

# Adalah's Review

Volume 2, Fall 2000, LAND





# Adalah's *Review*

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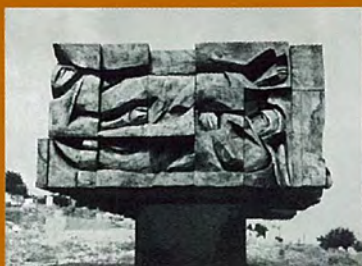
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## The Land Day Monument

Sakhnin (1976-1978)

A'bed A'bdi and Gershon Knispel

The drawings exhibited in this volume, by A'bed A'bdi, were sketched during the construction of the Land Day Monument

# Adalah's Review

Volume 2, Fall 2000, LAND

2.

Introduction  
**The Editors**

7.

Israeli Law as a Tool of Confiscation, Planning, and Settlement Policy  
**Usama Halabi**

14.

On the Politics of Legal Formalism  
**Jamil Dakwar**

23.

On Resisting Legalization  
**Samera Esmeir and Rina Rosenberg**

27.

Zionism 2000: Past, Future, and the Qa'dan Family  
**Ronen Shamir**

32.

Jewish and Democratic  
**Ruth Gavison**

39.

Communities, Lawyers, and Legal Strategies for Social Change  
**Neta Ziv**

44.

The Guest, the House, and the Judge  
**Marwan Dalal**

50.

I Will Pick Him Some Green Almonds from My Land  
**Salman Natour**

56.

Case Comment: H.C. 2814/97, The Follow-up Committee for Arab Education, et. al.  
v. The Ministry of Education, et. al.

On Legal Space, Political Forces, and Social Injustice  
**Samera Esmeir**

63.

The Mandate, the Lawyers, and the Dilemmas of Identities  
**Hassan Rafiq Jabareen**

69.

Palestinian Students, Political Space and Haifa University  
**Orna Kohn and Tawfiq Rangwala**

75.

Petitions Filed by Adalah to the Supreme Court of Israel  
**Gadeer Nicola**

# Introduction

## The Editors

Adalah staff completed preparations for this issue of *Adalah's Review* before the 'Al-Aqsa Intifada' erupted in early October. The delay in publication resulted from our staff members' deep involvement in Intifada-related events. The recent events began with a political protest by Palestinian citizens of Israel over governmental policy on the final status agreement. Quickly, however, a conflict between the state and the Palestinian minority arose over the substantive issue of Israel as a Jewish state. This conflict was reflected first in the killing of 13 Palestinian demonstrators by the Israeli police, then in the discriminatory policies of prosecutors, the Attorney General, and the courts against Palestinian detainees, and later in the government's initial refusal to establish a legally-sanctioned Commission of Inquiry to examine the events. Adalah's efforts in this regard, which are continuing, include representing Palestinian citizens of Israel arrested and detained in connection with the demonstrations, coordinating a group of 140 Palestinian volunteer lawyers also formed for this purpose, collecting testimonies from witnesses and Palestinians seriously injured as a result of police violence, filing legal challenges to the government's actions on a wide range of issues, conducting international and United Nations advocacy, organizing media protest campaigns, and participating in collective, community activities.

The next issue of *Adalah's Review* will deal extensively with these events and their repercussions. Although the subjects discussed in this volume do not arise from the Intifada events, they are intimately related and inter-connected. This volume focuses on the issue of land - the main subject responsible for the existing tension between the State and the indigeneous Palestinian community. The articles of Usama Halabi and Jamil Dakwar, respectively, describe and illustrate the practice of Palestinian land expropriation and

dispossession, a practice in which the legislature, the government and its agencies, and the Supreme Court take part. This volume also includes a special *dossier* on the implications of the Supreme Court's March 2000 judgment in *Qa'dan*, which concerns the right of a Palestinian family to live in a Jewish settlement in Israel, and highlights Adalah's recent legal work in different fields. Despite the fact that these articles were written before the Intifada, the range of topics discussed reveal a telling backdrop to the recent clashes.

Police brutality, which has been increasing and which reached new heights during the recent events, is not new. The police used excessive force against Palestinian demonstrators in several protests that took place throughout Israel in the last years, firing rubber-coated steel bullets and even live ammunition, seriously wounding hundreds of people. Most of these demonstrations involved protests over land - Palestinian land confiscation and home demolition by the State. The article of Orna Kohn and Tawfiq Rangwala examines the protests of Palestinian students at Haifa University during this year's commemoration of Land Day. Land Day marks the first national, collective, and powerful struggle of the Palestinians in Israel against land confiscation and dispossession. On this day - 30 March 1976 - Israeli security forces killed 6 Palestinian citizens and wounded hundreds more during protests. As with the recent events, the student demonstrators at Haifa University protested against the State's general attitude toward Palestinian citizens, its discriminatory land policies, and also police brutality, which reflects this outlook.

Land Day demonstrations took place during the same month as the Supreme Court delivered its decision in *Qa'dan*. In April 1995, the Katzir Cooperative Association rejected the Qa'dans' application to purchase a home in Katzir on the grounds that the community, established by the Jewish Agency, accepted only Jews as residents.

The Jewish Agency is a quasi-governmental entity, entrusted by the State, with the planning and funding of new settlements. These settlements, however, are built only for Jews. The Israel Lands Administration (ILA), a State institution which manages 'state's land' (93% of the land in Israel), allocated this land to the Jewish Agency to establish Katzir. The Zionist concept of utilizing "national institutions," such as the Jewish Agency as arms of the State, is inconsistent with principles generally held by liberal democracies, whereby towns and villages are established and developed to meet citizens' needs.

The Qa'dans, represented by the Association for Civil Rights in Israel (ACRI), challenged the refusal of the ILA, the Jewish Agency and the Katzir Cooperative Association to allow them to live in Katzir. The petitioners' argued that the State must grant them equal access because the land on which Katzir was established is "state land," and that the State may not transfer land to a third party (the Jewish Agency) to engage in prohibited discrimination on its behalf. The State argued that it is bound by its agreements with the Jewish Agency, agreements grounded in express legislation enacted by the Knesset. From the State's perspective, it is the function of the Jewish Agency to establish and develop communities. The State refrains from questioning the considerations that the Jewish Agency takes into account. As for the Jewish Agency, it argued that it is, by definition, required to develop the land only for the benefit of the Jewish people.

After five years of hearings and delays, the Supreme Court held that the State is prohibited from using "national institutions" to perform acts of discrimination based on national belonging on its behalf. With this holding, the Court struck a blow at one of the Zionism's sacred ideological principles. In the Israeli context, the Court's decision in *Qa'dan* - prohibiting overt or covert discrimination on the basis of national belonging

against an individual - is surely a breakthrough. Given the racism in Israeli society, a clear statement by the Supreme Court against discrimination based on national belonging is significant because of its high status and role in establishing norms.

However, Palestinian citizens of Israel did not join the local and international media or the academic community in celebrating the decision. While Israeli Jewish lawyers and journalists expressed their belief that *Qa'dan* marked a historic milestone in the Palestinians' legal battle for equal rights in Israel, the Palestinian community expressed their doubts and worries about the implications of the case. The agenda of Palestinian citizens of Israel did not change in response to the decision; they continued with their national struggle, with the land issue playing a central role.

It is important to note that the Court's decision dealt only with an individual claim of discrimination. In his article, Ronen Shamir argues that the Court in *Qa'dan* only recognized the discrimination practiced against individual Arabs - holding that an Arab citizen is entitled to the same rights as a Jewish Israeli citizen - but that the Court did not hear the issue of the collective rights of the Palestinian minority, rights that are derived from a meaningful civil equality and democratic norms. Moreover, although the petition focused on the functioning of the Jewish "national institutions," the Court did not discuss their statutory, quasi-governmental status.

Further, the Chief Justice of the Supreme Court, Aharon Barak, writing for the Court in *Qa'dan*, noted that the decision "looks to the future" and not to the past. According to Barak, history begins now, with the delivery of the Court's judgment. In his article, Marwan Dalal shows how this kind of rewriting of history, ignores the history and collective memory of Palestinians. In December 1997, Dalal first raised these issues in a letter to ACRI, commenting on its closing argument in the case. In addition to the historical argument, Dalal

then claimed that the language of the closing argument “gave justification to the discrimination and substantiation to the implementation of Jewish self-determination,” and provided “no legal context for the Arabs as a national minority.” Dalal also illustrates in his article the difficulty in comparing the decision in *Qa’dan* to that of the United States Supreme Court judgment in *Brown v. Board of Education*.

While working with ACRI, Attorney Neta Ziv represented the petitioners in *Qa’dan*. In her article, Ziv explains ACRI’s legal strategies and tactics, including its decision to ignore the collective memory of the Palestinian minority and its collective rights claim, and ACRI’s explicit position not to question the legitimacy of hundreds of kibbutzim, moshavim, and observation posts spread throughout Israel. Ziv concludes that the Court adopted the position of the petitioners on these points. Ziv also notes out that the petition questioned the legality of Katzir’s selection process, which was ignored by the Court. By sidestepping this issue and refusing to grant direct relief to the petitioners, the Court seemingly opens the door for Katzir to deny the petitioners a home in the community. While the Court states that it is forbidden to deny the Qa’dans admission to Katzir outright because of their national belonging, Katzir is not prohibited from establishing other criteria that would exclude the Qa’dans. The Qa’dans did not move into Katzir, and it is still unclear if they will ever be able to live there.

The Qa’dan family suffers both individual and collective discrimination in Baqa al-Garbiyeh, the Palestinian village where they reside. This discrimination is reflected in the poor living conditions of the town’s residents including inadequate infrastructure, minimal governmental and private services, and substandard educational facilities and programs. The article of Samera Esmeir analyzes the Supreme Court’s recent judgment in a case filed by Adalah on behalf of

the Follow-up Committee for Arab Education involving historical, intentional discrimination against Palestinian schools and Palestinian students by the Ministry of Education’s Department of Education and Welfare Services. Esmeir shows how the Court, in delaying its decision for three years based on requests for postponements and promises by the State, freed itself from ruling on the issues of affirmative action and appropriate remedial measures in cases of intentional discrimination.

In another article, written by Esmeir and Rina Rosenberg, the authors explain why Adalah did not petition the Supreme Court regarding the expropriation of land owned by residents of Umm al-Fahem and the Wadi ‘Ara area, in the region of al-Roha. They argue that political struggle was preferable in this situation, as the Court would almost certainly have denied relief. The political struggle over al-Roha lands is one of several land protests that recently met with some success — the basis of achievement being in the claim of recognition of Arab ownership of the land. Another example is that of a prolonged and courageous political struggle against land expropriation for the Trans-Israel Highway. Here, the owners of the expropriated land, for the first time, received compensation by gaining ownership of comparable land. What appears to be a major and historical achievement for the Palestinians is actually something else: Many times land given in exchange for expropriated land had been taken from residents of the towns, relatives of refugees (‘absentee’ property), or uprooted residents of destroyed Palestinian villages. Palestinian citizens also remember who owns the land on which Katzir was established: The Yunes family of ‘Ara. For these reasons, Palestinian citizens, for example, are also unable to join the Keshet, a Mizrahi group, in its call for “this land is also mine.” This call, which speaks about the division of the “land of all the people” among “all the people,” does not leave a

space for the ownership rights of Palestinian citizens on the land or the rights of Palestinian refugees. Thus, without opening the “historical” file, any “achievement” in this area is complex and problematic.

To overcome the discrimination and the resultant low standard of living, the Qa’dans are left with the possibility of moving to a nearby Jewish community, with a higher standard of living. They want to benefit from the services provided to residents there, including the better quality of education. Ruth Gavison examines the trend of integration reflected in the *Qa’dan* petition and raises several questions on that issue. It is unclear, however, whether the Qa’dans’ quality of life would rise following a move to Katzir, whose residents do not want them as neighbors. Katzir is not only a “community in which Jews live.” It is a community that was established based on a concept of Zionism hostile to Palestinian citizens. The petitioners, the petition, and the Court in *Qa’dan* accept this concept automatically. This form of equality is only partial; it does not respect a substantial segment of their citizenship rights. Thus, it is doubtful that the Qa’dans’ daughters would be happy in school, where in addition to the classes being taught in Hebrew and not in Arabic, their mother tongue, the underlying ideology is hostile to them and their culture. What educational value do they gain in never learning the history of their people, and only learning Zionist history? They would be studying in a school system that will never teach writings like those of Salman Natour, published here, on Palestinian collective memory and the right of return.

Opposition to integration of this kind is not a call for separation. Equality must also include respect for the collective rights of the individual, such as the right to education in his/her native language and in accordance with the norms of his/her community. Respect for these rights does not mean that people must live in separate

communities based on their identity; but quite the opposite. Respect for these rights becomes more important in communities where the majority is Jewish. The State must enable a Palestinian citizen to exercise his collective rights even when he chooses to live in a mixed community, or in a community where the majority of residents are Jewish. On this point, in his article, Hassan Rafiq Jabareen argues that the sense of belonging to a collective does not arise solely from birth, but also from choice, from certain power relationships, and at times, from cooperation and struggle against a common oppression and for a common cause.

Although, it is difficult for Adalah, as a legal center for Palestinian minority rights, to view the decision in *Qa’dan* as an achievement in and of itself, the decision raises a challenge for us in terms of how to use it to further our main agenda. For Palestinian citizens of Israel, the main land agenda demands the right to return to uprooted villages, official status for unrecognized Palestinian villages, increased development space for Palestinian municipalities, the establishment of new Palestinian towns and villages, the granting of national priority status to Palestinian localities, social and economic solutions to the poor conditions confronting their segregated neighborhoods in the ‘mixed’ cities, an end to the confiscation of Palestinian land in the Negev, and a halt to the issuance of demolition orders against Palestinian homes.

This Introduction differs slightly from the Introduction in *Adalah’s Review* in Arabic and Hebrew. Although the main ideas expressed are the same, this version provides additional background information for foreign readers.



**A'bed A'bdi:** Land Day Monument - Visions (1976-1978)





# Israeli Law as a Tool of Confiscation, Planning, and Settlement Policy

**Usama Halabi**

This essay reviews the land, planning, and settlement laws and policies adopted by the Israeli authorities both in Israel since 1948 and in the Palestinian Territories occupied since 1967. The laws and policies discussed illustrate the mechanisms utilized by successive Israeli governments and the military authorities to implement the Zionist project of controlling the land solely for the benefit of Jewish citizens of the State. In addition, the laws and policies reviewed portray a picture that connects the pieces of the Zionist project with regard to both Palestinian citizens of Israel and Palestinian subjects in the West Bank and Gaza. The seemingly three different Israeli regimes under which Palestinians live - occupation in the West Bank and Gaza, annexation in Jerusalem, and a quasi-democratic state in Israel - are in fact highly similar as far as land policy is concerned.

## Ruining the Palestinian Home and Building the “National (Jewish) Home”

The Zionist Movement, in the pre-state era, and subsequent, successive Israeli governments gained control of the land in Israel through the following mechanisms:

- The purchase of privately owned Palestinian land through the Jewish National Fund (JNF), which acted, before 1948, as a private foreign company based in Britain. The Israel National Fund Law (1953)<sup>1</sup> afforded the JNF Israeli company status.
- The expulsion of Palestinians from their villages, the destruction of almost 80% of pre-1948 Palestinian towns and villages, and the declaration of these evacuated/destroyed Palestinian villages as “closed military areas,” preventing their residents and original owners from returning to their land and homes (e.g., the villages Ber'em, Ikrith, and al-Ghabsyeh in the Galilee).
- The declaration of thousands of Palestinians as “absentees,” and the confiscation and classification of lands owned by them as “absentees’ property,” in accordance with the Absentees’ Property Law (1950).<sup>2</sup> The wide definition of “absentees” in the Absentees’ Property Law and the government’s extensive use of the Law, combined with its use of other laws to confiscate all lands not presently inhabited, created the complex problem of “present absentees” and “internally displaced Palestinians.”
- The confiscation of more than 400 Palestinian villages, in accordance with the Land Acquisition (Validity of Acts and Compensation) Law (1953).<sup>3</sup> The declared objective of this Law is to “validate,” retroactively, the taking of Arab-owned lands for military purposes or for use by existing or newly-established Jewish settlements.
- The transfer of confiscated Palestinian villages and Palestinian privately-owned lands to Jews from the Custodian of Absentees’ Property (acting in accordance with the Absentees’ Property Law (1950)) to the Development Authority (established by the Development Authority (Transfer of Property) Law (1950)),<sup>4</sup> and then to “Amidar,” a governmental company established for settling new Jewish immigrants.<sup>5</sup>
- The confiscation of Palestinian lands for “public purposes,” in accordance with the Lands (Acquisition for Public Purposes) Ordinance (1943), and then the use of these lands for the benefit of Jews only. For example, in 1953, the government expropriated 1,200 dunams of land in (Arab) Nazareth, claiming that it would be used to build government offices. In fact, the government used 80 dunams to build offices, and 1,120 dunams to construct a few thousand residential houses, which became the nucleus of (Jewish) Natserat Illit.<sup>6</sup>

- The classification of all of lands taken from Palestinians as “Mekarki’eh Yesrael” or “Israel’s Lands.” This includes lands registered in the name of the State of Israel, the Jewish National Fund, and the Development Authority. Article 1 of the Basic Law: Lands of Israel (1960)<sup>7</sup> provides that the ownership of “Israel’s Lands” is not transferable by sale or any other means. This legislated land tenure system ensures exclusive use by Jews of most of “Israel’s Lands,” which are estimated to be at least 92% of the total lands in Israel.<sup>8</sup>

- The establishment of new Jewish settlements on land confiscated from Palestinians. The policy of “Judaizing the Galilee” has continued even after “Land Day” (1976), and allowed the government to establish tens of new Jewish settlements in the Galilee (“Metzpim”). In addition, the government seized thousands of dunams of land from the Arab Bedouin, in accordance with the Land Acquisition in the Negev (Peace Treaty with Egypt) Law (1980).<sup>9</sup> The main purpose of this policy has been, and continues to be, to expand existing Jewish cities and towns, to achieve interconnection between them, and to fragment land continuity between Arab towns and villages.

- The absence of any serious land planning for Arab villages and towns since 1948. Consequently, most Arab villages possess poor outline plans that do not meet their development needs. Thus, “illegal (unlicensed) buildings” in these villages have become an unavoidable phenomenon. Hundreds of Palestinian owned homes have been demolished for being built outside of the outline plans of the Arab villages (e.g., the demolition of two homes in Nahef, an Arab village in the Galilee, in July 2000).

- The refusal to establish any new Palestinian village or town since the establishment of the State. To the contrary, in accordance with the National

Planning and Building Law (1965),<sup>10</sup> the government re-classified almost 40 Arab villages as “non-residential,” thus, creating the phenomenon of the “unrecognized villages.” These villages do not receive basic municipal services, nor do they possess even rudimentary infrastructure, schools or health facilities. All buildings in the unrecognized villages face the threat of demolition orders (e.g., the destruction of two homes in Umm al-Sahali, located in the Galilee, in 1998).

### Jewish Settlements and Land Seizure in the Palestinian Territories Occupied in 1967

When Israel occupied the West Bank, East Jerusalem and Gaza in 1967, and “set about colonizing the territory,” it already had “wide experience,” as “all the procedures for doing this were already tried and tested within Israel.”<sup>11</sup> Since 1967, successive Israeli governments and Military Commanders took the following steps to ensure full control of the occupied Palestinian lands and the transfer of as much of these lands as possible to Jewish hands:

#### East Jerusalem

The annexation of Jerusalem made all Israeli laws applicable to the city. Between 1968-1970, in accordance with the Lands (Acquisition for Public Purposes) Ordinance (1943), the government confiscated almost 17,000 dunams of Arab-owned land in the city. It then subsequently used these lands to build new Jewish settlements (“neighborhoods”) such as the French Hill and Ramat-Eshkol (3,340 dunams), Ma’alot-Dafnah (485 dunams), Neve-Ya’akov (470 dunams), Ramot (4840 dunams), Talpiot-Mezrah (2,240 dunams), Gilo (2,700 dunams), Atarot (1,200 dunams), and Ramat-Rahel (600 dunams).<sup>12</sup> In 1980, 4,400

dunams of Arab lands belonging to the villages of Shu'afat and Bet-Hanina were taken for "public use," upon which the government later built the Jewish settlement of Pisgat Ze'ev.<sup>13</sup> In the 1990s and in 2000, settlement expansion and building continues in Har Homa/Jabal Abu Ghneim. Today, 180,000 Israeli Jews live in East Jerusalem. They now constitute half of the population in this Palestinian city.

### The West Bank

- To ensure absolute control over land transactions in the West Bank, the Military Commander issued Military Order Concerning Land Transactions (West Bank) (No. 25) (1967). According to this Order, all land transactions require a license from the "competent authority."
- The Military Commander claimed 525,000 dunams, registered in the name of the Jordanian Government, as "state domain" or "government land." In subsequent years, he added another 160,000 dunams of "government land."<sup>14</sup> The legal basis for these claims is Military Order Concerning Government Property (West Bank)(No. 59)(1967).
- The Military Commander declared lands to be "abandoned property," similar to "absentee property" inside Israel. The Military Commander took over "abandoned properties," which include lands owned by Palestinians who left the West Bank before or as a result of the 1967 war. Estimates place these lands as amounting to 8% of the West Bank.<sup>15</sup> Several tracts of these lands have been used for the construction of Jewish settlements.<sup>16</sup> The legal basis for taking possession of "abandoned property" is Military Order Concerning Abandoned Properties (Private Property) (West Bank) (No. 58) (1967).
- The Military Commander ordered the freezing or

suspension of the land registration process in the West Bank, in accordance with Military Order (No. 291) (1968). Two-thirds of West Bank lands have been left without proper registration, as a result of this Order. Much fraudulent activity also occurred, with claims that Palestinian lands have been bought by Jews.

- From 1968-1970, the Military Commander promulgated numerous orders for the requisition of property for "military purposes," which amounts to approximately 50,000 dunams of land. Israel principally used this method during 1968-1979 to seize private lands for the purpose of establishing Jewish settlements.<sup>17</sup>
- Based on Military Order (No. 59) (1967) and the Ottoman Land Law (1855), the Custodian of Government Property started to declare uncultivated ("miri") and unregistered ("mawat") lands as "state domain." Using this approach, by 1985, the Israeli government, claimed 2,150,000 dunams (39% of the West Bank) as "state domain," through the Military Commander and the Civil Administration.<sup>18</sup> A survey conducted by the Civil Administration in 1985 revealed that 300,000 dunams could not be classified as "state domain" for various reasons. Thus, by 1988, "state domain" lands amounted to 1.85 million dunams or 34% of the West Bank.<sup>19</sup>
- In accordance with Article 12, Jordanian Land Law (Purchase for Public Use) No. 3 (1953) ("immediate possession"), as amended by Military Order 321, the Israeli government expropriated thousands of dunams of land, and used most of these lands for access roads and network highways to facilitate the expansion of Jewish settlements and to "bypass" Arab villages (e.g., Road #60). All of the 13 "bypass" roads, constructed after the Declaration of Principles (1993) and the Oslo 2 Agreement (1995), were built on Palestinian land



(e.g., the Bethlehem bypass road and the Halhul bypass road).

- By restricting the use of land by declaring it to be a “closed area” or a “combat zone,” the Israeli government prevented Palestinian landowners from using thousands of dunams of land. According to Article 90 of Military Order Concerning Security Regulations (No. 378) (1970), a Military Commander is empowered to declare any area as a “closed area.” Such an order deprives the owner of his/her right to use the land, without compensation.

- In sum, “the Israeli government, [through the Military Commander], by suspending the process of registration and by interpreting unregistered “miri”, “matrouka” and “mawat” lands as “state” lands, has rendered such land open to seizure.”<sup>20</sup> Combined with the other methods discussed above, it is apparent that Israeli Jewish control of West Bank lands has been a prominent goal of successive governments. By 1984, Israel had seized 41% of the West Bank. If the areas subject to restriction on use and access are added, by 1985, Israeli seizure amounted to 52%.<sup>21</sup> Estimates made in 1991 show that from January 1988- June 1991, the Israeli government seized an additional 8.8% of the West Bank and the Gaza Strip.<sup>22</sup> Therefore, a “reasonable assumption [was] that the ownership [and use] of 60% of the West Bank had been seized by mid-1991, with a substantial additional area subject to blanket restrictions on use and access falling short of outright expropriation.”<sup>23</sup>

- The Israeli government used seized lands to build more than 130 Jewish settlements in the West Bank and 16 settlements in the Gaza Strip. More than 195,000 Jewish settlers live on these lands. Israeli settlement policy in the West Bank and Gaza is based on three principles: (1) creating continuity between Jewish settlements; (2) fragmenting land

continuity between Arab towns and villages; and (3) concentrating settlers to establish densely populated Jewish settlement blocs.<sup>24</sup> These three principles lead to the ultimate political goal: Preventing the emergence of another Arab state, and “in fact have been followed in Zionist settlement strategies within Palestine since the early years of the century.”<sup>25</sup>

- The Palestinians in the Occupied Territories face the same planning policies as the Palestinians in Israel. These policies restrict the land area of Palestinian villages and towns, delineating their borders so as not to affect the land reserves of Jewish settlements. The Israeli planning authorities have issued thousands of orders to demolish Palestinian buildings. At the same time, new Jewish settlements have been established, and existing settlements expanded, based on modern planning methods. These same policies continued after the Oslo 2 Agreement, especially in Area “C.” In 1971, the Military Commander in the West Bank issued Military Order No. 418 (amending the Jordanian law) which transferred almost all planning authority to the Higher Planning Council, composed entirely of representatives of the Israeli Military government. In addition, from 1981-1992, the Central Planning Department (which also has no Palestinian representatives) prepared approximately 400 outline plans for Palestinian villages. In violation of local law, these plans disregarded factors such as population size and development needs. In contrast, outline plans for Jewish settlements follow legislatively approved planning standards and attempt to reflect the needs of the Jewish settlers. Moreover, while the Palestinians have had almost no role in the planning process, Jewish settlers have been involved in the preparation of plans because their elected local and/or regional councils act as local planning councils.

## Conclusion

The common goal of Israeli land, planning, and settlement laws and policy both in Israel and the Palestinian Territories occupied by Israel in 1967 has always been to “redeem” the “Nation’s Land,” eliminate or weaken and, in the best case, ignore the Palestinian presence, and settle the “empty lands” of “Eretz Yisrael” with Jews. Through policies adopted by the government, laws enacted by the Knesset and orders issued by the Military Commanders in the West Bank and Gaza, the Israeli authorities ensured control over the land, prevented continuity between Arab villages and towns in Israel, and reduced, to a minimum, the danger of establishing an additional Arab state in the 1967 Occupied Territories. These practices violate international law, ignore the right of the Palestinian people of self-determination, and deprive the Palestinian Arab community in Israel of its basic rights as a national minority.

## End Notes:

1. Sefer Hahukim (Laws of Israel) (1953) at 34.
2. Sefer Hahukim (1950) at 86. The Absentees' Property Law, Article (1)(b) defines an 'absentee' as:  
“(1) a person who, at any time during the period between the 16th Kislev, 5708 (29 November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, (5708-1948), that the state of emergency declared by the Provisional Council of State on the 10th of Iyar, 5708 (19 May, 1948) has ceased to exist, was the legal owner of any property situated in the area of Israel enjoyed or held it, whether by himself or through another, and who *at any time* during the said period-  
(i) was a national or citizen of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq or Yemen, or  
(ii) was in one of these countries or in any part of Palestine outside the area of Israel or  
(iii) was a Palestinian citizen and left his ordinary place of residence in Palestine  
(a) for a place outside Palestine before the 27th Av, 5707 (1 September, 1948); or  
(b) for a place in Palestine held at the time by forces which sought to prevent the establishing of the State of Israel or which fought against it after its establishment;  
(2) a body of persons which, at any time during the period specified in paragraph (1), was a legal owner of any property situated in the area of Israel or enjoyed or held such property, whether by itself or through another, and all members, partners, shareholders, directors or managers of which are absentees within the meaning of paragraph (1), or the management of a business of which is otherwise decisively controlled by such absentees, or all the capital of which is in the hands of such absentees.”
3. Sefer Hahukim (1953) at 58.
4. Sefer Hahukim (1950) at 278.
5. For this example and others see Usama Halabi, “The Impact of the Jewishness of the State of Israel on the Status and

## Israeli Law as a Tool of Confiscation, Planning, and Settlement Policy

- Rights of the Arab Citizens,” in Nur Masalha, trans. and ed., *Is Israel the State of All its Citizens and ‘Absentees?’* (Haifa: The Galilee Center for Social Research, 1993) at 24.
6. Id. at 20.
7. Sefer Hahukim (1960) at 56.
8. Ruth Kirk, “Land and Settlement in the Land of Israel,” in 3 *At the University* (December 1989) at 30 (Hebrew) and Ian Lustick, *The Arabs in the Jewish State: Israel’s Control of a National Minority* (Austin: University of Texas Press, 1980). See also Jhon Quigley, “Apartheid Outside Africa”, in 1 *Int’l and Comp.L.Rev.* 221, 234 (1991).
9. Sefer Hahukim (1980) at 979.
10. Sefer Hahukim (1965) at 307.
11. Anthony Coon, *Town Planning Under Military Occupation* (Ramallah: Al-Haq, 1992) at 175.
12. Usama Halabi, *The Legal Status of Jerusalem and its Arab Inhabitants* (Beirut: Institute for Palestine Studies, 1997) at 21-22 (Arabic).
13. Id.
14. Meron Benvenisti and Shlomo Khayat, *The West Bank and Gaza Atlas* (Jerusalem: The West Bank Data Base Project, 1988) at 60-61.
15. A. Coon, supra note 11, at 163.
16. Raja Shehadeh, *Occupiers’ Law* (Washington, DC: Institute for Palestine Studies, 1985) at 36.
17. M. Benvenisti and S. Khayat, supra note 14, at 62.
18. Usama Halabi, Aron Turner, and Meron Benvenisti, *Land Alienation in the West Bank: A Legal and Spatial Analysis*, (Jerusalem: The West Bank Data Base Project, 1985) at 82.
19. M. Benvenisti and S. Khayat, supra note 14, at 61.
20. A. Coon, supra note 11, at 165-166.
21. U. Halabi, et. al., supra note 18, at 83-84. See also M. Benvenisti and S. Khayat, supra note 14, at 60-62.
22. A. Coon, supra note 11, at 158.
23. Id.
24. U. Halabi, et. al., supra note 18, at 87 and A. Coon, supra note 11, at 175.
25. A. Coon, supra note 11, at 176.





A'bed A'bdi: Land Day Monument - Visions (1976-1978)



# On the Politics of Legal Formalism

Jamil Dakwar

Which legal approach - normative or formalist - provides more adequate protection for minority rights in Israel? Some jurists favor the formalist approach because it sets clear criteria for protecting the minority that the courts are prohibited from violating, interpreting in a radically different manner, or ignoring. Supporters of the normative approach argue that it enables judges to nurture the law with progressive norms that protect minority groups in cases in which the law is insufficiently clear or can be construed conservatively.

In this article, I argue that the dichotomy between the formalist and the normative, judicial consistency and legal creativity, following the legal rule and deviating from it, and form and substance, does not provide us with sufficient tools to understand the way in which the court violates the rights of the Palestinian minority in land-related matters. It also does not explain the court's contribution to expropriating Palestinian land and transferring it to Jewish use.

I do not argue that the court mingles the formalist approach with the normative, as that argument would assume that the formalist method exists separate and apart from the normative. My argument is different. I contend that judicial activity is purely normative, even where the court "formally" complies with fixed legal rules. Selecting the "normative" or "formalist" track is in itself a normative act underlying judicial activity. The manner in which courts follow legal rules also entails norms. I shall, therefore, attempt to inquire into the politics of judges' choices between the "normative" and the "formalist," and point out the norms underlying the various choices and how those choices are made. To do this, I have chosen two Supreme Court judgments that deal with the State's expropriation of land belonging to Palestinian citizens of Israel pursuant to the (Mandatory) Land (Acquisition for Public Purposes) Ordinance (1943), and transferred it to Jewish use.

Immediately after the State of Israel was proclaimed, "nationalization" of land in the country increased. This process is designed to transfer Arab-owned land systematically to state ownership and Jewish use. The objective is to reshape the geography and prepare for the absorption of hundreds of thousands of Jews. The absorption and settling of Jews throughout the country is considered an integral part of state security.<sup>1</sup> Immediately after the 1948 War, the State imposed an oppressive military regime on Palestinian Arabs, who had become citizens of the State, severely violating their basic liberties and rights.<sup>2</sup> In the shadow of the military regime, the State systematically expropriated Arab-owned land, primarily pursuant to the Ottoman laws and British Mandate Ordinances. The main legal tool for achieving the Zionist goals was the Land Ordinance (1943).

The Land Ordinance grants extensive, discretionary power to the Minister of Finance to expropriate ownership or other rights in land, without the owners' consent, permanently or for a limited period of time.<sup>3</sup> In most instances, the Supreme Court refrained from intervening in the Finance Ministers' decisions, leading to broader expropriation power than the Ordinance itself provided.<sup>4</sup>

The Land Ordinance served as an efficient and rapid tool for expropriating some two-thirds of Arab-held land, particularly in the Galilee region, to establish Jewish settlements and create a demographic balance between Arabs and Jews living there. The courts did not interfere with decisions of successive Israeli governments acting pursuant to the Land Ordinance, which legitimized the expropriation and sanctioned the policy of expropriating Palestinian land. These actions, according to those who favor the dichotomy between the normative and the formalist, are formalist. However, from the moment it becomes apparent that those judges perceived their role as

inseparable from Zionist philosophy and practice<sup>5</sup> and as a public and national duty of utmost importance that requires realization of the Zionist enterprise,<sup>6</sup> the question arises: what is the normative basis underlying the selection of the formalist approach, and how do judges comply with the principles set forth in the Land Ordinance?

### The Committee for the Protection of Expropriated Land in Nazareth v. Minister of Finance<sup>7</sup>

In July 1954, the government published a notice, in accordance with the Land Ordinance, regarding the acquisition of 1,200 dunams [300 acres] of land in eastern Nazareth. The purpose of the acquisition, according to the government's declaration, was to establish a site for government buildings, which would turn Nazareth into the capital of the Galilee, thus benefiting the city's residents. A group of Nazareth residents, who were directly harmed by the expropriation plan, quickly organized and established a "Committee for the Protection of Expropriated Land in Nazareth" to protect landowners' rights.<sup>8</sup> Nimer Hawari, a Palestinian attorney from Nazareth who was active in fighting Israel's discrimination of Palestinians during the military-government period, petitioned the Supreme Court on behalf of the Committee. The residents argued that the expropriation of their land was prohibited discrimination, and that it was unjust to take the small amount of land that remained under Arab ownership. The residents further argued that the establishment of the government buildings site was not the primary purpose of the expropriation. Rather, it was to constrict Palestinians in the future. The petition emphasized that these lands comprise the vital land reserves for Nazareth's development.

The Supreme Court dismissed the petition. It accepted the State's argument that it was impossible to find a better location for the

government-buildings site than government-owned, Jewish National Fund-owned, or state-held, absentee-owned land. The Court, through Justice Vitkin, also accepted the State's aesthetic consideration in selecting the location on which to construct the government buildings site:

The Director of the Development Authority added a reason to praise the site that the respondents chose, stating that this site is the prettiest and therefore the most attractive of all the sites for housing the future project for representing the state in the Galilee region... The site is like a symbol of respect for the state and should not be shunted aside.

Thus, the Court considered aesthetics to be a substantial and decisive factor, one that justifies the violation of the petitioners' property rights. Respect for the State and the site of its offices, according to the Court, is immensely more important than the future and development of the city. The Supreme Court refused to take into account the petitioners' argument that the expropriated lands are reserves vital for the city's development.

The Court denied the petitioners' claim of discrimination, and established a rigid legal test that places an extremely difficult, almost insurmountable burden of proof on the petitioners. The Court held that it is insufficient to argue that the petitioners are Arab and that only Arab land was expropriated, since it was possible to expropriate non-Arab land or use government land. The Court further held that it was necessary to prove that the discrimination was intentional and deliberate. This test, in effect, granted State authorities almost complete discretion in expropriating land under the Land Ordinance. Whenever the State wants to expropriate Arab land, it is sufficient that another consideration be



added, such as the aesthetics of the site, to legitimize the taking.

To a great extent, the petitioners were correct in not giving the establishment of the government buildings site high priority or considering it a public interest intended to serve the Arab population in Nazareth and the Galilee, as they saw it as housing the offices of the oppressive military government. Nazareth residents viewed construction of the site as a tactic to expropriate their land and to limit development of Nazareth, the only Arab city that survived the war, through which they could hope to maintain their social, political, and cultural life as Palestinians.

Two years after the Court delivered its judgment, Arab residents of Nazareth who owned some 15 dunams of land expropriated in 1954 for the government-buildings site, re-petitioned the Supreme Court.<sup>9</sup> Again they challenged the legality of the expropriation, arguing that the intended purpose of the “taking” was to settle Jews there and build a new Jewish city. These arguments were based, in part, on statements made under cross-examination by the Director of the Development Authority. Justice Agranat summarized those statements:

(1) Since the expropriations, the authorities established approximately 500 housing units and a chocolate factory on part of the expropriated land; (2) the authorities' plan to establish other factories on this site, as well as a shopping center and a movie theater; (3) some 5000 persons live in the housing units built there, and more than 2000 of them are new residents, only 100 or so being families of state employees; (4) the housing units that will be built in the future will also be intended for residential use of persons who are not state employees, most of which are intended for new immigrants.

In his short three-page decision, Justice Agranat, joined by Justices Berenson and Vitkin, dismissed the petition, noting that the aforementioned facts do not benefit the petitioners' case. Justice Agranat also chose not to give any weight to a new fact revealed in the judgment: That the area intended for the government buildings only covered 80-100 dunams of land. Justice Agranat stated:

The testimony (of the Director of the Development Authority - J.D.) indicates that the fact that the authorities utilize part of the expropriated land to establish residential and industrial buildings and to house persons, who are not state employees, neither benefits nor prejudices the applicant's claim. The purpose for which the area of 80-100 dunams is intended, part of which belongs to the applicants, remains the public purpose declared above, about which, in the previous suit, it was held should not be pondered. Also, the motives that led the authorities to select precisely this area to fulfill that purpose are those that remain fit and proper in that suit.

Therefore, the Court relied on its earlier expropriation decision to justify the denial of the second petition but refused to consider the new fact: The government used less than 10% of the land to realize the public purpose for the expropriation. The second judgment provided final legal sanction to the expropriation of Arab Nazareth's land, on which the Jewish town of Natserat Illit was to be built. It also largely reflected the important “political” role and function of Israel's Supreme Court in establishing the State and transferring ownership and control of land to the State for Jewish use. From the start, Nazareth residents clearly knew that the purpose of the expropriation was not to establish a government

buildings site, but to realize a specific Jewish public interest - the establishment of Natserat Illit, which would ultimately absorb new Jewish immigrants.<sup>10</sup>

### Saliba Suliman Makhul v. Minister of Finance<sup>11</sup>

In 1992, the Knesset enacted the Basic Law: Human Dignity and Freedom, which raised the status of private property rights from a fundamental right to a “constitutionally” protected right. It is not incidental, I believe, that the Israeli legislature constitutionally protected the right of private property 44 years after the founding of the State. Undoubtedly, the success of the Zionist enterprise and completion of the process of transferring land ownership from Palestinians to the State enabled the strengthening of property rights,<sup>12</sup> as the danger to the State had been essentially eliminated. As a result of its preservation of laws clause, the Basic Law does not affect the validity of the expropriation laws and many other laws that regulate management of state lands. This legal situation significantly reduces the likelihood of redistribution of state-controlled land.<sup>13</sup>

Most Supreme Court justices hold that the Basic Laws grant them power, although not explicitly expressed in the laws, to judicially review acts taken by the authorities, including the legislature, to protect the human rights enumerated in the Basic Laws. Did the enactment of the Basic Law lead to a change in Supreme Court decisions involving Palestinian land expropriation under the Land Ordinance? The judgment in *Makhul*, delivered in early 1996, reveals that the Supreme Court continues to deny legal relief to Palestinian citizens whose land was expropriated pursuant to the Land Ordinance. Despite the liberal rhetoric frequently sounded on the importance of the right to property, the Supreme Court continues to exercise limited judicial review of the public need that forms the basis of expropriation of Arab-owned land.<sup>14</sup>

In March 1976, the Finance Minister published notices, pursuant to his authority under the Land Ordinance, in which he declared his intention to expropriate extensive Arab-owned areas in the Galilee.<sup>15</sup> Most notices stated that: “The Finance Minister absolutely requires the land for public needs.” Mr. Saliba Suliman Makhul, a resident of Maker, an Arab town near Acre, received notice that the Finance Minister intended to expropriate some 50 dunams of his land.<sup>16</sup> Makhul vigorously opposed every offer of monetary compensation, and immediately filed an objection against the Finance Minister’s action. In his objection, Makhul stated that the land is his source of subsistence, and that the public need for the expropriation was not set forth. The District Court rejected his objection and ordered him, upon application of the Attorney General, to deliver possession of the land to the Finance Minister.

A decade passed, during which the government did not use the expropriated land for a public purpose. Makhul then petitioned the Supreme Court to revoke the expropriation. In his petition, filed by attorney Hashem Khatib, Makhul argued that the expropriation should be revoked because the public need was not explained and the planning authorities had delayed realizing the purpose of the expropriation.<sup>17</sup> Following the filing of the petition, the State rushed to present the plans to the Court. For some reason, throughout the 10-year period, the State never informed the petitioner about these plans. In its response to the petition, the State contended that the purpose of the acquisition was, and still is, development and construction of housing projects, public buildings, and welfare services for residents of the region and persons who had been vacated from Acre’s Old City. The Supreme Court justices chose not to interfere with the State’s decision:

The petitioner complains that no use was made of land that was expropriated more

than twelve years ago. From the respondents' response, we see that plans have now been prepared and actions are being taken to achieve the public objective of the land. In these circumstances, we suggested to counsel for the petitioner, and he agreed with the suggestion, to withdraw the petition, without that action prejudicing the right of the petitioner to return to this court if he is of the opinion that no use is being made of the expropriated land. It is superfluous to state that we take no position on the merits of the case.

The public need, for which the Maker land was expropriated, was the establishment of housing projects for "persons vacated from Acre's Old City."<sup>18</sup> However, in the beginning of the 1990s, following the immigration of hundreds of thousands of Jews from the former Soviet Union and the resulting housing shortage, the government decided to change the purpose of the expropriation, and establish a neighborhood of 4,900 apartments for new immigrants. Ultimately, the State considers housing for new immigrants a high priority national goal justifying the non-implementation of the plan to house persons vacated from Acre's Old City. The National Planning and Building Council eventually refused to approve the plan,<sup>19</sup> at which time, the Israel Lands Administration (ILA) decided to promote a plan for part of the Maker area, as an interim measure. The ILA plan covered some 300 dunams of land, of which 70 dunams were designated for a regional and national cemetery, 79 dunams for a hospital, and 14 dunams for an engineering facility. Part of the land expropriated from Makhul is included in this plan. Eighteen years after the expropriation of his land, Makhul continues to correspond with the authorities and protest that no use has been made of the land, and that the expropriation order should be revoked and the

land returned to him. A civil servant even referred Makhul to a Finance Ministry official charged with negotiating compensation for land expropriation in Maker. Makhul's attorney responded to the Finance Ministry's offer: "My client is not interested in compensation. He wants his land to be returned."

In 1995, Makhul again petitioned the Supreme Court. This time, the law offices of Nashitz and Brandes, one of Israel's leading law firms, represented Makhul. Unlike the petition of attorney Hawari on behalf of the Committee for the Protection of Expropriated Land in Nazareth, which included a collective claim of national-historical discrimination, Makhul's second petition focused solely on an individual claim of confiscation. Makhul argued that when the public purpose for which the expropriation was made is changed, the expropriation must be revoked and the land returned. He also argued that because of the long delay in realizing the purpose, the expropriation should be revoked, even if the purpose for the expropriation was changed in good faith.

The Supreme Court dismissed the petition in a lengthy 26-page opinion. Justice Goldberg wrote the majority opinion, joined by Justices Matza and Kedmi. Justice Goldberg rejected Makhul's first major argument, concluding that the State may change the initial purpose of expropriation:

The [State] authority may use the expropriated land for another purpose that itself justifies expropriation of the land, and its hands are not necessarily tied to the original purpose on which the expropriation was based... The public interest, which the planning authorities are entrusted to advance, require that they not close their eyes to the changing needs of society and changes in the order of social priorities.

For twenty years, the State held Makhul's land without using it or making plans for its development. Just before the Supreme Court hearing, the authorities hurriedly declared the public purposes and the plans they intended to realize. Ironically, Makhul's Supreme Court petitions awakened the State and hastened the planning process. In any event, none of the public purposes claimed by the State include benefits to the residents of Maker and Jedaide, whose land was expropriated. At first, the State offered the public purpose of housing for the Arab residents of the Old City of Acre. The State informed Makhul of this purpose in 1988, more than 10 years after the State expropriated his land, and only after Makhul had filed his first petition to the Supreme Court. Then the State declared a different purpose, which included a cemetery, industrial buildings, and hotels. The State also set aside this need in favor of a new public need - solving the new immigrants' housing shortage. Today, more than 24 years after the State expropriated the land of Maker and Jedaide residents, a Jewish cemetery sits on the land and serves residents of Acre, who live eight kilometers from the site. In an application for a rehearing, which the Supreme Court President denied, Makhul's attorney notes: "This peculiar cemetery was only born to bury the petitioner's constitutional rights."

As to Makhul's argument concerning the years of delay in realizing the public purpose for the expropriation, the Court distinguished between procedural delay - whether the purpose of the expropriation has been neglected, and substantive delay - whether the delay is reasonable. The Court divided the 20-year period since the expropriation into four periods, and held that none of them constitute substantive delay. Rather than giving effect to the cumulative period of 20 years, creating a problem for the State and acting to protect Makhul's property rights, the Court adopted a test that favors the State. According to the Court's

decision, the State can prepare new and different plans from time to time, whether or not they are well-founded, which will be considered a new beginning for purposes of calculating the delay. The Court also ignored its judgment on Makhul's first petition, where Makhul agreed to withdraw the petition while preserving his rights, enabling the State to use his expropriated land. The Supreme Court breached its promise to preserve Makhul's rights and held:

However, the basis for neglect of the expropriation, or foregoing the expropriation, is not found in the case before the court. The twenty years that have passed since the expropriation is surely not an insignificant period of time. But the time should be divided according to its component parts. The first period of some twelve years, starting at the time the notice was published and ending with the filing of petition HCJ 831/87, cannot serve as a basis for the claim that the purpose of the expropriation had been abandoned. The petition was dismissed with the consent of the petitioner to enable the state authority to realize the purpose of the expropriation.

Regarding the 'constitutional' protection of private property rights, the Supreme Court held that land expropriation harms the core of the right to property, as protected in Section 3 of the Basic Law: Human Dignity and Freedom. This right has a dual aspect - one economic and the other emotional. The Court did not give proper weight to the ongoing violation of Makhul's right to property, based on the Basic Law, and refrained from thoroughly and comprehensively discussing the matter. The Court found it sufficient to state that:

Payment of compensation surely minimizes the economic injury resulting from

expropriation of the land, but it does not negate the emotional injury that is suffered by one whose land was taken. In the present case, compensation was not paid to the petitioner because he is not prepared to accept it. This fact is not an obstacle for the Finance Minister, to the degree that it affects the economic aspect of the injury to the petitioner. On the other hand, the emotional injury has not yet healed. His unwillingness over all the years to accept compensation and his resolute fight to revoke the expropriation testify to the valiant emotional and unceasing connection between him and his land.

## Conclusion

The two Supreme Court decisions reviewed in this article illustrate the narrow legal boundaries in the battle over land expropriation. While the Supreme Court has essentially abandoned the Zionist rhetoric that characterized its decisions during the early years of the State, particularly after the massive expropriation of Arab-owned land was completed, the policy of judicial restraint is still in effect regarding the power to confiscate Palestinian land. Enactment of the Basic Law has had almost no effect on Palestinian property rights, and Arabs now live, as they did when the State was founded, under the risk of expropriation. Today, the amount of endangered Arab-owned land is less, but the change did not result from the 'constitutional' revolution of the 1990s, as liberal jurists argue, but from the little amount of land that remains in Arab hands - only 4% of the land in the State.

The Court's policy of judicial restraint is the practice of legal formalism, replete with norms and reflecting clear interests. The extraordinary creativity of the Supreme Court in complying with legal rules shows that the policy of judicial restraint cannot be explained by the dichotomy between

norms and formalism. The Court's creativity is expressed in its affording greater weight to aesthetic considerations than to property rights of Palestinian landowners; its invention of a new timetable whereby 20 years is not really 20 years; its choice of ignoring new, relevant facts and frequent changes in the purpose for which expropriation is made; and its establishment of rigid tests to prove discrimination - "deliberate intent" - knowing that a reasonable State authority does not leave incriminating evidence of theft.

Most importantly, however, from the founding of the State to the present, the Court witnessed the expropriation of the Palestinian-owned land but refused to recognize the discrimination against Palestinian citizens. Time after time, in case after case, the Court demanded proof of intentional discrimination, because the past, the Court said, can never teach us about the present. In each petition on the expropriation of Palestinian land in Israel, the Court set a new timetable, ignoring past events. No mention is made of the earlier purposes of the expropriation or of the time that passed since the expropriation was first executed. This is creative enforcement of legal rules and principles, which invites us to change the term "a policy of judicial restraint" to "a policy of political restraint."



## End Notes:

1. In his diary, Israel's first Prime Minister, David Ben-Gurion, related to the importance of the settlement of new immigrants: "The Galilee has a serious problem... It is unacceptable that we hold onto a Galilee that is empty and desolate. If we do not hasten to settle [it]... it would be a political defeat. We must establish a chain of settlements... For this purpose, we should take new immigrants [to live] there... because such settlement would have military value." See Yifat Holtzman-Gazit, "Land Expropriation Laws in the 1950s from the Zionist Ideological Perspective of Absorption of New Immigrants and Private Property," in *Land in Israel: Between the Private and the National*, ed. Hanoach Dagan (Tel-Aviv: Tel-Aviv University Press, 1999) at 223 [hereinafter *Land in Israel*], citing the *Diary of Ben-Gurion*, 6 November 1948.
2. Sabri Jiryis, *The Arabs in Israel* (Beirut: The Institute for Palestine Studies, 1969) at 1-42.
3. Section 3 of the Ordinance states: "Where the Minister of Finance is satisfied that it is necessary or expedient for any public purpose, he may acquire the ownership of any land." Section 2 of the Ordinance defines 'public purpose' as "any purpose certified by the Minister of Finance to be a public purpose."
4. Irit Haviv-Segal, "Coordination Problems and the Question of Public Purpose in Land Expropriation," in *Land in Israel*, supra note 1, at 97.
5. Yifat Holtzman-Gazit, supra note 1, at 223, 226.
6. Pnina Lahav, "The Daring and the Job: The Supreme Court in its First Decade," 14 *Tel Aviv University Law Review* 479 (1989) (Hebrew).
7. H.C. 30/55, *Committee for the Protection of Expropriated Land in Nazareth v. Minister of Finance, et. al.*, P.D. 9 (3) 1261.
8. Already at that time, Palestinian citizens of Israel considered application to the Supreme Court as an "aid" in the fight against the policy of discrimination against them. However, it is unclear how aware they were of the limitations of the legal battle, particularly during the early years of the State.
9. H.C. 181/57, *Abmad Suliman Kassem, et. al. v. Minister of Finance, et. al.*, P.D. 12 (4) 1986.
10. The jurisdiction of Arab Nazareth, with a population of 70,000, is 16,000 dunams, whereas the jurisdiction of Natsrat Illit, with a population of 50,000, is 40,000 dunams.
11. H.C. 2739/95, *Saliba Suliman Makbul v. Minister of Finance*, P.D. 50 (1) 309.
12. Eyal Gross, "The Right to Property as a 'Constitutional' Right and the Basic Law: Human Dignity and Liberty," 21(3) *Tel Aviv University Law Review* 405, 439 (1998) (Hebrew).
13. Section 10 of the Law states: "This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law."
14. In rare cases, the liberal rhetoric on the protection of human rights following the enactment of the Basic Law, had an effect. One example is the minority opinion of Justice Dorner in the *Nusseibeh* case. *Nusseibeh* involved a challenge to an expropriation of land belonging to a Palestinian family from Jerusalem. The government expropriated their land in 1968, a year after the 1967 War and the occupation of the eastern part of the city. In their petition to the Supreme Court, the petitioners argued that no public purpose existed at the time of the expropriation, and that the authorities deposited a plan for the land only in 1986, the designated purpose being commercial use. The Supreme Court ruled in favor of the *Nusseibeh* family, but reversed its decision after rehearing. In a 4-3 decision on rehearing, the Court decided not to interfere with the State's judgment in retroactively changing the purpose of the expropriation. See H.C. 5091/91, *Nusseibeh v. Minister of Finance*, Takdin Elyon 94 (3) 1765 and R.H.C. 4466/94, *Nusseibeh v. Minister of Finance*, P.D. 49 (4) 68.
15. Following this large wave of Palestinian land expropriation, the Arab leadership called for a general strike. Protests in the Galilee region followed, in which Israeli security forces killed six Palestinian citizens and wounded hundreds of

## On the Politics of Legal Formalism

others. As a result of these events, Palestinians in Israel commemorate Land Day every year on 30 March to mark their connection and ties to the land of their homeland, and the struggle against the policy of land expropriation and dispossession.

16. Other landowners, residents of Maker and Jedaide, received similar notices.
17. H.C. 831/87, *Makbul v. Minister of Finance, et. al.*, Takdin Elyon 88 (2) 13.
18. Arab residents of the Old City in Acre vigorously opposed the plans to uproot them and transfer them to other areas of Acre and the nearby villages of Maker and Jedaide, so that the Old City could be made into a tourist site free of Arab residents. The State took similar action in Old Jaffa, which was turned into a neighborhood for Jewish artists.
19. Until that time, more than NIS 1.5 million (in 1992 value) had been spent in Maker to pave roads.



# On Resisting Legalization

**Samera Esmeir** and **Rina Rosenberg**

In this essay, we wish to argue that legalization - the seemingly sole professional asset of human rights legal organizations - should be resisted in times when it could place limits on political action and endanger community mobilization by paralyzing or diffusing it. We believe that human rights NGOs would be severely mistaken, if they were to assume that they are the central actors in leading political struggles through mobilizing people around their professional activities, even if these activities were to adequately represent the "real" values and visions of the communities they wish to mobilize. This overemphasis on institutions of civil society may result in abandoning the political struggle against the state. Human rights centers can provide legal advice and litigate on behalf of the oppressed; however, they should never assume that legal professionalism alone will bring about political change. Rather, legal means are but one tool, and legal centers must be extremely careful in selecting cases and rushing into legalizing politics.

To illustrate these points, we have chosen to focus on one recent case in which Adalah refused to litigate a political struggle. This is a case of land expropriation, which took place in the Palestinian town of Umm al-Fahem, located in central Israel. This confiscation exemplifies the ongoing process of dispossession experienced by Palestinians in Israel, who became a subordinated minority after the State's establishment in 1948.

In May 1998, residents of Umm al-Fahem and the Wadi 'Ara area received notification from the Israeli Defense Forces (IDF) of the transformation of the status of some of their lands - al-Roha - into a military firing range to which their entry was to become so severely restricted as to be nonexistent. The IDF told the landowners that they could continue to cultivate their farms only on weekends and only if they obtained special entry permits and insurance policies releasing the IDF from all responsibility for personal and property damage.

Al-Roha landowners sent numerous letters of protest to Israel's Prime Minister and staged some demonstrations in Jerusalem, but to no avail. Several months later, the Municipality of Umm al-Fahem asked Adalah to file a petition to the Supreme Court of Israel on behalf of the Palestinian landowners against the confiscation. Adalah refused to petition the Court. This action - the reasons behind it and its political implications - is the focus of our analysis in this essay.

Soon after Adalah's refusal to take the case, in September 1998, the landowners, political figures, and community leaders set up a tent on the disputed land and initiated protests on the site. The Israeli police and security forces, in an attempt to disperse the protestors, employed harsh and violent measures against them. These actions resulted in mass demonstrations in Umm al-Fahem, met by extreme police violence, including a raid on the high school. These latter events received widespread local and international media attention. Since that time, Adalah has been involved with two groups formed in response to the confiscation and the police violence in Umm al-Fahem - a committee of local lawyers, and a representative community group including owners of the confiscated lands, community leaders, and Members of Knesset. In addition, Adalah represented Palestinians arrested as a result of the police violence at al-Roha.

Legalization, as Adalah understood it, was not merely an issue of legal representation, such as the intervention of lawyers in representing the local political movement; nor was it the expansion of the province of the courts or the judges at the expense of politicians. For Adalah, legalization meant that Adalah's lawyers would employ legal logic in translating the political case to a formal petition filed before the Supreme Court. This legal logic imposes limited discursive possibilities, which result in constituting specific political interests and identities. The legal logic and the legal



discourse are thus considered as a sphere of power that forms, formalizes, and codifies everything that interferes with its field of vision.

What is this legal logic, inherent to Israeli laws, that alerted Adalah to the need to resist legalization in this case of land confiscation? Legal logic operates in an authoritative way that de-politicizes relations of power by presenting them as seemingly competing interests that can be balanced in a rational, scientific, neutral, and objective way. Consequently, the existing relations of power between Palestinian Arabs and Israeli Jews - the dispossessed and those in control of the land who do not acknowledge the collective national rights of Palestinian citizens over their lands - is turned into a legal conflict between the government that wishes to confiscate the lands for the benefit of the public, and individuals who are struggling to preserve their property ownership. Legalization turns the systematic policy of massive Palestinian land confiscation (over 76% of Palestinian-owned lands have been confiscated) conducted throughout the history of the State, into instances of confiscation conceived of as singular events, which are never situated in the larger context of systematic theft of land. In short, the national struggle of Palestinians in Israel over their lands, which constitutes the heart of the conflict between Palestinians and Israelis historically, is displaced from legal arguments, replaced instead by public interests and conflicting interests of the state and individuals. Accordingly, lawyers who wish to argue against the confiscation of Palestinians' land are obliged to adopt these forms of legal argument and modes of representation that preclude alternatives, especially oppositional, collective identities and radical anti-Zionist political perspectives held by Palestinians. They are compelled to abandon the discourse of justice in favor of a language of balanced interests.

In addition, these lawyers must face "security arguments," which have always been privileged

by the Supreme Court of Israel. In the case of Umm al-Fahem, the lands were to be expropriated for military use. Arguing against the centrality of security interests is virtually impossible, for these interests are conceived of as paramount and absolutely essential to preserve the existence of the State. Thus, security interests have the potential to legitimize many oppressive practices against Palestinian citizens. The only legal way to challenge this vision is to argue that security considerations do not justify the violation of ownership rights in this very specific case. But this sort of argument would lead lawyers to delve deeply into security reasoning that in fact disguises Zionism's attempt to transform the land of Palestine into a homeland for Jews and Jews alone. Adalah's lawyers refused to play this game, as they know that the real issue is not security but a national struggle over lands.

What actions remain for Palestinians who wish to challenge land confiscation policies? In the case of al-Roha, after Adalah's refusal to legalize the land struggle, Palestinian citizens of Israel resumed their fight against the confiscation utilizing purely political means: protests, demonstrations, strikes, networking, parliamentary discussions, and the media in an attempt to affect public opinion and embarrass the Israeli government. By these tactics, they succeeded in delaying the implementation of the confiscation. For over two years, the issue had been the focus of negotiations between the Al-Roha Committee and the Ministry of Defense regarding the permanent status of the expropriated land. In May 2000, the parties reached an agreement, and the confiscation was not executed.

Had Adalah agreed to petition the Court, the Court, most probably, would have dismissed the case. Although bad verdicts sometimes mobilize people into political struggle, this would certainly not have been the case here because the political struggle was already at its peak - without the intervention of lawyers. Perhaps more importantly,

the legal logic that Adalah would have employed in order to defend the rights of Palestinians would have failed to mobilize the community due to its radical detachment from notions of justice held by Palestinians. This legal logic would have failed due to its obvious hostility to Palestinians' interests, its inability to gain structural hegemony and power during the 51 years of the existence of the State, or to shape people's political consciousness. Litigation that is grounded in an alienating legal logic, unable to present itself as legitimate, noble, objective and neutral, cannot produce community mobilization.

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**Samera Esmeir** is a Ph.D. student at the Institute for Law and Society, New York University.

**Rina Rosenberg** is the Development Director of Adalah.

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**A'bed A'bdi:** Land Day Monument - Visions (1976-1978)



# Zionism 2000: Past, Future, and the Qa'dan Family

**Ronen Shamir**

For whom did the Court write its decision in *Qa'dan*?<sup>1</sup> Which group of readers and commentators did the justices have in mind when drafting their judgment? When reading the Court's opinion, it is important to realize that it was not written for the Qa'dans, and certainly not for the Arab minority in Israel. It was written for the petitioners' attorneys - The Association for Civil Rights in Israel - as the representative of the defenders of civil rights in Israel and abroad. This public is composed of liberal organizations centered around attorneys and rights groups promoting universal rights that are irreconcilable with Israel's apartheid system, at least in its most blatant and audacious (although not most significant) form: The exclusion of an individual from a residential community for ethnic reasons. This public is very important to the Supreme Court. It is the public that gives it moral and political backing, and from which the Supreme Court draws its status in Israeli society and in the legal world abroad.

More than anything, the decision reflects the Court's awareness that this public is no longer willing to assent to decisions giving express legal sanction to Israel's ethnic-cleansing system, and the Court's sensitivity to the exceptional attention given to the case in the world media.<sup>2</sup> Concurrently, the *Qa'dan* decision also reflects the Court's awareness, or at least its assessment, that broad segments of the Jewish public do not consider discrimination against Arabs immoral and unjust, but a necessity for survival. With this realization in mind, the manner in which the Court chose to draft its decision is relevant.

In a hearing on the *Qa'dan* petition held in 1998, Supreme Court President Aharon Barak still thought that Jews were not ready for such a harsh decision.<sup>3</sup> The Court directed the parties to mediation, and begged the parties to reach a settlement so that it would not have to decide the case. In the meantime, as the years passed since

the filing of the petition (in the mid-1990s), several developments took place: The Qa'dan family grew and had to enlarge its home in Baka al-Gharbiya; the Mahameed family, from Umm al-Fahem, built a house in Katzir after a Jew bought a plot of land for him without informing the community's committee about the identity of his principals; and Arab families moved into Katzir following non-implementation of the criteria that had excluded the Qa'dans.

The mediation failed and the Court was left with no option.<sup>4</sup> In lean language, tightlipped and with great trepidation, but in unequivocal terms, the Israeli Supreme Court wrote the post-Zionist decision. This is a post-Zionist decision because it severs the equation between the concept "state lands" and the concept "nation's lands." This equation, which was based on history, politics, and primarily public consciousness, held that state lands are solely for use by the Jews. In the future, in accordance with the decision, the state will not be able to allocate land, directly or indirectly, only to Jews.

This post-Zionist decision is grounded in language outlined in the judgment in *R.A.M.*, in which the court nullified the decision of the Natserat Illit Municipality, prohibiting an Arab construction company from posting billboards written only in Arabic.<sup>5</sup> In addition to the legal grounds, the Court in *R.A.M.* found adequate theoretical justification for its decision in the fact that Zionism had sufficiently achieved its cultural and political objectives to enable it to be generous to Arab citizens of Israel, based on their being individuals with equal rights.<sup>6</sup> As in *R.A.M.*, the decision in *Qa'dan* also does not waste time on the extensive historical and social context of the civil status of Arabs. Barak repeatedly emphasizes that the decision "looks towards the future," as if wanting to tell us that there is great fear in looking to the past, in trying to make an historic accounting over the theft of Arab lands in the past, or, at least,

with the manner of allocation of land between Arabs and Jews in Israel.<sup>7</sup>

The ladder that enabled the Court to climb into the future, while ignoring the past, was provided by the Association for Civil Rights in Israel, which drafted the petition. In its decision, the Court cites the text of the petition:

This petition looks essentially to the future. It is not the petitioners' intent to criticize the long-standing policy that led to the establishment of settlements throughout Israel (with the assistance of the settlement institutions) - kibbutzim, moshavim, and observation posts - in which almost always only Jews lived and continue to live. The petitioners do not focus their claims on the legitimacy of the relevant policy during the pre-state period and in the years that have passed since the founding of the State. They also do not question the decisive role that the Jewish Agency played in Jewish settlement throughout the land in this century.

The pragmatism of both the petitioners and the Court led them to use conciliatory, delicate language that would not overly startle opponents.<sup>8</sup> It is no use to search the judgment for an expression of "the jurisprudence of regret," a concept that was coined following the decision in *Mabo*, in which the Australian Supreme Court recognized the historic injustice to aborigines who had lost their land.<sup>9</sup> It appears that it is still too soon to expect this attitude in Israel.

The concluding paragraphs of the decision draw a clear line between the past and the future. Because fourteen years had passed since the land was allocated for Katzir, and because it was assumed that the land being allocated and developed was only for Jewish residential use, the Court holds that it is necessary to take into account

the expectations of the residents and their legitimate reliance on the situation that existed on the eve of the petition:

The settlers in the community purchased homes at the location, and went to live there, relying on the situation as it was at the time. All of these factors raise difficult problems for the Jewish Agency, the Katzir Cooperative Association, and residents of the community - problems that are legal as well as social. We must also remember that the decision is given today, fourteen years after the allocation, and after the people who settled there and the Jewish Agency itself acted in accordance with expectations acceptable at that time and place.

In other words, the Court drafts a thesis that, when discrimination reflects "expectations acceptable at that time and place," it ceases to be discrimination. According to this logic, recognition of historic injustice is automatically nullified. Also, no mention is made of the expectations of the Qa'dans or of the years that they waited for the decision. Moreover, in making these comments, the Court assumes a legal foundation for future defense arguments against Arabs wanting to live in exclusively Jewish communities.<sup>10</sup>

The Court's strategy, therefore, is to draw a clear line between the past and the future. This strategy is only understandable if we take into account the audience to which the Court is speaking; a consideration that also explains the sharp disparity between the legal conclusions reached by the Court and the relief provided to the Qa'dans. The Qa'dans sought concrete relief, but were left hanging in the space of the present, a vague twilight zone between the past and future. At the end of the decision, in discussing the "relief," the Court addressed the State, and not the petitioners:

The State must consider the petitioners' request to purchase a plot of land in Katzir on which to build their home, this requirement being founded on the principle of equality, while taking into account relevant considerations - *among them, considerations relating to the Jewish Agency and residents living there, and including the relevant legal problems.* Based on these considerations, the state must decide with all deliberate speed if it is able to allow the petitioners, under the law, to build their home in Katzir. [emphasis added - R.S.]

It may be that, at some time in the future, the Qa'dans will purchase a plot in Katzir. But the gap - between a declaratory judgment "looking towards the future" and the paltry relief that does not give the petitioners, the individuals themselves, highest priority - remains. The decision is understandable, therefore, when we take into account two historical variables: First, the decision is not directed to the petitioners in particular, and the Arab public in general, and second, the decision seeks to fortify a rigid line between past and future to prevent discussion of past Zionist practices of occupying land. In the present, the petitioners remain "lone rights riders,"<sup>11</sup> required to raise the enormous resources necessary to cope with the existing machinery of discrimination.

What, then, is the practical significance of a decision that looks towards the future? The Court mentions at length and directs us to think of the *Qa'dan* decision as a local version of *Brown v. Board of Education*.<sup>12</sup> In *Brown*, the U.S. Supreme Court ruled that the policy of "separate but equal," which enabled segregation of Black and White students in the United States, is illegal. Although *Brown* is considered a major leap forward in the struggle of African-Americans for equal rights in American society, figures on the practical

consequences of the decision are revealing. The U.S. Supreme Court delivered its decision in May 1954. A year later, in 1955-1956, 2,782 African-Americans, constituting 0.12% of all African-American students, were studying with Whites in the American South. The following year, the number rose slightly to 3,514 (0.14%), and the year after that to 3,829 (0.15%). Ten years after the decision, only 1.2% of African-American students were studying together with Whites in the Southern states. That is, the Court's decision did not significantly change the social reality, and affected very slightly the ability of determined Whites to prevent African-Americans from penetrating "their" schools.

This reality changed dramatically only in 1964, when Congress enacted the Civil Rights Act. This law gave teeth to the 1954 decision; it denied allocations to districts that did not promote integration, granted incentives to schools that did, and transferred the prosecution of discrimination cases from the isolated state prosecutor lacking resources to the federal authorities. In other words, significant social change occurred only when the state began to function actively in the battle against discrimination. In the first eight years after enactment of the civil rights legislation (1964-1972), the percentage of African-Americans studying with Whites reached 91.3%.<sup>13</sup>

As long as isolated individuals were responsible for waging the struggle, the decision in *Brown* remained only a symbol - an important symbol, but one lacking practical substance. This finding is likely to be much more significant in the Israeli context. It must be remembered that the Qa'dans' struggle to integrate themselves into a Jewish community does not necessarily reflect the desires of most Arab citizens. It is not at all clear that the struggle for integration has top priority among the Arab public and the pressing needs of most of the Arab population, needs resulting from the inequality in investment in Arab villages, the

choking of Arab communities, and the refusal to establish new Arab towns and villages. As a symbol, integration is consistent with the aspirations of a few individuals, and primarily conforms to the perception of the liberal Jewish public. From this perspective, the *Qa'dan* case was conducted and continues to be conducted at the perimeter of the main problems in Arab-Jewish relations in Israel. The decision is very suitable for liberal Jewish thought on equal rights for individuals, and less so for inter-group thought on the layered structure of oppression existing in Israel. This is also apparently the reason why the Arab public responded to the decision with less enthusiasm than the attorneys and human rights activists among the Jewish public.

However, the Court's decision in principle offers a challenge to human rights activists and Arab attorneys. In fashioning their agenda on the needs and rights of Arabs in Israel, they can use the decision as a source for collective claims on allocation of land and establishment of Arab communities. This challenge now rests with them, and cannot and should not be faced in the context of the dialogue between Jewish lawyers and Jewish judges. Without such action, the *Qa'dan* decision is liable to remain a symbol that portrays Israel as an egalitarian society, without significantly altering the social reality.

## End Notes:

1. H.C. 6698/95, *Qa'dan v. Israel Lands Administration, et. al.*, P.D. 54 (1) 258.
2. See e.g., Serge Schmemmann, "Israeli Learns Some are More Israeli Than Others," *The New York Times*, 1 March 1998; and Edward Said, "Fifty Years of Dispossession," *al-Abram Weekly*, 7-13 May 1998. Said quotes the Qa'dans' attorney's comment that there would be a great public outcry if an attempt were made to prevent Jews from living in any

country in the world: "Of the land of the state 93% is characterized as Jewish land, meaning that no non-Jew is allowed to lease, sell or buy it. Before 1948, the Jewish community in Palestine owned a little over 6% of the land. A recent case in which a Palestinian Israeli, 'Adel Qa'dan, wished to buy land but was refused because he was a non-Jew has become something of a *cause celebre* in Israel, and has even made it to the Supreme Court, which is supposed to but would prefer not to rule on it. Qa'dan's lawyer has said, "as a Jew in Israel, I think that if a Jew somewhere else in the world was prohibited from buying state land, public land, owned by the federal government, because they're Jews, I believe there would have been an outcry in Israel."

3. See David Makovsky, "Constitutional Battle," *U.S. News & World Report*, 4 May 1998. In this article, Justice Barak is quoted as saying that the case should be settled: "We are not ready yet for this sort of judicial decision, which has unforeseen consequences. I suggest that you reach a compromise and avoid a judicial decision, since it is hard to know which way it will go."
4. For the history of the *Qa'dan* petition, simultaneous with the actions of Fathi Mahameed, Tawfiq Jabareen, and Uri Davis in the same area, see Neta Ziv and Ronen Shamir, "Build Your Home: Major Politics and Minor Politics in the Struggle Against Land Discrimination," 16 *Theory and Criticism* 45 (2000) (Hebrew).
5. H.C. 105/92, *R.A.M. v. Natsevat Illit Municipality*, 47(5) P.D.189.
6. On the distinction between liberal citizenship and republican citizenship and ethno-republicanism, see Yoav Peled, "Strangers in Utopia: The Civil Status of Palestinians in Israel," 3 *Theory and Criticism* 21 (1993) (Hebrew). On the attitude toward Arab citizens as individuals possessing rights, while denying their collective interest, see Gad Barzilai, *Communities Returned: State Law, Culture, and Israeli-Arab-Palestinian Identities* (forthcoming).
7. For the legal mechanisms that enabled the massive transfer of lands from Arabs to the state, see Sandy Kedar, "Majority Time, Minority Time: Land, Nation, and the Law of Adverse



Possession in Israel," 21(3) Tel Aviv University Law Review 665 (1998) (Hebrew).

8. On the dilemmas in drafting the petition, see Neta Ziv, "Lawyering for a Public Purpose: Who is the Public, What is the Purpose? Ethical Dilemmas in the Legal Representation of Minority Groups in Israel" (forthcoming, Hebrew).
9. In June 1992, the Australian Supreme Court decided for the first time that the land rights of aborigines must be recognized, notwithstanding the earlier decision that held that those rights had been nullified as a result of colonialist settlement. *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1. See Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo," 17(5) Sydney Law Review 5 (1995).
10. The Supreme Court used a similar tactic in H.C. 390/79, *Dweiqat v. The Israeli Government*, 34(1) P.D.1 (known as *Elon Moreb*). In this case, which appeared to endanger future Israeli settlement in the Occupied Territories, the Court spun a legal path enabling its continuation.
11. "Lone rights riders" is a term coined by Mary Ann Glendon to describe the situation of women wanting an abortion following the decision in *Roe v. Wade*. See Mary Ann Glendon, *Rights Talk* (New York: Free Press, 1991).
12. *Brown v. Board of Education*, 347 U.S. 483 (1954).
13. These figures are taken from Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: Chicago University Press, 1991) at 50.

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**Ronen Shamir** is Associate Professor of Sociology at Tel Aviv University, where he also lectures in the Faculty of Law.



# Jewish and Democratic

Ruth Gavison

For four years, the Supreme Court requested that state authorities reach an out-of-court resolution of the dispute between the Qa'dans, who wished to build their home in Katzir, and the State of Israel, the Jewish Agency, and the Katzir Cooperative Association, which refused to allow non-Jews to live in the community. Ultimately, the Court decided the dispute.<sup>1</sup>

The judgment is a complex document with interesting internal tension. The majority is clearly inclined to limit their holdings to the facts of the case, without establishing general principles. The Court also expressly notes that a lengthy process is involved, requiring cautious movement along the way. But the decision also contains, alongside the limited application, general statements of potentially far-reaching significance. In the end, the Court expressly holds that Katzir was not justified in prohibiting Arabs from residing in the community, but does not grant the petitioners the relief they requested - an order that their application to live in the community be determined on its merits, without taking into account their nationality.

Therefore, the mixed reaction to the decision is not surprising. Some praise the Court for its brave commitment to equality. Others view the decision solely as a declaration of principles, unlikely to bring about meaningful change in the discrimination practiced against Arabs. Some observers mention that the conception of equality emerging from the decision is not sufficiently sensitive to the fact that Israel is a quintessentially nationality-based communal society. That conception also minimizes the legitimate interests of individuals and societies - Jewish and Arab alike - to preserve their society and culture and diminishes the importance of cultural communities supporting that preservation. Finally, there are those who state that the Court weakens the State's unique Zionist and Jewish character, and only disagree in their assessment of this trend.

This variety of reaction indicates that the Court performed an important service for Israeli society. Its decision raises a major and painful problem in Jewish-Arab relations in Israel that Israeli society must resolve. For many reasons, the Supreme Court did not resolve, and could not resolve the problem. Its ruling, which raises questions about the principal elements of settlement policy in Israel, sharpens one of the contexts in which the relationship between the two elements of the state's self-identity - Jewishness and democracy - is particularly vague.

This attempt teaches us that it is impossible to assess the practical effects of this kind of decision when it is delivered. The Supreme Court's decision in *Elon Moreh* (which held that the State was prohibited from expropriating private land to establish Israeli settlements) led to the development of a bypass track to locate territory for the settlements. The decision certainly did not thwart the establishment of settlements. Some observers maintain that the U.S. Supreme Court's decision in *Brown v. Board of Education*, which held that equality requires the revocation of segregation between Blacks and Whites in public education, is that court's most important decision of the twentieth century.<sup>2</sup> It is surely important as a symbol, but there is strong debate over its practical significance. Separate educational systems sanctioned by statute were indeed eliminated, and some African-Americans (primarily among the higher socio-economic class) are integrated in American society. However, in many ways, American society and its schools are more segregated now than they were in the 1950s.<sup>3</sup>

That is to say, a court decision alone does not change a complex social reality. Acts by other authorities and the manner in which social and economic forces operate are also important. A Supreme Court decision establishes new legal boundaries for these processes, the precise content of which will be determined over time, as it is



applied to current problems. It is, therefore, clearly much too early to speak about the “end of discrimination” or the “end of Zionism.”

In the meantime, the principal contribution of the decision is in establishing a general framework for the public debate, which is vital. In conducting this debate, the participants do not have the liberty (nor possibly the duty) to focus on the case that led to the decision. They are also not free to set aside for future study questions relating to norms, policy, or general ideology that were not necessary to the decision and should not be decided by a court. Only such broad debate can enable a more complete evaluation of the Court's decision and make possible intelligent and sound action in planning our future steps. I shall analyze the Supreme Court decision in the context of this debate.

The Supreme Court's decision contains three principal components. First, it declared unanimously that the fact that the state is Jewish does not justify discrimination against non-Jewish residents. Second, it also expressly ruled unanimously that Israel cannot relieve itself of its duty not to discriminate against non-Jews by allocating land to the Jewish Agency or any other body. Third, it held that, in general, equality requires that considerations such as nationality or religion be ignored. The Court enumerated circumstances in which the presumption of disregard for considerations of nationality can be refuted, but held that, in the case under review, there was no justification for rejecting non-Jewish candidates outright.<sup>4</sup>

It is not accidental that the justices agree over the first two holdings. From both a legal and normative perspective, they had no option. The first principle - the duty to prohibit discrimination based on religion or nationality - has existed since the Declaration of Independence, and is also included in the Balfour Declaration and the UN resolution on the establishment of the Jewish state.

The second principle - that the State cannot relieve itself of its duty to non-Jewish residents by allocating land to other bodies, such as Jewish national institutions - is in essence only a simple reminder of the fundamental fact that a State, which holds a monopoly over power and over the welfare resources of all the residents, is vastly different from the institutions of a particular national movement involved in redeeming and purchasing the land to benefit one people.<sup>5</sup>

In the Israeli reality, a declaration that the principle of non-discrimination also applies to allocation of land to Jews and Arabs, and primarily the determination that the State is not allowed to evade it by allocating land to another body, have great symbolic importance.<sup>6</sup> The Court deserves praise for making this clarification. However, these two principles do not answer the main and difficult questions of the tension between democracy and Jewishness. It is agreed that the State has a duty not to discriminate, directly or indirectly, on grounds of nationality. However, discrimination, by definition, is different treatment that is unjustified. The key question is, if and when, in the context facing us, treatment taking into account the national or religious identity of persons is justified, and thus is not considered forbidden discrimination. Because the Court's decision itself stresses that it may be justified at times to take national or religious identity into account, it is important to identify the circumstances and historical conditions in which such considerations are relevant.

On this point, the Court leaped ahead somewhat. It expressly holds in the Katzir case that it was forbidden to adopt a rule excluding Arabs from living in the settlement. However, the Court fails to hold that this rule must be generally applied.<sup>7</sup> On the one hand, the Court leaves open the question of the legitimacy of arguments such as population dispersal, good integration, or cultural homogeneity. On the other hand, it

apparently rejects them when it holds that they do not apply in the case of Katzir.<sup>8</sup> More importantly, the Supreme Court explicitly holds that it is forbidden to deviate from the principle of “blindness to nationality” in the absence of special considerations, such as unique life style (it expressly mentions a kibbutz, moshav, or ultra-orthodox community) or security. In other words, the State may not legally allocate land to establish a community that is pre-determined to be “plain” Jewish.<sup>9</sup>

This conclusion is far-reaching, and is not called for in the case of Katzir. Katzir is already a Jewish community. The Qa’dans are aware of that fact and are willing to pay the cultural-identity price for living in a community whose public culture, religion, language, holidays, and historical narrative differ from their own. The question may not arise because even without prohibitory rules, social or economic forces will determine the character of new communities. But with living conditions as they are in Israel, is it really illegitimate for an individual to choose to live in an Arab, Jewish, or mixed community? Furthermore, does a person not have the right to demand that his state allow him to live in a supportive cultural environment of shared identity? Similarly, is it not legitimate for the state to plan communities so that their residents know in advance the cultural environment in which they will be living?

It is important to mention that this argument is not available to Israel under current conditions. The “separateness” of Jews and Arabs in Israel in most communities is far from equal. I assume that the Qa’dans would have preferred a high standard of living among Arabs in favor of such a standard of living in Jewish Katzir. However, the choices available to Arabs in Israel are extremely limited, a result of a combination of family, planning, and social conditions. Moreover, Jews use legal rules and social pressure to prohibit Arabs from living

in certain places, but do not let Arabs prevent Jews from settling in the heart of Arab areas when they consider it important (e.g., in the Muslim Quarter in Jerusalem or in Abu Dis).

The judgment, however, does not limit itself to the present situation. It forbids prohibitory rules also where the separation will truly be equal. In doing this, it relies on long and profound experience: Prohibitory rules are generally used to perpetuate discrimination and inferiority. Jews around the world fought against rules prohibiting them or placing quotas on them. Are we in Israel going to be the ones, of all people, to argue that rules prohibiting non-Jews is not discrimination?

The Court evades this difficult question and chooses an easier way to justify it: All prohibition is, on its face, suspect of being forbidden discrimination. However, under existing conditions - where different groups live together, though they are not assimilated and do not want to be assimilated, and still live in the shadow of a prolonged conflict accompanied by mutual fear - a sensitive policy of equality will create a great and structured chance for members of the two groups to attain complete communal life. Such a policy will require and justify sensitivity to national and cultural identity in planning the towns, and it will not be possible to routinely adopt a policy of “nationality blindness.”<sup>10</sup> The considerations and tools will differ, of course, depending on the different forms of towns. Rules suitable for a large city are not appropriate for a small town, which cannot provide more than a center of life, a school, and one community center. But this is not national color-blindness.

Such a policy does not necessarily express the State’s Zionist-Jewish uniqueness. It expresses the general fact that people do not live alone, and that a very substantial part of their identity is determined by how comfortable they feel in their environment. In some sense, it is more vital for the Arab minority in particular, that recognition be

given to its legitimate interest to combine mobility and housing in locations where they can find employment and a suitable standard of living, together with a supportive cultural environment of shared identity.<sup>11</sup>

With this, we return to Zionism. Part of the special reason for the establishment of the Jewish State was the wish of Jews to cease their perpetual and difficult experience as an estranged and foreign (and often also persecuted) minority in countries where they did not share the prevalent religious-linguistic-cultural identity. Jews are indeed the majority in Israel, and the public culture is Jewish-Hebrew. However, an individual does not live his daily life in his state. His quality of life is measured by the life he leads in his town, village or neighborhood, and by the school where he sends his children. Being a Jewish state containing a large non-Jewish minority, Israel will lose its justification for existence if it allows itself to violate the rights of its non-Jewish residents.<sup>12</sup> However, enabling a Jew who wants to live in a Jewish community in Israel is not a superior right or legitimization of separatism, and finding the tools that enable this choice is not necessarily unjustified discrimination.

For this reason, I agree with the Court that we must only adopt that understanding of Zionism (or Jewishness) of the State that does not require discrimination of non-Jews in Israel. It is important and urgent that we react to the many instances of discrimination against non-Jews in Israel in the area of housing and settlement. Revoking prohibitory rules will not solve these problems completely (Arabs also have difficulty in communities where such rules do not exist, and often are not willing to pay the price of estrangement inherent in living in a Jewish environment). At the same time, we must not ignore the special features of reality in Israel. This reality includes, and justifiably so, many elements related to community and identity. Preserving them often requires that national-

cultural reliance be taken into account when integrating a neighborhood, community, or educational institution. Integration is a good tool to eliminate some structural gaps, and intelligent selection of it should be encouraged. Forced integration, in contrast, is liable to be the wrong (and inefficient) tool to attain equality between sub-cultures that strive to preserve their unique identity.

The Court's judgment compels critical decision-making about relations between the State (and its Jewishness) and Zionism. It says that the State cannot play both ends - claiming legitimacy of its control over all its citizens, Jewish and non-Jewish, pursuant to its democracy, and, concurrently, placing State functions solely in the hands of national institutions of the Jewish people. Zionism is the national institution of the Jewish people. Its great achievement is the founding of the state through immigration, settlement, economic development, cultural regeneration, and military and political struggle. However, the symbiotic relationship between the two that has existed until now, with the State being called on to realize Zionist objectives, is no longer acceptable. The Court hints at a possible solution - a neutral liberal state that "privatizes" the national and non-national identities of its residents. Among currently acceptable slogans, its model is "A State of All its Citizens." This is indeed a model that equates Jews and non-Jews by taking away from both their demand that the state recognize their national-cultural rights. But it is not the only solution, and possibly not the most preferable and suitable to the wishes and values of all the country's residents.<sup>13</sup>

The second solution is official recognition toward both groups of the importance of the national-cultural dimension of private life, and the legitimacy of organizing to promote it. This solution is considered preferable in significant liberal philosophies, and also holds an important



place in the human rights tradition. Liberalism and human rights allow consideration to be given to the fact that individuals live in groups. When focusing on the individuals, we see the importance of belonging to their national-cultural group.

These two solutions require that a distinction be made between the State and the Zionist movement and its institutions. An equally important consideration is that the solutions do not necessarily mean the end of the uniqueness of Israel as the Jewish State. Israel's large Jewish majority can ensure arrangements that grant Jews and Israel's Jewish culture physical and cultural protection, subject to the rights of all citizens. These arrangements can show preference to Jews in immigration and ensure the underlying conditions necessary for Israel to continue to meet its function as the only country in which the Jewish people realize their right to political self-determination. In those matters in which a state is allowed to be involved in the welfare of the Jewish people, it may also be assisted by national Jewish institutions. These solutions also do not require termination of the connection between Israel and Jews in the Diaspora. This tie can continue through cooperation between Israel and the national Jewish institutions. Finally, the solutions are certainly consistent with preserving the link between the founding philosophy of the State of Israel and its symbols, and the fate of the Jewish people and the Zionist movement. Regardless of future developments, the Zionist movement and the struggles waged to establish the State and make it bloom, are an important part of its history.

Despite all this, I believe that the better solution for Israel and one that will preserve the accomplishments of Zionism, is not reciprocal privatization of the national movements, but the readiness to recognize both. To recognize the national-cultural rights of Arabs in Israel is not to forego the State's Jewish uniqueness. Arab citizens of Israel are a minority. In a democratic state, they

are entitled to protection of their rights, but not to the complete realization of their preferences. In the foreseeable future, only the Jewish people will be entitled to self-determination in Israel, but this must not lead to total disregard for the group rights of Arab citizens.

Furthermore, recognition of the national rights of Arab citizens of Israel is not only morally significant, it is an urgent political necessity. It would be foolish to ignore the fact that Arab citizens of Israel consider their national identity as a central part of their identity. Only recognition of this reality will enable, finally, the kind of dialogue that these national movements must maintain to reach an understanding on coexistence in the framework of the State of Israel. Such an understanding will give more complete meaning to the right to civic equality, and provide a fair response both to the needs of Arabs as individuals and to their interests as a group or groups. Most importantly, only such an understanding will enable attainment of responsible understandings about the interpretation of the civic bond that joins all citizens of the state, alongside the active, but different national identity of the various groups. Only recognition of the national-cultural bond of Arabs, which will receive political realization in a Palestinian state, can justify the demand for Arab recognition of the importance of the national-cultural bond of the Jews that justifies a Jewish state. Organization of the institutions of the Arab national movement in Israel will assist the Jewish State to act fairly towards Arabs living in Israel. It will also obligate Arabs living in Israel not to simply complain (justifiably) about discrimination, but to cooperate constructively and responsibly in pondering jointly the ways to coexist in Israel.

It is precisely Israel, which wants to preserve a strong bond between it and the revival of the Jewish people in the country, in all its forms, that would be wise not to identify the Jewishness of the State with the institutions and goals of Zionism.

This severance is not the end of Zionism: The reverse is true. It may be a requisite condition to renew its necessity and strengthen its ability to cope with the important national objectives facing the Jewish people in Israel and abroad. One of these objectives is demonstrating how a state, proud of its Jewish character and desiring to preserve it, can be democratic and just, when it has a large local population belonging to another national group. Another vital challenge is the preservation and development of Jewish identity, in all its forms, in Israel and abroad, and a creative rethinking of the ties between the Jewish State and the Diaspora. The State is a tool of enormous importance. However, a tool is measured by its ability to maintain standards and values, and these cannot be supplied only by a State.

## End Notes:

1. H.C. 6698/95, *Qa'dan v. Israel Lands Administration, et. al.*, P.D. 54 (1) 258.
2. *Brown v. Board of Education*, 347 U.S. 483 (1954).
3. Apparently, the Supreme Court in *Qa'dan* wanted to mention the law in *Brown*. A clear indication of this is that, in *Brown*, too, the U.S. Supreme Court distinguished between the holding in principle - that in education, separate cannot be equal and therefore, separate education systems are not legal - and the relief granted. The U.S. Court did not consider the petition as applying only to the petitioners, but also to the entire educational system in the Southern States. It was completely aware that it was causing an earthquake, and that the decision would require prolonged structural and systemic groundwork. It refrained, therefore, from ordering that the petitioners be allowed to study in the schools they chose, and imposed a duty to prepare for a situation of equality "with all deliberate speed." The Supreme Court in *Qa'dan* used the same expression, but emphasized that it limits its comments to this case and to the future. Thus, its refusal to grant explicit relief is surprising, and it is unclear why prolonged preparation time is necessary.
4. On this point, the justices disagree. Justice Kedmi does not concur with this holding as regards Katzir, in part because the land allocation was made to the cooperative association some time ago. Justice Heshin concurs with the majority, but it is unclear with which of the reasons he agrees. Three of the justices who heard the case (President Barak and Justices Ohr and Zamir) agree with the entire judgment.
5. An important implication of this point is that the judgment is limited to State-owned land. It does not take a position on whether it is permissible to limit transfer of non-Jewish rights in land belonging to the Jewish national institutions.
6. If land allocation to the Jewish Agency was intended only to enable a policy of prohibition of Arabs, if this entire policy is forbidden, and if the Jewish Agency is unable or unwilling to be involved in settlement activity that does not prohibit

Arabs where such action is illegal, then this decision can also have far-reaching practical implications, to the point of making future Jewish Agency settlement activity in Israel superfluous. Minister Yossi Beilin made comments along these lines, but based on the judgment itself, it is too early to reach such far-reaching conclusions. The Jewish Agency argued that its activities are not illegal because of prohibited discrimination between Jews and non-Jews. In the Katzir case, a majority of the justices rejected its argument.

7. The difference between the State's arguments and those of the Jewish Agency and Katzir on this matter is interesting. Because the State is the one that cannot relieve itself of its duties by transferring functions to another body, it is required to protect those functions that it considers necessary and legitimate. In this case, the petition enabled the State to transfer the responsibility. The Supreme Court places, and rightly so, the responsibility at the State's doorstep.
8. The vague relief granted by the Court may indicate awareness of the difficulty of this conclusion.
9. The Supreme Court may have been willing to enable the establishment of a purely Arab community, because it recognizes, *in dicta*, the right of minorities to demand separation as a way to protect their culture.
10. I will not explore the difficult question of whether such a policy also justifies total prohibition. Substantively, a person does not have a right or a legitimate interest in living in a community that does not have persons of another nationality. He has the right to choose to live, where possible, in a supportive cultural, shared-identity community. Ostensibly, this wording only justifies the setting of quotas, but quotas also differ from the principle of "nationality blindness." It is precisely intentionally established, bi-national communities that are unable to allow themselves to be blind to nationality; they must ensure a balance between the two peoples.
11. In towns and many other communities that do not have a legal way to prevent a person from purchasing or renting property, the Arabs are the ones prohibited. It is not

surprising that Adalah: The Legal Center for Arab Minority Rights in Israel is also concerned that integration of financially-secure Arab families in Jewish communities is liable to weaken the Arab struggle to obtain sufficient housing for Arabs.

12. The founding of the Jewish State, in the most limited meaning of a State containing a large Jewish majority, harms the State's non-Jewish residents and citizens in an important sense: It turns them into a minority in a State that was established on land where they, the non-Jews, had once been the majority. It is important to admit this harm, and also to admit that it is continuing unremittingly. Another feature of the Jewish State is control over immigration, and the systematic effort to increase the Jewish majority in the country. Furthermore, the Jewish State "celebrates" its Jewishness in symbolic and planned ways. These actions increase the estrangement of Arab citizens from the State because the State was founded on their catastrophe. These elements, as important as they are to understanding the profound difficulties of Arab-Israelis' relations to the State, do not amount to discrimination against them.
13. In the existing situation, in which the Arab population has almost no recognized institutions, while Jewish national institutions are incorporated by statute, and the State and its symbols are entirely Jewish, a pure "liberal" solution of this kind is a mockery.

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**Ruth Gavison** is a Professor of Law at Hebrew University.



Before and After *Qa'dan*:

# Communities, Lawyers, and Legal Strategies for Social Change

**Neta Ziv**

The Supreme Court's decision in *Qa'dan* received widespread reaction.<sup>1</sup> The judgment will be taught as a leading case on the principles of equality in Israeli jurisprudence. It will serve as an immense platform for discussion on the scope of the rights it establishes, and its contribution in clarifying the tension between the Jewish character of the state and Israel's commitment to democracy and equality. Some people will praise the decision, others will criticize its limitations, but there is no dispute about its importance as a precedent. *Qa'dan* was decided by five Supreme Court justices, but the decision is only one link in the long chain of processes, and it creates a potential for future action and advantageous use of the opportunity it invites.

This article will focus on a stage that is not generally given serious attention: The story behind the Supreme Court litigation, its unique history and background, the quandaries that preceded the filing of the petition, and the legal strategy that was chosen. I shall also raise some thoughts about possible implications of the judgment on the nature of "communal settlements," and the ways to ensure maximum equality of opportunity to reside in them.

I represented the petitioners in *Qa'dan* at the beginning of the legal proceedings. In 1995, in the context of my work at The Association for Civil Rights in Israel (ACRI), I met with 'Adel and Iman Qa'dan for the first time. I managed the file and was involved in making several of the decisions discussed in this article. In the summer of 1996, I left ACRI and went abroad to study, at which time Attorney Dan Yakir took over the representation of the petitioners. Although I was no longer representing the Qa'dans in the court action, I remained deeply attached to developments in the case. The *Qa'dan* file was one of the peaks of my professional career, and I dedicated much time, thought, and energy to it. When I left legal practice, I had the opportunity to observe the case from the

sidelines. Because of my unique position and perspective as the first attorney on the case, I wish to raise some thoughts after-the-fact, a few in criticism (constructive, I hope), in the belief that practical experience can enrich theoretical understanding.

Five years passed from the time that I first met the petitioners until the Court delivered its decision. During this time, the opinions and thoughts of the persons involved - among them the petitioners, the organization that represented them, the attorneys, the Court, and the Israeli public - would change regarding the questions raised by the case. Having been involved in the file, I am confident that I can examine the case in retrospect without my thoughts weakening the decision's importance. This article is written from that perspective.

My basic assumption is that, in reading any judgment, it is necessary to be aware that a legal proceeding has "hidden" participants, who generally remain behind the scenes of the official decision that is published and given notoriety. Searching for the identity of these legal agents, understanding their personal and professional motivations, and explaining the manner in which they perceive their role and the role of the law are important elements that assist us in better understanding the final product of the court file - the judgment.<sup>2</sup> The identity of the clients and their attorneys, the nature of the relationship that develops between them, the character of the professional-organizational framework in which the attorneys act and the ideology on which it is based, the professional-organizational framework's perception of its public-social role and of the function of the law, all have significance in the legal proceeding.<sup>3</sup>

A lawyer meets her client and the client explains the problem she is facing. The lawyer conceptualizes the problem to the client and later to the Court, in accordance with the accepted rules

of judicial practice.<sup>4</sup> The client's story reflects one way of describing the reality that she experienced. The lawyer reconstructs the story in a way that can, in her opinion, best achieve the desired objectives within the framework of the legal system. No one "objective" way exists to understand or describe the client's story, and every presentation, both the factual and legal aspects, is an expression of a normative stance, and affects the course and development of the court file. The lawyer can choose not to highlight certain facts that lie in the background of her client's claim, and to emphasize other facts. She can put before the court narrow and limited issues or present the case in its broadest aspects. She can choose how to categorize the case and the way to classify it, in accordance with recognized legal causes of action, and she can support it by the use of binding legal precedents. That is to say, what is not argued is no less significant than what is argued.

Thus, the lawyer representing the client has, to some degree, control over how to present the client's case in the courts. However, this control is not total. Lawyers carry with them their personal history and impress it upon their professional work. This personal history reflects their political and social milieu, their individual identity and perception of their role, e.g., their professional ethics in the broad sense.<sup>5</sup> This is especially true of social change or cause lawyers,<sup>6</sup> as they consider the law an important means toward the question of what change is desired, how to achieve it, the role of the client in that context, and the role of the law and the legal system in attaining the objectives. These factors merge and remain indivisible in the process through which the client's story becomes the story that the lawyer tells in court.

The *Qa'dan* case illustrates this process. The case reached ACRI through attorney Tawfiq Jabareen, an activist for the Palestinian minority, who also wished to reside in Katzir at the time.

The significance of the case was clear from the start: It could be used to criticize and challenge the legitimacy of Israeli settlement policy, practiced for years by means of the Israel Lands Administration (ILA), which sets aside settlements exclusively for Jews. This policy reflects the Zionist ideology of the State, which considered Jewish settlement throughout Israel a primary national interest.

The discussions at ACRI highlighted this awareness in two principal ways. The first issue raised was strategic: How to present the subject to the court and the public. The second issue discussed was substantive: The vast majority of attorneys working at ACRI at that time were Jews and not Arabs, and it was not clear how much agreement there was over the specific ways and arrangements through which the Jewish character of Israel should be expressed. I shall concentrate on the first aspect.

The relevant ACRI committees clearly understood that both in the courts and among the Israeli public, the file would be considered "problematic" and "sensitive" because it calls for a fundamental examination of the policy of "Judaizing" selected geographic areas in Israel. From this perspective, Katzir reflected the Zionist conception deeply rooted in the collective consciousness of Jews in Israel, which encouraged Jewish settlement in heavily populated Arab areas. By force, then, the petition questioned the legitimacy of hundreds of kibbutzim, moshavim, and observation posts spread throughout Israel, which had been established over more than three generations, settlement points that constituted the backbone of the labor settlement movement, one of the pillars of Zionism.

To meet this difficulty and to increase the chances of winning, the following strategy was adopted: The *Qa'dan* case would be presented in a way that would least "threaten" the values of the Zionist consensus. In other words, we believed that

the more the file was viewed as a challenge to the Zionist enterprise, the harder it would be to win, and the opposite - the softer and less revolutionary the presentation, the better the chances for victory. Application of this approach was reflected, for example, in the adoption of an explicit position not to settle scores with past settlement policy, and to drop legal arguments on the question of the legitimacy of the Jewish Agency as a factor in settlement activity over the years. The petition declared, therefore, that it does not relate to the question of the legitimacy of the collective settlement enterprise (kibbutzim and moshavim) but focuses on current and future settlement policy. The petition also limited itself to communities that are not based on a strong collective principle. It did not cover kibbutzim, for example, although discrimination is a severe problem there.

As noted, ACRI lawyers believed that proceeding in this way increased the petition's chances of success, and that it was worthwhile to pay the political "price" of failing to use the legal proceeding as an arena to document an alternative history - taken from the point of view and experience of the minority group - rather than the majority, as commonly accepted. This opinion also conformed to the substantive positions held by a significant portion of the employees and activists in ACRI, so that its adoption enabled the organization to avoid disagreements that almost certainly would have arisen if a more radical position had been adopted.

A second way to soften the claim in the petition was to place the difficulty with the selection process used by Katzir into the broader context of groups that are vulnerable and suffer discrimination. As such, we appended to the petition the expert opinion of Dr. Oren Yiftael, a geographer from Ben-Gurion University, who had thoroughly researched the connection between Israel's land policy and social inequality. The opinion described the negative social effects that

the ILA-Jewish Agency-Katzir Cooperative Association policy has on perpetuation of social gaps between powerful and weak populations in Israel. Arguments like this were raised for two reasons. The first reason was to inform the Court about the effects of that policy in areas other than Jewish-Arab relations, e.g., that the policy leads directly to social stratification based on class. The second reason was to enable the Court, if it so wished, to use these social statistics to forbid the discriminatory policy, not only because it is based on the national aspect of Jewish-Arab relations, but also because it harms other weak populations (such as Mizrahim, single-parent families, financially disadvantaged families, and families with disabled children).

The Court decided to base its ruling on the arguments of the first kind, and almost totally ignored those claims relating to the social aspect. The decision ignores the grave discriminatory implications of the selection policy and privatization of public land on other weak populations that do not benefit equally from the new forms of communal settlements. Possibly, the Court did not need the social aspects to support its precedent-setting decision on Jewish-Arab relations in Israel. In any event, Israeli law does not recognize discrimination based on social class, contrary to the protection it affords against discrimination based on group membership defined by sex, nationality, or religion. The poor and persons belonging to weak socio-economic populations have difficulty in defining their subordinate status in recognizable terms of class discrimination, and the Court has not yet shown sensitivity to those mechanisms that perpetuate socio-economic gaps.

Rather, the judgment is openly and clearly based on the time and scope with which the petition deals. More than once in the Court's decision, Chief Justice Barak made clear that the petition and the judgment look to the future, and that the judgment



does not apply to various kinds of communities (e.g., kibbutzim and those established for security reasons). Reading the decision, one gets the impression that Barak selected these statements from the petition to lay a basis for his holdings and to “minimize” the revolutionary character of the decision.<sup>7</sup>

It is fair to say, then, that the selected strategy succeeded in the sense that it enabled (or at least assisted in obtaining) a judicial precedent. However, it should be noted that this success came at a price. This approach led to a judgment that ignores the history of Arabs in Israel, narrated from their perspective. The petition laid out a story presented from a clearly Zionist outlook, and does not recognize or document the systematic land discrimination against Arabs in Israel. Furthermore, the relief given to the petitioners is vague, and it is unclear how it will be realized in practice. Arguably, this result was inevitable. It is impossible to expect that a court, dependent on the public for its political legitimacy, would act otherwise. The judicial system is not the appropriate venue for making acute historical accountings, or for the expression of regret by the majority to the minority who were dispossessed of their land. Breakthroughs of this kind would be made in other places.

In-depth discussion of this question is outside the scope of this article. My objective is to point out the place, role, and also the responsibility of lawyers who serve as important agents in managing court files that establish and define the parameters of the discourse in which courts operate. Lawyers must at least be aware that how they present a legal problem before the court is important. Thus, they are professionally responsible for taking into account the consequences that their choice of presentation has on the course of the file they are handling.

The focus on the national, rather than the social aspects raised by the petition, prevented further

development of the deliberations on the difficulty inherent in the practices currently used in accepting residents into communal settlements. From this perspective, the Katzir case could have opened the way to renewed discussion on the entire matter of “communal” settlement, housing, and residence. It is common knowledge that many communal settlements still make acceptance of residents contingent on meeting conditions set by filtering committees of one sort or another. In making their determination to accept or reject the candidates, these committees rely on undisclosed criteria (e.g., the results of graphological or psychological tests).

A large percentage of the communities under discussion are not communal settlements in the traditional sense of the term. Economic cooperation and reciprocal guarantee do not exist in the community. In most instances, the members are a group of people interested in a high quality of life and standard of living in a non-urban environment - a desire that is not, of course, inherently unacceptable. The problem arises because the opportunity to benefit from this option, which is generally realized on public land, is not available on an equal and fair basis to all residents of the state. This option is closed not only to Arabs, but to other groups (and individuals) as well, who for various reasons, are not accepted into these communities.

As noted, the petitioners raised this point, but the Court related to it only indirectly and marginally. The Court holds in paragraph 34 of the judgment that “the state cannot, by means of a third party that employs a discriminatory policy, relieve itself of its lawful duty to practice equality when allocating land rights,” and continues that, “what the state may not do directly it may not do indirectly.” However, this is not an operative clause, and it does not relate comprehensively to the broader aspects of class and other discrimination resulting from the mechanism that

communal settlements employ in selecting who lives there.

I shall raise a few initial thoughts that may be helpful in future discussions on this issue, while leaving aside, for the time being, the question of whether affirmative action should be instituted by establishing exclusively Arab communities (e.g., by establishing an Arab town, a possibility previously raised and mentioned again after the *Qa'dan* decision). One way or another, every internal selection process in existing or new communities or neighborhoods must be eliminated and prohibited where they provide a specific group power to determine who can live in the community. In exceptional cases (of communities having a clearly unique life style, which is rare), the "communality" of a community must be expressed in establishing the expectations and obligations of the residents to participate in the public life of the community, and the rules of interpersonal conduct and conduct in the public domain. For example, the communality of a community can be expressed in the willingness to take part in local committees, in the readiness to contribute to the local school system, in the commitment to maintain a clean community and to care for its public areas, in the willingness to volunteer in public affairs, by obeying the rules on hours for operating a business, by volunteering for "civil defense," and by those rights and obligations through which a group of residents become a "community." If a person declares that he accepts these obligations, he should be allowed to purchase a home in the settlement and become part of the community being formed there. It is superfluous to add that the community being "Jewish," as regards the population that comprises it, cannot be, in my opinion, a legitimate condition for establishing it.

The decision in *Qa'dan* removed one of the barriers that directly and openly prevented equality between Jews and Arabs in Israel. Removal of the

barrier is necessary, although clearly insufficient by itself, to achieve equality in practice. On this point, the law finished its role and the burden of continuing the work passes into other, more complex arenas, in which it is necessary to delineate, one by one, and probably in an implicit manner, the principles that are founded in the Supreme Court's decision.

### End Notes:

1. H.C. 6698/95, *Qa'dan v. Israel Lands Administration, et. al.*, P.D. 54 (1) 258.
2. On the academic tendency to ignore attorneys as an element in understanding the law, see, e.g., David Luban and Michael Milleman, "Good Judgment: Teaching Ethics in Dark Times," 9(1) *Geo. J. L. Ethics* 31, 38 (1995).
3. On the socialization forces operating on attorneys and shaping their professional consciousness, see, e.g., Tanina Rostain, "Waking Up from Uneasy Dreams," 51(4) *Stan. L. Rev.* 955-957 (1999).
4. William H. Simon, "The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in a Post-Modern, Post-Reagan Era," 48 *U. Miami L. Rev.* 1099, 1106 (1994).
5. On the influence of the cultural dimension of judges on the manner in which they "tell stories" and make assumptions based on "judicial notice," see Menachem Mautner, "Common Sense, Legitimization, Compulsion: On Judges as Story Tellers," 7 *Phelim* 11 (1999) (Hebrew).
6. On the power of public-interest lawyers to establish the judicial and also the public agenda in the area of civil rights, see Derrick Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," 85 *Yale L. J.* 470 (1976).
7. See the Court's judgment at para. 37.

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**Neta Ziv** is a lawyer, teaching at Tel Aviv University, Faculty of Law.

A Reading in the Unread in the Qa'dan Decision:

# The Guest, the House, and the Judge

Marwan Dalal

[The rhetoric of law] is a magical thing. It transforms things into opposites. Difficult choices become obvious. Change becomes continuity. Real human suffering vanishes as we conjure up the specter of righteousness. Rhetoric becomes the smooth veneer on the cracked surface of the real and hard choices in law.

Thomas Ross, *The Rhetorical Tapestry of Race*, 1990<sup>1</sup>

*Qa'dan v. Israel Lands Administration, et. al.*<sup>2</sup> [hereinafter *Qa'dan*], delivered by the Supreme Court of Israel on 8 March 2000, is being represented as a revolutionary decision both in Israel and abroad.<sup>3</sup> In this case, the Court ruled that it is illegal for the State, through a third entity - the Jewish Agency - to prohibit an Arab family from purchasing land and residing in the exclusively Israeli Jewish settlement of Katzir.

Many consider *Qa'dan* to be a very progressive decision because for the first time, the Supreme Court of Israel ruled that the State is not allowed to discriminate directly or indirectly on the basis of religion or nationality in the allocation of state lands. Since 1961, an agreement between the Jewish National Fund (JNF) and the State of Israel has been in force, which grants the Israel Lands Administration (ILA) the right to manage "Israel's lands." These lands include "state-owned land," JNF land, and the governmental Development Authority land, according to the principles set by the JNF.<sup>4</sup> One of these important principles is the JNF's prohibition on selling or renting land to non-Jews. The Court's ruling in *Qa'dan* may be interpreted as opening any future land transfer from the State to the JNF to legal challenge. However, it is equally important to note that the Court emphasized that its decision is tied to the special facts of the case, and therefore its ruling is not necessarily applicable in similar circumstances.

In this essay, I argue that the Court's decision is not revolutionary, but rather follows mainstream Zionist thinking. To support my argument, I will examine the a-historical text of the petition (filed by the Association for Civil Rights in Israel (ACRI) on behalf the Qa'dan family) and the Court's decision. I will compare the political, legal and historical context of *Qa'dan* with that of *Brown v. Board of Education*,<sup>5</sup> [hereinafter *Brown*] a landmark United States Supreme Court case, which many legal scholars and commentators compared inaccurately to *Qa'dan*. A critical reading of *Qa'dan* and *Brown* demonstrates the ways in which courts and lawyers formulate or construct authoritatively a certain history and a certain memory, which are accepted as objective, neutral, and interest-free. It also underlines the Court's perception of current day political reality. This critical reading will reveal the conceptually conservative nature of *Qa'dan*, and explore the question of what the *Qa'dan* decision means for the Palestinian Arab community in Israel.

A law system's active participation in writing history is no longer questioned.<sup>6</sup> Legal actors such as law professors, lawyers and judges write history in law reviews, petitions, and court decisions. As members of society, they too are subject to conscious and subconscious uses as well as abuses of history. Whose history do these legal actors write? What history is memorialized? These questions are as important as the practical implications of courts' decisions.

Courts, as state institutions, formulate a consciousness, which is reflective of the state. Courts are different, however, from other state institutions, which also shape citizens' awareness of themselves and their perceptions of others, because citizens consider the courts to be objective. Questioning this perception of objectivity does not mean dismissing the idea of the rule of law. Rather, it means refusing to accept

ideology as objectivity. It reveals courts' authoritative might in declaring history, and thereby shaping identities and loyalties.

Many legal scholars and commentators instinctively, yet inaccurately, compared the Court's decision in *Qa'dan* with that of *Brown*. In this comparison, they argue that the Israeli Court acknowledged the existence of segregation-based discrimination against the Arab community and offered a remedy to the petitioners, as the US Court in *Brown* did for African-Americans. Even Mr. Qa'dan offers a similar reading of the decision: "We know today that this is a state of all its citizens ... The meaning of this is enough discrimination, enough racism - give coexistence a chance."<sup>7</sup> Mr. Qa'dan, however, is still not living in Katzir and is now wondering whether he will ever be able to live there, as the Court did not rule that Katzir must allow the Qa'dans to move into the settlement.

Before explaining the inaccuracy of the *Qa'dan-Brown* comparison, it is important to highlight the basic differences between the African-American community in the US and the Palestinian Arab community in Israel. Historically, African-Americans suffered bondage through slavery, whereas Palestinians endured colonial dispossession. While neither group chose its citizenship, African-Americans became a part of the heterogeneous, changed and complex American nation, only after courageous political struggles in the South and the North of the United States. Arab Palestinians, however, were and still are essentially excluded from the Israeli nation, which is defined according to religious-national terms of Jewishness. Palestinian citizens of Israel are, of course, a part of both the Palestinian people and the cultural space of the Arab world.<sup>8</sup>

Unlike *Qa'dan*, which was the first Israeli Supreme Court decision to acknowledge discrimination against Palestinians in Israel, *Brown* was part of a series of decisions recognizing and abolishing discrimination against Black

individuals.<sup>9</sup> *Brown's* novelty came from its declaration that the "separate but equal" doctrine was unjust. While popularly known as the case that mandated the integration of Black students into White schools, it actually took another Supreme Court decision to offer a remedy for segregation.<sup>10</sup> *Brown* is also popularly perceived as the beginning of a conceptual change in the relationship between the American establishment, the White citizenry and the African-American community in the U.S. The *Brown* decision should not be credited with this change, as it was African-American political activism during the civil rights movement in the 1960s and 1970s that brought about this change.<sup>11</sup>

*Brown* can be seen, on the other hand, as the end of an era rather than the beginning of a new one. *Brown* expresses a melting pot model of citizenship, but as Lawrence Freedman describes it in 1997: "What is missing from *Brown* and from the first generation of cases, is any sense that blacks constituted a 'nation.'"<sup>12</sup> Writing two years after *Brown*, W.E.B. Du Bois described the bi-partisan consensus between Republicans and Democrats and their presidential candidates on all issues. He called for African-Americans and their progressive supporters to abstain from voting in the upcoming presidential election. Forty-one years later, Freedman's conclusion echoes Du Bois' earlier call.<sup>13</sup>

*Brown* acknowledged past discriminatory policies and also criticized them, especially the prevailing doctrine of "separate but equal."<sup>14</sup> In contrast, the Israeli Court in *Qa'dan* relied on past discriminatory judgments in rendering its decision (e.g., *Wattad* and *Bourkan*), while portraying them as enlightened rulings which promoted affirmative action and substantive equality.<sup>15</sup> In addition, the Israeli Court complimented the century-long efforts of the Jewish Agency - the quasi-governmental entity that settled Jews on confiscated Palestinian lands and prohibited Arabs from living on them -

rather than critiquing its discriminatory practices. With both of these actions, the Israeli court wrote a history that conceals the past oppression of the Palestinians, disregards previous displacement, and transforms dispossession into a legitimate practice of the Jewish Agency. The petitioners' representatives also contributed to this writing of history by the Court. By acceding to the "important" role of the Jewish Agency and choosing not to challenge its policies, or at least choosing to be silent about it, the petitioners' representatives allied themselves with the Court and mainstream Zionist thinking.<sup>16</sup> In paragraph 37, Chief Justice Barak quotes the Qa'dans' representatives: "The petitioners do not focus their arguments around the legitimacy of the [Jewish Agency's] policies during the period which preceded the establishment of the state and during the years after it. Nor do they undermine the decisive role that the Jewish Agency played in settling Jews around the country during this century."

*Qa'dan* - the petition and the decision - not only excludes the history of Palestinians in Israel, but also misrepresents their political struggle today against the dominant Zionist nature of the state. Within the Zionist left, it is accepted that Israel can be both a Jewish and a democratic state. A controversy exists however, within this camp, around the meaning of a "Jewish state" - be it one with a Jewish essence or a Jewish nature. A Jewish essence means that the state should give priority to Jewish interests and dominance to Jewish values. A Jewish nature means solely that the state should retain a majority of Jews within its boundaries. The vast majority of Palestinians reject both positions because, whether intentionally or incidentally, they reinforce Jewish Zionist supremacy, which prevents any kind of equality between citizens, and excludes and marginalizes Palestinians. At the most, Palestinians in Israel are willing to discuss the idea of an essentially democratic State with some Jewish character.

Following the petitioner's lead, the Court in *Qa'dan* adopts the more conservative "essence" definition of the Jewishness of the State. This is (and the petitioners bear considerable responsibility for this) a regression within the Jewish Zionist left as to the meaning of the Jewishness of the State. Chief Justice Barak in paragraph 31 states:

True, the return of the Jewish people to their homeland is derived from the values of the state of Israel as both a Jewish and democratic state ... from these values of the state - *from each and every one of them* as well as from their combination from each other - it requires more than one conclusion: for instance, it requires that Hebrew should be the main language in the state, and that the state's holidays should reflect the national rebirth of the Jewish people, and it requires that the Jewish heritage be dominant in both the religious as well as the cultural heritage of the state ... (emphasis added-M.D.)

Thus, the Jewish essence of the State, according to Barak, grows out of its democratic essence alone, and not only derives from its Jewishness or from its "Jewish-democratic" definition. Democracy, therefore, according to C.J. Barak, is sufficient to reinforce Zionist supremacy in the country.

Chief Justice Barak's ruling thus blurs the tension between democracy and Jewish essence, and establishes them as ideas that co-exist and that actually reflect reality. Writing in his typical genre, mixing his description, his ruling, and perhaps his desire, C.J. Barak states in paragraph 31 that:

The state of Israel is a Jewish state, which has minorities living in it, among these minorities is the Arab one. Each of these

minorities enjoys full equal rights. True, there is a special key to enter the house granted to the Jewish people (see the Law of Return - 1950). But the minute a person is legally inside the house, then he enjoys equal rights like the other residents of the house. The Declaration of Independence expresses that, when it calls "Sons of the Arab people, residents of the state of Israel, we urge you to keep the peace and participate in state building based on full and equal citizenship." There is no contradiction, therefore, between the values of the state of Israel as a Jewish and democratic state and full equality for all its citizens.<sup>17</sup>

The Court's decision not only excludes the history of Palestinians, but is also far from reflective of their political struggle today. It is interesting to note that at the same time as the Court delivered its decision in *Qa'dan*, two conferences were held - one in Nazareth in March on the rights of 1948 uprooted Palestinian citizens of Israel, and one in Boston in April on the right of return for Palestinian refugees.<sup>18</sup> Concurrently, Palestinians in Israel demonstrated against land confiscation and home demolition by the Israeli authorities, and commemorated Land Day and the Nakba.<sup>19</sup> These are the issues that continue to bring Palestinians into the streets. And they certainly reflect a challenge to the Zionist domination of the state, be it Jewish in essence or in nature.

The Palestinian struggle inside Israel is in its early stages. Judging from other groups' experiences, this struggle is primarily political and only secondarily legal. At a "Conference of Condemnation of the Law of Land Gathering," in 1961, the late attorney Hanna Nakara advocated for a political struggle to restore justice to the dispossessed. His statements, made 53 years after the Palestine newspaper warned of the Zionists'

intent to dispossess the Palestinians,<sup>20</sup> are as relevant today as they were then:

From this place we shout in its face [the Israeli government] - return the villagers to their villages, return the confiscated lands to their owners, take off your hand from the 1,250,000 dunams of land that you have stolen from Arab peasants. This is our agenda today and every day, until right is back where it belongs and justice is restored.<sup>21</sup>

#### End Notes:

1. Thomas Ross, "The Rhetorical Tapestry of Race: White Innocence and Black Abstraction," in 32 *Wm. & Mary L.Rev.* 1 (Fall 1990).
2. H.C. 6698/95, *Qa'dan v. Israel Lands Administration, et. al.*, P.D. 54 (1) 258.
3. See also Lee Hockstader, "Jewish Communities Can Not Ban Arabs, Israeli Court Rules," *The Washington Post*, 9 March 2000; Joel Greenberg, "Israeli Court Rules Arab Couple Can Live in a Jewish Area," *The New York Times*, 9 March 2000; Deborah Sontag, "Israel is Slowly Shedding Harsh Treatment of Arabs," *The New York Times*, 7 April 2000; Tracy Wilkinson, "Israeli Ruling Bars Jewish Bias in Land Sales," *The Los Angeles Times*, 9 March 2000; Yair Sheleg, "Katzir and a State of All its Citizens," *Ha'aretz*, 14 March 2000; and Joseph Algazy, "The Katzir Controversy," *Ha'aretz*, 3 April 2000. In contrast, see Graham Usher, "One Land, One People," *al-Abram Weekly*, 6-12 April 2000.
4. According to the Land Administration Law (1960), the Israel Lands Administration (ILA) manages "Israel's lands," which is today 93% of the total land in Israel. Half of the ILA Board of Directors is comprised of representatives of Israeli ministries, with the other half made up of JNF representatives (one of whom represents the Jewish Agency).
5. *Brown v. Board of Education*, 347 U.S. 483 (1954).



## The Guest, the House, and the Judge

6. Austin Sarat and Thomas R. Kearns, eds., *History, Memory and the Law* (Ann Arbor: The University of Michigan Press, 1999).
7. Joel Greenberg, "Israeli Court Rules Arab Couple Can Live in a Jewish Area," *The New York Times*, 9 March 2000.
8. Of course the Zionist movement had no intention of creating a nation with "non-Jews." See Edward Said, *The Question of Palestine* (New York: Vintage, 1992) at 56-114.
9. See *State of Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938) (abolishing a ban on black students from attending law school in Missouri); *Morgan v. Commonwealth of Virginia*, 328 U.S. 373 (1946) (eliminating segregation on buses in the state of Virginia); and *Shelby v. Kramer*, 334 U.S. 1 (1948) (declaring illegal the enforcement of a covenant banning citizens of African or Asian descent from living in the same neighborhood with whites).
10. See *Brown v. Board of Education* (Brown II), 349 U.S. 294 (1955). See also Richard Delgado and Jean Stefancic, "The Social Construction of *Brown v. Board of Education*: Law Reform and the Reconstructive Paradox," 36 *Wm. & Mary L. Rev.* 547 (1995); Leslie W. Dunbar, "Not By Law Alone: Brown in Retrospect," 70 *Va.Q.L.Rev.* 205 (1994); and Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991) at 49-57.
11. See Martin Luther King Jr., "Let Justice Roll Down," *The Nation*, 15 March 1965; Michael Eric Dyson, *I May Not Get There With You: The True Martin Luther King, Jr.* (New York: Free Press, 2000); Cornel West, *Race Matters* (New York: Vintage, 1994) at 133-151; and Howard Zinn, *A People's History of the United States* (New York: Harper & Row, 1995) at 435-459.
12. Lawrence M. Freedman, "Brown in Context," in *Race, Law, & Culture*, ed. Austin Sarat, (Oxford: Oxford University Press, 1997) at 49, 63.
13. W.E.B. Du Bois, "Why I Won't Vote," *The Nation*, 20 October 1956.
14. See *Brown v. Board of Education*, 347 US 483, 489-495 (1954).
15. The Court relied, *inter alia*, on both H.C. 200/83, *Wattad v. Minister of Finance*, 38 (3) P.D. 113 and on H.C. 114/78, *Bourkan v. Minister of Finance*, 32 (2) P.D. 800 as equality based judgements. In *Wattad*, an Arab Member of Knesset challenged a government policy of paying benefits, reserved by law for those who served in the army, to yeshiva students who had not served. The petitioner argued that this policy violated the principle of equality and constituted discrimination because it exempted Arabs. The Supreme Court ruled that special treatment for yeshiva students was justified because of the traditional place of Torah study in Israeli society. In *Bourkan*, the Court ruled that an Arab, who applied to purchase an apartment in the newly reconstructed Jewish Quarter of the Old City of Jerusalem, could be barred from consideration as a potential buyer because the State has a national interest in developing and maintaining this area exclusively for Jews.
16. The decision not to attack the Jewish Agency, made for tactical reasons according the petitioners' representatives, is not convincing. Morton Horowitz's concluding words in *The Transformation of American Law 1870-1960* (New York: Oxford University Press, 1992) at 272, written in the American context, offers a pointed and sharp reply to both the petitioners' representatives and the Supreme Court: "Until we are able to transcend the American fixation with sharply separating law from politics, we will continue to fluctuate between the traditional polarities of American legal discourse, as each generation continues frantically to hide behind unhistorical and abstract universalism in order to deny, even to itself, its own political and moral choices." The consequence of separating law from politics in the case of *Qa'dan*, however, did not result in unhistorical universalism, but rather a nationalist and exclusive Zionist history.
17. Attorney General Elyakim Rubinstein reminds us that the Israeli Declaration of Independence includes the term "the right of..." in other and more frequent contexts than the one mentioned by C.J. Barak. The term appears another

seven times in the Declaration in the context of "the right of the Jewish people..." See Elyakim Rubenstein, "Basic Law: Human Dignity and Personal Freedom and Security Authorities," 21(1) Tel Aviv University Law Review 21, fn. 14 (1997). Barak similarly perceives the Declaration and Israeli society. See Aharon Barak, *The Interpretation of Law*, Vol. 3 (Jerusalem: Nevo Publishing, 1994) at 328-332, 338-341 (Hebrew). Nonetheless, Barak's inclusion of the Arab minority into Israeli society may be seen as a positive step, as he formerly excluded them in a December 1999 interview: "The goodness of a judge is determined through his ability to look at the general picture and say that here I have a divided society, a pluralist society that has different values. This society includes ultra-Orthodox [Jews], religious [Jews], and secular [Jews]. Now, let us see what are the values, the principles, that are common to this society." See The Israeli Bar Association, *Orekb ha-Din*, Issue No. 11 at 16, 24 (1999). For a different 1948 context see Walid Khalidi, "Plan Dalet: Master Plan for the Conquest of Palestine," 69 Journal of Palestine Studies 3 (1988). This article was first published in 1961.

18. Hussein Ibish, "They Still Have Their Rights," *The Boston Globe*, 8 April 2000.
19. Graham Usher, "One Land, One People," *al-Abram Weekly*, 6-12 April 2000. Usher writes: "On 30 March 2000, Swaid assembled again with several thousand of his people in the Galilee town of Sakhnin, site of some of the fiercest clashes in 1976 and burial ground of three of the six who died. But he was not there to mourn their passing. He was in Sakhnin to continue their struggle. Before 1976, Israel's confiscation policies against us were 'direct,' similar to those they use today against the Palestinians in the West Bank, said Swaid. After 1976, the confiscation policies in Israel became 'indirect.' We lose our lands now because the Israeli government needs them for 'military zones', 'nature reserves' and highways. But - he implies - it is the same theft. Among the thefts Palestinians in Israel are currently facing are Israeli government's plans to build a Trans-Israel highway between the Galilee and Negev on 20,000 dunams of land, 17,000 of them Arab owned. There are designs to forcibly resettle 60,000 of Israel's remaining 120,000 Bedouin

from their 'unrecognized villages' in the Negev to concentrate them demographically in three new townships."

20. Rashid Khalidi, *Palestinian Identity: The Construction of the Modern National Consciousness* (New York: Columbia University Press, 1997) at 94.
21. Hanna Nakara, *Advocate of the Land and of the People* (Akka: Dar el-Aswar, 1985) at 355 (Arabic). See also George Giacaman and Dag Jorund Lønning, ed., *After Oslo: New Realities, Old Problems* (London: Pluto Press, 1998); and Edward Said, *The End of the Peace Process: Oslo and After* (New York: Pantheon Books, 2000).

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**Marwan Dalal** is an Adalah Staff Attorney.

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# I Will Pick Him Some Green Almonds from My Land

Salman Natour

We have become accustomed to our dictator through the war, and we grew to love him more day by day, and with great genius we developed rituals for him. We replaced the gods of Babylon, Ashur, Kan'aan and Athens with our new gods wearing military uniforms with white collars and neckties. Our dictator is multinational: He is an Arab, a Jew, an American, and a European. He is also multi talented: He can drive a tank and listen to Beethoven and recite Andersen's tales for children by heart.

It will eventually become apparent to us that destroying the physical boundaries is insufficient to circumvent our state of anxiety, and that the peace we so aspire to reach is no more than an illusion, for war has planted fear deep within ourselves.

We use the discourse of war to talk about peace because we have never experienced real peace, nor have we had the experience of interacting with the 'other,' except in his singular relationship with each and every one of us. And when we insist on this relationship, we usurp his freedom and independence and vice versa. We, therefore, proceed with war using the discourse of peace.

War has its own language, and so does peace.

We have outgrown the discourse of war from which we weaved our novels, legends, and lexicon.

We know the 'other' only as an enemy who continues to threaten our existence. Consequently, deep in our minds, hearts, and souls we can only perceive his antagonism, and we have convinced ourselves that this is an everlasting state. We even started to exaggerate our unconscious interaction with this phenomenon to prove the legitimacy of our convictions.

War has deformed us and ruined our logic.

What will we do without an enemy? How will we spend our nights and days? How will we

develop a culture and live without fear?

We have extended the state of war and became accustomed to it. We have grown strong and our hearts have hardened as we developed the myth of courage and heroism.

Each one of us is a hero boasting his ability to overcome the enemy and throw him into the sea or the desert.

Each one of us sees the other as a fly or an insect, and he himself an elephant or a lethal tank.

We boast the atomic bomb and the deadly jet bombers, and count the corpses as we count banknotes.

Our hero is a martyr and a fighter who did not die before killing tens of our enemies or destroying a village. We take pride in the rituals of burial with wreaths and only remember him to pave the way for another martyr.

We live in legendary times. Each one of us has his own legend, his epic that has more fiction than reality, we believe our imagination as if it were real, and deny reality as if it were fictitious.

We have created a new language for life. Death is sacred, and life has no value. We have developed another discourse for literature. The poet is a messenger, and the writer is a prophet, and we are extremely creative when it comes to singing to the wound, the stone and the rifle. Geography taught us that New York is nearer to us than Damascus! For whoever lives in Haifa, like me, can reach New York in ten hours but can never reach Damascus. Also, for a Syrian from Damascus whose ancestors used to reach Nazareth riding a donkey, China is much closer!!

We are strong, because whoever possesses an atomic bomb is powerful by definition, and whoever does not possess it can build it, and these are facts of life. Do we really fear war?

None of us fears the other, but we are nations trembling with fear. We fear ourselves for ourselves.

We are afraid that our big lie will be exposed,

and that our myths will be destroyed, and our tales will stumble.

Every year in May, Israel celebrates its independence and the Palestinians commemorate their Nakba (Catastrophe).

On the same land, one people rejoices and another weeps, one people sings for freedom and another yearns for it.

It is the land of unbearable contradictions. Those who live on this land hate it, and those who are not permitted to return to it adore it. Both, however, fight over it with incredible jealousy.

Do you believe we can give up this love so easily?

We venerate this land, so how can we give up what is sacred to us in exchange for peace?

What would befall the prophets of this land: generals, politicians and intellectuals? The prophets of anger, revolution, hatred, killing and destruction of a human being's life and dignity?

They have made us more fearful for their fate than we are for ours, for they have convinced us that there can be no war without them, and no peace without them, and no homeland or future without them. They have made us believe that we are worthless without them, for we are the herd in their eyes and they the shepherds.

We have resigned ourselves to being the 'herd' and we have reached the conclusion that this is our inescapable destiny that has inspired our tales and made us accustomed to our dictator, loving him more day by day and performing the rituals with great genius.

We have replaced the gods of Babel, Ashour, Kan'aan and Athens with our new gods in their military uniforms and white collars and neckties.

Our dictator is multi-national; he is an Arab, a Jew, an American, and a European. He is also multi-talented; he can drive a tank and listen to Beethoven and even recite Anderson's tales for children by heart.

Yes, we fear ourselves for ourselves, because

we do not want to lose this way of life that we have become accustomed to. Our life is full of clamor, movement and action. We wake up listening to the news, and sleep as we listen to the news. We play with politics, and eat it as bread, and drink it as wine. No sooner do we finish a war than we start planning for the next one. No sooner do we get rid of an occupation than we have a more refined one, described by its members as an enlightened occupation and by its victim as destiny.

We are creative in aggression because we have jet planes, and in the heart of the East we have long arms that can reach Beirut, Damascus, Baghdad, and even Tunisia and Uganda, and other arms that can reach Kuwait, and other still to Sudan and even Tehran. This Orient with its deserts, mountains, valleys, fields, and rivers has become a network of mechanical arms that are capable of every imaginable thing and leave their owner no space for fear except for their well being.

We don't fear the machine; we fear for it. We spend money to develop it, consolidate and consecrate it. We adore it so much that we take away our children's bread to feed it, and leave them to play with plastic toys of this machine. We take away from their education to spend on developing this machine, make it more efficient. Our bullet no longer kills only one, but five when it goes astray, and even more when it is fired in the air. Our bombs are scattered into tens of bombs, and we have replaced our gunpowder with Napalm, and fire with lasers. How can we ever give up this deeply-rooted venerated tradition?

We are invincible heroes who do not fear death because it has become synonymous with daily life: we love it, cherish it, challenge it, invite it into our homes, our fields, and our beds. We offer it our

souls for free. We die on the roads and borders, in the bedrooms and classrooms to momentarily appear on international TV screens.

Our most popular song has become “with our souls and blood...” Our mothers ululate over the torn corpses of their sons, while the murderer receives honorary medals and certificates of appreciation, and the occupation soldier is nominated for a peace prize only because he did not kill the child who stoned him, only because he did not kill the child.

In fifty years, we have reinstated the entire history, recollected all the myths and awakened all the prophets: Abraham, Ismail, Jacob, Moses, Mohammad, and Jesus Christ to fight for the historic right on the one hand, and for the sake of ‘jihad’ on the other. We have used them to legitimize invasions, occupations, killing and dispersion, awaiting for our reward on doomsday because they have convinced us that this world is worthless.

We fear for this tradition and these cultural accomplishments, so how can we sacrifice them for the sake of a dubious peace?

I am a Palestinian writer who remained in his country and on his land and in his forefathers’ home, and I live in the Jewish State. When they celebrated their independence, I went to a Palestinian village whose residents were expelled in 1948. Nothing is left except the stones of its ruined houses and its figs and Cactus trees. Every year, its residents visit the site to cry and recite poetry over its vestiges. I saw a seventy-year old man sitting on a big stone, frowning and absorbed in his worries. I asked him about his sorrow. “I’m not sad.” he replied, “I’m only scared!”

“What scares you, old man?” I asked.

Bursting into tears, he answered, “To die before I return to my land.” Then he added, “Here was my house.”

On the same day, I went to another Palestinian

village whose residents were also expelled from their homes, but the houses have not been destroyed. Jewish artists now live in them. I met one of them, an old friend whom I have known for many years. I asked him: “Why aren’t you celebrating your independence day?”

“Have you come alone?” he asked.

“Yes. Why do you ask?” I said.

He said, “Since I came to live here, I dare not leave my house on this occasion because I am terrified. This house belongs to a Palestinian family living in a refugee camp. I heard that you visit your deserted villages on this occasion, and I am afraid that the owner of this house will come from the camp to pay a visit. I don’t know how to behave should he decide to do that. Shall I allow him to visit it? Will I bid him welcome. How do you say welcome in Arabic? How do you say please come in? I will offer him a soft drink, not wine or beer, and will invite him to have a cup of coffee and I’ll pick some green almonds from my land. I’ll be nice and humane with him. I know only four words in Arabic: ‘Ahlan’ (welcome), ‘Keef halak’ (how are you?), ‘Shoo ismak,’ (what is your name?), and ‘Hawiyytak’ (give me your ID card). I learned them in the army. Will he be pleased that I’m speaking to him in Arabic? How do you say, ‘would you like some juice?’ Would he be pleased if I offer him some juice?”

“That would be extremely kind of you,” I answered. “Of course, he will be happy. But what will you say should he tell you ‘this is my house, and I want to return to it.’”

My Jewish friend, the artist, went quiet, his face darkened, and his forehead wrinkled. After a while, his face lit up as he asked: “How do you say goodbye, get lost, leave ... in Arabic?”

No one from the refugee camp came that day to the artists’ village because the Israelis prevented them from entering. But why was my friend so scared?

We fear ourselves for ourselves because we

have set up narrow borders for our humanity, and we are afraid that the “other” will force us to traverse these borders. To be human to a certain extent is a good thing, but to be human without limits is terrifying.

So, forgive us our restricted humanity, and excuse us for using the language of war to talk about peace, for how else can we explain the reason why we sing the praises of peace and the atomic bomb at the same time?

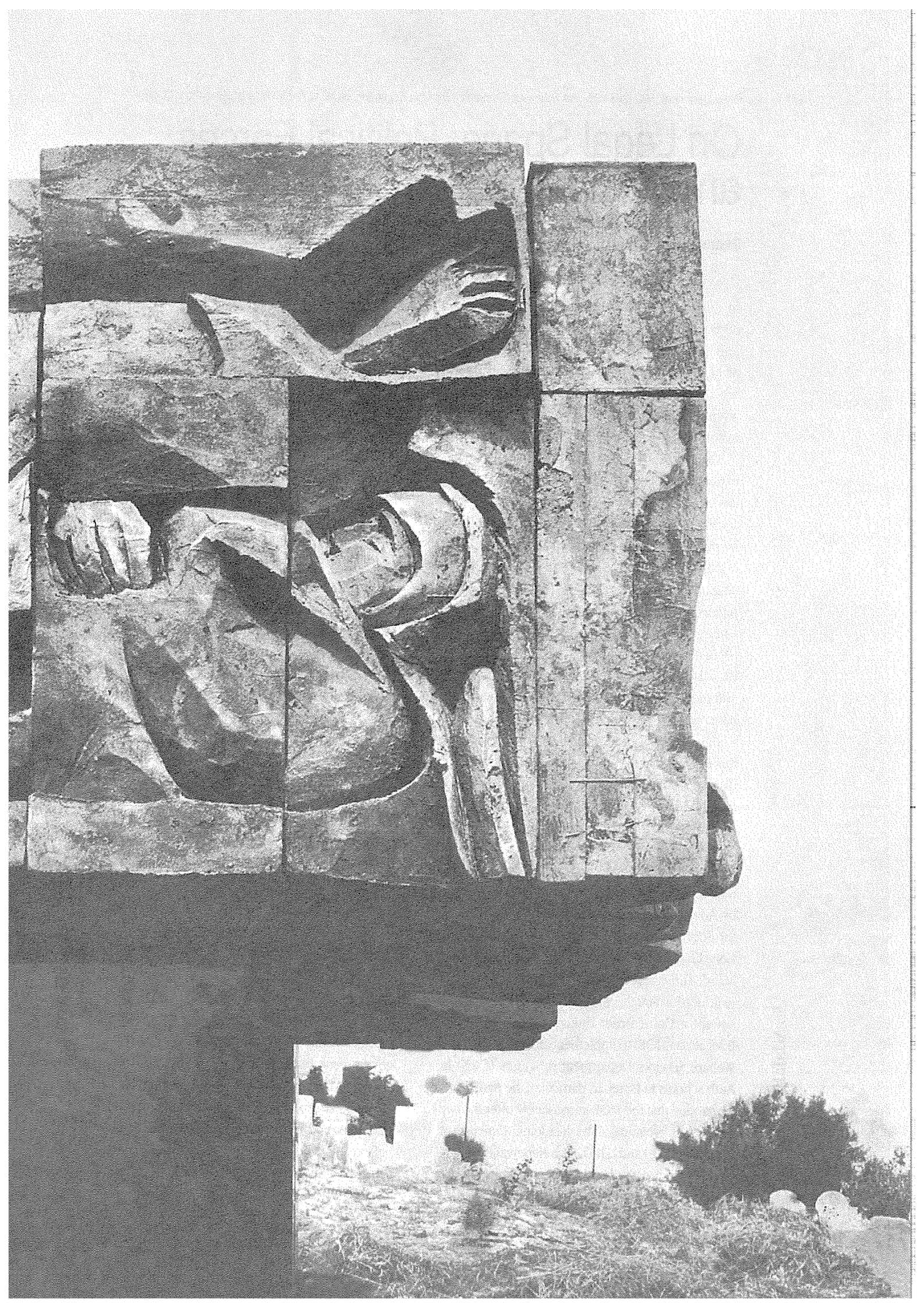
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**Salman Natour** *is an author and a playwright.*

This paper was read at a conference entitled “Fear in Societies that Suffer National Conflicts,” organized by and held at Helvetkern University in Zurich, Switzerland on 28-29 May 2000.









# On Legal Space, Political Forces, and Social Injustice

**Samera Esmeir**

In this essay, I will examine how the separation between (the relatively) autonomous field of law and social, political and economic forces is produced through an analysis of discursive legal practices. These practices provide the field of law with a set of ideas seemingly different from the materiality of social relations.

Ostensibly, the existing difference between the material-political and the normative-legal grants law a legitimacy and universality that hovers over social relations. However, this difference is created by pushing aside and ignoring the discrimination, occupation, injustice, and oppression characterizing social relations. The legal discourse passes by the social oppression in silence, or with a murmur at the most, and continues along its way using abstract, "neutral," and "objective" language. Creation of the difference between the material and the conceptual - between the law on the one hand and the State and society on the other hand - is an infinite process; hence, the difference is never fixed and is forever in danger of disintegration. The law, as if, aspires to establish this difference but does not completely succeed. As a result, it, and the system that creates it, can be exposed.

This case comment analyzes a recent Israeli Supreme Court decision on a petition filed in 1997 by Adalah on behalf of the Follow-up Committee for Arab Education (FUCAE), Dr. 'Awad Farih, Coordinator of the Negev Parents Committee, and Mahdi Turi, a student in Rahat, against the Ministry of Education and the State of Israel.<sup>1</sup> The petitioners sought a Court order directing the Ministry of Education (MOE) to implement all Educational and Welfare Services Department programs (EWS) in Arab schools in Israel. In particular, the petitioners demanded that the MOE immediately offer the two main EWS programs: 'The Academic Enrichment Program' (AEP) and 'The Urban Renewal Program' (URP), which combined, receive some 65% of the Department's budget. The MOE offered the AEP,

which was designed to help socio-economically weak communities, in Jewish schools since the 1970s and excluded all Arab schools. The MOE provided URP - supplemental education and welfare services - in selected schools in poor urban neighborhoods. Only 4 of the 140 Arab towns and villages in Israel received URP benefits.

I shall review the manner in which the Supreme Court, in this case, seeks to establish a difference between history and oppressive reality, on the one hand, by displacing it; and objective legal discourse, on the other hand, by solely grounding its decision on it. I will also show how the Court failed in this "mission." The very process of establishing difference is inherently bound to fail. In this instance, the Court's rhetoric reflects the failure in both what is present and what is absent. Only by understanding the Court's failure (not total, of course), can we evaluate the opening paragraph of Moshe Reinfeld's article reporting on the judgment, which appeared in *Ha'aretz* on 21 July 2000:

After years of discrimination in education within the Arab sector, the State took significant measures to promote equality in the distribution of resources based on the Arab percentage of the population. Thus, ruled the High Court of Justice yesterday after more than three years of hearings.

This paragraph, like the rhetoric of the judgment, describes the Court as the State's spokesperson, depicting an intimate connection between the judicial branch and the executive branch of government, between law and politics, and thus, failing to form a total separation and difference between them. The Court's decision and the newspaper article reporting on it lead readers to believe that the State requested and obtained a declaratory judgment from the Court sanctioning the State's actions.

The petition filed in this case is emphatically different. The petitioners depicted the harsh reality in the Arab education system in Israel at length. They provided several expert opinions in the petition indicating the dismal situation, and numerous documents showing that the State knew of the profound inequality between Arab and Jewish educational opportunities. The respondents admitted that Palestinian citizens were discriminated against and contended that the MOE would gradually rectify the injustice. The State declared that: "Following the filing of the petition, the respondent reviewed its position on the activity of the Department in the minorities sector and decided to expand its activity there, setting a goal that within five years, 20% of the Department's budget would be allocated to the minorities sector." However, the respondents noted, this gradual implementation cannot apply to the URP, because it is operated by the Ministry of Housing (MOH) and not the MOE. As such, the MOH decides upon which neighborhoods to include in the URP.

The Court decided not to rule on the issue of the URP. As for the AEP, the Court found that during the three years since the petition was filed, the MOE had begun to gradually implement it in Arab schools. The Court thus concluded that "the matter of the present petition was thoroughly resolved and is superfluous. For this reason, the petition is denied."

In its judgment, the Court avoided all description of the discriminatory reality suffered by Arab communities and schools. The opening paragraph of the Court's decision, written by Justice Beinesh, states:

In their petition, the petitioners laid out before us a rather gloomy factual base indicating that the Department, which *they contend* is the most important department involved in advancing Israel's weak

populations by operating projects and programs in educational institutions, does not operate its programs in Arab educational institutions in Israel (emphasis added - S.E.).

Justice Beinesh refuses to describe, even in brief, "the gloomy reality" that the petitioners depict at length in the petition. The Court even refuses to accept the petitioners' claim that the Department of Educational and Welfare Services is the most important entity involved in assisting disadvantaged populations, and holds that this statement is only a "contention of the petitioners." Toward the end of the decision, Justice Beinesh returns to the matter of discrimination, but here too, refuses to describe it, observing that:

We can only repeat that, as to the petition, there was no dispute that education in the Arab sector had been oppressed for many years, and there was also no dispute that steps had to be taken to improve the situation.

What Justice Beinesh neglected to note in the Court's decision is that Arab communities are the poorest in Israel; all but one are found within the five lowest socio-economic groups. Statistics of the Ministry of Education (MOE) show that the percentage of students obtaining a matriculation diploma during the 1995-1996 school year was "23% in the Arab sector, 27% in the Druze sector, 5.9% in the Negev Bedouin sector, and 45% in the Jewish sector." In addition, according to the MOE, Arab students comprise some 80% of all school dropouts.

Although emphasized in the petition, Justice Beinesh did not mention these facts in the Court's judgment, which both refused to merge legal language with the discriminatory reality of social relations, or expose its contribution to the

discrimination. The phrases “gloomy reality” and “the many years of discrimination against Arab education” are intended to leave the legal space free of any material gross intervention liable to remind the reader what the decision deals with - injustice, oppression, and discrimination against Palestinian citizens of Israel.

The Court also refrained from describing the identity of the petitioners, perhaps fearing that the description would lead to a glimpse at the prolonged historical oppression. For example, the judgment does not mention that the first petitioner - the Follow-up Committee for Arab Education - is an Arab non-profit corporation working for 20 years with the High Follow-up Committee for Arab Affairs in Israel to promote and improve Arab education. The judgment also ignores the fact that the third petitioner - Mahdi Turi - is a ninth-grade student at a school in Rahat in the Negev, a community found at the very bottom of the socio-economic ladder in 1995. The number of students who obtained a matriculation diploma in Rahat in the 1995-1996 school year was the lowest in Israel: Of those who took the matriculation exam, only 18.1% received a matriculation diploma.

As noted, the Court refused to hear the petitioners' complaints directed against the failure to apply the URP in Arab communities and neighborhoods, stating that the petitioners' claims were too general. The State did not raise the 'generality' argument; in fact, the State acknowledged the lack of clear criteria for selecting neighborhoods to participate in the URP. The State also provided the Court with a list of neighborhoods in which the URP operated. This list could have allowed for a detailed discussion of the budgets allocated, and the criteria used for the URP. However, the Court refused to venture into this discussion, and accepted the State's representations and good will in its judgment, without ruling on the issue:

The goal of directing 20% of the Department's budget to the minorities sector also applies to the Department's urban renewal budget, and the goal will be reached, as far as possible, already in 2001.

The Court's refusal to decide the URP issue indicates the manner in which the law offers legal representations and professional tools seemingly different from the discriminatory social relations that are heard by the Court. The decision instructs us that the Court does not contribute to the discrimination of Palestinian citizens; the Court *only refuses* to discuss the discrimination against them. The Court does not mention that the URP comprise some 30% of the EWS programs. Although both the discrimination and the refusal to hear the matter lie within the same space of discriminatory social relations, the judgment, by utilizing the legal invention referred to as an “argument stated in general terms,” establishes the difference between its refusal to discuss the discrimination and the “true” discrimination. The Court's refusal is based on an abstract legal precept from which its “neutrality” results. The “true” discrimination is that of the Ministry of Housing, which can be avoided by means of the legal precept.

In addition, the Court is silent about other facts set forth by the petitioners, namely, the petitioners' requests, over the preceding three years to the MOE for the operation of EWS in Arab schools. The MOE made repeated promises, but reneged on those commitments when a new government came to power. This situation should have raised the Court's suspicion regarding political promises, leading it to grant the petition and draft a decision requiring the MOE to fulfill its commitments. Instead, the Court chose to rule that the petition was superfluous, and to emphasize that the MOE agreed to implement the EWS programs in Arab schools. Thus, the Court avoided the necessity of



imposing responsibility on the State. The internal politics of the MOE, the large number of committees established in the past whose recommendations were never implemented, and the cumulative experience of unfulfilled government promises do not appear in the Court's decision. It is as if the law considers them irrelevant.

Further, the petitioners demanded *equal and immediate application* of all EWS programs in Arab schools. However, the Court accepted the goal that the MOE established for itself - allocation of 20% of the budget for Arab schools within five years. A reading of the petition indicates that the petitioners' request focused on *full equality and affirmative action*. The petitioners relied on the case of the *Israel Women's Network*,<sup>2</sup> in which the Court held that the principle of equality requires taking concrete measures to advance discriminated against populations. The petitioners argued that they are entitled to have the Minister of Education establish a policy of affirmative action in their favor, and to implement the EWS programs immediately to reduce existing gaps between them and other population groups. Full equality, according to the petitioners, is substantive not formal. When only 18.1% of students sitting for the matriculation exam in Rahat actually receive the diploma, as compared with 66.1% of students gaining this diploma in Herzliya (a Jewish town), it is clear that formal equality, reflected in an allocation of 20% of the budget, is insufficient to reduce the gap.

The 20-percent-of-the-budget criterion is abstract and ostensibly objective, reflecting the percentage of the Palestinian population in Israel. This criterion saves the Court from examining why the need for EWS programs by the Arab population is much greater than 20%. In establishing the "objective" criterion of 20%, the Court produces a difference between universal and enlightened legal norms and the dismal material reality found outside the law.<sup>3</sup> The holding conceals the fact that the

Court's decision does little to bring about true equality between Palestinians and Jews in Israel, thus perpetuating the discrimination.

According to principles of the rule of law and separation of powers, judges are supposed to delineate the opposing positions of the parties, weigh the parties' legal arguments, set them against each other, and choose a particular position based on universal legal grounds. Ostensibly, the petitioners and respondents, who come from different socio-political spheres holding various degrees of power, enter the legal space of the court free of oppression and on equal terms. The entry into the legal space constitutes a magical act, as if the historic injustice of one side maltreating the other is converted into a situation of mutuality - difference becomes similarity, inequality changes to equality.

The judges observe equal opponents and endeavor to preserve the magical effect of equality, giving equal time to the two parties. However, in making their decision, it appears that judges are aided by the cookbook of law, which provides an apolitical legal recipe intended to close the door that had, until then, remained open between legal space and extra-legal space, and confines the parties within the universal space of legal ideas. The judgment, the legal recipe, attempts to close the door, but fails because the door remains slightly open during the hearings, and uncontrollable political forces enter the courtroom. In this case, the judges failed to expel them, possibly because they did not want to, or because they invited them, or because they were unable.

The first political force that appeared in this case was the State's timetable, which ultimately controlled the Court's timetable. The petition was filed in May 1997. The Court soon thereafter issued an *order nisi*, and the State filed its response in December 1997. At that time, the MOE declared that it decided to expand its activity in Arab

schools, and intended to allocate 20% of its budget for this purpose within five years. At this stage, one of the primary disputes between the parties was already clear: Whether immediate or gradual implementation was the appropriate remedy for historical, intentional discrimination. The Court, however, yielded to the State's timetable:

We left the petition pending, at first following applications of the State, which was in the midst of examining the matter, and later because we wanted to investigate in depth the factual dispute on the changes that had occurred in the State's position since the petition was filed.

Indeed, Justice Beinesh dedicates 4.5 pages of her nine-page decision to various notices and requests for postponements made by the State. Only when the State's requests for postponement ceased, after three years, did the Court make its decision. In adopting the State's timetable, the Court in effect chose not to hear the primary disputes between the parties - the petitioners' request for affirmative action and immediate implementation of EWS programs. A hearing on this issue was certainly "superfluous" by July 2000, as the Court adopted the respondents' position in that it agreed to delay hearing the petition for some three years. By acting in this manner, the Court established that the power of the State compared with that of the petitioners also controls in its courtrooms.

Less than two weeks after filing its December response, the ostensibly egalitarian declaration by the State was replaced by an announcement that the Minister of Education had appointed a public commission to examine the operation of EWS programs. After this announcement, the Court decided to wait until the commission made its recommendations. The justices, we see, search the cookbook of politics, and not the cookbook of law, to find the principle of equality: appointed

commissions. After the commission issued its recommendation for gradual implementation, the Court again waited for the Minister to decide whether to accept or reject the recommendation. Now the Court searched the corridors of government for the principle of equality. In June 1998, the Minister decided that within two years, 20% of the EWS Department's budget would be allocated for Arab students, and within five years, 20% of the entire Ministry's budget would be allocated for Arab students.

In light of the Minister's decision, the Court should have returned to its timetable and decided the dispute over the appropriate remedy - immediate or gradual implementation. However, the Court postponed a hearing on the petition several more times, until the State announced, in March 1999, that 20% of the 1999 EWS Department budget was allocated for Arab students' needs, and that progress had been made in other areas. The Court decided to wait for the State again and again, until it found that the State made significant progress in attaining its declared goal - freeing the Court from having to decide the questions regarding affirmative action and immediate implementation of the programs.

In March 2000, the State filed another response, in which it stated that, in the 1999-2000 school year, 20% of EWS programs were allocated for Arab schools, except for a number of special cases and the URP. Only then did Justice Beinesh write the decision. On 20 July 2000, the spokesperson of the Court summoned journalists to hear the judgment.

The petitioners' legal contentions were made in opposition to the political forces raised by the State. The timetable and narrative presented by the State controlled the Court's decision. On the other hand, the political forces reflecting the gloomy political reality, sought to infiltrate together with the petition and the petitioners, but remained outside. They were expelled, together with the

legal arguments of the petitioners, at the moment they entered. It appears, however, that it was precisely the refusal to hear the legal arguments of the petitioners, and the decision to adopt the State's timetable that are what suppressed the establishment of the difference, and turned the Court into the State's spokesperson. It seems that the Court also realized this. Thus, it ordered the respondents to pay petitioners' expenses in the amount of NIS 20,000, a last desperate attempt to preserve the difference after it denied the petition.

### End Notes:

1. H.C. 2814/97, *The Follow-up Committee for Arab Education, et. al. v. The Ministry of Education, et. al.*, P.D. 54 (3) 233.
2. H.C. 453/94, *Israel Women's Network v. Government of Israel, et. al.*, P.D. 48 (5) 501.
3. Parenthetically, this formal 20-percent-of-the-budget criterion was rejected by the Court in its decision on Adalah's petition against the Minister of Religious Affairs. H.C. 240/98, *Adalah, et. al. v. Minister of Religious Affairs, et. al.*, P.D. 52 (5) 167.

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**Samera Esmeir** is a Ph.D. student at the Institute for Law and Society, New York University.



**A'bed A'bdi:** Land Day Monument - Visions (1976-1978)



# The Mandate, the Lawyers, and the Dilemmas of Identities

**Hassan Rafiq Jabareen**

Five years ago, I drafted a 16-page concept paper describing the cases that Adalah should undertake in its capacity as the first legal center in Israel to represent the collective rights of Palestinian citizens vis-a-vis the State. This concept paper was immediately to gain structural power by several means, after deep discussion and its subsequent approval by our Board. To begin, this paper was titled “Adalah’s Mandate” to designate Adalah’s legitimate space of operation. Cases that Adalah wished to undertake, which were not included in the founding document, in the Mandate, were to be defined as violating the Mandate, and inherently illegitimate. Through the title “Adalah’s Mandate,” this establishing paper gained extra formative power to decide, confine and establish what kind of legal representation is justifiable, acclaimed and indisputable. The Mandate also managed to decide and fix Adalah’s identity by deciding on the Palestinian struggles that Adalah is allowed to represent in the legal realm. What was outside the Mandate was unrepresentable legally, because it was not initially included in what was conceived, in the beginning, as lawful politics. For, what was conceived of at the moment of establishment as rightful political struggle was translated in the Mandate, which stated the rightful realm of legal representation. Left out were either illegitimate political struggles, or less crucial political struggles, or political struggles perceived of as impossible to win, hence their temporal illegitimacy at that very moment.

This essay focuses on the ways in which Adalah’s lawyers struggle with and against our own Mandate, reproduce it, question the politics behind it, reconsider what was excluded and defined as illegitimate, think about Adalah’s goals and hence its identity, and finally discuss our own politics and sense of justice. What this discussion is bound to produce, as this essay will elaborate, is difficult dilemmas, a sense of blurry clarity, an understanding of the unstable yet strong basis for

our decisions, and a realization of the rootless origin of our activities. These dilemmas become inevitable the minute the idea of the Mandate as such loses its sacred nature and the politics behind the Mandate are explored and discussed. For one of the main positivist expectations from the Mandate is to clarify positions, to draw boundaries, and to function as a textbook to which Adalah’s legal staff must refer in search of clear answers to complicated questions. When Adalah’s lawyers no longer look for answers in this textbook but in their politics and norms, the original founding moment begins to be thought of as a moment that always takes place and constantly invites new reflections. No illusions, however: The Mandate remains valid and it is only in reference to it that changes may take place. Yet, this essay is not concerned with the ways in which the Mandate changes or does not, but in the dilemmas that are opened when the powerful idea of the Mandate begins to be challenged. And, it is only when one understands the power embodied in the Mandate and the kind of politics reflected in it that has gained sovereign status, that one is able to appreciate the significance of the dilemmas generated by Adalah’s lawyers.

On 15 May 2000, Adalah’s lawyers convened to discuss “changes in Adalah’s Mandate.” The lawyers discussed four cases that would result, were Adalah to take them (and indeed Adalah took some of them), in changes in Adalah’s Mandate. Two cases entail a possible change of the criterion for selecting the parties that Adalah represents. Two other cases raise questions concerning Adalah’s identity as a human rights organization and as an Arab legal center, and the forms of rights that Adalah defends. The four cases together involve a challenge to Adalah’s Mandate, according to which Adalah is only to represent Palestinians against the State of Israel in collective rights cases by problematizing the notion “group belonging”

and obscuring the difference between individual and collective rights.

What follows is a summary and elaboration of the thoughts discussed by Adalah's lawyers in the meeting of 15 May.

### Expanding Representation: What does "Group Belonging" Mean?

Adalah's Mandate empowers Adalah to represent Palestinians, conceived of in ethnic and national terms, against the Israeli authorities in cases related to the violation of their collective rights. However, the oppressor is not always an outsider. Sometimes he or she resides within the boundary of the group as defined by birth. Some lawyers argued in the meeting that a progressive agenda, which is based on justice, should lead Adalah to also take cases in which the violator is, by birth, a member in the same Palestinian group. This position entails a realization of the impossibility of Adalah's claim to represent the whole Arab minority. This also entails, as the following two examples elaborate, our lawyers' wish not to remain neutral as to what goes on internally in the Palestinian community.

#### The First Case: Representing an Arab against an Arab

Ayub Kara, an Arab Member of Knesset (MK) from the Likud party (a right-wing Zionist political party) accused Mohammad Barakeh, an Arab MK and the leader of the Democratic Front for Peace and Equality (an anti-Zionist, Arab-Jewish party) of throwing stones at the police in the Palestinian town of Shafa'amr during Israel's Independence Day celebrations. Barakeh, who considered suing Kara for slander in a civil case, approached Adalah for legal advice. Adalah provided Barakeh with legal advice, thus raising the question of whether the case falls within the confines of Adalah's Mandate.

Barakeh and Kara are, by nationality, Palestinian Arab. Traditionally, Adalah has avoided representing one Arab against another, and refused to involve itself in struggles internal to the Palestinian community, fearing that its legitimacy would be questioned when representing the Palestinian community against the State's authorities.

However, the Barakeh case raised an interesting dilemma that revealed the problems imbedded in the ethnic criterion on which Adalah's Mandate is grounded. For although both men are Arabs, Barakeh, in this case, represented the Palestinian community who demonstrated in Shafa'amr, while Kara represented the position of the Israeli authorities, against which these demonstrations were directed. The political positions of Barakeh and Kara revealed the dubious nature of the criterion of pure ethnic/national affiliation. Kara, despite being Arab, represented a pure Israeli Zionist agenda, against which Palestinians in Israel struggle.

If one is to follow this non-ethnic criterion and consider the political positions of the parties involved, a series of more complicated questions arises: Should Adalah take a stand against an Arab MK representing an Arab party supporting positions detrimental to Arab group rights? Does not Adalah, by so doing, abandon the group rights perspective? Or should political positions, evaluated independently of formal national/ethnic affiliation, constitute the standard leading to Adalah acceptance or rejection of a case?

If Adalah were to completely avoid any involvement in Arab-Arab disputes and were to keep the formal definition of group rights as the basis for its Mandate, only representing the whole Palestinian minority against the Israeli authorities, then many problems arise as well. To begin, Adalah is a human rights organization that by choosing to support people based on "group belonging" by birth vis-à-vis the Israeli authorities, in fact ignores

other human rights violations occurring outside of this context. Moreover, the Palestinian community is a heterogeneous community that has diverse, non-objective interests and hence, the inherent impossibility to represent the whole Palestinian group as such. Maybe Adalah must acknowledge the fact that it represents a certain political position, within the spectrum of many political perspectives existing among the Palestinians in Israel, even when it presumably acts against the Israeli authorities on behalf of the Palestinian minority as a group.

Adalah's lawyers also raised a further more complicating comment. Even if Adalah does accept the non-ethnic/national criterion, and if Adalah does decide to instead adopt a political criterion, it seems that the case should be rejected. The reasoning, this time, is not located in the identity of the parties but in the subject matter of the case. Does Adalah consider stone-throwing a slander? Many Palestinians in Israel, in fact, view stone throwing as a part of the Palestinian struggle against Israel's oppressive practices.

### The Second Case: Representing a Collaborator in a Citizenship Case

A Palestinian man from the West Bank, a former collaborator with the Israeli occupation forces, sought permanent residency in Israel so that he would be reunited with his wife, a Palestinian citizen of Israel, and his children. The Palestinian man notified the Israeli authorities that he would no longer work as a collaborator against his people. The Minister of Interior refused his repeated requests for family reunification on the grounds that he is an Arab. If the man was Jewish, his citizenship would have been assured immediately according to the Law of Return. This discrimination by the State in the granting of citizenship and family reunification, based on

national belonging, squarely falls within Adalah's Mandate.

However, should Adalah represent a former collaborator? If we do, would we be indirectly endorsing collaborators? A collaborator represented by Adalah automatically gains a victim-status. Should a collaborator gain this victim-status? Clearly, this case raises similar questions to those described in the Barakeh case. However, whereas in the Barakeh case the oppressor was an "insider" with a politics of an "outsider," in this case, it is the oppressed that is an "insider" with a politics of an "outsider." Treating this case with political blindness, by disregarding the man's past and accepting it solely as a case of discrimination against an Arab, means establishing a criterion based on ethnic/national affiliation and not on wider conception of politics and (in)justice.

Were Adalah to accept this logic of the primacy of politics, it seems that Adalah then has to consider the rights of the collaborator's wife and children, and their wish to live as a family. This concern would lead Adalah to accept the case, rather than to reject it. However, one could also argue that this man has chosen a realm of action that contributes to the oppression of the group to which he belongs by birth, and as such he no longer belongs to it. In this case, national/ethnic affiliation is no longer conceived of in objective terms, but in terms of political action. A group is a group, in this case, not because of birth but because of sharing and fighting against a common oppression and for one cause. Therefore, for example, Adalah participated in the representation of Jewish Zionist historian, Teddy Katz. Katz was sued by an organization of former Israeli soldiers, some of whom took part in the deportation of Palestinians from the Arab village of Tantura in the 1948 war. Katz's research shows that not only did a deportation take place, but also a massacre of Palestinians.

## Shifting Identity: Collective or Individual Rights?

Is Adalah a human rights organization working to protect both collective rights and individual (civil and political) rights? Or is it an Arab legal center with a sole mandate of advocating for the collective rights of Palestinians in Israel, as an oppressed national united collectivity? Can these two identities exist in harmony?

### The Third Case: Representing Individual Arab University Students

Since its establishment, Adalah has represented many Palestinian students charged and indicted by Haifa University, in cases related to Palestinians' freedom of assembly, speech and association on campus. Adalah was involved, for example, in cases demanding the amendment of the University Regulations regarding publications in Arabic, the distribution of flyers in Arabic without a permit, and notice requirements for demonstrations on campus.

Recently, Adalah has represented individual students, based on their own indictments in front of the Haifa University Disciplinary Committee, in cases that have an individual rather than a collective character. Adalah's Mandate does not allocate a space for representing individual students. Nonetheless, the particular combination of rights, in this case, involving both individual political rights and Arab students' rights, renders it impossible to distinguish between individual and collective rights. Despite the individual character of the rights defended, these cases reflect oppressive practices carried out against Palestinian students in Haifa University as a collective. This combination also highlights the fact that individual rights are bound to be restricted as long as these individuals belong to an oppressed group. It further elaborates on the

false dichotomy between the individual and the collective, as if the individual can exist outside of a community in a pure individualized, isolated manner, and as if a collective cannot be manifested in personalized levels, and is not, at least partially, carried out by individuals.

### The Fourth Case: Representing the Prisoners from Iksal

The General Security Services (GSS) arrested two Palestinian brothers from Iksal (an Arab village in Israel), who allegedly belonged to Hezbollah and broke into an Israeli military camp. The GSS issued an order banning the two brothers from meeting with their lawyers during their detention, immediately following their arrest. The Court further issued another order banning the publication of any information about the case in the media.

Adalah represented the brothers during their "incommunicado detention." Adalah attempted primarily to lift the ban, which prohibited the brothers from meeting with their lawyers. After the Court further extended the brothers' detention, Adalah approached Advocate Riad Anes to handle the post-indictment aspects of the case, while Adalah would only represent them during the time of their "incommunicado detention," before the filing of criminal charges. One of the brothers later committed suicide in prison.

Should Adalah represent a person during the pre-indictment period of arrest? Adalah usually does not represent Palestinian individuals during their initial detention simply because they were arrested. In the past, Adalah represented individuals from Umm al-Sahali and al-Roha who demonstrated against the confiscation of their lands by the Israeli authorities. Adalah's representation was thus confined to protecting the political rights of Palestinians struggling against Israeli oppression of them as a national group.

Political individual rights were thus, as in the case of the students, heavily connected to collective/national rights.

Adalah decided to represent the brothers during their pre-indictment detention solely because of the ban imposed by the GSS on the brothers from meeting with their lawyers. In this case, Adalah determined that the brothers' arrest amounted to "incommunicado detention," a gross violation of human rights. Is Adalah becoming more like a human rights organization that defends individual's rights, such as the right of a detainee to meet with his/her lawyer? Is Adalah becoming more involved in civil liberties? Can Adalah's interference be justified on the well-grounded expectation that the rights of the two individual Palestinian brothers will be violated due to their national affiliation, as recent research demonstrates? Again, this case shows that there are no grounds for the distinction between collective and individual rights.

By focusing on the dominant discourse of minority rights, internal group conflicts may be missed or marginalized to an extent that a de-politicization of Adalah's work threatens to take place. Adalah cannot continue to ignore these intra-group dynamics, as we believe that in the long run, it may call into question our legitimacy as a human rights organization and as an Arab legal center. We must recognize and represent the community as a group with multiple political identities, and make choices based on this multiplicity, guided by progressive, feminist and human rights concepts of justice. Further, while the dichotomy of individual v. group rights somehow organizes or defines our case selection procedures through our Mandate, this strict separation does not work in practice, as the identity of individuals is so connected with the identity of the group. Thus, oftentimes cases of discrimination against individuals appear, upon reflection, as group rights cases. The questions raised in these four cases

examined in this essay may soon be resolved within the organization. However, additional dilemmas will continue to arise, and we welcome challenges to all of our instituted orthodoxy.

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**Hassan Rafiq Jabareen** is the General  
Director of Adalah.

**A'bed A'bdi:** Land Day Monument - Visions (1976-1978)





Rights on Campus:

# Palestinian Students, Political Space and Haifa University

**Orna Kohn and Tawfiq Rangwala**

In many societies, universities are the vanguard of social critique, progressive ideals, and intellectual openness. The very concept of a university is grounded on the free flow of ideas, of being able to say what you think without fear of reprisal. Yet at Israeli universities in general, and Haifa University, in particular, Palestinian students have long suffered from strict regulatory regimes that restrict their ability to speak out against the problematic discrimination they face as a minority group on campus and in Israeli society.

Haifa University is a microcosm of Israeli society in many ways. Eighteen percent of its students are Palestinian, matching the Palestinian Arab population of Israel. Their membership in the collective at the university comes with conditions and terms that compromise equality. For example, although Arabic is an official language in Israel, no classes are taught in Arabic beyond those teaching it as a foreign language. Moreover, the fact that no Arab universities exist within Israel highlights the importance of the Arab need to have a public sphere in which to discuss relevant issues. The restrictions against freedom of expression thus cripple the entire Palestinian community in Israel, and go beyond hampering the needs of students alone. Almost all political activities on campus require a permit.

Haifa University's history is filled with examples of Palestinian student leaders suspended or expelled for participating in political activities that are the norm on university campuses in many countries. Students have been disciplined for even the mildest protest such as two individuals sitting with a sign noting the atrocities perpetrated by the Israeli army in the Occupied Territories. In many ways, the streets of Haifa offer greater legal support for freedom of speech than the campus of Haifa University. Outside of the campus, a permit is needed to demonstrate only when more than 50 people participate in an open space and either a lecture or speech on a political topic is given or it

is a march. On campus, however, almost any political activity requires a permit.

The Arab Students Committee of Haifa University currently consists of 30 elected representatives from three political parties. Despite the University's refusal to formally recognize the Committee, it relentlessly tries to fight against the University's Regulations on speech, and attempts to foster an Arabic cultural and linguistic presence on campus. Highest priority is also given by the Committee to struggling against the University's discriminatory policies such as its admissions procedures and the manner in which military service (Arabs are usually not drafted) operates as an important competitive factor for acquiring the bulk of available scholarships and dormitory accommodations.

The obstacles to free speech and assembly imposed by the University make uninhibited discussion of such issues exceedingly difficult. The biggest battle fought by Palestinian students at Haifa University is the right to speak out at all. When allowed to speak, the next battle becomes the avoidance of sanctions for saying anything remotely controversial. Through stringent regulations on all political dialogue on campus, the University has sought to quash any opposition or discontent. Importantly, while Haifa University's regulations apply to all students - Jewish and Arab - the selective enforcement of them has hampered only Palestinian students' efforts at public activity. Incidents of University indictments against Jewish students for "illegal" political activity are rare.

Since 1997, Adalah has worked with the Arab Students Committee at Haifa University to protect the rights of Palestinian students on campus. Adalah provides legal support and consultation to the Arab Students Committee, represents students at disciplinary hearings and before the District Court in Haifa, files complaints on behalf of student victims of police brutality, and intervenes on behalf of the Committee to different University authorities



on a variety of issues. This note reviews Adalah's legal advocacy on behalf of the Arab Students Committee at Haifa University.

### The Case of Mr. Shadi Zeidan

In 1996, Mr. Shadi Zeidan, a law student and Chairperson of the Arab Students Committee of Haifa University, was charged with conducting an illegal demonstration, disobeying University security officers, and breach of public order. In March 1996, the Arab Students Committee requested and received permission from the University to hold a cultural event before Land Day. On the night of the event, the students discovered that the hall selected by the University was too small for the anticipated crowd. The University subsequently refused Mr. Zeidan's requests for a larger venue, even though many such halls were available. When the crowd could not enter the hall and the band refused to perform, a spontaneous protest broke out. Following the students' action, the University charged Mr. Zeidan, as the Chair of the Arab Students Committee, with the above offenses, which barred him from graduating and thus, prevented him from sitting for the Bar Exam. Later, the Haifa University Disciplinary Committee convicted Mr. Zeidan for disobeying security officers and breach of public order, and the Disciplinary Appeals Committee denied his request for appeal.

Adalah filed an appeal on behalf of Mr. Zeidan before the District Court in Haifa seeking the issuance of a temporary declarative order forbidding Haifa University from implementing its Disciplinary Committee decision. Adalah argued that the Disciplinary Committee's ruling was illegal in that it held the Chairperson individually responsible for the collective action of the Palestinian students. Adalah also asked the Court to declare the Committee's decision void on the ground that Haifa University's regulations,

pursuant to which Mr. Zeidan was charged, were an unconstitutional infringement of the right to freedom of expression. These regulations included the requirements that: (1) permission for a demonstration must be sought from the University eight days in advance; (2) any announcements must be submitted to the University at least 24 hours before they may be posted on the student activities board; and (3) pamphlets in Arabic must be submitted four days in advance to University security, if not translated to Hebrew, or two days in advance, if translated before posting or distribution. Adalah pointed out that these limitations imposed more restrictive limitations on free speech than permitted by Israeli law and case law of the Supreme Court of Israel. Furthermore, Adalah noted, Tel Aviv University's Tribunal had recently declared similar regulations unconstitutional.

Adalah and Haifa University subsequently reached a settlement, which was approved by the District Court. According to the terms of this settlement, Haifa University agreed to establish a committee to re-check the regulatory articles to which Adalah had objected, and to examine the whole subject of political activity in the University. The University promised that new regulations, consistent with fundamental rights of expression, would be drafted and put into effect by the 1998 school year.

After the agreement with Adalah, Haifa University amended its regulations. Article 2.1 of the regulations now provides that the University must allocate an area or areas for public activity, central enough so that protestors can be heard, but without obstructing any academic activity. No permits are needed in advance, although for organized events with more than ten people, the students must notify the Dean 24 hours in advance, or 36 hours in advance, if the event will be held after school hours. A copy of any written material to be distributed must also be submitted with the

notice. For public events in undesignated areas, a permit is still required and must be applied for 72 hours in advance. Haifa University shrewdly added an Appendix to the amendments, stating that this requirement involved 72 “working hours” - effectively bringing the required time period to ten days. Applications for permits can only be submitted twice a week for three hours each day. In addition, the only area deemed suitable for public activity remained on the outskirts of the campus, isolated from the general student body. Palestinian students walking to such an area together have been unjustifiably charged with participating in an illegal “march.” Even after the new, amended regulations came into effect, and despite the fact that the Appendix has been cancelled, the ability of Palestinian students to engage in any form of public activity remains hampered. This is true, even though Haifa University committed before the Court, in the settlement agreement, to make changes and strengthen freedom of expression rights on campus.

### **The Case of Mr. Fuad Mu’adi, Mr. Inad Mu’adi, and Mr. Raja Za’atra**

In addition to the restrictions on freedom of expression, the right of students to be represented by whomever they wish, when appearing before the Disciplinary Committee, is a contentious issue. To date, according to Haifa University’s regulations, only students and faculty members can represent students against the complex array of charges for which they might be indicted. In the past, Lecturers in the Faculty of Law - Dr. Ilan Saban, Dr. Sandy Kedar, and Mr. Hassan Jabareen, Adalah’s General Director - have represented many students. However, most students receive no professional legal representation, despite the complexity of the due process and freedom of expression rights at issue.

In a recent letter to the Dean of Haifa University, Adalah argued that the right to counsel is a fundamental right, and that no one should be convicted of an offense and punished accordingly, without the opportunity of securing counsel or being afforded a lawyer. This is an especially pressing concern given the enormous power wielded by the Disciplinary Committee, including the ability to expel students from the University.

Adalah represented three student activists in 2000 - Mr. Fuad Mu’adi, Mr. Inad Mu’adi, and Mr. Raja Za’atra - charged with taking part in an illegal demonstration, disobeying university security officers, and breach of public order. The alleged offenses took place in November 1999, during a break between classes. A group of Palestinian students staged a sit-in on a campus lawn to protest severe police brutality at a demonstration the night before, against Arab Members of Knesset, Mayors and community members. The three students named above were singled out and indicted because they were leaders in the Arab Students Committee. The Haifa University Disciplinary Committee found the students guilty, and in clear violation of their rights, prohibited them from calling witnesses, submitting evidence, or launching any defense at their hearing.

Adalah represented the students before the Disciplinary Appeals Committee, contending that the Committee breached the students’ right to a fair and impartial trial, convicted them on the basis of insufficient evidence, and denied them the requisite due process. Further, Adalah argued that a quiet protest such as a sit-in does not constitute a demonstration under the University’s regulations. Adalah also argued that the University’s failure to provide an adequate location for the demonstration contravened its own regulations, and rendered their application unconstitutional.

The Disciplinary Appeals Committee agreed with Adalah on two points, and sent the case back to the Disciplinary Committee for re-hearing. The

Appeals Committee emphasized the University's departure from standards of due process, and stressed the University's failure to meet its obligations under the regulations, rendering them inapplicable against the accused. For the first time, the Appeals Committee supported the Arab Students Committee's demands for freedom of expression, which served to draw further attention to the University's discriminatory application of its regulations.

### Mass Indictments of Palestinian Students

In April and May of 2000, Palestinian student groups staged intense protests and demonstrations across Israel. In the wake of severe police brutality during Land Day protests, including the use of tear gas and rubber-coated steel bullets resulting in tens of injuries and the death of one elderly woman, demonstrations at Haifa University increased in frequency and intensity. A media frenzy, combined with collective protests across the country, brought even more police initiated violence, which Adalah monitored closely. During this politically charged period, Haifa University filed dozens of indictments against Palestinian students. Adalah intervened in tens of cases, writing letters to the University authorities, placing ads in the media, and offering general legal advice and assistance to the Arab Students Committee.

At the end of May 2000, the Palestinian students' struggle culminated in a victory for equality at Haifa University. The Dean of Students announced that all disciplinary indictments against Palestinian students for political activities had been withdrawn. The extent of student protest, combined with the intense legal advocacy of Adalah, created a climate in which the University could not reasonably act to suspend Palestinian student leaders. Various Arab MKs and community leaders also helped to generate a storm of

opposition that could not be quietly subdued. Much credit must be given to the students, who engaged in ongoing protests against Haifa University's discriminatory policies even in the face of threats and intimidation.

The Dean of Students announced the University's decision in a letter to the Chairperson of the Arab Students Committee - Ms. Khulud Badawi - and invited her to a meeting with the Regulations Committee. Adalah views this letter as *de facto* recognition of the Arab Students Committee, as the representative of Palestinian student concerns at Haifa University. A few days earlier, the Dean of Students also wrote a letter on behalf of ten faculty members to the President and the Dean of Haifa University, calling for official recognition of the Arab Students Committee by the University, an unprecedented action for any Israeli University.

The Haifa University Senate subsequently reviewed the University's regulations on political activity, in response to calls by some faculty members for tighter regulations. The new regulations have not yet been published, but according to Adalah's information, they will not significantly affect the scope of freedom of expression at Haifa University.

### Conclusion

Despite the recent steps taken, Haifa University remains a harsh violator of the political rights of Palestinian students. The University regulations continue to work to limit free speech and prevent public gatherings. In effect, they disrupt solidarity and community amongst Palestinian students, and prevent the articulation of minority issues through a united voice. The discretionary power possessed by University security officers' renders many indictments arbitrary and unreasonable.

The Palestinian students who have struggled valiantly against this repressive system deserve

much praise, but this struggle is not complete. Adalah is committed to handling each individual case to ensure that every discriminatory policy and hearing conducted by the University is contested on its own merits. This tactic will hopefully force the University to reconsider its regulations, and offer equal treatment and the requisite due process to all its students.

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**Orna Kohn** is an Adalah Staff Attorney.  
**Tawfiq Rangwala** interned with Adalah during the summer of 2000. He is a J.D. student at Osgoode Law School in Canada.



**A'bed A'bdi:** Land Day Monument - Visions (1976-1978)



# Petitions Filed by Adalah to the Supreme Court of Israel

1997 - 2000

**Gadeer Nicola**

## **Final Judgments:**

### **The Right to Social Services for Arab Bedouin in the Unrecognized Villages in the Negev:**

Petitioned the Court on behalf of 7 organizations against the Minister of Labor and Social Welfare and the government-appointed head of the Segev Shalom Local Council demanding that welfare services, completely stopped due to budgetary constraints, be resumed immediately to 60,000 Arab Bedouin in the unrecognized villages. Additionally claimed that the number of social service providers be increased in appropriate proportion to the needs of the population. After filing the petition, services restored. The Court also accepted the Attorney General's commitment to add 11 positions for social workers over two years. Even with this promise, Arab Bedouin in the unrecognized villages in the Negev will receive 1 social service provider (SSP) for 2,291 people, as compared with Jewish localities in the Negev with a better socio-economic status, which receive 1 SSP for 641 people.

(H.C. 5838/99, Regional Council of the Unrecognized Villages in the Negev, et. al. v. Minister of Labor and Social Welfare, et. al., filed 8/99, judgment 9/00)

### **Equal Access for Arab Students to Academic Enrichment (Shahar) Programs:**

Petitioned the Court to compel the Ministry of Education (MOE) to provide academic enrichment programs equally to Arab and Jewish students. Operating since the 1970s, only Jewish schools received these benefits. The Attorney General admitted historical, intentional discrimination against Arab students, and declared that equality between the communities will be reached within five years. Adalah rejected the proposed time frame, asking for an immediate remedy, and affirmative action in regard to

budget allocations. Case dismissed after pending for three years. State committed to allocate 20% of its budget to Arab schools within five years. The Court ordered the MOE to pay NIS 20,000 to Adalah in legal expenses.

(H.C. 2814/97, Follow-Up Committee on Arab Education, et. al. v. The Ministry of Education, et. al., filed 5/97, judgment 7/00)

### **The Right for Arab Representation in Arab Local Government:**

Petition filed against the government-appointed Mayor and Local Council Secretary (both ultra-Orthodox Shas party members) of the Arab village of Mazra'ah demanding that the appointment of the Council Secretary be rescinded on the grounds that it was politically biased, with recruitment conducted through a closed bid, which effectively excluded all Arab residents of the village. Petition withdrawn, as elections were scheduled for the day following the last hearing. Court ordered the respondents to pay NIS 5,000 in legal fees to Adalah.

(H.C. 5734/99, Omar Imbaraki v. Yitzhak Edan, Mayor of Mazra'ah, et.al., filed 8/99, withdrawn 9/00)

### **The Use of Arabic on National Road Signs:**

Petition filed against the Transportation Ministry and the Public Works Department. The Court ordered the respondents to place Arabic on all national road signs within five years, and to pay NIS 7,500 to Adalah for legal expenses.

(H.C. 4438/97, Adalah, et. al. v. The Ministry of Transportation, et. al., filed 7/97, judgment 2/99)

### **Equal Funding for Arab Religious Cemeteries:**

Successfully petitioned the Court against the Minister of Religious Affairs (MORA) to distribute funds, totaling close to NIS 17 million annually, for religious cemeteries equally to Jewish and





Arab religious communities. Case brought by Adalah following the Court's dismissal of Adalah's petition challenging the entire budget of the MORA (of which Arab religious communities receive less than 2%) on the grounds of "generality." Court awarded Adalah NIS 20,000 in legal fees. Subsequent motion filed demanding that the Court instruct the MORA to implement the Court's decision in its 2000 budget.

(H.C. 1113/99, Adalah v. Minister of Religious Affairs, et. al., filed 2/99, judgment 4/00)

#### **Freedom of Movement for Arab Citizens of Israel:**

Petition filed to the Court on behalf of a Palestinian citizen of Israel (a student registered for Masters Degree study at Bir Zeit University) against the IDF Chief Commander of the Central Division challenging the Commander's order barring the petitioner from entering the West Bank for six months. Adalah argued that the order violated the petitioner's right to travel and right for education, as well as his due process right for a hearing and to confront the 'secret evidence' against him. Case dismissed. Court refused to intervene in the decisions of the IDF. Prohibition order against the petitioner not renewed by the IDF Commander.

(H.C. 1964/00, Mahmoud Mahameed, et. al. v. Moshe Ya'alon, IDF Chief Commander of the Central Division, filed 3/00, judgment 4/00)

#### **Cutting the 'Balance Grants' of Arab Municipalities and Local Councils:**

Petition filed against the Ministry of the Interior (MOI), the Minister of Finance, and the Prime Minister challenging the cuts in 'balance grants' to Arab local authorities. In accordance with the recommendations of a governmental committee, balance grants are given to all municipalities to close budget gaps between the municipalities. In the 2000 budget, the criteria used by the MOI

to determine the 'balance grants' discriminated against Arab municipalities in comparison to Jewish localities. Rather than remedying past discrimination, these criteria further widen the gap between Arab and Jewish localities. Petition withdrawn based on the respondents' announcement that the criteria will be changed in the 2001 budget.

(H.C. 6099/00, The National Committee of Arab Mayors v. Ministry of the Interior, et. al., filed 8/00, withdrawn 11/00)

#### **The Right to an Address for Arab Citizens Living in Unrecognized Villages:**

Successfully petitioned the Court against the Ministry of Interior (MOI) to allow residents of the unrecognized village of Husseniya to list the village as their official address on their identity cards. Adalah argued that the prohibition violates citizens' right to participate in elections without difficulty, the right to receive mail in one's village or home, and the right to maintain a community ('the right to be we'). The Court ordered the MOI to pay Adalah NIS 5,000 in legal expenses. This is the first time that Arab citizens have been permitted by the State to list an unrecognized village as their official address.

(H.C. 3607/97, Mohammed Sawa'ed, et. al. v. Ministry of the Interior, et. al., filed 6/97, judgment 11/98)

#### **The Right to Demonstrate for Uprooted Arab Residents of Umm El Faraj:**

The Committee for the Defense of the Rights of Uprooted Palestinians applied to the police for a permit to demonstrate inside Moshav Ben A'Ami to protest the Moshav's recent destruction of a mosque and cemetery. The Moshav sits on the land of Umm Al-Faraj, an uprooted Arab village. Petitioned the Court to compel the police to grant a permit to the uprooted Arab residents to demonstrate at the holy sites. The police

subsequently agreed to allow a maximum of 300 demonstrators to gather at the site, provided that they enter the Moshav on buses and that speeches are not electronically amplified.

(H.C. 5913/98, Wakim Wakim, et. al. v. Israel Police, et. al., filed 9/98, judgment 1/99)

### The Right to Kindergarten Education for Arab Children in Segev Shalom:

Petitioned the Court to compel the government-appointed Council in Segev Shalom (Negev) and the Minister of Education to establish kindergartens for 400 Arab Bedouin children, in accordance with previously issued government decisions. Following the issuance of an *order nisi* by the Court, the respondents re-opened kindergartens for 200 children. Adalah awarded legal fees of NIS 5000.

(H.C. 8534/99, The Parents Committee in Segev Shalom, et. al. v. The Government-appointed Council in Segev Shalom, et. al., filed 12/99, judgment 1/00)

### Announcements in the Arabic Press Regarding Political Parties and Platforms:

Successfully petitioned the Court to compel the Registrar of Political Parties to publish future announcements regarding political parties and their platforms in Arabic. Since the enactment of the Law of Political Parties (1992), the Registrar had published these announcements only in the Hebrew press.

(H.C. 989/99, Adalah, et.al. v. Registrar of Political Parties, et. al., filed 2/99, judgment 2/99)

### Equal Funding for Arab Religious Communities:

Petition filed against the Minister of Religious Affairs (MORA) and the Minister of Finance asking the Court to declare unconstitutional four provisions of the Knesset Budget Law (1998), which allotted 1.86% of the total budget of the

MORA to Arab religious communities. Case dismissed on the grounds of “generality.”

(H.C. 240/98, Adalah, et. al. v. Minister of Religious Affairs, et. al., filed 1/98, judgment 12/98)

### Equal Distribution of Holiday Charity Funds:

The Minister of Labor and Social Welfare (MSLW) and the Minister of Finance (MOF) administer a “holiday charity fund” to aid the poor in their observation of religious celebrations and feasts. Over the years, the State used the Fund to assist the Jewish poor in observing Passover, but did not allocate any money to “non-Jewish” organizations or give any support to members of Arab religious communities. Successfully petitioned the Court against the MSLW and the MOF for 20% of the Fund to be set-aside for needy Arab Muslim, Christian and Druze religious community members.

(H.C. 2422/98, Adalah, et. al. v. Minister of Labor and Social Welfare, et. al., filed 4/98, judgment 5/98)

### Transportation to School for Arab Students:

Arab children who live in Dahi, an Arab village of 700 people under the jurisdiction of the Afula Municipality (a Jewish city), attend elementary and secondary schools located 7 and 15 km, respectively, away from their village. There are no schools in Dahi. Representing 90 Arab students from Dahi, Adalah petitioned the Court to compel the Afula Municipality and the Education Ministry to renew obligatory bus services to school for the students, stopped for reasons of tax disputes. The Supreme Court immediately issued an *order nisi*, and within one week, the respondents renewed the required bus services. Adalah awarded NIS 5,000 in legal expenses.

(H.C. 5562/97, Maisa Zoabi, et. al. v. Municipality of Afula, et. al., filed 9/97, judgment 9/97)

**Pending Cases:**

**Demolition of the Mosque in Husseniya:**

Petition filed against the Magistrate Court in Acre and the Local Planning and Building Committee of Misgav seeking the cancellation of the Magistrate Court's order to demolish a mosque in the unrecognized village of Husseniya. Adalah argues that the Magistrate Court had no jurisdiction to order the demolition, and that the demolition would violate the right of residents to worship freely. Petition followed a successful motion for injunction, by which the Court stayed the demolition order pending the outcome of the case.

(H.C. 1631/00 and H.C. 1878/00, Kaman Sawaed v. Magistrate Court of Acre, et. al., filed 3/00)

**The Right to Preventive Health Services for Arab Bedouin Women and Children in the Unrecognized Villages in the Negev:**

Petition filed on behalf 121 Arab Bedouin living in unrecognized villages and three NGOs against the Ministry of Health (MOH) demanding the establishment of 12 Mother & Child Health Clinics to serve the unrecognized villages in the Negev. Arab Bedouin women and children have to travel for long distances in the desert to access health care facilities, provided only in Jewish localities and Arab government-planned towns. The Court decided in March 1999 that the MOH must establish six clinics and provide public transportation to existing ones. Motion for contempt subsequently filed to enforce the Court's judgment, seeking a heavy fine against the MOH for its failure to build the clinics. In July 2000, the Court ordered the MOH to set a new timetable for implementation of the decision.

(H.C. 7115/97, Adalah, et. al. v. Ministry of Health, et. al., filed 12/97, judgment 3/99, motion for contempt 1/00)

**The Establishment of Arab Schools in Beer Hadaj:**

Petition filed jointly with the Association for Civil Rights in Israel (ACRI) on behalf of the Regional Council for the Unrecognized Villages, Parents' Committees, and Arab citizens of Beer Hadaj against the Minister of Education and the Ramat ha-Negev Regional Council demanding the establishment of schools for Arab Bedouin children. As there are no Arab schools in the area, Arab Bedouin children must travel for long distances (32-40 km each way) to reach their schools, resulting in low registration and attendance rates. 34% of children between the ages of 3-18 in Beer Hadaj do not attend school. *Order nisi* granted.

(H.C. 5221/00, Dahlala Abu Ghardud, et. al. v. Ramat HaNegev Regional Council, et. al., filed 7/00, order nisi 7/00)

**Expansion of the Jurisdiction of Omer Municipality to Encompass the Land of Arab Unrecognized Villages:**

Petition filed against the Minister of Interior (MOD) and others to stop the proposed expansion of Omer (a Jewish town in the Negev) to include two neighboring unrecognized Arab villages - Em Batin and Al Maquman - within its jurisdiction. Expansion plan recommended without any consultation or community participation in planning by the affected Arab Bedouin residents of the unrecognized villages. *Order nisi* granted. The Court also issued an injunction freezing the implementation of the plan pending the outcome of the case.

(H.C. 6672/00, Jazi Abu Kaf, et. al. v. Minister of the Interior, et. al., filed 9/00, order nisi 9/00)

**Equal Funding for Arab Religious Buildings:**

Petition filed against the Minister of Religious Affairs, the Minister of Interior and the Minister

of Housing arguing that the current criteria for granting funds from the religious buildings (e.g., mosques, churches, religious courts) budget discriminates against the Arab Muslim, Christian and Druze communities. *Order nisi* granted. Temporary injunction freezing the distribution of NIS 125 million from the religious buildings budget, replaced by a commitment from the Ministry of Finance to allocate these funds to Arab communities, should the Court accept Adalah's petition.

(H.C. 1399/00, *Ittihad: The Union of Arab Community Based Organizations in Israel, et. al. v. Ministry of Religious Affairs, et. al.*, filed 2/00, order nisi 2/00)

### Equal Access for Arab Neighborhoods to Urban Renewal Programs:

Petition filed against the Minister of Housing and Building and the Prime Minister for the government's discriminatory implementation of the "Urban Renewal Programs" (URP). Despite the stated purpose of the URP, which is to reduce societal inequalities in the country, almost all of the poorest Arab municipalities are excluded. Since the establishment of the URP, 56 Jewish localities and 99 Jewish neighborhoods have benefitted from the URP, as compared with 4 Arab villages and 14 Arab neighborhoods, which received these programs. Petitioners demanded that objective criteria, in accordance with socio-economic standards, be established to determine URP beneficiaries. *Order nisi* granted. Case pending for final judgment.

(H.C. 727/00, *The National Committee of Arab Mayors, et. al. v. The Minister of Housing and Building, et. al.*, filed 1/00, order nisi 2/00)

### Recognition for the Unrecognized Arab Neighborhood of Al-Jelasi:

Al-Jelasi is a neighborhood in the Arab village of Kammaneh, located in the north of Israel, which was excluded from the plan to recognize

Kammaneh. The main objective of this exclusion was to pressure the residents of Al-Jelasi to move to the other neighborhoods of Kammaneh, thus leaving its lands open for the expansion of the nearby Jewish village of Kamoun. Petition filed against the Regional Council of Misgav, both the District and Local Planning Committees, the National Planning Council, and the Ministry of Interior on behalf of the residents of Al-Jelasi. Adalah argued that the government's decision to recognize the village of Kammaneh must relate to all of the village's neighborhoods, and that the continued denial of recognition to Al-Jelasi violated the rights of its residents. *Order nisi* granted.

(H.C. 7260/99, *Hashem Sawa'ed, et. al. v. Regional Council of Misgav, et. al.*, filed 11/99, order nisi 11/99)

### Exclusion of Arab Localities from the National Economic Priority List:

Petition filed against the Prime Minister challenging the government's selection of towns for the national priority list (NPL). The NPL classifies selected towns as "A" or "B" priority areas that receive benefits such as extra educational funding, additional mortgage grants to residents, and tax breaks to local industries. Adalah argued that current selection discriminates against Arab towns, and that clear criteria should be set for selection. Case pending for final judgment to be delivered by expanded panel of seven justices.

(H.C. 2773/98, *The High Follow-Up Committee on Arab Affairs, et. al. v. the Prime Minister of Israel*, filed 5/98)

### Use of Arabic on Signs in Mixed Cities:

Petition filed jointly with the Association for Civil Rights in Israel (ACRI) against Tel Aviv-Jaffa, Ramle, Lod, Acre, and Natserat Illit demanding that these municipalities add Arabic to all traffic, warning and other informational signs in their



jurisdiction because Arabic is recognized as an official language in Israel. *Order nisi* granted. In November 2000, the Court granted the Attorney General a 30-day extension of time to formulate a position, adding that the Court may expand the panel to include additional justices. The Court suggested that all Israeli cities, not only cities with a mixed Arab-Jewish population, should post signs in Hebrew as well as Arabic. Case pending for final judgment.

(H.C. 4112/99, Adalah, et. al. v. The Municipalities of Tel Aviv-Jaffa, et. al., filed 6/99, order nisi 2/00)



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## Publications

Legal Violations of Arab Minority Rights in Israel, March 1998

Adalah's Review, Volume 1, Fall 1999, Politics, Identity and Law

دقائق عدالة، العدد الأول، شتاء ١٩٩٩، سياسة القانون والهويات  
מחברות עדאלה. גליון מס' 1. חורף 1999, זהות, פוליטיקה ומשפט

Adalah's Annual Reports - 1997, 1998, 1999

Reflections and Thoughts on Human Rights, 2000 (Arabic)



# Adalah

## The Legal Center for Arab Minority Rights in Israel

Adalah (*Justice*) is the first non-profit, non-sectarian Arab-run legal center in Israel. Established in November 1996, Adalah serves the Arab community nationwide, close to 20% of Israel's population.

Adalah's legal work draws on Israeli law, comparative constitutional law, and international human rights standards. The main goal of Adalah is to achieve equality and minority rights protections for Arab citizens of Israel in the fields of Land and Housing Rights; Education Rights; Employment Rights; Language Rights; Political Rights; Women's Rights; Prisoners' Rights; Culture Rights; and Religious Rights.

In order to achieve this goal, Adalah:

Brings cases before the Israeli courts that raise issues of group discrimination and Arab minority rights;

Promotes equality and minority rights through legislative advocacy;

Provides consultation to Arab NGOs, CBOs, and other public institutions;

Organizes and facilitates panel discussions, study days, and workshops, and publishes topical reports on current legal issues concerning the Arab minority in Israel;

Trains young Arab lawyers and law students, and provides apprenticeship and internship opportunities in order to create a new generation of human rights lawyers.



## Adalah

The Legal Center for Arab Minority Rights in Israel

PO Box 510 Shfaram 20200 ISRAEL

Tel: (972)-4-950-1610 Fax: (972)-4-950-3140

[adalahorg@hotmail.com](mailto:adalahorg@hotmail.com)

<http://www.adalah.org>