FACIALLY NEUTRAL DISCRIMINATION AND THE ISRAELI SUPREME COURT

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I. INTRODUCTION

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

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

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

III. INTER-GROUP ALLOCATION OF PUBLIC RESOURCES IN ISRAEL

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

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

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

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

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

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

A petition to the Court in 1983[29] prompted the Attorney General to abandon this criterion in the context of awarding National Security funding for children. In recent years, there has been a noticeable trend away from using this criterion, but direct assistance for released soldiers to facilitate their reentrance into civilian life (rather than indefinite assistance to soldiers' families) has been maintained.[30]

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

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

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

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

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

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

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

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

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

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

A. *Distinctions Based on Place of Residence*

1. *Tax and Investments Benefits*

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

The main vehicle for the allocation of public funds for different localities is the government's long-standing practice of adopting preferential schemes for regions it categorizes as development areas. This authority is derived mainly from the Encouragement of Investment Act of 1959.[34] However, the government often operates outside of the confines of this law, using its so-called "residual authority," a vaguely defined source of enlarged governmental authority.[35]

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

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

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

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

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

37. *Id.*

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

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

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

2. *Land Development*

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

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38. *Id.*

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

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

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

42. *Id.* at 128-29.

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

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

45. *See id.*

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

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

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

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

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

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

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

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

49. *Id.*

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

51. *Id.*

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

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

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

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

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

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54. *See* Alterman, *supra* note 52.

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

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

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

58. *Id.*

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

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

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

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

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

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

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

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

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

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

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

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

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

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

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

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

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

3. *Unrecognized Villages*

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

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72. *See* Yiftachel, *supra* note 70.

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

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

75. *Id.* at 265.

76. *Id.* at 264, 286.

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

in the Planning and Building Act of 1965.[78] Under this law, buildings that are built without proper permits must not be connected to the electricity, water, and telephone systems, and may even be demolished.[79] The buildings in these unrecognized villages have no permits because the lands they occupy are not designated for housing in accordance with the existing building plans.

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

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

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

79. *Id.* at 373-84.

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

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

In 1998, in response to a similar petition against the Bedouin Education Authority, the High Court ordered the Ministry of Education to connect eleven elementary schools to the electricity system.[82] The submission of additional petitions to the Court resulted in the renewal of social services in 2000,[83] and in the connection of some villages to drinking water sources in 2003.[84]

4. *Ministerial Development Budgets*

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

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

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

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

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

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

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

86. *Id.*

87. *Id.* at 51-52.

88. *Id.* at 5-78

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

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

89. *Id.*

90. *Id.*

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

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

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

94. *See id.*

IV. The Court's Responses

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

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

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

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

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

125. *Id.*

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

127. *Id.*

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

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

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

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

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

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

The first case to adopt the color-blind approach related to the expropriation of lands near the Arab town of Nazareth in 1952.[130] The Court ruled that the fact that all the lands in question belonged to Arabs was not enough to establish dis-

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

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

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

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

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131. *Id.* at 1265.
132. *Id.* at 1265-66.
133. *Id.* at 1266.
134. H.C. 200/83, Wattad v. Sar Ha-Otzar [Wattad v. Minister of Finance], 38(3) P.D. 113.
135. *Id.* at 115-117.
136. *Id.*
137. *Id.*
138. *Id.* at 121.
139. *Id.* at 122-23.
140. *Id.* at 123.

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

The Court opened up its eyes to see group based discrimination only in the *Katzir* case discussed in Part III.A.2.[142] The Court ruled that the exclusion of an Arab family from the settlement was illegal.[143] In this case, it was virtually impossible to apply color-blindness because the association openly acknowledged that it rejected the family because of its Arab ethnicity.[144] The association did not even accept for consideration the application forms filled out by the Arab family.[145]

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

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

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

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

143. *Id.* at 278.

144. *Id.*

145. *Id.* at 265.

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

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

148. *Id.* at 83.

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

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

B. *Enhancing Judicial Review of Allocation Procedures*

1. *Institutional and structural deficiencies*

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

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

149. *Id.* at 84-86.

150. *Id.* at 95.

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

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

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

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

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

152. H.C. 5023/91, Poraz v. Sar Ha-Binuy V'Ha-Shikun [Poraz v. Minister of Housing], 46(2) P.D. 793.
153. *Id.* at 796.
154. *Id.* at 799.
155. *Id.* at 801.
156. *Id.* at 803.
157. *Id.* at 804.
158. *Id.* at 805.
159. Free Nation NGO v. Ministry of Construction and Housing, May 30, 2000 (unpublished).

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

Even when information is available in a timely manner, it still proves difficult to use the information in court. For example, what is often clear to readers of newspapers becomes unclear in court, when the affidavit presented by the state agency in response to the petition presents an innocuous story.[162] The fact-finding process, in response to petitions submitted for judicial review of administrative action in Israel, is far from satisfactory. The long-standing judicial policy of not allowing cross-examination with respect to submitted affidavits[163] significantly reduces the possibility of exposing untrue statements.

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

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

160. *Id.*

161. *Id.*

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

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

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

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

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

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

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

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

166. High Surveillance Commission for Matters of Arab Education in Israel v. Ministry of Education, 53(3) P.D. 233.
167. *Id.* at 239.
168. *Id.* at 240.
169. *Id.* at 239.
170. Adalah v. Minister of Religious Affairs, 52(5) P.D. 167.
171. *Id.* at 187-88.
172. *Id.*
173. Adalah v. Minister of Religious Affairs, 54(2) P.D. at 177-79.

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

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

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

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

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174. *Id.* at 181-82.

175. *Id.* at 183-84.

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

VI. POSTSCRIPT

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

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

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

221. *Id.* at 2.

222. *Id.* at 12

223. *Id.*

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

224. *Id.*
225. *Id.*
226. *Id.* at 12-13.