



On Justice Dorit Beinisch's assumption of the Presidency of the Supreme Court, the General Director of Adalah, Attorney Hassan Jabareen, argues that: "Beinisch's Court" will continue along "the path of Barak," and will become lost in a "triangle of contradictions": the Jewish versus the democratic nature of the state; occupation versus liberty; and religion versus state.

*Political and judicial circles and active human rights organizations in Israel are watching with great interest the changes taking place in the composition of the Supreme Court, (the highest judicial institution in Israel, which Israelis delight in calling the "fortress of democracy") with Justice Dorit Beinisch taking over the Presidency of the Court from Justice Aharon Barak, who has retired.*

Adalah General Director, Attorney Hassan Jabareen

**By Asad Talhami, Fasl al-Maqal**

"Fasl al-Maqal" held the following discussion with the General Director of Adalah – The Legal Center for Arab Minority Rights in Israel, Attorney Hassan Jabareen, on the subject of the Court in the era of Dorit Beinisch in comparison with the era of Aharon Barak, the various issues relating to the performance and functions of the Supreme Court, and what is expected of it as the High Court of 'Justice.'<sup>1</sup>

**Fasl al-Maqal:** How can the composition of the Supreme Court currently be assessed?

**Jabareen:** We can say that the Supreme Court has two camps, the first of which can be termed, relatively speaking, the "liberal camp," and the second the "conservative camp." The recent decision to ban family unification of Palestinians from either side of the Green Line made a very clear division between these two camps. Unquestionably, the new President of the Court, Justice Dorit Beinisch, belongs to the first camp, which was led by her predecessor Justice Aharon Barak. My impression is that the Supreme Court in the era of Beinisch will continue along the same path taken by Barak, particularly since the appointment of five new Justices is shortly to take place, over which Beinisch will have considerable influence. Therefore, we expect that the balance of powers in "Beinisch's Court" will lean more towards "Barak's stream." In simple terms, the Court will continue along its current path even though it has the power to annul laws and intervene in decisions made by the executive authority. This path was established by former Chief Justice Aharon Barak, who nevertheless failed to safeguard constitutional rights.

On the one hand, Barak anchored the principle that the Supreme Court is a constitutional court in the sense that it has gained the power to intervene in the content of laws legislated by the Knesset and decisions made by the executive authority, in spite of the absence of a written constitution. Barak described this as "the constitutional revolution." However, on the other hand, this revolution failed to establish criteria for

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safeguarding constitutional rights. That is, it determined the Court's authority, but failed to realize the full scope of constitutional rights, which the Court's confirmation of the prohibition on family unification of Palestinians made abundantly clear. Thus, Barak ends his Presidency with the most important decision in the history of the Supreme Court, a decision which contradicts human rights. Although Barak voted against the decision, the majority of the Court which he led adopted an immoral position. Consequently, each Justice in the panel can interpret the defense of constitutional rights in accordance with his or her individual judgment, and not according to transparent criteria, which Barak was unable to crystallize. This is what transforms the Court into a house for the Justices, rather than a Court with Justices in it. Furthermore, political developments in Israel will exert an influence on the Justices' positions. Significantly, when we approached the Court three years ago regarding the family unification case, a majority of the Justices supported the petition. However, political changes in Israel and the prevailing discussion of the "demographic threat" have reversed the balance of power. It seems that this situation will be repeated in the era of Beinisch.

**Fasl al-Maqal:** In relation to the contradictions which have always accompanied the Supreme Court?

**Jabareen:** Yes, particularly the "triangle of contradictions." The first side of this triangle is the definition of the state as "Jewish and democratic," which is in conflict with the rights of the Arab national minority in Israel. This results in the Court's continuing rejection of many petitions dealing with these rights. The second side is the contradiction between "liberty" and cases relating to the Occupation. Here, too, the Court will continue along Barak's route, which in practice means the rejection of the vast majority of petitions filed by Palestinians under the Occupation. The third side of the triangle concerns the contradiction between (the Jewish) religion and the state.

These contradictions have become apparent on numerous occasions. At times the Court has accepted petitions filed by Palestinians in Israel, and at others has rejected them. Thus, the Court which affirmed the right of Arabs in Israel to purchase land in a town defined as Jewish is the same Court which rejected family unification of Palestinians.

**Fasl al-Maqal:** Is there truth in the contention that the Supreme Court is a liberal court, or does it constitute the "final refuge of the citizen" *vis-à-vis* the authorities? Ultimately, is it not security considerations which influence its judgments?

**Jabareen:** There is no doubt that security considerations are the deciding factor in the judgments delivered by the Supreme Court. That is not idle talk but an established fact. Since 1967, thousands of petitions have been filed to the Court by Palestinians from the Occupied Territories. However, the Court only accepted three major petitions: a petition to proscribe torture; a petition to change the route of certain sections of the Separation Wall (although it rejected the decision of the International Court of Justice declaring the construction of the Wall in the Occupied Territories in contravention of international law); and a petition to ban the Israeli army's use of Palestinian civilians as "human shields" in pursuit of "wanted" Palestinians. I do not believe that the situation in Beinisch's era will change for the better, and I see the chances of a just verdict being issued by the Court in the great majority of issues relating to the Occupation as extremely low.

**Fasl al-Maqal:** What is the extent of the security establishment's interference in the decisions of the Supreme Court?

**Jabareen:** I do not believe that there is direct interference on the part of the security establishment in the work of the Justices. I cannot imagine a Justice who respects him or herself accepting direct dictates from the “Shabak” (the General Security Services) or any other security agency. However, there is no need for such intervention as there is an “institutional interest in Israel.” The judicial, legislative and executive authorities each have an interest. The interest of the Court is to appear independent, but simultaneously not to lose the trust of the Israeli public, specifically the Jewish, secular, Ashkenazi public. Consequently, the Court is constantly occupied with the issue of balances between its independent status and preserving the “consensus.” We saw that “Barak’s revolution” was implemented in a number of cases, through which the Court’s independence was demonstrated. For example, the Court’s intervention in a prime-ministerial decision to appoint or dismiss a minister, on the basis of “transparency of criteria,” and fighting corruption for the sake of good governance. Conversely, however, in cases relating to the Occupation, the Court did not provide any noteworthy indication of progress, and was therefore able to maintain the trust of Israelis. This is the general equation: the demonstration of the Court’s independence on one hand, and on the other deference to the Zionist consensus, with the exception of a small number of cases.

**Fasl al-Maqal:** Barak has frequently stated that the mission of the Justices is to maintain a balance between human rights and security. Is this what has been put into practice?

**Jabareen:** In the absence of clear criteria to define this balance, the scale is generally skewed towards the security in order to gain the support of the government, the Knesset, the security establishment and the majority of the public. Moreover, security considerations do not actually relate to security in many instances. There is no relationship, for example, between family unification and security. Accordingly, such considerations are mere pretexts.

**Fasl al-Maqal:** Until now, we have not seen the Court annul racist legislation, despite the fact that it granted itself the right to annul a number of laws. Correct?

**Jabareen:** Until now, the Court has cancelled three or four pieces of legislation, most of which concerned economic issues. When we confronted it with an important case like the law banning family unification of Palestinians, it decided to reject the petition and approve the racist law.

**Fasl al-Maqal:** And it was Justice Barak, considered the most prominent liberal Supreme Court Chief Justice, who defied the decision of the International Court of Justice in The Hague and deemed the racist Separation Wall legal.

**Jabareen:** In security cases, the Supreme Court appeared as a “security” Court, and its Chief Justice Barak embraced a highly sophisticated discourse of security. In reality, however, the position of the Supreme Court under Barak’s presidency did not differ from that in the era of his predecessors regarding cases relating to the Occupation. However, Barak resorted to the use of powerful rhetoric with an outward display of liberalism by frequently discussing the importance of upholding the human rights of Palestinians. The final result, though, was totally negative (the rejection of the petitions), just as during the eras of his predecessors. Thus, it is on account of his rhetoric and not the decisions that he delivered that Barak is considered “a human rights Justice,” and that his voice became known all over the world.

**Fasl al-Maqal:** What about cases relating to Arabs in Israel?

**Jabareen:** A measure of success was achieved in some cases in the era of Barak, who accepted a number of petitions which the Court had previously rejected. However, it is important to be aware that, although his discourse here was conservative, the result was at times positive, in contrast with the cases of Palestinians from the West Bank and Gaza. This disparity stems from the fact that Israeli public opinion is not interested in the Supreme Court's rhetoric surrounding cases relating to "1967 Palestinians"; rather, its principal concern revolves around the question of whether or not the Court interferes in the decisions of the occupying army. Barak said to the Israeli public that the Court does not interfere in the army's final decisions, and the Israeli public was therefore interested in the result and not the discourse. As for cases relating to Arabs in Israel, however, what most concerns the Israeli public is the Court's discourse and not the result, because it sees in this discourse and rhetoric an ideological and political issue of the first order. Thus, here the concept of the "Jewishness of the state," democracy and absolute equality come into play. Therefore, the Court appeared rhetorically conservative in this area, but the result nonetheless was sometimes positive.

The Ministry of Foreign Affairs was conscious of Barak's path, and used him as an "advocate" of its foreign policy. It published, for instance, a special booklet in English examining a number of the Supreme Court's deliberations on cases relating to Palestinians in the 1967 Occupied Territories. The booklet contained quotations from statements made by Barak's on the obligation to respect Palestinians' human rights. However, the reader was not shown the result produced by the deliberations (the rejection of Palestinians' petitions). Therefore, the reader who is not aware of this fact is left with the impression that the Court is extremely enlightened and intervenes in the occupying army's decisions. As a result, Barak became the most prominent advocate of Israeli policy in the international realm, and you may hear the dean of the most prestigious college of law in the United States (Yale University) state in a lecture that he wishes that there was a Court in the United States like the Supreme Court of Israel.

**Fasl al-Maqal:** Can the Court's new Chief Justice play Barak's role?

**Jabareen:** Barak has unique legal qualifications and knowledge. He is well-versed in legal literature from around the world and "comparative law," which gives him a more global perspective: for Barak, the borders of the world are not the borders of Jerusalem. Similarly, Barak published a number of articles and books in English, hence the veneration of "Barak's Court" or, more exactly, of Barak personally. I do not foresee that in the near future, any other of the Court's Justices will achieve this international status. Therefore, with his departure, the Ministry of Foreign Affairs will lose perhaps its greatest ambassador.

**Fasl al-Maqal:** Do you expect a change in the way in which the Court under Beinisch's presidency will deal with cases relating to Palestinians in Israel?

**Jabareen:** No, I do not expect any serious break from the Barak era in this area. Regarding constitutional cases, I do not anticipate a "revolution" from Beinisch; rather, she will continue down the path of balances. The defense of constitutional rights will be the exception, not the norm. The norm will remain based on "balances," will lean more towards religion than affairs of the state, and will favor the considerations of the occupying army over cases relating to the Occupation. More weight will be accorded to

the issue of the “Jewishness of the state” at the expense of democratic freedoms. Exceptions will be made from time to time, because without exceptions the Court will lose its legitimacy.

**Fasl al-Maqal:** In the position of State Attorney, Beinisch was credited with adopting bold positions, such as her insistence on bringing to trial members of Jewish terrorist organizations and Palestinian killers, after capturing them alive. A further example is her refusal to represent the Attorney General’s Office in defense of the decision made by former Prime Minister Yitzhak Rabin to expel hundreds of Hamas activists to Marj al-Zuhur. What infuriated the right and the settler leadership when Beinisch was appointed Chief Justice of the Court?

**Jabareen:** Beinisch is considered to be from the Supreme Court’s more liberal camp. We must, however, note that as she assumes her new position, it is not certain that she will adopt the same stances. In her new position, she cannot play the role of the independent Justice as she is obliged to reflect the representative view of the Court if she is to win the consensus. I think that Beinisch will be more conservative in her new position. Barak, for example, was more liberal in his writings as a professor than as a Supreme Court Justice, and more liberal as a Supreme Court Justice than as Chief Justice.

**Fasl al-Maqal:** What progress has been made in the endeavors to produce a constitution for Israel? Can such a project actually be realized?

**Jabareen:** Since the outset of the 21st Century, efforts to produce a far-reaching constitution on the back of the consensus reached between different political parties in Israel over specific cases – a powerful consensus over the concept of “the Jewishness of the state.” This constitution guarantees the Supreme Court the authority to annul decisions and laws, with the exception of personal status laws, the Court’s interference in which is rejected by (Jewish) religious parties.

**Fasl al-Maqal:** What about Arabs in Israel in the planned constitution?

**Jabareen:** They will be present, but marginalized. The constitution will be one-sided. It will be biased towards the Jewish majority without considering the Palestinian minority in Israel in a serious manner. In this respect, the constitution will bring nothing new. In practice, every constitution reflects the contemporary political situation. The Israeli constitution will be founded on “the demographic mentality,” according to which the Arabs pose a danger to the Jewishness of the state. Foundations such as these, let alone the continuation of the occupation of the Palestinian Territories, will not bring about a democratic constitution or safeguard the political liberties of the minority. Hence our opposition to the draft constitution proposed by the Knesset’s Constitution, Law and Justice Committee and the Israel Democracy Institute.