

**Case Review: Pardoning Protestors against the Disengagement from Gaza**  
**HCJ 1213/10, Eyal Nir, et al. v. Speaker of the Knesset, et al**  
**(decision delivered 23 February 2012)**

**By Keren Michaeli<sup>1</sup>**

"Within the Hebrew language's concept of amnesty," wrote former Israeli Supreme Court Justice Haim Cohen, "there has long been an element of free and unrestricted will, even of arbitrariness."<sup>2</sup> The Supreme Court's decision rejecting the petition against the "Termination of Proceedings and Deletion of Records in the Disengagement Plan 5770-2010" (the "Amnesty Law") demonstrates how right he was.

The Knesset enacted the "Amnesty Law" to pardon anyone who protested against the Disengagement Plan from Gaza in 2005 and against whom criminal charges were brought, and to delete the offenses from the criminal record. The provisions set in the law include the suspension or termination of criminal procedures that had been initiated by the state and the non-implementation or the termination of a sentence in cases of individuals who had already been convicted. The law does not apply to individuals who carried out serious violent offences or to law enforcement officers. The law's declared purpose is to mend the social rifts that resulted from the Disengagement that, according to its architects, is a "unique" and "traumatic" event in the history of the State of Israel.

The distinction of the group protected by the law (protestors of the disengagement plan who are predominantly Jewish Israeli settlers) from other groups (protestors against all other ideological backdrops) was at the core of the petition filed against the constitutionality of the Amnesty Law. The petitioners contended that this difference signifies a violation of the right to equality and consequently of the freedom of expression of those other groups whose members were not granted a similar exemption from criminal liability. In their view, this law contravenes the Basic Law: Human Dignity and Liberty – 1992 and must, therefore, be annulled. The respondents, on their part, claimed that the aforementioned violation is minor in view of the fact that the law is not significantly different from the Attorney General's policy regarding termination of proceedings and deletion of criminal records relating to that particular group, and that, consequently, its result is predominantly declarative. Be that as it may, claimed the respondents, the objective of the Amnesty Law – the attempt to mend the national and social rift brought on by the disengagement - justifies the violation inherent in it.

The majority opinion written by Supreme Court Chief Justice, Dorit Beinisch, concluded that there is no constitutional reason for annulling the Amnesty Law. Out of a panel of nine justices, only Justice Salim Joubran, the only Arab Justice, determined that the damage

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<sup>2</sup> AD 13/60, The Attorney General v. Matanah, PD 16, 430, 463 (Justice Cohen)

resulting from the law outweighs its benefit and that therefore, the law is unconstitutional. These contradictory views mirror the two Justices' opposing perceptions of the Amnesty Law. These perceptions are already apparent in the first paragraphs of both the minority and majority opinions. Justice Joubran's opinion opened with the principle of equality: "All people are equal before the law. This is true when they come up against civil justice, when they come up against administrative and public justice, and all the more so, when they come up against criminal justice." In contrast, Chief Justice Beinisch's majority opinion opens with a description of the harsh reactions to the Disengagement Plan: "From its inception, the Disengagement Plan was accompanied by a heated public debate which strummed the most sensitive cords of Israeli society and flooded onto the surface exceptionally deep ideological-religious and social tensions that threatened its stability. The protest against the Disengagement Plan spread in all directions and encompassed groups that viewed the possibility of its implementation as a loss of social, national and religious direction. The country was in turmoil. Those were grueling and painful days." These two different prefaces outline the methodology and signal the outcome of each of the opinions, as henceforth described.

### **The Right to Equality and Freedom of Expression: Concealed Discrimination**

Both the majority and minority opinions determined that the law provides for selective law enforcement with respect to a distinct political and ideological group and, therefore, its arrangements constitute illegal discrimination which contravenes the Basic Law: Human Dignity and Liberty. Notably, the two opinions put a different emphasis on the principle of equality and freedom of expression in their analyses. The majority opinion includes only a brief discussion of the violation of the two principles. In contrast, the strength of the minority opinion is in its meticulous analysis of the manner in which the Amnesty Law is incompatible with them, addressing at length the numerous problematic aspects of the law.

Thus, the majority and minority opinions both found that there does not exist a relevant difference in relation to the group of the Disengagement protesters that justifies an arrangement unique to it and that, therefore, these arrangements are discriminatory. Both opinions further note the destructiveness inherent in selective enforcement of the law to society at large and to the rule of law. The difference between the opinions regarding this issue lies in the extent of the inquiry into the nature of the violation of the discriminatory provisions of the Amnesty Law. The majority opinion does not discuss the harmful effect of the law in depth other than determining that "the result of the law under discussion is grave and inequitable because it sets apart one group in Israeli society and excludes it from the ambit of criminal justice." The opinion does not link the aforementioned general statement regarding the destructiveness of selective law enforcement to the specific destructiveness of the Amnesty Law itself.

The minority opinion, on the other hand, does not stop there. It exposes the entirety of the injury embedded in the Amnesty Law. Thus, Justice Joubran rejects the argument that the law is declarative in nature and thus does not violate the right to equality, denying, categorically that this is in fact a declarative law. In addition, in his view, "even laws that are symbolic, and do not generate a direct legal change, should reflect the fundamental values of Israeli constitutional law. A declarative law, by its nature, is a law that shapes the normative-legal framework that governs the law...even if these provisions have no direct effect on one law or another, their overall social importance, or their significant role in legal exegesis cannot be dismissed."

Justice Joubran clarifies the discrimination embedded in the Amnesty Law by stating that the relevant comparable group for the sake of legal analysis, that is the group discriminated against by the law, is composed of "all those who committed offenses for ideological reasons or, at the very least, against the backdrop of deep divisions in the Israeli public." In this way he raises to the surface the self-righteousness underlying the Amnesty Law. Why hail the mending of the national divisions following the Disengagement and not, for example, the healing of the rift between the Jewish public and the Arab public created following the events of October 2000? Justice Joubran further refuses to accept the argument that the protest against the Disengagement is disconnected from other aspects of political protest relating to Israeli-Palestinians relations and the relations of Jews and Arabs within Israel. Therefore, he summarizes that, "I was not convinced by the respondents' arguments, why offenders who committed crimes of an ideological nature in the context of an attempt to promote an overall Israeli policy that concerns ending Israeli control in parts of the region are not the appropriate comparable group."

Pursuant to his conclusion, Justice Joubran links the violation of the right to equality to the violation of freedom of expression by the Amnesty Law. He translates the true meaning of the violation – the preference of an ideological faction identified with the political right and in particular, with the settlement 'enterprise' – over other ideological factions - and its meaning: "freedom of expression of one receives a higher standing than the freedom of expression of another." In his view, "the constitutional violation at hand is severe, fundamental and profound. It is a violation of the autonomy of a human being facing the law as an individual; it is a violation amounting to degradation due to discrimination on the basis of ideology; and it is a violation of the equal scope of the right to express ideological viewpoints, which undermines the foundations of Israeli democratic discourse and the rule of law itself."

This forthright analysis stands in contrast to the simplistic position expressed in the Chief Justice's ruling. She does not accept the argument concerning the violation of the freedom of expression. In her view, this is not the purpose of the Amnesty Law, the objective of which is to "contend with a social, national and political traumatic event."

The significant difference between the majority and minority opinions regarding the issue of equality is not purely a legal one; it is a value-based one. The refraining of the majority opinion from inquiring after the nature and scope of the injury of the Amnesty Law conceals the arbitrariness on which it is based. The minority opinion exposes it completely. The difference in the analysis corresponds to the different outcomes of the two opinions. When the justices turn to examine the justification for the said violation, the minority

opinion cannot conceive that the benefit of the Amnesty Law outweighs its harm. The opposite conclusion, stated in the majority opinion, is made possible precisely by its presumably conscious refusal to recognize the significance of the violation.

### **The Deliberation of the Justification of the Violation: The Art of Distinction**

According to the Basic Law: Human Dignity and Liberty, a law that contradicts its provisions, (such as the Amnesty Law which violates the right to equality, which in turn, derives from the right of human dignity), is not necessarily unconstitutional. As long as the law is in keeping with the values of the State of Israel; is designated for a worthy purpose; and **its harm** does not exceed that which is strictly necessary in order to achieve the worthy purpose, it may be justified.

While Justice Joubran focused on the injury of the law, the lion's share of the Chief Justice's opinion focused on its *justification*. The central narrative characterizing her opinion is the distinct stature of the Disengagement which "was a unique and exceptional event in its intensity and scope." In fact, the word "unique", in various inflections, appears 36 times in the majority opinion (in contrast with 7 times in the minority opinion). The Disengagement's depiction as a "critical breaking point", "traumatic", of an intensity that is "exceptional in its scope and significance" and as the cause for "a rupture between various sectors of society" is repeated time after time throughout the opinion. This torrent of dramatic descriptions masks the harsh impact of the law and allows the Chief Justice to conclude that the law conforms to the Basic Law: Human Dignity and Liberty, in that it fulfills a worthy purpose, and its harm does not exceed the necessary degree.

Concerning the law's purpose, the Chief Justice adopts the respondents' position, which argues that the law aims at reconciliation and unification and, therefore, cannot be said to be of an unworthy aim. This determination is a significant weak point in the ruling. How is a law which attempts to reconcile only one ideological sector fulfilling a worthy purpose? The scale of the protest in the wake of the Disengagement does not justify, from a substantive perspective (as opposed to, perhaps, an economic perspective), different treatment than the one received by other ideological protests. The preference accorded to this protest is an arbitrary act deriving from political preference. Indeed, the purpose of the Amnesty Law is not the true bridging of national divides, which includes reaching out to both sides of the political debate. The true aim of the law is the appeasing of the political right by the government and the Knesset at the expense of the public that chose to express its protest on the basis of a different ideological nature. How can such a selective agenda be found to be "worthy"?

The additional condition of the constitutionality of a law is that the harm it causes does not exceed that which is necessary. According to the Court's jurisprudence, this condition of proportionality encompasses three-sub-tests: firstly, that there is a rational relationship between the law and the purpose for which it is legislated; secondly, that less harmful means which fulfill the purpose of the law to the same extent are not available; and thirdly, that there is an appropriate rationale between the fulfillment of the purpose of the law and the harm caused as a result of it. Both the minority and the majority opinions determine that the law fulfills the first two tests. There is a rational link between the Amnesty Law and the longed for reconciliation (at least in theory, although the two justices doubt the practical effectiveness of amnesty as a means of unification and

reconciliation). In addition, there is an agreement that an alternative means, which is less harmful than that of a sweeping amnesty, is not available. In this regard, the respondents claimed that the Attorney General's policy of the termination of procedures and the cancellation of sentences of persons who protested against the Disengagement is an alternative because, at the end of the day, its outcome is similar to that of the Amnesty Law. This claim was rejected because, in the view of the Justices, it does not effectively fulfill the law's purpose, as the latter constitutes a public declaration of forgiveness and pardon.

It is the determination as to the third test of proportionality – that the benefit of the law must not exceed its harm – that led to the contradictory outcomes. Justice Joubran contrasts the benefit of the Amnesty Law, the success of which is in doubt, with the severe harm caused by it: beyond the harm inherent in the discrimination of the groups excluded from the law, there is also the ensuing harm which includes the deepening alienation between the groups; the creation of a "chilling effect" towards ideological stands that were not granted an 'exemption' for protest actions"; and the undermining in the deterrent effect towards "those who hold the 'chosen view'". This analysis leads Justice Joubran to the conclusion that the last condition was not fulfilled. The Chief Justice's assessment of the scope of the violation of the right to equality and the resulting harm is entirely different. As described above, this aspect of the law was not analyzed comprehensively in the first part of her ruling. Accordingly, the Chief Justice's assessment of the harm inherent in the Amnesty Law is narrower. Indeed, she emphasizes elements of the Amnesty Law that limit, according to her, the harm it causes, including *inter alia*, its essentially declarative nature and the fact that it applies to a small and "normative" group. This lean perception of the harm caused by the Amnesty Law cannot challenge the "glory and splendor" of the Disengagement experience as it was repeatedly depicted in her ruling. In such an equation, the benefit of the Amnesty Law indeed does exceed its damage. Thus ended the affair and the ruling upheld the constitutionality of the Amnesty Law.

"I will have mercy on whom I will have mercy, and I will have compassion on whom I will have compassion,"<sup>3</sup> so God answers Moses in reply to Moses' pleas to forgive the Children of Israel for the sin of the golden calf. God's considerations are his alone and are not subject to justification or criticism. God is finally reconciled and concludes a covenant with Israel, but not before Moses orders the killing of approximately 3000 of the sinners. This is to teach us that the act of pardoning is forever arbitrary and always comes with a price tag. The Court's presumption of subjecting it to judicial review in the case of the Amnesty Law is thus shattered in the face of this simple truth.

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<sup>3</sup> Exodus 33:19