

The Or Commission Compared to the US Kerner Commission^{*}
By Professor Yoav Peled[†]

The question I want to raise is this: What conception of Israeli democracy guided the Or Commission in drafting its report? In other words, what conception of democracy, or what kind of democracy, did the Or Commission seek to restore?

It seems to me that the correct way to understand the Commission's report is not only from the narrow legal aspects it deals with, but also from a broad socio-political view. It is possible, I think, to understand the report as an attempt by the Commission to restore the kind of democracy that existed in the State of Israel prior to the October Events, and which, in the opinion of the Commission, was significantly damaged by those events. The Commission's objective, then, was to try to reestablish the situation that prevailed prior to the Arab minority's protest in early October 2000.

This attempt at reconstruction plays a central role in the Commission's work. I contend that the Commission did not try to improve the situation that existed prior to October 2000. Rather, it sought to return to that state of affairs.

There is much dispute over the proper way to describe the constitutional arrangement which existed in Israel prior to October 2000. One way, put forth by Prof. Sammy Smooha, is "ethnic democracy," a concept that drew great support, and also much criticism.

"Ethnic democracy" is a regime, or constitutional framework, founded upon equal rights for individuals, but in which one ethnic group, the majority group, holds institutionalized and statutory control over the state. (If control is in the hands of a minority ethnic group, the regime is clearly not democratic.) Smooha argues that such a regime deserves to be called a democracy, but not a first rate democracy, which is the status held by liberal democracy. In Smooha's way of thinking, an ethnic democracy is a second rate democracy.

As mentioned, this theoretical model was widely criticized. Some critics contended that a regime of this kind was not a democracy. There were also those who questioned whether this concept applied to Israel. I am convinced that many of you are aware of the criticism and the disputes that arose around Smooha's model.

In my opinion, "ethnic democracy" is very useful as an analytical tool. It enables us to distinguish between the citizenship status of three groups in what Baruch Kimmerling has called the Israeli "control system," the political order that comprises Israel and the Occupied Territories. The three groups are Jewish citizens, Palestinian citizens, and non-citizen Palestinians living in the Occupied Territories.

It is indisputable that a difference in citizenship status exists, both of Jewish in comparison with Palestinian citizens, and of Palestinian citizens in comparison with non-citizen Palestinians.

^{*} This text is a summary of remarks made at the "October 2000: A Memory for Protest" conference held in Nazareth on 2 October 2004. The conference was hosted by Adalah – The Legal Center for Arab Minority Rights in Israel, the High Follow-up Committee for Arab Citizens in Israel, and the Victims' Families Committee in remembrance of the October 2000 protests. Prof. Peled spoke on a panel entitled "Protest and the Or Commission".

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Clearly, then, we have three citizenship groups, each with its own separate status. “Ethnic democracy” makes this distinction, and provides the tools to distinguish precisely the features of the civil status of each of these groups. Therefore, “ethnic democracy” is, in my opinion, a very useful analytical concept. One can debate whether or not it is accurate to refer to it as a democracy, but that makes little difference at the moment.

I contend that the Or Commission, which professed to believe in liberal democracy and which spoke the language of liberal democracy, made an assumption that it chose not to question – that Palestinian citizens in Israel have individual rights equal to those of Jewish citizens. The Commission simply made this assumption, and pretended, possibly unconsciously, that this was indeed the case. In practice, though, as we see from an analysis of the report, it is clear that the conception underlying the thinking of the Commission, and which informs the drafting of the report, is not the conception of liberal democracy, and is not a genuine conception of equal rights for Jewish and Palestinian citizens in the State of Israel, but a conception conforming to “ethnic democracy.” That is, equal rights have a place, but there is more: Jewish control is defined and incorporated in the statutes and laws of the state, and these statutes and laws ensure that the state acts on behalf of the Jews. The Or Commission did not seek to alter this control. It wanted to preserve, or, more precisely, to restore that control to the way it had been previously. The Commission recognized, in my opinion justifiably, that something happened in October 2000 to challenge the situation that had existed previously. On this point, the Commission was right. Something indeed happened in October 2000 to break – perhaps not completely, but to a large extent – the constitutional mechanism which was in place before. It was this that the Commission wished to correct. It wanted to return to the reality which had prevailed until then, and to restore the situation that I refer to as “ethnic democracy.” The Commission did not want to progress beyond that.

On this point, it would be very instructive to compare the Or Commission with the Kerner Commission in the United States. The Kerner Commission did basically the same as the Or Commission (although it completed its work in six months, and not three years). It is readily apparent, however, that the Kerner Commission, unlike the Or Commission, was guided by a conception of liberal democracy. This is because, in the United States, liberal democracy is the accepted theory of government; no other conception of government can compete with it, at least not at the level of public, political, or legal discourse. Liberal democracy in the United States is automatic. Here, of course, liberal democracy is not automatic, as is obvious from a comparison of the two commissions.

Before making the comparison, I want to make a few points about the Or Commission’s report which, in my opinion, reinforce my argument.

The Commission identifies what it refers to as the “deeply-rooted causes” of the events of October 2000. The list of these causes, or the analysis of these causes, is a harsh, bitter, true, and profound indictment against the State of Israel. The Commission views as discrimination and deprivation actions taken against Palestinian citizens from the time that the state was founded to October 2000. In my opinion, discrimination and deprivation are not the correct terms. There are better terms, such as exploitation and oppression. But discrimination and deprivation are good enough. The comments made by the Commission and the content of its report certainly describe the situation.

However, the Commission then does something clever. It says, these are the deep causes, but there is something else. What is this something else? It is the radicalization of Palestinian protest. According to the Commission, the radicalization of Palestinian protest did not result

from deep causes and was not a response to what the Commission defined as discrimination and deprivation over the course of fifty some years, but was an *additional* cause.

This radicalization, the Commission states, is for the most part legitimate. Even the Islamic Movement, according to the Commission, first tried everything to make its claims before the legislative and judicial institutions. Only when it received no response to its claims, which were mostly justified in the Commission's eyes, did the Islamic Movement begin to take more radical measures.

That is, up to a certain point, the Commission believes that the radicalization of protest is legitimate. The Commission defines as "radical" an action which seeks to cope with problems at their roots. This is a good definition. What the Commission is saying is that radical action is not necessarily negative. Only at the fringes of the radical protest were there negative elements, in that they transgressed the boundaries of the law.

In the Commission's view, the problem arises at the margin of the protest, at the margin of the process of the radicalization of protest, because protest then becomes unlawful. Thus, we have had deep causes, we have had discrimination and deprivation, as the Commission calls them, for more than fifty years, which have not been attended to, and which have not been treated in any positive manner, except, of course, for the short period of Yitzhak Rabin's second government (1992-1995). In general, though, there has been no appreciable reduction in discrimination and deprivation, against which Palestinians protest in an admittedly radical fashion. Yet, only at its margin is this protest unlawful. As stated, the vast majority of the protest is lawful and legitimate.

Then the police responds. This response is, according to the Commission itself, unlawful. How so? The police used the same measures that are used daily in the Occupied Territories against non-citizens. The Commission discusses thoroughly, for example, the use of rubber bullets, concluding that rubber bullets are lethal ammunition. But the Commission does not say it is forbidden to use rubber bullets. Rather, it says that it is forbidden to use rubber bullets against *citizens*. It is apparent that the Commission is bothered by the police's attempt to blur the distinction between citizens and non-citizens. It is this attempt which makes the conduct unlawful.

As I mentioned above, "ethnic democracy" is based on two distinctions: the distinction between citizens and non-citizens, and the distinction between Jewish citizens and Palestinian citizens. These two distinctions are the *sine qua non* of "ethnic democracy."

The Commission criticizes the police for having blurred, by its conduct and the measures it used – either deliberately or unintentionally (a question that can be set aside for the moment: although testimonies presented by the Commission indicate that it was deliberate, the premise is true even if the police's actions were not deliberate) – the distinction between citizens and non-citizens, an element vital to "ethnic democracy." This matter infuriates the Commission.

Another expression of this point is evident from the Commission's rage at the use of the term "Intifada" by both sides (by the elected leadership of the Arab minority as well as by state officials). For the Commission, the use of the term "Intifada" erases the Green Line, canceling the distinction between citizens and non-citizens. This is a grievous act in the mind of the Commission.

What the Commission failed to ask – and now we get to the second aspect of my argument – is how the police acted in similar cases against Jewish demonstrators? Every action, down to the final detail, taken by the demonstrators in October, had been taken in the past by Jewish demonstrators, although possibly with less severity, with fewer people, and on a smaller scale: The stoning of vehicles by the ultra-Orthodox on the Sabbath, which endangered the lives of the drivers (we all recall the occurrences on Bar Ilan Street in Jerusalem); the burning of tires during labor disputes; and the blocking of intersections. What was the main action taken by the organization *Zo Artzenu* against [Yitzhak] Rabin, against the Oslo Accords, if not the blocking of roads, including a major road like the Jerusalem-Tel Aviv highway?

Each and every one of the kinds of actions taken by the demonstrators in October 2000 have been taken previously by Jewish demonstrators. Does anybody think that the police would use even rubber bullets against Jewish demonstrators? Not to mention live ammunition; and certainly not sniper fire.

There is a further point. Commander Ariyeh Amit, who was CO of the Jerusalem District of the Israel Police, was not promoted to Police Commissioner because under his command police officers mounted on horses were used to restrain ultra-Orthodox Jews who were stoning vehicles. In its report, the Or Commission did not compare police treatment of Jewish demonstrators to its treatment of Arab demonstrators in similar circumstances. Why? The report provides no explanation.

As I see it, the Commission assumed the distinction between Palestinian citizens and Jewish citizens. It did not want to challenge this distinction. It did not want to discuss it or raise questions about it. The Commission *did* want to ask about the distinction between citizens and non-citizens. This distinction was blurred during the events of October, and the Commission wanted to rehabilitate it. It did not want to question the other distinction, because ethnic democracy needed both of these distinctions. If one of them were challenged, the Commission wanted to rehabilitate it. The second distinction remained as it was.

The Commission's approach in this regard is also evident in its recommendations; not in the recommendations regarding responsibility for a variety of acts – the personal and institutional responsibility – which naturally take up a large portion of the recommendations. I am referring to the general recommendations, dealing with system-wide matters, which comprise a very small part of the report, and deal with those deep causes. On this point, comparison with the Kerner Commission is instructive.

The Kerner Commission completed its very lengthy report with a statement to this effect: We, the United States, are now facing three options following the “disturbances” (in the terminology of the Commission) that took place in the summer of 1967. The three options are 1) maintaining the status quo; 2) improving the situation in what is referred to as “the ghetto”, without integration; and 3) integration. These are the three available options, and the US government must choose between them. The Kerner Commission recommended, without hesitation and without any doubt in its mind, the integration option. In the Commission's opinion, the solution to the problems that led to the events of the summer of 1967 was integration.

The Kerner Commission also defined integration: the establishment of one American identity. No longer a White identity facing a Black identity, but one American identity.

Thus, the Kerner Commission, in 35 large-format pages, offered specific, precise recommendations in all areas in which Blacks were being discriminated against and oppressed,

such as housing, employment, welfare, and police treatment. Along with these recommendations, the Kerner Commission's report contains thick statistical appendices attesting to the discrimination. Its detailed suggestions to rectify the situation include proposed budgets which address the question of how to fund its proposed reforms. Parenthetically, it goes without saying that these recommendations were not implemented, but that is another story. The recommendations of such commissions are generally ignored.

The Or Commission did not recommend integration – this hardly even warrants mentioning – nor did it recommend any meaningful reforms regarding Palestinian citizens in those areas it identified as the deep causes of the events. The Commission totally ignored them. Why did it fail to discuss them?

It seems to me that, had the Or Commission wanted to delve into rectifying the deep causes, it would have been forced to state the pure and simple truth: to eliminate the discrimination and deprivation, it is necessary, first of all, for the State of Israel to decide that it is a state of all its citizens; that only if the State of Israel is a state of all its citizens will it be possible to treat, and overcome, the problems of discrimination and deprivation. As long as the state is defined constitutionally as something other than a state of all its citizens, it is impossible to expect equal treatment of all its citizens.

Was it conceivable that the Or Commission would recommend, as the Kerner Commission did, the establishment of one Israeli identity? Is there such a thing as Israeli identity? In other words, was there the slightest chance that the Commission would recommend the establishment of a liberal democracy in Israel – a state of all its citizens? Without such a recommendation, it is impossible to deal with the specific recommendations in the various areas of life, for it is clear that a state of all its citizens is a prerequisite for meaningful change in those areas laden with discrimination and deprivation that the Commission delineated so well.

As we have seen, the Or Commission sought to restore “ethnic democracy,” which, it realized, was challenged by the events of October. But one did not have to be a genius to guess that the Commission's recommendations – and surely its principal recommendations – would not be implemented. The reason? Members of Likud, the party that would be in power when the Commission published its recommendation – and it was clear at the end of 2000 that Likud would regain control of the government – explicitly stated that they did not intend to implement the Commission's recommendations. Their rejection of the recommendations came as no surprise; it was made ahead of time, in unambiguous terms. Before Likud's candidates were even elected, they opposed the establishment of the Commission and clearly stated that they did not intend to have anything to do with it.

This being the case, with the Commission aware that its recommendations had no chance of being realized, it could be expected to be slightly more daring, if it truly was interested in proposing changes that would lead to the establishment of liberal democracy. However, the Commission, or more precisely, its two Jewish members – and I think this is clear from its work – apparently did not have, as a commission of inquiry – and I think they also lacked it individually – a desire to establish liberal democracy in the state. On the contrary, they had an interest, and a personal commitment, to the State of Israel continuing as a Jewish state, that is, to maintaining its status as an “ethnic democracy.” Such a democracy, however, is now already a thing of the past, a piece of nostalgia.

Thank you.