



PALESTINE, APARTHEID, AND THE RIGHTS DISCOURSE

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Since the fall of the apartheid regime in South Africa, the oft-made analogy between the South African and Israeli cases has been extended to suggest the applicability to the Palestinian quest for justice through the rights discourse, arguably the most effective mobilizing tool in the anti-apartheid struggle. This essay explores the suitability of the rights approach by examining the South Africa-Israel analogy itself and the relevance of the anti-apartheid model to the three main components of the Palestinian situation: the refugees, the Palestinians of the occupied territories, and the Palestinian citizens of Israel. It concludes that while the rights discourse has many advantages, it cannot by its very nature—the focus on law at the expense of historical context—address the complexity of the Palestinian problem.

COMPARISONS HAVE LONG BEEN DRAWN between the apartheid regime of South Africa and the State of Israel as practitioners of institutionalized, legalized discrimination on ethnic and racial grounds. More recently, and especially since the victory of the anti-apartheid struggle in South Africa, the analogy has been utilized not merely for rhetorical ends but to suggest a model that could serve the Palestinians in their quest for justice. Specifically, the analogy suggests to many that the most visible and effective component of the anti-apartheid strategy—the rights discourse, which succeeded in creating a worldwide solidarity movement that played a not insignificant role in the ultimate defeat of the apartheid system—can be similarly effective in the Palestinian case. It is the contention of this essay the South Africa-Israel analogy should be pursued with caution; while the analogy is powerful and allows us to see aspects of reality that have remained hidden, like all analogies it tends to hide other aspects of that same reality. And just as the basic analogy is limited, so privileging the rights discourse in the Palestinian case could involve certain pitfalls arising both from the profound differences between the two cases (alongside their similarities), and from the tendency of the rights discourse, with its view of law as universal, to ignore historical context.

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The real subject of this essay, then, is the rights discourse, its potential and limitations, and the question of context as it relates to that discourse. To clarify these issues, however, it is necessary first to revisit the Israel-apartheid analogy, not with any claim to comprehensiveness, but with the aim of highlighting those elements with bearing on the applicability of the rights discourse and of exploring the preconditions that render the rights discourse effective or otherwise.

Although the rights discourse can mean many things, in this paper I use it to refer to a discourse that believes in its own power to effect social and political change. This belief rests on the assumption that there are objective, shared values that can serve as a cornerstone—the Archimedean point—capable of adjudicating moments of conflict. The basic idea is that the universality of rights creates a common ground allowing everyone—oppressors and oppressed—to find their place and participate in the discourse. Accordingly, while the struggle of the oppressed exerts pressure on the oppressor, at the same time it offers the possibility of a universal way out of the conflict: the quest for liberation by the oppressed creates the conflict and the solution to the conflict at the same time.

The rights discourse presumes the centrality of law and assumes that equal application of the law will lead to justice: the legal transcends the political and restrains it. In its most familiar version, the discourse emphasizes the individual as the center and beneficiary of political organization, with rights intended to limit the state's interference in the protected autonomy of the individual, leaving him a "free" sphere. At the same time, the sense of sameness, commonality, or common-belongingness shared by all the parties involved is seen as coming before that which differentiates them. It is important to point out that in the most notable cases where the rights discourse was successful—the South African case and in the U.S. civil rights movement of the 1960s—the struggle was not simply for human rights but for *civil* rights. The demand by both the South African and the American blacks was to enjoy the same rights and to be subject to the same laws as the dominant population.

I should point out that I do not subscribe to the view that the law is epiphenomenal or merely a superstructure. There is no doubt that the rights discourse, premised on law, has its own dynamic and power. Those who use for oppressive ends a legal system based on the universal principles of justice that lie at the heart of the rights discourse can be trapped by their own rhetoric: the founding fathers of the United States, for example, could not have imagined that the words of their constitution would one day be used to grant equal political rights to African Americans. Thus, the universality of law, and the power of discourse itself, can lead to results completely at odds with the intentions of the drafters of the laws or of those who deploy the legal discourse. In the final analysis, law is not merely at the service of politics, and normativity is not simply the shadow of power. Law shapes politics just as politics shapes the legal world.¹

THE ANTI-APARTHEID STRUGGLE IN SOUTH AFRICA

For someone who followed the struggle of the South African blacks from afar, the struggle could have seemed to have an almost aesthetic feel. Their demands, clear-cut and neat, were articulated with concision and clarity. It was easy to grasp the symmetry that the struggle aimed to achieve, where all South Africans would share the same basic rights; the imagined symmetry itself conveyed the asymmetry of the apartheid situation. By showing the whole, one can see what is missing—the absent rights of the black community became clear, concrete, framed, and (as such) visible. It was like showing a picture of a man without hands and asking: what is missing from the picture? We experience what is missing or flawed in relation to an imagined or framed totality.

At the heart of apartheid lies the concept of exclusion. But in order to exclude something, or to think of it as excluded, it is necessary first to imagine the possibility of inclusion. One cannot think of French people as being excluded from the right to vote in the U.S. presidential elections, because their inclusion was never envisaged. On the other hand, one might have conceived of blacks in the nineteenth century United States as having been excluded, because there was a totality (the American people) of which they were presumably a part, but from which they were in fact excluded.

In similar fashion, apartheid—which means “to put apart” or “to separate”—presupposes its opposite; one can only “put apart” something that is already together, or conceivable as being together, conceivable as a potential whole. Apartheid as a concept becomes thinkable only against the background of a certain unity, a common frame that encompasses the two parts, however separate. If the parts come together, ending their separateness, the apartheid is ended. By the same token, if the frame collapses, the apartheid also collapses, or at least becomes invisible. It is the frame that allows us to see apartheid clearly and that gives the term meaning. Without the frame, without that implied unity, we are simply in a situation of *differend*, where the two parties are so lacking in common norms that there are no grounds on which their conflict can be adjudicated.²

Simplifying the case somewhat, South Africans, at least in the years leading up to the end of the apartheid system, were moving, however haltingly, toward a certain sense of common belongingness: both blacks and whites were seeing themselves as South Africans. As it became increasingly apparent that separation was ultimately not viable in the long run, political slogans like “South Africa for South Africans” and “one man, one vote” became powerful mobilizers for political action. The struggle of the blacks for individual civil, political, economic, and social rights was conducted within a given frame—the state of South Africa—and as such assumed an integrational, universalist shape with centripetal powers. Significantly, the state itself was not in dispute as a *form* or as the potential bearer of duties; the two sides differed on the allocation of rights, not on the fact that a central body to which they both would owe allegiance should allocate them.³

THE PALESTINIAN CASE AND THE APARTHEID CONCEPT

That the apartheid model has relevance to the Palestinians is clear, given the basic similarities between the Israeli and South African cases as manifested in the dream of the rulers of both states to create a “pure” entity where the “other” is excluded. At the same time, the differences between the Israeli and South African histories and situations have evident bearing on those victimized by these histories and situations—the Palestinians and the South African blacks. Thus, the defining feature of the Palestinian case, in contrast to that of the South African blacks, is fragmentation; the Palestinian experience has so many different facets that it is impossible to subsume them all under a single term like Apartheid. The most obvious aspect of this fragmentation is the fact that Palestinians today form three distinct groups: refugees (the Palestinians in exile); the Palestinians of the occupied territories, and the Palestinians of Israel. The applicability of the apartheid concept to each case is discussed below.

The Refugees

The refugees, who form the largest of the three groups, can themselves be divided into three categories: the refugees of the 1948 war, those who became refugees after the 1967 war, and the “internal refugees” who were driven from their homes and lands in 1948 but who live in the State of Israel as Israeli citizens.⁴ Aside from the “internal refugees,” the concept of apartheid is by definition inapplicable to the refugees, since they are in exile, scattered in other countries and not subject to Israeli rule. Indeed, the very concept of apartheid presupposes a presence within the country while being excluded from (being outside) the rights regime. Still, despite the basic inapplicability of the apartheid concept to the refugees, looking at the refugee issue from this perspective is useful insofar as it sheds light on the relationship between the Israeli case and apartheid.

The main experience shared by all Palestinian refugees is one of loss, displacement, dispossession, and exile. The Palestinian question was a question of refugees and of displacement before it became a question of statehood and self-determination.⁵ For the refugees, it seems to me, the main issue is captured in the concept of return. Just as the negation of apartheid is equality and integration, so the negation of the exile is return. And if for the Palestinians the goal of return presumes equality (i.e., return not as second class citizens but as citizens with equal rights), “integration” would not appear to be part of the refugee agenda. And if in the South African case the geographical-political entity was the *locus* of the struggle, in the Palestinian case the struggle was *over* the geographical-political entity itself. In the first case the demand was for equality, in the second equality is implied in the demand for return but bears different meaning. In the Palestinian sense, the equality pursued is equality of the right *to* the land, as distinguished from equal rights *on* the land. In this regard, the concept of apartheid does not capture the refugees’ current situation.

In the war of 1948, some 750,000 Palestinians were driven out of or fled from their homes in what was to become Israel. Without this radical demographic upheaval, Israel would not have had a Jewish majority. It hardly matters whether this deportation was planned or merely “improvised” in the course of the war, what is beyond question is that it was implicit in the Zionist project from the very outset.⁶ It could be argued that there was no need for specific “plans” to deport the Palestinians because their deportation was “written” into the program of the Jewish state, albeit between the lines. It was the subtext of the text itself.⁷

The physical expulsion, or disappearance, of the Palestinians in 1948—Chaim Weizmann’s “miraculous clearing of the land”—made their expulsion

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from the legal text unnecessary. Populations that are expelled and therefore absent do not need to be discriminated against; discrimination is a sign of presence. Israel thus spared itself the necessity of imposing a classical apartheid regime within its borders through the mechanism of expulsion, through which it secured a Jewish majority inside the state. Once the Palestinians were only a minority, they could be allowed the vote

and some minimal political and civil rights. Israeli democracy—limited as it is—was made possible on the back of the demographic change.⁸

In South Africa, there was no comparable demographic upheaval—there, the transfers and “removals,” however massive, had been internal, and the uprooted population remained inside the borders. As a result, apartheid became inevitable (given the ideology of the country’s rulers) as a means of keeping the “undesired” communities separate even as they remained within the country. Apartheid in practice, then, was not a one-shot deal but a continuing “event” in the here and now, which is what made it visible. The 1948 expulsion, by contrast, was an intensified moment of violence, the historical facts of which have since been obscured by a forest of opposing claims, aided by the passage of time and the rooting of new realities. Yet it is the concentrated violence of 1948 which, by securing a Jewish majority, allows the machinery of the legal system to work “smoothly” and “noiselessly,” the relatively tranquil surface masking the harsh underlying reality.

The Palestinians in the West Bank and Gaza

If the category of apartheid is essentially irrelevant in the case of the Palestinian refugees in exile, the situation on the ground in the occupied territories increasingly resembles an apartheid reality—separation wall, fencing in of enclaves, parallel laws, closures, pass system, roads for Jews only, restrictions on water use for Palestinians only, land confiscations, closed military areas imposed at will, and so on. Yet despite an objective situation that seems to be moving toward de facto apartheid, the situation in the occupied territories is still not perceived as apartheid by either party or by the international community. There is no agreement on the frame, on a defined entity/area within

which the struggle is being waged. And in order for apartheid to be apartheid (i.e., in order for it to constitute a political category, a lens through which the reality can be seen and judged), the perception of an apartheid situation is as necessary as the physical reality of separation.

The occupied territories have an ambivalent status in Israeli opinion. Though the entire area is under Israeli control, in the eyes of the Israeli public the territories can be either “here” or “there,” either “part” of Israel or “outside” it, depending on the context. When it comes to confiscating land, building settlements, using water resources, and so on, the occupied territories have been seen as “inside” Israel ever since 1967. But when it comes to the Palestinians who live there, the territories have always most definitely been seen as being “out there” or “beyond the borders”—a perception that is very helpful precisely in keeping the Palestinian population outside the Israelis’ imagined political community. Without even the most minimal commonality that would mark an “inside” or a shared frame, Israelis feel no more ethical, moral, or legal obligations toward the Palestinians than they would toward any other foreigners. Indeed, Israeli opinion by no means takes for granted their continuing presence in the occupied territories. The transfer of Palestinians (both in the territories and in Israel proper) beyond the borders of Mandatory Palestine is a matter of public debate in the Israeli media; some Knesset members and even certain government ministers openly call for it.

Most Palestinians saw the signing of the Oslo agreements and the establishment of the Palestinian Authority (PA) as a step toward achieving their goal of an independent state—complete separation from Israel. In reality, it further entrenched the dual mechanism that allowed Israel to see the occupied territories as part of Israel when it came to land exploitation and separate from Israel when it came to responsibility for the Palestinian population. Land confiscations and settlement expansion continued during the Oslo period as never before; on the ground, Oslo was simply the continuation of the occupation by remote control, mediated by the presence of a quasi-government with a flag, ministers, and a president. With regard to the territories, Israel and the PA were in exactly opposite positions: Israel post-Oslo continued to enjoy the benefits of sovereignty without bearing the burden of responsibilities, while the PA was given the responsibilities of statehood without being given any of the authority or powers of a state.

Internationally, despite the de facto continuation of the occupation, the existence of the PA conveys the impression of two states. With the occupied territories no longer seen, internationally, as part of the Israeli body politic, any conflict inside the territories is seen not as part of a struggle against occupation but as a war across borders. As such, there is no restraint on Israel’s use of force against the Palestinians except with regard to actions expressly prohibited by the laws of war. Thus we are witnessing Israeli air raids on populated areas and the vigorous implementation of an official policy of assassination. These actions do not raise serious public debate within Israel, and within the international community they are greeted with a remarkable degree of “understanding.”

Thus, the situation of the Palestinians in the occupied territories is worse than apartheid in that the world does not react when Israel uses F-16s to bomb entire apartment buildings in order to kill this or that Palestinian leader—which, incidentally, the South African apartheid government never did. Israel can act with such impunity because, since the Palestinians are not citizens, the normative rules of how a state deals with its citizens do not apply. Moreover,

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the fact that the struggle is seen and articulated in terms of *decolonialization* rather than of *anti-apartheid* means that there can be no anti-apartheid-type movement. The belief of most Palestinians is that the struggle is for independence, for separation, for two states, not for integration and equality in one state. The result is that the powers are centrifugal, not centripetal, and the rights debated are not individual civil and political rights but group rights (self-determination). So while the physical facts on the ground are taking us from the

Algerian model toward the South African model, the political understanding of the Palestinians remains one of decolonialization.

In light of the above, if the Palestinians of the occupied territories wanted to adopt the model of the anti-apartheid struggle, they would have to pose the questions: What could be the equivalent in our case of the “freedom charter” or the slogan “South Africa for the South Africans”? Could we say “Israel for Israelis”? But the Palestinians in the occupied territories are not Israelis. Could we say “Palestine for Palestinians?” But the Jews are not Palestinians. Do we have the vocabularies to “transplant” such slogans? Can our demands or our vision be articulated in anti-apartheid terms, or must a new language be invented to fit our case?

The Palestinians in Israel

It is tempting to compare the South African case to that of the Palestinians who live inside Israel, who are Israeli citizens and who constitute about 20 percent of the Israeli population. The fact that Israel is a defined political entity, governed by law, within borders that are internationally recognized (even if not seen as definitive by Israel itself) means that there is a frame within which talk of apartheid becomes possible and meaningful. In this sense, the Israeli legal system has the unity, the form, and the “wholeness” against which the “putting apart” can be envisaged.

It is not my purpose here to catalog in any comprehensive fashion the forms of institutional discrimination practiced in various spheres against Israel’s Palestinian citizens. Since the lifting in 1966 of martial law imposed on all Palestinian areas when the state was founded, the most important form of discrimination concerns the allocation of scarce resources. More than 50 percent of the land belonging to the Palestinians who remained in Israel has been confiscated. House demolitions under various pretexts continue to target the Palestinian communities, infrastructure development and education in Palestinian areas

lag far behind Jewish areas, and so on.⁹ Not a single new Palestinian village or town has been established since the creation of the state.¹⁰ There are restrictions on Palestinian citizens' right to buy or use even "public land" administered by the state, to say nothing of the ban on non-Jewish use of the land under the jurisdiction of the quasi-governmental Jewish National Fund (JNF) and Jewish Agency (JA).¹¹ These limitations, and others regarding planning, construction, and development, confine the Palestinians to small "islands" or de facto "ghettos," creating a system of separation between the two national groups that has been compared to apartheid.¹²

On the other hand, as mentioned above, the Palestinians in Israel, because they constitute a minority not a majority, have been given a measure of political participation over the years that South African blacks under apartheid never had.¹³ Palestinian citizens of Israel participate in general elections, elect their own representatives to the Israeli Knesset, and enjoy some freedom of expression, association, and other political and civil rights. In recent years there has been increasing recourse to the Israeli High Court to achieve individual and group rights for the Palestinian minority. This process has not thus far resulted in any real structural changes, though at least at the formal legal level some improvements have been registered.¹⁴

It is significant that it was not until 1995, after the Oslo accords, that a case was brought before the High Court challenging the ban on Palestinian access to state lands.¹⁵ The fact that such a blatantly discriminatory policy—which amounts to legal separation, i.e., apartheid—went unchallenged for so many years shows that Israel's Palestinian citizens, like the Jewish majority, had not taken the category of citizenship seriously. On another level, it could be argued that the delay in seeking legal redress shows that the Palestinians did not see themselves as being merely discriminated against but, much worse, as being "outside" the system, on the other side of a zero-sum game where the state is an enemy bent on dispossessing them completely and erasing their national identity. In a sense, the rhetoric of anti-discrimination that gained currency in the late 1970s and was rearticulated in the 1990s under the slogan "Israel, a state for all its citizens" was actually a sign that the Palestinians were reconciling themselves to the existence of the state, an indication that the Palestinian minority had begun to take Israeli citizenship seriously. During the 1980s and 1990s, partly under the impact of the limited rights discourse that was gaining ground in those years, a thin sense of commonality within Israel began to emerge. But the continuing structural differences mentioned above¹⁶ weakened the fragile notion of common citizenship, which has almost entirely vanished since October 2000, when Israel's Palestinian citizens held demonstrations protesting Israeli violence in the occupied territories just after the outbreak of the al-Aqsa intifada and during which thirteen Israeli Palestinians were shot dead by Israeli police.¹⁷

Despite the parallels that exist between South Africa's apartheid regime and the situation of the Palestinian citizens of Israel, a number of important factors make the analogy problematic. In contrast to South Africa, where there was no

disagreement about the contours of the land in which the struggle was being waged, in Israel, as we have seen, what is “inside” and what is “outside” is left open among Israelis. Above and beyond the issue of the actual geographical borders—Israel pointedly refused to fix international borders at the end of the 1948 war and no longer recognizes the 1967 green line separating it from the occupied territories—there are a number of ways in which the Israeli polity is fluid, making the very idea of borders, as Oren Yiftachel put it, “very fuzzy.”¹⁸ Primary among these is the law of return, which grants all Jews, wherever they live, the right to immigrate to Israel and to obtain Israeli citizenship immediately upon arrival. With millions of Jews thus entitled to actualize their potential citizenship, a large part of the Israeli polity lies outside the state; indeed, as a Jewish state with the right of return, the “essence” of the state could be said to lie outside itself. A second complicating issue is the fact that well over half the land in Israel is administered not by the state but by the JNF and the JA, which hold these lands in trust for the Jewish people the world over; the land is mandated by law to benefit not Israel’s citizens but Jews, whether they are citizens or not. A third issue blurring what is “inside” and what is “outside” Israel is the settlements in the occupied territories, which are subject to Israeli law just as if they were part of Israel. Israeli law extends its jurisdiction “outside” the state irrespective of the state borders.¹⁹ And at the same time that Israel considers the settlements to be “inside” (even though they lie outside internationally recognized borders), within Israel proper there are entire Palestinian villages that are not recognized by the authorities, are deemed “illegal,” and do not receive state services. These so-called “unrecognized villages,” most of which were inhabited before the establishment of the state, are geographically “inside” the country, but in terms of their legal status, they are for all practical purposes “outside” the state’s responsibilities (though the inhabitants can vote on an individual basis).

Besides the absence of a clearly delineated frame, there is a second factor that seriously undermines the applicability of the apartheid model in the case of the Palestinians of Israel. Whereas in South Africa the blacks, whites, and “coloreds” all considered themselves South Africans, the situation is far more ambiguous in Israel, where, as we have seen, even in the best of times the civic “we” that had tentatively begun to emerge was always permeated and even overridden on both sides by a national “we.” Furthermore, in Israel it is not simply a question of two national communities struggling over the same territory. Beyond this, each community understands itself as part of a larger nationality whose members are living outside the land. As such, neither of the involved parties considers itself to be fully “present”; the Palestinians have their refugees, and the Israeli Jews have their potential immigrants. Thus the question of equality becomes problematic. Equality is the negation of discrimination, but discrimination has relevance only in relation to the same comparative lens. For example, when comparing Jews and Palestinians *within* Israel, the case of discrimination is clear, and the demand for equality makes sense. But what if we widen the lens and consider *all* Palestinians (Israeli citizens

plus refugees) in relation to the Jews of Israel, or the Palestinians of Israel with regard to *all* Jews (Israeli citizens plus Diaspora)? Where do we stop in the comparison? And how are we to adjudicate between their demands? Added to the fuzzy nature of borders, then, is the fuzzy nature of the populations involved.

These qualifications notwithstanding, the case of Israel proper is certainly that in which the rhetoric of rights can have the greatest effect. Slogans such as “Israel, state for all its citizens” can have meaning, and indeed has become part of a political program and inspired a vision for the future.

THE RIGHTS DISCOURSE AND THE RIGHT TO CONTEXT

The rights discourse, at least in part thanks to the success of the anti-apartheid movement in South Africa and the civil rights movement in the United States (and leaving aside the interesting debate about the extent to which these movements actually achieved their aims on the ground), has come to be seen by many minorities or oppressed groups as a basic, even primary, tool in their struggle for justice. In no case, perhaps, has the applicability of the South African model been claimed with greater insistence than with regard to the Palestinian case. Yet, as we have seen, the category of apartheid cannot describe the complexity of the Palestinian situation. Whereas the rights discourse is effective in a bounded situation, within an agreed upon “frame” (e.g., the South African state, the United States), in the Palestinian case there is no such frame: the apartheid model does not apply either to the situation of the refugees in exile (the majority of the Palestinians) or to that of the Palestinians in the occupied territories. The model is inadequate even with regard to the segment of the Palestinian people to which it most applies—the Palestinian citizens of Israel—because the core of the issue goes beyond the legal discrimination from which they are suffering at present.

One of the shortcomings of the rights discourse in general is that, being based on law, by definition it seeks to remedy a status quo, a situation as it now stands. Law being universal, it is applied to all situations as if they were equal; it operates on a situation as if it were an abstract entity rather than the product of a given history with a given context. Indeed, the rights discourse, deriving from the universality of law, almost inevitably dehistoricizes and decontextualizes the subject, cutting it off from its particularity. Thus, while there are indisputable gains in wielding the rights discourse, there are losses as well—the greatest being the loss of context. The Palestinian case, for example, when seen from a historical perspective, looks clear and simple: the story of one people taking the land of another people. But seen from a static point of view (the point of view of most legal theorists), it looks shattered and fragmented.

This being the case, to compare the Palestinian situation to that of other racial or ethnic groups in the world—specifically to that of the South African blacks under apartheid—is misleading, because the core of the Palestinian problem lies not in the specific demands of the three categories—the right

to return by the refugees in exile, for self-determination and an independent state by the Palestinians in the occupied territories, or for equal rights by the Palestinians in Israel—but in the concept of *loss*. One might even argue that giving primacy to the rights discourse in the Palestinian quest for justice could represent some dangers, because a rights discourse entails the renunciation of the frame, the historical context. Focusing on legal redress implies renunciation of the historical context and therefore renunciation of the right to address in some fashion the wider losses. Seen from this perspective, the very demands of the three groups represent in each case a historical compromise from the very outset.

I am by no means suggesting that use of the rights discourse be discarded in the Palestinian struggle; as the main language currency used by people all over the world, it remains very empowering despite its limitations. But it must be used in a way that reintroduces the totality of the Palestinian experience that was fragmented in 1948. (Yet the very reintroduction of this totality puts it in tension with the generally dehistoricizing rights approach.) My principal argument is that the Palestinians have lost not only their rights and their land, but also the context that enables them to demand these rights in a way that makes sense. Context is the background condition that allows us to speak and imbues our words with meaning, and the reclaiming of context is the reclaiming of language. In this regard, the first and basic right for the Palestinians in seeking a measure of justice is the right to context, the right to seek redress within the framework of their loss. Much effort, I believe, needs to be directed toward reclaiming this right.

NOTES

1. Marxism is generally seen as the example of foundational paradigm where the economy is the infrastructure and the legal is merely the superstructure. I am not sure that this is the right reading of Marx. In his early writings, such as *The German Ideology*, he claims that every ruling class will try to portray itself in universal terms and in so doing provides its opponents with the tools with which to oppose it (Karl Marx, *The German Ideology*. Amherst, NY: Prometheus Books, 1998, pp. 67–71). Antonio Gramsci took this idea further when he claimed that law is not merely a reflection of class interests but is itself a site of ideological struggle, hegemony, and ideology; see Chantal Mouffe, “Hegemony and Ideology in Gramsci,” and Norberto Bobbio, “Gramsci and the Conception of Civil Society” in *Gramsci and Marxist Theory*, ed. Chantal Mouffe (London: Routledge and Kegan Paul, 1979), pp. 168–205 and pp. 21–48,

respectively. For contemporary debate about the relative independence of law from politics, see Karl Klare, *The Unknown Dimension of European Marxism Since Lenin* (New York: Basic Books, 1973); Duncan Kennedy, “The Stakes of Law or On Hale and Foucault,” in *Sexy Dressing Etc.* (Cambridge, MA: Harvard University Press, 1993); and Robert Gordon, “Some Critical Theories of Law and Their Critics,” in David Kairys, ed., *The Politics of Law*, 3rd ed. (New York: Basic Books, 1998), pp. 641–662.

2. See Jean Francois Lyotard, *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1991). To speak of “difference” presupposes a degree of unity or commonality—an automobile can be compared to (differentiated from) a horse-drawn carriage, both being modes of transport, but it cannot be compared, say, to an egg, for they lack the basic

commonality that renders comparisons possible. In situations of such radical difference, the word “difference” ceases to have relevance, at which point one could describe this as a situation of differend.

3. For a discussion of the nature of the legal struggles and the development of rights discourse in South Africa, see Dennis Davis, “The Legal Struggle for a Democratic South Africa During the 1980s.” Available at <http://www.sipa.columbia.edu/regional/ias/documents/davis.doc>

4. For the case of the internal refugees and their status, see Hilel Cohen, *Present Absentees: The Palestinian Refugees in Israel* (Washington: Institute for Palestine Studies, 2000).

5. The more I think about the Palestinian question and its evolution from a question of refugees to a question of statehood, the more convinced I am that the question is being Judaized in the sense of being formulated along the lines of the Jewish question, where what matters is self-determination, statehood, and sovereignty. In this model, homeland comes before home and collective rights before individual rights. This is not exactly what the Palestinian experience is about, but a discussion of this topic is beyond the scope of this article.

6. For a detailed review of the concept of “transfer” in Zionism, see Nur Masalha, *Expulsion of the Palestinians: The Concept of Transfer in Zionist Political Thought, 1882-1948* (Washington: Institute for Palestine Studies, 1992).

7. See Benjamin Beit-Hallahmi’s discussion of mechanisms of denial in his book, *Original Sins: Reflections on the History of Zionism and Israel* (London: Pluto Press, 1991).

8. As Dr. Jamal Zahalka put it, “The Palestinians are the victims of racism as much as they were the victims of democracy.” By that he means that because the Zionist leadership at 1948 did not accept the idea of having a majority of Palestinians who would be denied their political rights, they were “obliged” to expel them. The other options were either to give up the idea of a Jewish state or to create an apartheid state. The Zionist leadership has chosen the option of expulsion. Jamal Zahalka, “The Options of Political Change in Israel,” a paper delivered at the ADC conference on June 9, 2002.

9. For an overall survey of the status of the Palestinians in Israel, see David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder, CO: Westview Press, 1990). See also Adalah: The Legal Center for Arab Minority Rights in Israel, *Legal Violation of Arab Minority Rights in Israel* (Shafa’amr, Israel: Adalah, 1998); Nur Massalha, ed. *The Palestinians in Israel: Is Israel the State of All Its Citizens and “Absentees”?* (Nazareth: Galilee Center for Social Research: 1993); Dan Rabinowitz, Asad Ghanem, and Oren Yiftachel, eds., “After the Rift: New Directions for Government Policies Towards the Arabs in Israel” (November 2000); and Nimer Sultany, *Citizens Without Citizenship: Mada’s First Annual Political Monitoring Report: Israel and the Palestinian Minority 2000-2002* (Haifa: Mada—The Arab Center for Applied Social Research, 2003).

10. The only case of creating a new residential locations was in the Negev, where the aim was to “concentrate” the Bedouins in limited areas rather than allowing them to continue, as was their tradition, to range over expanded areas. These new “villages” still fall within the general strategy of limiting the Palestinian presence in the public sphere.

11. For a detailed analysis of the Israeli legal system regarding land use and the transfer of land from Palestinian to Jewish hands, see Sandy Kedar, *Israeli Law and the Redemption of Arab Land, 1948-1969* (Boston: Harvard Law School, 1996). For the Judaization of the space and the limits of Israeli democracy, see Oren Yiftachel, “Ethnocracy: The Politics of Judaization of Israel/Palestine,” *Constellation* 6, no. 3 (1999): pp. 364-90.

12. The Israeli anthropologist Dani Rabinovich has characterized the case of the Palestinians in Israel as a “trapped community.”

13. While South African blacks were able to vote in their “homelands,” they had no political participation at the national level.

14. See Adalah’s reports for the years 1999 and 2000, accessible at <http://www.adalah.org/eng/publications.php>. It should be noted that the legal changes, such as they are, have not been accompanied by changes in the political domain, where

racism, including public calls for transfer, is on the rise.

15. In principle, the High Court outlawed such a practice as discriminatory. The court decision is limited to a certain kind of land, which is "state land" (as distinguished from other public lands belonging to the Jewish Agency or to the Jewish National Fund). At the time of writing, more than two and a half years since the decision was handed down, the petitioner has yet to be allowed to purchase a house in the Jewish settlement. High Court cases No.6698/95, published in *Israel High Court Reports*, 54(c) 1, p. 258. For a review of the case and commentary, see Adalah: The Legal Center for Arab Minority Rights in Israel, *Adalah's Review Volume II* (Shafa'amr, Israel: Adalah, 2000).

16. See also Jeff Halper, "Nisbul (Displacement): Israel's Form of Apartheid." Available at <http://www.sipa.columbia.edu/regional/ias/documents/apartheid.doc>

17. An official committee was subsequently appointed to investigate the events.

18. For a discussion of the nature of the Israeli borders, see Yiftachel, "Ethnocracy," pp. 364-90.

19. For the legal reality under occupation, see Eyal Benvenisty, *Legal Dualism: The Absorption of the Occupied Territories into Israel* (Boulder, CO: Westview Press, 1990); and Raja Shehadeh, *The Law of the Land: Settlements and Land Issues Under Israel Military Occupation* (Jerusalem: Passia, 1993).