The Backstory to the Jewish State Law Debate: March 2000-July 2018[1]

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The much debated "Jewish State" legislation, which, in addition to the Israeli discourse, has become yet another source of tension in the relationship between Israel and its critics abroad. For many outside commentators, the long and complicated back story is generally not known.

Israel's self-definition as a Jewish and democratic state is anchored in the Declaration of Independence, but the definitions of these terms and the balance between then have been the subject of discussion and conflict since then. Debates over minority demands and rights (particularly for Palestinian Arab citizens) are continuous and intense, involving Knesset legislation, government policies, and court decisions.

One of the major drivers of the current legislative push, and particularly the section that relates to "closed communities" was a decision of the Israeli High Court of Justice in March 2000, in the Qaadan vs. the Katzir Cooperative Settlement case. Based on the challenge posed by an Arab family (Qaadan) on the question of land allocation for small Jewish outposts in the Nahal Irun (Wadi Ara) region, the case revolves around the prioritization of the "democratic" over the Jewish dimensions.

In writing for the majority, Chief Justice Aharon Barak gave priority to the former, voiding the practice of reserving eligibility for residence in Katzir exclusively to Jews, which resulted in the rejection of Qaadan's application. Barak was aware of the implications, declaring his decision in this case to be "the first step in a long and sensitive road." Eighteen years later, after many additional steps, and growing push-back, the debate over Barak's views and decision on this case continue to resonate. The political response is embodied in the current "Jewish state" legislation.

At the time of the decision, those who give priority to the democratic and universalist principles greeted the outcome enthusiastically, seeing the ruling as evidence of the growing acceptance of their positions. *Ha'aretz* editorialists declared that "The court's ruling strengthened the citizen's entitlement to equality in his or her dealings with state institutions….The principle of equality has been affirmed, and without judicial wrangling over the Jewish character of the State of Israel" (9 March 2000). Oped writers wrote that "in denying the state the right 'to allocate state lands…on the basis of discrimination between Jews and non-Jews,' the High Court…smashed an old taboo that turns out to be essentially racist in nature".[2] In the *Jerusalem Post* (15 March 2000), David Newman (from Ben-Gurion University) wrote that the court's decision "struck at the very heart of the Zionist enterprise…[and] raised the major contradiction which is rooted in the definition of the State of Israel as a Jewish state and a democracy." (With some imagination, Newman compared the situation with neighborhoods in the U.S. or UK, where minority groups have difficulty obtaining housing, and described the ruling as a condemnation of "blatant discrimination").

On the other side, traditional Zionists who emphasize the centrality of the Jewish state condemned this decision. From their perspective, the court's narrow focus on individual rights

and equality, rather than on the collective historic rights of the Jewish people and the long-term security implications, was misplaced. They noted that in his long and detailed opinion, Aharon Barak did not consider the central geographic, demographic, and political factors in the Nahal Irun region. Between Afula and Hadera, the population ratio at the time was 5,000 Jews to 100,000 Arabs, many of whom live in towns such as Umm el-Fahm and Arara, from which Jews are systematically excluded. The area is near the Jenin district in the Palestinian Authority, where 200,000 Palestinians live. There is no free market in land sales, and Arab land-owners will not or cannot sell land to Jews without endangering their lives. Indeed, Justice Kedmi's dissent emphasized these concerns, and particularly the need to balance individual equality with "insuring the existence of Israel as a Jewish and democratic state."

Among this group, which can be assumed to reflect the view of the Israelis who vote for parties in the current government coalition, the decision reinforced the image of a judiciary that is out of touch and overly influenced by Western universalist ideology, in contrast to particularist Jewish and Zionist frameworks.[3] *Ma'ariv* editorial writers argued that "An honored place is reserved in Zionist history for the purchasers of Arab land to be used for the settlement of Jews. For years, this was the essence of Zionism. Yesterday, the last nail in the coffin of the holy mission…was nailed" (*Maariv*, 9 March 2000). Similarly, Yair Sheleg declared that the ruling "undermines the basic Zionist principle of promoting a Jewish presence on the land (as distinct from the obligation to protect the rights of all citizens in their present place of residence)" (*Ha'aretz*, 14 March 2000). In an op-ed in the *New York Times*, Yoram Hazony cited Barak's ruling as evidence of the inability of the Jewish state to preserve its own vital interests.[4] Jewish Agency head at the time, Sali Meridor, warned that this decision would increase the threat to Israel's territorial integrity and security.[5]

Critics also argued that lawyers for the State of Israel (represented through the Ministry of Housing), avoided presenting the core issues and principles, either because they had personal ideological objections, or due to their view of the legal obstacles to using this approach (Bagatz 6698/95, *Qaadan vs. Israel Lands Authority, et al.,* para. 40a). To the degree that the outcome represented a victory for post-Zionism, it was won (and lost) by default, rather than through the presentation of a convincing case. The apparent inability of the state to defend traditional Zionist interests and objectives was a major source of concern.

In giving primacy to the issues of individual equality and other norms usually associated with liberal homogeneous democratic societies, over the collective rights of the Jewish people to defend their vital national interests. While traditional Zionism, like other national, religious, or other ethnic-based movements, emphasizes the collective dimension, the Universalists give priority (or even exclusivity) to the centrality of the individual.

In their petition to the court, the lawyers for the Qaadan family (as summarized in Barak's opinion) highlighted the issue of individual rights and equality. They were careful to distance themselves from the most blatant post- or anti-Zionist claims, acknowledging "the Jewish foundations in the identity of the State of Israel, the history of settlement in Israel," (para 7) and the important contributions of the Jewish Agency in fulfilling Zionist goals" (para 37). They argued that the Jewish foundation of the state is of primary importance only with respect to core issues, such as the Law of Return, and does not apply to allocation of land for settlement.

In their view, the settlement phase of Zionism has been completed, (para 37) and while not arguing for a reversal of earlier policies, they stressed the "forward-looking" nature of their petition in establishing the principles of equality in Israel's democratic society (paras 7 and 37).

The numerous respondents in the case (the Israel Lands Authority, the Ministry of Housing, the local council of Tal-Irun, the Jewish Agency, the Katzir settlement group, and the Israeli Farmers Organization) emphasized different issues, avoided direct presentation of the central political issues. The lawyers for the government and the Housing Ministry acknowledged the right of individual Arab families to live in the area of Nahal Irun. However, they also claimed that in the specific case of Katzir, the nature of this cooperative organization and its by-laws, restricting admission to Israelis who served in the IDF (in other words, excluding Arab citizens who are exempted from military service), were legitimate.

This presented an easy target for Barak, who noted that other than IDF service, the members of the Katzir cooperative settlement did not share any distinctive factor, and thus were not entitled to protection from the principle of equality under a form of affirmative action (see the detailed discussion of this point below). A second claim, focusing on the role of the Jewish Agency, "the arm of the Jewish people in the diaspora," in managing the land provided by the state, was also weak and unconvincing. As Barak noted, beyond the technical issues regarding the transfer of responsibility to the Jewish Agency, the state did not provide special reasons to exempt this case from the general rules of equality (para 26). While citing the statutes governing allocation of state lands, the respondents did not make the case that the particular (Zionist) goals embodied in these statutes took precedence over individual equality.

The Jewish Agency's response was more substantive, acknowledging the direct clash between individual and group rights in questions of land distribution. Their arguments were anchored in the historical and national dimensions, emphasizing the continuing importance of settlement, in general, and in peripheral areas where the Jewish presence is thin, in particular. The Agency's advocates argued that these goals are entirely consistent with the Jewish and democratic foundations of the state, as well as the accomplishment of Zionist objectives (para 10). Citing the security aspect of this settlement in the chain of Jewish outposts in Nahal Irun and other areas, they asserted that this policy is necessary "to protect the Land of Israel in the name of the Jewish people" (as written in the charter of the community settlement). Many of these arguments are made by supporters of the proposed Jewish state law.

In his decision, Judge Barak avoided dealing with these arguments, asserting that that the general principle of individual equality had primacy (para 28).

At the same time, he acknowledged the Jewish dimension, and cited Israeli law and traditional foundations for individual equality, including the Declaration of Independence. His decision also cited an opinion by Judge Berenzon paraphrasing an ancient prayer – "When we were exiled from our land, and we were removed from our land, we became victims of the nations where we dwelled." Berenzon concluded that on the basis of this experience, the Jewish nation, as represented by the State of Israel, must not tolerate inequality, except in cases of affirmative action or "when special conditions obtain" (para 23).

Dismissing assertions that the values of democracy and the Jewish heritage are incompatible, Justice Barak cited the elements of Jewish tradition focusing on individual equality that are incorporated in the Basic Law: Human Dignity and Freedom. “We reject the claim of a clash between the nature of Israel as a Jewish state and a democratic state based on equality, or that a Jewish state justifies discrimination on the basis of religion or nationality.” According to Barak, the Jewishness of the state is expressed in the use of Hebrew as the national language, the calendar based on Jewish “national experience,” and the centrality of the Jewish tradition in religious and cultural dimensions (para 31).[6]

Furthermore, Barak acknowledged the legitimacy of restrictive land-use policies in response to security requirements and to prevent transfer of land to “undesirable elements” (para 19). He explicitly acknowledged the legitimacy of exclusive settlements for Jews (or for other groups, including Arabs, Druze, etc.) under specific conditions, but demanded accountability from the government in such cases. The opinion also notes the distinctive circumstances of this case, and excludes the use of this judgment as a precedent with respect to distinct communities, such as kibbutzim, or settlements related to state security (para 37).

The Illusion of Israeli “Normalcy”

In making the case for the priority of individual equality, Justice Barak cited a number of international documents, including the 1948 Universal Declaration of Human Rights and the European Convention on Human Rights. He noted that guarantees of equality and protection from discrimination based on race, religion, and nationality are incorporated in most modern constitutions (para 23). In Barak’s view, Israel, as a member of the club of democratic states, is also expected to prohibit discrimination and ensure equality.

Throughout his tenure on the court, Justice Barak has made extensive use of foreign precedents and opinions imported from the U.S., Canada, and Western Europe. (para 30). In this case, the opinion includes extensive quotes from the classic 1954 decision in *Brown vs. Board of Education*, in which the U.S. Supreme Court rejected the “separate but equal” argument on the basis that such arrangements are inherently unequal (para 30). On this basis, in part, Barak rejected a “separate but equal” formula for Jewish and Arab communities.

The extensive effort to transfer the norms and experiences of the U.S., Canada, Western Europe and other liberal democratic societies to the Israeli context provides a direct and important facet of Barak’s judicial philosophy, which has been expanded across the legal establishment since 2000. From this perspective, Israel is, or should be, a “normal” liberal and universally egalitarian state.

For Zionist critics, in contrast, Israel was established as a Jewish state, first and foremost, and in key areas, such as language, calendar, immigration, and control of land, the interests of the Jewish people have precedence. Many Israelis – like others in the Middle East – identify themselves according to ethno-national and religious membership rather than primarily as individuals. In this framework, most Israeli Jews are either Zionists themselves or descended from Zionists who chose to make their home in the Land of Israel, for both religious and national reasons.

In this context, the Israeli situation is by no means unique. In many democratic societies – including Europe, Japan, South Korea, etc. – the nationality that forms the core of the state's existence enjoys primacy, in terms of language, calendar, legal system, and other cultural factors. Even in ostensibly multicultural societies, such as Canada, the U.S., and Australia, the cultural foundations are based on dominant (usually Protestant Anglo-Saxon) norms.

Israel is not only a Jewish state, with a large Palestinian Arab minority, as well as other minorities, but the legitimacy of Israel continues to be denied, thus reinforcing the emphasis on collective rights. In 2000, Palestinian leaders, including Yasir Arafat, insisted that Jews are religious group, devoid of national rights, including the right to a sovereign nation state, and in 2018 his successor Mahmoud Abbas repeated the same mantra. Leaders among Israel's Arab population share these beliefs, joining in "Naqba day" commemorations and boycotting Israeli symbols, including the flag.

The response among Israelis is to reassert and insist on Jewish national rights, including in the Jewish state legislation. The specific language may change, and Knesset votes in favor or opposed to the particular form that this process takes will shift, (in part, in response to lobbying from European other outside actors) but the issue is unlikely to disappear from the national agenda. In the past 18 years since Judge Barak's decision in the Qaadan-Katzir case, these issues have become increasingly salient, and, for the reasons cited in this article, the saliency is likely to continue to grow.

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[1] This analysis is based on the author's previous publications on this topic, including "The Poor in Your Own City Shall Have Precedence: A Critique of the Katzir-Qaadan Decision" (Hebrew), *Kivunim Hadashim*, April 2001; and in English in *Israel Studies Bulletin* (November 2000)
[2] Joseph Algazy, "The Katzir Controversy," *Ha'aretz*, 3 April 2000
[3] Hillel Neuer, "Aharon Barak's Revolution," *Techelet* (Azure) 3 (Winter 1998/5758); and "Israel's Imperial Judiciary," *Commentary* (October 1999).
[4] Yoram Hazony, "Israel's Northern Exposure," *New York Times*, 13 June 2000
[5] Dan Izenberg, "Agency: Court Ruling Threatens Israel's Hold on Galilee, Negev," *Jerusalem Post*, 9 March 2000
[6] See also Aharon Barak, "The Role of the Supreme Court in a Democracy," *Israel Studies* 3:2, based on a speech delivered at the Netanya College of Law, 21 November 1997)