

# CHALLENGING ETHNIC CITIZENSHIP

German and Israeli Perspectives  
on Immigration



*Edited by*  
Daniel Levy  
*and*  
Yfaat Weiss



*Berghahn Books*  
NEW YORK • OXFORD

— Chapter 11 —

## THE FUTURE OF ARAB CITIZENSHIP IN ISRAEL

Jewish-Zionist Time in a Place with  
No Palestinian Memory



Hassan Jabareen

### Introduction

On 8 March 2000, Israel's Supreme Court granted the petition of the Qa'dan family—Palestinian citizens of Israel—who wanted to buy a house in a new community-based village called Katzir.<sup>1</sup> The respondents—the Israel Lands Administration, the Jewish Agency, the Katzir Cooperative Association, and others—had rejected their application on the grounds that the locality was intended for Jews only. The Supreme Court determined that this constituted discrimination on the basis of nationality, and it ruled that the state is prohibited from using “national institutions” to perform these discriminatory acts on its behalf. An important precedent, this decision sparked considerable public reaction. Until the handing down of the *Qa'dan* judgment, Palestinian citizens, who make up nearly 20 percent of Israel's citizens, were absolutely excluded from localities established by the state in conjunction with Zionist bodies such as the Jewish Agency and the Jewish National Fund.

Since its establishment, Israel has pursued a lands and rural settlement policy under which Arab ownership of the land has been transferred to the Jewish population for its use. These transfers have been based on sophisticated legislative and political mechanisms. Prior to 1948, only around 7 percent of the some 20.5 million dunams, which constituted the area of the new state, was in the hands of the Jews. Today, the state of Israel controls over 93 percent of the lands that make up its territory. The government body that administers the state's lands is the Israel Lands Administration.

The *Qa'dan* judgment exposes one of the many mechanisms of Jewish control over the land. The Israel Lands Administration transferred land to the Jewish Agency, which claims to represent the aggregate of Jewish interests both worldwide and in the state of Israel. The Jewish Agency decided to construct a rural community village called Katzir on the land that it had received from the state. When the Qa'dan family applied to buy a housing unit in the new village, they were told that they did not meet the criteria of the Jewish Agency, which was promoting Jewish interests only, and hence the residents would be exclusively Jewish. The Israel Lands Administration endorsed the Jewish Agency's position, arguing that the policy of the Jewish Agency was grounded in an agreement between the latter and the state.

In fact this mechanism, which involves nongovernmental Zionist bodies such as the Jewish Agency and the Jewish National Fund on the one hand, and the state of Israel, through the Israel Lands Administration, on the other, in the process of settling the “state's lands,” helped to exclude the Arabs from living in localities that were established as joint projects (as opposed to towns). Since 1948, some six hundred Jewish localities have been established, while the Arabs have not been allowed to set up a single locality.

This chapter discusses the *Qa'dan* judgment as a model, which outlines the issue of Palestinian citizenship in the state of Israel. This judgment constitutes a tangible application of a doctrine, which advocates the implementation of the state of Israel's values as a “Jewish” and “democratic” state. Many Israelis argue that the Supreme Court, which in *Qa'dan* highlighted the state's Jewish-Zionist characteristics, has also successfully implemented the state's commitment to the principle of equality between all its citizens against a nationality-based background.

In this presentation, I shall critique this civil model of *Qa'dan*. I will argue that this model presents a new form of “Israeliness,” a form that is “future-oriented” and will also include Palestinian citizens of the state. However, such inclusion is made conditional on their renouncing components of Palestinian identity, instead assuming the “Israeli Arab” identity, which is characterized by its Zionist components, including acceptance of the ideological values of Zionism. This model, which is underpinned by numerous judicial decisions as well as primary legislation, is at most prepared to relate to those Palestinians who are citizens of the state as possessing a status that is similar to that of diverse ethnic migrant groups, whose rights are limited to the civil-political sphere, with only a limited willingness to grant recognition of cultural aspects, on condition that such recognition will not adversely impact on the ideological structure of the state. It will be my contention that this model's problematic nature in respect to equality is an upshot of the failure to recognize Palestinians who are Israeli citizens as persons indigenous to their homeland or “patrials”: a group that is in the process of founding a people and is entitled to self-determination in the framework of the state, in contrast to an ethnic group not living in its own homeland.

In the first part of this chapter, I will start by distinguishing between the characteristics of homeland groups, which constitute a people or a national minority, and other ethnic groups, discussing the differences of their various demands and how countries relate to them. Then, based on a textual reading of the *Qa'dan* judgment, I will analyze the model of citizenship outlined in the judgment as it applies to the collective rights of the Palestinians in Israel. I will attempt to reveal deep ideological structures that are represented and activated through the judicial choices made, based on a disclosure of the narrative structures expressed in the judgment. I will further attempt an analysis of their impact on those affected by them.<sup>2</sup> In the second part, I will analyze the rights accruing to an individual Palestinian under the *Qa'dan* model. I will scrutinize the argument that while the "Jewish state" confers national rights on the national majority group, it is the "democratic state" that implements the principle of equality in the area of civil-political rights. In this context, I will critique those commentators who advocate making a distinction between civil-political rights and collective national rights.

### The *Qa'dan* Model: Israel's Palestinian Citizens as a Migrant Ethnic Group

A group that is defined as a people (or part thereof) is a historical community, which is resident in a defined area, normally its homeland, and is distinguished by possessing its own language and culture. Due to invasion or colonial occupation by other peoples and as a result of force or manipulation, the status of a number of national groups of this kind has changed, so that they have become nondominant national groups called national minorities (Steiner and Alston 1996: 987–1020; Kymlicka 1995: 11).

This involuntary change made the history and collective memory of these groups into pronounced and salient elements in shaping national awareness. The homeland (*patria* or territory) becomes the locus of national time, where the past, history, and collective memory have forged a distinct national identity. It is for this reason that residence in the homeland has continued to strengthen the claim to a different future for the territory, a future bound up in the political or diplomatic past that once prevailed in the homeland. Such a claim is tantamount to a refusal to accept a present or future that diminishes the groups' political status. The involuntary change in the status of these groups in their own homeland does not, therefore, prevent them from demanding a different status—one that is identical with their sovereign status, a status that is undergoing change, i.e., that recognizes their right to self-determination. This demand for self-determination is made both because they constitute a people, and also by reason of the destruction and the historical oppression that they have experienced as a people living in and on their own land. This is a demand made because of the present and the past alike, and

it is also a demand made because of the locus or place—the homeland (see Sack 1986; Smith 1981).

Residence in and ties with the homeland have contributed to the stability of the national identity of indigenous people or natives, whose struggle focuses primarily on issues bound up with the selfsame territory, such as self-determination, land claims, and demands over language (which in their eyes is the language of territory, i.e., of the homeland). The homeland shapes and re-creates the relationship of members of the homeland group with those who are not present in the homeland, namely the displaced group. Among other things, this relationship thwarts and in certain cases prevents the making of particular kinds of civil-political demands such as those relating to integration and assimilation.<sup>3</sup> Such demands are likely to create a new "we" identity of a different nature from the "we" identity of the homeland group: an identity that will agree to legitimate the denial of rights to those resident in the diaspora. The rights demanded by the diaspora take the form of recognition based on predominantly historical arguments. Nonrecognition of these arguments constitutes a denial of the history of the homeland group. Furthermore, self-perceptions such as "we" and "they," which are shaped by the power relationship and control over history, call forth difficult questions over demands for civil equality. From the outset, the situation has been such that a very marked perceptual gap has existed between the two groups, making it impossible to address the "language of rights" properly, as a language that will enable the principle of equality between them to be strengthened. The homeland group, which sees itself as a victim of the dominant group's powers of control, will call into question the purpose of the new and dominant "language of rights," implying that it is merely providing an "umbrella" to improve and promote the minority's interests. At the same time, the dominant group, justifying its hold over the territory by means of diverse moral arguments, which in turn provide justification for its supremacy over the homeland group, bolsters the ideological reasons for the continuation of the unequal situation.<sup>4</sup> The umbrella provided by the "language of rights" can, nevertheless, be used in order to promote legitimate interests of the homeland group, but these will be of limited scope, and the principle of equality will be of restricted applicability only (Abel 1995). Furthermore, civil-political demands under the umbrella of the dominant "language of rights" are, in certain cases, likely to perpetuate the cultural supremacy of the dominant group (i.e., the use of the dominant language) over the homeland group. Looking at how the homeland group relates to itself—as a group that is founding a people, and refusing to accept another people's supremacy—some might call this effort a question of "national honor" on the part of the homeland group.<sup>5</sup>

In contrast, any group of immigrants necessarily shapes its political agenda within the host country at a distance from its homeland. Unlike the homeland groups, which have claims on the country in all homeland contexts (such as self-determination, the acknowledgment of historical

wrongs, language and land claims), immigrant groups who are distant from their homeland bring their main demands to bear in the area of civil-political rights and antidiscrimination measures in the area of resource allocation. Assimilation and integration sometimes constitute an aspiration on the part of the immigrants themselves, and they are acceptable options. Immigrants perform an individual act of transition. They move from their homeland to a new country in search of their own personal happiness. This is also the unwritten agreement between them and this new homeland: they come to it, and they are absorbed as individuals who wish to be integrated in it, and not as a national community, which wishes to establish a national existence in a new territory.<sup>6</sup> Nevertheless, some immigrant ethnic groups that have accepted the host country's political and ideological structure do sometimes express demands for the recognition of symbolic cultural components that do not conflict with the economic, legal, and political foundations of the receiving or host country.<sup>7</sup>

The Palestinians in Israel are a national group that is resident in its homeland and is part of the Palestinian people who are partially located outside its homeland. As a result of the 1948 war, those Palestinians who are now citizens of Israel were transposed, for the first time in their history, from a dominant national community in Palestine into a national minority, which belongs to a defeated nation, in the new state—the state of Israel. Matters relating to the homeland constitute a paramount component in the demands of Palestinian citizens of Israel, such as the return of expropriated land; the right of return to the villages from which they were displaced; recognition of unrecognized villages; return of absentees' assets; extending the areas of jurisdiction of Arab localities, and so on. The concept of "land" has become a national symbol in this struggle. The first Land Day on 30 March 1976 in which six Palestinians from the village of Arrabe and Sakhnin in the Galilee were killed, is the first and most important national event in the history of the Palestinians as a national collective in the state of Israel. Its significance lies in the fact that the national minority managed, for the first time since 1948, to organize its struggle collectively, declaring a general strike from the Negev in the south to the Upper Galilee in the north, in protest against the policy of land expropriation (Bishara 1993).

Residence in their homeland has strengthened and stabilized Palestinian citizens' national awareness and has shaped their refusal to consider their status as being on the same footing as that of a minority ethnic group fighting solely for civil-political rights. This is despite the fact that, particularly in the 1990s, a variety of issues could be identified over which civil demands were made, especially with regard to budgetary matters, in which such demands were limited to matters of vital importance to the Palestinian citizens' development in the economic and social spheres. Nevertheless, the dogged and fundamental struggles of the Palestinian citizens, struggles in which they were prepared to take to the streets undeterred by the use of force on the part of the security forces, were over

national rights, i.e., as sons and daughters of the Palestinian people. In April 1998, during the protests in the Shefa'amr area against the background of the destruction of two houses in an unrecognized village, Umm al-Sahali, dozens of Palestinians were injured by shots fired by local security forces.<sup>8</sup> In September 1998, at the protests by residents of Umm al-Fahem and the Arab localities in Wadi 'Ara over land expropriations in the al-Roha area, more than 450 Palestinian citizens were injured as a result of shots fired by the Israeli police and the border police (Kernochan 1999). In June 1999, a clash took place between Palestinian citizens and the security forces following the destruction of a Palestinian house in Lod (Lydda), and sixteen people were injured.<sup>9</sup> The background to the eruption of al-Aqsa Intifada, which began in late September 2000 and during which thirteen Palestinian citizens were killed by police, derived from the national affiliation of the Palestinians in Israel to the Palestinian people. The same applied in September 1982 to the protests against the Sabra and Shatilla massacres of Palestinian refugees in Lebanon. The list is a long one. In all of these cases, what is involved is a kind of demand that is characteristic of a homeland group that sees itself as part of a people with claims to that homeland, as opposed to the type of struggle typically waged by immigrant ethnic groups.<sup>10</sup>

Is the *Qa'dan* petition characteristic of the struggle by Palestinian citizens of Israel as a national group resident in its homeland? The answer to this question might well also help explain the differences in how the two national groups in Israel related to the *Qa'dan* judgment. Specifically, the "conservative-Zionist" group argued that the judgment constituted an impediment to the Zionist enterprise, while the "liberal-Zionist" group explained that the judgment was a historic breakthrough for Arab rights. Nevertheless, a large proportion of the Arab public expressed indifference to the outcome, while others came out with intense criticism directed against the "jubilation" of the "liberal-Zionist" groups.<sup>11</sup>

The *Qa'dan* judgment is about admitting and including the non-Jewish others in the state of Israel in a project defined as a strictly Zionist-Jewish enterprise. In the judgment, this project is embodied in the image of the locality of Katzir, which was founded jointly by the Israel Lands Administration and the Jewish Agency with the aim of settling Jews in the Wadi 'Ara area (referred to in the judgment as Nahal "Iron"—the "Iron" Valley). The *Qa'dan* family, the petitioners, represented a challenge to this project through its claim to be able to join and be part of it. This was no easy thing. The Israeli public has understood the judgment as an important and revolutionary document because despite the project's declared goal, it nevertheless enabled "non-Jews" to be included and integrated in it.

The *Qa'dan* judgment adopts an antidiscriminatory approach, which seeks to remove obstacles caused by exclusion. All citizens are entitled to equal treatment so that they can gain entry to this ideological domain. National or racial origin makes no difference. Those who are admitted are individuals who are "set apart" by virtue of their standing as citizens.

Although the Qa'dan family represented not only the Arabs but also all those for whom the project was not intended, i.e., the "non-Jews," the "Arab" aspect of the judgment was particularly salient because of the Jewish Agency's presence in the legal text. It was this presence that in turn underscored the ideological presence of the Arab-Palestinian identity, because of the nonneutral relationship between Palestinian and Zionist identities constructed on relationships of rejection and negation: because the Zionist identity delimits and defines Israeli identity as a Jewish-Zionist identity, it by definition rejects the constituent elements of the importunate Palestinian identity. Azmi Bishara (1999) has provided a very cogent explanation of this attitude: "Israeliness does not distinguish the Arabs in Israel from the rest of the Arabs in the same way that it distinguishes the Jews in Israel from the rest of the Jews, because from the very outset Israeliness has been Jewish-Zionist and rejected the Arab, and even perceives itself as such. In order to be Arab-Israeli, the Israeli Arab has to be part of his rejection."

Prohibiting discrimination involves what Isaiah Berlin dubbed the "negative freedom" of individuals, according to which individuals' freedom shall not be vitiated or denied because they belong to this or that particular group. In other words, the state seeks to act neutrally, without *arbitrariness*, as it were, following a policy of "collective blindness." In contrast, a claim for equal treatment against the backdrop of group membership seeks to establish a positive right, which requires the state to adopt positive or affirmative measures so as to treat the group's legitimate interests with respect and concern.<sup>12</sup> In other words, in an antidiscrimination suit, the demand is for revocation of the institutions' *arbitrary* policy, which attaches weight to the collective or group difference of individuals. In contrast, in a suit for equal treatment against a group background, it is precisely the group's difference that should constitute the decisive factor. However, as will be explained below, antidiscrimination policy will not succeed, and discrimination will continue to exist without the guarantee of "positive" or affirmative equality.

Despite its importance, the *Qa'dan* type of suit is not characteristic of the principal actions and claims made by an indigenous national minority. Rather, it typifies the actions of diverse ethnic groups seeking to integrate in a new society. Nevertheless, its importance in terms of removing obstacles in the way of all individuals must not be downplayed, particularly when the exclusion is institutionalized by legislation or declared policy with the goal of maintaining the supremacy of the dominant group. However, a vast abyss separates this from any characterization of these suits as principal claims of an indigenous national minority.<sup>13</sup> This is not saying that a homeland minority should remain detached and refrain from all and any kind of integration. Clearly, at the very least, economic needs such as employment and academic studies will require the minority to strive for inclusion (Bruner and Peled 1998: 107).

However, in matters involving the historical reality of the homeland, the demand for inclusion is problematic from the homeland group's

viewpoint, because it is likely to undermine the legitimacy of the claims of the homeland groups, possibly giving the impression that their struggle is one of an ethnic group fighting for civil-political rights only, instead of a struggle by a homeland group seeking equality between two national groups. Does the *Qa'dan* case fall into this category?

The settlement of Katzir was established at the initiative of the Jewish Agency, which, according to the judgment, "took as its goal the settling of Jews throughout the whole of the country, and in particular in border regions including areas with a sparse Jewish presence."<sup>14</sup> According to the Jewish Agency's perception, a sparse Jewish presence is defined in terms of the Arab presence. In Wadi 'Ara, the Arab presence is on a large scale, and hence the presence of the Jews, according to the Jewish Agency's understanding, is sparse. The Arab presence, according to the Jewish Agency, constitutes a threat to the area's Jewishness. To put it more delicately, the Arab presence is not legitimate and hence solutions to this presence must be found. The settlement of Katzir was established with the goal of negating the presence of the Arab identity in Wadi 'Ara through the intermediary of settling Jews. In the eyes of the Qa'dan family, this is said to be a goal that lacks legitimacy. Furthermore, most of the settlement of Katzir was established on expropriated Arab land.<sup>15</sup> As a result, in the context of Katzir, "Jewish" and "Arab" identities are not neutral matters: the relationship between them is constructed on the basis of negation. This is through no fault of the Qa'dan family, but because of the goals of the Jewish Agency.

In this way, an enormous yawning gulf has been created between the request of the Arabs, as a homeland group, for the return of its expropriated land and the application of an Arab to purchase a house on expropriated Arab land, and also to present the success of this request as an Arab "victory." Does not this attempted purchase confer legitimacy and validation on a policy that is directed against someone who is not present on the land, i.e., the original owners of the land? Does it not convey an attitude embodying neutrality, and perhaps capitulation by the homeland group with regard to the illegitimate goals in establishing the settlement of Katzir? Is there not here a new association, resulting in the creation of a different "we" (including individual Arabs and the Jewish Agency) that negates and rejects the right of other displaced people who are the original owners of the land (in this context, they might be outside Katzir but not necessarily outside the entire homeland)? How legitimate is the fragmentation of the national "we" of the patriots when it comes about, not for internal reasons, but rather as a result of external intervention by those threatening it (*viz.*, the Jewish Agency)? Are the petitioners not placing themselves in a hostile situation that negates their very identity as Palestinian Arabs? It is also of interest to examine how the legal text relates to the collective rights of the national minority in Israel. What historical narratives were referred to in the text, what form was given to the image of the petitioners, and what are the limits of the dialogue of collective rights that emerge from it?

From the viewpoint of the homeland group, these questions point to the problematic nature of civil-political claims of the *Qa'dan* type. Notwithstanding the antidiscrimination policy, which professes to be at the heart of the judgment, the text related to the ideological aspects of the petitioners, members of the *Qa'dan* family. The *Qa'dan* text presents us with petitioners who do not raise historical claims, and do not contest the legitimacy of the Jewish Agency's actions, accepting the ideological values of the state of Israel as a Jewish-Zionist state, and expressing loyalty to the "Jewish people." In the first few pages of the judgment, Chief Justice Aharon Barak discloses the petitioners' credo by observing: "The petitioners do not discount the Jewish foundations of the state of Israel's identity, nor the history of settlement in Israel. Their petition is future-oriented. In their opinion, the Jewish foundations of the state's identity are of decisive weight only in matters involving the very essence of the Jewish nature of the state—such as the Law of Return, 5710–1950."<sup>16</sup>

What we have here is an extremely important and interesting disclosure. Despite the petitioners' national identity, they concur with the primary objectives of Zionism, which has broad support among Supreme Court justices. But it goes further than this. Specifically, the petitioners concur with that entire body of literature that supports efforts to achieve the greatest possible harmony between "Jewish" and "democratic," emphasizing the importance of the Law of Return, which is practically the only component designed to continue granting national preference to Jews in Israel (Gavison 1998: 213; Saban 1998/1999: 79). The legal text depicts the image of the petitioners as individuals who have no historic ties whatsoever with the territory, the land, the soil, or the place. Were such components to appear in the text, they would immediately create associations with the petitioners' indigenous Palestinian identity, which threatens the historical legitimacy of the Zionist project. The petitioners in *Qa'dan*, according to the text, are not seeking recognition of the historic wrong done to them and members of their people as a result of the policy of expropriating land, nor are they seeking recognition of their collective memory. What they are propounding contains nothing that in the slightest way identifies them with Palestinian national identity, such as the return of expropriated land or a partnership in managing the land of Katzir. But it goes further than this. The text presents them as, unexpectedly, accepting the national identity of the state as a Jewish state, conferring legitimacy on the "rural settlement enterprise," or to use Chief Justice Barak's words, "the issue in this petition is not the entire panoply of the Jewish Agency's actions."<sup>17</sup> The petitioners have no arguments or criticisms of the past. Their suit "is oriented toward the future"—an expression that is emphasized on a number of occasions in the text.

Apart from the ideological aspects of the petitioners as highlighted and propounded in the text, we have no information about them apart from the following attributes: "The petitioners are a married couple who have two daughters. They are Arabs who are currently living in an Arab

locality."<sup>18</sup> The reader is provided with no information, for example, about the Arab locality—which is the Arab village of Baqa al-Garbiyeh in the Triangle. This information could perhaps have been added in order to indicate the proximity of this village to Katzir, which according to the judgment is located in "Nahal 'Iron" (instead of calling the area by its standard Arabic name of Wadi 'Ara), and perhaps also in order to provide a comparative view of the standard of living in the two localities. We have not been afforded a glimpse into the personal lives of the couple who brought the petition in their quest for a different standard of living, and a better future for their children.

So what was it that the petitioners wanted in Katzir? This is something that the text does disclose to us: "They sought—and are still seeking—to live in a place with a different quality of life and standard of living from those where they are currently living."<sup>19</sup> This is a neutral request that has absolutely nothing to do with the national cleft. It could apply equally to any nationality, and is not specific to Arab identity. In practice, this is a request that completely neutralizes the fact that they are members of a homeland group, presenting them as people belonging to a (non-Jewish) migrant ethnic group, whose sole concern is better quality of life. Just as we do not care where immigrants have come from, the text does not provide us with the name of the Arab village from which the petitioners have come: the main thing is that they are citizens. Nor did the petitioners contest the respondents' argument that in Katzir the festivals and holidays would be Jewish-Zionist, and the schools would teach in Hebrew, following Zionist values. Like most immigrants, they will be unhesitatingly willing to accept the local language and values.

The implicit assumptions that allowed the judges to vote in favor of the petitioner in the *Qa'dan* case become even more transparent when we compare it to the case of *Bourkan*.<sup>20</sup> In this case, the petitioner underscored his membership in a group resident in its homeland, presenting a competing historical narrative for the purpose of recovering his home in Jerusalem—possibly the reason why the petition was turned down. *Qa'dan* presents petitioners who did not "confuse" the text with a threatening historical narrative and came in the guise of new citizens concerned to ensure that their children would be educated in "good" schools in a quality location. True, in both judgments the petitioners were seeking to purchase an apartment in a Jewish residential area, but there is a major difference between them. Firstly, Katzir does not resemble the Jewish Quarter of Jerusalem's Old City, as the purpose for which Katzir was established was specifically directed against Arab identity, while the Jewish Quarter had also existed in the homeland prior to 1948, for centuries constituting an integral, harmonious part of Arab culture. Secondly, the location is per se Jewish, and hence does not generate problems that resemble those of Katzir, which by its very nature and purpose is directed against the patrials. Thirdly, the petitioner in *Bourkan* was subversive, challenging the legitimacy of his removal from the Jewish Quarter. In contrast, the *Qa'dan* family was presented in the text

as conferring legitimacy on this denial of identity. Fourthly, and most importantly, the petitioner in *Bourkan* was using the trial to recover his own house, as opposed to the Qa'dan family, who had applied to Katzir in order to purchase a house built in the area on expropriated Arab land. The Qa'dan narrative was that of an "Israeli Arab," as opposed to *Bourkan*, who sought to present a Palestinian narrative.

In contrast to the meager narrative figure of the petitioners in the text of the Qa'dan case, the Jewish Agency looms large as a richly detailed literary figure in all its variety, with everything it has contributed, a moral, national figure possessing an abundant past and a history filled with deeds. The legal text presents its readers with a single history that played a starring role throughout the entire judgment: the history of the Jewish Agency as the executive arm of the Zionist movement in the area of rural settlement, immigrant absorption, and control of the land.<sup>21</sup> Despite the court's finding that exclusion on the basis of nationality is invalid, the text made no critical references whatsoever to the Jewish Agency's policies over the years. In parallel, there was no reference at all to the historical discrimination against Arabs in Israel in all matters relating to planning and land policy. The absence of these references occurred despite the fact that counsel for the petitioners enclosed an expert opinion on the matter, addressing the dearth of land and housing among the Arabs, an issue of which the text made no mention whatsoever. There was no expression in the text of the historical injustice done to them. The word "Arab" appeared just three times, in the context of the petitioners themselves. Were this a historical text to be read by historians of the future, they would not know whether or not there is an Arab population with historical roots in this country. It therefore comes as no surprise that the "we" of the text is also exclusively Jewish.

"Emptying" the judgment of the Arab-Palestinian presence made it easier to deal with the ethnic part of the judgment, starting with the ideological voiding of their presence from the homeland, as is expressed in Israel's Declaration of Independence: "The values of the state of Israel as a Jewish, democratic state are based, inter alia, on the right of the Jewish people to have an independent existence in its own sovereign state." In the words of Dr. Orit Kamir (2000): "The brief statement 'Eretz Israel was the birthplace of the Jewish people' therefore erases facts, opinions.... It thereby negates the possibility of the existence of any form of an Arab national entity whose 'birthplace' was also the territory in question. In this way, the opening sentence of the Declaration of Independence expresses that which is called by some the (ideological) 'emptying' of the land of its non-Jewish inhabitants, and certainly of any 'people' other than the Jewish people." Thus, anyone who expected this important judgment to acknowledge the Arabs as patriots, as natives and members of a people, will be disappointed. The text concludes resolutely that this land is "Eretz Israel," the Land of Israel, not Palestine and not Palastina, that there is only one exclusive historic right, and that it belongs to the "Jewish people."

The Jews are the only ones in the judgment to be called a "people," as opposed to an ethnic or a religious group. The others are simply "minorities" within the Jewish state, and at most they are defined negatively as "non-Jews." The Arabs constitute part of these "members of minorities," possessing no distinctive markers whatsoever such as membership of a people or nation, with their own language, comprising a high percentage of the population; being indigenous or native, etc. In the state of Israel, many minorities are recognized: Muslims, Christians, Druze, Bedouin from the North, Bedouin from the Negev. Although they are all Arab-Palestinians, neither legislation nor judicial rulings are prepared to relate to them as a single national group, instead treating them as small ethnic communities. Recognizing them as members of a given people and a nationality, as opposed to different ethnic groups, would threaten the view of the state as a Jewish nation-state (Nafa'a 1999).

Along these lines, the initial starting point, according to Qa'dan, is the finding that the state of Israel is a Jewish state, but even a Jewish state has rights and duties in respect of non-Jewish individuals as well, as propounded by Barak: "Indeed, the return of the Jewish people to its homeland is the result of the values of the state of Israel as a Jewish and simultaneously a democratic state.... But the values of the state of Israel as a Jewish and democratic state in no way require the state to discriminate between its citizens. Jews and non-Jews are citizens with equal rights and duties in the state of Israel."<sup>22</sup> The homeland group is required to accept these trenchant findings regarding the Jewishness of the state. Members of this group have no edge whatsoever over the other non-Jewish groups in the state of Israel when it comes to this subject. In this sense, they are all equal. They are all supposed to accept the state's characteristics without protest. Here, too, this is a requirement made of all of Israel's non-Jewish citizens and residents, just as it is made of all immigrant groups that accept the basic characteristics of the host state. However, this does not mean that they are devoid of rights. According to the text, they are entitled to equal civil rights like any ethnic group in a nation-state, on condition that these demands do not impair the political-constitutional structure of the state.<sup>23</sup>

The judgment in *Qa'dan*, as well as other cases, is an adoption of a similar stance, prohibiting discrimination on the basis of group affiliation.<sup>24</sup> They come out against the *arbitrary policy* of those administrative authorities, which prevents individuals from realizing their personal freedom. In these cases, the civil-political right had to be balanced against the "values of the state" as a Zionist-Jewish state, i.e., the realization of the civil right is made conditional on the characteristics of the state itself. Collective rights were replaced by civil-political rights. The court recognized just one set of collective rights—those of the Jews. Only the Jews appeared as a "people," contrasted with "the others" who appear as ethnic minorities and foreign groups.

However, even the granting of civil-political rights is not self-evident in the Jewish state, but predicated on the recognition that the petitioner's

claim will not undermine Jewish-Zionist dominance, be it in terms of land control, Arab language usage or any other realm that is potentially contested. The realization of civil-political rights will depend on Jewish-Zionist time and the strength of its enterprise. It may be noted then, with the utmost caution, that the rationale of the *Qa'dan* case and others is to enable individuals within the state of Israel to conduct their lives as they see fit, without interference, as long as this does not harm the political-constitutional framework of the state. This rationale ignores the fact that the country's Palestinian citizens belong to a homeland people and population, and that it seeks to relate to them using only the "umbrella" of civil-political rights. This rationale makes it possible to recognize cultural aspects of the Arab population, particularly in its private sphere, as long as these do not threaten the ideological-political structure of the state. And in fact, this is the situation in the state of Israel. The Arabs use their language in Arab localities, and Arabic is the language of education at Arab schools. The state recognizes their religious groups with regard to personal status, recognizes their religious festivals, enables them to have freedom of religion and of worship, and supports forms of their culture in the realm of folklore. Recognizing the Arabs as religious groups and different ethnic communities or groups, as opposed to recognizing them as a national minority, does not constitute an ideological threat to national exclusiveness over this land.

### Ethno-national versus Multicultural States

Those states that respect the freedom of immigrant groups with respect to symbolic ethnic-cultural subjects are defined as polyethnic states, as opposed to states that comprise more than one nationality, which are defined as multinational states (Kymlicka 1995: 11; Saban 2000: 29–32). Accordingly, the state of Israel is a binational state. The fact that the state defines itself differently does not make it a nation-state. The test is the territorial principle, the homeland. Nevertheless, the principle of "emptying the land and giving precedence to the Jews" defines the state of Israel as a Jewish state despite the Arab-Palestinian presence within it, the Arabs constituting only an ethnic group within it. As has been pointed out, the difference between a national group and an ethnic group is, *inter alia*, that the former is resident in its homeland, while the latter is not. In this case, the state of Israel is Jewish, despite the Arabs who "came and migrated" to "Eretz Israel"—the Land of Israel—because the function which determines that the Jews are the "people" who arrived here earlier is that of time, and not place or abode in the territory. At the very most, the territory may create a "Jewish people" or an "Israeli nation," but not a "Jewish people" that includes all Jews, even those who are not resident in the territory. Consequently, the absence of any recognition of the Palestinian Arabs as part of the homeland people and group leaves only one

alternative, which allocates to the Arabs a status similar to that of migrants. And thus you will find many Israelis who will readily draw the following parallel: just as the foreigners and migrants who came to France did not make it un-French, so the foreigners, the goyim, the aliens, the migrants in the state of Israel are not making it non-Jewish, even though Frenchness is a matter of territory (see Shammas 1995: 19).<sup>25</sup> But this is an Israeli specialty—looking for models of comparison in order to come up with forms of justification; many of them have defined the state as a nation-state, thereby shifting the debate to the question of the legitimacy of this model, which exists in many countries. But the problem lies not in the model, but in the very definition of the state of Israel as a nation-state, a definition that contradicts the fact that it is a binational state.

In conclusion, the *Qa'dan* model, which is based on the conception of the nature of the state as a "Jewish-democratic" state, demonstrates an Israeliness that is "future-oriented": an Israeliness involving, on the one hand, recognition of the past and the history of the Jews as the only people in this land who are entitled to self-determination in this state, and on the other hand, the Arabs, who have no history, and are not founding a people or a homeland group that is also entitled in turn to self-determination in this state. This Israeliness is "future-oriented" insofar as it grants conditional recognition to some of the civil-political rights and obligations of its "non-Jewish" citizens, while at the same time it asks them to accept the ideological "umbrella" of the state as a Jewish-Zionist state. According to this model, the Palestinian Arabs in the state of Israel are migrants in their homeland.<sup>26</sup>

### The Personal Autonomy of the Individual: "Israeli Arab" versus "Palestinian in Israel"

So far, I have related the *Qa'dan* case to the group rights of Palestinian citizens. In this section, I will briefly discuss the personal autonomy of the Palestinian individual according to the *Qa'dan* judgment. Many Israelis argue that while the Jewish state does indeed grant national precedence to the Jews, nevertheless it implements the principle of equality in the area of civil rights. In this context, I will consider whether this is in fact the case, and whether the rights of the Palestinian individual who holds Israeli citizenship are indeed equal to those of his Jewish counterpart, despite the collective precedence enjoyed by the population of the national majority.

The legal rhetoric and outcome of *Qa'dan* embody a civil model in which the Arabs can be included in a future-oriented form of Israeliness. In this Israeliness, the Arab's national identity must be drained away at the same time as it is negated. This identity is required so as to demonstrate loyalty to the basic values of Zionism. Loyalty of this variety is not a neutral loyalty to shared civil values, but rather loyalty to a nonneutral



ideology toward the Arabs (Yiftachel, Ghanem, and Rouhana 1999/2000: 67–68; Rouhana and Ghanem 1998; Smoocha 1993: 325–326). The only thing that will satisfy it is demonstrating a national identity, which does not contest its legitimacy. This is obviously not a question of loyalty to the state—nothing like this is to be found in Israeli reality because of the lack of any distinction between Zionism and Israeliness. And it is clear that the Palestinian national identity, which by definition requires an acknowledgment of the past, of history, of a collective memory, of a historical wrong, of the right of return, contests the legitimation of the ideological foundations of Zionism. Consequently, the integrationist model of *Qa'dan*, seeking to secure the stability of these Zionist foundations, requires renunciation of these Palestinian elements, which are to be replaced by integration in a nonthreatening identity, devoid of its own past or history, while at the same time this identity is supposed to accept the history of the Zionist side.<sup>27</sup> In other words, the Arab's identity is required to be Arab-Zionist, but because Zionism does not include the Arabs, this identity will assume the form of the "Israeli Arab" instead of the Palestinian who is an Israeli citizen (see Bishara 1996: 312). The Arab is required to demonstrate that he has stepped back a certain distance from his national identity, lest ideological positions be attributed to him, which will expose him as a Palestinian Arab. His national identity is the motivation and the reason for laying down conditions of loyalty of the type stipulated in *Qa'dan*, on the one hand, is also the reason, which requires him to act in opposition to it, on the other hand. The Arab individual cannot, within the framework of this model, identify with the longings of his people.

In contrast, the personal autonomy of the Jewish individual will benefit from broader freedom of choice. He enjoys a more diverse range of options, allowing him to be "himself." Generally, the Jewish individual's ideological affiliation, with rare exceptions, does not taint him with the suspicion of threatening the very existence of the project, the reason being that, through his very presence, he embodies the project's intrinsic goals. Accordingly, in most instances, the Zionist ideology does not attach great significance to the Jewish individual's ideological aspects because, as far as it is concerned, the main thing is that Jewish individual's ethnic affiliation. This enables the Jewish individual to enjoy broad freedom of action and self-expression: he may be Zionist, non-Zionist, anti-Zionist ultra-Orthodox (*haredi*), leftist, extreme right-wing, and so on. In contrast, the Arab individual, because of his national identity, is required to act like a conservative Zionist. Otherwise, and even if he appears to be a left-wing Zionist, the suspicion will arise that the position has been adopted because of his national affiliation, and not because of his ideological beliefs.<sup>28</sup>

Furthermore, the state, which sets itself a single goal—the self-determination of the Jewish people—is per se assuring the collective rights of the Jewish individual, thereby providing a cultural environment supportive

of the personal autonomy of the Jewish individual. The Jewish individual does not need, for example, to fight for the status of the Hebrew language and Hebrew culture in the state of Israel, because these are assured by the state. This supportive environment provides the Jewish individual's personal autonomy with multiple possibilities of choice. Things are very different for the Arab individual, who is required to struggle for collective rights in order to secure broader personal autonomy. Nevertheless, according to the integrationist model of *Qa'dan*, he will find himself in a different cultural setting, which in many instances constitutes the negation of his culture as a Palestinian.

In the *Mahameed* case, the issue before the Supreme Court concerned the connection between the rights of the Palestinian individual and his cultural rights.<sup>29</sup> The petitioner, a citizen and resident of Umm al-Fahem, obtained a B.A. in Arabic studies and Islam, graduating cum laude from An-Najah University in Nablus, West Bank. After being accepted for a second degree in this area at Bir Zeit University in Ramallah, West Bank, the respondent issued a restraining order prohibiting him from entering the territory of the West Bank on the grounds that the petitioner belonged to the Hamas leadership, and therefore constituted a risk "to the security of the region." The respondent did not deny the fact that the petitioner was never arrested or questioned concerning his involvement in any political activity, and that he does not have a criminal record. In parallel, the petitioner argued in his petition, inter alia, that the order prejudices his right to continue his studies, particularly given the fact that there is no university in Israel that provides Arabic-language facilities in his academic field. In his affidavit, the petitioner acknowledged that he is a religious person without any interest in political factions, and that his friends at An-Najah University belong to the Hamas movement. He explained that the university campuses on the West Bank are known for the political activities of the various Palestinian movements, and practically the entire student body belong to these movements; no Meretz, Labor, or Herut are to be found there, but instead Hamas, Islamic Jihad, Fatah, the Popular Front, the Democratic Front, and others. Because he is a religious person, not secular and not a Marxist, who attends the mosque on campus, it is natural for his friends to be involved in the more religious movements. However, these friendships in no way imply that he is involved in illegal activities, the petitioner declared. The Supreme Court justices rejected his petition out of hand, ruling, in just a few lines, that they saw no grounds to interfere in the respondent's decision.<sup>30</sup>

From the outset, the petitioner did not have the option of choosing between studying at a university in Israel or studying at a university outside the country; given his academic field, he had just one option, i.e., to study at an Arabic university, which does not exist in the state of Israel. Even if he had opted to study at another university outside the West Bank, this would not have helped him, because all the Arabic universities in the area (in Jordan or Egypt) are known for their political culture,

which is neither favored by, nor acceptable to, the dominant political culture in Israel. Moreover, neither did he have the option of being an "Israeli Arab" at An-Najah University, since this identity is perceived there as suspect and unacceptable. The only option open to the petitioner at An-Najah University, given the prevailing Palestinian sociopolitical culture, was to make a social choice that was acceptable in the context of Palestinian culture. Any other choice would not have been accepted there as normal. However, this normalcy constitutes an extreme aberration in the eyes of Israeli culture. The whole of Palestinian space or locus, in this instance, surrendered to Israeli culture. And in this way the petitioner lost his chance to pursue his academic studies.

The thesis of Canadian philosopher Will Kymlicka identifies a close tie between the individual's capacity to make choices and his personal autonomy on the one hand, and his cultural membership on the other. This cultural membership provides the supportive setting, which enables the individual to shape and realize his choices. Kymlicka (1995: 105) makes the following observations about the connection between the individual's rights and the collective context:

[L]iberals should recognize the importance of people's membership in their own societal culture, because of the role it plays in enabling meaningful individual choice and in supporting self-identity. While the members of a (liberalized) nation no longer share moral values or traditional ways of life, they still have a deep attachment to their own language and culture.... [Na]tional identity lies "outside the normative sphere" ... that it provides a secure foundation for individual autonomy and self identity. Cultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in confronting questions about personal values and projects.<sup>31</sup>

It would appear that according to the *Qa'dan* model, the personal autonomy and self-identity of the Arab individual are not accorded equal treatment with that of the Jewish individual in the state of Israel. Many researchers, such as Sammy Smooha (1999), Ruth Gavison (1998), Yoav Peled (2000), and Ilan Saban (1998/1999: 79) argue that despite its ethnicity, the Jewish state manages, to a marked degree, to provide a firm footing for civil-political rights in the area of the individual. Hence some of them argue that it is possible to reconcile the "Jewish" with the "democratic." However, these approaches fail to provide answers to the question as to whether these individual rights put into practice the principle of equality between Jewish individuals and Arab individuals. The problematic character of these studies is to be found in two areas: the first is the perception of the dichotomy between individual and collective rights; while the second and main one involves the way that they relate to the rights of the Palestinians who are Israeli citizens as an ethnic minority rather than as indigenous inhabitants. As is made clear in this part of the article, the lack of equality in the practice of civil-political rights in the

individual sphere arises from the ethnic definition of the state of Israel, which confers national rights on the majority group only. Hence, in my opinion, antidiscrimination policy also fails to implement the principle of equality in the individual sphere in the absence of any recognition of positive equality, i.e., recognition of collective rights.

Ruth Gavison (2000) is aware of the problematic situation created by the *Qa'dan* model in the sphere of assuring collective rights. She is critical of the approach of the court, which she argues, ignores national differences and opts for a policy of "national blindness." There is no doubt, in my opinion, that the failure to take account of national differences, as Gavison argues, will perpetuate the discriminatory situation against those groups which are denied justice in the name of a policy of "national blindness." Nevertheless, Gavison's criticism also suffers from the same logical flaw of "blind equality." She too argues that the policy is also supposed to provide expression of the state's Jewish-Zionist uniqueness, and hence "providing the possibility to the Jew who so wishes to live in Israel in a Jewish locality is not ... necessarily unwarranted discrimination." The impression given by Gavison's suggestion is that the Jews in the state of Israel are also founding a group comprising a national minority, which, unhesitatingly, justifies the assuring of exclusive rights for special requirements. Gavison tries to apply her alternative without distinction in terms of dominance and weight between a national-majority group and a national-minority group. This approach ignores the basic rationale, which underlies the granting of exclusive rights to groups of minorities. This rationale seeks to counteract a camouflaged policy involving a dictatorship of the majority. It is no coincidence that international law has seen fit to relate to the rights of minorities, as opposed to dominant groups, as exclusive rights, and many democratic constitutions have sought to lay down special protection for minorities, such as in the area of language or affirmative action. The Jewish nature of the state will be maintained as Jewish without any need for privileges or special legislation, for no other reason than because this culture is dominant. The danger in this approach is concealed in the legitimation it confers on a twilight zone, which will lead to a dictatorship of the majority. In my view, a fundamental problem in Israeli Supreme Court decisions relating to Arabs' rights lies precisely in the way that they relate to the national-majority group as a group with special needs, justifying special treatment, without examining issues on the basis of a majority-minority relationship.<sup>32</sup>

## Conclusion

In this chapter, I have tried to examine the relevance of the homeland group's civil status in a state that negates its national existence. The discussion has focused on the homeland group, not on the issue of whether it is possible to reconcile the two expressions "Jewish" and "democratic."<sup>33</sup>

As indicated in this presentation, most Israeli critics have attached no weight to a distinction between an ethnic minority and a homeland minority. This has blurred the distinctions, shifting the debate to a different fundamental question, which addresses the status of ethnic minorities in a nation state. This blurring has led to a situation in which characteristics of the state of Israel are presented as characteristics of a nation-state, even though (de facto) it is a binational state, and Palestinian citizens are presented as an ethnic minority group although they are a homeland minority. This, then, is the explanation of the source of the capitulation to the hegemonic dialogue, the dominant dialogue having created a model for itself, which is presented as a normal model of a similar type to standard models in many democratic countries, i.e., a model of a nation-state containing ethnic minorities within it. The dominant dialogue has also ordained that this comparison constitutes a defined area lying within the borders of the dialogue.

In order to subvert this dialogue, a different kind of attitude is required: one that refuses to discuss the degree of openness and tolerance of the "Jewish state" in respect of liberal rights of "non-Jews," but instead strives to focus on the relevance that must arise out of relating to the homeland group as a group that is in the process of founding a people. This approach is required because of its ability, at the very least, to pose a different question: is the definition of the state as a "Jewish" state a matter of "cultural violence"?

This violence, as presented in this article, embodies a negation of the national existence of the homeland group, the collective memory, history, demands for acknowledgment of the historical injustice it has suffered, language, and so on. Instead, it proposes relating to the homeland group as an ethnic group. In other words, this "cultural violence" is asking that the status of a people be turned into one of immigrants in its own homeland. In addition, it is asking this people to surrender to Jewish national "supremacy." The relevance of "cultural violence" is the demand for a change in the status, in actual fact, of the Palestinian citizen as an "Israeli Arab" to the status of a non-Jewish migrant in the Jewish state. The Palestinian citizen and the non-Jewish Anglo-Israeli are supposed to accept the state's Zionist values and to seek their national identity somewhere else, outside the "Jewish homeland." However, as opposed to the civil status of the non-Jewish Englishman, these values are not neutral to the Palestinian's identity, but rather negate its existence, and furthermore, the Palestinian has not left his homeland but is still living in it. The dialogue between authors A.B. Yehoshua (Buli) representing the "liberal Zionist" stream and Anton Shammas, from the Galilee village of Fasuta, throws into sharper relief the degree of "cultural aggression" of the Zionist dialogue in the eyes of the Palestinian citizen. Yehoshua, like many Zionists, draws a parallel, which at the same time encompasses a suggestion. He compares Shammas's insistence on seeking recognition of his national-Palestinian identity in the state of Israel with a Pakistani who comes to

England on an English passport and insists on being involved in fashioning English national identity by including Pakistani and Muslim symbols and language in English nationality. Shammas responds to this aggression as follows: "Buli, the minute a man like you does not understand the basic difference between the Pakistani who comes to England and the Galilean who has been in Fasuta for untold generations, then what do you want us to talk about?"<sup>34</sup>

## Notes

I would like to thank the following people for their helpful comments and assistance: Samera Esmeir, Oren Yiftachel, Jamil Dakwar, Ilan Saban, Ronen Shamir, Shulamit Almog, Eyal Gross, Gadeer Nicola, and Rina Rosenberg. I am, of course, solely responsible for the content of the chapter.

1. High Court (H.C.) 6698/95, *Qa'dan v. Israel Lands Administration et al. Piskei Din* (P.D.) 54 (1): 258.
2. Such an examination is influenced by critical approaches that seek to expose the narratives of judicial writing, analysis of the rhetoric revealed by judgments, and how judicial writing influences the shaping of reality. On this research, see Brooks and Gewirts 1996; Delgado 1989; Williams 1987; Farber and Sherry 1993; and Almog 2000.
3. "The homeland, as a concept and a set of practices, has played a major role in the persistence of groups against threats of assimilation or against domination by alien rulers and cultures ... ethno-national mobilization and identity formation is associated with a specific territory. This territory is the ethnic homeland around which ethno-national identity is framed and reproduced.... Homeland ethnicity, as noted, is held by groups that reside on the territory they believe to be the cradle of their identity and history." (Yiftachel 2000: 359).
4. Minow 1997: 347; see also Brown 1997: 85: "Minority people committed themselves to these struggles [for rights], not to attain some hegemonically functioning reification leading to false consciousness, but a seat in the front of the bus, repatriation of treaty-guaranteed sacred lands, or a union card to carry into the grape vineyards," citing Robert A. Williams, Jr., "Taking Rights Aggressively."
5. It should be noted that the symmetry or parallel that is drawn between the patriotism of a homeland group and that of the dominant group is misleading. The patriotism of a homeland group is a desirable response to a policy of oppression and discrimination, constituting an instrument of empowerment for members of the nondominant group, the outcome of the principle of equality and dignity. Equality, in this context, seeks not to detract from the status of the homeland group and to relate to its members with respect or dignity, and hence is the rationale underlying the international declarations and the international conventions on the recognition of such groups' self-determination. Consequently, treatment of this patriotism (as opposed to nationalism) constitutes a fundamental part of the conception of human rights. In the terminology of "rights," the concept of group rights replaces the concept of patriotism, but in fact the reference is to one and the same perception with different names.
6. I am aware of the dichotomy, which I am outlining in terms of the differences between the two groups. However, this dichotomy can be helpful in managing to see the overall picture, throwing the differences between the groups into sharper relief. It is obvious that some of the demands by the homeland groups relate also to the civil-political domain, but do not constitute the focal point of their struggle. On the other hand, the

- dichotomy between the struggle for self-determination and civil-political rights is also problematic, since in certain cases one sustains and is related to the other. Moreover, there are immigrant groups that, because of protracted residence, have come to relate to their struggle as a struggle by a national minority, such as French-speakers in Canada. Ilan Saban (2000: 19) notes that in practice, cases and circumstances are too diverse to be combined in the apparent dichotomy of an indigenous/immigrant distinction. The indigenous/immigrant characterization "is present in the eye of the beholder." It is not a simple matter of chronology, but rather a psychological and historical combination performed on the basis of a continuous comparison with the characteristic perception of the other community.
7. In the words of the Canadian philosopher, Will Kymlicka (1995: 14): "It is now widely (though far from unanimously) accepted that immigrants should be free to maintain some of their old customs regarding food, dress, religion, and to associate with each other in order to maintain these practices. This is no longer seen as unpatriotic or 'un-American.' But it is important to distinguish this sort of cultural diversity from that of national minorities. Immigrant groups are not 'nations,' and do not occupy homelands. Their distinctiveness is manifested primarily in their family lives and voluntary associations, and is not inconsistent with their institutional integration. They still participate within the public institutions of the dominant culture(s) and speak the dominant language(s)." See also Baker 1994.
  8. *Washington Times*, 26 April 1998.
  9. *Ha'aretz*, 23 June 1999; *New York Times*, 24 June 1999.
  10. The major gap between the positions of the "liberal-Zionist" trend and the Palestinian minority is the upshot of the quality of the Zionist treatment of and attitude toward the Palestinian minority as an ethnic minority and not a homeland minority, as I shall explain subsequently. On this basis, it is possible to explain the disparity in positions between the Jewish-Zionist public and the Palestinian minority over subjects such as military service or (alternative nonmilitary) national service, for example. See also Jabareen 2000.
  11. Jamil Dakwar, "To what extent is it an achievement," *Ha'aretz*, 15 March 2000 (Hebrew); The Editors, "Introduction," *Adalah's Review* 2 (fall 2000): 5.
  12. Dworkin distinguishes between "the right to equal treatment" and "the right to treatment as an equal." In the former, the citizen is entitled to equal distribution of goods, and it is here that the antidiscrimination issue arises, as opposed to the latter, which relates not to this distribution of burdens and benefits, but rather to the attitude of respect and concern, and I believe this is what involves the issue of group equality. As Dworkin (1978: 227) puts it, it is "the right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else."
  13. The American ruling in *Brown*, for example, which adopted the principle of "group blindness," raises a serious problem among the American Indians and native Hawaiians, since according to *Brown* they must be treated as racial minorities instead of national groups. As a result, their autonomous institutions were eliminated on the grounds that they were acting as for racial segregation. In 1969, the Canadian government, basing its arguments on the rationale in *Brown*, dropped the proposal requiring constitutional protection for the Indians. In the same spirit, the Canadian Supreme Court overturned legislation granting exclusive rights to the Indians. Thus, the use of antidiscrimination policy justified the overriding of claims for equality in these cases on the basis of group diversity. *Regina v. Drybones* [1970] *Supreme Court Review* (S.C.R.) 282; Kymlicka 1995: 58-60.
  14. Paragraph 10 of the judgment.
  15. A considerable proportion of the Katzir locality land originally belonged to the Yunes family from the village of Ar'ara. See The Editors, "Introduction," *Adalah's Review* 2: 2.
  16. Paragraph 7 of the judgment.
  17. Paragraph 28 of the judgment.
  18. Paragraph 4 of the judgment.
  19. Paragraph 4 of the judgment.
  20. H.C. 114/78, *Bourkan v. Minister of Finance et al.*, P.D. 32 (2): 800.
  21. Dalal 2000. On the history of anti-Aborigine discrimination in Australian land policy, cf. Australia's *Mabo v. Queensland* judgment, which acknowledged the injustice inflicted on the indigenous people of that country and recognized their forms of acquisition in Shamir 2000.
  22. Paragraph 31 of the judgment.
  23. The loyalty required of the Arabs who are citizens is a loyalty to the Jewish people. As I shall show in detail in the second part of this chapter, this is made perfectly clear in legislation and the rulings of the Supreme Court. An extreme illustration of this is to be found in Section 7 (A) (1) of the Basic Law. The Knesset prevents a political list of candidates from participating in elections if that list rejects "the existence of the state of Israel as the state of the Jewish people."
  24. See, for example, the case of *Re'em*, which is also an excellent example of the limits of the civil rights dialogue in the Jewish state. If *Qa'dan* was about the right to choose a place of residence, the *Re'em* case was about the right to use a language (Arabic in this case) on the basis of choice. H.C. 105/98, *Re'em Contracting Engineers, Ltd. v. Natserat Illit Municipality et al.* P.D. 47 (5): 189.
  25. For a detailed discussion, see Shammas (1995).
  26. The major reservation in drawing a parallel between the Palestinian citizens and the status of the non-Jewish migrants attaches to the issue of the status of the Arabic language in Israel. This is because, generally speaking, the original mother tongue of ethnic groups of migrants is not recognized as an official language in the host country. However, in the state of Israel, Arabic has a special status. On the other hand, given the judicial rulings, which have been handed down and the indecisive attitude of the government to the status of the Arabic language, this differentiator may be considered to be anything other than a primary differentiating factor.
  27. This is manifest when it comes to the inclusion of Arabs in national Zionist institutions, where the identity of the institution is a critical aspect of the function it plays. It can also be felt in political positions and in government ministries where the expression "we" and "them" is based on national limits, such as the army, the Israel Lands Administration, the police, Knesset committees (this is striking in the foreign affairs and security committees), some government corporations, senior positions in government organs including the judiciary, etc. On this matter, see Jabareen 1999, 2000.
  28. Judicial rulings on the highest level in a number of judgments have underscored this approach. In *Yardor*, Justice Haim Cohen in a minority opinion observed: "... even when it comes to that group of Jews who repeat time and time again, in words and deeds, that they do not recognize the state, the learned Attorney General has admitted, in response to my question, that no one would consider preventing them from presenting a list of candidates in the Knesset elections, if they so wish." H.C. 1/65, *Yardor v. Chairperson of the Central Election Committee*, P.D. 19 (3): 365, 380. In *Ben Shalom*, Justices Menahem Elon and Dov Levin observed in a minority opinion that an electoral list must demonstrate loyalty to Zionist values and, first and foremost, the Law of Return. H.C. 2/88, *Ben Shalom v. Central Election Committee*, P.D. 43 (4): 211. However, this requirement has never been demanded of ultra-Orthodox (*haredi*) non-Zionist movements and parties. The reason, in my opinion, is that these parties do not represent the Arab other, which threatens the Jewishness of the state. In fact, the very presence of the ultra-Orthodox per se strengthens the Jewish majority and the Jewish aspect of the state. In the *Zichroni* judgment, Justice Kahan based the importance of positions not on their content, but on the identity of the person expressing them. He observes that "... a statement containing opposition to the settlements in the area of Judea, Samaria and the Gaza Region constitutes a legitimate expression of an opinion, if it is made by an individual who seeks for the good of the state," (i.e., a Jew, H.J.) "but the same words, when said by a public personality who is identified

- by the residents of the area with the PLO, can have an inflammatory and subversive effect...." H.C. 243/83, *Zichroni v. The Board Committee of the Broadcasting Authority*, P.D. 37 (1): 757, 787. In the *Jiryis* judgment, the petitioner was asked to declare his loyalty to the Zionist ideology as a condition proving that he had ceased to believe in the national Arab way. H.C. 253/64, *Jiryis v. Haifa District Commander*, P.D. 18 (4): 673. See also Shamir 1991.
29. H.C. 1964/00, *Mahmoud Mahameed et al. v. Moshe Ya'alon, IDF Chief Commander of the Central Division* (unpublished).
30. It is interesting that in respect of the petitioner, it is argued that he constitutes a security risk because he is part of the Hamas leadership. However, he was allowed to move about Tel Aviv and Haifa freely and even be present in a Supreme Court courtroom entirely without restriction or impediment.
31. See also Margalit and Halbertal 1998: 93; Bruner and Peled 1998: 107.
32. It would appear that this approach, as it is found in various judicial rulings and in Gavison, originates in historical sources that view the history of world Jewry as the history of minorities within sovereign states, resulting in an absence of Jewish historical experience in how to behave as a national majority group in a democratic state. The first and only—at the time of writing—petition in which the Supreme Court recognized equality (as opposed to an antidiscriminatory approach) in the group domain is *Adalah v. Minister of Religious Affairs et al.* In this case, the Court held that the principle of equality is to be applied when allocating budgetary resources to cemeteries. Here, the petitioner had no choice other than to argue that "the Arabs and the Jews are all mortal, and they have an equal need to be buried with dignity ... the subject of cemeteries and death is not an exclusive need of one group or another." H.C. 1113/99, *Adalah v. Minister of Religious Affairs et al.* P.D. 54 (2): 104. It is regretful that only in connection with the subject of death has recognition so far been granted to the issue of equal needs between Jews and Arabs. On the politics of differences in Supreme Court decisions, see *Legal Violations of Arab Minority Rights in Israel*, Adalah, March 1998, 23–29.
33. Jewish and democratic is a pairing that is widely debated among Israeli scholars. They have managed to create a legal-political dialogue around the ethnic perception of the state of Israel, in which the key issue is its being a "Jewish" state on the one hand and "democratic" on the other. They have argued that there exists a genuine possibility of reconciling "Jewish" and "democratic" conceptions, while acknowledging the inherent contradictions. The main point here is that the dichotomy is set up in such a way that the Zionists have defined (rather than problematized) the state as a "Jewish" state and accepted its democratic nature at face value, rather than making it the subject of their study. True, the criticism that the critics bring to bear is trenchant and profound, but it still remains within the preset borders and limits of this dialogue: "Jewish" versus "democratic."
34. The quotations appear in Silberstein 1999.

## References

- Abel, Richard L. 1995. *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–94*. New York: Routledge.
- Almog, Shulamit. 2000. *Law and Literature*. Jerusalem: Nevo. [Hebrew]
- Baker, Judith, ed. 1994. *Group Rights*. Toronto: University of Toronto Press.
- Bishara, Azmi. 1993. "On the Question of the Palestinian Minority in Israel." *Theory and Criticism* 3: 7.
- . 1996. "The Israeli Arab: Reflections in a Split Political Dialogue." In *Zionism: A Contemporary Controversy*, ed. Pinchas Ginossar and Avi Bareli, 312. Sde Boker: Ben Gurion University of the Negev Press. [Hebrew]
- , ed. 1999. *Between the Me and the We: Constructing Identities and Israeli Identity*. Jerusalem: Van Leer Institute. [Hebrew]
- Brooks, Peter, and Paul Gewirts, eds. 1996. *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press.
- Brown, Wendy. 1997. "Rights and Identity in Late Modernity: Revisiting the 'Jewish Question.'" In *Identities, Politics, and Rights*, ed. Austin Sarat and Thomas R. Kearns, 85–130. Ann Arbor: University of Michigan Press.
- Bruner, Jose, and Yoav Peled. 1998. "On Autonomy, Abilities, and Democracy: The Liberal Multicultural Critique." In *Multiculturalism in a Democratic and Jewish State*, ed. Menachem Mautner, Avi Sagi, and Ronen Shamir, 107–131. Tel Aviv: Ramot Publishers. [Hebrew]
- Dalal, Marwan. 2000. "A Reading in the Unread in the Qa'dan Decision: The Guest, the House, and the Judge." *Adalah's Review* 2: 44–49.
- Delgado, Richard. 1989. "Storytelling for Oppositionists and Others: A Plea for a Narrative." *Michigan Law Review* 87: 2411–2441.
- Dworkin, Ronald. 1978. *Taking Rights Seriously*. Cambridge, Mass.: Harvard University Press.
- Farber, Daniel A., and Suzanna Sherry. 1993. "Telling Stories Out of School: An Essay on Legal Narratives." *Stanford Law Review* 45: 807.
- Gavison, Ruth. 1998. "A Jewish and Democratic State: Challenges and Risks." In *Multiculturalism in a Democratic and Jewish State*, ed. Menachem Mautner, Avi Sagi, and Ronen Shamir, 213–278. Tel Aviv: Ramot Publishers. [Hebrew]
- . 2000. "Jewish and Democratic." *Adalah's Review* 2: 32–38.
- Jabareen, Hassan. 1999. "On the Oppression of Identities in the Name of Civil Equality." *Adalah's Review* 1: 26–28.
- . 2000. "Towards a Critical Palestinian Minority Approach: Citizenship, Nationalism, and Feminism in Israeli Law." *Plilim* 9: 53. [Hebrew]
- Kamir, Orit. 2000. "The 'Declaration' Has Two Faces: The Strange Tale of 'The Declaration of the Zionist State' and 'The Declaration of the Democratic State.'" *Iyouni Mishpat* 23 (2): 473–482. [Hebrew]
- Kernochan, Julia. 1999. "Land Confiscation and Police Brutality in Um El Fahem." *Adalah's Review* 1: 49–53.
- Kymlicka, Will. 1995. *Multicultural Citizenship*. Oxford: Clarendon Press.
- Margalit, Avishai, and Moshe Halbertal. 1998. "Liberalism and the Right to Culture." In *Multiculturalism in a Democratic and Jewish State*, ed. Menachem Mautner, Avi Sagi, and Ronen Shamir, 93. Tel Aviv: Ramot Publishers. [Hebrew]
- Minow, Martha. 1997. "Rights and Cultural Differences." In *Identities, Politics, and Rights*, ed. Austin Sarat and Thomas R. Kearns, 347–365. Ann Arbor: University of Michigan Press.
- Nafa'a, Hisham. 1999. "Justice Zamir's Comment: Who is a Druze?" *Machbarot Adalah* 1: 18–20. [Hebrew]
- Peled, Yoav. 2000. "Strangers in Utopia: The Civil Status of Palestinians in Israel." *Theory and Criticism* 3: 45. [Hebrew]
- Rouhana, Nadim, and Asa'd Ghanem. 1998. "The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel." *International Journal of Middle East Studies* 30: 321–345.
- Saban, Ilan. 1998/1999. "The Option of the Limits of the Zionist Paradigm." In *Seven Ways: Theoretical Options for the Status of the Arabs in Israel*, ed. Sarah Ostzaki-Lazer, Asa'd Ghanem, and Ilan Pappé, 79. Givat Haviva: The Institute for Peace Research.
- . 2000. "The Legal Status of Minorities in Democratically Deeply Divided Societies." J.S.D. thesis, University of Haifa. [Hebrew]
- Sack, Robert. 1986. *Human Territoriality: Theory and History*. Cambridge: Cambridge University Press.
- Shamir, Ronen. 1991. "Legal Discourse, Media Discourse, and Speech Rights." *International Journal of the Sociology of Law* 18: 45.
- . 2000. "Zionism 2000: Past, Future and the Qa'dan Family." *Adalah's Review* 2: 27.

- Shammas, Anton. 1995. "The Day After: 'Palestinians,' 'Israelis,' and Other Innermost Thoughts." In *Arab Politics in Israel—at a Crossroads*, ed. E. Rekhass and T. Yagnes, 19. Tel Aviv: Tel Aviv University.
- Silberstein, Laurence J. 1999. *Postzionism Debates: Knowledge and Power in Israeli Culture*. New York: Routledge.
- Smith, Anthony. 1981. *The Ethnic Revival*. Cambridge: Cambridge University Press.
- Smootha, Sammy. 1993. "Political Culture and Social Cleavage." In *Israeli Democracy under Stress*, ed. Ehud Sprinzak and Larry Diamond, 325–326. Boulder: Lynne Rienner Publishers.
- . 1999. "The Status Quo Option: Israel as an Ethnic Democracy—a Jewish-Democratic State." In *Seven Ways: Theoretical Options for the Status of the Arabs in Israel*, ed. Sarah Osatski-Lazar, Asa'd Ghanem, and Ilan Pappé, 23–77. Givat Haviva: The Institute for Peace Research. [Hebrew]
- Steiner, Henry, and Philip Alston. 1996. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press.
- Williams, Patricia J. 1987. "Alchemical Notes: Reconstructing Ideals from Deconstructed Right." *Harvard Civil Rights-Civil Liberties Law Review* 22: 401–433.
- Yiftachel, Oren. 2000. "The Homeland and Nationalism." In *Encyclopedia of Nationalism*, ed. Alexander Motyl et al., 1:359–361. San Diego: Academic Press.
- Yiftachel, Oren, Asa'd Ghanem, and Nadim Rouhana. 1999/2000. "Is an 'Ethnic Democracy' Feasible? Jews, Arabs, and the Israeli Regime." In *Jama'ah*, ed. Haya Bamba-Sasportas, 67–68. Beer Sheva: Ben Gurion University.

— Chapter 12 —

## THE TRANSFORMATION OF GERMANY'S ETHNO-CULTURAL IDIOM

The Case of Ethnic German Immigrants



Daniel Levy

### Introduction

This chapter explores how changing national self-understanding in the Federal Republic of Germany is related to immigration and concomitant debates about citizenship. Most of the scholarly literature on the question of immigration and nationhood in Germany has focused on labor migrants (so-called guest workers). I examine the issue of German nationhood by focusing on a very different group of immigrants, namely, ethnic Germans from East and Central Europe. They have enjoyed privileged access to citizenship on the grounds of Germany's descent-based laws. The literature commonly presents this privileged access of ethnic Germans and the persistence of *ius sanguinis* as expressing Germany's ethno-cultural understanding, at the expense of a civic-territorial conception of nationhood (Bade 1990, 1999; Fulbrook 1999). In a comparison of citizenship and nationhood in France and Germany, Rogers Brubaker focuses on the prevalence of the ethno-cultural idiom in German national self-understanding. He argues that "particular cultural idioms, ways of thinking and talking about nationhood—ethno-cultural and differentialist [i.e., exclusionary] in Germany—were reinforced and activated in specific historical and institutional settings..." (Brubaker 1992: 6). According to Brubaker, the expansive approach toward ethnic Germans "reflects the pronounced ethno-cultural inflection in German self-understanding (Brubaker 1992: 4)."

This essay builds on the idea, in Brubaker's terms, that "citizenship in a nation-state is inevitably bound up with nationhood and national identity" and that "proposals to redefine the legal criteria of citizenship raise large and ideologically charged questions of nationhood and national

- Shammas, Anton. 1995. "The Day After: 'Palestinians,' 'Israelis,' and Other Innermost Thoughts." In *Arab Politics in Israel—at a Crossroads*, ed. E. Rekhass and T. Yagnes, 19. Tel Aviv: Tel Aviv University.
- Silberstein, Laurence J. 1999. *Postzionism Debates: Knowledge and Power in Israeli Culture*. New York: Routledge.
- Smith, Anthony. 1981. *The Ethnic Revival*. Cambridge: Cambridge University Press.
- Smootha, Sammy. 1993. "Political Culture and Social Cleavage." In *Israeli Democracy under Stress*, ed. Ehud Sprinzak and Larry Diamond, 325–326. Boulder: Lynne Rienner Publishers.
- . 1999. "The Status Quo Option: Israel as an Ethnic Democracy—a Jewish-Democratic State." In *Seven Ways: Theoretical Options for the Status of the Arabs in Israel*, ed. Sarah Osatski-Lazar, Asa'd Ghanem, and Ilan Pappé, 23–77. Givat Haviva: The Institute for Peace Research. [Hebrew]
- Steiner, Henry, and Philip Alston. 1996. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Oxford University Press.
- Williams, Patricia J. 1987. "Alchemical Notes: Reconstructing Ideals from Deconstructed Right." *Harvard Civil Rights-Civil Liberties Law Review* 22: 401–433.
- Yiftachel, Oren. 2000. "The Homeland and Nationalism." In *Encyclopedia of Nationalism*, ed. Alexander Motyl et al., 1:359–361. San Diego: Academic Press.
- Yiftachel, Oren, Asa'd Ghanem, and Nadim Rouhana. 1999/2000. "Is an 'Ethnic Democracy' Feasible? Jews, Arabs, and the Israeli Regime." In *Jama'ah*, ed. Haya Bambaj-Sasportas, 67–68. Beer Sheva: Ben Gurion University.