



## **ADALAH POSITION PAPER**

21 July 2009

### **Critique of the Draft Bill - Israel Land Administration Law (Amendment No. 7) 2009**

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**This paper is based on the version of the bill as it was put forth by the Israeli  
government on 21 July 2009**

1. The Knesset Economic Committee recently considered the issue of the Israel Land Administration reform, and approved a draft law on the subject. The draft law, inter alia, institutes a regime of land privatization, permits exchanges of land between the State and the Jewish National Fund (Keren Kayemet Le-Israel) (hereinafter - the “JNF”) and grants decisive weight to representatives of the JNF in the new Land Authority Council. The draft law is extremely prejudicial to the basic and constitutional rights of the Arab citizens of Israel, and it violates the rights of the Palestinian refugees and contravenes international humanitarian law (IHL) applicable to the Palestinian refugees and their property.

#### **The Land Privatization Policy**

2. The reform will lead to the transfer of ownership in leased properties throughout the State of Israel in the urban, rural and agricultural sectors, as well as with respect to land governed by outline plans enabling the issue of building permits.
3. Thus, Section 9(2)(b) of the draft law states that the definition of “transfer of title” shall be - “transfer of title in a real estate property, whether or not for consideration, from the owner to the lessee of such real estate property”. “Real estate property” was defined in Section 9(2)(c) of the draft law as “real estate that is part of State lands that is urban land, as defined in the Israel Land Law, 1960”. Section 13(1) of the draft defines “urban land” in the Israel Land Law as “land the designation of which, pursuant to a plan by virtue of which a building permit can be issued pursuant to the Planning and Building Law 1965, is for residential or occupational purposes”. “Occupation” is defined in the same section as “heavy and light industry, offices, commerce, tourism or hotels, excluding agriculture or animal husbandry.” The significance of this is that all State lands that are built up and leased, as well as all State lands for

which there are outline plans and which permit the issue of building permits, will be subject to privatization under the draft law.

4. The draft reform will lead to the transfer of title in real estate properties which were expropriated from the Arab population. Over many years, these properties have not been used for the purpose for which they were expropriated; or which the authorities intend to use for purposes other than the purpose of the expropriation; or whose expropriation purpose might cease to exist in the future. The draft law will lead to privatization of some of the lands of destroyed and evacuated villages, as well as many properties belonging to Palestinian refugees, which are controlled by the Custodian of Absentee Property and the Development Authority. This privatization policy will frustrate any future possibility of returning the above lands to their original owners, violating their constitutional right to property, and contravening both Israeli law and IHL.

### **Land Expropriated from Citizens of the State**

5. A great deal of land was expropriated from the Palestinian citizens of the State under many laws, the principal one being the Land Acquisition (Validation of Acts and Compensations) Law, 1953. Under this law, lands in the destroyed/evacuated villages were expropriated, as well as land in Arab villages which survived the war of 1948. The scope of these expropriated lands is estimated at approximately 1.2 million dunams. In addition, much land was expropriated under the Land Ordinance (Acquisition for Public Purposes), 1943, such as the 1976 Land Day expropriations of approximately 21,000 dunams.
6. Privatization of the land will lead to the frustration of the possibility for internal refugees to return to their villages and the land which was expropriated from them arbitrarily. These refugees are waging a long-standing struggle for recognition of their right to repossess their property and to return to the villages from which they were expelled during and after the 1948 war. See in this matter, e.g., the Supreme Court's judgment on Ikrith and Bir'im.
7. In addition, a significant portion of the above expropriated land has not been used until now for the purpose for which it was expropriated; another part is subject to an outline plan but in fact it is not being used for any purpose whatsoever; another part was leased for the establishment of Jewish settlements; and another part is being used by the military for various purposes. At the same time, we have often witnessed military camps and operations that have been abandoned or removed to other locations, small settlements that have been abandoned, outline plans which have never been executed, and the like. In all these cases, it is the right of the original land owner to request the return of these lands to his ownership.
8. The Supreme Court rulings show that the act of expropriation does not disconnect the relationship between the owner and the expropriated land, and as soon as the purpose of the expropriation ceases and the land is no longer

required for public needs, the owner has the right to repossess the land. The expropriation is not a final act from which there is no return.

9. The Supreme Court judgments state that the proprietary right acquired by the State in expropriated land is conditional, the condition being the necessity of the land to realize the purpose of the expropriation, i.e. the Authority must justify the act of expropriation and the continuation thereof on a daily basis. The Authority cannot act as if the land had been acquired other than by way of expropriation. Thus, for instance, in the case of Kirsik below:

“[...] The expropriating authority does not have the right and is not competent to do whatever it wants in the expropriated land - as if it were a private owner - and it is subject to the regime of specific public uses of the land. Indeed, the attachment of expropriated land to a public designation could be mandatory based on private proprietary right, but the individual’s right should remain available to him - in principle - and the land must be returned to his possession as soon as the public use thereof has ended. Upon termination of the public purpose, so also ends the legitimacy of the authority’s continued possession and ownership of the land. The time has come to place and set up the new doctrine firmly, and that is what we hereby announce this day.”

H CJ 2390/96, **Kirsik et al. v. the State of Israel**, PD 55(2) 625, p. 653.

See also in this matter:

H CJ 2739/95, **Makhoul v. the Ministry of Finance et al.**, PD 50(1), 209, pp. 323-324.

10. The authorities’ duty to return the land that is no longer required for the purpose of the expropriation also derives from the principles of public law, whereby the authorities’ power to expropriate derives only from the existence of a public need. In our matter, the above privatization of land will lead to a total break of the link between the land and its original owner. The original owner will no longer be entitled to repossess the land to the extent that the purpose of the expropriation ceases to exist, or in the event that the authorities decide to use the land for purposes other than the original expropriation purpose, or for any other justified reason. In the words of Chief Justice Barak in the Kirsik case:

“[...] This consideration [for the rights of the original owner] imposes on the State the duty to revoke the expropriation if the public purpose is no longer in existence [...] The reason for assuming the ownership was the existence of a public purpose that justified the sacrifice of the individual’s proprietorship on the altar of the general [good]. Justice requires that since the public purpose has ended, the original reason for continued State ownership of the land is removed, and title shall revert to the original owners. (See the above H CJ 282/71 [14], p. 469, 470). The State’s ownership derives from the use of its governmental power

against the wish of the original owners. This means that ownership of land has a special character (“Public Property”).”

H CJ 2390/96, **Kirsik et al. v. the State of Israel**, PD 55(2) 625, pp. 712-713.

11. Acquisition of title to land by way of expropriation is an extreme and far-reaching method, and a person’s rights to land may not be negated unless it is clear and obvious that this is the correct and only way to realize the public purpose. Expropriation clashes with one of the individual’s most important basic rights, the right to property, which was given constitutional status in Israeli law in Section 3 of the Basic Law: Human Dignity and Liberty - 1992.
12. Accordingly, it will contravene the law if the authorities have the right to use the expropriated land as if they were the owners regardless of the history of such land, and to decide to sell the land to the highest bidder and to thereby enrich themselves. On this point, the honorable former Chief Justice Barak stated in the Kirsik case as follows:

“Thus, for instance, it is not appropriate that the day after the expropriation the State will be able to sell the land on the market in order to finance its budget. There are restrictions to the State’s ownership. One of them - that is derived from the demand for justice and the proprietary right of the original owner that was denied him without his consent - is that upon expiry of the public purpose on which the expropriation was based, the expropriation itself shall be revoked.”

H CJ 2390/96, **Kirsik et al. v. the State of Israel**, PD 55(2) 625, p. 713.

13. Accordingly, the privatization should not to apply to land which passed into the State’s possession by way of expropriation in order not to disrupt the relationship and the link between the expropriated land and its owner, and in order not to frustrate any future possibility for the owner to realize his right to repossess the land.

### **Property of the Palestinian Refugees**

14. The privatization policy will lead to the sale of many properties belonging to Palestinian refugees. In fact, the significance of the privatization policy in the context of the Palestinian refugees is the expiry of any right available to the owners of these properties, defined as “absentees” under the Absentee Property Law 1950 (hereinafter - the “**Absentee Property Law**”), despite the special status of these properties from the legal, historical and political aspects.
15. This policy is illegal both under Israeli law and under IHL. As aforesaid, any sale of the properties constitutes, in fact, a final expropriation of the proprietary rights of the Palestinian refugees in their properties. This measure totally contradicts the Absentee Property Law, which deposits the absentees’ properties in trust with the Custodian General on a temporary basis, until a

solution can be found for the issue of the Palestinian refugees. In addition, sale of the Palestinian refugees' properties contravenes the provisions of IHL (the Regulations annexed to the 1907 Hague Convention on the Laws of War on Land, as well as Geneva Convention IV) concerning the duty to respect the individual's proprietary right and explicitly forbidding any final expropriation of property after cessation of hostilities.

#### Israeli Law

16. The absentee properties were transferred to the Custodian of Absentee Property under the Absentee Property Law - 1950. The law does not define the purpose of the Custodian institution, but it imposes on it the duty to guard these properties. The special purpose of the Absentee Property Law can be inferred from court rulings which discussed this issue. Supreme Court Justice Vitkon in Civil Appeal 54/58, **Habab v. The Custodian of Absentee Property**, PD 10, 918, 191, ruled as follows:

“The Absentee Property Law aims to fulfill a temporary function: **to look after the absentees' properties, lest they be considered abandoned, and whoever has the power to do so will take them.** For that purpose the law confers on the Custodian powers and authorities which place him, in actual fact, in the position of owner.”

(Emphasis not in the original)

See also in this matter:

Civil File 00/458 **Bahai v. the Custodian of Absentee Property**, p. 21, Paragraph 25.

17. This means that the Absentee Property Law expropriates proprietary rights only temporarily, and deposits them in trust with the Custodian for Absentee Property until a future arrangement is found that will lead to a solution for the specific issue of the absentees.

In these words, Section 28 of the Absentee Property Law specifies that to the extent a property that had been transferred to the Custodian is released:

“The right a person had in that property prior to its transfer to the Custodian shall revert to that person or his successor.”

18. Moreover, in the Knesset plenary session at which the draft Absentee Property Law was presented, Knesset Member Yosef Lam spoke of the principal purpose of the law, as follows:

“**This law intends to guard the absentees' property for purposes to be determined by the Knesset.** I do not want to go into the question here of whether or not it is for the benefit of the absentees, but **the backbone of the law is undoubtedly - to guard the properties of absentees.** Read the law and you will see that the Committee found it

necessary, in many cases, to guard an absentee's property more than the law guards the property of a citizen who is in Israel and is not considered absentee..."

(Emphasis not in the original)

(**Knesset Chronicles**, Vol. 4, p. 952)

19. Furthermore, this purpose corresponds with the purpose in Section 7 of the Absentee Property Law, which obligates the Custodian to guard the absentees' properties and to invest in them as required to realize this purpose. As aforesaid, transferring these properties to private hands contradicts this purpose in light of the contrasting interest of the private buyer.
20. The rulings further stated that, even if there is reason to utilize these properties for development purposes, the law mainly grants the State the power to hold them only until political settlements are formulated in which the fate of the properties will be decided. As worded in the judgment in the *Golan* case:

"The judgments have long recognized that guarding absentee properties is a purpose on which the law is based .... But I cannot accept that this is the only - or even the principal purpose - of the law, and that it has no other purpose (or almost none). Without elaborating, it can be said that the law is intended no less to serve the needs of guarding the properties for their absent owners and preserving their interest, than to realize the interests of the State in these properties: the ability to utilize them to promote the development of the country, while preventing their utilization by the absent entity as defined in the law, and the ability to hold them (or their pecuniary equivalent) until political arrangements can be formulated between Israel and its neighbors which will decide the fate of the properties on a mutual basis between the states."

H CJ 4713/93, **Golan v. the Custodian of Absentee Properties**, PD 48(2), 638, 644-645 (1994).

21. Note that Section 19 of the Absentee Property Law, enabling the transfer of absentees' property to the Development Authority, indeed appears to be intended to serve this purpose, since the transfer in question is to a government entity. Therefore, the sale of absentees' properties on the free market and the transfer of title therein to private owners are contrary to the law's purpose.

See in this matter:

Motion (Haifa) 76/1401 **Afana Mahmoud Mahmoud v. Hisham Khalil Alsayed**, District Court Precedents 5742 (2) 322, 331.

22. Needless to say that the legal route, constituting the sole and last resort of the absentees, will become redundant and devoid of content. When these properties are sold, it will no longer be possible to grant effective legal relief

under Section 28 of the Absentee Property Law, which enables the Custodian to release absentees' properties at his discretion and in consultation with the Special Committee appointed pursuant to Section 29 of the law.

23. Legal actions concerning the release of absentees' properties under Section 28 of the Absentee Property Law are widespread, and have not ceased to reach the courts from the establishment of the State to this day. In this matter see, e.g.: Civil Appeal 58/54, **Habab v. The Custodian of Absentee Property**, PD 10 918; Civil Appeal 170/66, **Fayad v. The Custodian of Absentee Property**, PD 20(4) 433; Civil File (Nazareth) 187/78, **The Custodian of Absentee Property v. Shalabi**, District Court Precedents 5741(2) 241; Civil Appeal 1397/90, **Diab v. The Custodian of Absentee Property**, PD 46(5) 789; Civil Appeal 458/00, **Bahai v. The Custodian of Absentee Property**.
24. In light of the aforesaid, the sale of absentees' properties to any third parties as set forth above is illegal, since it contravenes the Absentee Property Law and the purpose thereof.

#### International Law

25. There is no doubt that the international laws on warfare apply to the 1948 war, which created the issue of the Palestinian refugees, and therefore these events and the consequences thereof are governed by the principles of IHL.
26. The sale of absentees' properties, whether by way of tender or otherwise, constitutes, in fact, final expropriation from their owners, since we are no longer considering properties under custody status but properties that have been removed from such status and have been offered for sale. The title therein passes to purchasers whether among the citizens of the State or others. This act is contrary to Article 147 of Geneva Convention IV (hereinafter - the "**Geneva Convention**") which stipulates that extensive appropriation of properties from occupied territories constitutes a gross breach of the Geneva Convention.
27. Regulation 46 of the Regulations annexed to the 1907 Hague Convention concerning the Laws and Customs of War on Land (hereinafter - the "**Hague Convention**"),<sup>1</sup> stipulates the need to respect individual proprietary rights and expressly forbids the expropriation of private property. As set forth in the Article:

"Family honor and rights, the lives of persons and **private property**, as well as religious convictions and practice, must be respected.  
**Private property cannot be confiscated.**"

(Emphasis not in the original)

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<sup>1</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

<http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>

28. Michael Kagan, formerly of Tel Aviv University, analyses this issue and reaches the conclusion whereby the policy of the State of Israel after the 1948 war concerning the expropriation of the Palestinians' property constitutes a violation of the Hague Regulations and falls under the heading of "plunder". In his words:

Israel's June 1948 focus on conquest as a legal criterion for property confiscation was clearly rooted in the antiquated doctrine of war booty, in which conquest alone was enough to justify seizing property. This policy violated the Hague Regulations and likely fell under the definition of "plunder" used at Nuremberg."<sup>2</sup>

29. Furthermore, File No. 10 of the Nuremberg Trials, **US Military Tribunal at Nuremberg, US v. Alfried Krupp et al.**, made the first reference in the judgments to the confiscation of property after the cessation of hostilities in World War II. The court stated, inter alia, that the above confiscation constitutes a violation of Article 46 of the Hague Regulations which forbids, as aforesaid, the confiscation of private property. The court stated, inter alia:

"We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by Krupp firm [...] was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected: that the Krupp firm [...] voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and in leasing the Paris property [...]."<sup>3</sup>

30. Accordingly, the sale of absentees' property indisputably constitutes a violation of IHL, and particularly the Regulations of the 1907 Hague Convention.
31. Taking account of all of the aforesaid, you are requested not to ratify the privatization clauses in the Reform in question, to the extent they refer to properties belonging to Palestinian refugees, to the property of the destroyed/evacuated villages and of the internal refugees and to property expropriated from the Arab population.

### **The Land Exchange Transaction between the State of Israel and the JNF and the Manner in which the JNF lands were Administered by the Authority**

32. Pursuant to the Reform, and in order to enable privatization of the JNF properties under lease in urban areas, it was agreed that a land exchange agreement would be signed between the State of Israel and the JNF, whereby the JNF lands included in the privatization process would be transferred to

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<sup>2</sup> Michael Kagan, "Destructive ambiguity - Enemy nationals and the legal enabling of ethnic conflict in the Middle East," **Columbia Human Rights Law Review**, Volume 38 (2) (Winter 2007) p. 295.

<sup>3</sup> **US Military Tribunal at Nuremberg, US v. Alfried Krupp et al.**, cited in HOW DOES LAW PROTECT IN WAR? Second edition (2006) ICRC, Volume 2, pp. 1030.

State ownership, and in exchange the JNF would receive ownership of a total of 50,000 to 60,000 dunams from the State in the Naqab (Negev) and the Galilee.

33. Indeed, the principles of the above agreement were signed on 26 May 2009 (hereinafter - the “**Agreement**”). According to the Agreement, the JNF would transfer to State ownership real estate belonging to the JNF that had been allocated to third parties, designated for residential and occupational purposes. Against the said transfer of ownership, the State would transfer to the JNF (or the “Himnuta” company), vacant and unplanned land in the same scope in the Naqab and the Galilee.
34. Clause 2 of the Agreement stipulates, inter alia, that the JNF agrees that its lands will be administered by the Land Authority to be established pursuant to the government’s resolution of 12 May 2009 concerning the reform of the Israel Land Administration (hereinafter - the “**Authority**”). The Authority will administer the lands “in a manner that will preserve the principles of the JNF relating to its lands”. According to the Agreement, the JNF undertakes, inter alia, to perform development works in the Naqab from its own resources in a financial scope of NIS 100 million.
35. Administration of the JNF lands by the Land Authority in accordance with the JNF’s principles absolutely contradicts the State’s obligation to practice equality, including on the basis of nationality, in the administration of all the land under its responsibility.
36. The provisions of the Agreement in this matter constitute an attempt to circumvent the principles of public law and to prevent application of the right to equality with respect to the lands to be transferred to the JNF under the Agreement since, as is well known, the JNF’s principles forbid the allocation of rights in the land in its ownership to anyone who is not Jewish. In its response to the petitions pending before the Supreme Court on the issue of the applicability of the right to equality regarding the lands under its ownership,<sup>4</sup> the JNF clarified in that matter as follows:

“The JNF is not and cannot be loyal to the entire Israeli public. The JNF’s loyalty is reserved for the Jewish people alone - for whom it was established and for whom it acts. [...]

The JNF will argue that it bears no duty to allocate its land to non-Jews. To the extent the matter concerns JNF land, it will lead not only to interference with and disruption of the order of the JNF’s activities and tasks, but will negate entirely its unique function as the owner of the eternal property of the Jewish People.

Handing over land for the use of all citizens of the State constitutes a frontal contradiction of the purposes of the JNF and its *raison d’être*. The JNF is forbidden to act to allocate land to all of the citizens of the

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<sup>4</sup> H CJ 7452/04, **Abu Ria et al. v. the Israel Land Administration et al**; H CJ 9010/04, **The Arab Center for Alternative Planning et al. v. The Israel Land Administration et al.**; H CJ 9205/04, **Adalah v. The Israel Land Administration et al.** (cases pending).

State. If the JNF is required to act and to allocate its lands to all of the citizens of the State – that would be commensurate with liquidating and nationalizing its property.”

(Paragraphs 7, 27 and 220 in the JNF’s Response dated 15 December 2004)

37. Administration of the JNF lands in accordance with its principles will create a reality where these lands will be allocated solely for the purpose of Jewish settlement, and will deny them to Arab citizens due to their national affiliation.
38. The JNF presently owns approximately 2.5 million dunams, about 13% of the area of the State. These lands are spread over all areas and regions of the country. About 2 million dunams of the above JNF lands were transferred to it by the State, out of lands that were under its control.<sup>5</sup> This fact led to the granting of special status to the JNF in Israeli law, and to a view of the JNF as the decisive entity in the public dialogue so far as land policy in Israel is concerned.
39. These lands, despite their official transfer to the JNF, and taking account of the scope of the transfers, the importance of the land resource and the nature of the JNF, are still considered a public resource that retains its relationship, at the very least, to the application of the principles of public administration concerning the use thereof. Therefore, it is reasonable, in our matter, to apply the principles outlined in the **Ka’dan** case prohibiting the State from bypassing the principles of equality by transferring resources to third entities which are not obligated to act in accordance with these principles:

“The duty of the State to practice equality in allocating rights in land is violated if the State transfers the land to a third party which, on its part, discriminates in allocating land based on religion or nationality. The State cannot evade its legal duty to practice equality in allocating rights in land by using a third entity whose policy is discriminatory. Indeed, what the State is not permitted to do directly, it is not permitted to do indirectly.”

(HCJ 6698/95, **Ka’dan v. The Israel Land Administration**, PD 54(1) 258, 283 (2000))

40. Accordingly, the principles of good governance and proper public administration will continue to apply to these lands, regardless of the entities owning them or registered as their owners, in this period or any other. In other words, the principles of equality, fairness, good faith and reasonability, just like all other principles of good governance, will apply to these lands even under the JNF’s control.

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<sup>5</sup> Arnon Golan, **Seizure of Arab Land by Jewish Settlements in the War of Independence**, *Katedra: The Journal of the History and Settlement of the Land of Israel*, 63, pp. 151-152; Ruth Kark, 1955, “**The Emergent Shaping of Authorities, and State Land Policy in the State of Israel**,” *The Institute for the Study of the Use of Land*, p. 177; Yif’at Holman-Gazit, 2002, “**Using the Law as a Status Symbol: the JNF Law, 5715-1953, and the JNF’s Struggle to Establish its Status in the State**,” *Iyunei Mishpat*, 26(2), p. 636.

41. In any event, in managing lands owned by the JNF, the Authority will still operate as a public entity, which is forbidden to adopt discriminatory principles for managing land. As such, the Authority is duty-bound to act only in accordance with the criteria of public administration and the principles of equality, decency, good faith and just distribution of the land resources in the country. In a long list of judgments, the Supreme Court noted the unique public character of the Administration and the criteria, principles and rules which purport to guide it:

“Public lands should be used according to State criteria - the adoption of such criteria is the duty of public authorities in all their affairs, and all the more so insofar as it concerns dealing with property belonging to the entire public. Translating the said criteria into methods of conduct points, inter alia, to the duty to dispense fairness and equality, based on the principles of good governance.”

(HCJ 5023/91, **Poraz v. Minister of Construction and Housing**, PD 46(2) 793, 801 (1992)).

42. In the case of the **New Dialogue Society**, the following was stated, inter alia:

“The Administration serves as the public’s trustee in managing the State’s land. It must administer them while guarding the public interest therein, including safeguarding the land for the benefit of the entire public, including the need to refrain from granting unjustified benefits in the land to others. As required of every administrative entity, the Administration must act fairly based on pertinent and egalitarian considerations, giving equal opportunity to the entire public. One of the general purposes of every administrative entity is to act with equality. Thus also in determining and applying the policy for allocating lands.”

(HCJ 244/00, **New Dialogue Society v. Minister of Infrastructure**, PD 56(6) 25, 64 (2002)).

43. The above principles, of course, also pertain to the Land Authority to be established under the law to replace the Israel Land Administration.

44. Indeed, the main purpose behind the powers of the government and the Administration is to administer public resources based on the principles of fairness and equality among all citizens of the State of Israel. The honorable Chief Justice Aharon Barak noted the principle of preserving equality regardless of nationality as being the basis of the ILA’s power, and his words are good for every public authority, all the more so for the executive branch:

“Our conclusion, therefore, is: the decision that the Administration would have adopted to directly allocate land in Tel Iron to establish a community settlement for Jews only would have violated the (general) purpose which is the basis for the power of the Administration, i.e. the

realization of equality.... It has been found that such a decision, had it been adopted, would have been illegal.”

HCI 6698/95, **Ka’dan et al. v. The Israel Land Administration et al.**, PD 54(1) 258, pp. 278-279.

45. Moreover, the proposed land exchange is also contrary to the principle of distributive justice, since such exchange would finalize the fate of the lands transferred to the JNF to be used for the exclusive benefit of the Jewish citizens of the State. In the **New Dialogue Society** case the following was stated:

“These things bring to the surface the value of exercising distributive justice in the Israel Land Administration’s allocation of land. This value concerns the just social distribution of social and other resources. The duty to base considerations on distributive justice is an integral part of the power of the administrative authority, which has the power to decide to allocate limited resources. .... These things teach us that the value of distributive justice is an important one, to which every administrative authority must give appropriate weight in every decision concerning the distribution of public resources. This has special consequence in the case before us. The Israel Land Administration is the entity in charge of all of the lands in Israel. The importance of this asset, and the importance to be given to its just and appropriate distribution, cannot be exaggerated. The decisions contemplated in the petitions before us have momentous implications on the distribution of this limited and valuable resource. There is significant public interest in ensuring that resources of this type be distributed by the State, or authorities operating on its behalf, fairly, justly and reasonably.”

HCI 3939/99, **Kibbutz Sde Nahum et al. v. Israel Land Administration et al.**, PD 56(6) 25, 64-65.

46. In light of the foregoing, the said exchange of land would be unconstitutional, contrary to the basic principles of the legal system, and would constitute a gross violation of the basic rights that are expressed in the Basic Law: Human Dignity and Liberty and in previous Supreme Court judgments. It would also contravene international law and Israel’s undertakings under the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights. Accordingly you are hereby requested not to enact it and to act to cancel it immediately.
47. Further, the provisions of the Agreement concerning the preservation of the JNF’s principles also contradict the Attorney General’s position, as submitted to the Supreme Court in May 2007 pursuant to the above petitions. According to the Attorney General’s position, “the Israel Land Administration is obligated to maintain the principle of equality, and it must not discriminate on the basis of national affiliation, including in its activity as administrator of the lands under JNF ownership.” The Agreement gave no expression to this position, and its provisions, as aforesaid, contradict this explicit position.

48. Moreover, the exchange Agreement should be viewed in light of two more layers of discrimination. One layer concerns the distribution of JNF lands, which until now have been marketed on the principle that JNF land is for Jews only. Transferring these lands to the State today will not make them any more available for the Arab population. The other layer is the long standing discrimination against Arab citizens of state with respect to distribution of land, planning and residential accommodation. This discrimination is expressed in unequal distribution of land resources in Israel among all populations, with many restrictions on expansion of the development and jurisdiction of the Arab villages in Israel, inaccessibility of many areas of State land to Arab citizens, and the like.
49. Since the establishment of the State a great deal of land has been expropriated and/or transferred to the possession and/or ownership of the State and/or occupied by Zionist institutions which are designated by definition to serve the Jewish population only, such as the Jewish Agency and the JNF.<sup>6</sup> The consequence of this policy has been State control of the decisive majority (93%) of the land in the country, a resource considered to be the most important for social and economic development. The Official Commission of Inquiry into Clashes between Security Forces and Israeli Citizens in October 2000 (hereinafter - the “**Commission of Inquiry**”) clarified with respect to this issue as follows:
- “The expropriation operations were clearly and declaratively tied to the interests of the Jewish majority. The lands were transferred to entities, such as the JNF, designated by definition to serve the Jewish population, or the Israel Land Administration which, as shown by the patterns of its conduct, served the same purpose.”<sup>7</sup>
50. Thus, if we give a quick look at the Arab villages and towns we shall find that the population density in these areas is constantly increasing, the level of services is low, the standard of infrastructure is poor and public spaces are almost non-existent. The character of construction in all Arab villages and towns becomes saturated, and the majority of these places become, in fact, crowded dormitories that are unable to offer a living space. A perusal of the map of distribution of jurisdiction areas in the State shows a very harsh picture of shortage of land for development in Arab villages and towns. For instance, the jurisdictional area of the Arab villages and towns, with a total population of 1.066 million people,<sup>8</sup> constituting approximately 15% of the population, covers only about 3% of the land area of the country.
51. The Or Commission also referred to this issue, stating as follows:

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<sup>6</sup> See in this matter: Prof. Oren Yiftachel, “**Land, Planning and Inequality: Distribution of the Space between Jews and Arabs in Israel,**” position paper, Adva Center, November 2000.

<sup>7</sup> Official Commission of Inquiry into the Clashes between Security Forces and Israeli Citizens in October 2000, Report, Vol. A, Jerusalem, September 2003, p. 42.

<sup>8</sup> This number does not include the Arab population of the Golan, Jerusalem and the mixed cities - Haifa, Lod (Led), Ma’alot-Tarshiha, Nazareth Ilit, Akka (Acre), Ramle and Tel Aviv - Jaffa.

“One of the consequences of the actions performed concerning land was a drastic reduction in the lands of the Arab villages. For example, in Sakhnin, the “village land area” from the time of the Mandate until the end of the 1970s was approximately 70,000 dunams. The jurisdiction area at the end of the century was 9,700 dunams, and the outline plan area was only 4,450 dunams. Consequently, within the outline plan of Sakhnin there were only 191 sq.m. per person, while in Carmiel there were 524 sq.m. per person. Many Arab villages were “surrounded” by areas such as military regions, Jewish regional councils, national parks and nature reserves, highways and the like, preventing or reducing future expansion. With the growth of the population in the Arab towns and villages, the need for land for light and heavy industry, commercial areas and public buildings increased. Many villages did not have the land reserves required for those purposes.

In the first fifty years after the State was established, the Arab population increased about sevenfold. In parallel, the area of construction for residential purposes remained in principle almost without change. Consequently, crowding in the Arab towns and villages increased significantly. The lack of land for construction was especially difficult for young couples seeking apartments. Public construction was of no material help. New towns were not built (excluding the Bedouin villages) and Administration land was not usually released for construction in the Arab villages. Arab citizens were also unable to obtain equal terms with respect to mortgages, since the majority had never served in the military. Residents of Arab villages and towns seeking to build on their own land were blocked by the laws of these authorities.

A principal obstacle to residential building within the areas of the Arab villages was the absence of outline plans and master plans. The preparation and updating of such plans always requires time, but in the Arab sector the delays were often unreasonable. In addition there was a lack of effective representation for the Arab sector in the planning and building committees. In the national council and the regional councils there were no Arab representatives at all, or they were given only nominal representation. In many cases, local committees were not set up in the Arab villages, and instead they were affiliated to regional councils run by Jews. The result was that decisions concerning the development of the Arab villages were insufficiently sensitive to the needs of the Arab population. Even after the preparation of the plans was expedited in the 1990s, still, at the end of the century, about half the Arab villages lacked approved master plans enabling expansion of the built-up areas therein, and many of them had no approved outline plan. Consequently, in many parts of the jurisdiction areas the owners of private land were unable to build houses legally. An extensive phenomenon developed of building without permit, part of which derived from the inability to obtain a building permit. This was irregular construction usually of single-family homes. Demolition

orders were issued for Arab houses in the Galilee, the Naqab, the Triangle and the mixed cities.”<sup>9</sup>

52. In this context it is stated in the Agreement that the majority of the land to be transferred to JNF ownership are State lands in the Naqab and Galilee regions. The aforesaid location of the land amplifies the anticipated detriment to the Arab population, since the majority of this population lives in those areas, and is crying out for development, appropriate planning and land resources. Transfer of public resources to an entity which declares itself to be acting for the benefit of only one sector of the population - the Jewish sector - and is not obligated to the general public of the State, violates the principle of equality, the constitutional right to dignity and the principles of sustainable development.
53. Transferring land to the JNF in the Naqab and the Galilee means, in fact, that the Arab citizens of the State will not be able to acquire any rights in land in these areas. This situation is especially serious in light of the concentration of Arab citizens in these regions and their socio-economic condition.
54. As you know, about half of the Arab population (53%) in Israel lives in the northern district, and about 13.9% live in the south. From an overall view of the population of these areas, the northern region and the Naqab are considered to have a high concentration of Arab citizens.
55. In addition, the decisive majority (69%) of the Arab villages and towns in Israel (without the mixed cities and the unrecognized villages) are located in the north. In the southern district there are seven recognized Arab towns and villages, and another 10 have been recognized recently. There are presently 40 additional villages in the Naqab that are not recognized,<sup>10</sup> in which 80,000 Arab Bedouin citizens of Israel reside.
56. The distribution of jurisdiction areas between the Arab and Jewish local authorities in these regions shows a most serious picture of discrimination against the Arab citizens, creating a shortage of residences and development inability of almost every kind. Thus, for instance, the jurisdictional areas of the Arab local councils in the north constitute 12.2% of the land, while the [Arab] population in this region constitutes 53% of the [entire] population therein.<sup>11</sup> Similarly, in the Beer-Sheva district in the south, the jurisdictional areas of the Arab local councils, in addition to those recently recognized, is less than 1%, while the percentage of the Arab population in the area is 28.3%.<sup>12</sup>

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<sup>9</sup> The Official Commission of Inquiry into the Clashes between Security Forces and Israeli Citizens in October 2000, Report, Vol. A, Jerusalem, September 2003, pp. 43-44.

<sup>10</sup> Some of these places existed even before the establishment of the State, and some were set up pursuant to orders issued by the military governor, at the end of the 1940s and the beginning of the 1950s. The military governor then transferred these residents from their original villages, from before 1948, to the present ones.

<sup>11</sup> Israeli Central Bureau of Statistics (CBS), Israel Statistical Annual No. 59, 2008, Table 2.8.

<sup>12</sup> Ibid.

57. These data have additional significance in light of the fact that the Arab population in these districts is relatively young compared with the Jewish sector in the State. The percentage of Arab citizens belonging to the 0-19 age group out of the total Arab population is 50%.<sup>13</sup>
58. A detailed look at the northern and southern districts shows that the young Arab population (the 0-19 age-group) in the north amounts to 46.6% whereas in the south this group constitutes 66.1%.<sup>14</sup> At the same time, the growth rate of the Arab population in the south is 4.4% per annum, and in the north, it is 2% per annum.<sup>15</sup>
59. This combination of data, a young population, high growth rate, low socio-economic status and shortage of land for development, emphasizes and clarifies the very high vulnerability of the Arab population as a consequence of the continued discriminatory policy of the State in general, and in particular its policy on the administration of JNF lands.
60. These characteristics, added, of course, to the background of massive expropriation of land that took place in previous years, lead to the foregone conclusion that prohibiting and/or restricting Arab use of land areas, by transferring them to the JNF or by any other method, will exacerbate the above data. It will thus deepen the ongoing discrimination and prevent the development of the Arab population in these regions.
61. Furthermore, the existence of the unrecognized villages in the Naqab, due to the authorities' ongoing policy of non-recognition, aggravates the dismal picture in the southern district. Some of these villages existed even before 1948, and some were set up under orders issued by the military government in the region at the beginning of the 1950s. The military government moved many residents from villages that had been in existence then to the villages where they are living today. The ongoing policy of non-recognition of the villages has led to terrible living conditions in these villages; they exist without water, electricity, no infrastructure whatsoever, no health services or education. Approximately 50% of the Arab Bedouin in the Naqab suffer from this policy. While the State of Israel has undertaken in the Agreement to act in accordance with principles that ensure the allocation and development of land resources in favor of the Jewish public only, it continues its refusal to develop and/or recognize dozens of Arab villages, the majority of which had been in existence prior to 1948, containing more than 80,000 Arab Bedouin citizens.
62. In the present case, not only does the State of Israel not fulfill its duty to take certain actions to end discrimination and close the enormous gaps as noted above between Jewish and Arab citizens, but it adopts, under the Agreement, separate and discriminatory rules that perpetuate the discrimination and enlarge the gaps.

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<sup>13</sup> CBS, Israel Statistical Annual No. 59, 2008, Table 2.10.

<sup>14</sup> Ibid.

<sup>15</sup> CBS, Israel Statistical Annual No. 58, 2008, Table 2.4.

### **JNF Representation in the Israel Land Authority Council**

63. As aforesaid, the Agreement, as well as the draft ILA reform law, approved in the Knesset Economic Committee, allow for a large proportion of JNF members in the Council, namely 43% (6 of 13 members of the Authority Council). The Agreement further stipulates that this ratio shall also be maintained in the Council's committees, and that the Chairmen of the sub-committee and budget committee will be selected from among the JNF representatives. This composition of the Authority Council and the committees is disproportionate and contradicts the principles of normative public administration and good governance.
64. In the circumstances of the case, the significance of this statement is that the JNF has become almost a full participant (with the government) in administering the public land resources in the State of Israel and in determining the land policy of the State of Israel. It is clarified that the JNF's partnership as above is not restricted only to its own land, which will be administered by the Authority, but dominates all State land.
65. The Land Authority will be a public authority established by law to administer State lands, and among its duties will be "to administer State lands as a resource for the development of the State of Israel for the benefit of the public, the environment and future generations, including retaining sufficient land reserves for the future needs and development of the State."
66. As aforesaid, the JNF sees itself as an entity entrusted with the interests of the Jewish people alone. From this viewpoint, the JNF takes the stance that its lands should be marketed only to Jews. Thus, the JNF and its representatives cannot truly represent the interests of the general public in Israel regardless of nationality and/or religion, as the situation should be in the Authority Council, since the Authority in question is a public one, to be established under the law. The Authority Council is supposed to be entrusted with the interests of the general public in Israel, Jews and Arabs alike.
67. This position is also valid in light of the importance of the land resource to be administered by the Authority. Land is considered a major and most vital resource for social-economic development. Considering that the Authority will administer approximately 93% of the land in Israel, its policy in this matter will be decisive. The Authority will have the power to decide who will use the land resource and on what terms. The representation granted to the JNF in the Authority Council will enable an entity which declares expressly that it takes discriminatory action and acts only for the benefit of the Jewish public to take an active and decisive part in shaping policy that is so important and vital for the general public, including the Arab public.
68. Accordingly, the sections in the Land Reform bill enabling exchange of lands between the State of Israel and the JNF should not be enacted, and the JNF's representation in the Authority Council should be amended.

In light of all of the foregoing, the draft law concerning the Israel Land Administration should not be enacted.