise, according to which the Knesset’s Constitution, Law, and Justice Committee would be in charge of drafting the constitution through a series of Basic Laws.

Scholars usually point out that the reasons for the failure to adopt a constitution include (Cohen 2003) the following: the heritage of the British Mandate, which did not include constitutionally protected human rights; the socialist and illiberal perceptions of many of the Zionist leaders; Mapai’s desire to safeguard its coalition with the Religious Front; and Mapai’s desire for “unhampered freedom to govern” (Sager 1976:93). Yet the arguments against the adoption of a written constitution included the following (Cohen 2003; Goldberg 1998; Kohn 1954; Sager 1976; Sapir 1999; Shapira 1993): (1) Only a minority of the Jewish people reside in Israel, and the state does not have the right to tie the hands of the Jewish people with a rigid constitution; (2) the state is in its formative years with an ongoing immigration of thousands of Jews, and there is a need for unification before a constitution can be adopted; (3) the debate over a constitution requires addressing the most fundamental issues in the life of the state and the people. These kinds of discussions might endanger the unity of the people and lead to a “cultural war” between the secular and religious parties; (4) as exemplified by the British experience, the rule of law can be maintained and the freedoms can be secured without a written constitution; and (5) religious parties further claimed that the Torah is the constitution of the Jewish people and there is no need for another constitution. These parties

rejected the notion of popular sovereignty and recognized divine sovereignty as the source of legitimacy.

These arguments betray ideological orientations that perceived the formation of the state as an ongoing project of Zionist nation building, and did not consider Israel an ordinary nation state, because the majority of the ethnically and religiously-conceived nation resides outside the state. It also shows that religious arguments played a role in rejecting secular constitutionalism. In addition, Nadim Rouhana argues that the “founding fathers” needed some time to “incorporate the spoils of the war with the Palestinians – the enormous property that Palestinians left behind – and to employ these spoils for the benefit of Jewish society,” and that “constitutional efforts could have hindered the designs of the founding fathers” (Rouhana 2004:1). Indeed, Israeli legislators were concerned that a constitution would undermine security legislation, specifically the emergency regulations (which allowed for the seizure of Palestinian property, as I explain next; Karp 1993).

The Rise of Constitutionalism

Israeli scholars often argue that Israeli legal consciousness has moved from a formalist, technical, inductive conception of the law in the first three decades of Israel’s history toward a value-oriented, purposive, educative conception of the law during the 1980s and onward (Mautner 1993). Alongside this change in legal reasoning and conceptions of the law, a change occurred in the role of the Supreme Court. The Court’s early approach was deferential toward the legislative and executive branches. In the first decades of the state, the Court tried to establish its institutional legitimacy and ability to curb the power of the executive branch, which exemplified an “Eastern European background of czarism, Bolshevism, and authoritarianism that shaped the consciousness of Israel’s ruling elite and contributed to the rise of *étatisme* (*mamlakhtiyut*) in the early 1950s” (Lahav 1997:100). Facing these non-liberal attitudes, the Court deployed a Zionist, collectivist, “nationalistic liberalism” (Oz-Salzberger and Salzberger 1998). Following this approach, the Court challenged the executive on only a few occasions and based on formal, procedural, and technical justifications (see, e.g., Peretz 1958).

On the rare occasions in which the Court stepped outside technical reasoning and resorted to an overt normative and substantive reasoning, it more often than not endorsed the prevailing Zionist consensus. For instance, the *Yardor* (1965) case dealt with the disqualification of al-Ard’s

Socialist Arab List from the Knesset's elections.¹ The Court approved this disqualification despite the fact that the list met all the procedural requirements, and the law did not enumerate any substantive ground for disqualification. The fact that the Arab left-wing list had a democratic, secular, and egalitarian agenda for all citizens made it difficult for the Court to justify its disqualification on notions of "defensive democracy." Instead, the Court chose a doctrine of "defensive Zionism" (Oz-Salzberger and Salzberger 1998). The Court approved this disqualification because it considered the list to undermine the "fundamental constitutional premise" of the continuity of Israel as a Jewish state.

Even in the celebrated case of *Kol Ha'am* (1953), the Court can hardly be seen as a counter-majoritarian hero who defended extreme or marginal minority voices against governmental suppression.² In that case, the Court defended the right to free speech by imposing a restrictive "clear and present danger" standard for assessing governmental regulations of free speech. Accordingly, it rejected the state's closure of the Arabic and Hebrew communist newspapers, which were vocal critics of the state's policies. However, seen in historical context, the Court joined in this ruling the "societal center" (Rozin 2006). Indeed, mainstream newspapers and the Journalists' Association were very critical of the government's decision to close these newspapers and saw it as their interest to defend freedom of speech (Rozin 2006). Thus, although the Court's ruling contradicted the government's position, it was consistent with influential mainstream voices. In any case, this ruling remained largely ignored in the Court's jurisprudence for three decades as the Court hardly referred to it in its subsequent rulings (Saban 2011).

The Court became an "activist" court and abandoned this deferential posture toward the executive and legislative branches given their inability to resolve controversial and political issues – such as questions of state and religion – that ended up at the Court's docket. The culmination of the changes in the Court's stature, power, and jurisprudence occurred in the 1990s with the enactment of two basic laws – Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom. These laws constitutionalized for the first time the values of Israel as a "Jewish and democratic" state. They also introduced for the first time a partial list of rights. The enactment of these Basic Laws at that specific time originates,

¹ E.A. 1/1965 *Yardor v. Central Elections Committee for the Sixteenth Knesset*, P.D. 19 (3) 365 (1965).

² H.C. 73/1953 *Kol Ha'am Co. v. Minister of Interior*, P.D. 7 871 (1953).

at least partially, in the desire of some legislatures to entrench certain legal and political arrangements against the backdrop of the change in the constellation of the Israeli ruling elites from secular to religious and from Ashkenazi to Mizrahi Jews (Kimmerling 2001). Thus, the threatened cosmopolitan and neoliberal elites sought to insulate their preferred arrangements from majoritarian decision-making by delegating these issues to the judiciary, which shared these values (Hirschl 2000).

Glaringly, the Israeli legislature omitted equality from this list of rights. The reason for this omission was the fear that the imposition of egalitarian norms would undermine the Jewish character of the state. Accordingly, equality might upset the religious-secular status quo within the Jewish majority by weakening the status of religion and the religious establishment, and might undermine discrimination against the Palestinian citizens (Karp 1993). The failed attempts of Palestinian lawmakers to introduce the formal principle of equal protection of the laws into Israeli law illustrate that the Knesset feared that formal equality might undermine the Jewishness of the state (Sultany 2003). Nevertheless, former Chief Justice Aharon Barak considered this constitutionalization of rights as a “constitutional revolution” that granted the judiciary the power to review the validity of legislative acts.

The Limits of Judicial Intervention

Yet there are many reasons to doubt the simplistic conventional wisdom. The notion of “judicial activism” has been subjected in recent years to critical scrutiny. To begin with, there is no agreed-upon, non-controversial, neutral baseline that demarcates the legitimate boundaries of judicial intervention and according to which “activism” and “passivism” can be assessed (Sultany 2012a). Indeed, the dichotomies between activist/passivist and substantive/proceduralist courts are hard to defend. The theoretical distinction between passivism and activism merely obfuscates the real political differences (Seidman 2001). They may be more accurately seen as two sides of the same coin and as different postures of judicial and legal politics. The difference between them is one of visibility of intervention. It is a difference in degree rather than kind. Tribe writes: “Judicial authority to determine when to defer to others in constitutional matters is a procedural form of substantive power; judicial restraint is but another form of judicial activism” (Tribe 2000:xvi). In this sense, a passive court is always already an activist court and vice versa. Likewise, a proceduralist court is always already a substantive court and

vice versa. Even so-called substantive courts often claim that their review focuses on processes and procedures and distinguish between “legality” and “merits.” Thus, arguably, they generally produce a limited and ineffective protection of rights (Galligan 1982).

Additionally, the wealth of recent scholarship questions the activist reading of judicial intervention: Empirical studies show that supreme courts never stray far from mainstream public opinion (Friedman 2010); historical research shows that judicial rulings may de-radicalize demands for social change (Forbath 1991), have little effect on the reality of subordinated minorities (Klarman 1996; Rosenberg 2008), and may also produce a backlash from conservative actors (Klarman 2006). Comparative inquiry shows the gap between law in the books and law in action and the inefficacy of judicial activism as in the case of some rulings of the Indian Supreme Court or the question of advancing socio-economic rights (Cassels 1989; Krishnan 2003).

These critiques are relevant to the Israeli Court’s record. From the story of the rise of judicial activism and of a liberal Court challenging the other branches of government and spreading the discourse of rights, some Israeli scholars exempt two major areas of judicial decision-making: cases dealing with the occupation of the West Bank and the Gaza Strip (Sheleff 1993), and cases dealing with the expropriation of lands from the Palestinian citizens (Holzman-Gazit 2007). Indeed, the Court limited only the excessive practices of the occupation regime, but not its ordinary operation (Kretzmer 2002), and legitimated its practices and overall structure (Shamir 1990; Sultany 2007, 2014). Likewise, the “constitutional revolution” left no significant marks on the land regime inside Israel and provided very few protections to Palestinian landholders (Holzman-Gazit 2007).

Land and occupation, however, are not the only areas of law that are inconsistent with the image of an activist Court. The gap between law in the books and law in action is evident in the very limited effect of the Court’s intervention in political agreements, political appointments, and political allocations (Barak-Erez 2002). Furthermore, with respect to social rights, the Court exercised a minimalist, rather than an activist, approach (Barak-Erez and Gross 2007). Simultaneously, it enforced a conservative anti-distributive approach to economic rights that protected the status quo (Gross 1998). This shows that “activism” is not necessarily progressive. Additionally, the story of the transformation from form to substance and values is challenged by the existence of a significant “exception,” which is constitutional law (Segev 2006).

Finally, scholars cite the Court's concern about its legitimacy as an explanation for its early deferential attitude. Yet this concern did not end after the first three decades. In fact, the increasing power of the Court made it more vulnerable to critiques and attacks by other branches and substantial segments of the Jewish population (Saban 2008). Consider, for instance, the judges' vocal opposition to attempts by the Minister of Justice Daniel Friedmann in 2008 to curtail judicial power through changes in the appointments' method of Supreme Court justices or empowering the legislature to override judicial rulings (Yoaz 2008). Consider also the 250,000 ultra-orthodox demonstrators who expressed in February 1999 their rejection of the Court's interventions in religious questions (Sontag 1999). Thus, the Court's perceived vulnerability and its need to maintain its legitimacy influence its choice of a course of action – whether its primary orientation is “formalist” or “substantive,” “passivist” or “activist”.

This chapter does not seek to evaluate the overall performance of the Court or, more generally, the Israeli legal system. Rather, I focus on the main ways in which this system has influenced or contributed to the subordination of the state's Palestinian citizens. Unlike the previously mentioned conventional accounts, I will not distinguish between different periods or Courts, because my argument will be that the effect of subordination remains overall similar despite the changing legal tools and postures. There is no necessary connection between one form of legal consciousness (whether “formalist” or “substantive”) and judicial posture (whether “passivist” or “activist”). And there is no necessary connection between the latter and subordination. Law is relatively autonomous. As such, it does not necessarily reflect or mirror the interests of ruling elites (Kennedy, *The Rise and Fall*, 2006; Tushnet 1977). Legal consciousness – the social practice and understanding of the law – mediates the influence of ideologies and interests on concrete arrangements and institutions (Kennedy, *The Rise and Fall*, 2006). It effectively reproduces and legitimates power structures and systems of privilege, but it does not reproduce them in the same way; that is, it may moderate their influence and limit their excesses.

In Israel's case, legalism (the belief that outcomes in judicial rulings follow from applying legal reasoning to the legal materials) and the rule of law (the semblance of legality) – whether in the formalist or the value-oriented mode – mediates the influence of Zionist ideology through negotiating the contradiction between Jewishness and democracy (as in denying its existence or reconciling it through modifications). But by

doing so, the law shapes this Zionist ideology and contributes to its evolution. Legalism imposes a false necessity by obscuring the intertwining of law and politics and the inescapable legislative and policymaking role of the judiciary (Kennedy 1998; Posner 2008). The law is not necessarily a coherent gapless system. Judges resolve gaps, ambiguities, and contradictions in the law by choosing among alternative policy choices. The law does not necessarily mandate these choices; rather, they are related to, influenced by, and contribute to political and ideological debates (Kennedy 1998). This implicates the judiciary in an active lawmaking role regardless of the visibility of judicial intervention (whether the judge is “activist” or “passive”). In this sense, the law did not mirror Zionist ideology; rather, it constituted it.

Law and Control?

An example of an instrumentalist conception of the law as “mirroring” Zionist ideology is to perceive the law as a servant of a control system. Following Lustick’s model of control – which includes segmentation, economic dependency, and cooptation of minority members (Lustick 1980) – Saban (2011) argues that in the first three decades, the law was an “able servant” of the control system within a project of colonization. Despite the admission that the control system itself may contain a tension between different interests, such a functionalist view risks either lapsing to a reductionist instrumentalist conception of the law (according to which the law is a mere “servant”) or a totalizing discourse (in which legal developments that are contrary to the control model are represented as legitimating devices for the control system) (Saban 2011:339).

I reject this view for several reasons. First, not all legal rules and institutions are oppressive and seek to control; some rules are “facilitative,” providing citizens with tools to pursue social or economic activities (Tushnet 1977). In other cases, the law can be a strategy in warfare (Kennedy, *Of War and Law*, 2006). It can play a constitutive role in humanizing and civilizing the colonized (Esmeir 2012). Legal rules can indirectly influence citizens’ lives (as in libel suits that touch upon the historical memory of Arab citizens; Bilsky 2011). Control may be one of the effects of legal arrangements if it is understood narrowly (as in security legislation to control political protest). If defined broadly (to include all aspects of the Palestinian minority’s interaction with the legal system: control of land, people, consciousness, memory), however, it loses its analytical utility, because it lumps together too many diverse

practices and arrangements. For instance, if control means governance or regulation, then every legal system seeks to control citizens.

Secondly, the legal system might not be the most important component in a control system. Control can be achieved in various other ways, such as by establishing an extensive intelligence apparatus and an elaborate system of recruiting informants (Cohen 2009, 2010). The efficacy of this control can also be achieved given several historical – social, political, economic – factors and contingent upon them (Smooha 1980).

Thirdly, both the instrumentalist and totalizing conceptions ignore the law's indeterminacy. Whether gaps, ambiguities, and contradictions in Israeli law have been used to improve or subordinate the status of the Palestinian citizens is a question that requires examining the effects of the deployment of legal tools. Yet one cannot deduce a function from observing effects (Hunt 1985), because there is no necessary correspondence between the effects and the form of law. Legal actors may produce different effects from the same legal language under different circumstances. In this sense, functionalism is legalistic, because it assumes that these effects are legally mandated.

Fourthly, reducing the law to a mere servant of the function of control misses the active and constitutive part of the law. It is exactly given the existence of gaps, ambiguities, and contradictions that the judiciary does not just *apply* the law, but also *makes* the law. As mentioned earlier, Israeli law does not merely reflect Israeli politics; it also mediates state ideology and shapes it. It is, then, a mistake to scrutinize the law's role through the ends that a political regime pursues and ignore the law's internal politics and constitutive role (Esmeir 2012).

Therefore, in contrast to functionalist approaches, I do not posit an overarching function of the legal system nor an inherent feature in it. Unlike instrumentalist approaches, I maintain that the judiciary is a policymaker and does not mechanically reflect political will. Israeli law's seemingly neutral and general language is potentially indeterminate and permits judicial discretion. Nevertheless, as will become apparent next, disagreements among or between the judges and the political branches are relatively limited. Ultimately, legal arrangements systematically disadvantage the Palestinian citizens vis-à-vis the Jewish citizens in the distribution of material and symbolic benefits and resources.

Subordination by Law

In this section, I describe briefly the primary ways in which Israeli law is implicated in dispossessing the Palestinian citizens, in granting them a differentiated and precarious citizenship status, and in segregating them from the Jewish majority.

The Legal Structures of Dispossession

Through the ethnic cleansing of Palestine, the Zionist movement transformed Palestine from an Arab majority country into a Jewish majority state (Pappé 2006). This transformation was by no means merely demographic. Jewish ownership by 1948 comprised about 8.5% of the lands (6.6% according to Jiryis 1973; Kedar 2001). Yet after 1948 and by the 1960s, the situation was reversed, with the state and the Jewish National Fund owning 93% of the lands inside Israel (Kedar 2003). In 1960, the Basic Law: Israel Lands defined “Israel lands” as those owned by the state, the Development Authority, or the Jewish National Fund. It declared that the ownership of these lands “shall not be transferred either by sale or in any other manner.”

The lands that the state appropriated did not include only the spoils of war (refugees’ property) in the immediate aftermath of the war; they also included Palestinian citizens’ lands that that state expropriated. At the time, as the Palestinian community inside Israel grew from 156,000 in 1948 to 1.4 million in 2013, the state transferred most of these citizens’ private lands to its control. An elaborate legislative and judicial apparatus has enabled the state to make these changes and to create a land regime congenial to the needs of the ongoing formation of an ethnocratic settler regime (Forman 2011; Holzman-Gazit 2007; Jiryis 1973; Kedar 2001, 2003; Kretzmer 1990; Mehozay 2012a). Ethnocracies seek to utilize the country’s resources for the benefit of an ethnic group whose members control and dominate its decision-making institutions to the exclusion of citizens who do not belong to this group (Yiftachel 2006). Settlers’ law – and especially the supreme courts’ jurisprudence – uses many seemingly neutral, technical, and procedural legal tools that justify and facilitate the appropriation of natives’ lands for the benefit of the settlers (Dakwar 2000; Kedar 2003).

One major component of the legal structures of dispossession in Israel is the seemingly technical category of “absentee.” Through this category, the law disconnects the native from his historical entitlements and his

homeland. At the time the law entrenches the war's outcome, it whitewashes the spoils of war by ignoring the context of raw power that severed civilians' relationship with their property and homeland. The Absentees' Property Law – 1950 effectively defined every Palestinian refugee as an absentee whose property could be transferred to the Custodian of Absentee Property. The definition was so broad that anyone who left the areas controlled by Zionist military for a short period of time between November 29, 1947, and May 15, 1948, to an adjacent Palestinian or Arab territory could be considered an “absentee” (Peretz 1958). Even those who remained in their homes, which happened to fall under Jordanian control during the war until their territory was transferred to Israel in the Rhodes Armistice Agreement of 1949, became “present absentees” (Jiryis 1973; Kedar 2003). The Custodian had very broad powers to declare persons as “absentees” and their property as “absentee property.” Contributing to this process, the Court imposed the onus of proof regarding title over land on the “absentee” landowners rather than on the state that seized their lands (Kedar 2003). In order to whitewash this land grab and make it permanent, the Custodian transferred the seized lands to the Development Authority. The latter, in turn, “sold” these lands to the state and to the quasi-state body, the Jewish National Fund. The latter, along with the government's representatives, is part of the Israel Land Administration that governs and regulates all state lands in Israel.

In other cases, the state exploited the Ottoman category of *Mawat* land (uninhabited and uncultivated land) to expand its holdings. Accordingly, the Court developed evidentiary rules that expanded the *Mawat* category – and hence state land – and rejected oral and written evidence that the landowners provided (Kedar 2001). The Land (Acquisition for Public Purposes) Ordinance – 1943, a British Mandate law that Israeli law incorporated, authorized the minister of finance to seize lands for “any public purpose.” The state used this Ordinance to seize Arab lands in order to establish new Jewish communities (Kretzmer 1990).

Other legislation relied on the existence of the military regime that the state imposed exclusively on the Palestinian Arab citizens from 1948 to 1966. This regime curtailed their basic rights, including strict limitations of the right to movement under a pass permits regime administrated by military governors who regulated Arab access to the labor market and suppressed their political activities. For instance, Article 125 of the Defense (Emergency) Regulations – 1945 empowered military commanders to declare certain areas as “closed areas.” Likewise, the state used

security measures and pretexts through the Emergency Regulations (Security Zones) – 1948. These regulations empowered the defense minister to declare “security zones.” These military orders prevented landowners or village residents from physically being in and using their property. Finally, the Emergency Regulations (Cultivation of Uncultivated Land) – 1949 authorized the minister of agriculture to seize “uncultivated” lands. Occasionally, the state used these legal tools simultaneously to dispossess an Arab landowner: a land in a security zone or closed area remained uncultivated and thus allowed the minister of agriculture to seize it on the grounds that it is uncultivated (Jiryis 1973).

These few examples show that Israel went to considerable lengths to legalize its actions in order to present them under the aura of “rule of law.” The state, however, appropriated a “considerable amount of land . . . with no legal basis at all, or based on provisional laws” between 1951 and 1953 (Forman and Kedar 2004). These appropriations were retroactively legalized through the Land Acquisition (Validation of Acts and Compensation) Law – 1953.

It is unclear whether the existence of a written constitution would have hindered some of these measures of dispossession, as the founding fathers may have feared. It is clear, however, that the right to private property became a constitutional right in the Basic Laws of the 1990s only *after* most of the Palestinian citizens’ lands have been taken away. This constitutionalization of property rights effectively entrenches this dispossession, because it protects existing property relations and presents them as a neutral baseline (Gross 2004). This entrenchment is facilitated, on the one hand, by the Supreme Court’s general conception of property rights as possessive – and hence very protective of current property owners – rather than distributive (Barak-Erez and Gross 2007). On the other hand, the Court’s jurisprudence of dispossession with respect to Arab property rights continued after the enactment of the Basic Laws (Holzman-Gazit 2007). This jurisprudence is manifested, for instance, in approving very broad definitions of the public purposes that justify land confiscation. In a recent case regarding the Lajjun lands, the Court rejected an appeal by Arab landowners.³ The state seized the Lajjun lands (200 dunams) in 1953 according to the abovementioned Land Acquisition (Validation and Compensation) Law. The finance minister

³ C.A. 4067/2007 *Muhammad Khalil Abdelfattah Jabareen and 486 others v. State of Israel* (2010). Last accessed July 29, 2013 (<http://elyon2.court.gov.il/files/07/670/040/E01/07040670.E01.pdf>).

issued a certificate stipulating that the lands are taken for “vital settlement and development needs.” However, the lands were used for forestation only. In 2007, the landowners requested the Court to annul the expropriation, given the fact that the state did not use the land for the specified goals despite the passage of more than 50 years. The petitioners relied on a 2001 landmark ruling in which the Court ordered the government to offer Jewish landowners the right to regain ownership of their private land that the state had confiscated for a public purpose, but ceased to use it for that purpose. In that case, the state seized the land for military training and after three decades changed the public purpose, and decided to establish a residential neighborhood on that land.⁴ In the case of the Arab owners of Lajjun, however, the Court ruled that forestation falls within the “settlement and development” goals of the state. The Court reasoned that the interpretive influence of the new Basic Laws is limited, and the Land Acquisition Law is exceptional and needs to be interpreted according to its time.

The story of dispossession is incomplete without the denial of Bedouin land rights in the Naqab in southern Israel. Ronen Shamir, who reviewed the Court’s rulings on Bedouin land rights, argues that the question cannot be reduced to a binary between “nomads” and Western conceptions of property. Rather, this binary – as the Court constructs it – is itself part and parcel of the Bedouins’ dispossession (Shamir 1996). On the one hand, the Court constructs the Naqab as an empty space waiting for (Zionist) redemption, and perceives the Bedouin as nomads even when they reside in permanent communities (*ibid.*). On the other hand, the law facilitates their concentration in specific townships. Bedouin are allowed to reside and build only in designated places; all the other places are considered state lands. Thus, the law transforms them from citizens with claims over disputed lands into lawbreakers of the Planning and Construction Law – 1967, which the state enacted long after many of their communities have existed. In light of this, state law transforms the conflict between the Palestinian Bedouin and the state from a collective question into individual criminal cases (*ibid.*).

The record of the Israeli Court, then, does not display a “jurisprudence of regret” in which the settler-colonial society critically reviews its history of dispossession of the indigenous peoples (Webber 1995; as observed by Gross 2004). This attitude was evident in the 1992 Australian case of

⁴ H.C. 2390/1996 *Yehudit Kersik et al. v. State of Israel, Israel Land Administration*, P.D. 55 (2) 625 (2001).

Mabo v. Queensland (No. 2),⁵ in which the High Court rejected legal doctrines that justified the dispossession of aborigines. Specifically, the High Court rejected the doctrine of *terra nullius* (no man's land) and recognized native title as part of the common law and as predating the British colonization of Australia in 1788. The Court referred to the history of land acquisition as "a national legacy of unutterable shame." The Israeli Court's record also differs from the Canadian ruling in *Delgamuukw v. British Columbia* (1997),⁶ in which the Canadian Supreme Court recognized the evidentiary weight of oral history in proving title over land. The effect of these rulings has hitherto been limited on indigenous rights in Australia and Canada. Nevertheless, they point toward a direction never taken by Israel's Supreme Court.

The Legal Structures of Differentiated Citizenship

Differentiated citizenship is not necessarily objectionable. Many scholars, especially multiculturalists, have criticized notions of universal citizenship and formal equality (Fiss 1976; Kymlicka 1996; Young 1987). Yet these are critiques of the insufficiency of formal arrangements to guarantee genuine equality to disempowered groups and historically oppressed minorities. These are critiques that seek to supplement formal equality with a substantive notion of equality. Nonetheless, some Zionist scholars use these critiques of formal equality to justify preferential treatment of the dominant Jewish majority (Yakobson and Rubinstein 2009; for a critique, see Sultany 2010). Differentiated citizenship in Israel is objectionable because it is practiced against the backdrop of the lack of formal equality.

The Court's jurisprudence subordinates notions of equality to Jewishness as a *Grundnorm* (basic norm). Indeed, this is manifested even in the celebrated case of *Qa'adan* (2000) in which the Court declared discrimination against non-Jews in land allocation and housing illegal.⁷ In this case, an Arab family's application to purchase a house in the community of Katzir was rejected on the grounds that Katzir was established for Jews. Chief Justice Barak used the metaphor of the state as a Jewish house whose key the state gives exclusively to Jews via the Law of Return. He claimed that those who

⁵ *Mabo v. Queensland* (No.2), 175 CLR 1 (1992).

⁶ *Delgamuukw v. British Columbia*, 79 DLR (4th) 185 (B.C.S.C.) (1997).

⁷ H.C. 6698/1995 *Adel Qa'adan v. Israel Land Administration et al.*, P.D. 54 (1) 258 (2000).

are already inside the house are entitled to equal rights. Chief Justice Barak then is implying a distinction between rights *over* the land and rights *in* the land. Only Jews are entitled to the former, whereas the Arab citizens are entitled to the latter only (Sultany 2005). Indeed, the Court's inclusion of the Arab citizens is conditioned upon stripping them from their collective Palestinian national identity and endorsing a forward-looking perspective that ignores the past injustice committed against them (Jabareen 2002). Furthermore, in some cases (like the housing case of *Bourkan* and the religious budgets case discussed later in the chapter), the Court uses notions of substantive equality in order to deny formal equality for Arab citizens and justify preferential treatment of Jewish citizens.

Yoav Peled captures this differentiated and unequal status when he argues that Israeli Jews' status is one of republican citizenship while Arab citizens' status is one of liberal citizenship (Peled 1992). In republican citizenship, the bearer of the citizenship is part of the national group that owns the state and is part of the definition of the common good. By contrast, the bearer of liberal citizenship is entitled to individual rights and is not part of the communal definition of the public good. In fact, in the case of the Arab citizens, the public good is defined at their expense, as in the case of land ownership (Rouhana 1998).

Some scholars mistakenly conceive certain differentiated arrangements as if these were acts of granting group rights to the Arab citizens, such as in education, exemption from military service, and religious status (Rubinstein and Medina 2005; Saban 2011). Thus, the fact that Arab citizens have a separate educational system is taken to exemplify self-government rights in education. Yet these scholars' own acknowledgment that this self-government is "extremely limited" (Rubinstein and Medina 2005) undermines this argument. In other cases, like the exemption of Palestinian citizens from military service, these scholars wrongly consider the arrangement as a right (Rubinstein and Medina 2005; Saban 2011). Yet the practice of exempting the Arab citizens from compulsory conscription is not entrenched in a legislative act. This practice is not a legally protected interest (and hence a "right"), as it does not give rise to a legal claim by those who are bearers of this alleged right. In other words, the practice does not correspond to a duty upon the state not to recruit Arab citizens. The state is under no duty to exempt them. Should the security establishment decide to send recruitment orders to some – or all – Arab citizens, the latter cannot argue in a court of law that they have a right to be exempted. The petitions

challenging the exemption of the Ultra-Orthodox Jews from military service are instructive. The Court ruled in February 2012 that the Tal Law, which enshrines this exemption, is unconstitutional.⁸ Furthermore, the fact that the army does recruit those Arab citizens who are Druze or Bedouin shows that this exemption is not granted to all Arab citizens as a national group.

Likewise, group-based religious rights do not reflect recognition of the Arab minority as a national group. Rather, religious communities are granted jurisdiction over personal status, including those comprising the Arab minority. The state is willing to grant Arab citizens religious rights but not meaningful national rights (Karayanni 2012). Moreover, these religious rights substitute for, rather than complement, equality. The state, in this case, delegates religious jurisdictions against the backdrop of lack of separation between religion and state; that is, it does not proffer equal status to the different religious groups. Rather, Israel endorses one religion and merely tolerates others (Dworkin 2006). Religions are privatized because the public sphere is Judaized and, consequently, debates on religion and state are conducted from the perspective of Jewish domination (Karayanni 2006).

In this section, I revisit the Arabs' citizenship status given recent developments. I address three primary aspects of Arab citizenship: citizenship and nationality; citizenship and family life; and citizenship and loyalty. I argue that while the difference between the republican and liberal citizenships is evident in the first instance of differentiation, the "liberal," individualistic citizenship is undermined by the second instance, and then further undermined by the third instance.

Between Citizenship and Nationality

The legal system creates two tracks for acquiring citizenship: the Citizenship Law and the Law of Return. It is only the latter that serves as Israel's nationality law (Tekiner 1991). The Knesset enacted the Citizenship Law only in 1952, four years after the establishment of the state, whereas it enacted the Law of Return – which grants every Jew around the world the right to Israeli citizenship by virtue of being a Jew and immigrating to Israel – in 1950. Prior to the enactment of the Citizenship Law, the British Mandate's Palestine Citizenship Orders

⁸ H.C. 6298/2007 *Yehuda Resler et al. v. The Knesset* (2012). Last accessed July 29, 2013 (<http://elyon1.court.gov.il/Files/02/270/064/a22/02064270.a22.HTM>).

(1925–1942) remained legally valid, and the state registered residents according to the Residents Registration Ordinance of 1949. For some authors, this suggests that Israel had no “citizens” – in the strict sense of the word – between 1948 and 1952 (Margalith 1953). In fact, the delay in the enactment of the Citizenship Law was due to concerns about dual nationality and racial discrimination. Regarding the former, the law allowed dual nationality (i.e., Diaspora Jews who wanted to acquire Israeli citizenship could still retain their previous foreign citizenship). Regarding the latter, the law created differentiated citizenship. Indeed, the enactment of the Law of Return prior to the Citizenship Law exemplifies not only the extreme importance of the Law of Return in the Israeli constitutional structure, but also the distinction between nationality and citizenship in Israel and the precedence of nationality status over citizenship status.

Some authors justify the Law of Return on cultural grounds, on preferential immigration policies, or on maintaining connections with compatriots (e.g., Jakobson and Rubinstein 2009). Yet these arguments ignore both the violent conditions that allowed the emergence of a Jewish majority in the wake of the deliberate expulsion of the majority of the Palestinian people and the constitutive role the law plays in maintaining this majority status (Zreik 2008). The law is not comparable to other repatriation measures, because the Jewish majority is a recent immigrant community; the majority of the Jewish people reside outside the state; and the law is ideological as it considers even Jews who were born inside Israel as those who acquired their citizenship through the Law of Return (Sultany 2010).

The backdrop for the gap between nationality and citizenship is the lack of alternative inclusive nationality (“Israeli nationality”). That is, there is no nationality that citizens are entitled to by virtue of being citizens and without differentiation according to their religious, national, and ethnic affiliations. The Supreme Court endorsed this gap between nationality and citizenship when it rejected in the *Tamarin* (1970) ruling an attempt to designate a citizen’s identity as Israeli rather than Jewish in the identity card issued by the Ministry of Interior.⁹ The state opposed a similar attempt 33 years later by a group of Jewish and Arab petitioners by claiming before the Court that registering the nationality as Israeli rather than Jewish or Arab would undermine the foundations on which the state was established (Yoaz 2004). The petitioners withdrew their

⁹ H.C. 630/1970 *Tamarin v. State of Israel*, P.D. 26 (1) 197 (1972).

petition to the Supreme Court on procedural grounds and resubmitted to the District Court in its capacity as an Administrative Court. The District Court rejected the petition on grounds of non-justiciability. Judge Solberg – who became a Supreme Court Justice afterward – reasoned that there is no legal recognition of an Israeli nationality, and the Court cannot create such a nationality *ex nihilo*.¹⁰ The Supreme Court rejected the petitioners' appeal, notwithstanding its decision that the question is justiciable. The Court highlighted that the petitioners ignored or obscured the difference between nationality and citizenship; that the “constitutional Jewishness” of Israel leaves no room for “Israeli nationality”; that the *Tamarin* ruling's conclusion regarding the lack of existence of an Israeli nationality remains valid; and that the petitioners failed to prove the evolution of such a nationality since the *Tamarin* ruling.¹¹ Thus, the Israeli legal system rejected attempts to create an inclusive nationality for Arabs and Jews that would create an Israeli civic nation composed of all citizens. The legal bond between the state and a person, then, remains differentiated: It privileges those who belong to the dominant ethnic-religious community.

Between Citizenship and Family

Another method of acquiring citizenship is naturalization. In Israel, naturalization generally requires: residency in the country for a specified number of years, intent to settle in Israel, knowledge of Hebrew, and the renunciation of foreign citizenship. Because Jews can acquire immediate citizenship through the Law of Return, this procedure applies only to non-Jews. If the Israeli legal system couched the legal arrangements described in the previous subsection in ethnic-religious terms, it defended the legal rules governing naturalization on dubious security grounds. The Citizenship and Entry into Israel Law (Temporary Order) – 2003 suspends the naturalization of spouses of Israeli citizens if they were from the West Bank, the Gaza Strip, Lebanon, Syria, Iraq, and Iran. This law follows an earlier governmental decision in May 2002 to suspend these naturalizations (Sultany 2003). Despite the classification of the law as a Temporary Order, it has been in effect since 2003 through multiple extensions. In 2006 and 2012, the Court upheld the law's

¹⁰ District Court (Jerusalem) 6092/2007 *Ornan et al. v. Minister of Interior* (2008). Last accessed July 29, 2013 (www.daat.ac.il/daat/maamar.asp?id=136).

¹¹ C.A. 8573/08 *Uzi Ornan et al. v. Ministry of Interior* (2013). Last accessed October 16, 2013 (<http://elyon1.court.gov.il/files/08/730/085/m15/08085730.m15.pdf>).

constitutionality despite its discriminatory nature and its violation of civil rights. The law is discriminatory – notwithstanding its neutral and general language – because it virtually exclusively impacts the Palestinian citizens who are more likely to have spouses from these countries than are Israeli Jews.

The law effectively forces the Palestinian citizen whose spouse resides in one of the listed Arab territories and states to make a difficult choice: Either have a family life outside the state (a choice, as we shall see next, that may lead to revoking citizenship) or to give up the family unit in order to stay in the state and hold on to the citizenship status (Davidov, Yuval, Saban, and Reichman 2005).

In upholding the law as constitutional, the Court approved dubious national security arguments. The state argued that terrorists might use their acquired citizenship status to perpetrate attacks inside Israel. Yet it was obvious to some of the dissenting judges that this security justification is unfounded.¹² Indeed, for the minority judges the individualized case-by-case, graduated process of naturalization that existed prior to the ban on family unification seemed more appropriate for security examination than a blanket, sweeping ban. Such a ban “amounts to an extreme case of profiling on the basis of national origin” (Barak-Erez 2008:185). Justice Cheshin, writing for the majority in 2006, acknowledged the collective injury caused to the Arab citizens by this blanket ban. Yet he imposed a sense of necessity by claiming that it is unavoidable in “times of war” in which the extremely destructive actions of the few justify curtailing the rights of all the members of their community.¹³ The split in the justices’ opinions shows that a different outcome was available in Israeli law. Yet the scope of disagreement was limited. The main dissenting opinion of Chief Justice Barak did not disagree with the majority as a matter of principle regarding the security rationale and the propriety of the laws’ purpose. Rather, Barak disagreed primarily regarding the proportionality of the violation of rights (Jabareen 2007).

Then-prime minister Ariel Sharon acknowledged the dubious nature of the security justification in the debate on the extension of the law: “There is no need to hide behind security arguments. There is a need for

¹² See Justice Levy’s dissent in the 2012 ruling in H.C. 466/2007 *MK Zhava Galon v. Attorney General* (2012). Last accessed July 29, 2013 (<http://elyon2.court.gov.il/files/07/660/004/O30/07004660.O30.htm>).

¹³ H.C. 7052/2003 *Adalah v. Minister of Interior*, P.D. 61(2) 202 para 115 of Cheshin’s opinion (2006).

a Jewish state” (quoted in Ben and Yoaz 2005). Only two of the dissenting judges in the 2006 ruling suggested that demographic considerations motivated the enactment of the law. Yet demographic considerations were implicit in other judges’ opinions (Ben-Shemesh 2008; Masri 2013). The Court effectively upheld the law’s demographic rationale and thus legitimized the depiction of the Palestinian minority as a demographic threat.

The rulings on family unification exemplify the weakness of individual, liberal notions of Palestinian citizenship inside Israel. The law approved in these rulings suggests that the Palestinian citizens are “inherently suspect” and unequal (Barak-Erez 2008). The interests of state security, behind which lurks the demographic interest, supersede the right to family life and to equality. This is, as Michael Karayanni (2012:319) points out, a setback: If the *Qa’adan* ruling stripped the Palestinian from her collective identity and history in order to prevail over the state interest, in the family unification cases, the individualized Palestinian citizen loses before the state interest.

Between Citizenship and Loyalty

The expansion of the power to revoke citizenship is another measure that security justifications obfuscate. On July 28, 2009, the Knesset amended Article 11 of the Citizenship Law (Amendment No. 9) to empower the Administrative Court to revoke citizenship, upon the interior minister’s request, if a citizen committed a “breach of allegiance.” The Amendment defines “breach of allegiance” as one of the following three acts: (1) a terrorist act as defined by the Prohibition on Financing Terrorism Law – 2005, as well as assisting in the commitment or inciting to commit such a terrorist act or active membership in a terrorist organization as defined by the said law; (2) treason or grave espionage (both violations of the Penal Law – 1977); and (3) the acquisition of citizenship or the right to permanent residency in one of the following states or territories: Iran, Afghanistan, Lebanon, Libya, Sudan, Syria, Iraq, Pakistan, Yemen, or the Gaza Strip. Amendment No. 10, enacted on March 28, 2011, authorizes courts to revoke citizenship as a form of punishment in criminal proceedings in addition to any other punishment stipulated in the Penal Law.

Amendments No. 9 and No. 10 are part of ideologically motivated laws by right-wing Knesset members. Member of Knesset David Rotem, of Yisrael Beiteinu, who initiated Amendment No. 10, declared: “There is

no citizenship without loyalty” (quoted in Lis 2011a). This was the slogan of Yisrael Beiteinu’s electoral campaign against the Palestinian minority inside Israel. In particular, centrist and right-wing Jewish politicians repeatedly accused minority leaders of disloyalty. The laws governing charges of terrorism or support of terrorism are often very broad and obscure. Thus, the security apparatus and Israeli establishment can abuse them to criminalize dissent and reframe political opposition as extremism or security threat. Indeed, “security” is not a neutral notion; rather, it is part and parcel of the state’s ideology (Barzilai 2003). Revoking citizenship becomes an ideological tool to punish Palestinian Arab citizens for their political views and activism.

Indeed, some officials have increasingly attempted to revoke the citizenship of Arab citizens and political leaders as a punishment for their actions and views. Few of these attempts have materialized so far. For instance, the minister of interior sought to revoke the citizenship of the Palestinian Member of Knesset Azmi Bishara (National Democratic Assembly), who left Israel after being suspected of “aiding the enemy during war” (Khoury 2009). The minister also asked the Attorney General whether he could revoke the citizenship of Member of Knesset Haneen Zoabi (National Democratic Assembly) pursuant to her participation in the May 2011 freedom flotilla to break the siege on Gaza because her acts were “a premeditated act of treason” (quoted in Ravid 2010).

In contrast to this legislative expansion of the possible ways to revoke the citizenship of a Palestinian, it is virtually unthinkable to revoke the citizenship of a Jew. The bond between Jewish nationals and the state is far stronger than the one between Palestinian citizens and the state. For instance, Yigal Amir, an Israeli Jew, assassinated Prime Minister Yitzhak Rabin on November 4, 1995. A petition to the Supreme Court demanded that the minister of interior revoke his citizenship status. In response, the Ministry of Interior claimed that even when a crime amounts to a breach of allegiance, the minister is not obligated to revoke citizenship, because reasonable discretion is still granted to the minister. The Court approved the Ministry’s position and rejected the petition.¹⁴

Although measures for revoking citizenship impact a relatively small number of Palestinian citizens, this differentiated approach exposes the precarious status of Palestinian citizenship. It is based on weak and unequal foundations, and the state may strip it if these citizens do not

¹⁴ H.C. 2757/1996 *Hila Alrai v. Minister of Interior*, P.D. 50(2) 18 (1996).

behave according to the Zionist consensus that has been increasingly lurching to the right in recent years. The *Qa'adan* ruling conceived the Palestinian citizen as an individual rights holder with no title over the homeland. In the family unification cases, the Court compromised the right to family life and equality in this bundle of individual rights at the altar of the state's interest in maintaining a Jewish demographic majority. Loyalty laws further undermine the remains of this bundle of individual rights because the state gives, and the state takes away.

The Legal Structures of Segregation

The vast majority of Palestinian citizens in Israel live in Arab communities. Only a small minority of these citizens live in the so-called mixed [Arab-Jewish] cities. Virtually all school-age Palestinians – from kindergarten to high school – study in Arab schools. Arab communities are overcrowded, economically underdeveloped, with high poverty rates, and deficient schools (Sultany 2012b). Attempts by individuals to escape the fate of low-quality life confront the reality of extremely limited social mobility. One possible reason for this limited mobility is the prevalence of stereotypes and racist attitudes toward Palestinian citizens among the Jewish majority. The state education system, the militarization of Israeli society, outspoken religious figures, and a sensationalist media all nurture these attitudes (Bar-Tal and Teichman 2005; Peled-Elhanan 2012). They effectively decrease the possibility that Jewish citizens would rent or sell apartments to Palestinian citizens. However, the main factors for low social and spatial mobility are legal and institutional.

Education

Segregation in education is manifested in the institutional separation of the state education system into Arab and Jewish systems (the latter are internally divided into secular and religious systems). The state education system in the Palestinian community relegates Palestinian children to second-class status (Coursen-Neff 2004; Human Rights Watch 2001). The state discriminates against the Arab state education system in virtually every respect. Admission policies of the universities further disadvantage students coming from the periphery, as the heads of universities recognized when they decided in 2003 to change the admission criteria to admit poorer Jewish students (Sa'ar 2003). The increase in Palestinian students that followed this change alarmed the education

establishment, and it quickly reverted to the previous admission criteria (Sa'ar 2003). Additionally, medical schools introduced different requirements that effectively lowered the number of admitted Palestinian students (Stern and Traubmann 2006; Traubmann 2007).

Furthermore, the state's resources are dedicated to using the Arab education system as an important tool for control and subordination (Abu-Saad 2004; al-Haj 1995). The long-standing involvement of the General Security Service in appointing educators based on political considerations exemplifies this control (Ettinger 2004; Sultany 2004). This control of the education system is part and parcel of the security establishment's general surveillance and political control of the minority that continued after the formal dismantlement of the military government in 1966 (Cohen 2010). In 2005, the state declared its intention to cancel the position of a security service representative in the Arab education system after Adalah – The Legal Center for Arab Minority Rights – petitioned the Supreme Court. Whether the security apparatus's interference in other ways will discontinue remains to be seen.

The legal system has contributed to this attempt to control the education system – be it state or private institutions – through a myriad of laws (such as the State Education Law – 1953; Education Ordinance (New Version) – 1978; Supervision of Schools Law – 1969; and The Civil Service (Discipline) Law – 1963). These laws sought to restrict political activism in schools and used disciplinary measures against teachers if they participated in political activities or exhibited “improper behavior,” even if that activity occurred outside the school itself (Saban 2011).

Moreover, the decentralized structure of local government law perpetuates the Arab education's separate and unequal status. As Yishai Blank (2006) argues, the educational segregation is not a result of the free choices of Jewish and Palestinian citizens. Rather, these choices and preferences are shaped by the background rules that local government law creates. These legal rules enhance segregation despite the seeming absence of a formal and direct state-sanctioned policy of segregation. Specifically, the “involvement of local governments in education . . . has been made possible by the basic legal infrastructure, which gives local governments seemingly ‘technical’ powers in education matters: placement of students in schools; establishment of special and selective schools; . . . and participation in funding schools within their jurisdictions” (Blank 2006:371–372). Processes of suburbanization led to fears of white flight (wealthy parents leaving to smaller communities), and

disparities between localities and between neighborhoods led to disparities between schools. Blank argues that:

the shift from state funding to self-generated funding and the emergence of competition between localities in Israel over economically strong populations, have . . . exacerbated the disintegration of the public education system and have contributed to the widening gaps within the system . . . The principal victims of this phenomenon are pupils in peripheral towns, in poor neighborhoods, and in Arab towns and villages.

(ibid.:374)

The taxing and zoning power of local municipalities contributed to these processes (ibid.). For instance, residential segregation leads to segregation in education through enrollment zones (ibid.). Blank critiques the lack of state intervention – to guarantee an equal baseline – and the commodification of education. The withdrawal of the state – especially with the advancement of neoliberal policies – makes segregation in education resilient. Although the background rules seem neutral and technical, they have distributive outcomes and influence the incentives and preferences of different actors and citizens. Without attending to these background rules, the separate and unequal education system is likely to persist.

Housing

Segregation in education goes hand in hand with housing segregation (Denton 1996). State law and policies in land allocation and housing restrict the spatial mobility of young Palestinian couples. While the state has established hundreds of Jewish communities, it has not established any single new Palestinian town or village since 1948 (except in the forced concentration of the Bedouin communities in poor towns that accompanied their dispossession from their ancestral lands and the demolition of their villages). Quasi-governmental Zionist bodies whose status the state has legally enshrined – the Jewish National Fund and the Jewish Agency – played a major role of Judaizing Palestine and established gated Jewish-only communities.

The Supreme Court contributed to this segregation. In a famous case, it approved the refusal to sell an apartment to an Arab in East Jerusalem.¹⁵ Bourkan – a former resident of the Jewish Quarter in East Jerusalem – sought to purchase an apartment in the neighborhood.

¹⁵ H.C. 114/1978 *Bourkan v. Minister of Finance*, P.D. 32(2) 800 (1978).

The legal challenge to the Jew-only selling policy failed, because the Court justified this preferential and exclusive policy on grounds of the previous historic expulsion of the Jews from the neighborhood. In other words, the Court used the notion of affirmative action – that is associated with a substantive notion of equality and seeks to remedy historical patterns of discrimination against minorities – to privilege the Jewish majority and deny equal access to housing for Arabs.

Unlike the *Bourkan* ruling, the Court's ruling in the *Qa'adan* case (2000) advanced formal equality. Nonetheless, it hardly challenged the segregation policies. Although it prohibited discrimination in housing and land allocation, the Court limited its holding to the specific settlement of Katzir. Moreover, the Court did not examine the decades-long discriminatory land policies, nor did it examine the role of admission committees in gated communities. Thus, it “may remain a symbolic victory, as discrimination may continue behind a façade of [formal] equality” (Gross 2004:90). Furthermore, the Knesset entrenched the loophole of admission committees on March 23, 2011, when it enacted the Cooperative Associations Ordinance (Amendment No. 8) – 2011. This statute legalized the role of the admission committees and their ability to reject candidates on grounds of “social incompatibility.” Given public criticism, the statute includes a prohibition on rejecting candidates on grounds such as race, religion, gender, and nationality. Nonetheless, “social incompatibility” is a blanket and vague criterion that can be applied in practice to effectively exclude vulnerable sectors of the Israeli citizenry, specifically the Palestinian citizens. The Supreme Court rejected petitions seeking to invalidate the law and thus sanctioned housing segregation. A majority of 5 out of 9 judges claimed that the petitions lacked “ripeness” and enough factual basis for judicial determination because the effects of the law can be assessed only after its implementation and in a case-by-case analysis. Some of the judges, however, added substantive comments in which they rejected the logic of “formal equality,” that *Qa'adan* exemplifies, and returned to the logic of “substantive equality” to privilege the majority, that *Bourkan* exemplifies.¹⁶

Despite the growing influence of globalization and neoliberal ideology in Israel since the *Bourkan* ruling, the state continues to maintain a strong presence in the market through multilayered cooperation with

¹⁶ H.C. 2311/11 and 2504/11 *Uri Sabah et al. v. The Knesset, et al.* (delivered on September 17, 2014).

private actors in order to produce a spatial order congenial to Judaization. Even in the so-called “mixed cities,” planning authorities reproduce the *de facto* segregation between Jewish and Palestinian populations (Falah 1996; Yacobi 2009). Separation walls exist not only in the West Bank but also inside Israel, between Jewish and Arab neighborhoods in the “mixed cities” Lydda and Ramle, and between the adjacent communities of Caesarea (Jewish) and Jisr Al-Zarqa (Arab).

The separation between the communities is also an effect of personal law arrangements. Mixed Jewish–Arab marriages are extremely rare. This rarity cannot be understood without the backdrop of the lack of civil marriage in Israeli law, on the one hand, and the preservation of the Ottoman legally sanctioned autonomous status of Jewish, Christian, and Islamic religious authorities over personal status, on the other. These legal and institutional arrangements effectively make the prospect of such mixed marriages even less likely.

The “Passive Virtues” of the “Activist Court”

The foregoing shows that seemingly apolitical categories (like absentee, *Mewat*, breach of allegiance, mixed cities, and equality) advance and conceal subordination of one ethnic group to another. This subordination is represented as either an outcome of law – rather than politics – or of private choices rather than law. It thus conceals the intertwining of law and politics, and ignores the role of background rules in shaping private choices. These representations allow the Court to deny its role in the process of subordination. Another method of denial is the pretense of non-intervention. Alexander Bickel (1986) suggested in his canonical book that courts should deploy what he called the “passive virtues”: a set of “procedural” devices that allow the court to refrain from deciding cases on the merits when the application of general legal principles hinders the required flexibility for political expediency or when these principles are controversial. These devices include standing requirements (restrictions on petitioners’ access to the court), ripeness (temporal restrictions according to which the issue is not ripe for judicial intervention), and the political question doctrine (according to which the court would refrain from deciding issues that are considered “political questions” and hence nonjusticiable). Other scholars followed Bickel in suggesting a form of minimalism that leaves more room for the legislative and executive branches of government and asks the courts to decide cases on the basis of narrow and thin justifications (Sunstein 1999). These

devices are suggested as an attempt to prevent judicial activism and advocate for a deferential attitude vis-à-vis other branches. These are devices for a minimalist court, and not an activist court. Yet critics of these approaches have long pointed out that the deployment of minimalist devices requires the court to use its political judgment and thus it does not really extract the court from politics (Deutsch 1968; Tushnet 2005).

In Israel, the Court's political judgment on using avoidance devices is entangled with the Court's conception of its role within the Zionist project. The Court, considered by many as an activist court, used minimalist devices. Although the Court expanded access to the court system by minimizing the standing requirements, it used different rhetorical and legal devices to effectively limit this access and, ultimately, affirm state power. These minimalist devices are largely "technical" or "procedural," but they allow the Court to deny responsibility. The consequences of this judicial "non-intervention," however, are detrimental to the status of the Palestinian citizens. In what follows, I mention briefly some of the devices that the Court used to justify or show deference: security, thin rulings, political questions, general questions, delay, ripeness, and color-blind jurisprudence.

Security

Foot-dragging and delay in deciding controversial cases is a hallmark of a reluctant judiciary. The Court exemplified such hesitation in cases that are related to security, even when security considerations were ostensibly tenuous. In May 2012, the Court decided to reject the petition against the long-standing emergency declaration.¹⁷ Israel has declared a continuous state of emergency since its inception in 1948. This makes it an enduring state of emergency and longer than, for instance, Egypt's declared state of emergency that lasted (with few interruptions) since 1958 and expired only after the ousting of President Mubarak in 2011. In Israel, it took the Court about 13 years to decide the 1999 petition against the declaration of a state of emergency in the country. The Court noted that the extensive legislation that made use of the emergency declaration often had no apparent connection to security (as in ordinances related to economy and consumerism; see also Lis 2011b). Yet, it granted the authorities

¹⁷ H.C. 3091/1999 *The Association for Civil Rights in Israel v. The Knesset* (2012). Last accessed July 29, 2013 (<http://elyon1.court.gov.il/files/99/910/030/t38/99030910.t38.pdf>).

more time to make the necessary changes despite the fact that the government made few changes during the 13 years after submitting the petition. Writing for the Court, Justice Rubinstein – who served prior to his appointment as a legal advisor to the security establishment, a cabinet secretary, and an attorney general – argued that “Israel is a normal state that is not normal” given the security threats that it faces.

The long-standing nature of emergency powers and their different legal sources reveal that far from being exceptional measures addressing security needs, these powers serve as a governing norm; rather than being tools that suspend the law, they extend and channel state power under the rule of law (Mehozay 2012b). Emergency regulations have been used against Palestinian citizens and their political leaders long after the end of the military regime in 1966. For example, the Supreme Court refused to intervene in the travel ban issued by the minister of interior against the political and religious leader Ra’ed Salah, who intended to visit the religious sites in Mecca.¹⁸ It also refused to intervene in the travel ban issued against the author, translator, and literary critic Anton Shalhat.¹⁹ In both cases, the Court heard the security apparatus representatives *in camera*, and Salah and Shalhat had no way of challenging the alleged evidence against them. The Court avoided writing an opinion in Shalhat’s case and pressured the petitioner to withdraw his petition. These cases exemplify the Court’s common and uncritical acceptance of the security apparatus’s reasoning.

Thin Rulings

Security considerations often go hand in hand with “thin” rulings, as in the case of the curtailment of prisoners’ rights. Following Hamas’s capture of an Israeli soldier in Gaza in June 2006, the government decided to worsen the conditions of the Palestinian prisoners, including those who are citizens of Israel and are classified as “security” prisoners. These new punitive measures included preventing the security prisoners (but not the criminal prisoners) from pursuing an academic

¹⁸ H.C. 4706/2002 *Shiekh Ra’ed Salah et al. v. Minister of Interior* (2002). Last accessed July 29, 2013 (<http://elyon1.court.gov.il/files/02/060/047/M05/02047060.m05.pdf>).

¹⁹ H.C. 841/2006 *Anton Shalhat et al. v. Minister of Interior* (petition withdrawn). See Adalah – The Legal Center for Arab Minority Rights. 2006. “Supreme Court Submits to GSS Dictates and Does Not Cancel Order Banning Literary Critic ...” *Adalah’s Newsletter* 24, April. Last accessed July 29, 2013 (<http://adalah.org/newsletter/eng/apr06/2.php>).

degree via correspondence from the Israeli Open University. These measures persisted even after the Israeli soldier was released in a prisoners' exchange deal between Israel and Hamas in October 2011. The District Court rejected the prisoners' petition to allow them to resume their education, and the Supreme Court rejected in December 2012 their request for an appeal.²⁰ The Court reasoned that the discrimination against security prisoners is not an impermissible discrimination. The thin nature of the Court's ruling exemplified another hallmark of a minimalist court: The ruling consisted of four short paragraphs and did not explain the Court's conclusion concerning the permissibility of discrimination in this case.²¹

"Political" Questions

At the time the Court expanded its rhetoric of judicial review and intervened in the "nitty-gritty" politics (Barak-Erez 2002), it used occasionally the "political question" argument to avoid intervening in governmental decisions against Arab citizens (and also in petitions of Palestinians in the Occupied Territories, see Sultany 2002, 2014). This is especially striking, not only because it reveals the political judgment of the Court regarding when and where to intervene, but also because it shows the Court's unwillingness to intervene even when at face value the state's decision is flawed. Consider the case of the Palestinian village of Iqrith. The Israeli army occupied Iqrith in October 1948. A week later, the villagers were requested to leave for 15 days for security reasons. The Court ordered the army in an early ruling to allow the return of the displaced persons to their village.²² The army reacted by destroying the village (Peretz 1958). During the subsequent years, several government-appointed committees recommended that the villagers return to their village, but none of these recommendations or promises materialized (Jamal 2011). In 2003, the Court rejected a 1997 petition by the displaced villagers.²³ The Court accepted the petitioners' argument that the

²⁰ P.A. 2459/2012 *Said Salah et al. v. Israel's Prison Service* (2012). Last accessed July 29, 2013 (<http://elyon1.court.gov.il/files/12/590/024/s07/12024590.s07.pdf>).

²¹ The Court reiterated its position in a longer ruling in an expanded panel in April 2015. Additional Hearing in H.C. 204/13, *Said Salah et al. v. Israel's Prison Service* (delivered on April 14, 2015). Last accessed September 3, 2016 (<http://elyon1.court.gov.il/files/13/040/002/C25/13002040.C25.pdf>).

²² H.C. 64/1951 *Dawood et al. v. Minister of Defence*, P.D. 5 1117 (1951).

²³ H.C. 840/1997 *Awni Sabit et al. v. Government of Israel*, P.D. 57(4) 803 (2003).

security conditions that have justified their displacement are no longer valid. It also acknowledged the governmental promises made to the villagers. Nevertheless, the Court argued that this is a political question in which the state has wide discretion. It also accepted the Sharon government's tenuous argument that allowing the return of these citizens will be a precedent that will be detrimental to Israel's vital interests because it may be used in the context of the Palestinian right of return in the Oslo process.

"General" Questions

In other cases, the Court justified its lack of intervention in the political branches' decisions by claiming that petitions regarding discriminatory distribution of state resources are too "general" to warrant a judicial remedy and lack a sufficient "factual basis." In a petition against the state budget, petitioners argued that a budget that grants Arab citizens who comprise one-fifth of the population only 1.86% of the Ministry of Religious Affairs budget is discriminatory. The Court rejected the petition, maintaining that it refuses to be a "general supervisor" of the state budget.²⁴ It also claimed that the petition is general and lacked a factual basis, despite the numbers the petitioners provided. The Court reasoned that the focus should be on substantive equality rather than formal equality, and this requires an inquiry into the religious needs of every community. In the absence of such an inquiry, the petition is general. This is a remarkable argument: As previously mentioned, notions of substantive equality are normally used to allow minorities to obtain equality beyond the formal measures given the persistence of structural impediments and historical discrimination. Yet here the Court uses substantive equality in order to *deny* formal equality.

Moreover, the Court is selective and inconsistent as it vacillates between the general and particular in accordance with the case before it. In the ban on family unification cases, the Court approved a blanket measure that supplanted the existing case-by-case system. Similarly, in the political prisoners cases, the Court approved a general suspension of the education privileges for all "security prisoners." In contrast, in the "admission committees" case, it deemed the petition general because it lacked a case-by-case analysis of the law's effects. In the Religious Affairs budget case, it is unclear how specific should the petition be to avoid

²⁴ H.C. 240/1998 *Adalah v. Minister of Religious Affairs*, P.D. 52(5) 167 (1998).

“generality” and provide sufficient factual basis. What is clear, however, is that the Court’s intervention – whether requiring general or “particular” analyses – disadvantaged the Palestinian citizens.

Delay

If the *Sabit* case mentioned earlier used the political question to reject the petition of those displaced from Iqrith, the Court rejected an earlier petition of the displaced because the petitioners were “late” in approaching the Court.²⁵ The petitioners challenged in 1981 the legality of a Certificate that the minister of finance issued in 1953 and that transfers Iqrith’s lands to the Development Authority. They also challenged the military commander’s 1963 and 1972 closure orders of the village. The Court reasoned in a few pages that the passage of a long period of time hinders the ability to examine the considerations that guided the state authorities in issuing these orders. The Court did not distinguish between the 1972 and 1953 orders concerning the lapse of time. Despite the sympathy that the Court expressed to the petitioners, it denied their claim that the security conditions that prevented their return were no longer valid given the “well known” fact “that requires no proof” that the security conditions on the northern border adjacent to the village are not peaceful. In other words, the security conditions cited by the Court were not internal to Israel but external to it and bear no relationship to Iqrith and the displaced.

Ripeness

The ruling on the so-called Nakba Law deployed a different rhetorical tool of deferential courts. If the previous case was rejected because it was too late, here the case was rejected because it was premature. The Budget’s Foundations Law (Amendment no. 40) – 2011 authorizes the minister of finance to lower state funding of institutions or bodies that organize events that reject the Jewish and democratic character of the state or consider Independence Day as a catastrophe day. This law is clearly directed against Palestinian citizens who present an alternative narrative to the Zionist narrative and commemorate the Nakba (catastrophe), the ethnic cleansing of the Palestinians. The Court rejected the

²⁵ H.C. 141/1981 *Iqrith’s Committee of the Displaced, Rameh Village et al. v. Government of Israel*, P.D. 36(1) 129 (1982).

petitions against the constitutionality of the law despite the chilling effects of the law. The Court reasoned that the law's impact couldn't be assessed prior to its implementation, and thus the question is not ripe for judicial intervention.²⁶ The Court made a similar argument in the above-mentioned case concerning admission committees.

Color-blind Jurisprudence

Facially neutral discrimination in the distribution of benefits and resources complements the absence of formal equality. The criterion of military service has operated as a pretext to discriminate against Palestinian citizens, even though they are not legally required to serve. This criterion has influenced housing and employment. Yet additional criteria have proliferated over the years like tax and investment benefits, land development, and unrecognized villages. The Supreme Court has allowed this facially neutral discrimination and legitimated it by deploying a "color-blind" jurisprudence (Benvenisti and Shaham 2004). According to this approach: "If discriminatory policies can be explained on any seemingly neutral grounds other than 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." (ibid.:700) By employing this jurisprudence, the Court allowed the growing disparities between Arabs and Jews to proceed under the judicial imprimatur.

Disparate impact under facially neutral criteria is evident also in lower courts' application of criminal law. Palestinian citizens who are suspected of violating criminal law are more likely than Jewish citizens in a similar position to be indicted, convicted, and sentenced to prison in lower courts (Rattner and Fishman 1998). This shows disparity in the application of criminal law and a harsher policy against Palestinian citizens. During the military government period, the state criminalized Palestinian citizens for violating the pass-permits regime that regulated their movement and their access to the labor market (Koren 2004). Criminalization is also evident in cases involving political speech and popular protest in more recent times. The mass arrests of Palestinian

²⁶ H.C. 3429/2011 *Graduates of the Orthodox Arab College v. Minister of Finance* (2012). Last accessed July 29, 2013 (<http://elyon1.court.gov.il/files/11/290/034/c04/11034290.c04.pdf>).

citizens in the October 2000 protests and the arrests following the protest against the onslaught on Gaza (December 2008–January 2009) are examples of this phenomenon (see, e.g., Baker and Asali 2009; Rosenberg 2002).

Occasional Limits on the Excessive and the Peripheral

Although the subordination of the Palestinian citizens is the dominant effect of Israeli law, the intervention of the Supreme Court occasionally limits excessive and peripheral cases of this subordination. By “peripheral,” I mean cases in which many liberal Zionists would consider a particular instance of discrimination unrequired by the Zionist or Jewish nature of the state or unnecessary to maintain them. These issues are located in the penumbra rather than in the core of the definition of the state as a “Jewish state” or as the “state of the Jewish People.” The core issues include the demographic question of maintaining a Jewish majority as we saw in the family unification cases. By “excessive,” I mean those cases that may be related to the core issues but the methods of advancing these core ends are themselves controversial, because many liberal Zionists would consider them excessive. Had Chief Justice Barak’s opinion in the family unification case garnered the support of the majority in the Court, it would have been another example of limiting the excess. Ultimately, Zionism may house a spectrum of views and thus does not necessarily determine the outcome in every case before the courts. Nevertheless, the very fact that the concepts of Zionism or Jewishness of the state – no matter how contestable – are the concepts that frame the debate has important exclusionary effects from the standpoint of those whose political/normative identity is defined in opposition to Zionism or Jewishness.

I describe here briefly three examples of this occasional moderating effect: political participation, freedom of speech, and state subsidies. Yet, as we shall see, limiting the excesses is often accompanied by a judicial avowal of the mainstream ideology: either by affirming ethnocentric values (as in the case of political participation), or accompanied by a judicial condemnation of protected individual Arab interests (as in the case of free speech). These are not necessarily rhetorical tools, but indicate that the judges themselves are part of the dominant ideology. In the case of limiting peripheral discrimination, the Court’s ruling is at times too late and

ineffective to be consequential (as in the case of state subsidies). This shows the weakness of the judicial system in the overall power structure. This weakness is inconsistent with the image of a powerful, interventionist Court.

It should be noted, however, that limiting the excessive and the peripheral is not a consistent or coherent judicial strategy. Rather, it is contingent on the specific case and its context as well as on the composition of the Court. As many of the cases discussed in this chapter show, it is not clear what cases the Court would consider excessive and in which areas of the law. Yet this occasional moderating effect allows the overall power structure to persist while providing it with a semblance of legality. This moderating effect on particular practices contributes to an overall effect of moderation on the socio-political system by pushing it toward centrism (Kennedy 1998). This centrism ensures that the power structure will not lean drastically toward either the left or the right extremes of the Zionism continuum: Contrary to left-wing hopes, as mentioned earlier, the Court endorsed neo-liberal economic attitudes. Contrary to right-wing hopes, the Court protected Arab political participation.

Political Participation

The state not only entrenches in its Basic Laws the Jewish character of the state; it also further prohibits the political attempt to change the rules of the game that are rigged for the benefit of the Jewish majority. The Basic Law: The Knesset may allow disqualification of political parties or individual candidates from participating in specific parliamentary elections if they explicitly or implicitly reject the Jewish character of the state by demanding democratization through equal status for all citizens. Article 7A stipulates that a candidate or a candidates' list may be disqualified from Knesset elections if they explicitly or implicitly, through their goals or actions: (1) deny the existence of the state of Israel as a Jewish and democratic state; (2) incite to racism; or (3) display support of an armed struggle of a hostile state or of a terrorist organization against the state of Israel.

Unlike the previously mentioned *Yardor* case, the Supreme Court has prevented several attempts in recent years to disqualify Palestinian parties. In the case of the disqualification of Azmi Bishara and the National Democratic Assembly, a majority of a deeply divided Court

(7 to 4) decided to reverse the disqualification.²⁷ Then-Chief Justice Barak invoked the lack of evidence to justify his ruling. But in discussing Bishara's advocacy of "a state for all its citizens," Barak insisted that the only meaning of "state of all its citizens" that is compatible with the Jewishness of the state is the individualist meaning that seeks equal individual rights within the state of the Jewish People and does not challenge the ideological structure of the state. The Jewishness of the state for Barak is not defined merely on cultural terms, but also demographic and ethnic terms, namely, the continuity of the majority status for Jews. Thus, while the Court prevented the Knesset from thwarting Arab representation, it simultaneously reproduced the political ceiling under which this representation is permitted.²⁸

Freedom of Speech

A review of the Court's jurisprudence on free speech shows that there is a hierarchy of rights: the Palestinian citizens and the Palestinian residents of the Occupied Territories are not granted the same protection that the Court grants to the Jewish majority (Salzberger and Oz-Salzberger 2006). In many cases, including during the 1980s, the Court allowed the closure or refusal to grant publication permits. In some of these cases, the Court either ignored the ruling of *Kol Ha'am* (1953), or coopted it (by claiming that the governmental curtailment of free speech has passed the muster of "real and present danger"), or distinguished the case before it from *Kol Ha'am*, given the use of a different legal regulation to restrict speech (Salzberger and Oz-Salzberger 2006). We saw in the abovementioned case of the Nakba Law that the Court continues its weak protection of Arab citizens' free speech rights.

Occasionally, the Court did protect free speech, but this protection came at a price. The Court annulled the decision of the Censorship Board to forbid the screening of the movie *Jenin*,

²⁷ E.A. 11280/2002 *Central Elections Committee for the Sixteenth Knesset v. MK Ahmad Tibi et al.*, P.D. 57(4) 1 (2003).

²⁸ More recently, the Court approved the Knesset's decision to increase the electoral threshold for political representation from 2 % to 3.25 % and thus to disadvantage minority representation. See H.C. 3166/14 and 4857/14 *Yehuda Gutman et al. v. Attorney General, State of Israel* (ruling delivered on March 12, 2015). Last accessed September 5, 2016 (<http://elyon1.court.gov.il/files/14/660/031/s13/14031660.s13.htm>).

Jenin by the director Mohammad Bakri.²⁹ This movie sought to present an alternative, Palestinian narrative to the Israeli narrative surrounding the Israeli army's major incursion in the Occupied Territories and destruction of the Palestinian Authority's institutions during the so-called Operation Defensive Shield. One can read this ruling as a protection of a "democratic threshold" and a "major aid" to the Palestinian minority (Saban 2008). Yet the Court did not justify the protection in line with classical liberal defenses of speech as in the market place of ideas in which a variety of views are heard and from which the truth can emerge. Rather, the Court reasoned that it was protecting untruthful speech to avoid violence and critiqued the movie as deceptive and insulting to the Israeli public. This reasoning makes the Court's approach "apologetic" (Salzberger and Oz-Salzberger 2006). Only by endorsing the Zionist consensus through denying the possibility of an alternative narrative to the events could the speech of the Palestinian director be allowed. Only through disparaging the speech (by reframing it as a lie and marginalizing it) could the speech be heard.

In addition, around the same time of the decision against Bakri's documentary, the interior minister decided in December of 2002 to close the Islamic Movement's weekly *Sawt al-Haq wa al-Hurriyyah* according to the British Mandate's Press Ordinance of 1933 (Rofeh-Ofeer and Waked 2002). The Ordinance gives wide discretion to the minister based on vague and broad provisions ("danger to public safety"). The minister justified the closure of the newspaper for two years by arguing that its content includes incitement to violence and "endangers public safety." The Court is implicated in the continued validity of this Ordinance. It rejected a petition asking the Court to declare some of the provisions as unconstitutional given their infringement on free speech and freedom of occupation following the enactment of the basic laws during the 1990s.³⁰

The Peripheral

Earlier we saw in the case of religious budget distribution that the Court is reluctant to intervene in state distribution of resources. Yet on other occasions, the Court has intervened. The case of subsidies and tax

²⁹ H.C. 316/2003 *Bakri v. Censorship Board*, P.D. 58(1) 249 (2003).

³⁰ H.C. 6652/96 *The Association for Civil Rights v. Minister of Interior*, P.D. 52(3) 117 (1998).

benefits is an instance in which the Court limited relatively peripheral manifestations of discrimination. Yet even in these cases, the delay in the legal proceedings and lack of implementation made the rulings quite ineffective.

In 1998, the High Follow-Up Committee, the body representing the Arab citizens, submitted a petition against the governmental classification of localities to National Priority A and B. This classification allowed the distribution of greater benefits and incentives to those communities in the A category. The petition focused on education-related benefits and argued that this classification is discriminatory given the fact that the government included only 4 Arab communities (out of 553) within the A category. Eight years after the submission of the petition, the Court ruled in 2006 that the governmental decision constituted an illegal discrimination. Yet it gave the government a one-year period to begin the implementation of the ruling by ceasing to distribute benefits according to the impermissible classification.³¹ The Court granted the state another extension until 2009. The state sought another extension through a 2009 law that extended the implementation of the discriminatory decisions until January, 2012 (Adalah 2010). Following another petition, the state announced that it intends to comply with the 2006 ruling (Adalah 2011). In other words, only in 2011 and more than a decade after the original state policy did the state announce that it will cease to use that specific discriminatory policy. During these 12 years or so, the state continued to distribute benefits in a discriminatory manner to the detriment of the Arab communities. In this sense, justice delayed – as the saying goes – is justice denied.

Conclusion

This chapter has laid out the legal structures of subordinating the Palestinian minority in Israel. For this purpose, it challenges the view of the Israeli Supreme Court as a liberal, rights-vindicating Court. As far as the rights of the Palestinian citizens are concerned, the Court has overall justified, refined, and advanced their subordination. Far from being a counter-majoritarian or activist court defending the weak and the disempowered, it has been an active participant in the evolution of

³¹ H.C. 2773/98 *The High Follow-Up Committee for Arab Citizens of Israel v. The Prime Minister* (2006).

the Zionist project. This chapter presented the primary manifestations of the Court's contribution to the dispossession, subordination, segregation, and control of the Palestinian citizens as well as the legal and discursive tools it has deployed.

Although the Court has occasionally delivered rulings critical of the Israeli executive and legislature, these were too few and too limited to meaningfully challenge existing power structures. They often reflected disagreements regarding the form and extent of discrimination rather than a rejection of discrimination altogether. The Court effectively legitimated the primary practices of a settler regime by providing it with an aura of the rule of law. Without that aura, Zionist practices would appear to be mere raw power and force. The Court depoliticized the oppressive practices and presented them as more natural and necessary than they were likely to be perceived without the legal imprimatur (see, e.g., Kennedy 1998).

The Court's dismal record is likely to worsen even further. Since the Likud's victory in 1977, the Zionist right wing has been strengthening its grip on the Israeli political system. The failure of the Camp David summit in July 2000, the second intifada, and the October 2000 mass protests have all accelerated this movement to the right. These developments have led to the evolution of a new Zionist consensus that seeks to redraw the boundaries of citizenship in Israel (Rouhana and Sultany 2003). It is too early to tell how this will influence the Court's jurisprudence. Nevertheless, in 2012 the right-wing politicians secured the appointment of Asher Grunis – considered by some as “the darling of the right wing” – as the Chief Justice of the Supreme Court (Karpel and Zarchin 2011). In the same month, Justice Noam Solberg – a resident of the West Bank settlement Gush Etzion – became the first settler to sit on the Court. With the retirement of former Chief Justice Barak – the most influential liberal Zionist judge in the Court's history – these changes might signal a right-wing turn in the Court's jurisprudence as well. The Court is still likely to uphold a Zionist centrist position, through its moderating effect, but the political center itself has been consistently moving rightward.³²

³² The Court's record in 2015, after writing this article, supports this conclusion (Adalah 2015).

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