Is This Land Still Our Land?
The Expropriation of Zionism

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Is there still hope for Zionism in the Israeli courts?

At first, this may seem like a surprising question. Israel's legal system, after all, is committed in principle to the idea of a Jewish state. The Zionist worldview, as emphasized by former chief justice of the Supreme Court Shimon Agranat in 1965, is a "constitutional given." As Agranat wrote in one of his famous rulings, "Not only is Israel a sovereign, independent, freedom-loving country, characterized by a government of the people, it was also established as 'a Jewish state in the land of Israel.'"[1] While no Israeli judge has, as yet, overruled that declaration, it is highly doubtful that Agranat's successors currently serving in the Israeli judiciary are willing to stand behind it and support it resolutely—in fact, quite the contrary. Over the past two decades, three cases have been brought before the Supreme Court that have tested the commitment of the state's judicial authorities to the fundamental principles of Zionism. The outcome of these cases (or likely outcome, as one of them is still pending) should be highly disturbing to the decisive majority of Israelis who still believe in the idea of a Jewish state.

The first ruling, which caused considerable public repercussions when it was issued in 1995, concerned Adel Kaadan, an Arab Israeli who sought to lease a plot of land from the Katzir community on which to build his home. From the outset, the chances that his request would be granted were not very good. Katzir, located in the Nahal Iron region of the Galilee, was built by the Jewish Agency in 1982 on state land leased from the Israel Land Administration (ILA). At the time, the agency felt the need to strengthen the Jewish presence in the region, which is inhabited by a large Arab population. The community's bylaws provided that membership would be open only to someone who had "completed compulsory service under the Defense Service Law… or is exempt from compulsory service under the Law, or whose army service was deferred under that Law."[2] In other words, only to Jews. Needless to say, Adel Kaadan did not meet those conditions.

When his request was denied, however, Kaadan petitioned the Supreme Court. And in March 2000, after lengthy hearings, the court accepted the petitioner's argument that the establishment of communities designated exclusively for Jews violated the principle of equality. In a ruling that aroused much controversy, the court held that "the state was not permitted by law to allocate state land to the Jewish Agency for the purpose of establishing the community of Katzir based on discrimination between Jews and non-Jews." Then-chief justice Aharon Barak, who headed the panel, explained that "not only do the values of the State of Israel as a Jewish state not require discrimination based on religion or nationality, these values themselves prohibit discrimination and require equality between religions and nationalities."[3]

Four years later, this story was repeated with only minor variations when Fuad and Bahaa Abu Riyya, a doctor and a lawyer, wanted to buy a home in the Makosh neighborhood of the Galilean town of Carmiel, which was built on land owned by the Jewish National Fund (JNF). The ILA, which administers JNF land, refused to approve the transaction, claiming that the fund's charter permits only Jews to lease its property. The Abu Riyya family also petitioned the Supreme Court, and subsequently, the Association for

Civil Rights in Israel as well as the Arab organizations Adalah and the Arab Center for Alternative Planning all filed comprehensive petitions against the ILA, claiming that its general policy of allocating JNF land only to Jews violates the principle of equality and discriminates against Israel's non-Jewish citizens.[4] The first petition employed the harshest language of all, asserting that JNF policy was "patently illegal."[5]

The Abu Riyya couple's specific complaint was resolved in the interim, but the petitions against the JNF's fundamental right to designate the land it owns exclusively for Jewish communities are still pending in the Supreme Court.[6] The JNF has responded to these petitions by contending that their acceptance means nothing less than the total renunciation of Zionism. The state, however, in its capacity as respondent on behalf of the ILA, believes otherwise. Attorney General Menachem Mazuz stated unequivocally that justice favors the petitioners: "The constitutional principle which requires the ILA to distribute state lands equally, requires… the same even in regard to property owned by the JNF." He went on to maintain that "this principle applies even if it contradicts the JNF's charter."[7] Although the court has still not rendered a decision, remarks made by the panel of judges adjudicating the petitions, headed by Chief Justice Dorit Beinisch, indicate that they concur with the opinion of the attorney general.[8]

Whatever the eventual outcome of this specific case, it is clear that a dam has burst. In 2006, newlyweds Ahmed and Fatna Zbeidat applied to live in the northern community of Rakefet, which is under the jurisdiction of the Misgav Regional Council. The admission procedure at Rakefet, as is customary in all similar communities, includes referring the candidates to a private evaluation institute in order to determine the extent of their "social compatibility." In this case, the institute concluded that, due to Mr. Zbeidat's problematic social skills and his wife's individualistic personality, the Zbeidats was not suited to life in this particular communal setting. On the basis of this evaluation, the Misgav Regional Council Admissions Committee, and subsequently the ILA Appeals Committee, determined that the couple could not join the community.[9]

The affair did not end there, of course. The Zbeidats, in conjunction with Adalah, the Mizrahi Democratic Rainbow Coalition for Social Justice, and the Jerusalem-based Open House for Pride and Tolerance petitioned the Supreme Court against both the decision and the use of social compatibility criteria by Rakefet in particular and similar communities in general. The Zbeidats argued that these criteria, in effect, serve to discriminate against applicants "for reasons related to personality traits, social and personal status, political outlook, skin color, and ethnic or national origin," in violation of basic rights to dignity, liberty, and equality. "It is not acceptable," the petitioners wrote, "to preclude an Israeli citizen from building his home on public land which public law dictates must be equitably distributed, in accordance with the code of social justice."[10] In October 2007, Supreme Court Justice Miriam Naor issued an interim order instructing the ILA and the Rakefet community to allocate a plot of land to the Zbeidats.[11]

There are those, no doubt, who will see a guiding hand behind these three cases, and ascribe to the Arab organizations involved a less idealistic motive than fighting discrimination: namely a calculated and methodical effort to affect the demographic and residential maps of the State of Israel. There may or may not be some truth to this hypothesis. In either event, the questions raised by these cases cut to the very essence of the Zionist enterprise, and exacerbate a bitter and longstanding conflict over its purpose and justification.

In this context, it is important to emphasize that while Zionism was never a monolithic movement, and its various factions understood its essential attributes differently, Jewish settlement in the land of Israel was perceived by all of them as a primary goal. This complemented another objective, the immigration of Jews to their historical homeland, seen by generations of Zionists as the basis of the entire project of national renewal. The job of realizing these aspirations was given to such institutions as the Zionist Federation, the JNF, and the Jewish Agency, which, with the aid and support of private individuals, purchased territory throughout the country for the purpose of "redeeming the land." A popular song once sung by

Jewish children throughout the world described this collective effort and its purpose:

> I will tell you, little girl,
> And you, little boy,
> How it is in the land of Israel.
> Land is redeemed:
> A dunam here, and a dunam there,
> Clump by clump—
> That is how we redeem our people's land
> From north to south.
> On the wall hangs a box
> A blue box
> For every cent that goes inside
> Land is redeemed.[12]

The Kaadan, Abu Riyya, and Zbeidat petitions (and others which have followed in their wake) have placed the effort to settle Jews on land within the boundaries of the State of Israel into question—judicially, politically, and morally. They do so by portraying it as blatant discrimination on ethnic grounds, unworthy of an enlightened country. Whatever our opinion may be regarding the real motives behind these petitions, there is no doubt that the issues they raise are worthy of serious discussion. Moreover, if the true meaning of their demand for equal—or ostensibly equal—land distribution is to put Zionism itself on trial, then it is appropriate to present, against such claims—and against the judicial authorities' predilection for acquiescing to them—a sound and reasoned argument in favor of preserving the Jewish character of the State of Israel.

II

No one will question the importance of the principle of equality in any democracy worthy of the name, and Israel is no exception. The Jewish state's Declaration of Independence holds that "the State of Israel… will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race, or sex." Although this declaration is not always consistent with facts on the ground, for reasons we will address, the ideal it expresses is viewed by many as a compelling aspiration. In fact, Israeli law ascribes constitutional status (i.e., superior to regular statute) to the right of equality.[13] This principle, in the words of former chief justice Moshe Landau, "breathes the breath of life into the whole constitutional system of the state."[14]

Despite its importance, however, the right to equality is neither absolute nor exclusive. It must always be weighed against other basic rights and values to which free and enlightened countries are also committed. The aspiration to equality, compelling though it may be, must sometimes yield, for instance, to the need to ensure liberty, to abide by the principle of majority rule, to maintain a system of free economic competition, and so on. Each of these principles is essential to the existence of a free society. A democracy cannot, for example, abolish the right to private property in order to distribute society's assets anew in a more equal manner. History has proven that attempts to create or re-create a society on such a utopian basis lead to totalitarianism—the polar opposite of democracy and the worst of all possible regimes.

Furthermore, the practical implementation of the right to equality is not always clear-cut. It must often be interpreted in a broader context of overall justice. A policy of affirmative action, for example, sometimes impinges on formal equality in order to advance a more substantive equality for groups

that have suffered years of discrimination and exclusion from power and influence. An example of this is the policy adopted by many universities of admitting students from disadvantaged communities and geographical areas even though they have lower qualifications than would be demanded in a free and equal competition. This was the Supreme Court's reasoning in its precedent-setting 1994 ruling that three directors of public companies should have their appointments annulled, because a greater effort should have been made to fill their positions with female candidates—even if their qualifications were inferior to those of the men already assigned to these positions.[15]

The right to equality is often tempered not only by other basic rights and considerations of justice, but also by important state and social interests. For example, universities in the United States and elsewhere give preferential treatment to students from peripheral geographical areas that are *not* disadvantaged in order to provide the student body with greater exposure to people from a variety of backgrounds. In this case, equality is sacrificed for the sake of considerations and values that do not rise to the level of rights.

Another example of an important state interest that overrides absolute or formal equality relates to candidates for positions that require high-level security clearances, and must therefore meet extremely exacting criteria. As a result, Israelis of Arab origin often have difficulty finding work in the IDF, in the secret services, and in the military industries. In still other cases, however, the state authorities are often *in favor* of granting preferential benefits to minorities, even if the purpose of doing so is not the remedying of injustice. A prominent case is Israel's decision to establish seven Bedouin towns in the south in order to encourage permanent settlement among the traditionally nomadic tribes. To that end, the state allocated land and marketed it at a particularly low price. When a Jewish citizen named Eliezer Avitan sought to lease a plot of land from one of these towns, the ILA refused his request on the grounds that he did not meet the necessary criteria,

i.e., he was not a Bedouin. Avitan petitioned the Supreme Court, claiming discrimination, but was denied redress. Justice Theodor Orr, who presided, explained the court's decision:

> There is a public interest in assisting Bedouins to settle permanently in urban communities… due to other public considerations relating to the need to vacate state lands that were seized by Bedouins and to demolish buildings that were constructed without a license. This interest, combined with the need for a change in generations-old values, customs, and practices of Bedouin society, justifies favoring Bedouins by allocating subsidized plots of land to a community intended to settle the Bedouins permanently.[16]

In these and other situations, the right to equality has been contravened or restricted in favor of a policy that favors a minority group. Of course, a democratic government is also likely to demonstrate a certain preference for majority groups. Such a preference, for instance, characterizes the nation-state, which has, by definition, a special affinity for a particular nation with a distinct cultural and/or ethnic identity.

Israel clearly belongs to this category of states, and is frequently attacked by its critics on the grounds that its institutional and cultural identification with the Jewish people, the majority of which lives outside its borders, disqualifies it from being considered a genuine democracy. These critics often point to Israeli immigration policy—primarily the Law of Return, which grants automatic citizenship to any Jew who makes *aliya* to Israel—as a particularly severe form of discrimination on grounds of national origin.[17] International law and the constitutional norms practiced in other Western countries, however, present a very different picture. A significant number of European states—including Germany, Finland, Greece, Poland, Ireland, and Slovenia, to mention just a few prominent examples—grant special privileges to members of their respective nations living outside their borders in everything pertaining to immigration, including residency status and citizenship. As stated by Alexander Yakobson and Amnon Rubinstein in their book *Israel and the Family of Nations*, "It is a recognized European

norm that a nation-state can maintain official ties with its 'kin' outside its borders and treat them preferentially in certain areas, including immigration and naturalization."[18] In October 2001, a committee of human rights jurists on the European Council (also known as the Venice Commission) affirmed the legitimacy of these ties between a cultural-ethnic community and its "kin-state," and further recognized the right of such a state to look after the interests of those it deems to be part of its nation and to assist them in preserving their identity in their places of residence.[19]

In its emphasis on Jewish content and motifs in its national symbols, its national anthem, and its various institutions of government, Israel is no different from other countries which are considered exemplary democracies. The Christian cross, for example, is displayed on the flags of Switzerland, Sweden, Finland, and the United Kingdom, and more than a few democratic constitutions confer preferred status on a particular religion or church. This is the case, for instance, in Norway, Denmark, England, and Greece. As Yakobson and Rubinstein comment, "the instances of cultural 'non-neutrality' in the contemporary democratic world are so numerous and significant that they cannot be described as mere exceptions: rather, they tend to be the rule."[20] Obviously, minorities living in the aforementioned countries—Jews, Muslims, members of different Christian denominations—may feel uncomfortable with national symbols and constitutional arrangements which do not reflect their belief systems. Nevertheless, commonly accepted democratic values do not require the nation-state to relinquish its special character in favor of the minority groups living in its midst.

Israel's Jewish majority, however, does not derive its legitimate right to mold the country in its own image solely from international law and the norms practiced in other Western democracies. This right is also based on the history of the Jewish nation and the circumstances that induced it to establish a sovereign state in the land of Israel. While living in the diaspora, the Jews suffered pogroms, persecution, and degradation for two thousand years, and faced the very real threat of physical annihilation just a few decades ago. Furthermore, unlike Arabs living in Israel, Jews are

unable to express their national heritage, identity, and aspirations fully in any other country. In several important ways, the State of Israel was founded as an attempt to create a framework of affirmative action—political, legal, and cultural—for the Jewish people as a whole. Despite Palestinian allegations concerning the historical injustice they have suffered, from a broader perspective, Zionism is based solidly on the principle of justice. This simple truth was recognized by the various nations that gave their support to the establishment of a national homeland for the Jewish people, support which was codified in the League of Nations' approval of the British Mandate on July 24, 1922, and later in the United Nation General Assembly resolution of November 29, 1947, which called for the partition of Mandatory Palestine into separate, independent Jewish and Arab states.

The allocation of land for exclusively Jewish communities is not ethnocentric and injurious in the sense that it does not arise out of hatred of foreigners. It serves, rather, to fulfill one of Zionism's pivotal objectives: creating an environment in which Jews can develop their national and cultural identity. Because an individual's character is, to a great extent, determined and formed under the influence of the enveloping community, many people choose to live within communal frameworks that allow them to cultivate and express a common cultural and/or ethnic identity. Even liberal theory, the guiding spirit of ardent advocates of civil rights, justifies this choice and sees it as the realization of an essential right.[21] Indeed, the Supreme Court has already voiced its opinion that "there are situations in which separate but equal treatment is lawful treatment." In the Kaadan ruling, however, the court also implied that the right to community life based on this principle is reserved only for minorities seeking to preserve their customs. According to this logic, Jews cannot claim it for themselves, because they constitute a majority of the Israeli population.[22] Jurist Eliav Shochetman, who strongly criticized the court's decision, addressed the weakness of this assertion:

> I do not believe that the right of a group to preserve its culture and way of life and its desire to prevent forced assimilation should be limited only

> to minority groups. I believe that there are many Jews living in Israel who have left their places of origin in the diaspora in order to preserve their culture and way of life within a Jewish framework. Should the rights of these Jews—who may well be the majority—be denied only because they belong to the majority? And should the Jews in their own land aspire to revert to minority status in order to enjoy the right to preserve their culture and way of life undisturbed?[23]

Another reason for establishing Jewish communities throughout Israel is concern over Arab irredentism. As emphasized by jurist Ruth Gavison, former head of the Association for Civil Rights in Israel,

> In the context of the ongoing conflict, Israel is justified in establishing Jewish towns with the express purpose of preventing the contiguity of Arab settlement both within Israel and with the Arab states across the border: Such contiguous settlement invites irredentism and secessionist claims, and neutralizing the threat of secession is a legitimate goal.[24]

Indeed, history has proved that nation-states find it difficult to govern territories in which an alienated and even hostile population has established a solid demographic majority. This was the case, for example, with Germany, which lost Alsace-Lorraine to France after World War I, and, most notoriously, with Czechoslovakia, which was forced to relinquish the Sudetenland to Nazi Germany in 1938.

Preserving the Jewish character of various communities dispersed throughout Israel, especially relatively small ones, is therefore as much an inevitable consequence of geopolitical reality as it is both historically justified and supported by commonly accepted international norms. Naturally, Israel should not discriminate against minorities living in its midst. Even a pure egalitarian society, however, would not necessarily require an equal distribution of every particular resource, parceling out supplies like an automaton devoid of analysis and consideration. Israel must consider the overall picture and the different needs of different groups of its citizens. The Jewish state can fulfill its obligations to its

non-Jewish citizens in many ways: It can designate separate communities or neighborhoods for non-Jews, as it did with respect to the Bedouin population; in areas in which a large minority group resides, it can solicit bids designated for these groups only, and it can give preferential consideration to minorities living in mixed cities. All of these methods are available to the Jewish state, so long as it remembers the purpose for which it was established in the first place, and so long as it remembers that equality—so dear to some proponents of democracy in Israel and the world over—cannot be used as a pretext for undermining the rights of this nation, fighting for its sovereign existence in its own state, on its own land.

III

Unfortunately, Israel's legal authorities, especially the Supreme Court, have been systematically negating the principles underlying Jewish settlement in the State of Israel. This predilection is clearly manifest in their attitude toward the JNF, one of the most important organizations serving the Zionist vision. The JNF, which played a decisive role in the Jewish people's return to its historical homeland, now finds itself defending the very justification for its existence, while the state to which it has contributed so much gives it the cold shoulder.

Perhaps we should refresh our memory about the goals of the JNF and what it has accomplished so far. In 1901, during the Fifth Zionist Congress in Basel, Theodor Herzl announced the establishment of the Jewish National Fund as the World Zionist Federation's executive arm for purchasing land. The organization's Hebrew name, Keren Kayemet, was taken from a verse in the Mishna: "These are the precepts, the fruits of which a person enjoys in this world, but whose *principal remains intact* (*keren kayemet*) for him in the world to come."[25] The Zionist movement decided that the fund

would be private, with its primary source of income being donations from Jews around the world. Herzl, who envisioned his Jewish state as a country in which minorities would live alongside Jews, nonetheless determined that the fund would serve the Jewish nation exclusively. "The Jewish National Fund should be the property of the Jewish people alone, an untouchable property," he declared. "The Jewish people is not only the founder of the property for that purpose, but its perpetual owner. This will prevent arbitrary use that is incompatible with the goals of the founder."[26] From its inception, the JNF adopted an iron-clad rule not to sell the land it acquired, but only to lease it, based on the biblical passage "The land shall not be sold forever."[27]

The JNF was registered as a private company in England in 1907 and quickly became intensely involved in purchasing land in Palestine for the Jewish people: the "redemption of land," as it was called at the time. Thanks to worldwide fundraising efforts, the JNF succeeded—"clump by clump," as the song goes—in purchasing almost one million dunams by the time the state was established. The communities that were built on these lands not only developed local agriculture and transformed the socioeconomic structure of the Jewish *Yishuv*, but to a large extent constituted the borders on which the UN Partition Plan was based.[28]

A short time after the establishment of the state, the status of the JNF was codified in Israeli law. On November 23, 1953, the Knesset passed the Jewish National Fund Law, in recognition of the JNF's important contribution to the Zionist enterprise. The law did not make the JNF a governmental or public body; it was registered as a private Israeli company, a status it maintains to this day.[29] The fund's charter, which was approved by then-minister of justice Pinhas Rosen, stated that the purpose for which the JNF was established was "to purchase, acquire on lease or in exchange, to receive on lease or otherwise, lands, forests, rights of possession and easements, and any similar rights, as well as immovable properties of any other type, in the territory which has been determined (including, as understood in this memorandum, the State of Israel, in any area under the jurisdiction

of the government of Israel) or in any part thereof, *for the purpose of settling Jews on the lands and properties as stated*."[30]

During the state's first decade, with the advent of massive waves of immigration, Israel was beset by a severe economic crisis. Government ministries sought sources of income which would enable the young state to bear the financial burden of absorbing all these immigrants. To this end, the authorities turned to the JNF, which enjoyed surplus liquidity, and asked it to purchase land from the state. In 1949 and 1950, in what came to be known as the "first million" and "second million" transactions, the state sold approximately two million dunams to the JNF. Many of the groups behind the petitions against the JNF's land-allocation policy today claim that this land, which was primarily held by the government since 1948, in place of absentee Arab owners, was transferred to the JNF without adequate compensation. They hold that the transactions between the state and the JNF were simply a fraud designed to secure Jewish control over plundered Arab property. A study by geographer Arnon Golan of the University of Haifa, however, shows that the JNF paid a realistic price for the land it purchased—18.25 liras per dunam. After all, the purpose of these transactions was to infuse cash into the state's empty coffers.[31]

In the 1950s, the JNF itself managed the land it had acquired over the years. When the state asked the JNF to transfer the administration of this property to the ILA in order to centralize the management of state lands under one authority, the fund agreed but stipulated a number of conditions: That the property to be transmitted to state administration would remain that of the JNF—in other words, of the Jewish people—i.e., it would not be sold, only leased; and that the ILA would administer the property subject to the JNF's charter, which, as stated, requires that only Jews can lease or permanently reside on its land.

The state accepted the JNF's conditions and formalized them in three laws passed by the Knesset in 1960. In effect, Basic Law: Israel Lands, the Israel Lands Law 5720-1960, and the Israel Lands Administration Law 5720-1960 constitute one constitutional structure that delineates all the

legal provisions currently in effect in Israel regarding land administration.[32] Just prior to the enactment of these laws, MK Moshe Sneh of the Israel Communist Party proposed that the ownership of JNF land—and not just its actual administration—be transferred to the state. MK Zerach Warhaftig, then-chairman of the Constitution, Law, and Justice Committee, strongly opposed the idea. "MK Sneh's proposal is far-fetched," he stated.

> He speaks of nationalizing the Jewish National Fund. He suggests that all lands become state lands. The Jewish National Fund—and surely MK Sneh remembers this—purchased all its lands with monies it received from the entire people… and because the land was purchased with the people's funds, it must remain in the JNF's possession. By what right can we take its lands and transfer them to the state?[33]

In addition to the Knesset's legislation, the state's commitments to the JNF were reinforced in an agreement signed between the two on November 28, 1961. The agreement unequivocally stated, "The lands of the Jewish National Fund shall… be administered subject to the Memorandum and Articles of Association of the Jewish National Fund."[34] In other words, the state undertook to lease JNF land, which was under the "ownership of the people," for the creation of Jewish communities only. It was agreed that any departure from that principle would require the fund's consent.[35]

Such departures, it should be emphasized, have occurred more than once over the years, but they were usually resolved efficiently by the state and the JNF. Whenever the authorities needed to allocate JNF-owned land to individuals belonging to minority groups—usually in areas that already had dense concentrations of these groups, such as the Galilee—they gave land to the JNF in exchange, generally in areas with large Jewish majorities. However, this practice was halted in 2004, following the interim conclusions reached by the Gadish Committee. This committee, which was appointed by the government to examine the possibility of comprehensive land reform, recommended a large exchange agreement, whereby the JNF would transfer tens of thousands of dunams of municipal lands to the ILA,

in exchange for ownership of an equal amount of land in the Galilee and the Negev.[36]

Talks between the ILA and the JNF in preparation for the "large land exchange deal" have continued, fraught with difficulties, for several years, and have effectively ended small-scale, individual exchanges between the two entities. Consequently, when the aforementioned Abu Riyyas sought to purchase a house on land owned by the JNF, the ILA, unable to solve the problem in the same manner it had previously resolved such disputes, denied their request. The couple's petition to the Supreme Court and the petitions subsequently filed by Arab organizations attacked the fundamental principles of the JNF, characterizing them as a crude violation of the principle of equality. While such claims may not come as a surprise, the attorney general's response shakes the very foundations of the entire JNF endeavor.

Clearly, the attorney general's support of the Arab petitioners' claims completely contradicts the 1961 agreement between the ILA and the JNF, as well as the entire legislative framework designed to anchor the principles and objectives of the JNF in Israeli law. The attorney general's assertion that the JNF must act equally in allocating its lands to all citizens means, in effect, that the state has repudiated its commitments to the Fund and to the Jewish people as a whole. Moreover, it blatantly disregards the fact that the JNF is not a governmental organization that serves the Israeli citizenry, but rather a private entity established by and for the Jewish people, which has provided all its resources. The JNF's response to the petitions filed against it underscores this point, which has been obfuscated by its critics:

> The JNF is not a trustee of the public that resides in Israel. The JNF's loyalty is to the Jewish people in the diaspora and in Israel…. Not only is the JNF not obligated to act for the benefit of all Israeli citizens, it is obligated to act to purchase land for the use of Jews. Handing over land for the use of all citizens of the state directly contradicts the JNF's objectives and *raison d'être*. The JNF is prohibited from allocating land to all residents of the state. Requiring the JNF to allocate its land for the benefit of all citizens

> of the state would be tantamount to its dissolution and the nationalization of its property.[37]

In support of such arguments, several prominent figures, such as Nobel Prize laureate Professor Robert (Israel) Aumann, Lt. Gen. (Res.) Moshe Ya'alon, and a former secretary of the United Kibbutz Movement, Dubi Helman, asked the Supreme Court to add them as respondents to the petitions submitted by the Arab organizations. They emphasized in their motion that while acting as fundraisers and donors in the service of the JNF, they believed that the funds they raised were intended to purchase lands on behalf of the Jewish people. Any use of JNF lands for another, contradictory purpose would, therefore, undermine the basic trust upon which the Fund is built:

> The JNF has a clear and obvious commitment to act in accordance with its objectives and to safeguard the lands it has purchased, which belong to the Jewish people—a contractual commitment towards the respondents, as to other donors and fundraisers, and a lawful commitment as trustee obligated to act in accordance with the terms and objectives of the trust…. After the passage of decades, during which Jews have donated to the JNF from their assets with the aim of purchasing lands as property of the Jewish people, these lands cannot be used now for purposes other than those for which the funds were donated and for which the properties were purchased with those funds. The trust of tens of thousands of Jews cannot be violated nor can the donors and their bequests be ignored. The basic rights of the donors cannot be infringed, and they cannot be forced to hand over their property for a purpose they do not desire.[38]

The undermining of the JNF's status caused an uproar in the Israeli legislature as well. MKs Zeev Elkin, Moshe Kahlon, and Uri Ariel submitted a private bill to the Knesset, supported by ministers and MKs from both the right and left, which sought to reinforce the commitment undertaken by the state in 1961: to administer JNF lands in accordance with the fund's charter, i.e., solely for Jewish settlement.[39] On July 18, 2007, the bill

easily passed a preliminary reading with a majority of 64 to 16 (an unusually large margin) and is currently awaiting deliberation in the Economic Affairs Committee.[40] Naturally, however, the initiative encountered strong opposition in the Arab sector, joined by critics from academic and media circles.[41] The Israeli newspaper *Haaretz* took matters a step further, publishing an editorial on July 20, 2007, under the banner "A Racist Jewish State." "This bill reflects an abasement of the Zionist enterprise to lows never imagined in the Declaration of Independence," declared the writer. "Even though the Jewish National Fund purchased lands for the Jewish people while it was still homeless, the State of Israel has already been established and these lands must now serve all its citizens."[42]

These statements reveal a misunderstanding of the essence of the JNF and its mission, as well as a surprising ignorance of Zionist history. We can only imagine what position the writer would have taken had the courts sought to nationalize lands owned by religious endowments such as the Muslim *wakf*, or properties belonging to the various Christian churches in Israel, which, according to their own internal laws of administration, are not leased or sold to anyone who is not a member of their respective faiths. It is highly doubtful that any Israeli court employing the principle of equality would even conceive of violating the arrangements that enable such preferential treatment. Until very recently, the equivalence between these religious organizations and the JNF was recognized even by the most progressive adherents of the Zionist left. A statement by Israel Prize winner Yaakov Chazan, one of the ideological architects of the socialist Mapam party, is especially pertinent in this respect: "The lands of the Jewish National Fund," he said, "which were purchased with the funds of the Jewish people, are dedicated to Jewish settlement, just as the Muslim wakf is dedicated to satisfying the social needs of the Muslims."[43]

Since its inception, the JNF has purchased more than 2.5 million dunams of land in Israel for the Jewish people. It has prepared one million dunams for agriculture, planted more than 223 million trees, cultivated 400,000 dunams of natural woodland, and constructed 160 reservoirs and

dams throughout Israel.[44] Despite all this, the legal system of the State of Israel now threatens to tie the JNF's hands, and not because it has become corrupt or violated the law, but rather because of its loyalty to the vision in whose name it was established and on behalf of which it has labored diligently for over one hundred years.

IV

It is obvious that the JNF's current predicament is only part of a larger picture. Public criticism of its "discriminatory" policies and the legal attack on its legitimacy are ultimately directed against Zionism itself. Influential groups in the Israeli establishment and society have adopted an extreme liberal discourse on the issue of human rights and have elevated the principle of equality to exclusive supremacy. In the name of this principle they do not hesitate to criticize Israel for acting in its legitimate security interests, to attack the moral considerations that led to the state's establishment as an act of historical justice, and even to challenge the basic right to property (at least in the case of the JNF, which, as we have emphasized, is a private company).

Former chief justice Aharon Barak once stated that "Civil rights are not a platform for national destruction."[45] The same Barak also explained that "a 'Jewish state' is a state in which Jewish settlement in its fields, cities, and towns is its primary concern."[46] Nevertheless, in its Kaadan ruling, the Supreme Court, over which Barak presided, has denied the legitimacy of establishing Jewish communities and, today, under the presidency of Dorit Beinisch, is likely to rule that Israel is not permitted to honor its commitments to the JNF and allocate a limited amount of property—only 13 percent of Israeli land is owned by the JNF—for the Jewish people and its needs. The attorney general himself, in the name of the government, has

already paved the way for abandoning the national enterprise launched by Herzl in 1901.

The next stage should be obvious to any thinking person. After the alleged discrimination in land-related matters is ostensibly rectified, the Law of Return will be the next sacrifice on the altar of equality, followed by the jettisoning of other expressions of Jewish "ethnocentricity." The Knesset will naturally object strenuously, and the Israeli majority, which views itself as unapologetically Zionist, will protest, but in the Supreme Court and the legal system in general a different spirit prevails. Although the Supreme Court would not dare to oppose openly the idea of a Jewish state, it is highly doubtful that it would effectively defend it against demands to abandon it in favor of an ideal that, on the surface, displays a far more enlightened and democratic image: that of a "state of all its citizens." Under such circumstances, civil rights—or at least a particular, narrow interpretation of them—are indeed liable to become a "platform for national destruction."

How can this downward spiral be reversed? First, we must transfer this fateful debate about the Jewish character of the State of Israel from the insular legal arena to the realm of national deliberation by the public at large and its democratically elected representatives. It is the legislature and the government which must decide such fundamental issues, not a small, elite coterie of professional jurists who are appointed by committee rather than elected by the democratic process. Far-reaching changes in the character of the state, as well as the moral and constitutional foundation on which it stands, require the support of a decisive majority of the public, if not a wall-to-wall consensus. These radical changes must not be imposed by means of court rulings and scholarly opinions.[47] One who seeks to defend democracy cannot claim to do so through anti-democratic means, ignoring the will of the electorate and the political process through which that will is legitimately expressed.

The State of Israel cannot and need not discriminate against its minorities. It must satisfy their needs and respect their legitimate rights. It would betray the values it stands for if it acted otherwise. But Israel is first and

foremost a Jewish state. This was the dream of its founders and remains the primary reason and justification for its existence. Over the years, it has achieved this goal, thanks to its deep commitment to the Jewish people and to the central objectives of Zionism: *aliya*, settlement, and security. If Israel is tempted to abandon these principles in order to project a more attractive image to its critics both within and without, the national homeland itself will be in danger of collapse. Currently, the majority of the Jewish public, in Israel and the diaspora, vehemently opposes the expropriation of the state and the land on which it stands. The Jewish state is precious to the Jewish people. Jews want it to be strengthened, not undermined. They must demand no less from their leaders.

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Notes

1. Elections Appeal 1/65 *Yaakov Yardur et al. v. Chairman of the Central Elections Committee for the Sixth Knesset*, P.D. 19 (3), p. 385.

2. Bylaws of the Katzir Cooperative Society for Communal Settlement, section 3, clause 6 (e), as amended on February 8, 1982. Cited in HCJ 6698/95 *Adel Kaadan et al. v. The Israel Land Administration et al.*, P.D. 54 (1), p. 258, para. 2. The complete ruling appears at http://elyon1.court.gov.il/files/95/980/066/a14/95066980.a14.HTM.

3. HCJ 6698/95 *Adel Kaadan et al. v. The Israel Land Administration et al.*, P.D. 54 (1), p. 258.

4. HCJ 7452/04 *Fuad Abu Riyya et al. v. The Israel Land Administration et al.*; HCJ 9010/04 *The Arab Center for Alternative Planning v. The Israel Land Administration et al.*; HCJ 9205/04 *Adalah—The Legal Center for Arab Minority Rights in Israel v. The Israel Land Administration et al.*

5. Petition submitted to HCJ 7452/04 *Fuad Abu Riyya et al v. The Israel Land Administration et al.*, para. 67. For the complete petition, see www2.tau.ac.il/InternetFiles/Clinican/UserFiles/File/kklatira.doc.

6. The state's response to HCJ 7452/04 *Fuad Abu Riyya et al. v. The Israel Land Administration et al.*, para. 6; see also the letter sent by advocate Osnat Mandel, head of the Supreme Court Petitions Department in the State Attorney's Office, to advocate Hisham Shabita on November 4, 2004. Also in the Supreme Court hearing on September 28, 2008, it was explicitly stated by both the judges and the petitioners that the Abu Riyya issue would be resolved, see http://elyon1.court.gov.il/files/04/520/074/n28/04074520.n28.pdf.

7. The state's response to HCJ 7452/04 *Fuad Abu Riyya et al. v. The Israel Land Administration et al.*, para. 6.

8. HCJ 7452/04 *Fuad Abu Riyya et al. v. The Israel Land Administration et al.* In Supreme Court hearings on September 24, 2007 and September 28, 2008, the judges expressed their opinion that JNF lands should be marketed in an equitable manner.

9. Jackie Khoury, "Ahmed Zbeidat Was Not Accepted to the Settlement of Rakefet 'Because He Lacks Interpersonal Intelligence' and Petitioned the High Court of Justice," *Haaretz*, February 14, 2007 [Hebrew].

10. From the petition in HCJ 8036/07 *Fatna Abrik-Zbeidat et al. v. The Israel Land Administration et al.*

11. The Supreme Court's decision in HCJ 8036/07 *Fatna Abrik-Zbeidat et al. v. The Israel Land Administration et al.*, section 3, October 31, 2007, http://elyon1.court.gov.il/files/07/360/080/C04/07080360.c04.pdf.

12. "A Dunam Here and a Dunam There," lyrics by Yehoshua Friedman, music by Menashe Ravina.

13. HCJ 6427/02 *The Movement for Quality Government in Israel v. The Knesset*, sections 24, 26, Supreme Court decision dated May 11, 2006, http://elyon1.court.gov.il/files/02/270/064/A22/62064270.a22.pdf.

14. HCJ 98/69 *Aharon Bergman v. The Minister of Finance et al.*, P.D. 23 (1), pp. 693, 698.

15. HCJ 453/94 *The Israel Women's Network v. The Government of Israel et al.*, P.D. 48 (5), p. 501.

16. HCJ 528/88 *Eliezer Avitan v. The Israel Land Administration et al.*, P.D. 43 (4), p. 298.

17. See, for example, Na'ama Carmi, *The Law of Return: Immigration Rights and Their Limits* (Tel Aviv: Tel Aviv University, 2003) [Hebrew]; Uzi Ornan, "Not Jewish, Not Democratic," *Haaretz*, February 16, 2001 [Hebrew]; Yoav Stern, "Israeli Arab Human Rights Group Unrolls 'Democratic Constitution,'" *Haaretz*, February 28, 2007.

18. Alexander Yakobson and Amnon Rubinstein, *Israel and the Family of Nations: The Jewish Nation-State and Human Rights* (London: Roudledge, 2009), p. 126.

19. Venice Commission (European Commission for Democracy Through Law), *Report on the Preferential Treatment of National Minorities by the Kin-State*, adopted by the Venice Commission at its 48th Plenary Meeting, Venice, October, 19-20, 2001.

20. Yakobson and Rubinstein, *Israel and the Family of Nations*, p. 144.

21. In this context, see Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University, 1989).

22. The decision of the Supreme Court HCJ 6698/95 *Adel Kaadan v. The Israel Land Administration et al.*, March 8, 2000, paragraph 30 of the judgment of former chief justice Aharon Barak. There, justice Barak addresses the assertion that the "decision to allocate land for the establishment of the Katzir community for Jews only does not violate equality, because the Israel Land Administration is also willing to allocate land for the establishment of an Arab-only communal settlement." According to Barak, "The legal argument is that separate but equal treatment is equal treatment. As we know, this claim was first raised in the 1950s in the United States regarding its education policy, which separated education for white students and education for African-American students. The Supreme Court (in *Brown vs. Board of Education of Topeka*, 347 U.S. 483 (1954)) held that the 'separate but equal' policy is 'inherently unequal.' Underlying this approach is the perception that separation is offensive to the excluded minority, that it highlights the differences between that minority and the others, and reinforces feelings of social inferiority.… Over the years, a great deal was written on the subject, emphasizing that separate treatment may sometimes be equal treatment or that separation is at least justified despite the violation of equality. This is primarily the case, *inter alia*, where the desire for separate but equal treatment arises from within minority groups which seek to preserve their culture and way of life, and wish to prevent 'forced assimilation'…. Indeed, I am willing to assume—without ruling on the matter—that there are situations in which separate but equal treatment is lawful treatment." Barak's criticism of "separate but equal" treatment following the famous *Brown vs. Board of Education* ruling does not accurately reflect the prevailing reality in national democracies, and

it is doubtful whether it is at all relevant to Israel. Separate treatment of groups in accordance with their religions and outlook is an accepted constitutional practice in Israel as, for example, in the field of education, where separation still exists between the state schools and the state religious schools.

23. Eliav Shochetman, "The Legality and Constitutionality of Jewish Settlement in Eretz Yisrael," *Mishpat Umimshal* 6:1 (July 2001), p. 123 [Hebrew]. Also see Yaffa Zilbershatz, "The Right of the Majority to Choose Its Residence," *Mishpat Umimshal* 6:1 (July 2001), pp. 87-107 [Hebrew]; Shimon Sheetrit, "The Matter of Equality and Separate Living in Communal and Rural Settlement: Was the Ruling in the Kaadan Affair Unpreventable?" *Karka—Journal of the Land Policy and Land Use Research Institute of the JNF* 56 (April 2003), pp. 27-65 [Hebrew].

24. Ruth Gavison, "The Jews' Right to Statehood: A Defense," Azure 15 (Summer 2003), p. 96.

25. Mishna Peah 1:1.

26. Getzel Karsel, *Megilat Haadama*, ed. Nathan Agmon (Bistritzky), vol. 1: *Korot* (Jerusalem: Jewish National Fund, 1951), pp. 24-25 [Hebrew].

27. Leviticus 25:23. For an elaboration on this principle and its effect on Israeli law, see Yossi Katz, *The Land Shall Not Be Sold Forever: The Legacy and Principles of the Jewish National Fund in Israeli Legislation* (Jerusalem: The Land Policy and Land Use Research Institute of the JNF and the Cathedra for the History of the Jewish National Fund and Its Enterprises, Bar-Ilan University, 2002) [Hebrew].

28. See Jacob Markovitzky, *The Spirit of the Valleys: The Enterprises of the JNF as Stepping-Stones in the Development of the National Homeland, 1920-1936* (Tel Aviv: Ministry of Defense, 2007) [Hebrew].

29. The Jewish National Fund Law 5714-1953, Book of Laws 138, December 3, 1953, p. 34. Section 2 provides: "The Minister of Justice may approve a memorandum of association and articles of a company limited by guarantee, submitted to him by the existing company, for the purpose of establishing a body incorporated in Israel to continue the activities of the existing company, which was founded and incorporated in the diaspora."

30. Emphasis ours. On May 20, 1954, the minister of justice approved the Memorandum and Articles of Association of the JNF (published in the *Yalkut Hapirsumim* [Official Gazette] 5714-1953, no. 354, June 10, 1954, p. 1197). Article 3 (a) of the charter provides that JNF lands are for Jewish settlement.

31. Arnon Golan, "The Transfer of Abandoned Rural Arab Lands to Jews during Israel's War of Independence," *Cathedra* 63 (April 1992), p. 150 [Hebrew].

32. *Divrei Haknesset* [Knesset Protocols], vol. 29 (1960), pp. 1916, 1926 [Hebrew].

33. *Divrei Haknesset*, vol. 29, p. 1925.

34. Covenant Between the Government of Israel and the JNF, Article 4, www.kkl.org.il/kkl/english/main_subject/about_kkl/a_amana.htm.

35. Covenant Between the Government of Israel and the JNF, Article 5.

36. In this context, see Tzur Ehrlich, "Small Box," *Makor Rishon*, November 28, 2008 [Hebrew]. If the JNF reaches an arrangement with the state as part of a broad land exchange deal which would transfer marketable land to the JNF, this would not present a fundamental problem from a moral or Zionist perspective. Conversely, if the JNF receives non-marketable land (the bottom of Lake Kinneret, for example), this would be a fatal blow to the organization and the purpose for which it was established.

37. The JNF's response to HCJ 9010/04 *The Arab Center for Alternative Planning et al. v. The Israel Land Administration et al.*, sections 218, 220. The complete response appears at www.kkl.org.il/kkl/hebrew/nosim_ikaryim/al_kakal/sugiot_mishpatiot/bagatspdf.pdf.

38. HCJ 9205/04 *Fuad Abu Riyya et al. v. The Israel Land Administration et al.*, Supreme Court decision on September 28, 2008—petitioners' motion to be added as respondents.

39. Israel Land Administration Bill (Amendment—Administration of JNF land for the benefit of the Jewish people) 5767-2007.

40. Amnon Meranda, "Bill Reserving JNF Land for Jews Only Passes Preliminary Hearing," Ynetnews, July 18, 2007.

41. See, for example, Mordechai Kremnitzer and Roy Confino, "Legislation Note—The Bill Regarding the Land Exchange Deal Between the Jewish National Fund and the Israel Land Administration," April 17, 2008, on the Israel Democracy Institute website: www.idi.org.il/BreakingNews/Pages/Breaking_the_News_23.aspx [Hebrew].

42. "A Racist Jewish State," *Haaretz*, July 20, 2007.

43. *Divrei Haknesset*, vol. 27 (1959), p. 2953 [Hebrew].

44. Data taken from the JNF website: www.kkl.org.il/kkl/english/main_subject/about_kkl/jewish%20peoples%20land/jewish%20people%20land.x.

45. Elections Appeal 2/84 *Moshe Neimann v. Chairman of the Central Elections Committee for the Eleventh Knesset*, P.D. 39 (2), p. 225, para. 6 of Judge Barak's ruling.

46. Aharon Barak, *Interpretation in Law*, vol. 3: *Constitutional Interpretation* (Jerusalem: Nevo, 1994), pp. 331-332 [Hebrew].

47. Ironically, Aharon Barak, under whom the Supreme Court adopted a policy of unprecedented judicial activism, expressed this clearly: "Despite the fact that the court is sometimes forced to resolve the conflict between the State of Israel's values as a Jewish and democratic state, I do not believe that the court is the state institution that should, in these matters, create consensus where it doesn't exist…. Not every problem which is resolvable using judicial tools should be resolved with judicial tools… many are the issues, including the present one, whose appropriate solutions are, first and foremost, social and political. Indeed, the values of Israel as a Jewish and democratic state are worthy of being examined by Israeli society, whether within political or social-academic frameworks." Ron Margolin, ed., *The State of Israel as a Jewish and Democratic State: Panel Discussion and Related Sources* (Jerusalem: World Union of Jewish Studies in Conjunction with the Avi Chai Foundation, 1999), p. 15 [Hebrew]. See also Ruth Gavison, "A Jewish and Democratic State: Political Identity, Ideology, and Law," *Iyyunei Mishpat* [Tel Aviv University Law Review] 19:3 (July 1995), p. 631 [Hebrew]. HCJ 4481/91 *Gavriel Bargil, CEO of Peace Now et al. v. The Government of Israel et al.*, P.D. 47 (4), p. 210.