HCJ 4481/91

Gavriel Bargil and others

v.

1. Government of Israel
2. Minister of Building and Housing
3. IDF Commander in Judea and Samaria
4. IDF Commander in Gaza Strip
5. Custodian of Government and Abandoned Property in Judea and Samaria
6. 'Supreme Planning Council'
7. 'Settlement Sub-Committee'
8. Jewish Agency
9. World Zionist Federation
10. Judea, Samaria and Gaza Council
11. Amana – Settlement Movement of Gush Emunim Central Agricultural Settlement Cooperative Society Ltd
12. Ariel Local Council
13. National Religious Party

The Supreme Court sitting as the High Court of Justice

[25 August 1993]

Before President M. Shamgar and Justices E. Goldberg, T. Or

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The petition asks the court to find the Government's policy of allowing Israeli citizens to settle in the occupied territories of Judea, Samaria and the Gaza Strip to be illegal.

Held: The court held that the petition was too general to be justiciable.

Petition denied.

Israeli Supreme Court cases cited:

[1] HCJ 390/79 *Dawikat v. Government of Israel* IsrSC 34(1) 1.

[2] HCJ 663/78 *Kiryat Arba Administration v. National Labour Court* IsrSC 33(2) 398.

[3] HCJ 2926/90 (unreported).

[4] HCJ 852/86 *Aloni v. Minister of Justice* IsrSC 41(2) 1.

[5] HCJ 606/78 *Awib v. Minister of Defence* IsrSC 33(2) 113.

[6] HCJ 910/86 *Ressler v. Minister of Defence* [1988] IsrSC 42(2) 441; IsrSJ 10 1.

[7] HCJ 1635/90 *Jerzhevski v. Prime Minister* IsrSC 45(1) 749.

American cases cited:

[8] *Warth v. Seldin 95 S. Ct.* 2197 (1975).

[9] *Schlesinger v. Reservists to Stop the War* 418 U.S. 208 (1974).

[10] *Valley Forge College v. Americans United* 454 U.S. 464 (1981).

[11] *Baker v. Carr* 369 U.S. 186, 211-213, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

[12] *Powell v. McCormack*, 395 U.S. 486, 519-521, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969).

For the petitioners — A. Feldman.

For respondents 1-8 — N. Arad, Director of the High Court of Justice Department at the State Attorney's Office.

For respondent 9 – M. Berkovitz.

For respondents 10-11 – D. Rotem.

For respondent 10 – Z. Turlow.

For respondent 12 – Y. Inbar.

For respondent 13 – P. Maoz.

JUDGMENT

President M. Shamgar

1. This petition addresses the settling of citizens who are residents of Israel in settlements, in the territories held by the Israel Defence Forces (IDF) under military occupation.

2. (a) The petition relates to the establishment — in the past or the present — of civilian settlements; in the words of the petition, 'these actions are not essential for the defence of the IDF forces in the area or for defending the State for reasons determined by the authorities directly responsible for the defence of the State (defence reasons).' The petition asks why settlement should not be permitted only to settlers who are prepared and undertake to leave the area after the defence reasons lapse. The petition further explains, *inter alia*, that its intention is to rescind the authority of State authorities to build, with State budget funds, Jewish Agency funds or Zionist Federation funds, any housing units, public buildings, infrastructure, electricity, water connections, roads, paths, etc., other than for defence reasons.

The petition demands that the State budget, when submitted for Knesset approval, should specify the expenditures in the occupied territories 'for settlement and the settling of citizens of the State and its residents there, separately from and independent of the other expenditures of Government ministries.' Directing the petition against the Minister of Building and Housing, the IDF authorities, the Custodian of Government and abandoned property and planning and building authorities, is designed to ask us to determine restrictions for the actions of these authorities in matters relating to settlement.

(b) The petition wants us to consider the *legality* of the actions of the Government of Israel and other authorities with regard to settlement which is being carried out not for defence reasons but for the purpose of permanent settlement. It is argued that the legality is prejudiced because these actions run counter to the State's obligation under public international law not to exercise its sovereignty in the occupied territories, to maintain the status quo and to act in accordance with the customary and written rules of public international law.

(c) The petition seeks to base its arguments on three areas of law: customary public international law, administrative law and civil law.

The petitioners refer us to public international law, as set out in the Geneva Convention concerning the Protection of Civilian Persons in Time of War, 1949 (hereafter — 'the Geneva Convention'), which prohibits the transfer of the State's population to the occupied territories. The issue of settlements is admittedly an ideological one, and the petitioners point out that they do not deny the right to adopt any ideological position, provided that it does not conflict with existing law. Exercising full sovereignty in the occupied territories is contrary to law. The Government has only the authority

to exercise its powers under art. 43 of the Annex to the Hague Convention concerning the Laws and Customs of War on Land, 1907 (hereafter — 'the Hague Convention'). This article embodies the axiom that every action of a military administration is governed by the principle of transience. Emphasis is placed on restoring law and order and life as it was on the eve of the occupation, and no new public order may be established in any sphere. Any permanent settlement is contrary to the principle of transience, since it leads to a substantive change of a permanent nature. Moreover, the settlements change the law in the occupied territories: they lead to Israeli legislation that relates especially to the Jewish residents in the territories, their being subject to the jurisdiction of the courts in Israel etc., and to defence legislation that creates separate and unique legal arrangements for this population.

Furthermore, since the Geneva Convention allegedly prohibits even a voluntary and uncoerced population transfer of the State's population into an occupied territory, the respondents' actions are contrary to the rules of the Geneva Convention. Every site on which a settlement is established is *de facto* annexed to the territory of the State of Israel. The legal and political climate prevailing in it is precisely identical to that of the State of Israel. Any actions of the authorities that do not apply and implement the legislation in force in the area are unreasonable, to the extent that they breach the international undertakings of the State. They are tainted with an improper purpose, and therefore, by virtue of Israeli administrative law, they should be voided, and in order to void them there is no need for the legal determination that the Geneva Convention is part of customary international law.

(d) The authorities that establish settlements are an integral part of the Israeli Government and bureaucracy, which considers questions of settlement, land, people's willingness to settle, and not considerations of a military Government in occupied territories.

The facts created in the territories as a result of the settlements are permanent and independent of any political arrangement that may occur after the military Government ends. In view of the housing crisis that exists in the State of Israel, the range of economic incentives offered to persons settling in the occupied territories amounts almost to a 'forced transfer of the citizens of the State to the occupied territories'. The petitioners argue that the expenditure of State funds to finance these benefits is expenditure for purposes prohibited under the customary rules of international law. The act of enticing people to live in the occupied territories and exploiting their

economic distress for this purpose are also prohibited, and the impropriety lies both in the motive and in the outcome.

(e) Finally, these acts are not merely contrary to customary public international law norms, nor are they merely improper from the viewpoint of administrative law, but they are also, as stated, allegedly invalid for a third reason, namely under the constitutional law of the State of Israel, since the settlements violate the fundamental principles of the State of Israel as a democratic and egalitarian State. How so? No-one disputes that Israel's administration of the occupied territories is undemocratic, in the sense that the military commanders are not elected by the local population and are not answerable to it for their actions. Notwithstanding, the court has held on several occasions that to the extent that defence requirements and other obligations imposed on the occupying State allow, human rights of the local residents may not be violated unnecessarily. Creating a large community of Israelis who are citizens of the State and who live in the occupied territories and enjoy material assets, political rights, economic rights, legal rights and basic rights that are far superior to those given to the Arab residents of the occupied territories creates improper discrimination, which humiliates the residents of the occupied territories, and creates a social and political system contrary to the values of the State of Israel as a democratic and liberal State.

In the petitioners' opinion, the authority given to the Jewish Agency and the Zionist Federation is also improper, for how can the fifth respondent justify, under the customary rules of international law, the conferral of powers and authority on a body that is extrinsic to the territories and that operates within a jurisdiction, discretion and ideology that are blatantly Jewish and Zionist, and that certainly does not include among its goals the welfare of the local Arab population.

3. In my opinion, this petition should be denied, for it is defective in that it relates to questions of policy within the jurisdiction of other branches of a democratic Government, and it raises an issue whose political elements are dominant and clearly overshadow all its legal fragments. The overriding nature of the issue raised in the petition is blatantly political. The unsuitability of the questions raised in the petition for a judicial determination by the High Court of Justice derives in the present case from a combination of three aspects that make the issue unjusticiable: intervention in questions of policy that are in the jurisdiction of another branch of Government, the absence of a concrete dispute and the predominantly political nature of the issue.

4. (a) The petition before us seeks relief which is partly injunctive and partly declarative. The petition is characterised by its generality, namely by the absence of any attempt to establish a concrete set of facts as a basis for the argument, which is customary in this court and of course also in every other judicial forum, or perhaps even by a deliberate failure to make such an attempt. The clear purpose of the petition is to attack a general Government policy that prevailed at the time of submitting and hearing the petition, without reference to concrete acts or inaction.

The petition amounts to a general objection to Government policy. It is more general, by comparison, even than the case heard in the United States Supreme Court, *Warth v. Seldin* (1975) [8] (a petition claiming that the planning and building legislation in a certain city prevented persons with medium or low incomes from living in that city). In that case, the petition was denied, *inter alia*, because it violated the rule that the judiciary, by virtue of its judicial self-governance, does not consider abstract matters of sweeping public significance that are merely general objections on matters of policy, best considered by the legislature or the executive.

As stated in that case, the United States Supreme Court rejected the approach where:

> 'The courts would be called to decide abstract questions of wide public significance, even though other Governmental institutions may be more competent to address the questions…'

See also, for instance, *Schlesinger v. Reservists to Stop the War* (1974) [9], at 222. The court does not deal with abstract problems, unless they are linked to a dispute with concrete implications; it will certainly not do so if the case is one of abstract problems of a predominantly political nature.

(b) In Professor A. Barak's book, *Judicial Discretion* (Papyrus, 1987) at 242-245, the author points out that:

> 'The court is an institution for deciding disputes. This is its main function. Exercising judicial discretion that aims to choose between different possibilities with regard to a legal norm, its existence — the scope of its application — is only a means for deciding a dispute. It is not the purpose of the proceeding but merely a by-product thereof. It is not an act that stands on its own, but it is incidental to deciding the dispute…
>
> …

> …It is true that judicial legislation is becoming a central function of the Supreme Court. Nonetheless, even this central function is incidental to deciding disputes. Even the Supreme Court is a court that decides disputes between the parties. In this way it is different from the legislator, for whom the creation of law is a central function... the judge always engages in the creation of law incidentally to deciding a dispute.'

See also *ibid.*, at p. 245, note 20.

For this reason the court could consider the question whether a right of appeal should be granted to someone tried in a military court in Judea and Samaria, when a petition was submitted to it by someone who was tried in the trial court, without having a right of appeal to a court of appeal; however, following our approach, the court would not have considered the matter on the basis of an abstract petition, unrelated to the concrete case of a specific person.

In order to remove any doubt, I would add that it is not the fact that the matter regards a dispute about land in the occupied territories that stops us from intervening; this court has in the past dealt more than once with petitions about a concrete dispute with regard to Jewish settlements in Judea, Samaria or the Gaza Strip (see, for example, HCJ 390/79 *Dawikat v. Government of Israel* [1]; HCJ 663/78 *Kiryat Arba Administration v. National Labour Court* [2]). The courts, however, are only prepared to hear objective, defined and specific quarrels and disputes, not abstract political arguments. For this reason, the High Court of Justice has, for instance, refrained from considering the proper or desirable water policy (HCJ 2926/90 [3]). In the aforesaid case, HCJ 2926/90 [3], we further pointed out that it is incumbent upon every authority, including the water authorities, to comply meticulously with the law and to conduct themselves in accordance with the principles of proper administration. It is not inconceivable that the court will consider a concrete issue concerning non-compliance with the law in so far as it relates to issues of water administration, but it is not reasonable for the court to turn itself into a body that outlines the general water policy. There are situations in which, during a hearing on a concrete dispute, the court may even comment on the correct manner in which any particular authority should act, but when it has before it a general and sweeping issue, no matter how important it may be, and this merely raises the question the desired general policy, it does not regard the matter as being within its jurisdiction. In other words, the court will not deal with foreign, defence or social policy, when the

claim or petition are unrelated to a defined dispute, merely because the petitioner or plaintiff attempt to cloak their claim or petition in legal language.

(c) Moreover, there is no basis for raising an objection because of the absence of *locus standi*: in cases where a claim is raised about a material violation of the rule of law, the court had generally been inclined to hear a petition, even when petitioners have not shown a direct injury to themselves; however in each of the aforesaid cases there was a concrete issue at the centre of the litigation, whether it might be an issue of settlements in a certain place, a concrete act of pardon, or a specific question of extradition. On the other hand, we have not seen fit, as stated above, to consider abstract and general political problems, a matter which, as stated, is within the jurisdiction of a different authority. It is simple and clear that the separation of powers was not intended merely to prevent intervention in matters that are in the jurisdiction of the judiciary, but to prevent intervention into the defined jurisdiction of each of the three authorities. This is the essence of the balance between them. In the words of the Supreme Court of the United States in *Valley Forge College v. Americans United* (1981) [10], the court must not deal with:

> 'generalized grievances, pervasively shared and most appropriately addressed to the representative branches.'

As stated in *Valley Forge College v. Americans United* [10], the courts must not become a judicial version of a debating club (as stated there: 'judicial versions of college debating forums') or a 'vehicle for the vindication of the value interests of concerned bystanders.'

Justice Brennan of the United States Supreme Court, one of the adherents of extending the right of standing, and one of the main proponents of the liberal approach, said about this:

> 'Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional(ly) commit(ted)." *Baker v. Carr* [11]. But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision-making power. Cf. *Powell v. McCormack*, 395 U.S. 486, 519-521, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969).'

Thus, on the one hand, the court must refrain from considering foreign policy matters that are in the sphere of the governing authority charged with them and which are being dealt with by it. On the other hand, it would be right and proper for the court to relate, where necessary, the preliminary question, namely, which is the branch of Government that has been given the authority to make a decision under constitutional law.

5. This alone was enough to decide the petition. However, if it is argued that the issue is a mixed legal-political one, I would refer to what was explained, *inter alia*, in HCJ 852/86 *Aloni v. Minister of Justice* [4], at pp. 1-29. As we said there, attempts have been made to bring predominantly political disputes into the jurisdiction of the court. In that case I pointed out that I personally do not believe that it is, in practice, possible to create a hermetic seal or filter that are capable of preventing disputes of a political nature from penetrating into litigation before the High Court of Justice. The standard applied by the court is a legal one, but public law issues also include political aspects, within the different meanings of that term. The question which must be asked in such a case is, generally, what is the *predominant* nature of the dispute. As explained, the standard applied by the court is a legal one, and this is the basis for deciding whether an issue should be considered by the court, that is, whether an issue is predominantly political or predominantly legal.

In the case before us, it is absolutely clear that the predominant nature of the issue is political, and it has continued to be so from its inception until the present.

I would therefore deny the petition.

Justice E. Goldberg

Already in HCJ 606/78 *Awib v. Minister of Defence* [5], at pp. 128-9, Vice-President (as he was then) Landau said about the issue of settlements:

> ‘I have very gladly reached the conclusion that this court must refrain from considering this problem of civilian settlement in an area occupied from the viewpoint of international law, in the knowledge that this problem is a matter of controversy between the Government of Israel and other Governments, and that it is likely to be included in fateful international negotiations facing the Government of Israel. Every expression of opinion by this court on such a sensitive matter, which can only be made *obiter*,

> will have no effect either way, and it is best that matters that naturally belong in the sphere of international policy are considered only in that sphere. In other words, although I agree that the petitioners' complaint is generally justiciable, since it involves property rights of the individual, this special aspect of the matter should be deemed non-justiciable, when brought by an individual to this Court.'

When HCJ 390/79 *Dawikat v. Government of Israel* [1] came before the court, Vice-President (as he was then) Landau said, at p. 4:

> 'In the meantime, the intensity of the dispute in the international arena has not waned; instead the debate has intensified even among the Israeli public internally... this is therefore a serious problem that currently troubles the public... this time, we have proper sources for our decision, and we do not need, and it is even forbidden for us when sitting in judgment, to introduce our personal views on the matter as citizens of the State. There are still strong reasons to fear that the court will be seen to have abandoned its proper place and descended into the arena of public debate, and that its decision will be received by part of the public with applause and by the other part with total and agitated repudiation. In this sense I see myself here, as someone whose duty it is to render judgment in accordance with the law in respect of every matter lawfully brought before the court, as a captive of the law, with the prior, clear knowledge that the general public will not pay attention to the legal reasoning but only to the ultimate conclusion, and the court as an institution may lose its proper standing as being above the disagreements that divide the public. But what else can we do; this is our job and our duty as judges.'

The petition before us does not deal with any violation of Arab residents' property rights (as in *Awib v. Minister of Defence* [5] and in *Dawikat v. Government of Israel* [1]), but with the question of the legality of establishing civilian settlements in the occupied territories, for reasons other than security reasons. We are not asked to make passing statements, but to provide an answer that seizes the legal problem 'by the horns'. Are the said settlements lawful or unlawful (as the petitioners argue), with all the practical, political and international ramifications arising from the answer that will be given.

Should we refrain from considering this matter? That is the question facing the court in full force. Note that it is not the petitioners' *locus standi* that is at issue, for they do have this right. In my opinion, the crux of the matter is whether this dispute should properly be determined by the court, *notwithstanding* our ability to rule on it as a matter of law. In other words, does this case fall into the category of the few cases where this Court will deny a petition for lack of institutional justicity (in the terminology of Justice Barak in HCJ 910/86 *Ressler v. Minister of Defence* [6], at p. 474 {72}, and HCJ 1635/90 *Jerzhevski v. Prime Minister* [7], at p. 856).

I believe that we must answer this question in the affirmative. This is not because we lack the legal tools to give judgment, but because a judicial determination, which does not concern individual rights, should defer to a political process of great importance and great significance. Such is the issue before us: it stands at the centre of the peace process; it is of unrivalled importance; and any determination by the court is likely to be interpreted as a direct intervention therein. The special and exceptional circumstances referred to, which are unique, are what put this case into the category of those special cases, where the fear of impairing the public's confidence in the judiciary exceeds 'the fear of impairing the public's confidence in the law...' (*Ressler v. Minister of Defence* [6], at p. 496 {106}).

The petitioners have the right to place a 'legal mine' on the court's threshold, but the court should not step on a mine that will shake its foundations, which are the public's confidence in it.

Justice T. Or

The petition refers to issues of a general nature, and is, in fact, a request to the court to give its opinion to outline in general what is permitted and prohibited with regards to settlements in Judea, Samaria and the Gaza area.

This is not a concrete petition relating to a specific settlement, with all the special factual details and conditions relating to such a settlement, or to an infringement of any property rights of one of the residents of the said areas.

A petition formulated in such a way cannot be heard. Therefore I agree with the conclusions of my esteemed colleague, the President, that the petition should be denied.

Petition denied.

25 August 1993.

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