

On Class and Nationality in Housing Rights

By Suhad Bishara¹

In August 2004, the Israel Lands Administration (ILA) Council adopted "recommendation procedures for accepting candidates to purchase leasing rights for lands in agricultural and community settlements" (Decision No. 1015). These procedures direct the Selection Committees of small community and agricultural settlements to apply a number of criteria in deciding whether or not to recommend that the ILA accept a candidate's request to live in one of these settlements. The regulations are written in seemingly neutral, technocratic language in order to allay any suspicion of arbitrariness. However, it is my contention that the apparent "professionalism" of these procedures masks a practice of excluding citizens on the basis of their ethnic background or socio-economic status.

Two criteria are most prominent among the conditions established for accepting candidates to these settlements. The first criterion requires that the candidate "has the financial capability to build a house in the settlement in the period of time required by the development contract with the ILA." According to the second criterion, the candidate must be suited to social life in a small community. In order to ensure that the decision will not be made arbitrarily, candidates "suspected" of unsuitability are referred to a special institute where "professionals" are charged with the responsibility of assessing whether or not the candidate is suited to social life in a small community. The procedures ensure that different bodies are represented in the decision-making process by stipulating that the Selection Committee should be formed of the following representatives: "in a community settlement [...]: a senior official from the settlement agency (The Jewish Agency or The World Zionist Organization), a senior official from the Ministry of Housing and Construction along with representatives of the cooperative association, the regional council and the settlement body – in the relevant settlements [...] in an agricultural settlement: the composition of the Selection Committee will be established by the society's governing bodies."

The explanation accompanying the decision states that "behind the selection procedures and recommendations [of candidates] for land allocation and the purchasing of [leasing] rights is [a belief in] the importance of social cohesion, contribution to the community and [the candidate's] suitability to the way of life in agricultural and community settlements with less than 500 occupied residences, in settlements established by The Jewish Agency or The World Zionist Organization."

The ILA Council's decision applies to Jewish settlements which are organized into 44 regional councils, which jointly control approximately 80% of territory in Israel.² Approximately 10% of the country's population lives in these settlements.³ The majority of the regional councils enjoy a middle to high status (cluster 5 – 10) on socio-economic indices.⁴

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² www.ha-keshet.org.il/volumes.asp?id=1

³ Calculation based upon statistics from the *Israel Statistical Yearbook*, No. 55 (2004), Table 2.13.

⁴ www.cbs.gov.il. See the map of the regional councils according to socio-economic level, presented at the end of this article.

On the surface, the process for the selection of candidates by these committees is organized, transparent and professional. However, the data suggest that what the process has established, *de facto*, is a means of filtering out candidates according to their nationality and socio-economic status, as well as their ethnic origin. Of the 475,000 Jewish residents of rural settlements⁵ who are affected by this decision, approximately 53,600 are recorded as being of Asian ethnic origin and approximately 70,400 as being of North African origin.⁶

The schisms in Israeli society follow national and ethnic lines. In such a divided society, the concepts of "social cohesion" and "suitability to community life" are not neutral. Jews and Arabs in Israel are divided by language as well as by national and cultural identity. By the very existence of this schism, Arab candidates will not be able to meet the criteria required for social cohesion or social suitability and, thus, Selection Committees will be able to reject them without having to specifically identify the reason as one of national identity. Additional factors also ensure that Arab candidates have no chance of being accepted to live in these settlements: the presence of representatives of the "settlement body" in the Selection Committee; the absence of Arab representatives among Committee members; the fact that announcements about the existence of such settlements are not disseminated among the Arab minority; and the fact that the settlements are planned as Jewish settlements. These factors are intended to result in the selection of solely Jewish candidates. No attempt is being made to provide equal opportunities to all citizens.

Is national and cultural distinctiveness, which might thwart "social suitability", a sufficient reason to establish separate settlements on the basis of national identity? In my opinion, the answer must be no. The sole, acceptable premise for the promotion of such settlements cannot be based upon considerations of national identity, but rather on the principle of "corrective justice", or as it is more commonly known - "affirmative action". According to this principle, the state is obligated to advance a policy of corrective justice towards groups that have historically suffered discrimination and deprivation by the state. Such a policy attempts either to achieve real equality or, at least, to make progress toward its realization.

Two main arguments support this position. First, segregation on the basis of nationality does not provide a remedy for the class discrimination that is connected to ethnic schisms. The data show that the ethnic origin of a Jewish candidate is a decisive consideration in the deliberations of the Selection Committees of community settlements. Such a consideration is disguised by the fuzzy claim of social unsuitability or by giving considerable weight to the candidate's socio-economic status in opposition to the principle of corrective justice. The criterion of "social-economic cohesion and suitability" in and of itself stands in opposition to the principle of equality, as it exacerbates, rather than narrows, differences.

Second, the principle of corrective justice is normally applied in the case of a national minority, and only there can it justify the establishment of settlements on the basis of nationality. Here, it is worthwhile extending the discussion. In her article entitled, "Zionism in Israel? A Note on Qaadani,"⁷ Prof. Ruth Gavison argued that the Jewish majority in

⁵ According to the decision, these are community settlements established "by The Jewish Agency or by The World Zionist Organization [...] with no more than 500 residential dwellings, kibbutzes, cooperative villages, worker's moshavs, and agricultural cooperatives."

⁶ *Israel Statistical Yearbook*, No. 55 (2004), Table 2.22.

⁷ Ruth Gavison, "Zionism in Israel? A Note on Qaadani", *Mishpat Umimshal*, Vol. 6, No. 1 (July, 2001), pp. 25-51 (Hebrew).

Israel has a right to enjoy a sense of belonging in a supportive cultural-linguistic environment. Gavison supports the right of persons who belong to the majority to choose to live in an environment that they consider to be both comfortable and culturally suitable on the grounds of their identity. Thus, according to her argument, the "special characteristics" of a settlement can be based upon communal and identity foundations. According to Gavison's line of reasoning, segregation on the basis of cultural identity, even if this is based upon nationality, as in Israel, is a legitimate tool that can be applied by the Jewish majority to preserve Jewish identity in the Jewish state.

In response to Gavison's argument, it must be noted that the Jewish majority in Israel exercises total control over all state institutions, including cultural and educational institutions. Accordingly, it controls the dominant culture, the symbols of the state and everything else required to safeguard the Jewish nature of the state demographically, geographically and culturally. It is not clear what sources Gavison draws upon to support her claim of the *special* right of the majority to preserve its cultural identity. The arguments Gavison sets forth are related to the principle of corrective justice, except that, as acknowledged above, normally this principle is not applied to serve the needs of the dominant majority, but rather to advance a minority group and to protect their rights. Needless to say, affirmative action policies are usually applied by the dominant group on behalf of groups that have been deprived and discriminated against over long periods of time, by the dominant group. In contrast, Gavison's argument legitimizes actions taken by the dominant majority to award itself all manner of benefits and privileges in order to maintain its advantageous position. Such an approach purges of all meaning the very purpose of prohibiting discrimination.⁸

The principle of corrective justice is an exception to the principle of anti-discrimination. In other words, discrimination against a person or a group on the basis of nationality, race, gender, etcetera, is forbidden, *except* in cases where it is applied for the advancement of justice itself; for example, in narrowing societal gaps or providing for fair representation. It is not accidental that international law provides no recognition of the right of the dominant majority to preserve its culture through segregation. Such a right is reserved for national, linguistic, cultural, or ethnic minorities as part of their right to maintain their culture and way of life and "to prevent the imposition of assimilation."⁹ The rationale behind this exception is that the minority group risks losing its identity and culture through its submission to the majority culture. Accordingly, based upon the principle of corrective justice and in order to advance equality between different cultures and identities, it is actually minority groups that have been granted the right to preserve their culture through separation, as provided by Article 27 of the *International Covenant on Civil and Political Rights*:

⁸ See e.g., Articles 1 and 3 of *The International Convention on the Elimination of All Forms of Racial Discrimination*. Article 1(1) of the Convention states: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Article 3 of the Convention states: "States parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

⁹ Regarding this case, see the statement of Justice Barak in *H.C. 6698/95, Adel Qa'dan, et. al. v. Israel Lands Administration, et. al.*, PD 54 (1), 258, 279.

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In the Israeli context, then, the principle of corrective justice actually justifies the establishment of Arab settlements, but certainly cannot be invoked to justify the establishment of Jewish-only settlements.

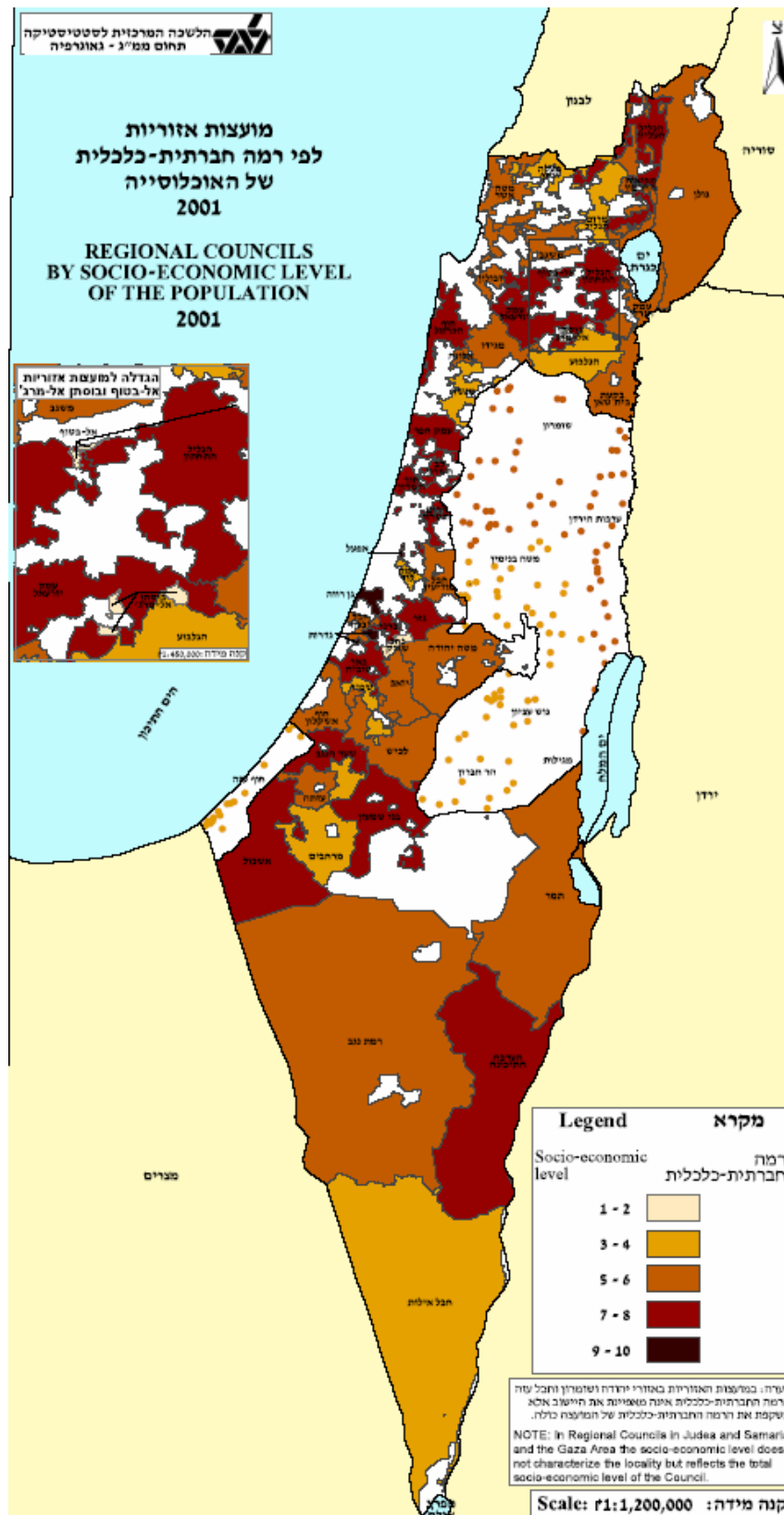
This having been said, the principle of corrective justice still forbids discrimination on the basis of socio-economic or ethnic background within settlements of the Arab minority. That is, even in the event that Arab settlements were established, it would be unjust to create them solely for wealthy members of the minority group. These points justify the cancellation of "suitability" tests, which result in discrimination on the basis of class background.

The above arguments lead to the conclusion that Decision No. 1015 of the ILA Council is another attempt to circumvent the principles of equality and distributive justice that were established in the Supreme Court rulings in *Qa'dan*¹⁰ and in the case brought by the Mizrahi Democratic Rainbow (Keshet Hademocratit Hamizrachit).¹¹ The extreme nature of the ILA Council's decision is all the more harsh given the fact that it further institutionalizes the division of vast expanses of land (as stated previously, approximately 80% of territory in Israel) to be allocated in violation of the principle of open and public tenders. The institutionalization of such practices serves as a filtering mechanism that, although ostensibly intended to ensure social cohesion, results in the allocation of most of the state's land resources with no regard for accepted principles of equality or the just allocation of the land.

In the case brought by the Mizrahi Democratic Rainbow, the Supreme Court ruled that the principle of distributive justice is a basic principle. Nevertheless, this principle should be developed so that it can be applied to invalidate any proceeding in which a relatively small group of Jewish citizens from the upper-middle socio-economic class concentrates land resources in its hands and conducts a selection process on its own behalf that discriminates on the basis of social, economic, national or ethnic background. Through its failures, Decision No. 1015 of the ILA Council demonstrates, in practice, how important it is to combine the principle of corrective justice with the principle of distributive justice.

¹⁰ In spite of the justified criticism that has been leveled against it, the ruling in *Qa'dan* did establish, among other things, that: "the state's obligation to act with equality in the allocation of land rights is violated if the state transfers land to a third party that discriminates in the allocation of land on the basis of religion or nationality. The state cannot be released from its legal obligation to act in accordance with equality in the allocation of land rights through the use of a third party that applies discriminatory policies. Indeed, what the State cannot do directly, it cannot do indirectly." H.C. 6698/95, *Adel Qa'dan, et. al. v. Israel Lands Administration, et. al.*, PD 54 (1), 258, 283. For criticism of the *Qa'dan* ruling, see 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.

¹¹ H.C. 3939/99, *Kibbutz Sde Nahum, et. al. v. Israel Lands Administration, et. al.*, PD 66 (6) 25.



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