



Challenging the Prohibition on Arab Citizens of Israel from Living on Jewish National Fund Land

Excerpts from Supreme Court Petition: H.C. 9205/04, Adalah v. The Israel Lands Administration, the Minister of Finance and the Jewish National Fund

**Before the Supreme Court in Jerusalem
Sitting as the High Court of Justice**

H.C. 9205/04

The Petitioner

1. Adalah – The Legal Center for Arab Minority Rights in Israel represented by attorneys Suhad Bishara and/or Hassan Jabareen and/or Marwan Dalal and/or Orna Kohn and/or Gadeer Nicola and/or Morad El-Sana and/or Abeer Baker and/or Adel Bader of Adalah – The Legal Center for Arab Minority Rights in Israel, PO Box 510, Shafa'amr 20200. Tel. 04-9501610, Fax. 04-9503140.

– v. –

The Respondents

1. The Israel Land Administration
2. The Minister of Finance
Respondents 1 and 2 represented by the Office of the Attorney General, 29 Salah al-Din Street, Jerusalem.
3. The Jewish National Fund, 1 Kakal Street, Jerusalem 91002.

Petition for an Order Nisi and Temporary Injunction

A petition is hereby filed for an order nisi against the Respondents ordering them to show cause:

1. Why Regulation 27 of the Regulations of the Obligations of Tenders (1993) should not be cancelled. The aforementioned regulation declares that “in a transaction involving land of the Jewish National Fund that requires issuing a tender according to these regulations, the Israel Land Administration is authorized to conduct the tender in accordance with the Covenant agreed upon between the state and the Jewish National Fund on November 28, 1961” [...]



2. Why not to cancel the policy of Respondent 1, which determines that only Jews have the right to participate in tenders it administers for Jewish National Fund-owned lands.
[...]

The Grounds for the Petition

Introduction

1. “The principles of public law are, by their nature, cognate – they are but a branch of the tree of public welfare – and are in the public domain. The principles of public law are in the blood of the public authority, and the blood is its soul. All these principles are known and dear to us: fairness, honesty, good faith, the prohibition of arbitrariness, the obligation to use discretion in a matter on its own merits, the prohibition of discrimination, the prohibition of extraneous motives, the obligation to act according to the principles of natural justice, etc. Tenders laws are rooted in public law and, by definition, assume all of these principles: the latter are assumed in tenders laws, and tenders laws are assumed in them. Just as these principles of public law have been adapted to each and every field of public law [...] so they should be adapted to the field of tenders. All principles of public law should be directed at the tenders laws: [...] the principle of fair competition, the principle of equality between bidders, and all remaining characteristics of a tender as such.”

Justice Heshin, Civil Appeal 6926/93, *Israel Shipyards Inc. (Ltd). v. Israel Electric Co.*, PD 48(3) 749, pp. 769-770.

2. The Israel Land Administration (henceforth “the ILA”) is legally authorized to administer Israel’s lands, including the land of the Jewish National Fund (henceforth “the JNF”). This petition is concerned with an ILA policy that prevents Arab citizens of the state from participating in tenders that the ILA organizes for the purpose of the distribution of JNF land. The ILA claims that the reason for this policy is based on the Covenant signed in 1961 between the State of Israel and the JNF that requires the ILA to honor the registered objectives of the JNF.



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3. The Petitioner will claim that the ILA is obliged to act in accordance with the principles of public law, and first and foremost the principle of equality. The policy that is the subject of this petition is not based on primary, but only on secondary legislation – Regulation 27 of the Regulations of the Obligation of Tenders (1993). This regulation is contrary to the law which authorizes the enactment of these regulations, namely, the Obligation of Tenders Law (1992), as well as general tenders laws. In addition, the petitioner will claim that the respondent's policy and Regulation 27 referred to above are inconsistent with the limitations clause of the Basic Law. [The Basic Law: Human Dignity and Liberty]
4. While the ILA is authorized to engage with any third party, as a public body it is not authorized to adopt a stance and/or goals that are in opposition to the basic principles. Engagement with a third party does not release a public body from compliance with constitutional law requirements. A discriminatory policy undertaken by Respondent 1, such as the policy which is the subject of this petition, transmits a negative message towards the Arab citizens by the state, and makes the state a partner in an action that discriminates against, harms and humiliates an entire population – one which is a national minority in Israel.
5. At present, two and a half million dunams [1 dunam = 0.001 square kilometers] of land are registered under the ownership of the JNF. The continuation of the ILA's policy may lead to the creation of segregated public spaces on the basis of nationality; that is, settlements or neighborhoods in which only Jews can live and the land of which other citizens are forbidden from purchasing the rights to or from building a house on. This geographic spatial vision, which in and of itself is unacceptable under any democratic regime, is sufficient to necessitate a ruling that will order an immediate cessation of the aforementioned ILA policy.
[...]



The Facts

The ILA's Policy in Administering JNF Land

1. State, Development Authority and JNF lands were placed under the trusteeship and administration of the ILA. Article 2(a) of Israel Lands Administration Law (1960) determines that the government shall establish the ILA for the purpose of administering Israel's Lands. Article 1 of the Basic Law: Israel Lands defines Israel's lands as including lands owned by the JNF. There is no primary legislation that establishes that administration of the land by the ILA shall be done in accordance with the JNF's registered objectives.
2. Despite the absence of any form of authorization in primary legislation, and in contradiction of the Obligation of Tenders Law (1992) (henceforth "the Obligation of Tenders Law"), Regulation 27 of the Regulations of the Obligation of Tenders (1993) stands as the sole reference that establishes that the ILA is authorized to conduct a tender in relation to a transaction involving JNF lands, in a manner consistent with the Covenant signed between the State of Israel and the JNF in 1961. Article 4 of this Covenant establishes that:

Israel's lands shall be administered in accordance with the Law, that is to say, on the principle that land is not sold, but only given on lease, and in accordance with the land policy laid down by the Board established under Article 9. The Board shall set the land policy with a view to increasing the absorptive capacity of the land and preventing the concentration of lands in the hands of individuals. The lands of *Keren Kayemeth LeIsrael* [the Jewish National Fund] shall, moreover, be administered subject to the Memorandum and Articles of Association of the *Keren Kayemeth LeIsrael*.

[...]
3. Article 3(a) of the Memorandum and Articles of Association of the JNF establishes that the objectives of the JNF shall be:

To purchase, acquire on lease or in exchange, to receive via lease or in another manner – **lands**, forests, possession rights... and all the rights attenuate therein, and, too, any type of permanent properties in the



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- prescribed region (which expression shall in this Memorandum mean the state of Israel in any area within the jurisdiction of the Government of Israel) or any part thereof, for the **purpose of settling Jews** on such lands and properties.¹ [Emphasis added in original]
4. Respondent 1's policy of excluding Arab citizens from participation in tenders that it manages and administers can be found in many documents published for the purpose of marketing ILA-administered lands. For example, [the ILA's] Procedure 37.01, the "Fiftieth Anniversary of the Leasing of Urban Lands," clarifies that:
- The ILA is authorized not to extend the lease [in an urban area] or to establish special conditions that will apply to an additional period in certain cases, and especially if [...] the leaser is a "foreign citizen" or someone with whom the Covenant with the JNF restricts the ILA from entering into an agreement. [...]
- [...]
5. Furthermore, the information sheet about tenders for the lease of land in accordance with ILA Procedure 31.02, Art. 2.1 declares that:
- Every citizen has the right to participate in the public tender. Participation in the bidding for land of the JNF will be undertaken in accordance with existing restrictions that exist in the Memorandum and Articles of Association of the JNF.
- [...]
6. In a rental contract with a kibbutz, Respondent 1 makes a statement of clarification based upon Directive No. 53 of the [ILA's] Agricultural Department (1996):
- Since in accordance with the directives of the Covenant between the State of Israel and the Jewish National Fund (henceforth the JNF) [...] the management of the land owned by the JNF, including its lease and the agreement or rejection to the transfer of rights in it, are to be undertaken by the ILA as directed in the Memorandum and Articles of Association of the JNF, the cooperative settlement declares that it is aware that only upon this prior and basic condition is the ILA willing to establish an engagement with it through this contract.
- [...]

14. Thus, Respondent 1 is acting as a public body in contradiction of the law when it excludes Arab citizens from participation in civic tenders, claiming that “they are not Jews.” Such an act contradicts judicial rulings regarding the validity of the principles of public law and is contrary to the provisions of the Obligation of Tenders Law, which require maintaining the principle of equal opportunity in the administration of such tenders.

The Extent of JNF Lands and the JNF’s Institutional Relationship with the ILA

15. Today, the JNF owns approximately 2,555,000 dunams of land, or close to 13% of the area of the state. These lands are spread out throughout the state and divided according to district as follows:

Table 1: Division of JNF Lands by District, as of 2003,² [by square km.]

| District | JNF |
|--------------|--------------|
| Jerusalem | 508 |
| Northern | 1,031 |
| Haifa | 207 |
| Tel Aviv | 24 |
| Central | 403 |
| Southern | 382 |
| Total | 2,555 |

[...]

17. Approximately 2 million dunams of the JNF’s lands were state-controlled lands transferred to the JNF by the state. The first million was transferred to the JNF in 1949,³ and the second million was transferred in 1953.⁴ These transfers led to the JNF’s being conferred a special legal status, as well as to the JNF’s being perceived as having a decisive role in public discourse in all that relates to land policy in Israel.
18. Accordingly, a review of Israel’s laws reveals the JNF’s special status with regard to the determination of land policy, the possibility of the transfer of state lands to it, and its having the authority to



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expropriate land for public use. Thus, for example, Article 2(6) of the Israel Lands Law (1960) declares that ownership of lands can be transferred between the state, the Development Authority and JNF; Article 6 of the JNF Law [(1953)] and Article 22 of the Land (Acquisition for Public Purposes) Ordinance (1943) provide the JNF with status equivalent to a local authority for purposes of expropriation in accordance with the Ordinance.

19. Article 4A of the Israel Lands Administration Law (1960) establishes that half of the members appointed to the ILA Council shall represent the JNF, and in accordance with its recommendation. This provides the JNF with decisive influence in the determination of land policy in Israel in all matters related to land administered by the ILA.
[...]
22. The large extent of the lands registered in the name of the JNF and the institutional relationship it has with the ILA led then-Attorney General Elyakim Rubenstein to note the following in a speech before “The Israeli Forum on Land Policy” in 2000:
Questions also arise about the spirit of the times, as well as questions about ‘how it [the division of lands between the JNF and the rest of the lands administered by the ILA] will look’ and is it ‘a wise maneuver’ – do these lands of which we are speaking actually belong solely to the JNF. These are issues that need to be related to wisely, since we do not live in a reality where matters can be undertaken ‘behind closed doors,’ but rather in an ‘open and transparent’ manner.
[...]

Cumulative Effects of the Discriminatory Land Policy

23. The discriminatory policy of Respondent 1 in administering registered JNF-owned land is severe, extreme and totally unreasonable, among other reasons due to its being conducted in conjunction with other discriminatory policies of the ILA against Arab citizens in the allocation of lands, the expropriation of lands, the establishment of settlements, etc.



24. Since the establishment of the state, much land has been expropriated and/or transferred to the possession and/or ownership of the state and/or to the possession of Zionist bodies such as the Jewish Agency and the JNF, whose mission, according to their own definition, is to serve the Jewish population exclusively.⁵ The result of this policy is state control of an overwhelming majority (93%) of land in the state, a resource considered to be the most important for economic and social development. *The Official Commission of Inquiry to Investigate the Clashes between the Security Forces and Israeli Citizens in October 2000* (henceforth “the Commission of Inquiry”) related to this subject and made clear that:
- Expropriation activities were directed clearly and overtly to serve the interests of the Jewish majority. The lands were transferred to bodies such as the JNF, whose declared mission is to serve Jewish settlement, or to the ILA, who on the basis of its pattern of management served the same mission.⁶
25. This control renders governing bodies and government policy the main and even the sole decisive factor in the matter of distribution of these land resources. This situation provides the state with extensive powers that should be used with care, fairness, equality, and due consideration to the just allocation of resources and to ensuring sustainable development of all the state’s population. With near total control of the land resources in the state in the hands of the state and its governing bodies, the state’s policies have the most decisive influence in regard to the division among different population groups of this important resource.
26. However, land policy in Israel has two dominant characteristics: (a) a nationalization of its ownership and centralization of its control; and (b) an unequal and selective distribution of rights to possess the land.⁷ Respondent 1 applies a discriminatory and inequitable policy in all matters pertaining to the allocation of land and its development for the betterment of the population. The lands have been allocated on the basis of nationality and for the betterment of the Jewish population.
[...]



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29. As a result of the application of such mechanisms, Arab citizens of the state are prevented from purchasing rights to land in hundreds of community settlements distributed throughout the state, and are limited to narrow spaces within their towns and villages, which existed prior to the establishment of the state.
[...]
35. The result of this continuous policy is, *de facto*, that the Arab citizens of the state are not able to lease or to purchase land in over 80% of the state.⁸ This appalling fact, together with the absence of government initiatives to build public housing in Arab towns and villages, has led to a housing crisis, overcrowding, and a severe shortage of land for development and housing.
[...]

Continuation of the Policy: Creation of Separate Spaces Based on Race/ Nationality

39. The continuation of the policy of Respondent 1, the subject of this petition, may well lead to severe consequences, which are contrary to democratic values. Thus, for example, a situation may be created of neighborhoods of cities and/or in settlements and/or regions where Arab citizens are forbidden from residing, and which are open only to Jews. Such was the situation in Givat Makush in Carmiel, where only Jews were allowed to present their candidacy [for bids in the neighborhood] [...] and such was the case in the petition submitted by the Abu Ria family, [...] when Respondent 1 refused to authorize a transaction that would have transferred the rights to an apartment in Carmiel from a Jewish family to an Arab family, claiming that such rights can only be transferred to a Jewish family.
40. Such an outcome is harsh in and of itself, but is all the more severe in light of the extent of the land owned by the JNF, which stretches, as noted previously, over 2.5 million dunams throughout the expanse of the country. The vastness of the land owned by the JNF and the extent of the land administered by Respondent 1 grant the ILA a decisive role in shaping the space in the state. ILA policy in this



matter has, to date, created “homogeneous” spaces designated solely for Jews.

[...]

42. Furthermore, the lessons that can be learned from certain cases in the history of other peoples lend support to the values and morals that are the basis for basic constitutional principles. For example, among the prominent laws in South Africa, until their annulment with the declaration of the end of the Apartheid regime, were ‘The Native Land Act’ (1913, 1936), which prohibited the black population from purchasing land outside their designated areas; and the ‘Urban Areas Act’ (1923), which was established for the purpose of creating separate residential areas for blacks, and in order to move them from mixed living neighborhoods to areas on the margins of urban spaces. In 1950, the ‘Group Areas Act’ was enacted, which enabled blacks to be moved to areas designated for them and black townships that had grown near the expanding white areas to be relocated.⁹

[...]

45. As an additional example, the “zoning” laws legislated in the beginning of the 20th century in the United States sought to strengthen racial segregation. The first urban planning regulation based on racial zoning was implemented in Baltimore in 1910, and then later in several cities in California. According to this regulation, separate areas in cities were designated on the basis of race: there were neighborhoods or buildings that were designated for whites only, and other neighborhoods and buildings for blacks only.¹⁰ A U.S. Supreme Court ruling in *Buchanan v. Warley*, 245 U.S. 60 (1917) harshly attacked laws and regulations establishing racial zoning and cited that states cannot restrict the African-American population to a certain residential areas.



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For all of the above reasons, the Honorable Court is requested to grant the remedies set forth in this petition, and to order the Respondents to pay the costs herein.

[signed]

Suhad Bishara
Advocate, Counsel for the Petitioner

Notes

- 1 The Official Gazette, 354, 10 June 1954, p. 1196. (Hebrew)
- 2 Israel Lands Administration (2004), Yearly Report of Activities - 2003. (Hebrew)
- 3 Arnon Golan, "The Acquisition of Arab Land by Jewish Settlement in the War of Independence," *Catedra*, Vol. 63 (1992), pp. 122-154 (Hebrew); Ruth Kerk (1993), "The Buds of the Design of Authorities and Official Land Policies in the State of Israel," *Karka'* Vol. 36, pp. 31-44 (Hebrew); Yifat Holman-Gazit (2002), "Use of the Law as a Symbol of Status: The Jewish National Fund Law, 1953 and the Battle of the JNF to Establish its Status in the State," *Iyoni Mishpat* 26(2), p. 636. (Hebrew)
- 4 *Ibid.*: Arnon Golan, p. 152; Ruth Kerk, p. 33; Yifat Holman-Gazit, p. 637.
- 5 In regard to this matter, see: Oren Yiftachel (2000), "Land, Planning and Inequality: The Division of Space between Jews and Arabs in Israel." Position Paper, Adva Center (2000) (Hebrew).
- 6 The Official Commission of Inquiry to Investigate the Clashes between the Security Forces and Israeli Citizens in October 2000, Report, Volume 1, Jerusalem, 2003, p. 42. (Hebrew)
- 7 Alexander (Sandy) Kedar, "Weak Regions: Israeli Law and the Ethno-National Region in Israel," unpublished manuscript. See also, Oren Yiftachel and Alexander (Sandy) Kedar (2000), "On Power and Land: Israeli Land Regime," in *Theory and Criticism* 16 (2000): 67-100 (Hebrew).
- 8 *Ibid.*, p. 85.
- 9 Scott Bollens (1999), *Urban Peace-Building in Divided Societies: Belfast and Johannesburg*, Boulder, CO: Westview Press; Grant Saff (1995), "Residential Segregation in 'Post-Apartheid' South Africa: What Can Be Learned From the United States Experience," in *Urban Affairs Review*, 30(6) pp. 782-808.
- 10 Marsha Ritzdorf (1997), "Locked Out of Paradise: Contemporary Exclusionary Zoning, the Supreme Court, and African Americans, 1970 to Present" and Christopher Silver (1997), "The Racial Origins of Zoning in American cities," both in June Thomas and Martha Ritzdorf (eds.), *Urban Planning and the African American Community: In the Shadows*, Thousand Oaks, CA: Sage Publications, pp. 43-57 and pp. 23-42 respectively.