

12 March 2002

Members of the Official Commission of Inquiry
Supreme Court
Jerusalem

Re: Request to Cancel Notices of Warning Given to Arab Public Representatives

Dear Sirs:

I am writing on behalf of Members of Knesset (MKs) 'Abd al-Malek Dahamshe and Dr. Azmi Bishara, and also on behalf of Sheikh Ra'ed Salah, to request cancellation of the notices of warning that were issued to them on 27 February 2002. The said notices of warning were issued in violation of law, as is apparent from the following:

- A. The element of incitement set forth in the Commission of Inquiry's mandate exceeded the Commission's authority and was discriminatory.
 - A1. The government set the mandate of the official Commission of Inquiry when it established the Commission of Inquiry on 8 November 2000. This mandate called on the Commission, *inter alia*, to investigate the chain of events that began on 29 September 2000, including "the factors that led to the events at that time, including the conduct of the inciters and organizers from all sectors who participated in the events, and of the security forces."
 - A2. On 10 November 2000, I wrote to the then Prime Minister, Ehud Barak, and to the Chief Justice of the Supreme Court regarding the content of the Commission of Inquiry's mandate. My letter related explicitly to the legal problems raised by including incitement in the mandate, whereby the Commission was to examine and investigate the actions of the executive branch for an act or omission that it committed which led to the public's loss of confidence in it. The main reason for this lies in the principle of the separation of powers. At the end of my letter, I requested Prime Minister Barak to change the mandate to conform it to the legal function of an official Commission of Inquiry.
 - A3. In addition, the Chief Justice of the Supreme Court was requested to



instruct the members of the Commission, upon appointment, to exercise their authority pursuant to Section 2(b) of the Commissions of Inquiry Law (1968), and request the government to limit the mandate of the Commission of Inquiry so that it does not include incitement, thereby conforming the mandate to the applicable law.

- A4. On 19 November 2000, I sent a similar request to the members of the Commission of Inquiry, and repeated this request a year later, on 28 November 2001. In the last letter, in addition to the legal problems inherent in including the element of incitement, I warned that this element was directed solely towards Arab public representatives. I have not received any reply to my correspondence relating to the Commission of Inquiry's mandate.
- A5. After completion of the first stage of testimony, and following the issuance of the notices of warning, it is clear that the Commission chose not to exercise its power pursuant to Section 2(b) of the Commissions of Inquiry Law, and investigated the matter of incitement.
- A6. In so acting, we believe that the Commission did not consider and/or did not properly consider the reasons stated in our aforementioned letters relating to the legal problems inherent in including incitement in the Commission of Inquiry's mandate. These problems warrant the cancellation of the notices of warning that were issued to the Arab public representatives, all of which relate to incitement.

Attached hereto are copies of my letters relating to the mandate of the Commission of Inquiry, dated 10 November 2000, 19 November 2000, and 28 November 2001.

- A7. In his book *Official Commissions of Inquiry* (2001), Dr. Klagsbald emphasizes the need that official commissions of inquiry have an executive purpose and investigative power that does not exceed the powers of the executive branch, because:

The place of the official commission of inquiry in “the constitutional format” - as a wing of the executive branch that is intended to perform an administrative function - dictates its powers. Its powers must be derived from the areas of activity of the executive branch, in a manner that does not compete with the powers of the other branches that are part of the same “constitutional format.”¹

- A8. Prof. Segal holds the same opinion: “The existence of a matter of significant public importance that justifies investigation by a commission of inquiry results from the broad public distress based on a crisis of confidence in the governmental administration for an act or omission it committed.” Prof. Segal adds that, “the institution of the commission of inquiry must be reserved, in principle, to the investigation of matters relating to the responsibility of the government before the Knesset, and should not be employed to investigate other matters.”²
- A9. Experience in Israel indicates that, in the vast majority of cases, commissions of inquiry pursuant to the Commissions of Inquiry Law (1968) were established to investigate the executive branch following its act and/or omission that led to the public’s lack of trust in the executive branch. Noteworthy in this regard was the second Shamgar Commission of Inquiry, which examined, in 1996, the circumstances of the assassination of the late Prime Minister Yitzhak Rabin. It concentrated on the executive branch although the circumstances that preceded the assassination included savage incitement against Rabin himself.
- A10. Furthermore, implementation of the mandate of the Commission of Inquiry regarding the element of incitement discriminated against the Arab public representatives. The investigation of incitement was directed only against them. No investigation was conducted against any individuals from the Jewish community who were responsible for incitement, although information was provided on widespread rioting throughout the country by Jewish rioters calling out “death to Arabs” and injuring Arab citizens and Arab public and private property.

See my letter of 19 February 2002 to the Commission.

A.11 In addition, the Commission chose not to summon Ariel Sharon, the opposition leader at the time of the events that were the subject of the Commission's investigation, although it was Sharon's visit to the area of al-Haram al-Sharif on 28 September 2000, that was controversial. The then Jerusalem Police Commander, Major General Yitzhaki, warned the political echelon against Sharon ascending to the area of al-Haram al-Sharif on the grounds that it would increase the already existing tension. Also, former Minister Ben Ami accused Sharon, in a television broadcast that was submitted to the Commission, of taking actions that aggravated the situation.

A.12. It is surprising that the Commission ignored this subject, which took place only one day before the events began. Rather, the Commission deemed it appropriate to warn the three representatives of the Arab public for "messages of violence" that they allegedly conducted during the two years that preceded the October events.

A.13. For this reason alone - the discriminatory exercise of the Commission's mandate on incitement against the Arab public representatives - the Commission must cancel the notices of warning that it issued to those representatives.

B. Political questions asked by the Commission exceeded its authority and were discriminatory.

B1. The Commission of Inquiry asked the Arab public representatives political questions, and in so doing exceeded its authority as an official Commission of Inquiry.

B2. For example, during the questioning of MK 'Abd al-Malek Dahamshe on 2 January 2002, Justice Or asked him:

How you act as a Muslim - regarding the Temple Mount we already know, and your opposition to the occupation of the territories we

know. This is from your being a Palestinian. In which events, if you can point them out, in this conflict among the three identities that you mentioned, do you fight for your Israeli citizenship, in opposition to your being Palestinian or as a Palestinian... can you illustrate for us?³

- B3. Prof. Shamir also asked MK Dahamshe political questions, among them the following:

Let's go back to the matter of the mosques. Under the circumstances, I understand that your movement took several initiatives to build... to rebuild abandoned mosques. I can surely understand the Islamic emotion over abandoned holy sites, but wouldn't it have been more logical to dedicate the few resources to build mosques where there are worshippers, and not in a place where there are no Muslims at all? In other words, it is possible to build a mosque for people to pray, and it is possible to build a mosque for political reasons.⁴

- B4. The Commission of Inquiry also asked MK Azmi Bishara political questions during his testimony on 3 December 2001. For example, Justice Or asked MK Bishara about an interview he gave in 1998 to Ari Shavit of *Ha'aretz*:

Sir, you remember well... that matters got to a point there. To the point, Mr. Bishara. You said, "Correct, this is the paradox of the Arabs in Israel. This is the paradox of Azmi Bishara in the State of Israel. If Azmi Bishara tells you there is no paradox here, say to him 'liar.'" You can't say "I am a proud Arab and also a loyal Israeli." Are you a proud Arab?⁵

- B5. Prof. Shamir also asked Dr. Bishara political questions, such as the following:

Yes, but if we were to describe some scale that measures the primacy of the national attachment of parliamentary parties - I am not talking about Sons of the Country or other movements - would it be correct to say that Balad would be at the head of this scale?⁶

- B6. Prof. Shamir continued and made the following comments about the movement that Dr. Bishara represents:

... the legitimacy of the State of Israel was, and you [in the plural] in fact say it, the 'al Hoquq al Shar'iyah' [the legitimate rights], the decision of the United Nations that called for the establishment of the Jewish State and a Palestinian State. But as for the State of the Jews, now you come and operate an entire political movement that seeks to undermine it.⁷

- B7. The Commission of Inquiry also asked Sheikh Ra'ed Salah political questions during his questioning on 28 January 2002. For example, Prof. Shamir explicitly asked him about the political goals of the movement that he heads, and also about his position on the Oslo Agreements:

With your permission, I would like to go back to the question, what interests me is the political goals of the movement, then we can speak about other matters.⁸

With your permission, the Islamic movement was against the Oslo Agreement, right?⁹

- B8. The Chairman of the Commission of Inquiry, Justice Or, also asked Sheikh Ra'ed Salah political questions, among them a question on the meaning of a poem written by Sheikh Ra'ed Salah. After he read a translation of the poem, Justice Or, who does not speak Arabic, interpreted the poem as he understood it:

On 18 August, your poem was published, another poem, and you... this was after the destruction of the Sarphand Mosque and you state: "Desecrate the houses of prayer to Allah and massacre the worshippers, dig graves for our people, and pelt the muezzin with your blasts of anger, but your fate, good enemy, is removal. Proceed, destroy Sarphand and its hymns, desecrate, devour the splendor, and wash the *Jabe' al Habiba* in blood, chuckle while you make us bleed, but your fate enemy, enemy of justice, is surely removal, you are nothing more

than a growth on my flesh. Enemy of Allah, your fate of removal is decreed and your oppression too is on the way to hell.” Before I... explain what you mean. I’ll tell you how I understand it.¹⁰

- B9. The Commission of Inquiry employed this pattern of questioning, e.g., asking political questions, only with the representatives of the Arab public. The Commission had no authority to take this approach, and in doing so, it discriminated against them. For this reason, too, the notices of warning issued to the three representatives of the Arab public are invalid.¹¹

C. Reliance on information from the General Security Service and police.

- C1. It seems that the Commission of Inquiry was assisted by extensive intelligence material that was apparently submitted by the General Security Service (GSS) and/or the police. It is also clear that the Commission did not investigate the political statements made by representatives of the Jewish public, and certainly did not interpret them. These facts support the assumption that the GSS and/or police submitted information to the Commission only against the Arab public representatives. Such action by public entities, which are supposed to act with fairness, equality, and without bias, but in fact were motivated by racial discrimination, renders illegitimate the material that they submitted. Therefore, the Commission of Inquiry is prohibited from relying on the material in making its decisions.

For the reasons stated above, the Commission of Inquiry is requested to cancel the notices of warning that it issued to the three Arab public representatives - MK ‘Abd al-Malek Dahamshe, MK Dr. Azmi Bishara, and Sheikh Ra’ed Salah.

Your prompt reply would be appreciated.

Very truly yours,

Hassan Jabareen, Advocate

Request to Cancel Notices of Warning Given to Arab Public Representatives

End Notes

1. Avigdor Klagsbald, *Official Commissions of Inquiry* (Jerusalem: Nevo, 2001) at 140 (Hebrew).
2. See Zeev Segal, "Commission of Inquiry pursuant to the Commissions of Inquiry Law, 5728-1968: Its Constitutional Status and Legitimate Area of Activity," 3 Legal Research 199, 218, 245 (1984) (Hebrew).
3. Protocol of the Commission of Inquiry at 9073.
4. Id. at 9136.
5. Id. at 8519.
6. Id. at 8597-8598.
7. Id. at 8659.
8. Id. at 9536.
9. Id. at 9546.
10. Id. at 9524-9525. Editors' Note: The text of the poem by Sheikh Ra'ed Salah, quoted by Justice Or in Hebrew, is not an accurate translation of the Arabic original. For the full and accurate text in Arabic, see *Sawt al Haq Wa-al-Hurriya*, 18 August 2000.
11. Compare with A. Klagsbald, supra note 1, at 329.