

On the Morality of Arab Collective Rights in Israel

By Amal Jamal¹

Palestinian Arab citizens of the state of Israel are increasingly demanding collective rights, besides their traditional struggle for equal individual citizenship rights. Several Palestinian intellectuals and politicians have begun reframing the Arab struggle for equality and refocusing their search for full citizenship in Israel by emphasizing the obligation of the state to recognize them as an indigenous national minority.² In the past, the Arab demand for equality was based mainly on distributive justice and individual liberal philosophy, according to which the state should integrate its Arab citizens as equal participants in society and state.³

The demand for collective rights does not replace the demand for full citizenship equality, but rather complements it. Collective rights are increasingly viewed as a precondition for guaranteeing individual equality. They entail the demand for self-government in several aspects of Arab life in Israel such as education, communication, planning, control over resources, social welfare and development.

This shift in Arab politics raises many questions, the most important of which is whether this shift is justifiable and how. This paper sets out to provide five different but interrelated justifications for Arab collective rights in Israel. These justifications overlap, but for reasons of clarity they are addressed separately.

1. Indigeneity and the Right to Self-Government

One of the most important justifications of Arab collective rights in the state of Israel is the claim that Arabs are the native inhabitants of Palestine, who were invaded by a settler colonial movement and deprived of their basic collective right of self-determination.

The Arab population in Israel meets most if not all parameters of indigeneity that were set by Jose Martinez-Cobo, the Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,⁴ whose definition of an indigenous people is to date the most accepted and well known. Martinez-Cobo's main parameters are: priority in time; voluntary perpetuation of their cultural distinctiveness; self-identification as indigenous; and experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant society. Furthermore, an accepted notion in the treatment of indigenous communities is that indigeneity establishes conditionality between the existence of a group of people and their bond to a specific place.⁵

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² Azmi Bishara, "On the Question of the Palestinian Minority in Israel," *Theory and Criticism*, No. 3 (1993), pp. 7-21 (Hebrew); and Hassan Jabareen, "The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place With No Palestinian Memory," *Mishpat Umimshal*, Vol. 6, No. 1 (July, 2001), pp. 53-86 (Hebrew), and revised version in *Challenging Ethnic Citizenship*, eds. Daniel Levy and Yfaat Weiss (New York: Berghahn Books, 2002), pp. 196-220.

³ An exception in this regard was Al-Ard (the land) movement, which drew its name from the principle of 'first occupancy' and challenged the state on collective national terms. On Al-Ard see: Sabri Jiryis, *The Arabs in Israel* (New York: Monthly Review Press, 1976); and Ilana Kaufman, *Arab National Communism in the Jewish State* (Gainesville: University of Florida Press, 1997).

⁴ Jose Martinez-Cobo, *Study of the Problem of Discrimination against Indigenous Populations*. Available at: www.undp.org.

⁵ Tony Bennett & Valda Blundell, "Introduction: First Peoples," *Cultural Studies*, Vol. 9, No. 1 (1995).

The Palestinian community in Israel is an indigenous community on account of its descent from the population that inhabited Palestine at the time of colonization and before the establishment of Israel. The Palestinians have clear priority in time when compared with the Jewish community, whose members have mostly emigrated from several countries in the last 120 years and moved to settle in the country.⁶ The self-consciousness of the Palestinians as a group was established and remains connected to their historical experience in concrete territorial space. The political and cultural reality established by Zionism has not broken the sentimental, cultural, moral and legal bond that Palestinians have to their homeland.⁷

The Palestinian community in Israel is not merely a disadvantaged group of citizens who require attention, caring or gentleness. This community is mainly characterized by its fundamental connection with its land, which has contributed to its development as a distinct national group. Most Palestinians in Israel not only recognize themselves as Palestinians, but also view themselves as the original "first occupants" of the land.⁸ They have sought a common strategy to rebuild part of their own social and cultural institutions that express their distinct national identity.

In direct contrast with this development, the state sought to destabilize the Palestinian community as a group by disconnecting it from its land and depriving it of the status of an indigenous national minority.⁹ The state adopted a policy of de-Palestinianization, aiming at uprooting Arab existence, physically and symbolically from the Israeli space.¹⁰ This policy came to empty the basic Palestinian claim of historical precedence of any content.

Protecting the indigeneity of the Palestinian community in Israel makes granting this community the collective right to govern some aspects of its common life an imperative. Failure to recognize the legitimacy of the collective presence of the Palestinian community in Israel and continuing current state policies towards this community will lead to its disintegration.

2. Righting Past Wrongs and Corrective Justice

Another important moral and political justification supportive of Arab collective rights stems from the past wrongdoing against this group conducted by the state based on the particular identity of the Arab community. These wrongdoings encompass all realms of Arab life. They establish the right for restorative or corrective justice, something that grants the Palestinian community in Israel the right to restore at least part of its past common experience.¹¹

Restorative justice is not conditioned by the argument of first occupancy.¹² Even when we accept the notion that peoples claiming land on the basis of corrective justice were themselves guilty of previous misappropriation, although this is not true in our particular case, the demand

⁶ Walid Khalidi, *Before their Diaspora: A Photographic History of the Palestinians, 1876-1948* (Washington, D.C.: Institute for Palestine Studies, 1984); Baruch Kimmerling and Joel Migdal, *The Palestinians: The Making of a People* (Cambridge: Harvard University Press, 1994).

⁷ Amal Jamal, "The Ambiguities of Minority Patriotism: On the Love for Homeland Versus State among Palestinian Citizens of Israel," *Nationalism and Ethnic Politics*, Vol. 10, No. 3 (2004), pp. 433-472.

⁸ Nadim Rouhana, *Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict* (New Haven: Yale University Press, 1997).

⁹ Baruch Kimmerling, *Zionism and Territory: The Socio-territorial Dimensions of Zionist Politics* (Berkeley: University of California Press, 1983); Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamic of Multiple Citizenship* (Cambridge: Cambridge University Press, 2002).

¹⁰ Oren Yiftachel and Avinoam Meir (eds.), *Ethnic Frontiers and Peripheries: Landscapes of Development and Inequality in Israel* (Boulder: Westview Press, 1998).

¹¹ Richard Kraut, *Aristotle: Political Philosophy* (Oxford: Oxford University Press, 2002), especially pp. 98-177.

¹² Tamar Meisels, "Can Corrective Justice Ground Claims to Territory?" *The Journal of Political Philosophy*, Vol. 11, No. 1 (March 2003), pp. 65-88.

for corrective justice is still valid.¹³ It is the immorality of the wrongful dispossession of their bond with the land or the destruction of their common experience that justifies corrective justice.

Past wrongdoings cannot be answered by compensation alone. Compensation means exchanging what has been lost with something else. In the case of tangible resources, such as land, compensation would mean to receive money or a piece of land instead. Such a solution does not correspond with corrective justice, since it ignores the wrongdoing itself and the deprivation, psychological loss and suffering that accompanied it. Accepting compensation for past wrongdoings and their implications on the common experience of the victims renders the victims irrelevant to the argument of corrective justice. Furthermore, accepting compensation would mean that the reality that existed before the wrongdoing is morally invalid or irrelevant.

Only legitimating the restoration of part of the common experience of colonized peoples could meet the demand for correcting past wrongdoings. The claim for corrective justice places the common past experience and the form in which this experience was abducted as two central and equivalent moral foundations legitimating collective rights, such as in the case of Zionism. Collective rights in the form of self-government and restitution may reestablish part of the lost common past experience, and is therefore a justified basic right, especially for indigenous minorities.

3. The Exclusionary and Ethnically Active Character of Jewish Nationalism

Every nationalism contains civic and ethnic elements in varying degrees and different forms. However, which elements predominate is important.¹⁴ In the Jewish case it is the ethnic, cultural and vernacular that are emphasized. Therefore, Israeli citizenship is loaded with ethno-religious meaning.¹⁵ Its symbols and signs are mainly Jewish, not civic. The Israeli state meets the standards of what Rogers Brubaker terms as "nationalizing states." It views itself as an "unrealized" nation-state, as a state destined to be a nation-state, the state of and for a particular nation, but not yet in fact a nation-state (at least not to a significant degree); and the concomitant disposition to remedy this perceived defect, to make the state what it is properly and legitimately destined to be, by promoting the language, culture, demographic position, economic flourishing, or political hegemony of the nominally state-bearing nation."¹⁶

The Israeli state has adopted a collectivist ideology in which it reflected the common good of the Jewish people. The collective characteristics of the state ideology have been transplanted through different ideological mechanisms. No Israeli state institution is "color-blind" when it comes to issues of civil justice as well as citizenship. The army became a central tool for implementing the "melting pot" policies that intended to establish a common identity for all Jews, excluding Arabs. The educational system and the state-controlled media institutions were turned into tools for promoting the collectivist endeavor of the emerging modern Jewish nation. Other state institutions were utilized to expand Jewish sovereignty over Arab lands, aiming at emptying the Israeli space of Arabs. The "general will" and "public interest" in Israel are exclusively determined by the Jewish majority. Therefore, one can neither speak of civic

¹³ Ross Poole, *Nation and Identity* (London: Routledge, 1999).

¹⁴ Anthony D. Smith, *National Identity* (London: Penguin Books, 1991); Anthony D. Smith, *The Nation in History: Historiographical Debates about Ethnicity and Nationalism* (Cambridge: Polity Press, 2000); Peter Alter, *Nationalism* 2nd ed. (London: Arnold, 1994).

¹⁵ Baruch Kimmerling, *The Invention and Decline of Israeliness: State, Society, and the Military* (Berkeley: University of California Press, 2001).

¹⁶ Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge: Cambridge University Press, 1996), p. 63.

nationalism and a common civic public good in Israel nor about what Habermas named "constitutional patriotism", patriotism common to all Israeli citizens, Jews and Arabs alike.¹⁷

The nationalizing character of the Israeli state creates a range of burdens, barriers, stigmatizations and exclusions against the Arab indigenous minority for being Palestinian. It is in the face of such state characteristics that Will Kymlicka has spoken of the need for external protections for minorities.¹⁸ These protections are required to guarantee minorities some responsibility over central domains of their collective rights, and to ensure their national as well as cultural integrity. Therefore, granting the Arab population collective rights as an indigenous minority becomes indispensable if real equality between Jews and Arabs is sought. This could be achieved by granting the Arab community differentiated citizenship rights, enabling a certain form of self-government autonomous from the state. Differentiated citizenship rights take indigeneity into consideration and add new dimensions to citizenship that do not otherwise exist, establishing separate but interconnected spheres of life between different groups of the citizenry. This differentiated citizenship expresses the right of self-determination of indigenous minorities, which does not necessarily have to be translated into statehood, as James Anaya and Siegfried Wiessner have already demonstrated.¹⁹ Such remedial solutions to the right of self-determination have to be worked out in collaboration with the indigenous peoples concerned and should lead to non-discrimination, respect for cultural integrity, rights over lands and resources, social welfare, development and self-government.

4. The Contradictions of Liberal Equality in Ethnic States

Israeli constitutional law gives clear priority to Jews over Arabs in Israel. Most, if not all, of the Basic Laws in Israel have a clear ethnic affiliation in the sense that they protect the Jewish character of the state and the interests of the Jewish people rather than those of Israeli citizens.²⁰ When in 1992 the Israeli Knesset passed the two Basic Laws "Human Dignity and Freedom" and "Freedom of Occupation," the legislator added a purpose clause in which the liberal rights praised in these laws were subjugated to the ethnic character of the state. The purpose section of these two laws, which is identical in both cases, reads as follows:

The purpose of this Basic Law is to protect human dignity and freedom [in the case of the other Basic Law, "to protect freedom of occupation"] in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic State.

The two laws establish a conditional linkage between protection of individual rights and the values of the state of Israel "as a Jewish and Democratic State." According to Dan Avnon this linkage, "[H]as overshadowed the language and practice of rights that the basic laws legislation of 1992 sought to further."²¹ Even when the Israeli state sought to establish liberal rights as leading values of the Israeli political and legal culture, these were conditioned by guaranteeing the Jewish character of the state. The ethnic character of the state undermines liberal principles that are used as tools exclusively in the hands of the dominant ethnic nation. In order to justify

¹⁷ Juergen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: MIT Press, 1998).

¹⁸ Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995).

¹⁹ James Anaya, *Indigenous Peoples in International Law* 2nd ed. (Oxford: Oxford University Press, 2004); Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis," *Harvard Human Rights Journal*, Vol. 12 (1999), pp. 57-128 at 116.

²⁰ There are 11 Basic Laws in Israel which are considered to have constitutional status. All of them emphasize the substantial Jewish character of the state of Israel or protect the interests and institutions of the Jewish people.

²¹ Dan Avnon, "The Israeli Basic Laws' (Potentially) Fatal Flaw," *Israel Law Review*, Vol. 32, No. 4 (Autumn 1998), pp. 535-566.

this character, the hegemonic Israeli political culture utilizes several citizenship discourses which legitimate the prioritization of Jews over Arabs.²²

The flaws of Israeli liberalism are best manifested in the rulings of the Supreme Court. Two recent Supreme Court rulings – *Qa'dan, et. al. v. Israel Lands Administration, et. al.*²³ and *Adalah, et. al. v. Municipality of Tel Aviv-Jaffa, et. al.*²⁴ – demonstrate the negative implications of liberal equality in a context of ethnic nationalism. Despite the positive aspects of these two rulings for individual rights and for the principle of non-discrimination, they remain subordinate to the principles of "liberal Zionism" and the ethnic character of the state, excluding Arab citizens when liberal rights clash with the public good as defined by the Jewish majority.²⁵ In other words, the rulings of the Supreme Court have enforced liberal equality, but at the same time provided the moral, philosophical and legal grounds for depriving the Arab community any recognition of its collective identity as a national minority entitled to group rights. The rulings in these two cases implement an enduring attitude that creates a chasm between Arab citizens as individuals and their collective identity.²⁶

Therefore, the treatment of Arab demands for equality from a liberal perspective is inadequate and even tricky. The moral and political priority of the Zionist worldview dominant in all state institutions renders positive civil and political equality an unachievable goal. The national bias in the Israeli understanding of liberal equality renders collective rights indispensable for the Arab community.

5. Ethnic Majoritarianism and Ineffective Representation

A basic principle of democratic justice is the participation of all members of society not only in defining the meaning of justice but also in determining the rules according to which the discussion on the contents of justice takes place.²⁷ It is very important to note that the participation of disadvantaged groups in defining the rules according to which the interpretations of the principles of justice occur is no less important than the interpretations themselves. Special group representation rights do not only come to legitimate these rights. Iris Young rightly claims that, "[C]ommitment to political equality entails that democratic institutions and practices take measures explicitly to include the representation of social groups whose perspective would likely be excluded from expression in discussion without those measures."²⁸

Therefore, special group representation is necessary to surmount institutionalized exclusion. This right comes to incorporate underprivileged groups, especially indigenous minorities, into the most crucial decision-making mechanisms as equal participants in determining their present and future. Consequently, special group representation rights are not a matter of achieving instrumental equality only; they are about establishing shared sovereignty between all national groups within the polity. In this sense, special group representation does not leave the symbolic and material dimensions of the state untouched. In order to turn democratic participation into a real translation of the right of groups to participate in determining their well-being, there is a need to deconstruct the exact institutional structure that renders such a possibility unattainable.

²² Yoav Peled, "Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State" *American Political Science Review*, Vol. 86, No. 2 (1992), pp. 432-443.

²³ H.C. 6698/95, *Qa'dan, et. al. v. Israel Lands Administration, et. al.*, March 2000.

²⁴ H.C. 4112/99, *Adalah, et. al. v. Municipality of Tel Aviv-Jaffa, et. al.*, July 2002.

²⁵ Amal Jamal, "'Liberal Zionism': Enlightened Jurisprudence and the Challenge of Multiculturalism in Israel," *State and Society*, Vol. 4, No. 1 (December 2004), pp. 789-824.

²⁶ Ilan Saban, "A Sole (dual-linguistic) Voice in the Dark?" *Iyoni Mishpat* (Tel Aviv University Law Review), Vol. 27, No. 1 (July 2003), pp. 109-138.

²⁷ Melissa Williams, *Voice, Trust and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton: Princeton University Press, 1998).

²⁸ Iris Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), p. 148.

Suffice it to say that Arab participation in the Knesset creates the impression that Arab MKs are genuine participants in the Israeli moral community, and participants in the definition of the moral order that dominates Israeli public culture. However, Israeli representative politics is based on ethnic majoritarianism that is translated into an automatic Jewish majority in cases of major dispute. Most of the crucial decisions are made in institutions, representative or administrative, in which there is Jewish hegemony. As a result, Arabs are excluded from real and effective participation in determining the political agenda and from defining the possible choices within it, despite the fact that their participation in the Israeli democratic system is taken as an acceptance of the structure of the public order and the ideological ethos that legitimizes it.

Based on this reality, the representation of the Arab community in the Israeli parliament is not sufficient to express the political rights of this community. Firstly, this representation is not effective. Secondly, this representation cannot be accountable for all aspects of the community's collective life. Thirdly, the authorization of the representation of the Arab leaders is conditional on rules of games that are subject to priorities set by a dominant majority with clearly antagonistic goals. Fourthly, the representation of the Arab community in the Israeli Knesset is limited by legal rules that prevent Arab leaders from pursuing some of the goals they consider necessary for equality between all citizens of the state.

This political reality demonstrates the need to empower Arab representatives in the Israeli political system by establishing quotas and granting them veto rights on issues that concern their community. There is a need to establish political mechanisms that render ethnic majoritarianism void and strengthen responsive representation.

Conclusion

After having explicated the justifications for Arab demands of collective rights in Israel, it may suffice to say that changes required to meet such demands have to be made on several levels. Serious reconciliation between the Arab minority and the state and its Jewish majority renders liberal justice flawed and unsatisfying. The process of change has to be based on principles which involve collective rights based on the right of indigenous peoples to self-determination and corrective justice. It cannot be limited to celebrating diversity in a multicultural system. It has to involve a certain form of self-government. This form of self-government does not have to aspire to statehood, but it does have to exceed the level of local or administrative autonomy as envisioned by several Jewish scholars.²⁹ It has to go beyond the existing parliamentary jurisdiction, since the latter does not tolerate even the mere concept of concurrent sovereignty.

As has been already clarified, indigeneity is self-containing and inherent rather than delegated or negotiated. It challenges the legitimacy of the colonial state, though it does not legitimate an outright secession. Indigeneity aims at securing patterns of shared sovereign accommodation in ways that preserve and enhance indigenous cultural autonomy and territorial groundedness, while guaranteeing an inherent and collective right to self-determination over land, identity and political voice.

On the ideological level, the process of accommodating indigenous rights includes the disavowal of the settler-colonial ideology of the state, a process involving more than assertions and counter-assertions of rights. There is a need to develop a political culture based on genuine recognition of the self-identifications of all groups involved in the process. In the case of the Arab indigenous minority, this recognition would mean accepting its inherent bond to its homeland and its historical right to it. On the institutional level, Arab demands for collective rights have to involve a process of restructuring the state, which involves incorporating Arab

²⁹ Sammy Smooha, *Autonomy for the Arabs in Israel* (Ra'anana: The Center for Study of Arab Society in Israel, 1999).

self-identification as an indigenous people into the identity of the state. In this sense, liberal multicultural rights will not be sufficient if we are to follow the moral, legal and political justifications raised above. The envisioned institutional change intends to protect indigenous culture and secure self-determination as complementary dimensions of the same process. Accommodating indigenous rights without restructuring the state on equal collective grounds cannot be taken seriously. This means changing the meaning of sovereignty as accepted in the nation-state's literature. For Israel to be the expression of the Jewish people's right to self-determination, the state does not have to be an actively discriminatory nationalizing agency. The state could encompass all its citizens while giving each group within it equal opportunity to influence the public sphere and express its national identity and culture.