

Kufr Qassem: Between Ordinary Politics and Transformative Politics

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The Political Trial as a Border Case

The term “political trial” is problematic for liberal legal thought. The term itself testifies to a mingling of fields - the political and the legal. Contrary to prevailing opinion, which attributes political trials to totalitarian regimes, Otto Kirschheimer showed as far back as the 1960s that the phenomenon also exists in democratic states.¹ Kirschheimer also pointed out that the special function of political trials was to legitimize the regime. In his view, political trials, unlike other means of political repression give legal legitimacy to state action, turning political adversaries into criminals. However, to retain the legitimizing effect of the judgment, the political authorities have to guarantee some degree of judicial independence even at the cost of introducing elements of uncertainty into the trial.

During the 1980s, writers associated with the Critical Legal Studies (CLS) movement criticized the liberal attempt to define a separate category of political trials and argued that every trial is a political trial.² However, CLS writers did not relate to the significant difference between two types of political trials that I shall call for the purposes of this article “ordinary” political trials and transformative political trials. The former help retain the hegemonic narrative, while the latter serve as an important social junction in which the boundaries of collective identity are exposed and criticized through a confrontation with an Other (usually the defendant in a criminal trial) who challenges the collective identity and offers an alternative identity narrative. This article is intended to sharpen this distinction by examining the judicial narrative, an important though often neglected

element of political trials.³

The Kufr Qassem trial was a transformative political trial, and this article examines the extent of its success in redefining the boundaries of the Israeli collective. I do this by placing it within the broad context of infiltrators’ trials in the 1950s, and by comparing it with a low-profile case (*Hussein*) heard by the Supreme Court. This comparison will illustrate the difference between the two types of political trials.

Ordinary Politics: Trials of Infiltrators During the 1950s

In his article, “Unfortunate or Perilous: The Infiltrators, the Law and the Supreme Court 1948-1954,” legal scholar Oren Bracha investigates the political and legal map that characterized the handling of infiltrators during the 1950s.⁴ Many of the Arab infiltrators had left the country during or after the 1948 War. Their attempt to return was perceived as threatening the stability of the borders of the newborn Jewish state. In order to prevent their return, the authorities adopted several means, including the establishment of a border police, a tough policy of “free shooting” against the infiltrators, routine searches and deportations of infiltrators who were caught, and the like.⁵ The issue soon arrived on the doorstep of the Supreme Court. Some infiltrators who were caught by the border police petitioned the Court to intervene to prevent their deportation and order the authorities to issue them Israeli identity cards. Bracha contends that the ideological beliefs of the Court were reflected in the creation of legal categories that prevented a genuine understanding of the complexity of the phenomenon and contributed to

a black and white presentation of the matter. The Court decided most petitions according to one of two categories - either "forced deportation" or "free-will emigration." Only those who came within the rubric of "forced deportation" were entitled to relief. The Court denied relief to "free-will emigration" petitioners, who included, in part, people who fled because of the fear of war and students and workers who left for study or work. In other words, narrowing the category of "forced deportation" and expanding the category of "free-will emigration" provided a favorable result for the authorities.

The Court thus provided the political system with legal justification for its tough policy against infiltrators. However, the Court maintained a degree of independence from the political authorities in cases where it intervened and prevented the deportation.⁶ The Court's willingness to criticize, intervene, and even change the decision reached by the authorities, although rare, enhanced the status of the judiciary and contributed to its image as defender of the rule of law. The Court's treading along a narrow thread between legitimization and criticism is illustrated clearly in *Hussein*.⁷

In *Hussein*, the Court decided on a petition filed by several Arab inhabitants of Kufr Majd el-Krum who fled from their village following an act of retaliation committed by an Israeli army unit several days after the army seized control of their village. The petitioners subsequently re-entered Israel. They petitioned the Supreme Court to prevent their deportation and to order that Israeli identity cards be issued to them. The Supreme Court had to decide between two opposing factual

versions. The petitioners claimed that they left because of the army's actions in the village, which included the shooting and killing of several residents and the destruction of a number of houses. The army claimed that the petitioners had not been in the village on the day of the conquest, and that it had not conducted any special action in the village after taking control.

The Court demonstrated a certain degree of independence when it granted little credibility to the army's version of the events, which was based on confidential sources, while it afforded a high degree of credibility to the testimony of one of the village's leaders [*mukhtar*]. The Court ultimately preferred the petitioners' version, though it made a point of describing the action as "an ordinary retaliatory act."⁸ However, while the Court considered it an ordinary retaliatory act (which would not require examination of its legality), the historian Benny Morris states that there had been a massacre and as a result dozens of families left the village and went to Lebanon.⁹ The different name given to the event that took place in Majd el-Krum turned out to be crucial in this case.

Surprisingly, the Court's acceptance of the petitioners' version of the events was not decisive. In order to decide the legal issues, the Court created, for the first time, a distinction between two categories of people who had left Israel during and after the war - "forced deportation" and "free-will emigration" - and determined that only the first would justify Supreme Court relief in favor of the petitioners. In *Hussein*, the Court ruled that there was no forced deportation from the village, but only that people left as a consequence of the "retaliation act." Therefore, the Court rejected the

petition. This double move - accepting the factual basis of the petition, while rejecting it on the merits - enabled the Court to retain its independence vis-a-vis the political authorities and the army and enhanced its legitimacy. At the same time, it created a legal classification that would provide the basis for denial of most future petitions.

Ostensibly, the Court could have based rejection of the petitioners' claim on the legal classification. However, Justice Heshin, speaking for the Court, added a moral justification to the legal argument, in the form of a short narrative. One reason for adding this narrative might be that this was the first time that the classification had been presented. The short narrative, stated in the last sentence of the brief judgment, reveals the norm that shaped the Court's judgment:¹⁰

At a time in which the state is in danger, when it is surrounded by hostile nations that had fought it relentlessly and viciously, and are still harassing it and are determined to swallow it alive - in those chaotic days, people desert the country and move over to the enemy camp. Later they return, claiming to be its loyal citizens, and have the presumption to demand equal rights with all the other citizens... This Court is of the opinion that a person who travels of his own will, and without permit, from the line of defense of the state, to the line of attack of the enemy, is not worthy of this Court's providing him with remedy and help in the fight the army authorities are waging with him and his like to defend the state and its citizens.

These paragraphs reflect a sharp reversal. Until this point, the Court was satisfied with a formal legal

explanation for rejecting the petition. Here, the Court offers a moralizing narrative according to which the petitioners abandoned the country in a time of hardship, joined the enemy, and later, professing to be its loyal citizens, had the audacity to claim their rights in Court. This narrative seems odd. Ostensibly, even if the petitioners were not legally entitled to relief, based on the facts that the Court accepted as true, someone who left the country after an act of retaliation by the army cannot morally be equated with someone who just "traveled" of his own free will and chose to join the enemy. The language the Court chose to use, describing the petitioners as people who had "abandoned" or "traveled" of their own free will to cross enemy lines is possible only if we ignore the moral meaning of the act of retaliation that was described above.

The short narrative that the Court provides is immensely important. Its role is to retell the events so that people will fall neatly in one of two categories: Either loyal citizens or enemies. The petitioners entered the Court as infiltrators and left it as people who "professed" to be loyal citizens but were revealed as belonging to the enemy. This legal narrative leaves no place for the ambivalence or complex reality of Arab citizens of Israel. In other words, the legal narrative performs an act of boundary drawing, placing the infiltrators (except those who had been deported by force) behind enemy lines.

Transformative Politics: The Kufr Qassem Decision¹¹

In contrast to the Majd el-Krum affair that was discussed in the *Hussein* judgment and did not

become part of Israeli collective memory, the Kufr Qassem massacre became a symbol, to a large extent, because of one memorable paragraph in the decision, known as the "black flag" paragraph:¹²

The hallmark of manifest illegality is that it must wave like a black flag over the given order, a warning that says: "forbidden!" Not formal illegality, obscure or partially obscure, not illegality that can be discerned only by legal scholars, is important here, but rather, the clear and obvious violation of law... Illegality that pierces the eye and revolts the heart, if the eye is not blind and the heart is not impenetrable or corrupt - this is the measure of manifest illegality needed to override the soldier's duty to obey and to impose on him criminal liability for his action.

The Israeli legal scholarship discussing the *Kufr Qassem* judgment has mainly dealt with delineating the proper limits of the duty to obey an illegal order. For the most part, it ignored the long narrative that preceded the "black flag" paragraph, even though, as I shall argue, it was this narrative that contributed the main novelty of the decision.¹³

Understanding this novelty does not lie in comprehending the delicacy of the legal precepts but in the study of the story told by the presiding judge, Benjamin Halevi. His narrative constituted the first attempt by an Israeli court to look straight at the violence of the Israeli soldiers and the suffering of the Arab victims, and to give them a name, face and voice. In order to do this, the judge had to overcome the legal impulse to classify and see the events through the prism of legal categories

that tended to mask the problematic reality that was the fertile ground of the massacre.¹⁴

By going back to the narrative of Halevi, it is possible to focus on the way he used the massacre at Kufr Qassem to attempt to transform the collective consciousness regarding the meaning of Israeli citizenship. In this sense, the judgment in *Kufr Qassem* joins a long tradition of transformative political trials, which constitute junctures of identity in the society. The main power of these political trials lies in the new narrative that they offer. This new narrative sought to redraw the boundaries of the collective and thus reshape the Israeli collective identity.

The Kufr Qassem massacre took place in 1956 in a border zone, a place of political and existential ambiguity. The villages of the Triangle were located close to the Israeli-Jordanian border. Although their residents had received Israeli citizenship, they had been under military rule since the 1948 War. The Arabs lived under a permanent nighttime curfew beginning at 9:00 p.m.¹⁵ The massacre took place several hours before the offensive of the Sinai War began. However, as Rosenthal contends, the massacre was intimately connected to this war, as indicated by the extended curfew (which was changed to begin at 5:00 p.m.) that was placed on the village because of the planned offensive.¹⁶ The responsibility for keeping the curfew was given to a unit of the Border Police that had been annexed to an Israeli army brigade for the duration of the war. As noted, the Border Police had been formed as a response to the wave of infiltrators.¹⁷ The policy on opening fire on infiltrators was especially severe.¹⁸

As Hussein shows, the great ambiguity of the

border area requires the Court to draw clear lines, but also provides it with discretion as to how to draw these lines. The Court could have chosen to place the Kufr Qassem massacre in the context of the Sinai War, the struggle against the infiltrators, the military rule, and to see them all as mitigating circumstances. Previous, well-known cases of massacres, such as Dir Yassin and Kibye, never reached the Court. These cases are generally considered to be actions that occurred during combat, or beyond the borders of the State of Israel, and therefore as falling outside the Court's jurisdiction.

The fact that the Kufr Qassem massacre is remembered in Israel as a massacre of 49 peaceful, innocent Arab citizens is not only due to the different circumstances but is largely the result of the narrative Judge Halevi chose to advance. As in *Hussein*, this narrative reveals the politics of the Court. However, in contrast to *Hussein*, the judgment in *Kufr Qassem* was not meant to confirm the hegemonic narrative with the help of legal classifications, but to change the prevailing beliefs about the Arab citizens of Israel, from perceiving them as a fifth column or partial enemies to recognizing them as full-fledged citizens.¹⁹ The course leading in this direction entailed the change in language first and foremost.

The Achilles heel of developing an Israeli civil discourse was the phenomenon of infiltrators. A close reading of the *Kufr Qassem* judgment reveals how much the hybrid category of the infiltrator blurred the line between enemy and citizen, and prepared the emotional grounds for the border police unit to commit the massacre.²⁰ Here lies the link between the infiltrators' petitions to the

Supreme Court and the criminal case of the Kufr Qassem massacre. In their testimonies during the trial, the soldiers time and again pointed out the difficulty of distinguishing between an Arab citizen and an infiltrator, and how much it helped that there was such a draconian curfew, during which anybody who violated it (even those who were unaware of the curfew) would be shot. For example, Major Melinki testified that he asked Colonel Shadmi about the curfew order: "I am ready to kill a *fida'i*, but what about the civilian returning to his village without knowing about the curfew?" Colonel Shadmi's answer to this question has become part of Israeli collective memory ever since the trial: "I don't want any sentiment, I don't want any arrests, *Allah Yerahmo* [God have mercy on them]."²¹

The category of infiltrators is thus used to blur the line between a civilian and a fighter. This moral twilight is most obvious in the cross-examination of Major Melinki on the murder of the women: "And if I see someone returning to the village who says he is not a *fida'i*, who can guarantee that every woman is really a woman, and that every woman with a belly is pregnant and not a *fida'i* who is carrying something?"²² The Court's opinion explained that Lieutenant Gabriel Dahan, the commander in charge of the unit that committed the massacre, was at the time mainly occupied with fighting infiltrators.²³ Judge Halevi concluded that the problem is that the soldiers are completely incapable of distinguishing a combatant from a citizen. Therefore, the judge drew the line clearly, so that Arab citizens of Israel would be included among Israeli citizens.

The rhetoric employed by the judge indicates



his awareness of the deep connection between language and citizenship. The judge's involvement in "translating" is conspicuous. Throughout the judgment, he changed the expression "Arabs," which the soldiers used, to "citizens." Regarding one of the cases, he pointed out that, "In these three confessions they refer simply to 'Arabs,' without explaining that most of the victims were women; none of the defendants was interested in emphasizing this shameful and aggravating circumstance."²⁴

In addition to changing the language, the judge offers a narrative that is intended to give the Arabs a human face. Rather than settle for a customary general summary of the massacre and rapidly getting into a discussion of the legal principles involved, he adopts a strategy of delay. He breaks down a massacre that took place over an hour into small episodes that are described in chronological order - from random shooting at vehicles to taking the people out of the vehicles, standing them in a row and executing them by firing squads, to individual shooting of the injured who were still alive. This description creates in the reader a growing sense of horror that is intensified as the events unfold. Moreover, at the end of each episode the judge lists the names of the victims killed, one after the other, as if the judgment should also serve as a memorial to them. In the midst of every shooting episode, the judge inserts brief exchanges of words that took place, which show the human interaction and enhance the sense of horror: "Isma'il, who saw nearby the bodies of those who had been killed in the previous incident, and could already sense the murderous intention of Dahan and his soldiers, approached Dahan

saying, '*Dakhilkum* (please), why do you want to shoot us?' 'Shut up!' Dahan answered, and gave the order to fire and shot the three with the Uzi in his hand."²⁵

The judge contrasts these hair-raising descriptions with the way in which the defendants chose to describe the events, demonstrating in this way how language itself becomes part of the dehumanizing process. "Later... a truck came with about seven or eight Arabs on it. I stopped it in order to get them into the village... I told them 'follow me' but they began to run. I opened fire and killed them. After that, another car came, also with about seven or eight Arabs, and it was the same again. After that came a horse-drawn wagon with five Arabs in it, and the same happened."²⁶ The judge quotes from these testimonies and rejects as a lie the claim that the victims ran away before they were shot. He points to the routine explanation that the soldiers provided ("and it was the same again") as throwing light on the terrible nature of the crimes that were committed in Kufr Qassem.

Kufr Qassem marked the first time in which soldiers from the Israeli army were put on trial for committing a massacre, and the Court responded to the challenge. The aim of the judgment's legal narrative was to turn a fuzzy category of Arab citizens into a clear one, situating the massacre deep within the boundaries of civil society (applying the penal and administrative law) and in this way, subject the army to the rule of law. The Court thus undertook to redefine the boundaries of legitimate army action so that the civil law, rather than the laws of war, apply, and so that the Arab victims are recognized as Israeli citizens (and not

as a quasi-infiltrators). The attempt to move the case into the civil sphere was undermined from the beginning. The trial was conducted in a military court, and the judges, defendants, and prosecutors wore army uniforms.²⁷ However, the function of the judgment is to move the reader from the military discourse, which does not acknowledge any boundaries, into a civil discourse that is limited and defined by the law, and to move the public discourse from an ethnic categorization of Jews and Arabs into a civic categorization of Israeli and non-Israeli citizens. The Court's decision can be seen as erecting a metaphoric border: The Arabs enter the Court suspected of being enemies (of war, infiltrators, a fifth column) and leave it as full-fledged citizens of the state of Israel. The army enters the Court with unbounded powers (security prevailing over the law, war, defense regulations, emergency) and comes out subjected to the rule of law.²⁸

The Limits of a Transformative Trial

Judge Halevi's efforts succeeded in impressing on the public that the events at Kufr Qassem included the murder of Israeli citizens. Nonetheless, they did not induce a collective process of soul-searching. What can explain this failure?

One explanation involves the relations between the Court and the political authorities. *Kufr Qassem* was a kind of ritual in which the state cleansed itself from the sin that was attributed to it.²⁹ The politicians, particularly Prime Minister and Defense Minister David Ben Gurion, preferred to silence the whole affair. Confronted with international pressure, they agreed to a trial but were not willing to truly condemn the soldiers who committed the

massacre.³⁰ Indeed, the politicians' involvement after the Court gave its judgment led to pardons being granted to the convicted defendants.³¹ The defendants were not dismissed from the security forces but rather the opposite occurred - they were promoted within the defense establishment,³² a pattern that repeated itself in similar cases.³³ Moreover, even the narrative forwarded by Judge Halevi made a sharp distinction, which was so important to Ben Gurion, between the conduct of the border police unit that committed the massacre and the army's conduct.³⁴ This distinction ultimately enabled preservation of the ethos of Israel's purity of arms and rendered unnecessary the self-examination of the weaknesses of Israeli democracy (treatment of its Arab citizens, and its attitude toward the army and the other security forces). Judge Halevi's judgment surely led to the prosecution of Colonel Shadmi (who was not a defendant in the trial of the border police unit), but he was only convicted of exceeding his authority by altering the start of the curfew, for which he was given a symbolic fine of one *grush* (cent).³⁵ These developments can help explain how "Shadmi's *grush*" and not Halevi's transformative narrative became a symbol of the trial for Arab citizens of Israel. They saw it as expressing more than anything the low value given to the lives of Arab citizens by the army authorities and Israeli courts alike.

Another explanation for why the *Kufr Qassem* judgment failed to induce a change in Israeli collective identity is internal to the legal discourse. Judge Halevi tried to use his judgment as an entrance card for Arab citizens into the Israeli collective. The facts of the massacre taught the

judge that providing formal citizenship to Arabs did not prevent the *de facto* exclusion created by the military government and did not change the public's suspicious attitude toward Arab citizens of the state. By means of language and an empathetic narrative, Judge Halevi sought to combat the severe de-humanization apparent in the soldiers' testimonies at the trial. To accomplish this, the judge identified with the Arab victims, respecting them as human beings and defending their right to live in dignity. In other words, the judge chose a liberal discourse to give individual effect to the citizenship of Arabs living in Israel. For this purpose, the judge had to ignore the historical and group context of the national conflict. The entrance card to citizenship provided in his judgment was issued to Arabs as individuals; the citizenship was passive (negative liberty) and minimal.³⁶ These constraints on the legal narrative shaped the collective memory of the events as the murder of citizens, while the historical context of the Sinai War, the military regime, the harsh border police policy, as well as the racism revealed in the testimonies of the soldiers, disappeared.

Conclusion

The starting point of this article was my belief that there is no way to completely separate law from politics, and that we have to learn to accept the existence of political trials. I argued that the degree of legitimization of a political trial is connected to the degree of the courts' independence from the state authorities. For this purpose, I suggested distinguishing between two types of politics, a routine (ordinary) politics, and a transformative politics (intended to change public consciousness).

In *Hussein* and *Kufr Qassem*, the Court attempted to draw the boundaries of the Israeli collective identity by confronting the complex case of Arab citizens of Israel, or of those who wished to obtain citizenship. However, while the routine politics in *Hussein* advanced a narrative intended to conform the specific case to the hegemonic narrative of the period, the transformative politics of the decision in *Kufr Qassem* offered an alternative reading of Israeli citizenship that included Arab citizens more fully.

In the two cases, the Court sought to preserve its independence from the political and military authorities. In *Hussein*, the independence of the Court was mainly manifested on the procedural level, but at the narrative level, the Court supplied the moral justification to further validate the authorities' actions. It was this gap that helped the Court fulfill the legitimization function of the political trial.

In *Kufr Qassem*, this dialectic of legitimization and criticism was more complicated. This time the Court used its judgment as an educational tool, offering a new reading of Israeli citizenship that included Arab citizens more fully. For this purpose the Court had to confront the army directly and, for the first time, impose judicial rule. This confrontation was apparent, for example, in the judge's denial of the army's motion to conduct the trial *in camera*³⁷ and in the severe prison sentences imposed (from seven to seventeen years). However, the judge was unwilling to go all the way (or maybe he was unable), so his judgment also functioned to conserve the ethos of purity of arms of the Israeli army by laying all the blame on the border police unit.

The significant gap between action and words was revealed subsequent to the decision, when its sting was nullified. The overall result was a divided, rather than a collective memory of the events. Israeli Jews remember the affair with the image of the "black flag," symbolizing the superiority of the rule of law over the rule of power. The Arab minority in Israel remembers the affair through the image of "Shadmi's *grush*" as standing for the utter disregard for the lives of Arab citizens, and the superiority of force over the law in Israel. Our return to the narrative of the judgment can help expose the transformative potential of Halevi's judgment, a potential that remains essentially unfulfilled.

End Notes

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1. Otto Kirschheimer, *Political Justice* (Princeton: Princeton University Press, 1961).
2. For elaboration, see David Kalrys, et. al., eds., *The Politics of Law* (New York: Basic Books, 1998).
3. This article is part of an extensive work on political trials in Israel as junctures of collective identity that will be published by the University of Michigan Press in 2002. For further discussion on transformative political trials in Israel, see Leora Bilsky, "The Kastner Affair," 12-13 *Theory and Criticism* 125 (1999) (Hebrew); Leora Bilsky, "Law and Politics: The Trial of Yigal Amir," 8 *Philim* 13 (1999) (Hebrew); Leora Bilsky, "I Accuse: The Deri Trial, Political Trial and Collective Memory," in *SHAS in the Israeli Political Perspective*, ed. Yoav Peled (Tel Aviv: Yediot Aharonot, 2001) at 279 (Hebrew).
4. Oren Bracha, "Unfortunate or Perilous: Infiltrators, the Law and the Supreme Court 1948-1954," 21(2) *Tel Aviv University Law Review* 333 (1998) (Hebrew).
5. For details, see Benny Morris, *Israel's Border Wars 1949-1956* (Oxford: Clarendon Press, 1993) at 118-184.
6. O. Bracha, *supra* note 4, at 369.
7. H.C. 125/51, *Muhammad Ali Hussein v. Minister of Interior, et. al.*, P.D. 5, 1386.
8. *Id.* at 1391. The Court presents the chronology of events at 1390.
9. Benny Morris, *The Birth of the Palestinian Refugee Problem 1947-1949* (Cambridge: Cambridge University Press, 1988) at 228. Morris bases this conclusion on an investigatory report of the United Nations. This report appears only in the extended Hebrew version of his book at page 304, published by Am Oved: Tel Aviv, 1991.
10. See *supra* note 7, at 1392.
11. Military Court 3157, *Military Prosecutor v. Major Melinki, et. al.*, 17 Dist. Ct. Rep. 90 [hereinafter: *Kufr Qassem Judgment*]. For further discussion, see Yoram Shahan, "Black Flag is Waved," in *The Courts of Law: Fifty Years of Adjudication in Israel*, eds. D. Hesin, et. al. (Tel Aviv: Ministry of Defense Publishing, 1999) at 54 (Hebrew).
12. *Id.* *Kufr Qassem Judgment* at 213-214. The translation is in Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York: Hill and Wang, 1993) at 301.
13. See e.g., Ilan Schiff, "By Virtue of the 'black flag' Test" and Adi Parush, "Critique of the 'black flag' Test," in *Kufr Qassem*, ed. Ruvik Rosenthal (Tel Aviv: Kibbutz Hameuchad, 2000) at 117, 131 (Hebrew); and Adi Parush, *Obedience, Responsibility and Criminal Law: Legal Issues from a Philosophic Perspective* (Tel Aviv: Tel Aviv University Press, 1996) at 65-116 (Hebrew).
14. For a rejection of the formal distinctions raised by the defense, see *Kufr Qassem Judgment*, *supra* note 11, at 186, 192.
15. For details, see Amos Carmel, *It's All Politics: The Israeli Political Lexicon* (Tel Aviv: Dvir, 2001) (Hebrew).
16. Ruvik Rosenthal, "Who Killed Fatma Sarsur," in *Kufr Qassem*, *supra* note 13, at 14. According to Rosenthal at 18, the objective of the curfew was unclear. It was presented (in the disclosed part of the judgment) as being intended to protect the residents from accidental injury by the army. In the concealed part of the judgment, the curfew was described as resulting from the army's fear that residents would collaborate with the enemy.



17. B. Morris, *supra* note 5, at 121-123.
18. *Id.* at 431-434. Morris, at 429, connects the rigid Israeli army policy to the growth of the *fedayeen*, terrorist infiltrators employed by the Egyptian authorities beginning in the spring of 1954.
19. It is certainly possible to say that as far back as the signing of the Declaration of Independence, there were supporters of the narrative granting equal civil rights to Israel's minority groups. However, formally recognizing civic equality in the Declaration of Independence (where the primary emphasis is the Zionist narrative of movement from exile to redemption) differs significantly from recognizing Arab citizenship by severely punishing soldiers who failed to assimilate Arab citizenship and perpetrated the massacre. In the *Kufr Qassem Judgment*, the Israeli Court coped with the danger that Israeli society would face if its Arab citizens were not treated equally. For further reading, see Pnina Lahav, "A Jewish State... to be Known as the State of Israel: Notes on Israeli Legal Historiography," in 19(2) *Law and History Review* 387 (2001).
20. B. Morris, *supra* note 5, at 433. Morris, at 431-434, contends that the free-shooting policy, which began in 1949 and led to the killing of between 2,700 - 5,000 infiltrators, nurtured an attitude of disregard for Arab lives. Incomprehensibly, during these years, not one Israeli soldier was prosecuted for injuring infiltrators or for harming Arabs citizens of Israel while conducting searches for infiltrators in their villages.
21. The testimony is brought in the *Kufr Qassem Judgment*, *supra* note 11, at 152.
22. *Id.* at 154.
23. *Id.* at 223. Karpel elaborates and states that Dahan attained fame as the assassin of infiltrators. A photo of him appears on the cover of *Olam Hazei* (Issue 966), with his foot resting on the body of an infiltrator. See Dalia Karpel, "Yes, We are From the Same Village," in *Kufr Qassem*, *supra* note 13, at 181.
24. *Kufr Qassem Judgment*, *supra* note 11, at 105.
25. *Id.* at 109.
26. *Id.* at 115 (quoted from 'Ofer's affidavit).
27. The trial was held in a military court because it involved offenses set forth in the Military Jurisdiction Law that were committed by soldiers (reserves called up for the Sinai War). For details, see *Kufr Qassem Judgment*, *supra* note 11, at 199. Judge Halevi was a civil judge who consented to serve as the president of the military court. This was not the first time he consented to serve in this capacity. See Tom Segev, *supra* note 12, at 267. Halevi was harshly criticized for wearing an army uniform during the trial. See Ron Leunenberg, "The Kufr Qassem Affair as Viewed by the Israeli Press," 2 *State and Government* 48, 55 (1972) (Hebrew).
28. Symbolic evidence of this is the decision to publish the military court judgment in the civil court judgments reporter rather than in a separate reporter, as is customary.
29. Yigal Eilam, *Complying with Orders* (Jerusalem: Keter, 1990) at 58 (Hebrew).
30. R. Rosenthal, *supra* note 16, at 44-45.
31. *Id.* at 46.
32. *Id.* at 13, 27. See also D. Karpel, *supra* note 23, at 178-195.
33. For details, see the judgment in the Yossi Ginosar case, H.C. 6163/92, *Yoel Eisenberg, et. al. v. Minister of Construction and Housing*, P.D. 47(2) 229.
34. The *Kufr Qassem Judgment*, *supra* note 11, is littered with comments distinguishing the army from the border police. At 120, the judge also creates a moral distinction by presenting army officers' comments against the border police unit: "You are killers of innocent people on their way from work. You are committing a crime. Stop it!"
35. From the start, the authorities did not intend to prosecute Shadmi. His trial was a by-product of the harsh judgment given by Judge Halevi. R. Rosenthal, *supra* note 16, at 42; and Y. Eilam, *supra* note 29, at 58.
36. The results of the individualistic approach can be found in H.C. 6698/95, *Qadan v. Israel Lands Administration*, P.D. 54 (1) 258.
37. One-third of the sessions were held *in camera*. R. Rosenthal, *supra* note 16, at 37.

