The Jewish Political Tradition

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a. We hold that the State was not permitted by Law to allocate State Land to the Jewish Agency for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews.

b. The State must consider the petitioners' request to purchase land in the Katzir settlement for the purpose of building their home. The State must make this consideration on the basis of equality and in consideration of the various relevant factors, including factors relating to the Agency and the current residents of Katzir. The State must also consider the numerous legal problems involved in this matter. Based on these considerations, the State must decide, with all deliberate speed, whether it can allow the petitioners, in the framework of the law, to build a house within the Katzir communal settlement.

Commentary. The Phantom of Integration

With its borrowings from American antidiscrimination law, there is something uncanny about *Kaadan v. Israel Lands Administration*. Justice Barak's opinion is, among other things, a meditation on the debate about "separate but equal" that developed in the United States after the abolition of slavery; and insofar as it rejects separation, it evokes a vision of equality that belongs to a time and place far removed from contemporary Israel. Indeed, the vision is doubly remote. Not only is the political situation in Israel quite different from the situation in which American practices of racial segregation and desegregation arose, but even in the United States, the landmark civil rights cases handed down by the U.S. Supreme Court, including *Brown v. Board of Education,* seem to belong to a bygone era.

One could easily liken the *Kaadan* ruling to a transplanted organ, inserted into a foreign body. But perhaps a more apt analogy is to a phantom limb. Like the amputee who "feels" a limb no longer there, the *Kaadan* case represents a body of judicial opinion that assumes the existence of certain social conditions, including a particular political ethos, which are conspicuously absent. The reigning ideal of the civil rights era was that of integration. Nearly a century of Jim Crow had led many Americans to conclude that

separation between racial groups was *inherently* unequal, and the basic proposition laid down by the Court was that equality demanded integration. By the latter half of the twentieth century, the ideal of integration had a significant, if initially small, basis of support in the general population. This is not to deny the extent of popular resistance to the ideal, then and now, nor to overstate the extent to which integration in America has been achieved. But whether it was a case of law following society or society following law, the two were clearly in lockstep, and the policy of desegregation spearheaded by the federal courts and Congress corresponded to an extralegal social reality.

To be sure, many Americans remained committed to segregation, and many communities stayed segregated (and some became more so) even after the Supreme Court declared racial restrictions on property unconstitutional. But when we compare the social context surrounding the American desegregation cases to Israel, striking differences appear. Even before the Court struck down racial restrictions on property in 1948 in *Shelley v. Kraemer* (a case more closely analogous to *Kaadan* than *Brown* is), there was already some de facto integration and a demand for integration (on the part of both blacks and whites). Further, there was an emerging philosophy of integration, which fueled a civil rights movement dedicated to integrating neighborhoods, workplaces, and schools. Nothing of the sort can be observed in the Israeli context.

Undoubtedly, isolated instances of line crossing exist in Israel (one notable example is Neve Shalom, a settlement devoted to creating an integrated Jewish-Arab community). But these amount to little more than a glimmer of genuine integration, let alone an integrationist movement. In this regard, one wonders what the references in *Kaadan* to " 'mixed' settlements" allude to—urban centers, like Jaffa and Haifa, where Jews and Arabs live in close physical proximity and diminishing social contact, or Jerusalem neighborhoods like Abu Tor, where Jews and Arabs on the same block lead almost totally separate existences, or like Musrara, where Arab residents in a "Jewish" building have been subject to harassment. In the absence of anything resembling the American civil rights movement, the paean to integration in *Kaadan* is uncanny much the way a phantom limb is uncanny: it is a disembodied ideal, a text without a context, a credo to which no substantial segment of the Israeli public subscribes. *Kaadan* attests to an irrepressible

faith in the existence of a normal (political) body in the face of a contradictory reality (as if "is" really does follow from "ought"). It attests, in short, to an illusion.

The *Kaadan* opinion is uncanny in another way as well. The word suggests something unsettling, outside the domain of the ordinary and the familiar. In German, "uncanny" is *unheimlich,* "un-homey, alien, unfamiliar, not at home." These connotations are peculiarly—indeed, doubly—appropriate to a legal challenge brought against land-occupancy restrictions whose primary goal was to overcome the historic condition of Jews as a homeless, landless people.

Israel's basic land policy was established well before the establishment of the state. Land acquisition was an important Zionist aim as early as 1901, when Palestine was still ruled by the Ottoman Turks. It was then that the Jewish National Fund (JNF, or Keren Kayemet le-Yisrael) was founded with the express purpose of acquiring as much land in Palestine as possible and preserving it as "the perpetual property of the Jewish people." The British mandatory government, which succeeded the Turks, posed serious obstacles to Jewish land acquisition: laws that restricted certain areas to Arabs and made only limited areas elsewhere available for Jewish settlement. Here we see the ironic origins of the Israel Lands Administration policy that *Kaadan* seeks to overturn. As the Israeli scholar David Kretzmer observed, "The Zionist movement strenuously opposed legal restrictions on the sale of land to Jews and at the same time laid down a land policy that forbade the sale of land that had been purchased by Jewish national institutions" (*The Legal Status of the Arabs in Israel* [Boulder, Colo.: Westview, 1990], p. 60). Once the Jewish state was established, it took over both the lands acquired by the JNF and the policies that governed them.

Land acquisition was part of a larger Zionist project devoted not just to restoring Jews to the land but to reconstituting the Jewish nation as a vibrant social, cultural, and political *collectivity.* That collectivist impulse is still reflected in the Basic Law that governs Israel Lands—roughly 90 percent of the land in Israel—and in the policies of the Israel Lands Administration that oversees them. JNF lands (roughly 19 percent of Israel Lands) are, by law, held as the eternal property of the Jewish people "for the purpose of settling Jews on said land and property"; all other Israel Lands are publicly

owned (for now, although there are moves afoot to privatize), to be leased to private entities subject to various restrictions, including those which entail, as in *Kaadan,* the exclusion of Arabs.

This system of land ownership presents a sharp contrast to the Anglo-American regime of private property. Just as the concept of Israel Land expresses the collectivist spirit of Zionism, so the Anglo-American system reflects the core values of liberal individualism. Most real estate in the United States is privately owned. In keeping with the American credo of rugged individualism and a free market, the common law has generally frowned upon restrictions on the right of individual owners to transfer, or "alienate," their property on whatever terms and to whomever they want. Indeed, long before racial restrictions on property were declared to violate the constitutional principle of equality, American law purported to prohibit all (or mostly all) "restraints on the alienation" of property, in the name of individual rights, economic efficiency, and the mobility of property. The American policy of desegregation was underwritten by the principles of an open market and the owner's right to sell as much as by the constitutional principle of equality.

However, Western society was always more ambivalent about market values than the law let on. After all, the mobility of property implied social mobility, which led in turn to the uprooting of traditional communities and the erosion of ties to a particular group and place. The alienation of property implied a deeper social alienation. Not coincidentally, it was the Jew who came to symbolize the evils attributed to alienation and modernization. What the contradictory images of the Jew as archcapitalist and archcommunist had in common was that they both presented the Jew as a rootless cosmopolitan. In both instances, alienation was seen as the property of the quintessential alien nation. The Jew epitomized the *unheimlich* in the Western anti-Semitic imagination. It was precisely this stigma that Zionism, in its quest for "normalization," sought to erase by reconstituting the Jewish nation and homeland.

Justice Barak labors mightily to establish the Jewish pedigree of equality as a value demanding the dissolution of ethnic restrictions on land. He makes a strong case that liberal equality is supported by the religious tradition and historical experience of the Jews. I have no quarrel with this view.

But the issue is not whether liberal equality is consistent with the Jewish tradition. Almost every great religious tradition is susceptible to both liberal and illiberal interpretations. The issue is not even whether liberal values are consistent with Zionism, that is, Jewish nationalism. The issue is whether the liberal vision of equality is consistent with nationalism, *tout court.*

Within Israel today (as well as outside it), there are strong proponents of the view that liberalism and nationalism are reconcilable. Justice Barak is clearly a part of this "liberal nationalist" camp. His commitment to liberalism is reflected in his judgment subordinating the government's land policies to the basic law of equality, which prohibits treating people of different nationalities or religions differently. His belief in nationalism is reflected in his affirmation of "the right of the Jewish people to be independent in their own sovereign State," as well as a "number of conclusions" that "naturally flow" from the "values of the State of Israel as both a Jewish and democratic State," including the "return of the Jewish people to their homeland," the adoption of Hebrew as "necessarily the predominant language," and the state sponsorship of "festivals [that] reflect the national renaissance of the Jewish Nation." His belief that liberal and nationalist ideals can be synthesized receives expression in his insistence that "the values of the State of Israel as a Jewish and democratic State do not imply a rule that the State can discriminate among its citizens" and, more pointedly, in his strenuous denial that a conflict between "the values of the State of Israel as a Jewish State" and the value of equality exists.

As Justice Barak's opinion illustrates, a commitment to liberal nationalism easily leads to embracing integration as a social ideal. But liberal nationalism lends itself to separatism just as easily. The logical path from liberal nationalism to separatism is nicely laid out by the Israeli political philosopher (and former minister of immigration and absorption) Yael Tamir, one of the foremost theorists of liberal nationalism. In a pluralist society where citizens belong to more than one cultural group, the liberal principle of equality dictates that the government refrain from interfering with the cultural practices and commitments of its citizens. But if the government actively supports the culture of any one group (for example, by making its language and festivals the official ones), then the principle of equality requires

providing *equal* support to other groups. So Tamir proposes a "rehabilitation" of the principle of separate but equal.

Once the value of nationalism is conceded and society is conceived as being composed of several distinct national groups, integration no longer looks like the embodiment of equality. On the contrary, integration threatens to undermine cultural subgroups, especially minority ones. The fear that assimilation into the dominant culture is the predictable consequence (if not the hidden agenda) of integration has led many critics to characterize it as a doctrine of domination and subordination. The obvious alternative is to empower groups on their own. In America, it was Black Nationalists in the sixties who first gave voice to this revisionist view. They criticized *Brown v. Board* not only for failing to fulfill its own stated ideals ("with all deliberate speed," the phrase Barak lifts from *Brown,* is widely viewed as a code word for foot-dragging and delay) but also for the very ideals on which it relies. It is no accident that the critics of *Brown* within the Black Power movement identified themselves as nationalists. Then, as now, the links between nationalism, separatism, and a particular vision of equality were, if not logically necessary, politically compelling.

The influence of this revisionist view on Israelis seeking to reconcile liberal and nationalist ideals is not hard to make out. We see it in that portion of Barak's opinion where he allows that "occasionally treatment which is different may be equal," especially when "the desire for treatment that is separate but equal is initiated by the minority group that requests to preserve its culture and lifestyle and desires to prevent 'forced assimilation,'" as in the case of the Bedouins. The attraction of liberal nationalists to a separatist vision of equality reveals the difficulty of effecting a genuine reconciliation between nationalism and liberalism. It is not enough simply to assert the compatibility of the two, as Barak does. True, he does not apply the principle of separate but equal to *Kaadan.* But his decision to forgo its application is not based on an outright rejection of the principle (he allows, as we have seen, for its possible application). Rather, his decision is based on the fact that the Jews of Israel are culturally dominant. The reason that they have no right to reserve land for themselves (and exclude others) is that they are not threatened with assimilation or cultural or physical extinction. If they were,

then, according to the logic of Barak's opinion, the judgment might have to be reversed.

In other words, the obligation of the Jewish state not to discriminate against non-Jews is premised on the success of the Jewish nationalist enterprise. It is only because the Jews are not an imperiled minority that laws denying non-Jews access to property are impermissible. The restrictions on the transfer of land to non-Jews can now be dissolved, not because their purpose has been abandoned but, on the contrary, because it has been realized. (Notice that the case for the preservation of Arab culture plays no role in the analysis.)

If this is the underlying logic of Justice Barak's opinion, it should not be surprising that the opinion has failed to stir integrationist sentiment in the population at large. But without the development of a social movement solidly in favor of integration, it is hard to see how a legal judgment like *Kaadan* can have much effect. For all of its shortcomings and limitations, *Brown v. Board* was a transformative judicial decision—it changed the face of American society. This could never have happened had *Brown* not fostered, as well as reflected, a popular commitment to integration.

Without any comparable interplay between popular attitudes and the court, *Kaadan* is uncanny, *unheimlich,* in two respects. First, its basic idea that equality requires desegregation is out of touch with the surrounding reality; law and society, mind and body, are badly out of sync. Second, it purports to return Jews in Israel to their earlier *unheimlich* status as free, but unprivileged, agents in the market for real estate. The condition of free agency and alienable property that results from breaking down barriers to property reflects the values of liberal individualism—a value framework that privileges the right of the individual to acquire and transfer property without regard to the claims of groups. In invoking *Brown,* Barak is trying to transport this liberal vision to a context still marked by the collectivist ethos of nationalism.

Palestinian nationalism is no different from Jewish nationalism in this regard. Indeed, as the Israeli Arab writer Anton Shammas once observed, it is in many respects the mirror image of Jewish nationalism. Neither the Israeli-Jewish side nor the Palestinian side has produced a Martin Luther King, Jr., or a civil rights movement. Not integration but partition is the

watchword—even among liberal nationalists and most of what's left of the left. American-style integration is almost inconceivable.

Of course, it is not the case that *no* Israelis champion the cause of integration. Justice Barak represents a small group of civil libertarians, mostly, though not exclusively, lawyers, dedicated to liberal integration and liberal nationalism. Radical social change is unlikely to be effected by the judiciary. But the court might in this case play the time-honored role of the visionary by preserving illusions that might someday be converted into reality—here, the illusion that Israel is a society that prohibits segregation. After all, as Theodor Herzl said of a different vision once dismissed as illusion: "If you will it, it is no dream."

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