

THE POLITICS OF EQUALITY: THE LIMITS OF COLLECTIVE RIGHTS LITIGATION AND THE CASE OF THE PALESTINIAN-ARAB MINORITY IN ISRAEL

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Human and civil rights organizations have long used litigation in an attempt to advance a particular cause, to bolster a certain right, or to bring about social change. A prominent example is strategic litigation filed on behalf of minority groups—including national and indigenous minorities. Such cases typically seek remedies from the government or public institutions due to discrimination or neglect experienced by minorities, or stemming from limitations on their ability to express or enjoy their culture and practices. In many cases, however, litigation fails or only partially succeeds in creating the kind of sustainable, widespread, and group-based change that the petitioners seek.

Focusing on Israel and the Palestinian-Arab minority, which constitutes nearly one-fifth of the country's population, this Article explores the limitations and shortcomings of litigation as a strategy for obtaining collective rights. The Article examines three different kinds of collective rights that Palestinian-Arab petitioners have attempted to achieve through legal action in Israel: the right to political representation (in decision-making bodies); linguistic rights (in public accommodation); and equitable (group-based) allocation of public resources. The significance of these rights for national minorities is explored, along with the specifics of each of the cases highlighted and their outcomes.

This Article demonstrates that while the outcome of each legal case was a 'success'—on a technical level—the judgments failed to achieve the substantive equality and group-based rights that the petitioners sought. Worse still, some of the judgments actually may have led to setbacks. Accordingly, this article argues that litigation has thus far been an insufficient tool for protecting the collective rights of the Palestinian-Arab minority, as the courts have failed to draft meaningful and sustainable frameworks for action and enforcement into their judgments. The article concludes by suggesting that given the challenges and political and social constraints faced by national minorities in legal and other public spheres, the law is dependent on the will of the courts. Thus, the courts must view their role more broadly and take a more expansive—and perhaps even activist—approach in rendering its rulings.

I.	INTRODUCTION.....	24
II.	THE NEED FOR COLLECTIVE RIGHTS FOR MINORITY GROUPS.	26

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III.	BACKGROUND ON PALESTINIAN ARABS IN ISRAEL	30
IV.	UTILIZING THE LAW AS A TOOL FOR THE RECOGNITION OF COLLECTIVE RIGHTS IN ISRAEL	33
A.	Representation in Decision-Making Bodies	34
1.	Normative Framework	34
2.	Case Study: Legal Action Regarding Representation in the Israel Land Council	36
3.	Case Study: Legal Action Regarding Representation on the Planning and Building Commission	39
B.	Cultural Rights: Linguistic Case	39
1.	Normative Framework	39
2.	Case Study: Legal Action Regarding Signposting	41
3.	Case Study: Legal Action Regarding Language on Road Signs	46
C.	Allocation of Material Resources	47
1.	Normative Framework	47
2.	Case Study: Legal Action Regarding Allocations for Education	48
3.	Case Study: Legal Action Regarding Allocation for Christian and Muslim Cemeteries	52
V.	CONCLUSION.....	53

I. INTRODUCTION

Human and civil rights organizations have long used litigation to advance a particular cause, to bolster a certain right, or to bring about social change. A prominent example is strategic litigation filed on behalf of minority groups—including national and indigenous minorities. Such cases typically seek remedies from the government or public institutions due to various forms of discrimination or neglect experienced by minorities, or stemming from limitations on their ability to express or enjoy their culture and practices. In many cases, however, litigation fails or only partially succeeds in creating the kind of sustainable, widespread, and group-based change that the petitioners seek.

A number of factors can account for this lack of success. Rulings are often narrow in scope and application or lack sufficiently stringent penalties, which in turn render them ineffective deterrents against future violations of minority rights. Additionally, the judges are usually members of those in power within the societies they are asked to scrutinize, and thus may be unable to sympathize with the merits of the petitioners' claims, or simply reluctant to change the prevailing political order. Furthermore, even when positive judgments with enforcement mechanisms are handed down, implementation is still dependent on the goodwill of political functionaries.¹

Focusing on the Palestinian-Arab minority in Israel, this Article will explore the limitations and shortcomings of litigation as a strategy for the realization of collective rights. Nearly 20% of citizens in Israel are Palestinian Arabs who are indigenous to the region.² This Article will examine three different kinds of collective rights that Palestinian-Arab petitioners in Israel have attempted to achieve through legal action: the right to political representation (in decision-making bodies); linguistic rights (in public accommodation); and equitable (group-based) allocation of public resources. The significance of these rights for national minorities will be explored, along with the specifics of each of the cases highlighted and their outcomes.

This Article will demonstrate that while the outcome of each legal case—on a technical level—was a “success”, the judgments failed to achieve the substantive equality and group-based rights that the petitioners sought. Worse still, some of the judgments actually may have led to setbacks. In each of the cases below, legal tools were employed and exhausted by and on behalf of the Palestinian-Arab minority, after other advocacy strategies failed to convince the relevant political functionaries to make the desired social change. Indeed, the prevailing social and political forces impeded positive change due to their lack of will and through the use of poor enforcement mechanisms. Thus, the outcomes were undesirable and the goal of reinforcing collective rights was unrealized. Accordingly, this Article argues that litigation in Israeli courts, thus far, has proven to be an insufficient tool for securing the Palestinian-Arab minority's cultural and political rights in a substantive and sustainable way, particularly in cases where collective, rather than individual, rights are at stake.

This Article will conclude by arguing that given the political and social challenges and constraints faced by national minorities in legal and other public spheres, the law is dependent on the will of the courts. Thus far, even when the Israeli courts have ruled in favor of Palestinian-Arab rights, the wording of the right supposedly defined or declared in the judgment was overly vague and lacked “teeth”, or a framework for enforcement, thereby leaving room for the State and its actors to evade the spirit of the rulings. Therefore, this Article will argue that the courts must view their role more broadly and take a more expansive—and perhaps even activist—approach in rendering their rulings. Only such a change will ensure that the law will realize its potential for safeguarding the rights of minorities and promoting social justice. In a system in which majority groups are overrepresented among political functionaries, and the majority either overtly or covertly seeks to deprive minority groups of their individual and collective rights, it is the role of the law, especially via the courts, to perform its counter-majoritarian function and protect the status and rights of minorities.

¹ This issue is compounded by the fact that minority groups generally lack adequate political power to ensure full implementation of the remedies awarded once legal proceedings have concluded.

² ILAN PAPPÉ, *THE FORGOTTEN PALESTINIANS: A HISTORY OF THE PALESTINIANS IN ISRAEL* 6 (2011) [hereinafter *FORGOTTEN PALESTINIANS*]; As'ad Ghanem, *State and Minority in Israel: The Case of the Ethnic State and the Predicament of its Minority*, 21 *ETHNIC & RACIAL STUD.* 428, 430 (1998).

II. THE NEED FOR COLLECTIVE RIGHTS FOR MINORITY GROUPS

Before examining the litigation pursued by the Palestinian-Arab minority in Israel in an attempt to secure their collective rights, the Article first will outline briefly the impetus for, and evolution of, individual and collective minority rights. In most societies, minorities tend to be at a distinct disadvantage in relation to majority groups. Indeed, exceptions notwithstanding, the socio-political status of the majority is almost always superior to that of the minority by virtue of its position as the dominant group in society.³ Consequently, majorities can—and often do—secure favorable access to the spectrum of national resources to the detriment of minorities. Furthermore, minority groups often are exposed to significant pressures to assimilate and therefore face the risk of cultural erosion and loss of their unique identities.⁴

Substantive national minorities⁵ and indigenous minorities, whose statuses as minorities almost without exception have been established against the groups' will via war and/or colonization, generally seek to maintain their unique group-based identities. In addition to equality on the individual level—and freedom from discrimination as members of a minority group—they seek group-differentiated rights in order to preserve their culture and identity. International law addressing minority rights establishes that national minorities, particularly indigenous minorities, who are among the most maligned and disadvantaged of all minority groups globally, require special protections.⁶ Therefore, a number of instruments have been adopted to address this reality, namely, the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (“1992 UN Declaration”) and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (“2007 UN Declaration” or the “2007 Declaration on Indigenous Rights”).⁷

Instruments of international law are increasingly drafted with the intention of responding to claims brought forth by minority groups generally, and to specifically address their need for collective rights. Collective rights, which can be read into earlier instruments of international law, are included in both the 1992 and the 2007 UN declarations, but they are particularly pronounced in the 2007 Indigenous Declaration.⁸ The specific rights guaranteed to the group depend on the nature of the group,

³ The experience in South Africa is a prime exception to this assertion, where the (white) minority was able to dominate the African majority and other minorities (“coloured”, Indian, etc.) by virtue of its wealth and military. The same scenario has been experienced in many other postcolonial nations and in countries in which economic and military power are correlated with being a member of a particular religious or linguistic group, which comprises the minority of the population, such as: the white residents of Jamaica, the Spanish colonials of Mexico, and more. Nonetheless, the far more widespread societal dynamic is that described in the text here. *See generally*, TED R. GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY (2000).

⁴ *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 12 (1995) [hereinafter *Multicultural Citizenship*]; WILL KYMLICKA, MULTICULTURAL ODYSSEYS (2007) (exploring intergovernmental organizations' establishment of multiculturalism policies).

⁵ The term “substantive minority” refers to minority groups comprising at least a small percentage, or more, of a country's population. *See generally* Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT'L L.J. 345 (2008) (arguing for participatory equality for ethnic and racial minorities).

⁶ *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 95-215 (2d ed. 2004).

⁷ Not all minority groups aim to attain the same kind of rights. Immigrant groups, whose minority status can be assumed to derive from an active choice on the part of the individual to join a new society, are expected to integrate into their chosen society and adopt the norms of that country. The experience of national minorities, however, is different. The term, “national minority” refers to ethnic, religious, or racial groups that, either by virtue of their indigeneity to the place or through immigration, constitute a minority percentage of the population of a state.

⁸ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* <http://www2.ohchr.org/english/issues/indigenous/declaration.htm>.

but irrespective of the particular rights, they are conferred upon the minority due to its uniqueness *as a group*.⁹

A basic tenet established early in the 1992 UN Declaration is that members of minority groups must be able to exercise their rights “individually *as well as in community with other members of their group*.”¹⁰ The wording of this clause suggests a differentiation between the individual’s right to equality, regardless of membership in any religious, ethnic, linguistic, or other national minority, and the minority group’s right, as a whole, to what is essential for the maintenance of the collective. The codification of this concept paved the way, at least in part, for the more explicit iteration of collective rights contained in the 2007 UN Declaration.¹¹

The types of collective rights stipulated therein range from property ownership and enjoyment rights, to language rights, to various manners of cultural expression (including the preservation of religious, agricultural, and medicinal practices), to self-administration and even autonomy over certain spheres of life, such as education. Finally, it also includes a requirement that the government consult with the relevant group on issues which are liable to impact them directly.¹² Building on this foundation, the 2007 Declaration on Indigenous Rights calls on states to refrain from taking any measures that would dispossess indigenous peoples of their lands or resources, force their assimilation, or otherwise deprive them of their unique cultures.¹³ Importantly, and in line with these instruments, the realization of collective rights requires applying special measures on a permanent or semi-permanent basis in order to assure appropriate protection of each minority group’s unique and usually fragile identity and interests.¹⁴

⁹ See *Multicultural Citizenship*, *supra* note 4, at 12. See generally, WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP 83-84 (2001) [hereinafter *Politics in the Vernacular*] (arguing that special measures for minority groups generally provide them with legal protection, both on individual and collective levels, with the aim of achieving equality with majority groups. Minority groups are in particular need of these protections due to their members being the frequent target of discriminatory actions and pressure to assimilate).

¹⁰ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, at Art. 3(1), U.N. Doc. A/RES/47/135 (Dec. 18 1992).

¹¹ See, e.g., Preamble of the 2007 UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 at 3 (Sept. 13, 2007) available at http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf (retrieved 5 Apr 2013) [hereinafter *the 2007 Declaration on Indigenous Rights*] (stating in relevant part: “Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.”).

¹² For instance, Article 13 of the 2007 Declaration on Indigenous Rights stipulates a right on the part of indigenous peoples and requires that states enable them to “designate and retain their own names for communities, places and persons.” *Id.* at Art. 13(1). Article 14 of the Declaration lays out a requirement that indigenous groups be allowed to control and steer their own education systems. *Id.* at Art. 14(1). Article 15 emphasizes the importance that their histories and collective memories be “appropriately reflected in education and public information.” *Id.* at Art. 15(1). Article 18 guarantees indigenous peoples the right to “participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.” *Id.* at Art. 18. Regarding traditional medicinal practices, and their connection to the land and flora, Article 24 states: “Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.” *Id.* at Art. 24(1). Article 26 stipulates not only the right of the indigenous peoples to maintain use of their land, but it also calls on states to recognize their systems of determining ownership. *Id.*, at Art. 26.

¹³ Article 8 of the 2007 Declaration on Indigenous Rights reads: “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.” *Id.* at Art. 8(1).

¹⁴ Jabareen, *supra* note 5.

It is important to note that collective rights are not to come at the expense of the individual rights to which each citizen is entitled, regardless of group affiliation.¹⁵ In other words, collective rights must not penalize or restrict the individual freedoms and rights of a member of the minority group. By the same token, the realization of collective rights is often necessary in order to guarantee equality on the individual level and between majority and minority groups. Minority groups cannot realize their labor and social rights, for example, without living in an environment that is linguistically accessible. Neither the collective nor the individual rights of members of minority groups can be fulfilled without ensuring that the minority is able to participate effectively in the life of the nation.¹⁶

Each state has assets held collectively by its citizens and whose distribution is determined by those in power. Collective assets include public budgets, adequate representation in decision-making bodies, land, representation in, and control over, the state's identity, and more. The state and its decision makers assume the position of trustee of these assets and thus have an inherent duty to divide them equitably. Guaranteeing collective rights for minority groups can help to ensure that they, and not only the majority, have access to, and are able to participate in, the fair and equitable distribution and enjoyment of such public assets.

The application of group rights is meant to transform the situation of minority groups and to enlist the institutional power of the legal and judicial system to play a role in societal transformation. Consistent with this view, only a fundamental societal change that is free of conditions of group subordination may address the injustices suffered by the marginalized group. This concept suggests conceiving the notion of group equality as "a substantive societal condition"¹⁷ and to view the eradication of continuing societal conditions of injustice and inequality as the paramount concern. The fundamental goal of a struggle for group equality, then, must be "the complete transformation" of the society.¹⁸ The end of group discrimination, according to Charles Lawrence, "requires fundamental societal transformation, not just adjustments within established hierarchies".¹⁹ The abolishment of group discrimination requires redistribution of societal resources. Accordingly, the task of group rights is to carry out this societal transformation.

A real question arises as to what means should be employed in order to engender such a transformation. Proponents of litigation as a strategy for securing minority rights suggest that general political processes cannot be trusted to defend minority rights, as they are, by definition, powered by the will of the majority and set up as such to prevent a tyranny of the minority—an experience particularly feared in a post monarchy or post dictatorship society.²⁰ As the argument follows, only through counter-majoritarian bodies such as the courts, namely the Supreme Court, can minorities stand a chance of having their rights defended based on principle (enshrined in law), rather than on economic, social, and

¹⁵ Yousef T. Jabareen, *Toward Participatory Equality: Protecting Minority Rights Under International Law*, 41 ISR. L. REV. 635, 656 (2008).

¹⁶ For more on this point, see *Politics in the Vernacular*, *supra* note 9.

¹⁷ Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824 (1995).

¹⁸ *Id.* at 825.

¹⁹ Charles R. Lawrence III, *Foreword to Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY xi, xviii (Francisco Valdes et al., eds., 2002).

²⁰ Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153, 172 (2002).

other political concerns of the majority relative to the attitudes and perceptions of the minority at the time.²¹

Another stream of thought, however, suggests that sustainable change cannot be achieved when it is imposed on the majority by a counter-majoritarian institution such as the courts.²² Therefore, critics of activist courts and of seeking major change on behalf of minorities through them, contend that the role of the courts is to uphold basic principles without creating new frameworks for the roles and actions of governments and government actors, especially given that judges may not consistently represent the views of the public or be in a better position to dictate morality.²³ The latter, they argue, is destined to backfire, causing resentment on the part of the majority of the minorities whose rights were “stolen” through luck of the draw of the right court, and ultimately leading to circumstances in which minority rights are enshrined in the books but absent from practice on the ground.²⁴

An additional, often parallel, argument against using litigation to obtain minority rights is that it may have the undesired effect of divorcing political issues from the treatment of minorities, where the political issue must be addressed in order for any change to be lasting.²⁵ In other words, given that the desired remedies often are far broader than the addition of specific programs, policies or cosmetic changes to public spaces, perhaps these changes need to be made through the political branches; or perhaps these are the kinds of changes that cannot be legislated, court-ordered, or otherwise politically and legally forced upon societies. And even if civil and minority rights advocates cannot wait for society to “evolve,” and political and legal means are a necessary immediate step, perhaps for them to have any substantive impact, they must be accompanied by major grassroots movements, shared by both majority and minority groups, which directly address the political, and not just the legal, aspects of the problem.

Furthermore, many opponents of using litigation to secure minority rights cite the legitimacy that such tactics grant the same institutions that often serve as “rubber stamps” or as active participants in furthering minority discrimination.²⁶ An additional critique often raised regarding the reliance on litigation to achieve minority rights is that it entails significant financial investments that are often prohibitive for members of minority groups. Accordingly, these significant financial investments certainly do not guarantee equal access to litigation as a strategy—as opposed to public political action, establishing grassroots organizations, and other methods of creating social change that require relatively little investment or expertise.²⁷

²¹ See generally GAD BARZILAI, COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES (2005); but cf. *id.* (arguing that it is highly questionable whether courts are, in fact, counter-majoritarian, or whether they simply further the majority’s views through a more specific forum). For an additional critique, see Gad Barzilai, *The Ambivalence of Litigation: A Criticism of Power*, 13 JADAL (2012), <http://mada-research.org/en/files/2012/05/Jadal13/Eng/Gadi-barzilai.pdf>.

²² *Id.* at 161.

²³ See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 58-72 (1962).

²⁴ See, e.g., Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 982 (1997) (“‘Rule-shifting’ has its merits and advantages, but it is simply less potent than ‘culture-shifting’ in accomplishing the things I want to accomplish.”).

²⁵ Samera Esmeir & Rina Rosenberg, *Resisting Litigation in Umm El-Fahm*, HUMAN RIGHTS DIALOGUE, SERIES 2, NO. 2 (SPRING 2000), LITIGATING HUMAN RIGHTS: PROMISE V. PERILS, (Carnegie Council on Ethics and International Affairs, Ser. No. 2(2), 2000).

²⁶ See e.g., Gad Barzilai, *The Evasive Facets of Law: Litigation as Collective Action*, ADALAH’S NEWSLETTER (Adalah, Hifah, Isr.), Feb. 2005, at 1, available at <http://adalah.org/newsletter/eng/feb05/ar2.pdf>.

²⁷ For more on this topic, see, e.g., *Preliminary Material, in THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF MARGINALISED INDIVIDUALS AND MINORITIES IN NATIONAL CONTEXT*, i-xxi (D. Anagnostou & E. Psychogiopoulou eds., 2010).

It is this author's contention that there must not be a definitive choice made between litigation and other political or grassroots methods of creating lasting social change for minorities. Both are necessary, and both must be bolstered in the case of the Palestinian-Arab minority in Israel. But they must be wielded appropriately—each utilized or abandoned, depending on the issue and its surrounding context. In the context of the Palestinian-Arab minority in Israel, which will be explored below, the community's extreme lack of power and influence, from the legislature to the street, has made litigation an attractive means of circumventing that impotency and attempting to shift the balance of power in order to examine issues of discrimination. What we shall see below, however, is that their lack of power has not been counterbalanced adequately by the courts—mostly due to the latter's unwillingness to assert the full range of its authority and employ its tools.

This article will review three prominent examples of collective assets—political representation, cultural-linguistic rights, and allocation of material resources—and it will then discuss the Palestinian-Arab minority's attempts to achieve those rights through litigation. But first, in order to place these rights in context, let us conduct a short overview of this minority group's historical and present reality.

III. BACKGROUND ON PALESTINIAN ARABS IN ISRAEL

In the aftermath of the 1948 war, a significant number of Palestinian Arabs remained within the borders of the newly established State of Israel and were granted citizenship. Since 1948, this group's population has grown to eight times its original size (from 160,000 to around 1.3 million); however, it has remained roughly 18% of the total population throughout the years. Palestinian Arabs are a native, linguistic, religious, and ethnic minority in Israel.

While this group is Palestinian ethnically and culturally, their legal status differs from other Palestinians in the region. Palestinians in pre-1948 historic Palestine may be divided today into three broad groups: Palestinians living in the West Bank under Israeli military rule and in Gaza under a mixture of self-rule and ultimate Israeli military control, in which most of the population is stateless²⁸; Palestinian residents of Israeli who occupied and annexed East Jerusalem (Palestinian East Jerusalemites) and hold permanent residency in Israel²⁹; and, the focus of this article, Palestinian Arabs in Israel who became citizens of Israel following the 1948 war.

²⁸ The majority of Palestinians in the West Bank and Gaza hold no citizenship in any country, particularly those who were born in either of those locations. That said, there are those Palestinians in Gaza who hold a nationality, such as in Egypt, and those in the West Bank who hold a nationality in Jordan or other countries; they are the minority. The vast majority of Palestinians in the occupied Palestinian territories are stateless; however, with the new recognition by 138 states of Palestine as a state, Palestinians in the West Bank, Gaza, and East Jerusalem may find themselves eligible for passports and nationality in the state of Palestine. It is questionable, however, what kind of citizenship rights the state of Palestine could provide as long as it remains under Israeli occupation. For an analysis of litigation brought on behalf of Palestinian residents of the West Bank and Gaza over the years, and the level of success and failure in securing basic human rights and in challenging violations of international humanitarian law, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002). The legal issues and rights sought by Palestinians living under occupation in these areas are significantly different from those of Palestinian citizens of Israel, whose struggle is primarily for equality of citizenship and equal participation in society as individuals and as a collective. The rights and legal challenges brought by Palestinian minorities in foreign countries, after having emigrated to them or after having been accepted as refugees by them, is beyond the scope of this Article.

²⁹ Immediately following Israel's occupation of the area now known as East Jerusalem (among the other territories captured), Israel annexed East Jerusalem as part of Israel and has since applied full Israeli law and jurisdiction over the area. Palestinian East Jerusalemites hold permanent residency—a status which, among other limitations when compared to citizenship, is revocable under certain circumstances, including changing one's center of life even to other parts of the occupied Palestinian territory.

It is important to note that the uniqueness of this group is not only derived from their status as a national minority, but also from the fact that they are an indigenous, original community. They continue to live in their homeland, the place in which they lived long before the inception of the State of Israel, when they were part of the majority group together with the rest of the Palestinian people.³⁰ The State of Israel was established in 1948 on the ruins of the native Palestinian people, for whom the 1948 events were a national tragedy—known in Arabic as the *Nakba*, or “catastrophe.”³¹ The indigenous nature of the Palestinian-Arab population, with national, linguistic, cultural, and religious characteristics distinguishing it from the majority group, is an integral part of the way in which it experiences its condition and status in Israel, and constitutes the most central rift in Israeli society—the national-ethnic divide.³²

Israel is officially defined as a Jewish and democratic state. Palestinian Arabs hold Israeli citizenship, but their national and ethnic affiliation to Palestinians has led successive Israeli governments to view them with great suspicion.³³ Jewish-Israeli society questions Palestinian Arabs’ loyalty to Israel, while the latter continually re-evaluates its role within Israeli society and politics and within the region at large.³⁴ In the shadow of the ongoing Israeli-Arab conflict, a great deal of hostility shapes these attitudes, as the Jewish majority views Palestinians who remained in the State as part of the Arab world, as a potential fifth column, and often simply as enemies of the State. The primary consequence of these attitudes has been that, by every measurable standard—such as income, education, infrastructure, employment, the criminal justice system, and the level of social services—Palestinian-Arab citizens lag far behind Jewish citizens.³⁵ Palestinian Arabs continue to be excluded from the centers of power and

³⁰ See EDWARD SAID, *THE QUESTION OF PALESTINE* (2d ed. 1992) (critiquing Zionism’s impact on the Palestinians); see also BARUCH KIMMERLING & JOEL S. MIGDAL, *PALESTINIANS: THE MAKING OF A PEOPLE* 162-63 (2003).

³¹ *An-Nakba* (the Catastrophe) is the term used by Palestinians and Arabs referring to the exodus and displacement of Palestinians from their land in the immediate aftermath of the founding of Israel in 1948. It is estimated that nearly 800,000 Palestinian were driven from their homes into exile (either forcibly or in search of temporary refuge), and they became refugees in the West Bank, the Gaza Strip, and the neighboring Arab countries. Palestinian society and the Palestinian way of life were largely destroyed. The tragic consequences of *an-Nakba* still reverberate today and fuel the Palestinian struggle for an independent state in the West Bank and Gaza. See ILAN PAPPÉ, *THE MAKING OF THE ARAB-ISRAELI CONFLICT 1947-51* (1994) (examining essential diplomatic and military battles, with special focus on the creation of the Palestinian refugee problem and the failure of international mediation to achieve peace). Nearly 160,000 Palestinians remained in Israel. They were stunned by the Arab defeat, weak, and without a national political leadership. AS’AD GHANEM, *THE PALESTINIAN-ARAB MINORITY IN ISRAEL 1948-2000: A POLITICAL STUDY* 11-12 (2001).

³² See AMAL JAMAL, *ARAB MINORITY NATIONALISM IN ISRAEL: THE POLITICS OF INDIGENEITY* (2011) (outlining the struggle of Arab-Palestinian citizens to reframe their citizenship rights in the context of indigeneity and Arab collective rights within the ethnocentric structure of Israel’s majority); Ghanem, *supra* note 31 (tracing the political activity of Arab-Palestinians and describing the ideological streams of Arabs in Israel); Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432 (1992) (arguing that various principles of citizenship legitimation have resulted in divergent types of citizenship for Jews and Arabs); Nadim Rouhana & As’ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT’L J. MIDDLE E. STUD. 321 (1998) (contending that Israel’s present ethnic structure cannot provide its Palestinian citizens with equality, identity, and security).

³³ Muhammad Amara, *The Collective Identity of the Arabs in Israel in an Era of Peace*, in *THE ISRAELI PALESTINIANS: AN ARAB MINORITY IN THE JEWISH STATE* 249, 250-51 (Alexander Bligh ed., 2003); see generally Ghanem, *supra* note 31 (arguing that Israel is an ethnic state that has employed sophisticated policies of exclusion and discrimination to deny equality to the Arab minority); Peled, *supra* note 32 (arguing that Israel’s ethnic democracy has served as a vehicle for discrimination against the Arab minority).

³⁴ DAN RABINOWITZ & KHAWLA ABU-BAKER, *COFFINS ON OUR SHOULDERS: THE EXPERIENCE OF THE PALESTINIAN CITIZENS OF ISRAEL* 11-12 (2005).

³⁵ See generally ASS’N FOR CIVIL RIGHTS IN ISR., *COMMENTS ON THE COMBINED INITIAL AND FIRST PERIODIC REPORT CONCERNING THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*

are grossly underrepresented in government institutions, as well as in the general public sphere.³⁶ Political parties representing the community in the Israeli Knesset (Parliament) have consistently played the role of a permanent opposition; being unwelcome in any governing coalition and enjoying few political peers, they have difficulty pushing through legislation, and although they sit on Knesset committees they do not set their agendas, rendering them relatively impotent in advancing their community's minority rights.³⁷

Indeed, prejudice against Palestinian Arabs in Israel distorts the Israeli political process in the two ways noted by Professor John Hart Ely's process-oriented theory.³⁸ First, due to a deep-seated prejudice against the Palestinian Arabs on the part of almost all of the other majority sub-groups, Palestinians are barred from the Israeli "pluralists' bazaar" that would otherwise enable them to build coalitions with other groups with shared interests on given issues (Palestinians and disadvantaged Jews). As such, they consistently end up on the losing side of the classification. Second, prejudice affects the judgment of government decision makers who, being occupied by positive myths about their own group and negative myths about "outsider" groups, avoid coalitions with Arab parties. In addition, government decision makers consistently devalue the cost of their actions where the Palestinian-Arab community, with which they do not identify, will be the one that is primarily affected.³⁹

Like other national and indigenous minorities worldwide, the Palestinian-Arab minority in Israel seeks collective rights in order to enjoy and express its identity and equalize its position vis-à-vis Israel's Jewish majority, on both the individual and group levels.⁴⁰ This goal is sought specifically in relation to the three types of collective rights that will be reviewed in this article: representation in decision-making bodies, cultural-linguistic rights, and allocation of material resources.

Indeed, the need for these collective rights was in recent years expressed by the community itself in the political document released in 2006 and entitled *The Future Vision of the Palestinian Arabs in Israel* ("The Future Vision").⁴¹ Formulated by a wide range of Palestinian academics, legal experts, and community leaders, the Future Vision document outlines their thoughts and hopes regarding their current and future challenges as citizens within a state whose identity, collective history, and ethos they do not share—a state with a majority that holds a different vision than theirs.⁴² The document also offers concrete recommendations for the changes necessary to realize their collective rights, to make room for both majority and minority visions of the State and their existence in it.⁴³ Indeed, the Future Vision addresses the three realms discussed in this article indicating the centrality of these realms for the community.

In regards to the *Right to Power Sharing and Appropriate Representation*, the framers of the document seek effective representation and participation in the decision-making procedures employed within the

(1998).

³⁶ See Ghanem, *supra* note 31, at 165. Also, in 2009, only 7% of all civil employees were Arab. See also Nabil Khattab et al., *Social Justice in Jewish-Arab Relations in Israel*, THE ISRAEL DEMOCRACY INSTITUTE (Apr. 22, 2013), <http://en.idi.org.il/analysis/articles/social-justice-in-jewish-arab-relations-in-israel>.

³⁷ See Ghanem, *supra* note 31, at 165.

³⁸ See ELY, *supra* note 23, at 145-70 (arguing that the two degrees of prejudice experienced by a minority group indicate a failure of the legislators to accord a group equal respect and concern).

³⁹ *Id.* at 153-58.

⁴⁰ See Jabareen, *supra* note 5.

⁴¹ The Nat'l Comm. for the Heads of the Arab Local Auths. in Isr., *The Future Vision of the Palestinian Arabs in Israel*, 5 (2006), <http://www.adalah.org/newsletter/eng/dec06/tasawor-mostaqbali.pdf>. [hereinafter *Future Vision*]. The author of this Article authored the legal chapter in *Future Vision*.

⁴² *Id.*

⁴³ *Id.*

official institutions.⁴⁴ They stipulate that “[t]he two groups should have mutual relations based on a consensual democratic system,” which is defined as “a coalition between the elites of the two groups, equal proportional representation, mutual right to veto and self administration of issues exclusive to each community.”⁴⁵ Regarding *Linguistic Rights*, the authors of the document write that they seek “official recognition of Palestinian-Arab [collective] existence in the state, and [recognition of] their national, religious, cultural and linguistic character”⁴⁶ A different part of the document asks the State to “guarantee[] a dual language system of both Arabic and Hebrew.”⁴⁷ With respect to *Allocation of Resources*, the document calls for “equal distribution of resources[,] [including] budget, land and housing.”⁴⁸ Generally speaking, they “believe that Palestinian Arabs in Israel, as a collective and as individuals, should have equal participation in all public resources[,] including political, material and symbolic resources.”⁴⁹

The following section will outline the impetus for turning to the courts in an attempt to guarantee collective rights for the Palestinian-Arab minority in Israel. It will then trace the history, challenges, and outcome of several central cases brought before the Israeli Supreme Court (sitting as the High Court of Justice)⁵⁰ in the struggle to achieve progress in the three essential categories of rights mentioned above.⁵¹

IV. UTILIZING THE LAW AS A TOOL FOR THE RECOGNITION OF COLLECTIVE RIGHTS IN ISRAEL

Civil rights advocates in democratic countries often turn to the courts in search of justice that appears unattainable through pressure exerted on the legislative and executive branches alone. As was mentioned above, in light of Jewish hegemony in Israel, the country’s executive and legislative branches hold disproportionate power. This renders the third branch of government, the judiciary, the only remaining avenue available for transforming the reality of the Palestinian-Arab minority—despite the fact

⁴⁴ *Id.* at 10.

⁴⁵ *Future Vision*, *supra* note 41, at 11.

⁴⁶ *Id.* at 15.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 14.

⁵⁰ The Israeli High Court of Justice is a first and last instance court that reviews the laws, policies, and decisions made by the State, the military, and the state agencies. It holds its sessions in the Israeli Supreme Court, typically before a panel of three Supreme Court Justices, except in certain cases in which a larger panel is deemed necessary. The proceedings are summary proceedings without evidentiary hearings or the opportunity for cross-examination. The relief sought is injunctive or mandamus relief against the state or a state actor. Nevertheless, during deliberations on High Court of Justice petitions—which can last up to years in some cases—many procedural and substantive tools are available to the Justices. For instance, Justices may order temporary injunctions, stays of execution, timelines for updates from the ground from any of the parties in order to inform their decisions, or may refer the case to mediation. Its decisions are final, with the rare exception of cases in which there has been a change in the factual situation or in the law since the decision was granted, and a new hearing is therefore required. The abbreviation “HCJ” before a case name indicates that the case was determined by this Supreme Court proceeding. The terms “Supreme Court” and “High Court of Justice” are used interchangeably in this Article, both referring to the Supreme Court sitting as the High Court of Justice.

⁵¹ The Israeli Supreme Court’s members (up to fifteen) are selected, as are all Israeli judges, by the Judicial Selection Committee. This Committee consists of nine members. It is chaired by the Minister of Justice, and includes the President and two other Judges of the Supreme Court, another Minister designated by the Government (in addition to the Minister of Justice), two members of the Knesset elected by the Knesset, and two representatives of the Israel Bar Association elected by the National Bar Council. Israeli Supreme Court justices have life tenure, unless they resign, retire at the age of seventy or are removed from office. The Supreme Court Justices must be citizens of Israel, and until today, there has only been one Palestinian Arab citizen member of the court, Justice Salim Jubran. Justice Jubran did not sit on the bench of any of the cases discussed in this Article.

that Palestinian Arabs are grossly underrepresented in that branch as well.⁵² Nevertheless, Palestinian-Arab minority rights advocates have used the courts not only to remedy various forms of discrimination against individual members of the group, but also in an effort to secure group-based rights.⁵³

In the 1970s, the Association for Civil Rights in Israel (“ACRI”) pioneered the strategy of filing legal petitions in Israeli courts on behalf of all residents of Israel in defense of fundamental rights. The focus on bringing such petitions on behalf of the Palestinian-Arab minority gained ascendancy in the mid-1990s. Shortly after, organizations founded by, and for, the Arab community, began to advocate specifically for the rights of Palestinian Arabs. Foremost among them is the non-profit legal organization, Adalah—The Legal Center for Arab Minority Rights in Israel—which is almost exclusively dedicated to direct legal action.⁵⁴ Irrespective of their particular focuses, all of these organizations view the law as an essential tool for the advancement of social equality and the attainment of individual and collective rights for the Palestinian minority.

These organizations and others, as well as tens of private attorneys, bring a range of cases before the courts, many of which touch on central areas of contention between Palestinian Arabs and the State. Previous and ongoing cases have addressed the following issues, in the context of the claims made by the Palestinian-Arab community: land rights, budget distribution, representation in decision-making bodies, and educational and cultural rights. These emphases are reflected in the cases outlined below. This Article will focus on three leading cases addressing collective rights and it will briefly address a few others. The rulings outlined here represent the most influential cases on collective rights over the last two decades. The Article will demonstrate that while there have been notable successes in these cases, the overall effectiveness of solely using the law as a tool for promoting social change on the group level is questionable.

A. Representation in Decision-Making Bodies

1. Normative Framework

In order for majority groups to maintain hegemony, minority groups are often consigned to the fringes of the decision-making processes, if not excluded from these altogether. Consequently, they lack the ability to wield meaningful influence over the management and distribution of state resources, such as budgets and land. Furthermore, they are rendered impotent in preventing or modifying the adoption of policies, legislation, and other decisions that negatively affect them.⁵⁵

Similarly, when a minority’s status is contested on the national level, a state’s *de jure* and *de facto* rules are often structured to the benefit of a more dominant group. In such situations, the principle of strict equality is insufficient. In order to compete on an equal footing, minority groups require special group-based arrangements and protections. Such arrangements could include proportional representation, the right to veto major decisions, self-steering in various spheres of life, and more.⁵⁶ Group-based arrangements are common in many countries throughout the world and have proven to be

⁵² Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT’L L. & POL. 885 (2004) [hereinafter *Minority Rights in Deeply Divided Societies*].

⁵³ See Katie Hesketh et al., *The Inequality Report: The Palestinian Arab Minority in Israel*, ADALAH (Mar. 2011), http://adalah.org/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf.

⁵⁴ ADALAH: THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL, <http://adalah.org/eng/>.

⁵⁵ See Asbjørn Eide, *Minority Protection and World Order: Towards a Framework for Law and Policy*, in UNIVERSAL MINORITY RIGHTS 87, 105 (Alan Phillips & Allan Rosas eds., 1995).

⁵⁶ Politics in the Vernacular, *supra* note 9, at 73-77.

an effective tool for rectifying inequality,⁵⁷ as they help to override the majority's natural tendency to safeguard its own interests to the detriment of those of minority groups.⁵⁸

One such arrangement, “appropriate representation”—which refers to the inclusion of members of the minority group in political decision-making bodies at all levels, not only numerically, but in a manner that faithfully reflects the minority group's interests—is capable of obtaining equitable distribution of material and cultural resources, and facilitates the realization of their group-based aspirations and need for identity recognition.⁵⁹ The goal of appropriate representation is that the inclusion of members of the minority group be authentic, effective, and (at a minimum) proportionate to the minority group's percentage of the population; in other words, representation must not be tokenistic.⁶⁰ Those individuals appointed must represent the interests of their group; the appointees must have meaningful decision-making power; and, the number of representatives must be large enough to hold real influence over the outcome of the decision-making processes.

Simultaneously, appropriate representation of minorities entails not only enabling the minority group to meaningfully participate and receive a share of the full gamut of national resources, but it also requires government and public bodies to develop and implement mechanisms of consultation with representatives of the minority groups in order to ensure that an effective forum is in place to address the interests and concerns of the group.⁶¹ The 2007 Declaration on Indigenous Rights recognizes the significance of this issue for minority groups, particularly indigenous minorities, and calls on states to take active steps to combat discrimination against minorities through consultation and cooperation with minority representatives.⁶² Such steps include consulting minority groups in the process of appointing officials, ensuring that they are equal partners in designing mechanisms of participation, and including recognized community leaders in every stage of the decision-making processes, especially those that will impact the minority community.

⁵⁷ See generally *Id.*; Clive Baldwin, Chris Chapman & Zoe Gray, *MINORITY RIGHTS: THE KEY TO CONFLICT PREVENTION* (Minority Rights Group, 2007).

⁵⁸ Examples of countries that have established “consociational” systems of representation include Belgium, Lebanon, Switzerland, and Canada-Quebec. Likewise, *The Future Vision of the Palestinian Arabs in Israel*, mentioned above, calls for consociationalism in Israel as a means of securing true power-sharing. *Future Vision*, *supra* note 41. As was discussed in the previous section, the Palestinian Arab political parties hold a disproportionately low percentage of seats in the Knesset (eleven of 120). Hesketh, *supra* note 53, at 52. Again, given that the Palestinian Arab parties have consistently remained in the opposition, their ability to successfully introduce legislation regarding their community's minority rights, that will pass either in a committee or on the floor of the Knesset, is limited at best, rendering their representation little more than a token.

⁵⁹ See Ilan Saban & Scot Streiner, *Appropriate Representation of Minorities: Canada's Two Types Structure and the Arab-Palestinian Minority in Israel*, 24 PENN ST. INT'L L. REV. 563, 565-68 (2006) (discussing the two types of appropriate representation).

⁶⁰ See *Id.* at 566 (discussing how dense appropriate representation surpasses the scope of class appropriate representation by obsessing about the consequences to minority groups).

⁶¹ Politics in the Vernacular, *supra* note 9, at 87-88.

⁶² The 2007 Declaration on Indigenous Rights, *supra* note 11, at Arts. 15(2), 17(2), 18, 19, 30, 32, 36 and 38; see also S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment*, JURIST (Oct. 3, 2007), <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> (providing a discussion of the rights afforded by the resolution as well as the legal and political significance of its adoption).

2. Case Study: Legal Action Regarding Representation in the Israel Land Council

Beyond Palestinian-Arab representation in the Knesset, a common sphere in which consultation and cooperation with minority groups is gravely needed, is that of land rights. The ability of the Palestinian-Arab minority to maintain and develop a presence in its historical lands, and to have freedom of choice in location, either as a community or integrated among Jewish Israeli residents, is crucial to its standing within society.⁶³ It is also important for a meaningful share of the resources and power of society, on a multitude of levels, from economic to cultural to political.

The leading case addressing this issue was filed in 1998 by the ACRI against the Israel Land Administration (“ILA”). The ILA did not include Palestinian-Arab representatives within the Israel Land Council (“ILC”), its primary decision-making body.⁶⁴ The case relied heavily on *Women’s Network in Israel v. Minister of Labor and Social Welfare*, a 1998 precedent setting ruling relating to fair representation of women in senior public bodies.⁶⁵ In *Women’s Network*, the Supreme Court held that women must be afforded adequate representation on the boards of government companies and must be appointed to senior positions in comparable public entities. Furthermore, the ruling stated that in order to achieve the goals of equal representation and equality, affirmative measures might be necessary.⁶⁶

Using this case as a basis, the petitioners in the ACRI case hoped to achieve a similar outcome for Palestinian Arabs in Israel, specifically in relation to representation in the ILC. The ILC, established in 1960 under the Land Administration Law, is one of the country’s most powerful public bodies.⁶⁷ Responsible for administering over 93% of the total land in Israel, the ILC determines both land allocation and land use, on behalf of the State.⁶⁸ The ILA’s Board consists of twenty-four seats. At the time of the filing of the petition, half of these seats were allocated to representatives of the Israeli government ministries, while the other half were representatives of the Jewish National Fund. While nearly 20% of Israeli citizens are Palestinian—an indigenous minority that has experienced numerous expropriations of its land—⁶⁹ no single Arab citizen of Israel had ever occupied a seat on this powerful body.

A number of factors influenced the final outcome of the petition. Immediately following its filing, the government attempted to reach a compromise by appointing one Arab to the Council. In light of the need for appropriate representation of national and indigenous minority groups, the petitioners clearly regarded this sole appointment as insufficient. Following the failed compromise attempt, and while the petition awaited deliberation in court, the Israeli Knesset passed two amendments to pre-

⁶³ Hesketh, *supra* note 53, at 31-38.

⁶⁴ HCJ 6924/98 The Ass’n for Civil Rights in Israel v. Israel Land Auth. 55 P.D. V 15 [2001] (Isr.). The author of this Article was one of the two attorneys who represented the petitioner.

⁶⁵ HCJ 2671/98 Women’s Network in Israel v. Minister of Labor and Social Welfare 52(3) P.D. 630. [1998] (Isr.).

⁶⁶ *Id.*, Judgment, para. 41. The decision is available in Hebrew at, <http://www.civil-service.gov.il/NR/rdonlyres/DE151DF3-9977-4667-B029-6732AA20BEB0/0/267198.pdf>. For a brief discussion in English, see RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* (U. of Pa. Press, 2004) at 27.

⁶⁷ See Israel Land Administration Law, 5720-1960, 14 LSI 50 (1960-1961) (Isr.) (establishing the Israel Lands Council which governs and supervises all activities related to the law).

⁶⁸ *Id.*

⁶⁹ See generally FORGOTTEN PALESTINIANS, *supra* note 2 (tracing the historical narrative of Israel’s sizeable Palestinian minority); HUSSEIN ABU HUSSEIN & FIONA MCKAY, *ACCESS DENIED: PALESTINIAN ACCESS TO LAND IN ISRAEL* (2003) (exploring the ongoing Jewish-Arab land conflict and the policy ramifications of Israeli land policy on Israel’s significant Palestinian minority).

existing laws mandating adequate representation of Palestinian Arabs on the boards of directors of government-owned companies as well as in public service.⁷⁰

In July 2001, the Court delivered its final judgment. In its decision, the Court called on the State to give weight to the principle of adequate representation of Arab citizens on the ILC. Additionally, on the operative level, the Court recommended the government to affirm its recent Arab appointment to the Council and to appoint an additional Arab member.

Notably, the Court's ruling went beyond the concrete circumstances of membership in the Council. The Court seemed to formulate, for the first time, a binding legal principle—albeit not a statutorily recognized one—that the State is obligated to consider the need for adequate representation of Palestinian citizens in public bodies, especially those vested with pivotal public functions.⁷¹ Echoing the ruling in the case pertaining to adequate representation of women in public companies—*Women's Network*—the Court noted that ensuring the representation of Palestinian citizens in public bodies might require affirmative action.⁷² The ruling also included a declaratory statement that “for the benefit of Israeli society, and for the good of the individuals who comprise it, the principle of equality between Arabs and Jews must be cultivated.”⁷³ The operative part of the judgment in this case, however, was relatively weak in comparison to the more direct and stronger worded order for adequate representation of women dictated in the *Women's Network* case.

At the time, the ruling was hailed as a tremendous success by Jewish and Palestinian-Arab civil rights activists alike. It was described by ACRI as a “precedent-setting judgment mandating affirmative action for Arab citizens” and “a significant step forward in the struggle for equality . . . [O]n a practical level, [the decision] enable[ed] the involvement of Arab citizens in official decision-making processes.”⁷⁴

Despite this ‘landmark’ ruling, a deeper reading of the judgment and its practical implications reveals a different story. The Court ruled that out of the twenty-four people who sit on the Council, the State was only required to appoint two Arabs. Clearly this is far less than 20%, the approximate percentage of Palestinian-Arab representatives that should have been appointed in a system of proportional representation. Secondly, the Court did not require consultation with the Arab community regarding the choice of whom to appoint. This omission left the door open for the appointment of ‘token’ representatives—individuals who do not faithfully represent the interests of the community.⁷⁵

⁷⁰ In June 2000, a new amendment to the Governmental Companies Law, 1975, was passed by the Knesset, stating that, “In the board of directors of governmental companies, adequate representation will be given to the Arab population.” Art. 18(a)(1) of the Governmental Companies Law, 1975. In December 2000, a new amendment to the Civil Services Law, 1959, applied the adequate representation mandate in civil service to the Arab population. Ali Haider, *Arab Representation in the Civil Service, in Government Corporations and in the Court System*, THE ASSOCIATION FOR THE ADVANCEMENT OF CIVIC EQUALITY IN ISRAEL (2003), <http://www.sikkuy.org.il/2003/english03/pdf/civilEn03.pdf>; See also, in Hebrew, Art. 18(a)(1) of the Governmental Companies Law, 1975: http://www.nevo.co.il/law_html/law01/139032.htm#Seif86 (last visited Jan. 18, 2014); Art. 15(a) of the Civil Services Law, 1959: http://www.moital.gov.il/cmsTamat/InternalPage.aspx?FRAMELESS=false&NRNODEGUID=%7bF895A658-CB43-4A12-BC63-A5DC8AB84F01%7d&NRORIGINALURL=%2fNR%2fexeres%2fF895A658-CB43-4A12-BC63-A5DC8AB84F01%2ehtm&NRCACHEHINT=Guest#_Toc317671217 (last visited Jan. 18, 2014).

⁷¹ The Ass'n for Civil Rights in Isr., *supra* note 64, at ¶ 27.

⁷² *Id.* at ¶ 29.

⁷³ *Id.* at ¶ 15.

⁷⁴ See *Obligation on the State to Provide Proper Representation of Arabs in the Absence of Explicit Statutory Provision*, THE ASS'N FOR CIVIL RIGHTS IN ISR. (July 9, 2001), <http://www.acri.org.il/he/?p=5543> (last visited Jan. 18, 2014).

⁷⁵ Saban, *supra* note 52, at 981.

Absence of such a guarantee threatens to render the duty to ensure adequate representation an “empty duty.”⁷⁶

It is therefore not surprising that the implementation led to a very poor outcome. Initially, two members of the Palestinian-Arab community were appointed to the Council by the government; however, the community did not view them as credible.⁷⁷ Furthermore, with time, the ruling was disregarded entirely, pointing to inadequacies in terms of enforcement. In 2009, the law was changed to require that all appointees (with the exception of two representatives of the Jewish National Fund) be employees of the State.⁷⁸ A restructuring of the Council’s membership followed, and the State appointed new Council members who were all Jewish males. Because the makeup of the Council was a violation of the 2001 ruling as well as the legislation on women’s rights, in 2010 ACRI filed another action seeking representation of both Arabs and women on the Council.⁷⁹ The case is still in progress, and the most recent interim decision was issued in May, when the Court issued an Order *Nisi* requesting the State to provide justification for why it has not appointed Arabs or women to the Council.⁸⁰

Despite what appeared in 2001 to be a successful ruling, to this day, there has been no resolution of the issue, and its outcome was in many regards a failure when tested on the ground. While, on the declaratory level, the Court seemed to acknowledge and express support for the collective rights of the Palestinian-Arab minority, the ruling was in fact quite narrow. The judgment failed to order the government to take the kind of practical steps that could have prevented this outcome. For example, the Court could have interpreted the law to require proportional and authentic representation, including government consultation with representatives of the Arab community, such as the Arab Knesset members and the heads of the Arab Local Authorities, prior to choosing the representatives. It is possible that such consultation would, as one would argue, be never-ending and that the internal politics of the community would be at play at such a level that it would be virtually impossible for the government to select representatives that would satisfy the entire Palestinian-Arab population. Without any attempt to consult the members of the community, however, the choices of representatives were even further from the consensus than they would have been with some consultation, despite its inability to produce consistent results. Instead, the weak and narrow ruling was coupled by a lack of will on the part of the government to implement the judgment in any meaningful way. Together, the outcome utterly failed to fulfill the petition’s goal of realizing the right of appropriate representation of Palestinian Arabs in Israel.⁸¹

⁷⁶ *Id.*

⁷⁷ See Decree *Nisi* Appropriate Representation Israel Lands Council, THE ASS’N FOR CIVIL RIGHTS IN ISR. (May 21, 2012), <http://www.acri.org.il/en/2012/05/22/dec-representation-in-ila/>.

⁷⁸ *Representation of Women and Arabs in Israel Lands Council*, THE ASS’N FOR CIVIL RIGHTS IN ISR. (July 24, 2013), <http://www.acri.org.il/he/?p=16915>.

⁷⁹ *Decree Nisi Appropriate Representation Israel Lands Council*, THE ASS’N FOR CIVIL RIGHTS IN ISR. (May 21, 2012), <http://www.acri.org.il/he/?p=21394> (last visited Jan. 18, 2014); see also THE ASS’N FOR CIVIL RIGHTS IN ISR., <http://www.acri.org.il/pdf/petitions/hit8318.pdf> (in Hebrew).

⁸⁰ Joanna Paraszczuk, *High Court: Not Enough Arab, Women In Top Government Posts*, THE JERUSALEM POST (June 6, 2011), <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=240751>; *Order Nisi Regarding Representation of Women and Arabs in the Israel Lands Administration*, THE ASS’N FOR CIVIL RIGHTS IN ISR. (May 22, 2012), <http://www.acri.org.il/en/2012/05/22/dec-representation-in-ila> (last visited Jan. 18, 2014).

⁸¹ It should be noted that, as of this writing, the latest government appointments did not include any members of the Palestinian-Arab community.

3. Case Study: Legal Action Regarding Representation on the Planning and Building Commission

From the Palestinian-Arab minority's perspective, the real test as to the effectiveness of the Court's ruling in the ACRI case promptly presented itself in a subsequent case, in which Palestinian-Arab citizens demanded adequate representation among the seventeen members of the Planning and Building Commission in the Northern District. Although Palestinian Arabs comprised more than 50% of the District's inhabitants, only two Palestinian-Arab members served on the Commission.

The National Committee of the Heads of Arab Local Authorities in Israel, a self-organized umbrella group that represents all Palestinian-Arab mayors in Israel, petitioned the Supreme Court arguing that the inclusion of only two Palestinian-Arab members out of a total of seventeen violated the right to equality of the District's Palestinian-Arab residents. They further argued that this could not constitute adequate representation of the Palestinian-Arab minority when they constituted over 50% of the District's residents.⁸² To further their argument, the petitioners relied on the new laws of adequate representation, the precedent-setting ruling in the ACRI case, and the exceptional importance of the Planning and Building Commission for the Palestinian-Arab residents of the district.

As in the ACRI case, the Court rendered yet another disappointing judgment.⁸³ It refused to accept the petitioners' position that, under the adequate representation principle, the Commission's makeup should be roughly proportionate to the makeup of the population under its authority. The Court accepted the government's assertion that the Commission had no Palestinian-Arab professionals who qualified for membership partly because of the general lack of experienced Palestinian-Arab government employees. In doing so, the Court overlooked the fact that the lack of qualified or experienced candidates for the Commission among the Palestinian-Arab minority was a result of longstanding, historical exclusion of Palestinians from public service. The circle was thus completed once more: historical ethnic discrimination operates to rationalize and thereby perpetuate ethnic subordination.⁸⁴

To this day, there has been little progress in translating the spirit of the Supreme Court judgment in the ACRI case into concrete results. Currently, Palestinian-Arabs represent only seven to eight percent of all public employees despite comprising close to 20% of the population.⁸⁵ Indeed, if anything remains of the Court's affirmative action rhetoric in the ACRI case, it is the kind of affirmative action that, to use Delgado's language, "serves as a homeostatic device, assuring that only a small number of . . . people of color are hired or promoted. Not too many, for that would be terrifying, nor too few, for that would be destabilizing. Just the right small number, generally those of us who need it least, are moved ahead."⁸⁶

B. Cultural Rights: Linguistic Case

1. Normative Framework

Just as national and indigenous minorities seek the collective right of meaningful representation, they also require protection of their cultural rights in order to be able to fully express and enjoy their

⁸² The author of this article was one of the two attorneys who represented the petitioners.

⁸³ HCJ 9472/00 The Nat'l Comm. of Arab Mayors v. Minister of Interior [2001] (Isr.).

⁸⁴ See Ronen Shamir, *Zionism 2000: Past, Future, and the Qa'dan Family*, 2 ADALAH'S REV. 27 (2000).

⁸⁵ In 2011, only 7.8% of all civil employees nationally were Arab. Ali Haider, *Arabs, the Israeli Civil Service Needs You*, HAARETZ (Aug. 16, 2012, 9:28 AM), <http://www.haaretz.com/opinion/arabs-the-israeli-civil-service-needs-you-1.458640>.

⁸⁶ Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223-24 (1991).

identities and safeguard them amidst social and political pressure.⁸⁷ Some common cultural rights sought by minorities include the right to practice their religions freely, the right to use their traditional lands and the right to engage in traditional practices such as hunting and fishing, or the use of particular plants and herbs for medicinal purposes or in rituals.⁸⁸ The realization of these rights requires not only non-interference by states but also necessitates an obligation on the part of states to take positive measures to create the environment necessary for these practices.⁸⁹ Creating such an environment may be achieved through a number of means including appropriate budget allocations, modifying law and policy for specific groups, or granting rights of self-government in particular spheres of life such that minority groups are able to control some of their own institutions, including those in the educational and cultural spheres.

Language is a leading example of a cultural right, and linguistic preservation holds particular significance for national and indigenous minorities.⁹⁰ Language is often embedded in religious and cultural practice and is instrumental for the preservation of these traditions. Furthermore, linguistic recognition and the right to use native languages in public forums provides minorities, who frequently face severe and prolonged discrimination, with the tools to access social and economic rights and services,⁹¹ thus aiding in equalizing the status of majority and minority groups. For instance, minorities require linguistic equality in order to compete fairly in the job market and in national networks of higher education—both of which are essential for the social and economic advancement of both individuals and their groups on the national level.⁹² Linguistic rights are also critical for promoting a sense of belonging, which contributes to social cohesion and stability. Thus, preservation of a minority's language contributes to the group's ability to compete on equal footing socially and economically and promotes the cultivation of a shared society.⁹³

⁸⁷ Jabareen, *supra* note 15, at 665.

⁸⁸ See International Covenant On Civil And Political Rights (ICCPR), art. 27, Dec. 19, 1966; The Declaration on the Rights of Minorities, *supra* note 10, art. 1.1; The 2007 Declaration on Indigenous Rights, *supra* note 11, arts. 11 & 12. For an overview of rights concerning a group's cultural practices, see *Multicultural Citizenship*, *supra* note 4, at 30-31.

⁸⁹ See General Comment No. 23: *The rights of minorities art. 27*, ¶ 6.1 & 7; The Declaration on the Rights of Minorities, *supra* note 10, art. 2.1, Dec. 18, 1992.

⁹⁰ *Multicultural Citizenship*, *supra* note 4, at 12; POLITICS IN THE VERNACULAR, *supra* note 9, at 78–82. A relevant example of such an issue exists among the Kurdish communities in Turkey, Syria, and Iraq. For more on that topic, see, e.g. Gurr, *supra* note 3.

⁹¹ Such public services include, e.g., public health clinics, national post offices, public modes of transportation, and government offices such as the Income Tax Authority, the Social Security Institution, and the Ministry of Interior.

⁹² Saban, *supra* note 52, at 925-38.

⁹³ In order to fully realize the linguistic rights of national and indigenous minorities, depending on their percentage of the population, it may be necessary for states to institute a policy of bilingualism. Such a policy entails granting the relevant languages equal status in both law and practice. Thus, all areas of the public sector become bilingual including, but not limited to, government documents and forms, mass media, courts of law, the labeling of road signs and public buildings, and so forth. Education systems may also adopt bilingualism, by which they teach both languages in order to advance equality and integration on the technical level and to promote the values of coexistence, acceptance, and intercultural education. Canada is a worthy example of a bilingual system. See Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 16-23 (U.K.). Article 16(1) stipulates generally that “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the parliament and government of Canada.” In the 1970s and 80s, Canada undertook a comprehensive conversion to bilingualism, including all governmental and public service authorities. See Joseph Eliot Magnet, THE OFFICIAL LANGUAGES OF CANADA (Y. Blais ed., 1995); compare to the status of Hebrew and Arabic in Israel: Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, 36 ISR. L. REV. 5 (2002). On the importance of education for civic integration, see POLITICS IN THE VERNACULAR, *supra* note 9, at 293. In fact, guaranteeing linguistic rights in education is required by international law, for instance in The Declaration on the Rights of Minorities, *supra* note 10, at art. 4.4.

The importance of linguistic preservation, access, and equality is recognized in international law. Enshrined in many of the legal instruments of minority rights is an obligation of states to officially recognize minority languages and to incorporate them into public spaces.⁹⁴ The 2007 Indigenous Declaration is notable in this realm⁹⁵; as was previously mentioned, it allows indigenous groups to self-administer their own education in their native tongue,⁹⁶ and also requires government offices and services to be linguistically accessible to indigenous groups.⁹⁷ The Declaration even emphasizes the importance of including indigenous languages on road signs.⁹⁸ Perhaps not surprisingly, indigenous peoples were integral in the framing of the 2007 Declaration, and the final product reflects the primacy of linguistic rights from their perspective.

2. Case Study: Legal Action Regarding Signposting

Language and linguistic recognition is, similarly, a key demand of Palestinian Arabs in Israel. In 1999, Adalah and ACRI brought legal action against the Municipality of Tel Aviv-Jaffa and four other so-called “mixed” Jewish-Arab cities’ municipalities (Acre, Lod/Lydda, Ramle, Natzirat Illit),⁹⁹ demanding the inclusion of both Arabic and Hebrew in their signposting on the municipal level.¹⁰⁰ The petition was filed not only because Arabs were unable to find their way around, but also in the hopes that adding Arabic to municipal signs would give members of the Arab community a sense of belonging, and would constitute an expression of their indigenous and historical connection to the land.

In formulating the ruling, the Justices were forced to consider the status of Arabic as an official national language. Paragraph eighty-two of the British Mandate’s Palestine Order in Council of 1922 (as incorporated into Israeli law), treats the Arabic and Hebrew languages identically (in that order) as the two official languages of the State.¹⁰¹ Paragraph eighty-two provides a unique legal anchor for the

⁹⁴ See, e.g., ICCPR, *supra* note 88, art. 27; The Declaration on the Rights of Minorities, *supra* note 10, art. 4.

⁹⁵ S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment*, JURIST (Oct. 3, 2007), <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

⁹⁶ The 2007 Declaration on Indigenous Rights, *supra* note 11, at art. 14.1 (“Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”).

⁹⁷ *Id.* at art. 13.2 (“States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.”).

⁹⁸ *Id.* at art. 13.1 (“Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.”).

⁹⁹ Some 10% of Arab citizens of Israel reside in so-called “mixed” cities such as Acre, Lydda, Ramle, Haifa, and Tel Aviv-Jaffa, cities which consist of sizable populations of Jewish and Arab residents. For instance, Tel Aviv developed alongside the ancient port city of Jaffa and today they constitute the same municipal unit. About 5% of the population of Tel Aviv is Palestinian Arab, primarily residing in Jaffa. Beyond the numbers, however, Jaffa, like many other cities in Israel, is historically significant to the Palestinian community living in Israel and beyond. Prior to the establishment of the State of Israel, four of the cities that requested via the petition to add Arabic captions (Acre, Lydda, Ramle, and Jaffa), were national, cultural, and economic centers for the Palestinian community until its overthrow in 1948.

¹⁰⁰ HCJ 4112/99 Adalah and the Ass’n for Civil Rights v. Municipality of Tel Aviv-Jaffa et. al. 56(5) PD 393 [2002] (Isr.). For additional discussion on this case, see Zeev Segal, *Do Israeli Arabs Have Collective Rights*, 12 J. L. SOC’Y 94 (2010) (hereinafter Segal); Michael Karayanni, *Two Concepts of Group Rights for the Palestinian-Arab Minority Under Israel’s Constitutional Definition as a “Jewish and Democratic” State*, 10 I. CON 304, 310 (2012) (hereinafter Two Concepts of Group Rights).

¹⁰¹ Palestine Order of Council of the British Mandate of Palestine, 1922-1947, ¶ 82.

collective right held by the Palestinian-Arab minority, as opposed to an individual right.¹⁰² This special legal arrangement was never changed by the Israeli legislature; in fact, the Knesset has rejected attempts to nullify it.¹⁰³

As Justice Dorner commented in her concurring opinion, while the status of the English language as an official language was canceled in Art. 15(b) of the Law and Administration Ordinance, the Knesset rejected a bill attempting to annul the status of Arabic as an official language (Bill on the Language of the State – 1952, Knesset Record, Volume 12, Annex, at p. 2528).¹⁰⁴ There may be other considerations for preserving this status, but from a normative perspective, there is a bilingual arrangement according to law. It should be noted that the Court refused to hear the issue again, and rejected the application for a review of the decision, in which the Court noted, *inter alia*, the power of political authorities to change the normative status on the topic:

It has been clarified that the opinion of the Attorney General is not supported by the opinion. Needless to say, he, like the rest of those interested in the issue, is given the option to bring the issue before other official bodies more suited than the court for their determination.¹⁰⁵

That said, despite the legal status of Arabic as an official national language, in practice, Hebrew is the dominant language in all aspects of Israeli life and has been given added legitimacy and public presence through subsequent legislation and policy.¹⁰⁶

The Supreme Court decision was handed down in June 2002 and it represents the central legal precedent regarding the status of Arabic in Israel.¹⁰⁷ In the decision, the Justices ordered the local authorities in the “mixed” cities to add Arabic to all signs within their respective municipal jurisdictions,¹⁰⁸ as well as to all safety and caution signs and all signs leading to municipal institutions within the cities under their jurisdictions.

¹⁰² See Saban, *supra* note 52, at 925 (“The most far-reaching group-differentiated right that is granted to the Palestinian minority by Israeli Law is the normative status of Arabic as one of the two official languages of the state.”). Justice Dorner also commented on this uniqueness. See Adalah and the Ass’n for Civil Rights, 56(5) PD at ¶ 6 (Dorner, J., concurring) (“In general, the principle of equality between Jews and Arabs applies to personal rights. This rule has few exceptions, and among them is the recognition of the Arabic language as a second official language, along with the Hebrew language.”). See also Adalah and the Ass’n for Civil Rights, *supra* note 100.

¹⁰³ HCJ 7260/02 Municipality of Ramle v. Adalah, Nevo Legal Database (by subscription) (Isr.), available at <http://elyon2.court.gov.il/files/02/600/072/F03/02072600.F03.htm> (Isr.) (unpublished opinion).

¹⁰⁴ HCJ 4112/99 Adalah v. Municipality of Tel Aviv [2002] (Isr.). A summary of the verdict in English, as published by the petitioner (Adalah): <http://adalah.org/features/landlangrep/4112decision-eng.pdf>.

¹⁰⁵ *Id.* at ¶ 5. See also Adalah and the Ass’n for Civil Rights, *supra* note 100.

¹⁰⁶ It should be stressed that, despite the identical formal normative statuses of Arabic and Hebrew established by The Palestine Order in Council, 1922, *supra* note 101, at Part VIII (82), later legislation provided for public aid for the cultivation of the Hebrew language only, such as the Supreme Hebrew Language Institute Law, 5713-1954, 7 LSI 140 (1953) (Isr.) and the Law on the Use of the Hebrew Calendar, SH No. 1682, 312, Aug. 4, 1998, Nevo Legal Database (by subscription) (Isr.), http://www.nevo.co.il/Law_word/law14/law-1682.pdf. Moreover, other legislation granted public assistance to the cultivation of other languages spoken by Israelis, to the exclusion of Arabic, an official language according to law. See National Authority for Yiddish Culture Law, SH No. 1577, 182, Mar. 17, 1996, Nevo Legal Database (by subscription) (Isr.), http://www.nevo.co.il/Law_word/law14/LAW-1577.pdf (established the referenced authority in order to assist and encourage creativity in the Yiddish language); see also National Authority for Ladino Culture Law, SH No. 1577, 185, Mar. 17, 1996, Nevo Legal Database (by subscription) (Isr.), http://www.nevo.co.il/Law_word/law14/LAW-1577.pdf (established the Ladino authority for the same purposes).

¹⁰⁷ For more on the ruling, see Two Concepts of Group Rights, *supra* note 100, at 310-14.

¹⁰⁸ The decision referred to the municipalities of Tel Aviv-Jaffa, Lod/Lyddá, Ramle, and Natziat Illit. Following the filing of the petition, the municipality of Acre decided on its own accord to add Arabic to its signs, and

In Chief Justice Aharon Barak's majority opinion, the Court emphasized that the Arab minority is not only a numerically large minority in Israel, but it is also a minority with a longstanding presence there.¹⁰⁹ This emphasis is the first time in which an Israeli court granted legal standing to the status of the Palestinian-Arab minority as an indigenous minority, even if it did not use the actual word, "indigenous".¹¹⁰ More significantly, the ruling in this case was based on a positive conception of the linguistic rights of the Palestinian-Arab citizens and the significant role language plays in maintaining identity. The judgment also strengthened the basis for the special status of the Arabic language in the State of Israel, particularly given what Chief Justice Barak described as the lengthy history of Palestinian-Arab presence in the land.

The petitioners considered the judgment to be "profoundly important" and hailed it as "an important step in the recognition of the collective rights of Arab citizens in Israel, primarily the right to language and culture."¹¹¹

Nevertheless, similar to the petition on representation described in the previous section, the outcome of this legal action, even if it represented some modicum of progress, must be considered limited, both technically and in relation to recognition of the collective linguistic rights held by the Palestinian-Arab minority. First, although municipalities did indeed add captions to their signs, they practically made a mockery of the judgment, executing it in a blatantly unprofessional manner, including frequent spelling and grammatical errors that were unreasonable.¹¹² For instance, Arab youth talked about a sign that was erected on one of the beaches in Israel on which it is written in Hebrew, "bathing is prohibited in this place" and in Arabic that "bathing is permitted." A similar example is that of the city of Acre, which is written in Arabic letters as "Akko," the Hebrew name for the city, and not "Akka," its Arabic name. Such is also the case for the cities of Be'er Sheva, Lod, and Tiberius. These errors demonstrated the municipalities' insulting and belittling attitude toward the Palestinian-Arab citizens reading the Arabic signs.

Secondly, on a fundamental level, the Arabic captioning added to the signs, in many cases, was a technical transliteration of the Hebrew writing appearing on the sign, rather than the label of the place with the authentic Arabic name to which Palestinian-Arab citizens are accustomed. By merely transliterating the Hebrew text, the central goal of collective linguistic rights and the main impetus for bringing the litigation—attaining a sense of belonging in the country and preserving the historical, original Arabic names of cities—certainly was not achieved.

Naturally, a counter-argument can be made for the importance of uniformity in the names of places in a country in order to avoid splintering and exclusion of any one group and to foster social

therefore its status in the petition was changed to mere formal respondent. A previous petition had led to bilingual signposting in Haifa, according to a settlement reached by the parties and given the status of a court judgment. HCJ 2354/93 Ass'n for Civil Rights in Isr. and the Org. for Soc. Advancement in Haifa v. Municipality of Haifa, Nevo Legal Database (by subscription) (Isr.) (unpublished opinion).

¹⁰⁹ Adalah and the Ass'n for Civil Rights, *supra* note 100, at ¶ 25.

¹¹⁰ *Id.* ("Arabic is the language of the largest minority in Israel, *one that has long lived in Israel*. This language is connected to cultural, historical and religious characteristics of the Arab minority group in Israel. It is the language of citizens that despite the Arab-Israeli conflict wish to live in Israel as loyal and equal citizens, where their language and culture are respected (emphasis added).").

¹¹¹ *The Arabic Language is an Official Language in Israel*, ASS'N FOR CIVIL RIGHTS IN ISR. (July 28, 2002); Press Release, Adalah, Supreme Court Issues Historical Judgment Affirming the Collective Rights of Palestinian Minority in Israel (July 26, 2002), <http://adalah.org/eng/Articles/141/Supreme-Court-Issues-Historic-Judgment-Affirming>.

¹¹² See Hesketh, *supra* note 53, at 47. See also Press Release, Adalah, Adalah and ACRI Demand Implementation of Israeli Supreme Court Ruling Ordering the Addition of Arabic to Signs in Nazaret Illit Municipality (Nov. 19, 200), <http://adalah.org/eng/Articles/955/News-in-Brief->

cohesion. However, even the choice of such a name has the potential to be informed by the dominant culture's choice. Without a deeper sense of cultural inclusion on the part of the Palestinian-Arab community, creating permanent, uniform names has the potential to be received as another affront by the majority on the minority.

Moreover, the decision about word choice in labeling places was not the only critique that the case raises. Yet, two other major needs of the Palestinian-Arab community remained unaddressed: the need to mark Palestinian historical sites and the importance of recognizing Arab national heroes through signposting.¹¹³ Fulfillment of these needs would require adding new signs and changing existing ones, not simply adding Arabic captions to existing Hebrew signs. While the petition perhaps did not explicitly raise this deeper recognition of cultural and historical recognition, the Court's oversight nonetheless represents a failure to recognize the full meaning that the language carries for each group. Indeed, the ruling failed to equalize the Hebrew and Arabic language's status, thus turning a blind eye to the Palestinian-Arab population's essential character as an indigenous national minority and their need for collective linguistic rights.

Instead, despite the important and principled ruling on the status of the Arabic language, the obligation to add Arabic to municipal signs only received technical and formal expression. This will not result in the realization of the essential objective of bilingualism to which the Palestinian-Arab minority aspires.¹¹⁴ In fact, arguably, the decision weakened the position of Arabic vis-à-vis Hebrew and perhaps even that of the community as a whole, as it forced the judges to consider the relative statuses of the two languages, ultimately deciding in Hebrew's favor.¹¹⁵ Highlighting this inferiority in a Supreme Court opinion could open the door for official authorities to find additional justifications, beyond those cited in the opinion, for deviating from the bilingual status required by law.

¹¹³ Many geographic places within and around the current borders of Israel have deep historical significance for the Palestinian-Arab minority, not only as individuals but also as a collective; these sites include unrecognized Arab villages, abandoned and destroyed villages, and other religious and historical sites. In most cases, there is no signage whatsoever in these places; however, in some places the sites have been given Hebrew names—old or new. Furthermore, many of the names currently in use for geographic locations reflect a Jewish Zionist narrative. This narrative is not only inappropriate, or at best incomplete, to Arabs, but it is also fiercely disputed and carries with it deep and painful connotations. Similarly, figures or events of significance to Palestinian-Arabs remained virtually unrecognized, even in neighborhoods in mixed cities in which Arabs have a sizable presence. See Saban, *supra* note 52, at 935 (“In terms of the theoretical framework that was presented for group-differentiated rights, the minority’s demand is for a significant right to special representation and allocation, as distinct from merely formal linguistic representation. In other words, the demand is that the minority itself should be able to choose the linguistic representation that is adopted in its language. This will enable its participation—as an ethno-national community—in determining the public human landscape of the country.”).

¹¹⁴ See four important documents: *The Future Vision of the Palestinian Arabs in Israel*, *supra* note 41; Yousef T. Jabareen, *An Equal Constitution for All? On a Constitution and Collective Rights for Arab Citizens in Israel*, MOSSAWA CENTER: THE ADVOCACY CENTER FOR ARAB CITIZEN IN ISRAEL (2006), http://www.mossawacenter.org/my_documents/publication/constitution_paper_ENG.pdf; Adalah, *Democratic Constitution*, ADALAH: THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL (2007), http://adalah.org/Public/files/democratic_constitution-english.pdf; Nadim N. Rouhana, *The Haifa Declaration*, MADA AL-CARMEL (2007), <http://mada-research.org/en/files/2007/09/haifaenglish.pdf>.

¹¹⁵ Note the difference in the statuses of the two languages as described by Chief Justice Barak and by Justice Dorner, respectively. Adalah and the Ass’n for Civil Rights, *supra* note 100 at ¶ 25 (Barak, C.J.) (“The desire to ensure dignified coexistence between the descendants of our forefather, Abraham, in mutual tolerance and equality, justifies recognizing the use of the Arabic language in municipal signposting—in the same cities in which there is a significant Arab minority (six to 19% of the population)—alongside its senior relative, Hebrew.”); *Id.* at ¶ 7 (Dorner, J., concurring) (“While Hebrew is the first official language of the State of Israel, as the national language of the majority, the status of Arabic as an official language according to amended Paragraph 82 was designed to uphold the freedom of language, religion and culture for the Arab minority.”).

It is interesting to note that all three Justices on the panel, including the two in the majority, were divided in their reasoning, and this divide could explain the narrow, literal decision granted. Former Chief Justice Barak reasoned that Paragraph 82 of the Palestine Order in Council of 1922, which established the status of the Arabic language as an official language, did not create in and of itself a direct obligation to add Arabic to all municipal signs. Nonetheless, he reached this obligation through interpretation, balancing the various objectives of the discretion given to local authorities, namely in the implementation of the values of equality and in protecting language rights.

Justice Dorner joined Chief Justice Barak's decision, but her concurring opinion was based on different legal reasoning. In her view, the obligation of the respondent municipalities to add Arabic to all municipal signposting is anchored in Paragraph 82 of the Palestine Order.¹¹⁶ According to Justice Dorner, "[t]he status of the Arabic language as an official language cannot be reconciled with the reduction of signposting in certain areas within the jurisdiction of the respondent local authorities." Justice Dorner went on to state that, "such a reduction in fact has a damaging connotation."¹¹⁷ Justice Cheshin, in a lengthy dissenting opinion, reasoned that the petition must be declined both on the merits—as "theoretical, general and vague"—and on jurisdictional grounds, as ruling on the petition would constitute rendering "a political determination of the highest level,"¹¹⁸ which is beyond the scope of the Court's jurisdiction. According to Justice Cheshin, the petition asked the Court to take political measures, which are within the authority of the political organs of the State—the government and the Knesset (Parliament)—and not the Court.¹¹⁹

The opinion also revealed the reluctance of the Court (both the majority and dissent) to accept bilingualism as a right owed to substantial national minorities. The opening section of the Chief Justice's opinion reveals an individualistic approach to the right to language¹²⁰—one that is not easily reconciled with the collective essence of this right. This approach contradicts the same court's rulings that declared Arabic's status as the language of a long-present community in Israel. This is even more striking when compared to the collective approach taken by the Chief Justice regarding the status of the Hebrew language.¹²¹

¹¹⁶ *Id.* at ¶ 5 (Dorner, J. concurring).

¹¹⁷ *Id.* at 480 (Dorner, J., concurring).

¹¹⁸ *Id.* at ¶ 38 (Cheshin, J., dissenting).

¹¹⁹ Adalah and the Ass'n for Civil Rights, *supra* note 100, at ¶ 55 (Cheshin, J., dissenting).

¹²⁰ *See, e.g.*, Chief Justice Barak's wording in paragraphs 16 and 19 of the opinion. *Id.* at ¶ 16 (Barak, C.J.) ("The first overall objective relevant to the present matter is that which deals with the protection of one's right to his language. One's language is a part of his personality. It is the instrument with which he thinks."); *Id.* at ¶ 19 ("Given that language is highly important to the individual and his development, one's possibilities must not be limited because of language.")

¹²¹ *See, e.g.*, Chief Justice Barak's wording in paragraph 21. *Id.* at ¶ 21 (citations omitted) ("The fourth overall objective that must be considered here is recognition of the importance of language as an element in national cohesion and in defining the sovereign state. Language is not just an expression of an individual's identity. Language is also an expression of the general public. It is the common thread that ties individuals to a particular society. It develops social cohesion in Israel. Hebrew is the force that unites us as members of one state. Hebrew cannot be owned by this group or that in Israel. The Hebrew language is an asset held by the entire [Jewish] people.")

Chief Justice Barak's narrow view of bilingualism is also illustrated by some of his later statements in the opinion, according to which the addition of Arabic to public signs will cause an injury to national cohesion—albeit a minor one. Such a statement could have serious ramifications for the status of the Arabic language. The "national cohesion" that the Chief Justice describes is an exclusive cohesion shared only by the Jewish majority, as distinct from an inclusive cohesion shared by both national communities existing in the state. Had it taken a broader view, the Court could have concluded that adding Arabic to municipal signs was in fact a step toward strengthening (bi)-lingual cohesion in the state, as it reflects the social-national, linguistic mosaic that is an essential element of Israeli society.

Justice Cheshin's dissenting opinion also adopted a narrow view of the principle of bilingualism. He characterized the demand for language equality and group linguistic rights as political and one that "diverges from the function and authority" of the Court.¹²² Justice Cheshin proffered that the right of an Arab citizen in Israel to his language is a passive right that does not impose an affirmative right on the State to implement it via the addition of Arabic to municipal signs. Therefore, for Justice Cheshin, Israeli law does not recognize group rights, rather it only protects individual rights.¹²³ Of course, his view was overruled by the two other justices. Yet, his view remains a source for developing future legal arguments against the collective linguistic rights of the Palestinian-Arab minority.

Naturally, the decision served as the subject of much academic criticism.¹²⁴ One such critique is that of Professor Michael Karayanni, who discusses this ruling as exemplifying his 'thin' concept of minority rights in relation to the Palestinian minority in Israel. Accordingly, Israeli constitutional law is prepared to grant some group accommodation rights in line with Justice Barak's recognition of the Arab minority as an indigenous minority. However, such rights and accommodations are relative and limited; they are only permitted to the extent that they do not threaten the dominant status of Jewish rights. Indeed, both in the narrow ruling and in its practical outcome, the realization of the Palestinian-Arab minority's collective linguistic rights was outweighed by the interest in preserving Jewish hegemony in all aspects of Israeli life, including cultural and linguistic expression.

3. Case Study: Legal Action Regarding Language on Road Signs

Another salient example of the literal as opposed to substantive fulfillment of these rights is the 1997 case, *Adalah v. Ministry of Transportation*, demanding that the Ministry of Transportation, the Public Works Department, and the National Roads Company add Arabic to all national road signs.¹²⁵ The petition alleged discrimination against the Palestinian-Arab minority in violation of the official status of the Arabic language in Israel (under the Palestine Order in Council) and Israel's requirements toward national minorities under international law. Furthermore, the petitioners argued that the absence of

¹²² *Id.* at ¶ 59 (Cheshin, J., dissenting).

¹²³ *Adalah and the Ass'n for Civil Rights, supra* note 100, at ¶ 19-24; *See also* *Adalah and the Ass'n for Civil Rights, supra* note 100, at ¶¶ 51-52 (Cheshin, J., dissenting) ("The petitioners come to us with a different view. The right that they claim—the right to cultivate a national and cultural identity—is not a right endowed to the individual on his own. In fact this is a right shared by all the state's citizens by virtue of their being citizens. The right that the petitioners claim is derived from the fact of an individual belonging to a certain segment of the population: his membership in a cultural and national minority group We recognize the freedom of culture and of language. This right of an individual, as in the right of all individuals—subject to exceptions—grants him the right to engage in cultural activities as he wishes; every person is free to express himself in whatever language he desires, and the state is not permitted to obligate him to express himself in a certain language or to prevent him from using another language. However, the obligation imposed on the state to assist the minority to preserve and develop its language and culture—a quasi-obligation—is not one that is recognized by us.").

¹²⁴ Ilan Saban, *A Lone (Bilingual) Cry in the Dark? Following HCJ 4112/99 Adalah v. Municipality of Tel Aviv-Jaffa*, 27 TEL AVIV U. L. REV. 109 (2003-04); Yaacov Ben-Shemesh, *State Neutrality and the Right to Language, Following HCJ 4112/99 Adalah v. Municipality of Tel Aviv-Jaffa National Neutrality and the Right to a Language*, 8(1) MISPHAT UMIMSHAL L. & GOV'T 347 (2005); Ilan Saban & Mohammad Amara, *On Collective Rights and Reality: The Status of the Arabic Language in Israel*, 4 ST. & SOC'Y MEDINA VE-HEVRAH 885, 909 (2005); Eyal Benvenisti, *The Defense of Minority Communities in the Courts*, LEGAL LEAVES C 463 (2003-04); Geirshon Girshon Gontovnik, *The Right to Culture in a Liberal Society and in the State of Israel*, 27 TEL AVIV U. L. REV. 23 (2003-04); Michael M. Karayanni, *On the Concept of 'Ours': Multiculturalism with Respect to Arab-Jewish Context Relations*, 27 TEL AVIV U. L. REV. 71 (2003-04).

¹²⁵ HCJ 4438/97, *Adalah v. Ministry of Transp.*, 98 Takdim Elyon (1) 11 [1998] (Isr.).

Arabic on signs posed a safety hazard to the general public by denying Arabic speakers signage that they could read quickly in order to avoid traffic accidents and needless speeding.¹²⁶

The State's counterclaims were of practical, not principled nature; however, they stood to have a substantial impact. The State argued that the addition of Arabic to all road signs would clutter them with a "forest" of words and serve to confuse more than to assist drivers. To counter this claim, *Adalah* offered the results of research conducted on the matter, which demonstrated that signs bearing three languages were equally as effective as signs with two languages. In a hearing that took place at the end of 1998, the Supreme Court ordered the State to develop a timeframe shorter than five to seven years, as the State had proposed, in which to add the Arabic translations of the nation's road signs. In February 1999, the State committed to adding Arabic to all of the country's road signs within a five-year period.¹²⁷

Although Arabic translations have been added to thousands of signs across the country since the Supreme Court decision, to this day the State has yet to fully implement the decision by adding Arabic to all of the signs. Furthermore, as in the previous *Adalah* case discussed above, inaccuracies and negligent spellings have been found on numerous signs, and the organization is forced to continually monitor the implementation of the judgment.¹²⁸

What perhaps renders this reality even more harmful to the realization of the Palestinian-Arab minority's linguistic rights is the dynamic that has resulted from the line of litigation exemplified by the cases above—a dynamic in which the State and local municipalities are aware that full, timely, and meaningful implementation of the judgments rendered by the Supreme Court on this topic is not necessary because the consequences are negligible, if they exist at all. Moreover, there is no adequate way of ensuring that the substance and spirit of the judgments—beyond the technical face value of their instructions—are implemented. This is the result of overly broad wording employed by the Supreme Court justices and their leniency with state and municipal actors who delay or evade full translation of the judgments into action.

C. Allocation of Material Resources

1. Normative Framework

The "transformative" approach to group equality not only focuses on formal discrimination, but also on the lasting material discrimination suffered by the minority. Material discrimination refers to the ways that discrimination and exclusion economically and culturally subordinate minority groups to the majority and subordinate the life chances of the minority to those of the majority in almost every sphere of life.¹²⁹ Accordingly, although a narrow approach to group rights might succeed in eliminating the formal manifestations of group discrimination (a substantial achievement for many minority members),

¹²⁶ In order to appreciate the extent of the danger, at the time the petition was filed, less than 20% of all road signs included Arabic. *Id.*; see also *The Use of Arabic on National Road Signs*, ADALAH, <http://adalah.org/eng/Articles/618/The-Use-of-Arabic-on-National-Road-signs->. The remaining road signs were posted in Hebrew with English translations only. The only signs on which Arabic did appear were those located near Palestinian-Arab towns. *Id.*

¹²⁷ *Id.*

¹²⁸ In the course of litigating the case, it was discovered that only 3.5% of the National Roads Company's employees were Arab, of whom less than a quarter were employed full time. It was also discovered that there was not a single Arab member of the company's management, and among 174 engineers only one was Arab. As a result, Adalah added this issue to the demands of the case and to this day continues to push for increased hiring of Arabs in the company.

¹²⁹ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988).

its short reach ultimately allows the perpetuation of conditions of material subordination of the minority group.¹³⁰

Minorities' need for an equitable distribution of resources—including in relation to identity preservation—is supported by international law.¹³¹ Article 5.1 of the 1992 Declaration on Minorities stipulates that “national policies and programs shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.”¹³² In his Commentary on the Declaration on Minorities, minority rights expert Professor Asbjørn Eide notes that the article should be read to include the distribution of such resources as public health, education, social security, housing, and other public welfare programs.¹³³

As a starting point, minorities require budgetary and other material resources proportional to their percentage of the population. However, in order for minority groups to achieve equal standing with majority groups, programs must expand the strict or formal definition of equality and distribution without discrimination into the realm of equity. Given that minority groups are often disproportionately disadvantaged socio-economically and have experienced long periods of deprivation and discrimination, principles of distributive and corrective justice often demand that extra measures and special allocations be undertaken in order to bring minorities to a status that is parallel to that of majority groups.¹³⁴ Affirmative action programs are only one of many ways to offer disadvantaged groups legitimate opportunities to progress and fully and equally enjoy the resources of a state.

2. Case Study: Legal Action Regarding Allocations for Education

The leading legal action brought in Israel regarding these principles relates to distribution of funding for education. In February 1998, the Israeli government adopted a program intended to advance education in Israel's periphery. “Incentives in the areas of education and culture,” as the government decision stated, “were intended to improve the level of student achievement, with the aim of reducing the existing gaps between areas in the periphery and the center.”¹³⁵ The classification of a town as bearing national priority status, as defined by the plan, entitled it, and the teachers in its schools, to a host of comprehensive and significant benefits and incentives.¹³⁶ In order to determine who was eligible

¹³⁰ Jabareen, *supra* note 15, at 661-64.

¹³¹ See, e.g., Declaration on the Rights of Minorities, *supra* note 10. Even General Comment 23 on Article 27 makes clear that although the rights therein are articulated as negative rights, they also obligate states to take positive action to create conditions for their realization. Human Rights Comm., General Comment No. 23: The Rights of Minorities, 50th Sess, U.N. Doc. CCPR/C/21/Rev.21 (Apr. 8, 1994).

¹³² Declaration on the Rights of Minorities, *supra* note 10, at art. 5.1.

¹³³ Asbjørn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Subcomm. on Prevention of Discrimination and Protection of Minorities, Working Group on Minorities, Rep. on its 4th Sess., May 25-29, 1998, art. 5.1 Commentary, U.N. Doc. E/CN.4/Sub.2/AC.5/1998/WP.1 (May 13, 1998).

¹³⁴ See The Declaration on the Rights of Minorities, *supra* note 10, art. 4; the ICCPR, *supra* note 88, art. 2. See also Patrick Thornberry, *An Unfinished Story of Minority Rights*, in *DIVERSITY IN ACTION* 47, 48 (A.M. Bíró, & P. Kovács eds., 2001).

¹³⁵ See Government Decision No. 3292, 15 February 1998, available at <http://www.pmo.gov.il/about/Projects/Documents/des3292.pdf>.

¹³⁶ For example, incentives for teachers included a 75% reduction in tuition for teacher training, along with full reimbursement of transportation expenses, an 80% housing subsidy for teachers who reside in the same town in which they teach, and full coverage of teacher participation in payment for continuing education courses. On the municipal level this included, for example, full funding of the installation of computer systems in schools in Priority Area A and annual grants of 100,000 NIS (approximately \$25,000 USD) “to encourage disadvantaged populations” for each community center in towns classified as Priority Area A.

for these incentives, the plan classified each town and city in Israel in one of three categories.¹³⁷ Of the 535 cities and towns that were granted priority, only four were Arab towns and all were of small populations.

This program was viewed by the Palestinian-Arab community as particularly grievous given the poor state of Arab education as a whole in Israel. Indeed, on virtually every level—from achievement levels to drop out rates, to class size, to infrastructure, and most certainly in relation to funding—Arabs fare much worse than students in the Jewish education system.¹³⁸ A report issued by a government-appointed committee, the Or Commission,¹³⁹ detailed many of the disparities between state investment in Jewish and Arab education.¹⁴⁰

Given this reality, even the most cursory examination of statistics revealed that the State's claim that the selection of national priority areas was based on geographic and need-based considerations was unfounded. For example, if scholastic achievement in peripheral areas were a determining factor, then why were sixty-two towns from non-peripheral areas—the majority of which are predominantly Jewish—added to the 491 periphery towns granted extra support. Similarly, if the criteria were economic, determination of priority areas could have been in line with the State's own yearly ranking system of the socio-economic situation of all towns in Israel conducted by Israel's Central Bureau of Statistics (CBS).¹⁴¹ According to this recognized and accepted ranking system, the need for economic support is

¹³⁷ Government Decision No. 3292, *supra* note 135.

¹³⁸ For more information, see *Dirasat and Haifa University Law School Release a Report on the State of Arab Education in Israel*, DIRASAT ARAB CTR. FOR LAW & POLICY (Jan. 22, 2011), <http://www.dirasat-aclp.org/index.asp?i=679> (detailing the release of a research report which shows that the state of Arab-Palestinian education remains in a state of crisis as Arab-Palestinian students lag roughly 2.5 times behind their Jewish peers in academic achievement); see also Or Kashti, *The Jewish Student Receives 5 Times As Many Enrichment Hours As the Arab Student*, HA'ARETZ, Aug. 12, 2009 available at http://www.dirasat-aclp.org/Fact_Sheet-Education%5B1%5D.pdf (providing statistics on the disparities in education between the Arab and Jewish population).

¹³⁹ The "Or Commission," or the "State Commission of Inquiry into the Clashes Between Security Forces and Israeli Civilians," was appointed on November 15, 2000 by then Israeli Supreme Court President, Aharon Barak, one month after the tragic October 2000 events in which twelve Arab citizens and one resident of the Gaza Strip were killed at the hands of Israeli security forces. The public hearings, headed by then Israeli Supreme Court Justice Theodor Or, lasted two and a half years, from February 2001 to August 2003. The Commission's report was released on September 2, 2003. In a general sense, the report acknowledged the status of the Arab minority and critiqued the state's approach; however, it failed to hold state officials explicitly accountable for the killings. Although no English translation of the Or Commission Report exists, a summary in English, prepared by the Israeli newspaper *Ha'aretz*, may be found on the Sikkuy website. See *Official Summary Of the 'Or' Commission Report, First Or Watch Conference Proceedings*, HA'ARETZ (June 24, 2004), <http://www.sikkuy.org.il/english/2004/OfficialSummary.pdf>.

¹⁴⁰ The report stated that discrimination against Arab schools continued in many areas: the ratio of pupils per teacher, the number of students in each classroom, the number of suitable and functional classrooms, the existence of sports facilities and laboratories, the rate of computers per student, and more. The establishment of public kindergartens and public preschools for ages 3-4, special education, support programs, enrichment programs, professional education—all of these significantly lagged behind the Jewish. Indeed, the state of Arab education on all levels is crying out for investment, a situation which is well-documented and known to all.

¹⁴¹ Under the CBS system, each town in Israel is given a score from 1-10 based on a number of factors such as demographic data, education and academic performance levels, standards of living and income, certain features of the workforce, and the existence and amount of pensions. The CBS consistently places Palestinian-Arab local authorities among its lowest socio-economic rankings. Data for 2004 demonstrates that approximately 45% of Arab local councils rank in the two lowest clusters (one and two), and 97% are found in the four lowest clusters. Arab communities, as a whole, constitute more than 80% of the total towns and villages among the three lowest clusters. See Jabareen, *supra* note 5, at 382-83.

greatest in Arab areas.¹⁴² Nonetheless, the final map used by the program did not appear to correspond with this ranking system, nor with the actual needs on the ground.

Some three months after the program's approval, *Adalah* filed a petition to the High Court of Justice on behalf of the Higher Follow-Up Committee on Arabs in Israel and the Higher Follow-Up Committee on Arab Education in Israel, challenging the decision to approve the particular set of national priority areas.¹⁴³ The petition requested that the Court nullify the State's decision on the grounds that it was based on invalid motivations, namely intentional and wrongful discrimination against the Palestinian-Arab population. Hearings on the petition continued for nearly eight years, during which time the decision remained in effect and the program continued to be implemented.

Finally, on February 27, 2006, the Supreme Court rendered its decision.¹⁴⁴ The justices, for the most part, accepted the petition's claims of discrimination and ordered the nullification of the State's decision within a year.¹⁴⁵ In a lengthy and detailed opinion, Chief Justice Barak stated unequivocally the opinion of the Justices regarding the motivations of the ministers who had approved the "illegal decision." Its illegality, he explained, was based on the fact that it "cannot be reconciled with the principle of equality" and because "its results lead to unlawful discrimination against the Arab sector in realizing its right to education."¹⁴⁶ The Court went on to hold that the discriminatory result alone was enough to invalidate the decision, regardless of its intent.¹⁴⁷

Thus, the Supreme Court held that the State's decision must be invalidated. In consideration of the fact that the immediate cancellation of the decision would spur "complicated difficulties" within the education systems of the Jewish towns that had already planned their budgets based on the discriminatory decision, the Court decided to grant the State a grace period and stipulated that "the start of the cancellation of the government decision [would] be upon the passage of twelve months from the day of the rendering of this decision."¹⁴⁸

However, the Ministry of Education seemed unable to adhere to this timeline or any timeline established by the Court.¹⁴⁹ Following the initial twelve-month period, the State requested a six-month extension. As this date approached, the Ministry instead requested permission to implement the decision "gradually," which, based on the wording of the request, seemed to indicate a four-year period. While the Court did not approve the request, it did grant an additional extension through June of 2008. On November 9, 2008, shortly after the extension had expired, the State Attorney's Office announced that the State simply could not fulfill its obligation and the Court was called to hear explanations regarding

¹⁴² The discriminatory character of the state's decision on the classification of towns into priority areas can also be found by comparing two of the cities deemed Priority Area A, Natzirah Illit and Migdal Ha'emek, with their eleven neighboring Palestinian-Arab towns, which were placed in the non-priority category. If the motive behind the classification had been geographic, then there would have been no reason to separate the first two Jewish cities from their eleven Arab neighboring towns; if the division had been based on socio-economic criteria, then there would be all the more reason to include the eleven Arab towns in the priority areas.

¹⁴³ HCJ 2773/98 Supreme Follow-Up Comm. et al. v. Prime Minister of Israel, amended and resubmitted as HCJ 11163/03 Supreme Follow-Up Comm., et. al. v. Prime Minister of Israel [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/03/630/111/a18/03111630.a18.pdf.

¹⁴⁴ HCJ 11163/03 Supreme Follow-Up Comm. et al. v. Prime Minister of Israel, Judgment [2006] (Isr.), *available at* http://elyon1.court.gov.il/files_eng/03/630/111/a18/03111630.a18.pdf. For additional discussion on this case, see Segal, *supra* note 100, at 102-04. See also Karayanni, *supra* note 100, at 317 (summarizing the main issues addressed by the court and providing commentary on its impact for the Palestinian-Arab minority).

¹⁴⁵ Supreme Court Follow-Up Comm., *supra* note 144.

¹⁴⁶ *Id.* at para. 16. HCJ 11163/03, Judgment, Para. 16.

¹⁴⁷ *Id.* at paras. 18, 19.

¹⁴⁸ *Id.* at para. 28.

¹⁴⁹ Hesketh, *supra* note 53, at 23.

the State's failure to implement the judgment. The petitioners requested that the Court hold the State in contempt of court. Instead, on behalf of the full panel of Justices, Chief Justice Beinisch ruled that the Court had:

[N]o alternative but to point out that the issue before us is a grave expression of the liberty that the respondents have taken upon themselves in not implementing this Court's decision. While the respondents were required to implement the ruling given by the Court, they have behaved as if it were a recommendation that may be respected according to their own determination of their priorities."¹⁵⁰

Nonetheless, the Court obligated the State to implement the judgment during the academic year of 2009-10. In December of 2009, the State proposed a new map of national priority areas. It included some 1.164 million Jews and 882,000 Arabs (the latter representing approximately 43% of those who reside in the updated national priority areas and 72% of all Arabs in Israel).¹⁵¹ The Priority Areas Law, enacted in June of 2009 as part of the Economic Arrangements Law for the years 2009-10, stipulates that all prior government decisions on the topic of priority areas, including the discriminatory government decision on benefits and incentives in the area of education, will remain in effect for a period of two and a half years from the date of the new law's enactment.¹⁵² According to this new law, the government decision that was nullified by the Supreme Court in February 2006 may remain in effect until January 2012. Despite the seemingly more objective criteria contained in the new law, an appropriate remedy for the state of Palestinian-Arab education is far from guaranteed. A gaping loophole written into the law leaves final authority for distribution of the funds to the relevant ministries responsible for any given budgetary allocation. Thus, implementation depends, to a certain extent, upon the 'good-will' of these ministers and will require constant monitoring. Irrespective of the Priority Areas Law, implementation of the decision has yet to take place.

The clear and dismal bottom line is that this illegal and discriminatory government decision has remained in place for over fifteen years. What is more, the plan continued to be implemented indefinitely following an unequivocal Supreme Court ruling that ordered its cancellation. Even if the State were to implement the judgment today and put into place a fair and equal plan, the new distribution would not compensate Arab students for the budget allocations of which they were unlawfully deprived during the more than decade and a half over which the original program was in place and the judgment went unimplemented. Instituting true equality in the distribution of priority areas requires affirmative action for Arab towns in order to compensate Arab students for past discrimination, such as the type contemplated by the Supreme Court in the political representation case discussed earlier.

Beyond its specific failures, the national priority areas case represents a systemic and profound failure regarding the equitable distribution of material resources. While the decision upholds Israeli constitutional principles of equality in the realm of material resources, and even though the Court condemned the discriminatory result of the plan (regardless of its intentions), it failed to recognize collective Palestinian rights, or their right as a group to a status comparable to that of the Jewish population. Furthermore, even the basic individual right to equality was not upheld in practice, as the judgment has yet to be fully implemented. For all of these reasons, the outcome of this case on both the legal and practical levels represents a particularly grave deprivation of the basic individual and group rights of the Palestinian-Arab minority.

¹⁵⁰ Supreme Court Follow-Up Comm., *supra* note 144, at para. 8.

¹⁵¹ As calculated by Michal Belikof from the Sikkuy organization, January 2010.

¹⁵² Sawsan Zaher, *On Institutionalized Discrimination in the Implementation of High Court Decisions*, ADALAH NEWSL. ISSUE NO. 63 (Adalah, Haifa, Isr.), August 2009, available at http://adalah.org/features/education/Sawsan_No_Implementation_article_English%5B1%5D.pdf.

3. Case Study: Legal Action Regarding Allocation for Christian and Muslim Cemeteries

A case concerning the allocation of budgets for Christian and Muslim cemeteries based on a percentage-of-the-population criterion serves as yet another example of an Israeli Supreme Court judgment lacking the necessary teeth to compel implementation.¹⁵³ In early 1999, the Adalah organization petitioned the High Court of Justice claiming that two clauses of the 1999 Budget Law were unconstitutional because they allocated funding for only Jewish cemeteries (over \$4 million USD annually), while neglecting Arab Muslim, Christian, and Druze cemeteries entirely. Adalah demanded that the Ministry of Religious Affairs establish patently non-discriminatory criteria for the distribution of the funds to the cemeteries of all four sects.

In a lengthy decision, the Court held that the Ministry must distribute the funds according to a proportionality test, based on each sector's percentage of the population. The Court made grandiose statements about true implementation of the principle of equality. Justice Zamir, writing on behalf of the Court, stated:

The resources of the State, whether in land or money, as well as other resources, belong to all citizens, and all citizens are entitled to benefit from them in accordance with the principle of equality, without discrimination on the basis of religion, race, gender or other illegitimate consideration.

The principle of equality must also guide the legislative authority, which too, like any other authority in the State, must act as a fiduciary to the public in accord with the basic values of the State of Israel as a Jewish and democratic state, which include equality. . . .

Such discrimination, particularly if it is methodical, may cause very severe damage, not only to a specific person or a specific entity, but also to the social fabric and the feeling of partnership which is a pre-condition for proper living in community. In any event, such discrimination is illegitimate at its core, from both a moral as well a legal perspective.¹⁵⁴

Again, however, the State (here the Ministry of Religious Affairs) stalled implementation and the petitioners were forced to file a motion after the judgment had already been rendered, in which they demanded that the Court intervene and order the Ministry to implement the decision in its 2001 budget. The Ministry claimed that the funds were set aside and that the relevant Palestinian-Arab municipalities and other bodies need only apply in order to receive them.¹⁵⁵ Yet as of this writing, over a decade after said claim was made, the funding has yet to be transferred to the relevant bodies charged with Palestinian-Arab cemeteries of the various sects.

In fact, the above cases can be added to a long list of rulings concerning allocation of public budgets to the Arab community, rendered by the Supreme Court in the last decade, that have never been fully implemented by the State.¹⁵⁶ Two salient examples are the case that secured a plan of gradual allocation from the education budget for the purpose of implementing the “*Shabar*” educational

¹⁵³ HCJ 1113/99 Adalah v. Minister for Religious Affairs 54(2) 164 [2000] (Isr.), available at http://elyon1.court.gov.il/files_eng/99/130/011/i13/99011130.i13.pdf.

¹⁵⁴ *Id.* at para. 3.

¹⁵⁵ See *Equal Funding for Arab Religious Cemeteries*, ADALAH, <http://www.adalah.org/eng/Articles/674/Equal-Funding-for-Arab-Religious-Cemeteries>.

¹⁵⁶ *Id.* at paras. 4, 5.

enrichment programs in Arab towns and villages within five years, which has not yet been put into practice;¹⁵⁷ and the case concerning the urban neighborhood rehabilitation (“*Shikum Skhuno?*”) program that resulted in a significant reduction in a number of localities where the program operates, rather than it being expanded to Arab towns.¹⁵⁸

V. CONCLUSION

This article has attempted to demonstrate that despite a number of positive rulings in favor of the advancement of Palestinian-Arab rights, the Supreme Court in Israel has failed in its attempts to grant this minority the full range of collective rights they seek. Notwithstanding the intent of the Court on the practical and rhetorical levels and, in some cases, operationally, the results were very far from what the justices and petitioners seemingly envisioned. Clearly, the State demonstrated a lack of interest in implementing the Court’s judgments; however, the Court also failed to use all of the tools at its disposal to ensure that the spirit of its rulings would be translated into action on the ground.

This oversight on the part of the Court appears even more negligent—and perhaps even deliberate—as more and more cases regarding Palestinian-Arab minority rights were heard before the Court and resulted in lack of implementation. As aforementioned, the Israeli High Court of Justice has a wealth of procedural and substantive options available, including issuing temporary injunctions and stays of execution; leaving cases open on the docket; ordering regular updates from the parties; and playing the role of implementation supervisor. As a pattern began to emerge, in which the State was reluctant to implement the Court’s judgments, either within a timely manner, according to their full meaning, or at all, it was up to the Court to take more pro-active measures in order to fully enforce its judgments. For instance, in the ACRI case regarding representation on the Israel Land Council, the Court might have ordered consultation with various leaders of the Palestinian-Arab community prior to the appointment of Council members in order to ensure that the appointments would be effective and truly representative, despite their low number (two of the twenty-four members). In the cases regarding adding the Arabic language to signposts in municipalities and on national road signs, the Court could have ordered consultation with Arabic language professionals prior to finalizing the text that would be added to ensure its linguistic and cultural accuracy and avoid the mockery made of the Court’s decision and the case’s petitioners. Given all of these previous experiences, in the most recent principled ruling regarding budget allocations for education the Court could have implemented better judicial oversight over the State. It could have issued an interim injunction to freeze the funds allocated for the program, or it could have exhibited less latitude in granting the State extensions to implement its decision. All of these areas of leniency weakened the strong statements made by the justices, belittled the importance of the issue among the Palestinian-Arab population, and diluted the resultant outcome.

Of course, the Court does not operate in a vacuum. It faces social, political, and other external influences that constrain its authority, limit its ability to maneuver and temper its impact. It seems, for

¹⁵⁷ HCJ 2814/97 *The Follow-Up Comm. for Arab Educ. v. The Ministry of Educ.* 54 P(3) PD 233 [2000] (Isr.). In the 1970s, the Ministry of Education launched academic enrichment programs designed to help socio-economically weak communities. However, since their inception, these flagship programs have only been implemented in the Jewish educational system and thus have excluded all Arab schools. This exclusion contradicted the fact that Palestinian communities rank at the bottom of the socio-economic ladder, according to all official statistical and sociological data in Israel. See Yousef Jabareen, *Law and Education: Critical Perspectives on Arab Education in Israel*, 48 AM. BEHAV. SCIENTIST 1052, (2006) (arguing that the Israeli legal system’s narrow formal view on educational equality for Palestinian children is unlikely to bring about societal transformation in the struggle for education equality).

¹⁵⁸ HCJ 727/00 *The National Committee of Arab Mayors v. The Minister of Housing and Construction* 55(2) PD 79 [2001] (Isr.). See also Ilan Saban, *After the Storm? The Israeli Supreme Court and the Arab-Palestinian Minority in the Aftermath of October 2000*, 14 ISR. AFF. 623, 634 (2008) (explaining the Supreme Court’s inability to ensure fair and proportionate allocation of the budget to the Palestinian-Arab minority).

example, that public opinion, and certainly the stance of the legislative and executive branches, are not yet ready for implementation of full civil rights for the Palestinian-Arab minority. Indeed, the limited outcome of seemingly groundbreaking decisions reflects unwillingness, at this stage, on the part of the public and the State to create a situation of true, substantive equality between majority and minority groups. Beyond legal action, much groundwork still needs to be laid among the Israeli public and its officials in order for the Court's decisions to have any meaningful effect.

Nevertheless, the Palestinian-Arab minority in Israel, like minorities in other countries, has limited avenues for seeking justice. As was discussed above, prejudice against Palestinian-Arabs in Israel distorts the Israeli political process as described by Professor John Hart Ely's process-oriented theory,¹⁵⁹ thereby reducing any chance of making headway via the political channels.

The disadvantaged status of minority groups vis-à-vis both the public and elected officials, and their accompanying distress, should trigger the courts to apply both stricter review and heightened sensitivity to the minority's position in society when reviewing government actions in cases that relate to such groups. Such acute awareness, alongside a critical examination of government actions, should be aimed at providing redress for political injury caused to minorities, correcting existing injustices in government systems and agencies,¹⁶⁰ and creating a framework for wider change.

Unfortunately, however, the Israeli Supreme Court views its role narrowly. An analysis of the rulings discussed in this article indicates that Supreme Court Justices are more concerned with a strict interpretation of the law than with being at the vanguard of a broader process of social change. While more favorable decisions promoting equality could have been made without creating undue legal or institutional upheaval, the justices were seemingly reluctant to use their authority and discretion to protect the rights of the Palestinian-Arab minority as a group. In light of the inequality inherent in the system, it is incumbent upon the Supreme Court to use its authority to protect those disenfranchised by the system.

Even where political and grassroots advocacy are necessary to engendering sustainable change, bold and deliberate action by the courts is a necessary piece of the puzzle that will ensure that each and every citizen benefits from their most basic right to equality before the law. The courts must engage in proactive strategies and use the full strength of the law—along with all of the legal tools available to them—to promote and guarantee group-based equality for national minority groups. They must lead the call for change by taking a more active approach in promoting immediate and effective outcomes and by serving as a watchdog for recalcitrant government authorities that stand in the way of social transformation. One can only hope that the courts in Israel and elsewhere will adopt new, wide-ranging and transformative visions, which will help to engender real change in the lives of national minorities. It seems that creating social transformation requires a shift in public opinion, whereby there is broad-based agreement on the mutual benefit of advancing the status of the minority in order to advance society as a whole. An increase in judicial “robustness” and a willingness to adapt the law to such a shift is also required. Ultimately, only this attitudinal shift accompanied with an attendant change in the laws will lead to the realization of both individual and collective minority rights in Israel and elsewhere.

¹⁵⁹ ELY, *supra* note 23, at 145-70.

¹⁶⁰ *Id.* at 153-58.