

## **Case Review: Unrecognized Education System**

**by Dori Spivak\***

In June 2004, Adalah petitioned the Supreme Court of Israel on behalf of some three hundred three- and four-year-old Arab Bedouin children who were denied the opportunity to attend kindergarten because of the Ministry of Education's refusal to establish kindergartens in the "unrecognized villages" in which the children live. During the hearing on the petition, the state declared that it recognizes the right of all the Bedouin preschool children who are "interested" in attending kindergarten. However, the Ministry did not recognize its obligation to provide them with kindergartens in their villages. The Ministry contended that they could exercise their right only in kindergartens located in permanent ("recognized") communities or in educational centers located far from the "unrecognized" villages in which the children live. The Court denied the petition.<sup>1</sup>

Before turning to a discussion of the reasoning for the petition's dismissal, I have a preliminary question: Can a state establish a public education system, while at the same time explicitly refusing to recognize the very system that it built and maintains? To be cynical for a moment, it seems that one can only respond with, "Yes, only in Israel."

In 1998, Supreme Court justices were shocked to learn that Israel operates thirteen public schools that were not connected to the electricity grid, and consequently had no lighting, heating or cooling systems, in spite of the harsh weather. The schools lacked basic teaching aids, such as televisions, videos, and personal computers. Members of the Knesset's Education Committee, who visited some of these schools, were stunned. For example, the Knesset's current Speaker, Ruby Rivlin - then a regular member of the Knesset - commented that these schools were "one thousand and fifty years" behind the schools in which he had studied. In response to the petition filed by parents of pupils in the schools, the Ministry of Education explained that the schools had been established illegally because they were located in unrecognized Bedouin villages. However, the Ministry of Education continued, because of the importance of elementary education, and the Ministry's obligation to provide every Israeli with an education, it decided to establish and maintain schools in these unrecognized villages, even though the Ministry of the Interior and other state bodies considered the establishment of these schools illegal.

In a ruling delivered by the Court at the end of an urgent hearing on the petition, the Supreme Court used language unprecedented in its severity in describing the government's failure. "Inconceivable situation", "badge of shame for the state", and "this situation cannot continue" were some of the harsh comments made by the Court as it ordered the state to rectify the situation immediately.<sup>2</sup>

---

\*Deputy Director of Clinical Programs, The Buchmann Faculty of Law, Tel Aviv University. For the past seven years, the author has represented Bedouin Parents Committees in a number of petitions to the Supreme Court relating to the right to education. These petitions include H.C. 4671/98, *Abu-Frech, et. al. v. The Education Authority for the Bedouins in the Negev et. al.* (1998), which is discussed above.

<sup>1</sup> H.C. 5108/04, *Abu-Guda, et. al., v. Minister of Education, et. al.* (decision delivered 9 September 2004). Chief Justice Barak wrote the opinion, in which Justices Levy and Jubran concurred.

<sup>2</sup> H.C. 4671/98, *Abu-Frech, et. al. v. The Education Authority for the Bedouin in the Negev, et. al.* (decision delivered 23 August 1998.)

Yet, during the six years that have passed since this ruling, little has changed. True, schools in unrecognized villages were hooked up to generators, which provided them with electricity, so the state formally complied with the explicit directive given by the Supreme Court. However, the Court's attempt to embarrass the state and potentially bring about fundamental change in the state's attitude toward education for the Arab Bedouin was completely unsuccessful. The neglect continues and, despite some improvement in Bedouin education, the severe discrimination against the Bedouin remains unchanged.

The following facts illustrate the severity of the problem: (1) a mere 25.9% of Bedouin in the Negev (Naqab) obtain a matriculation certificate, in comparison with 34% of all Arabs and 51% of Jewish youths; (2) among the small number of Bedouin students who do receive a matriculation certificate, only 46.8% meet the basic admission requirements for entry to universities, compared with 73% of Arabs and 87.3% of Jews; (3) huge gaps exist in reading comprehension and knowledge of mathematics between Bedouin students and other students in the Israeli education system; (4) in recent years, the overcrowding in Bedouin classrooms and the shortage of buildings have reached a crisis point, and there are enormous gaps in terms of existing facilities and equipment, such as libraries, computers, science rooms; (5) essentially, the battle begun several years ago against the high drop-out rate is over;<sup>3</sup> and (6) special education for the Bedouin in the Negev, which, because of the limited scope of this article cannot be given the space it deserves, is in an appalling condition.<sup>4</sup>

In the course of the seven years in which I have been monitoring and taking part in the struggle, in and out of court, of Bedouin parents to uphold their children's right to education, it has become clear to me that blame must be directed at the Ministry of Education and the State of Israel, and not at the courts. The Ministry of Education is directly and primarily responsible for the serious failure of the Bedouin education system, a failure which is recognized almost universally (including by the state Commission of Inquiry headed by Justice Or ("Or Commission"), which investigated the events of October 2000, during which thirteen Arab citizens of Israel were killed by police, and published its conclusions in September 2003), but very little was done to rectify the failure.<sup>5</sup> The best way to solve the problem is to wage a public and political struggle: to shout and protest in the Knesset, in the Ministry of Education, in the media, and in the streets. The courts cannot instantly change the thinking of all the relevant officials, some known and others unknown, who simply do not want to alter the way that they have been treating Bedouin children for so many years.

Nevertheless, the courts are an integral part of the state mechanism, and they are charged with reviewing the actions of the executive branch. Clearly, judicial review does not always lead to operative changes, and it is not to be expected that the courts will grant petitioners everything they demand. However, for petitioners, gradual, and not revolutionary, change, or the very

---

<sup>3</sup> On the severity of the drop-out rate in Bedouin schools in the Negev, see State Comptroller, *Annual Report 52B for 2001 and Accounting for the 2000 Fiscal Year*, p. 96 (Hebrew).

<sup>4</sup> Figures from the yearbook of the Central Bureau of Statistics for 2003 and from "Arab Education in the Shadow of Poverty – Position Paper Submitted to the Minister of Education and Others," which was issued by the Regional Council for the Unrecognized Villages in the Negev and others. The document can be found at [http://www.shatil.org.il/data/beduin\\_education\\_position\\_paper.rtf](http://www.shatil.org.il/data/beduin_education_position_paper.rtf) (Hebrew).

<sup>5</sup> The full text of the Or Commission's report can be found at <http://www.court.gov.il/heb/index.htm> (Hebrew), or a summary of the report in English at:

<http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=335594&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>. For a comprehensive description of the discrimination against the Arab educational system in Israel, see Human Rights Watch, *Second Class: Discrimination Against Palestinian Arab Children in Israel's Schools*, published in September 2001, which can be found at <http://www.hrw.org/reports/2001/israel2>.

existence of a hearing in court, can lead to the exertion of public and political pressure upon state officials that may generate the desired change. Courts can lay the foundation for future petitions they consider sound, or, conversely, discourage future petitioners. In the judgment delivered by the Court in the matter of kindergartens for three- and four-year-old Bedouin children, the Court failed not only by refusing to give an operative order, but also through its muted and limited criticism, and the impossible burden of proof the Court placed on the petitioners, that may well put off future potential petitioners. Without delving too deeply here into the facts and law, I wish to direct my criticism to the following points.

**A. The judgment offered a “neutral” factual description, which failed to discuss the deplorable state of the education system for the Bedouin sector.** The Supreme Court’s decision from 1998, cited above, emphasized the “badge of shame” earned by the state for the failed education it offers to Bedouin children in the Negev. In the new judgment, the shame and condemnation expressed by the Court in 1998, which is the only way to describe the state’s handling of Bedouin education, disappeared, as if it had never existed. The wording is almost neutral. It emphasized the importance of the right to education as a human right, including the obligation to guarantee egalitarian and non-discriminatory education, of which level and quality are not allowed to be affected by the depth of a student’s pocket. However, when we move from the general to the specific, the obligation of the state to treat its citizens equally is non-existent. The Court’s opinion fails to point out that the state grossly violated the right of Bedouin children to education. The massive discrimination reflected in Israel’s education system for the Bedouin sector, which is the main cause of the lamentable results achieved by the system, goes unmentioned. A neutral position, which disregards the unequal background norms, is also apparent from the Court’s procedural argument that the petitioners must make their claims before the planning authorities, and not before the Ministry of Education. Meanwhile, the Court neglected to mention the harsh discrimination faced by the Arab Bedouin at the hands of planning officials responsible for setting land plans in the Negev. It should be mentioned that this inequitable treatment has been sharply criticized over the years by numerous individuals from inside and outside of government, including the members of the Or Commission.

In my opinion, therefore, the Court failed in its judicial review role. Even if it believed that the law prevented the Court from granting the petitioners the relief they sought, that is, to oblige the state to establish kindergartens in their villages, the Court could at least have laid out the shameful factual picture in its entirety. It could have even mentioned some of the stark findings of the Or Commission relating to the education system for the Arab sector in general, and the Bedouin sector in particular. Unfortunately, the state needs to be constantly reminded that a revolution, and nothing less, is required in the handling of the education of the coming generation of Bedouin in Israel. The courts, even if they do not bring about the desired change in policy, can and must draw attention to failures, omissions, and discrimination against minorities and disadvantaged groups. From this perspective, and unrelated to the results of this specific petition, the Court’s opinion strengthens the hand of those favoring the *status quo*, and weakens those who seek the advancement of the Arab Bedouin and achievement of the requisite fundamental transformation of the Ministry of Education’s conception of the Bedouin community.

**B. The judgment failed to oblige the Ministry of Education to present a complete factual foundation.** The judgment adopts in its entirety the state’s argument that proper educational services do not have to be provided in every place where students live. As noted, the state declared that every three- and four-year-old child who is interested can be registered in a kindergarten in one of the educational centers or in recognized communities. These

kindergartens are many kilometers from the children's homes (up to eight kilometers, and in some cases, the roads from the villages to the kindergartens are unpaved). Even if we accept the Court's and the state's basic assumption, the question remains of how the children are to reach the kindergartens in which they are supposed to learn. This question does not bother me alone. The Court stated that a situation exists in which "the kilometers between the petitioner villages and the educational institutions, which lack paved access roads, can take ten times as long to negotiate because of the harsh conditions along the way and because of inclement weather. In such a case, there is a fear that the three- and four-year-old children will not be able to get to the kindergartens designated for them in the organized villages, leaving the respondents' position, whereby they recognized their obligation to provide educational services to the petitioner children, unfulfilled."

If this is the Court's understanding, then why did it deny the petition? The Court explained that the factual foundation laid before it was incomplete, so it could not examine the question of accessibility to the schools. Rather than issue an *order nisi* (an order to show cause), which would have required the state to submit a detailed affidavit setting forth all the relevant facts, the Court suggested that the petitioners contact the Ministry of Education, gather information, and negotiate a solution. If necessary, the Court made clear, the petitioners could return to Court. It should be noted that, a year earlier, Adalah was compelled to withdraw an almost identical petition after the Court stated, during the hearing of the petition, that the petition lacked a comprehensive factual foundation. Again and again, rather than conduct meaningful judicial review of the Ministry of Education's actions, a review which would center around the necessity for transparency and accountability of the Ministry's actions, the Supreme Court prefers to announce 'case in closed'. The parents of the Bedouin children are the ones who are asked to do "homework" before returning to Court the next year to file yet another unsuccessful case.

Obviously, effective judicial review of an action taken by a governmental authority must be done with the Court being in possession of a complete presentation of the facts. However, in many other cases, the Supreme Court knew, and knows, how to demand that the state supply these facts. Placing the burden on the Bedouin parents, particularly in light of the known state of education in their communities, as described above, of their depressed economic condition, and of their limited ability to organize their efforts in a collective struggle, deals a death blow to future petitions of this kind. Hence, my conclusion is that the Court did not fulfill its role as protector of vulnerable minority groups.

**C. Another generation of Bedouin children is left behind.** As mentioned, the Supreme Court concluded its opinion with a recommendation to the parties to maintain contact with each other, so as to achieve a consensual resolution of the matter. Should they fail to do so, the Court added, the doors of the Court remain open to the petitioners. Is this really the case, though? At the beginning of the opinion, the Supreme Court mentions one of the state's arguments for dismissing the petition summarily: some of the petitioner children, who had also petitioned the Court a year earlier, were now older than five years of age. In other words, they had lost their chance to study in kindergarten, no matter how the Court ruled. The denial of the current petition means yet another delay of at least one year in exercising the (recognized) right of three- and four-year-old Bedouin children to obtain a kindergarten education. The dispute will possibly be resolved outside Court, or in Court after Adalah files another petition - its third on this matter. In any event, it is clear that another class of Bedouin children will reach elementary school in a substantially inferior condition. While almost all other Israeli children in their age group attend kindergartens (whether funded by the state or by the sources), their time was wasted.

In 2018, when the results of the matriculation exams for the Bedouin sector will be compared with other sectors of Israeli society, it is likely that we shall see, once again, an enormous disparity between Bedouin children and other children in the country. Will anyone recall that these Bedouin children, who were born in 2000, had petitioned the Supreme Court in 2004 to protect their right to a preschool education, and the Court failed to offer a helping hand?

One does not have to be an expert to understand what our state must do to prevent the fulfillment of this pessimistic forecast. In its judgment, the Court chose to refrain from determining the legality of the state's claim that its interest in promoting "planned" communities justifies its decision not to provide school transportation for the children of the "unrecognized" communities. Is it really possible to pressure the Bedouin in the Negev to move to "recognized" communities by preventing their school children from receiving an education? From an historical perspective, this is certainly possible. For dozens of years, the state, through the Israel Lands Administration, has been attempting to advance its interest in the Negev by violating the fundamental right of Bedouin children to education.<sup>6</sup> What about the future? Will the state be allowed to act in such an arbitrary manner? Will the state continue to operate a state education system for the Bedouin while arguing simultaneously that the legal recognition of this very same education system is "questionable" because it is located in an "unrecognized" community? A clear ruling is necessary on this fundamental point of law, a ruling which will prohibit the state from infringing the right to education, one of the most important human rights, just in order to pressure the Bedouin parents to leave their homes and relocate elsewhere. It is my belief that such a formal prohibition would receive widespread support, including from those public officials, who believe that other ways that are used by the state to persuade the Bedouin to move to "recognized" communities, are legitimate.<sup>7</sup>

---

<sup>6</sup> For the historical background of the land dispute between the Bedouin and the state, including the judiciary's position, see Ronen Shamir, "Suspended in Space: Bedouins under the Law of Israel", 30 *Law and Society Review* 23 (1996).

<sup>7</sup> For a comprehensive discussion of the "unrecognized" Bedouin villages from a human rights perspective, see the position paper submitted on 22 May 2003 by Bimkom and the Association for Civil Rights in Israel to the Borders Committee, which heard the matter of the establishment and municipal organization of new Bedouin communities in the Negev. The position paper can be found at [www.acri.org.il/hebrew-acri/engine/printfactoryh.asp?id=638](http://www.acri.org.il/hebrew-acri/engine/printfactoryh.asp?id=638) (Hebrew).