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POWER-BREAKING OR POWER-ENTRENCING LAW? THE REGULATION OF PALESTINIAN WORKERS IN ISRAEL

Guy Mundlak†

I. NADIM¹

His name is Nadim. It is early April, 1995, 5:00 a.m., just before dawn. The place is the Palestinian side of the Erez entry point, on the border between the Gaza Strip and Israel. Nadim has joined the queue of Palestinian workers waiting for the Erez entry point to open,

† Senior Lecturer, Tel-Aviv University, Faculty of Law and the Department of Labor Studies. The author wishes to thank Ruth Ben-Israel, Eyal Gross, Niva Elkin-Koren, and Frances Raday, as well as the editors and the anonymous reviewers of the *COMPARATIVE LABOR LAW AND POLICY JOURNAL* for their helpful comments. Members of the Department of Labor Studies in Tel-Aviv, and participants in the faculty seminars in Tel-Aviv Faculty of Law and Haifa University Faculty of Law, have also provided many challenges to earlier versions of this manuscript. The paper was originally developed for a conference of the International Network on Transformative Employment and Labor Law. I wish to thank my colleagues there for their encouragement.

1. Nadim is a composite character who is introduced for illustration purposes. His story is typical of most Palestinian workers in Israel. It is based on journalistic accounts and interviews. The most thorough account is presented in AMIRA HASS, *DRINKING THE SEA AT GAZA* (1996) [Hebrew]. Various components of the story are derived from court cases or from reports prepared by human-rights organizations in Israel. The reason for choosing to tell the story of a representative Palestinian worker, rather than of a real one, is the desire to eliminate out of the ordinary experiences. The fictional narrative emphasizes the routine that is common to most workers. More onerous experiences can be outlined, drawing on the same sources, but the critics of the point of view presented here would dismiss them as being atypical. However, the typical narrative of Palestinian workers usually also contains an atypical component.

On the use of narratives in legal scholarship, see Steven L. Winter, *Legal Storytelling: The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989):

The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law. The basic thrust of the cognitive process is to employ imagination to make meaning out of the embodied experience of the human organism in the world. In its prototypical sense as storytelling, narrative, too, proceeds from the ground up. In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power; it is what makes narrative a powerful tool of persuasion and, therefore, a potential transformative device for the disempowered."

See also PETER BROOKS AND PAUL GERWIRTZ, *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 24-60 (1996).

admitting for the day those who hold a magnetic card allowing them to work in Israel. It is not as cold as it was at that time of day a couple of months ago. Still, a few of those in front of Nadim have lit a small fire in an empty barrel to warm their hands. A few children are walking around selling chewing gum or warmed beans. At some distance, Nadim sees his nephew, 14 years old, among the vendors. His nephew is considered a grown-up in the Gaza Strip and insists on helping the family. Times are hard and every little contribution to the family is necessary.

It has been almost a month since the last seal-off of the territories was removed. It was imposed in late-January, after two bombs exploded; one in Jerusalem and one at the Beit-Lid Junction, approximately 40 kilometers north of Tel Aviv. The suicidal bombings killed 34 people. In response, Israel closed all the entry points between the territories and Israel prohibiting the entry of all Palestinian workers into Israel. The seal-offs have been a routine response since the Gulf war, imposed after almost each terrorist attack in Israel. They last between a few days to a couple of months. They are removed gradually, admitting every few days more Palestinian workers, slowly restoring their entry into the construction sites, fields, and restaurants of Israel.

The Erez gate has opened and the long queue is starting to move forward at a slow pace. The security checks are long and tedious, and time seems to be an under-valued commodity at the Erez entry point. Time, in fact, seems to move at a different pace in this small territory. No one pushes. The workers have learned to take the long procedures with some unexplainable calm. The queue advances over a long unpaved, sandy path. There are fences on both sides and security guards watch the workers as they shuffle their feet in the Gaza sands. Nadim has learned the unwritten rules by experience. Do not throw anything. Do not make hasty moves that seem out of the ordinary. Try to be invisible.

Nadim is thirty-four, married, and has five children. His magnetic card allowing him to enter Israel was renewed last week, approximately three weeks after the closure was lifted. Once this is done, it is usually married men over forty holding a card who are admitted to work. Gradually, the age of card-holders re-admitted is lowered. Nadim's brother, who is twenty-five, has not been allowed to work since the Gulf War because rarely do Israeli security authorities admit young workers. The criteria for admissions to work have become quite stringent. They have also become unpredictable. Renewal of entry permits requires applicants to appear at the offices of the civil

authority in the territories. But, there are no formal announcements regarding the changing criteria for re-issuing the permits to work in Israel. These change by the day and spread through the grapevine in the territories. A phone call will rarely produce a definite answer regarding one's status. Even when a worker fits the formal criteria, he may find that his old permit is not renewed with no explanation beyond the "security problem." Nadim feels quite lucky that his permit was renewed. Luck has become an explanation to cling to as other explanations tend to be arbitrary. For the last few years, life in the Gaza Strip seems to have been based on fatalism.

Nadim has passed all the security checks and it is now 6:00 a.m. In light of the security problem, strict legislation has been passed prohibiting Palestinian workers from staying overnight in Israel. They are required to commute daily from the territories to their workplace. The taxis from the Gaza Strip are no longer permitted to cross the entry point, and Nadim waits for the bus that will take him to the construction site where he works. The ride lasts an hour so he gets some sleep on the way. He gets off at the Ashdod junction where he needs to take another bus to the site. While waiting for the bus, he counts the minutes anxiously. His permit allows him to be only at the construction site, and if caught elsewhere, he will be returned to the territories or even detained. Although he needs to change buses, a good explanation for his presence at the bus stop, he knows the policemen who check the permits are not always tolerant about commuting "excuses." The presence of a Palestinian at a bus stop is deemed a security threat, given that several suicidal attacks have taken place at bus stops. It is noteworthy that none of the terrorist attacks in Israel have been committed by a permit-holding Palestinian. The bus arrives and Nadim hurriedly gets aboard. In a short time, he will arrive at the construction site and start his work day.

Construction work is not easy. Nadim works with some fellow Palestinian workers, some construction workers from Romania and a few Israeli workers, mostly foremen. It is a strange group. They don't mix. Each one keeps to himself and to his group. Some construction contractors have stopped employing Palestinian workers because of the security threat. Nadim remembers his work as a teenager and as a young man prior to the intifada (the Palestinian uprising that started in November, 1987). At that time, he worked with a small contractor doing repair and construction work in residential homes. His employer was friendly and so were most families where they worked. His Hebrew is fluent. He is familiar with Jewish holidays and Israeli culture. After the intifada started, he was often looked upon by the fami-

lies where he worked as a threat. Even his employer became hostile, making frequent derogatory remarks, although always adding, "I don't mean you." Nadim grew tired of all this, and succeeded in finding a job with a large construction company.

Permits are not provided to Palestinian workers *carte blanche*. They are issued for work with a specific employer. Moving from one workplace to another thus requires a double effort: To find an employer willing to hire the worker and to obtain a new work permit. Many small employers have been reluctant to hire Palestinian workers during the last few years. The security problem, coupled with the frequent closures of the territories, have made the employment of Palestinian workers less attractive. Small employers, who employ both Palestinian and Israeli workers, have also found that since the intifada, the work environment has become hostile or at least tense. Thus, they prefer to maintain a more homogeneous workforce, even at the cost of higher wages paid to Israeli workers. However, the larger employers have succeeded in obtaining work permits for foreign workers, such as the Romanians, at the construction sites.

It is the end of the work day and Nadim figures that with some luck he will be able to make it back home in three hours. In the "old days," it was simply an hour drive with a taxi picking up workers from or to the Gaza Strip. Now it is worse than any commuter's nightmare. Before he leaves, he goes to the foreman to collect his weekly "travel expenses." These are not really reimbursement for travel expenses, but actually part of his wages. It is a common arrangement where the workers receive part of their payment in cash. Nadim likes this arrangement because he doesn't pay any income tax and he receives the money in cash, occasionally more frequently than once a month. His employer likes this arrangement because the formal wages the employer reports are lower than they actually are, so he has to pay less in the various fringe benefits mandated by law and calculated on the basis of the worker's reported wages. As the money is paid, the foreman and Nadim grin and crack the usual joke about the high cost of travel these days. If Nadim makes it in time, he'll be able to stop at the grocery near his house and pay some debts, perhaps buy some necessities. Nadim is back home. It's 8:00 p.m. In a few hours, he'll be warming his hands again over the barrel at the Erez checkpoint.

A. *A Delayed Introduction: Placing Nadim in Context*

Nadim's experience represents that of thousands of Palestinian workers in Israel after the peace process commenced in 1992.² He is part of a mass of Palestinian workers who fill an important niche in the Israeli labor market. These workers are the subject of regulations that developed when capitalist and colonial interests converged. To understand why and when these two divergent types of interests meet, it is important to account first for the structure of the political economy following the Six Day War (1967), and how it shaped the situation of Palestinian workers in the last few years since the formal peace negotiations commenced. Section II outlines the history of Palestinians' employment in Israel. Following the historical analysis, the discussion will turn to highlighting the effects of legal intervention in the labor market [section III]. The law governing the employment of Palestinian workers in Israel is by definition labor law. Despite the traditional role ascribed to labor law, which is to mediate the inherent tension between labor and capital ("power breaking law"), the legal analysis will demonstrate that in relation to Palestinians' work in Israel, labor law has been used to achieve three interrelated objectives. First, labor law has been used to entrench the position of Palestinian workers as outsiders in the Israeli labor market. The rhetoric of equality that has been used to govern the employment of Palestinians conceals a practice of segregation and discrimination. Secondly, labor law has been used to make Nadim invisible. Nadim is not considered an individual, but a representative of his group. Thirdly, and closely related, Nadim is not considered a subject entitled to rights, but an instrumental agent. Labor law is not concerned with protecting his rights, but rather with securing other people's interests which may be threatened by his presence.

The concluding section generalizes the experience of Palestinian workers in Israel. Their experience is colored by two complementary interests, capitalism and colonization. Consequently, the experience of Palestinian workers in Israel must be understood as a result of an

2. A comment on terminology: First, I use the term "Palestinian workers" to denote workers from the territories occupied in 1967, during the Six Day War. This includes the Judea and Samaria region (also known as the West Bank), and the Gaza Strip. Arab citizens within Israel also identify themselves as part of the Palestinian people, but because they are citizens of the Israeli state, they are insiders in the Israeli economy and their discrimination and exclusion merits a different analysis. Second, the territories themselves are referred to in the text simply as "territories," rather than being called by one of the ideological terms, "occupied territories," "administered territories," or "the Judea and Samaria region and the Gaza Strip." I believe that an analysis of Palestinian work in Israel cannot be relieved of the ideological baggage that accompanies the topic. Yet, I prefer to highlight the ideological problems through a substantive discussion on the role of law rather than entangle the text with problems of terminology.

idiosyncratic configuration of interests in the region. At the same time, the Palestinian story is not detached from that of migrant workers worldwide. The inadequacy of Israeli labor law in providing a remedy for Palestinian workers is also a result of a democratic deficit that accounts for the vulnerability of workers who are detached from their nation state. It therefore raises a presumption on the limits of labor law when geopolitical or social borders overlap economic inequality.

II. THE POLITICAL ECONOMY: A HISTORICAL PERSPECTIVE.

Nadim was "invited" to work in Israel, although often viewed as a threat. He is promised wages equal to those of comparable domestic workers, but he does not enjoy equal treatment, equal wages or equal benefits. Nadim would have preferred to stop working in Israel, but he'll do whatever is needed to secure his work permit. The law takes an important part in structuring these anomalies. It is important to contextualize the legal analysis in the political economy of the region. The historical account of the political economy is highly institutional. It complements Nadim's subjective perspective by describing the background conditions that shaped the law governing Palestinian work in Israel. The historical analysis indicates that the disempowerment experienced by the individual worker is a result of political forces on both the Israeli and Palestinian sides which dictate the individual's narrative. This analysis is divided into three phases: cultivating reliance (1967-1970), mutual reliance (1970-1993), and one-sided reliance (1993-present).

A. *Cultivating Reliance: Palestinian Workers in Israel Following the Six Day War*

The Six Day War ended a long period of insecurity within Israel. Once the short war had ended, Israel found itself occupying, with no well defined plan, new territories inhabited by many Palestinians. It was probably unimaginable at that time that the occupation would last for so long. Shortly after the occupation when borders were for the most part recognizable by common knowledge, but physically unmarked in most areas, Palestinians started to cross the borders to work within Israel. At first, the numbers were negligible, but as it became evident that the status of the territories was not likely to change in the short term, they increased. The interests underlying the

political debate regarding the entry of Palestinian workers combined both economic and security considerations.³

As to the security considerations, the dominant position was that of the political hawks who sought to use economic integration as a means of controlling the population of the territories. They argued that their poor economic conditions could lead to a revolt. It was envisaged that employment opportunities in Israel would provide some legitimacy to the political situation. The hawk's security stance also dovetailed some pressing economic interests. Prior to the Six Day War, the Israeli economy was facing escalating wage demands by the Histadrut (the major Israeli trade union). Unable to control the wage escalation, the economy plummeted into a recession. The Minister of Finance saw the influx of additional workers into the Israeli labor market as a means of breaking the Histadrut's monopoly over the labor market and, therefore, an instrument of recovery.

The Palestinian workers admitted into Israel found an existing niche waiting to employ them. This was the niche of manual labor that required low levels of skills and offered low levels of pay and social status. The roots of segmentation in the Israeli labor market lie in the pre-statehood of Israel. They continued after statehood with the process of internal colonization of both the Israeli Palestinian population and of the new Jewish immigrants from Arab countries in the early 1950s.⁴ The quick growth period after the Six Day War ensured that the Palestinians' entry into the Israeli labor market would not be accompanied by internal displacement and unemployment, because those who occupied the lower segments of the labor force, especially the Jewish population, moved upwards to more secure and better paying jobs.⁵

Despite the strong security and economic considerations which justified the policy of permitting the entry of Palestinian workers, there were some objections to the entry of Palestinian workers into Israel. Some were ideological based on the premise of socialist Zionism that viewed Jewish work as a value in itself. Others saw the entry of Palestinian workers as the sign of a long-term occupation and the beginning of a de-facto annexation of the territories. The most serious

3. The mapping of interests draws on two comprehensive studies: MICHAEL SHALEV, *LABOR AND THE POLITICAL ECONOMY IN ISRAEL* (1992); LEV L. GRINBERG, *THE HISTADRUT ABOVE ALL* 162-205 (1993) [Hebrew].

4. On the situation of the Arab minority in Israel, see NOAH L. EPSTEIN & MOSHE SEMYONOV, *THE ARAB MINORITY IN ISRAEL'S ECONOMY* (1993); On the internal colonization of the Jewish newcomers in the 1950s and its aftermath, see SHLOMO SWIRSKI, *ISRAEL: THE ORIENTAL MAJORITY* (1989).

5. On the effects of Palestinian work in Israel on the citizen-workers in Israel, see MOSHE SEMYONOV & NOAH L. EPSTEIN, *HEWERS OF WOOD AND DRAWERS OF WATER* 43-64 (1987).

objection was first voiced by the Histadrut, which was concerned with wage undercutting.⁶ The Histadrut's objection was not based so much on socialist premises of labor solidarity or the fear of the Palestinian workers' exploitation, but on a much more nationalistic agenda that sought to ensure high wages for domestic labor. The economy in the territories was unorganized and wages were drastically lower than those of Israel. It was clear that the Palestinian workers would be willing to work for wages that would undermine all of the Histadrut's efforts to escalate wages. If there was any hesitation in the Histadrut's position, it evolved from the inherent conflict of interests the Histadrut had, being the second largest employer in the state at that time.⁷

The final political compromise was expressed in a Cabinet decision from October, 1970, when the number of Palestinian workers in Israel was already over 15,000. This decision established the basic principles, which are still in force, regarding the employment of Palestinian workers in Israel.⁸ The central provision of the decision was that Palestinians who hold a work permit would be entitled to work in Israel and their wages would be equal to those of domestic workers. To ensure compliance, the Cabinet decision further stipulated that all work permits would be obtained from bureaus to be established by the Israeli Employment Service in the territories.⁹ In practice, it has been the basis for holding that work permits would not be general in nature, but attached to a specified employer. The Employment Service's payments division would also collect the wages and benefits from the employer and remit them to the worker. This process was to ensure that employers would not underpay their Palestinian workers. It further ensured that the employment of Palestinian workers would not be part of the informal economy. All wages would be reported and the payments division could make all the necessary deductions from them. The Histadrut's interest in ensuring that these workers

6. On the Histadrut's position regarding the employment of Palestinians in Israel and its administration of Palestinian workers' interests in later years, see ELKANA MARGALIT, *TRADE UNIONS IN ISRAEL: PAST AND PRESENT* 297-310 (1994) [Hebrew]. See also *supra* note 3. For the Histadrut's official position on this matter, see RAFFEL B. BENKLER, *HISTADRUT AND THE WORKERS FROM THE TERRITORIES* (Histadrut International Department, unpublished manuscript, 1992) (on file with the author).

7. See GRINBERG, *supra* note 3, at 195-201.

8. The Ministers' Committee on Security Number 1/B, from Oct. 8, 1970. The Cabinet decision matches an earlier agreement between the Histadrut and representatives of the Cabinet on Oct. 24, 1968. See GRINBERG, *id.* at 198.

9. The Employment Service is an agency established by the EMPLOYMENT SERVICE LAW (1959). Among its major functions is to act as a centralized employment exchange (the employment bureau). In the past, it was compulsory to seek work through the bureau, although over the years this requirement was relaxed for reasons of flexibility and market efficiency, and currently it mostly applies only to foreign and Palestinian workers.

would make the required contributions to the Histadrut's pension plans was also guaranteed by this centralized arrangement and eased the task of collection from the Histadrut itself.¹⁰

The cabinet decision formalized the mutual reliance of the Israeli industrial relations system (state, employers and the Histadrut) with the Palestinians. Despite its importance, it was enacted in law only in 1994, as part of the statutory arrangements implementing the Israeli-Palestinian peace process documents.¹¹

B. *The Period of Mutual Reliance—1970 to 1993*

The ongoing state of occupation created a new and complex reality in Israel. The borders between Israel and the territories were clear, but lost some of their significance. Jewish settlements were erected in the territories and were accompanied by the growing use of military force to suppress sporadic revolts against the occupation. The economic borders were even more fluid. The territories relied on Israel for necessary commodities and Palestinian workers continued to stream into Israel.¹² During this period, the number of permit holders gainfully working in Israel was steadily on the rise (see Figure 1), while almost the same number of workers worked unlawfully without holding a permit. It is estimated that at times, almost a third of the workforce in the territories was employed in Israel, while others worked in Arab countries, mostly on the Persian Gulf, and the rest worked within the territories or remained unemployed.¹³ Although Palestinian workers accounted for only a small share of the workforce in Israel, five to ten percent, depending on the period of time and whether illegal workers are included, they secured a few niches in which they dominated the workforce. These included menial low-wage work and temporary (seasonal) work, most notably in construction and agriculture, and to a lesser extent in traditional industry and services.

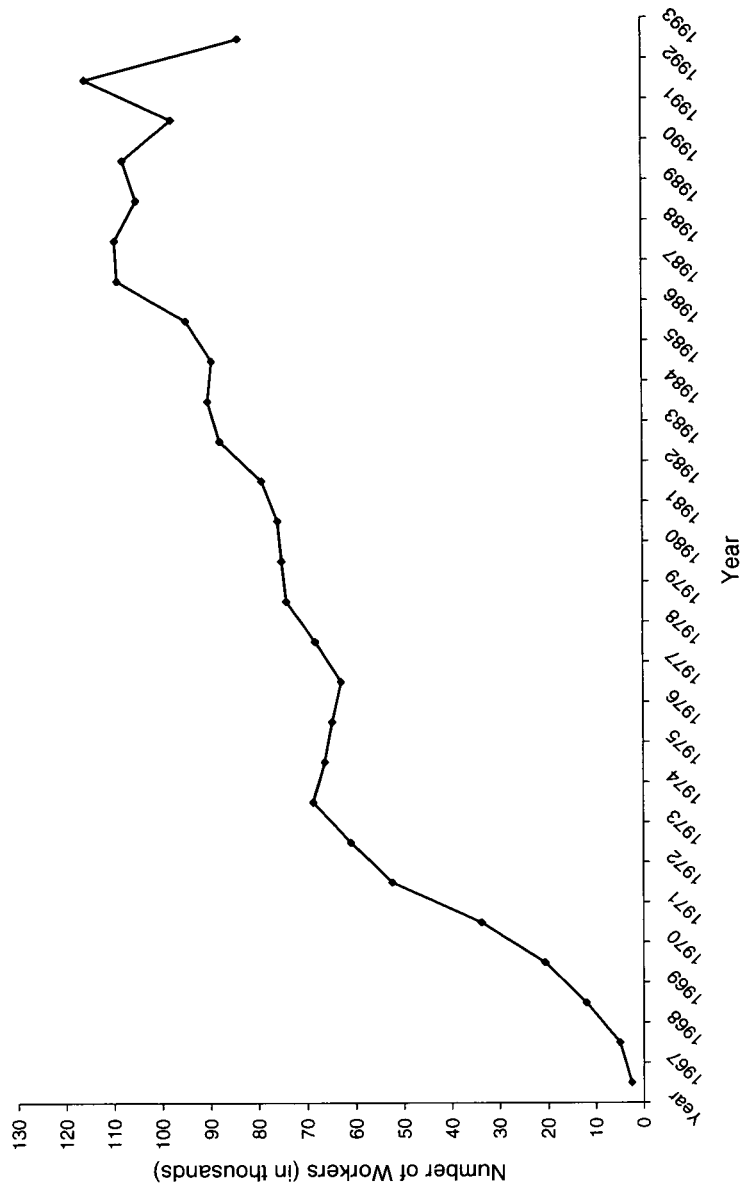
10. See GRINBERG, *supra* note 3, at 199-200.

11. THE LAW IMPLEMENTING THE AGREEMENT ON THE GAZA STRIP AND JERICO AREA (1994).

12. Salim Tamari, *The Palestinians in the West Bank and Gaza: The Sociology of Dependency*, in THE SOCIOLOGY OF THE PALESTINIANS (1980).

13. For a survey and analysis of Palestinian work in the described period, see Emanuel Farjoun, *Palestinian Workers in Israel: A Reserve Army of Labor*, in FORBIDDEN AGENDAS 107-143 (1984).

FIGURE 1¹⁴
Number of Palestinian Workers in Israel 1967-1993



14. Source of data: Israeli Central Bureau of Statistics, MONTHLY BULLETIN OF STATISTICS. All measurements on this topic are controversial. It is difficult to measure the number of illegal workers and there is also a large number of independent contractors and vendors who have a permit to engage in trade in Israel. The two groups are not counted. There are also very different figures that are published by alternative sources. These are often used by the ILO Report of the Director General (Appendix), REPORT ON THE SITUATION OF WORKERS OF THE OCCUPIED TERRITORIES (annual publication). Because the emphasis here is on the trend, rather than on the absolute numbers, the exact numbers are of little importance. All the data series demonstrate the same trend.

The 1970 Cabinet decision was generally carried out, at least at the level of formal policy, and to a larger extent, to the level of formal administrative implementation.¹⁵ In reality, however, the large number of workers who worked illegally, and the disorder that accompanied the administration of Palestinian work in Israel, suggest a more complex picture. Some workers experienced the humiliation of selling their work on a daily basis in what were known somewhat bluntly as the "slave markets." These markets were informal venues located at major highway junctions where workers would crowd early in the morning waiting for a work opportunity. Small contractors turned up to select workers for a day's work, with little or no negotiations over pay. None of these workers held a valid work permit, nor was any law or rule applicable to their employment in Israel. By contrast, some permit holders, especially those from East Jerusalem, enjoyed the right to vote and the right to get elected in workers' committees that were established at their workplace and were promoted according to rules established by collective bargaining agreements. Those who retired after years of work for one employer also enjoyed a pension, usually just a basic pension, but occasionally even a comprehensive pension plan.

The policy forbidding Palestinian workers to stay overnight in Israel was principally based on security justifications, but also on the desire to prevent a residential presence of Palestinians in Israel. Despite the difficulty of daily commuting, the authorities asserted that, "it is generally acknowledged that traveling time, although usually more than that spent by Israeli workers, is nevertheless within reasonable time. Moreover, traveling to and from work in the company of other persons from the same village, who often work at the same site, may reinforce village identity."¹⁶ This statement vividly demonstrates the authoritarian spirit in which the Cabinet's decision of 1970 was implemented.

The political climate changed drastically during the Palestinian uprising (the intifada) that started in November, 1987. The spontaneous widespread revolt against the occupation was not the result of a well organized nationalistic agenda. The active participants in it were, for the most part, workers whose motivation was to exact vengeance for the daily humiliation they experienced.¹⁷ In one of the thorough

15. For the state's formal position on these issues, see STATE OF ISRAEL, MINISTRY OF DEFENSE, COORDINATOR OF GOVERNMENT OPERATIONS IN JUDEA AND SAMARIA AND GAZA DISTRICT, AN EIGHTEEN YEAR SURVEY (1967-1985) (1986).

16. STATE OF ISRAEL, MINISTRY OF DEFENSE, *Id.* at 21.

17. Gad Gilbar, *The Demographic and Economic Origins of the Intifada*, in *At the Core of the Conflict: The Intifada* (1992) [Hebrew].

journalistic accounts of the intifada, the authors reported that when those detained were asked about their reasons for taking an active part in the uprising, they gave a fairly consistent response:

a personal experience of maltreatment by their Jewish employers in Israel or by their fellow Jewish workers. Each one had his own personal story. Even those who settled comfortably in one stable workplace and had a close relationship with their employer held some grudge. The stories were all similar. Verbal abuse, occasional physical abuse, denial of wages, unreasonably difficult work, and above all, the abuse suffered at the hands of the security forces, including the military and police . . . The more intimate their relationship with the Israelis, the more hostility and jealousy colored their experience . . . Israel has provided them with the experience of denial. Some were denied their wages. Others were denied participation in the workers' committees that represent all workers. They were denied social benefits in return for the considerable sums deducted from their wages. They were denied their dignity.¹⁸

The sense of abuse was not limited to work-related experiences and included all aspects of daily routine: traveling from place to place, searches and seizures, confiscation of identity cards, and more.

The intifada lasted for several years.¹⁹ Surprisingly, throughout the intifada, the number of Palestinians working in Israel remained relatively stable. Yet, for the Israeli employers and co-workers, the Palestinians were viewed as an immediate security threat. Indeed, there were some violent occurrences in which workers were involved, but they were committed by illegal workers (*i.e.*, those not holding work permits). Similarly, for Palestinian workers, the ambiguity of amicable and suspicious relations that prevailed before the intifada was replaced by hostility and economic necessity.

The explanation of the enigmatic *de facto* state of war between the Palestinian people and Israel, together with the continuation of economic integration, lies in the years of mutual-reliance cultivated by the Cabinet decision of 1970. Since the decision to allow Palestinians to work in Israel, the territories have become a dependent suburb of the Israeli economy. By the time the intifada started, it was impossible to untie the territories from the Israeli economy and the political climate was unsuitable for initiating economic independence for them. The Palestinians were therefore unable to forgo their employment opportunities in Israel. The mutual reliance formula's flip-side also explains why Israeli employers strongly objected to cutting back on

18. ZEEV SHIFF & EHUD YAARI, INTIFADA, 75-77 (1990) [Hebrew; translated by the author].

19. It is unclear whether it formally ended, although the Oslo agreement of 1993 may be viewed as a pivotal point terminating the uprising. *Id.* at 75.

Palestinian work in Israel. The presence of Palestinian workers in some sectors, most notably construction and agriculture, became anything but temporary. Twenty years of Palestinian labor in these sectors stigmatized the work as "Arab jobs." Israeli workers were reluctant to substitute for the Palestinians. Moreover, years of a cheap and readily available workforce led to manual work routines and low investment in technology. The manual and difficult nature of construction work further deterred Israeli workers from construction jobs.

The employers' interests were voiced most strongly following the Gulf War (1991).²⁰ The Palestinians' support for Iraq was met by a long closure imposed on the territories and workers were denied entry into Israel. The closure, which lasted over two months, caused a considerable slowdown in all construction and agricultural work in Israel. After the closure was lifted, Israel, for the first time, reduced the number of work permits and a strict quota system was introduced. The justification given for this policy was security. Yet, despite the hostility that the Palestinian position elicited among the Israeli people, employers consistently demanded that the security forces allow Palestinian workers to continue their work in Israel. The employers' lobbying during the months after the closure was lifted, succeeded and resulted in a record number of work permits issued for Palestinians in Israel in 1992 (see Figure 1). Thus, the economic reliance on Palestinian labor defeated the alleged security justification. The economic reliance of the territories on the Israeli labor market, especially after the Palestinian workers were expelled from the Gulf states because of their support for Iraq, defeated the hostility towards the Israeli employers. The peak number of Palestinian workers in Israel during 1992, seemed to indicate the stability of the mutual reliance formula in the regional labor market. However, in reality, it presaged its end.

20. From 1991, a growing concern regarding the absence of Palestinian workers was expressed in the professional newsletters and journals of the agriculture and construction sectors, as well as in general managerial monthlies. A short list of these articles includes: Yaakov Orev, *Agriculture with No Dependence on Workers From Judea, Samaria and Gaza*, THE FIELD 848 (1993); Shai Chermesh, *Will Abel Strike Cain?*, GARDEN, FIELD AND FARM 42 (1993); Yossi Oren, *What's Happening in the Fields?*, GARDEN, FIELD AND FARM 47 (1993); Ilan Alter, *Contractors and Equipment Are Idle, Waiting for New Projects*, CONSTRUCTIONS 29 (1993); Tamar Fisher, *Employing Foreign Workers*, CONSTRUCTIONS 28 (1994); Simona Leibovitz, *A Sector in Transition*, CONSTRUCTIONS 37 (1992); Arnold Gross, Shosh Speigel & Asher Izrael, *Shocks Expected in the Israeli Economy*, 79 MANAGERS 28 (1994). [All sources are in Hebrew.]

C. *One-Sided Reliance: Palestinian Workers in Israel from 1991 to the Present*

The Madrid convention in October, 1991, started a new political era of efforts for peace in the Middle East, eventually leading to the signing of the Declaration of Principles (the "Oslo Agreement") by Israel and the PLO. Subsequently, two protocols were signed in April and May, 1994. Section 7 of the Paris Protocol on Economic Relations holds that, "both sides will attempt to maintain the normality of movement of labor between them, subject to each side's right to determine from time to time the extent and conditions of the labor movement into its area." Following the Oslo Agreement and these protocols, the Palestinian autonomous entity was established in Gaza and Jericho and peace negotiations have continued since then.

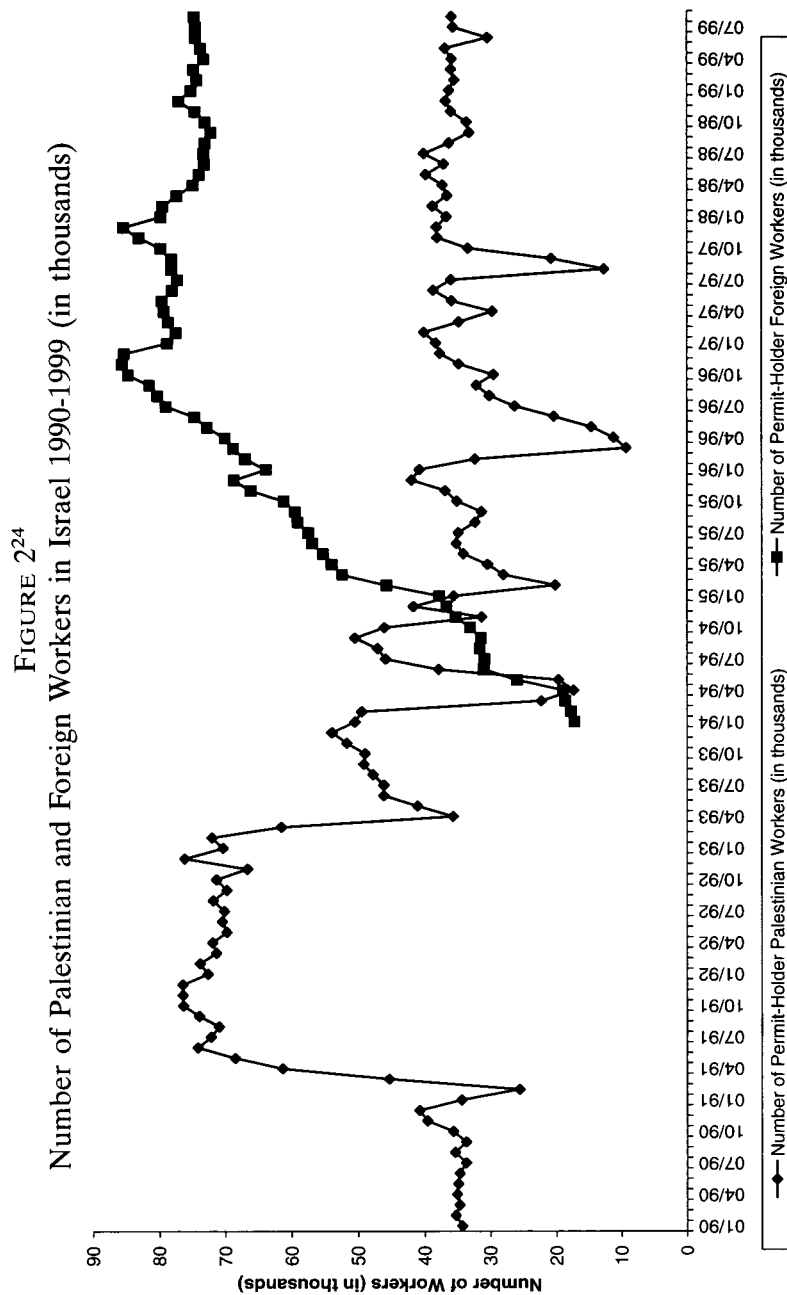
The peace process, whenever it materializes, holds a great promise for the region. Primarily, it will respond to the security threat felt daily by all sides, but it is also well acknowledged that peace carries an economic dividend.²¹ However, five years after the Madrid conference, the ILO noted that the misery index in the occupied territories has climbed. In the Gaza Strip, unemployment figures fluctuated between 17 and 33% and in the West Bank, they ranged between 11 and 30%.²² Only in 1998, has the decline in the Palestinian economy come to a halt.²³ The explanation to these findings lies largely in the new policy on the employment of Palestinian workers in Israel.

Between 1991 and 1999, the territories have been sealed off numerous times amounting to a total of approximately thirty-four months. Some closures were complete, others were partial, some lasted a few days, others lingered for several months. Some were in response to terrorist attacks within Israel while others were preventive in nature, for example, during the Jewish holiday period in September or April of each year. Unlike the generally steady rise in the number of Palestinians employed in Israel until 1992, the figures since then indicate frequent fluctuations with a general tendency to decline (see Figure 2).

21. On the importance of the "peace dividend" and its distribution, see the following collections of essays: STANLEY FISCHER, DANI RODRIK & ELIAS TUMA, *THE ECONOMICS OF MIDDLE EAST PEACE: VIEWS FROM THE REGION* (1993); STANLEY FISCHER, LEONARD HAUSMAN, ANNA KARAIK & THOMAS SCHELLING, *SECURING PEACE IN THE MIDDLE EAST: PROJECT ON ECONOMIC TRANSITION* (1994); see also Ofira Seliktar, *The Peace Dividend: The Economy of Israel and the Peace Process*, in *THE MIDDLE EAST PEACE PROCESS: INTERDISCIPLINARY PERSPECTIVES* 223-236 (1998).

22. These figures represent peak employment. See ILO, *REPORT OF THE DIRECTOR-GENERAL, APPENDICES, REPORT ON THE SITUATION OF WORKERS OF THE OCCUPIED ARAB TERRITORIES* 28 (1996).

23. ILO, *REPORT OF THE DIRECTOR-GENERAL, APPENDICES, REPORT ON THE SITUATION OF WORKERS OF THE OCCUPIED ARAB TERRITORIES* 7 (1999).



24. The source of data is from the ISRAELI CENTRAL BUREAU OF STATISTICS, MONTHLY BULLETIN OF STATISTICS. On the reliability of information, see *supra* note 14.

Paradoxically, while closures were uncommon during the intifada, they have become the common response to the alleged security problem after the peace process began. For a third of the working population in the territories who were employed in Israel in the early 1990s, and for a larger share of the households that benefitted from the income earned in Israel, closure constitutes a harsh economic blow. The hardship imposed by the closures was not limited to the temporary unemployment involved. First of all, the long and numerous closures reduced the available income for many households in the territories, lowering consumption, and thus, strongly affecting economic activity in the territories. Secondly, as Figure 2 demonstrates, since the peace process emerged, the use of closures has been coupled with a general decline in the number of workers in Israel. After each closure, fewer permits are issued. The decline is attributed to a new policy to restrict the number of Palestinians working in Israel. This policy requires two explanatory components: The first concerns the reason for denying Palestinians their work permits and the second is the absence of effective employers' pressure as was demonstrated during the years of the intifada.

The debate held throughout the 1990s with regard to the employment of Palestinian workers in Israel is reminiscent of the debate that brought about the 1970 Cabinet decision. The alliances between the political and economic factors have remained almost the same since then.²⁵ The emerging peace process and the frequent terrorist attacks in Israel led the Labor government that was elected in 1992, to opt for a policy of separation between Israel and the Palestinian entity. The motivation for this was both mixed and inconsistent.²⁶ The more benign motivation asserted that separation was necessary in recognition of the autonomy accorded to the Palestinians in the territories. At the same time, political statements also made clear that reducing the number of workers allowed to enter Israel was meant to pressure the Palestinians in the political negotiations. A third explanation asserts

25. For a systematic analysis of economic and political arguments that have been raised during the peace talks with regard to economic integration in general, see Oren Gross & Eli Sagie, *Separation or Integration: Comments on the Economic Aspects of the Permanent Israeli-Palestinian Agreement*, *ECONOMIC QUARTERLY* (forthcoming, 2000) [Hebrew].

26. In addition to numerous journalistic accounts of the various positions, these may be identified in various Knesset Records, including those on the number of permits issued to Palestinian workers (February 4, 1998; February 26, 1997; April 20, 1994; November 15, 1993), those on the work conditions of Palestinian workers in Israel (July 12, 1995; November 2, 1994; June 29, 1994), and those on the Law of Foreign Workers (1991) and its amendments (see *infra*, § IIID.) (January 8, 1996; November 1, 1994; December 20, 1993; March 12, 1991; February 19, 1991).

that it is necessary to cut down the number of permits to defy the growing number of terrorist acts.

The counter-political argument, which favored maintaining a high level of Palestinian employment in Israel, was likewise based on several reasons. Unlike the debate in 1970, very few actually believed that at this stage of the peace process, the entry of Palestinian workers would actually blur the borders and aid the annexation of the territories. The concern for the economic well-being of the Palestinians in the territories was common to most supporters of economic integration. It was clear that lowering the number of permits would seriously damage the Palestinian economy that relied on labor export. A moralistic strand of the supporters for the continuation of Palestinian work in Israel was based on the moral responsibility of Israel as the beneficiary of Palestinian labor throughout the years since occupation and its responsibility for the absence of economic independence in the territories. The more dominant, pragmatic version was based on the fear of poverty and misery in the territories and its impact on the fragile peace process.

As long as the employers, and most notably the employers' associations in Israel, supported the continuation of Palestinian work in Israel, the separationist tendencies had only a marginal impact. Yet, employers still sought a way to escape the mutual reliance formula. The first opportunity came with the massive Jewish immigration wave from the former Soviet-Union. The efforts to integrate them into the low-skilled, low-waged niche occupied by the Palestinians was not highly successful.²⁷ The immigrants soon realized the negative social premium placed on working in "Arab jobs." The Jewish immigration wave also exacerbated the need for more low waged construction workers because the Government exerted a strong pressure on construction companies, by means of economic incentives, to rapidly build new housing projects that would respond to the serious housing shortage at the time.

Consequently, employers sought an alternative way to escape the mutual reliance formula with the Palestinian workers. Following the long closure imposed on the territories during the Gulf War, employers requested permits from the Minister of Labor and Welfare to bring foreign workers into Israel. In light of past policy which strictly objected to the entry of foreign workers into Israel except under extraordinary circumstances, the permits requested were limited at first

27. See David Bartram, *Foreign Workers in Israel: History and Theory*, 32(2) THE INTERNATIONAL MIGRATION REVIEW 303 (1998).

for temporary aid to repair the economic harm caused by the closures. Despite her objection, the Minister of Labor and Welfare could not resist the employers' pressures, approving the entry of a steadily growing number of foreign workers. By 1994, the trickle of permits for foreign workers had become a flood. By 1995, there were approximately 75,000 foreign workers in Israel holding a valid work permit and probably the same number without one. Thereafter, the number continued to rise peaking in 1997, at an estimated 200,000 foreign workers (with and without valid work permits), although the exact figures are highly controversial and difficult to ascertain.²⁸ The reduction in the number of work permits for Palestinian workers was matched almost precisely by the increase in those issued for foreign workers (see Figure 2).

The entry of foreign workers into the Israeli labor market accounts for the absence of employers' demand for Palestinian workers since 1992. The fate of foreign workers in Israel merits a separate discussion.²⁹ Clearly, the entry of foreign workers distorted the formula of mutual reliance which had served as the most important safety net for Palestinian workers in Israel.³⁰ The presence of foreign workers in Israel has introduced new social problems to the Israeli society which was unaccustomed to the presence of foreign (migrant) labor in the past. Still, a large part of the Israeli population strongly objects to the continuation of Palestinian work in Israel and prefers the foreign workers, indicating the intensity of their personal insecurity.³¹ More recently, opinion surveys are also starting to reveal the growing xenophobia stirred by the quick and massive influx of foreign workers into Israel.³²

28. The formal figures are reported by the Israeli Statistical Bureau in its periodic publications. Real estimates (which include both legal and illegal workers) are derived from a conference on the employment of foreign workers sponsored by the Israeli Center for Management in November, 1997.

29. See *supra* note 27. The first effort to conceptualize the phenomena of foreign workers in Israel is by Leah Achdut & Ruby Nathanson, *THE NEW WORKERS: WAGE EARNERS FROM FOREIGN COUNTRIES IN ISRAEL* (1999) [Hebrew].

30. David Bartram carefully notes that the entry of foreign workers was based on both political and economic reasons. His argument matches the analysis here which highlights the complementary nature of security and economic interests; *supra* note 27.

31. In a study conducted in 1996, 58% of the surveyed population preferred foreign workers over other alternatives, while only 5% showed preference for continuing to employ Palestinian workers. The other options presented were workers from neighboring countries (13%), does not matter (10%) and none/do not know (14%). Roni Bar Tzuri, *Foreign Workers in Israel: Conditions, Attitudes and Policy Implications*, in *THE NEW WORLD OF WORK IN ERA OF ECONOMIC CHANGE* 31-64 (1996) [Hebrew].

32. SENATE FOUNDATION AND THE FRIEDRICH EBERT FOUNDATION, *ANNUAL SURVEY OF PUBLIC OPINION ON FOREIGN WORKERS IN ISRAEL* (Dec. 1999).

Starting in July of 1997, the Likud government sought to ease the economic pressure on the Palestinians by introducing a number of measures. They included, among others, the removal of the quota system, defining a few thousand workers as "closures-proof" (*i.e.*, workers who will be allowed to enter Israel, even at a time of closure), allowing a few thousand workers to sleep overnight in Israel and easing the formalities at the Erez Gate.³³ The reasons for these new policies are twofold: First, the Likud government is more inclined to encourage integration of the Palestinian economy, compared to the dominant strand of the Labor Party's leadership, who support a separation plan. Secondly, the desire to encourage the entry of Palestinian workers is a result of a growing awareness regarding the extent of the social problem created in Israel by the entry of foreign workers.

The new policy must still be regarded with suspicion because removal of the quota system was possible only because it is well known that the demand for Palestinian labor is currently limited and the economic (*i.e.*, market governed) quota is much stricter than the political one. An important factor in the slack demand for Palestinian labor is that foreign workers, both legal and illegal, are considerably cheaper than legal Palestinian workers.³⁴ As Figure 2 demonstrates, the removal of quotas did not result in a growing employment of Palestinians in Israel. Also, during some of the closures imposed since the new policy was announced, the closure-proof permits were of no use and the closures were complete. Given the consistent history of a discrepancy between asserted policy and de-facto policy, it is still difficult to assess the new development. This state of uncertainty aptly concludes the development of the political economy in the region.

III. THE LAW

Traditionally, articles in law start with a case or a statute. The analysis of the law then expands from the legal text outwards to other disciplines, drawing on various methodologies. This strategy is difficult to implement in the case of the Palestinian workers in Israel. Based on the narrative and the three-staged presentation of the political economy, the legal analysis must confront two structural puzzles.

The first puzzle evolves from Nadim's story. Nadim's daily routines are saturated with law, yet Nadim is a subject at the margins of law. The extensive bureaucracy that deals with work permits, the searches at the bus stops, the employment service that centralizes the

33. The Knesset Protocols, Announcements by the Minister of Labor and Welfare, on Jan. 7, 1998 and July 8, 1999. See *supra* note 23, at 5.

34. Workers' Hotline Bulletins (April, 1997) (November, 1999).

employment of Palestinians in Israel, and other daily institutions that govern each and every step Nadim makes, are all products of the law. Yet, for those who seek to read the law as telling a story about everyday life, the primary legal texts on Palestinian work in Israel, most notably statutes and cases, suggest that Palestinian workers in Israel are almost invisible. They hardly seem to be subjects of Israeli law, as a group or as individuals. This is the puzzle of lawlessness.

The second puzzle evolves from the three-phased analysis of the political economy in the region. This analysis indicated that where formal expressions of law can be identified, they seem *prima facie* to be benign. The entry of Palestinian workers into Israel is governed first and foremost by the principle of equality originally formulated in the Cabinet decision from 1970. Yet, in Semyonov and Epstein's comprehensive study of Palestinian workers in Israel, there are indications that wages for legal Palestinian workers in Israel are considerably lower than wages of comparable domestic workers.³⁵ Palestinian workers are heavily segregated into a number of sectors and occupations.³⁶ A large number continue to work illegally. Semyonov and Epstein find empirical support for the prevalence of the exclusionary explanatory model, according to which superordinate groups that are threatened by wage competition from minority group members, establish mechanisms, legal and others, to block them from joining lucrative occupations.³⁷ These institutional mechanisms can also account for the wage differentials between comparable Israeli and Palestinian workers, even after controlling differences in human capital.³⁸ Juval Portugali criticizes the market-segmentation theories for ignoring nationalist dimensions of the Palestinian's employment in Israel. However, Portugali also notes that wage discrimination and segmentation is derived from the generative order of the modern welfare state.³⁹ Consequently, the second puzzle which must be addressed is how can the formal legal statement of equality be resolved with the institutional structures that entrench inequality.

Together, the two puzzles shape the agenda for legal analysis. They require a broad construct of what law is, the function it plays, and a critical scrutiny of how it is implemented in action. "Law" is to

35. See *supra* note 5, at 88.

36. *Id.* at 17-42.

37. *Id.* In their work, they draw on the work of Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547 (1972). This work is also in line with the literature on labor market segmentation as developed originally by MICHAEL PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979).

38. *Id.* at 85-98.

39. JUVAL PORTUGALI, *IMPLICATE RELATIONS: SOCIETY AND SPACE IN THE ISRAELI-PAL-ESTINIAN CONFLICT* 73-74 (1993).

include more than its simple presentation in statutes and cases. In this sense, the executive decision from 1970 is "law." The fact that it was not codified as a statute until 1994 is also "law," just as the fact that it still awaits serious judicial scrutiny. Lawlessness is just as much a legal reality as formal presentations of law. In a similar vein, the text of a law which is not enforced cannot be treated as a statement of the law. The expansive perception of law suggests that the solution to the puzzles of lawlessness and inequality is to be found in a contextual analysis of the law. The reading of the law, or its absence, must be embedded in the political economy of the region and the institutional infrastructure that underlies it.

The first part of the analysis will suggest that the absence of the Palestinians' effective political voice must create a theoretical presumption against the power of law to protect their interests. To test this presumption, the subsequent parts of this section will observe all three branches of government: legislative, executive and judicial. Together, the various components of the analysis will elucidate the precise factors of the Palestinians' situation. The analysis will distinguish between problems of enforcement (section B), problems associated with the content of the legal rule, both primary and secondary (sections C and D), and problems rooted in adjudication of the legal rule (section E).

A. *Raising a Presumption Against the Traditional View of Labor Law—the Democratic Deficit*

The study of the role of law governing Nadim's experience as a worker in Israel is by definition the study of labor law. It is the law that governs the exchange of work for money. The *prima facie* benign law that regulates Palestinian work fits the traditional pluralist account of labor law, according to which law seeks to mediate the inherent conflict between labor and capital, as well as other social cleavages.⁴⁰ Law counterbalances the immediate interests and inclina-

40. The term "pluralism" denotes various meanings. One relevant meaning is that which was developed by the industrial pluralists, starting with the seminal work of SIDNEY & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* (1897). In their work, the Webbs emphasized the need for organized representation of workers' interests as a method of empowerment in a market society. This theory has been translated into a particular notion of collective labor regime, and accordingly, labor law. On this conception of industrial pluralism and its limitations, see Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. OF CHI. L. REV. 575 (1992). However, the term "pluralism," as used here, also accommodates individual entitlements and statutory standards of the type described in RICHARD EDWARDS, *RIGHTS AT WORK* (1993). More generally, the term here seeks to cluster the various ideologies and political instruments that seek to tweak capitalist markets for the purpose of empowering workers without undermining the capitalist market itself.

tions of the strong factions in society and serves as a protective device for the weaker ones. It seeks to inhibit the reproduction of social domination in order to provide social stability. According to this view, law is a power-breaking institution for it aims to break the accumulation of power by the stronger party.

The pluralist regulation of labor is traditionally composed of three building blocks: the law of contracts, mandatory statutory standards and autonomous collective labor law. These building blocks co-exist, but they are constantly in competition because each assumes different power structures.⁴¹ The law of contracts leaves the distribution of power for the market to decide on an individual basis. Similarly, the rules structuring collective negotiations between labor and capital relegate the distribution of power to competitive market pressures, but individual market power is replaced by collective power. Statutory standards assign entitlements and empower various groups on the basis of collective (social) decision making. Yet, unlike autonomous collective labor law, statutory standards reflect the interplay of political power among the various factions in society rather than the politics of collective bargaining. From the outset, when thinking about the three forms of labor regulation, it is almost inconceivable that any of these can be used as a power-breaking instrument in favor of the Palestinian workers.

Market power is often deemed by economists to be a sufficient power-breaking regulatory measure of the labor market. However, even when putting aside the debate over both the efficiency and justness of an unfettered labor market, Palestinian workers are excluded from the operations of the market altogether. At the macro-level, control over the supply of Palestinian labor is, at least formally, independent of economic considerations and regulated wholly by centralized political agencies. The quotas imposed during the last few years are mostly responsive to labor demand and only to a much lesser extent to labor supply.⁴² At the micro-level, the work permit ties the Palestinian worker to a single employer.⁴³ A worker who wants to move from one employer to another must receive a new work permit. The employer for whom he works must sign a "release form" before

41. See generally PAUL WEILER, *GOVERNING THE WORKPLACE* (1990).

42. See *supra* section II. It is interesting that even after removing the quota system in 1998, the prevailing constraint on the employment of Palestinians is the slim demand for their labor and not problems associated with labor supply. The reason is that the state continues to regulate the demand for Palestinian labor indirectly, through the foreign workers' permit system, instead of directly, through the Palestinians workers' permits system. See *supra* section IIC.

43. The source of this decision is an internal policy of the Ministry of Interior Affairs, authorized by Section 6 of the LAW OF ENTRY TO ISRAEL (1952).

he is allowed to apply for a permit to work for a new employer.⁴⁴ Unlike a comparable domestic worker, if the Palestinian worker's employer refuses to pay him his wages, the threat of leaving his employer is attenuated at best. Given that most Palestinian workers are engaged in low-skilled, low-waged jobs, the employer can easily replace the worker while the worker's prospects of finding a new job are faint. Even if the worker finds a new employer willing to employ him, a mission that has become more difficult since 1993 when alternative options for employing cheap labor became available, the transaction costs are prohibitive. The bureaucratic process for issuing a new permit requires obtaining the release form, seeking a new employer, applying for a new permit, and even going through a renewed security inspection. Although the Employment Service has recently canceled the requirement of a release form, in response to abusive practices in which employers required their workers to sign a waiver of all claims they may have, the procedures for moving from one employer to another are still cumbersome.⁴⁵ As individuals, Palestinian workers do not function in a market environment. They are denied even the slim protection provided by markets for low-skilled workers.

In the past, the market power of Palestinian workers was for the most part collective, although not organized. The years of mutual reliance guaranteed these workers steady employment because they could not be substituted by domestic workers. Unlike the economic analysis of markets, for many employers they were merely generic participants in a large labor pool and not distinguishable individuals. Their power was therefore in their collectivity and strong enough to ensure their employment even after the intifada started. Yet, given that their power was based on an easily substitutable commodity—cheap labor—it was too fragile. Once the strongly nationalistic labor market in Israel joined the world-wide globalization trend and opened the gate to foreign workers, the Palestinians as a group had little to offer in terms of relative economic or political advantage. Their wages were higher than those of foreign workers and they were deemed to be a walking “ticking bomb.”

The collective power of Palestinian workers is different, not only from the typical power attributed to workers in the economic analysis

44. The requirement of providing a release letter is grounded in the Employment Services' internal procedures. These are not formally “law,” but rather administrative rules that are deemed to be technical in nature. Their validity according to the principles of administrative law has not been tested.

45. The decision to cancel the requirement for a release letter is in the Employment Services' internal procedures, update from April 1997. On the normative status of these decisions, *see id.*

of markets, but also from the typical power of organized labor. Although there is no legal restriction on foreign unions to organize workers in Israel, this has never been done and the political situation of the Palestinian General Federation of Trade Unions (PGFTU) did not allow such an innovative effort.⁴⁶ The Histadrut never took a strong position on aiding Palestinian workers in Israel. Indeed, from the time of the territories' occupation, Histadrut officials have been concerned with Palestinian work in Israel, but not with Palestinian workers as such. The fundamental question that concerned the Histadrut was whether the employment of Palestinians in Israel would undercut its achievements in collective bargaining. The Histadrut did provide some representation for Palestinian workers.⁴⁷ It translated some of the applicable collective bargaining agreements to Arabic, secured a seat for Palestinian workers on the workers' committees established in workplaces where their presence was substantial, and provided limited consultation and legal representation, most notably for workers from East Jerusalem. Yet, in general, its efforts to secure the rights of Palestinian workers were negligible compared with the representation it provided to domestic workers. Most notably, the Histadrut decided not to accept Palestinian workers as members of its trade unions.⁴⁸

46. The weakness of the Palestinian trade unions can be attributed to various factors. First, these are unions that function under a state of occupation. Israel never objected to trade union activity in the territories as such, but viewed trade unions with suspicion. Until the mid-1980s, trade unions were mostly dominated by the Communists, and from the mid-1980s onwards, they switched their alliance to the Fatah branch of the PLO. The border between traditional trade unionism and political activism, including the use of violent force, was not clear in the past, leading to the Israeli treatment of trade unions as a security threat. Consequently, their steps were closely monitored by the military authorities in the territories. During the intifada, many of the trade unions' offices were shut by the military authority for security reasons.

A second set of problems encountered by trade unions in the territories is rooted in their fragmentation. A few years ago, 161 trade unions were reported to be active to varying degrees, while in the 1980s, approximately 50 trade unions were registered with the Israeli Military Authorities. Registration is required by the Jordanian Law, No. 21, from 1965, which governs trade unions in the West Bank, and the Egyptian Military Order 331, that governs trade unions in the Gaza Strip. The Jordanian law stipulates that any group of workers which has more than 20 members can establish itself as a trade union. The small number of workers required is responsible in part for the fragmented structure of trade unionism. Furthermore, trade unions tend to be very local in nature and socially factionalized, occasionally deploying rivalrous strategies. The institutional structure does not lend itself to an effective use of organizational power.

The problems described here are detailed in the various ILO REPORTS OF THE DIRECTOR GENERAL, APPENDICES: REPORT ON THE SITUATION OF WORKERS OF THE OCCUPIED ARAB TERRITORIES (various years 1985-1996). See also JOOST HILTERMANN, BEHIND THE INTIFADA: LABOR AND WOMEN'S MOVEMENTS IN THE OCCUPIED TERRITORIES (1991).

47. See *supra* note 6.

48. One of the reasons for the Histadrut's resistance to accept Palestinian workers as full fledged members was the ILO's objection to such practices. The ILO viewed such a step as a blurring of the state of occupation. I thank Professor Ruth Ben-Israel for this observation.

The only substantial formal move for workers' solidarity the Histadrut displayed was in March, 1995, when together with the PGFTU it established a liaison committee to solve the problem of Palestinian workers in Israel and agreed to pay the PGFTU half of the one percent deducted from the Palestinian workers' wages as trade union agency fees. This agreement was one of the first times the Histadrut opted for a policy not heavily influenced by nationalism, although even this agreement is better explained by the political climate of peace-making than by genuine labor solidarity.⁴⁹ Lacking organized representation in Israel by either the PGFTU or the Histadrut, the Palestinian workers could not rely on their potential collective power for economic negotiations or political pressure.

Finally, it is quite evident why statutory standards are not likely to help these workers. The political process in general, and the democratic process in particular, is generally controlled by the "insiders", while "outsiders" are not allowed to participate. As residents of the territories, the Palestinian workers have very little power to affect Israeli statutory policy. Their interests could be represented only by solidaristic labor groups, left-wing political parties, and non-profit organizations within Israel. Yet, the influence of such groups is considerably smaller compared to that of the alliance of interests between employers and the government, as was demonstrated in the preceding historical analysis.

Palestinian workers are thus employed in Israel without any of the formal bases of power which traditional labor law relies upon. They have no direct impact on the democratic process through which minimum labor standards are determined. They do not function in a market setting where wages and working conditions are affected by the forces of supply and demand. They do not enjoy trade union representation. The absence of power indicates a democratic deficit.⁵⁰ Any legal arrangement that governs their employment in Israel is not affected by their interests. Consequently, the initial presumption must be that with regard to Palestinian workers, labor law cannot fulfill its power-breaking role as it secures the interests of those who are represented in the democratic process or in the operations of the labor mar-

49. The agreement, for the most part, did not materialize for a long time as the Histadrut experienced extremely difficult financial difficulties after 1995, and did not transfer to the PGFTU the trade union agency dues as agreed. Recently, the ILO reported that the Histadrut and the PGFTU reported that the transfers are now being made. See ILO, *REPORT OF THE DIRECTOR-GENERAL, APPENDICES, REPORT ON THE SITUATION OF WORKERS OF THE OCCUPIED ARAB TERRITORIES* 17 (1999). While the Histadrut still maintains an ongoing relationship with the PGFTU, the relationship is currently, like the peace process, undeveloped and hesitant.

50. On the democratic deficit, see MICHAEL STORPER & ALLEN SCOTT, *PATHWAYS TO INDUSTRIALIZATION AND REGIONAL DEVELOPMENT* (1992).

ket, individually or collectively. Still, it is only a rebuttable presumption. The principle of equality asserted by the Cabinet decision, and the absence of any statutory arrangement that explicitly discriminates against these workers, may point to the need to revise this initial presumption. To test this presumption, there is a need to scrutinize the Cabinet decision and the legal developments following it.

B. The False Promise of Equality: Enforcement of Palestinian Workers' Rights

The basic principle outlined in the Cabinet decision passed in 1970, was that all Palestinian workers were entitled to wages and social conditions similar to those of comparable domestic workers. It is arguable that the Cabinet decision was only declaratory, rather than constitutive in nature. Wages and benefits in sectors where Palestinian workers concentrate are established primarily through minimum standards legislation, collective bargaining agreements and extension orders issued by the Minister of Labor and Welfare.⁵¹ Furthermore, limited equality to non-domestic workers is required by the international conventions that Israel has ratified.⁵² Except for the National Insurance Law, which limits most of the benefits to Israeli citizens or residents, there are no labor standards that explicitly differentiate on

51. Labor statutory standards apply territorially to all workers in Israel [NORDAN OIL INC. v. WILLIAM MURRAY, 13 Piskei Din Avodah 368 (1982)]. Collective agreements apply to all workers employed by an employer who is a party to the agreement or a member of an employers' association that is a party to the agreement [Sections 15, 16 of the COLLECTIVE AGREEMENTS LAW (1957)]. Extension orders further extend the coverage of collective agreements to all workers in a sector, or even the state, depending on the scope of the order [Sections 25-33 of the COLLECTIVE AGREEMENTS LAW (1957)]. The nationality of workers is thus irrelevant for the mandatory force of these legal instruments.

52. There are three applicable conventions signed and ratified by Israel: Convention 9 concerning equality of treatment for national and foreign workers regarding workmen's compensation for accidents (ratified in 1954); Convention 97 concerning migration for employment (ratified in 1958); Convention 118 concerning equality of treatment of nationals and non-nationals in social security (ratified in 1966). For a detailed analysis of the applicable conventions and customary law, see LEONARD M. HAMMER, *MIGRANT WORKERS IN ISRAEL: TOWARDS PROPOSING A FRAMEWORK OF ENFORCEABLE CUSTOMARY INTERNATIONAL HUMAN RIGHTS* (1998).

It should be emphasized that this article observes only the situation of Palestinian workers in Israel and not the situation of Palestinian workers employed in the territories. The relevant international law in the territories is that which governs the rights of people living under belligerent military occupation; the 1970 Hague Convention IV (Regulations Respecting the Laws and Customs of War on Land) and the 1949 Geneva Convention IV (The Protection of Civilian Persons in Time of War). Under these conventions, Israel is required to enforce the labor legislation that prevailed in the territories prior to the military occupation. The ILO Plenary Conference decided that Israel is not bounded by ILO Conventions when it comes to the employment situation of Palestinian workers in the territories because the territories are not part of its sovereign territory. The political thrust of this decision was to avoid any decision that could be interpreted as acknowledging annexation of the territories to Israel, although the effect of the decision was to lower the international standards imposed on Israel with regard to ensuring employment rights and standards in the territories.

the basis of nationality. Although the Cabinet decision did not alter the basic principles of Israeli labor law, it cannot be viewed simply as a restatement of the law. At the time the decision was passed, labor law was still undeveloped in Israel. Although the basic statutory provisions had been enacted, the legal doctrine was flimsy and only with the establishment of the labor courts in 1969, did the body of labor law start to develop. The principle of equality could not be taken for granted in 1970. Currently, it is possible to state that the principle of equality underlies the whole body of Israeli labor law.

For workers in an economy where income per capita is significantly lower than that of Israel, the decision to equalize income promised tremendous gain,⁵³ but that promise did not fully materialize. Numerous reasons account for the gap between the principle of equality and its implementation. First, the Cabinet decision does not apply to illegal workers. With regard to those workers who are legally employed, the problems include an informational barrier, the complexity of the administrative system and the division of responsibilities among the various agencies involved, slack enforcement and indirect discrimination. Each of these explanations merits a separate consideration.⁵⁴

1. Illegal Workers

For the large number of workers who work in Israel without a permit, and thus negotiate their wages directly with their employers, commonly on a daily or weekly basis, the principle of equality does not apply. Although the labor court has never denied social rights from illegal workers,⁵⁵ access to the labor court is limited because an illegal worker will not take the risk that his name will be revealed in a courtroom and then be submitted to the military or civil authorities. The illegal workers are part of the informal economy.⁵⁶ In reality,

53. In 1967, it was estimated that income per capita was lower than 10% of that which prevailed in Israel. The high level of economic growth in the territories, which was based to a large extent on remittances of income earned in Israel and in the Gulf States decreased the difference, although it remained significant.

54. Many of these problems described herein are surveyed in the Workers' Hotline (Kav La-Oved) Bulletin. The information is also based on their files, including examples of letters sent to employers who violated the duty to transfer all sums to the payments division, and from cases they brought to court. Most of these are settled without a verdict. For a formal indication of the severity of the problem, see THE STATE OF ISRAEL, THE COMPTROLLER'S REPORT NO. 44, 566-573 (1994).

55. It seems that the labor court never decided that illegal workers are entitled to social benefits, but always assumed that to be the case. There are a few regional labor court cases that prescribe illegal workers all their rights without raising any difficult questions. Cf. District Labor Court—Jerusalem 1522/98, SILVERA THERESA V. YUNIOV AMIKAM (Unpublished, 13.10.1998).

56. On the nature and reasons for the evolution of an informal economy, see generally Castells & Portes, *World Underneath: The Origins, Dynamics and the Effects of the Informal Economy*, in THE INFORMAL ECONOMY 3 (Alejandro Portes & Manuel Castells, et al., eds., 1989).

despite the formal statement of the law, workers who "choose" to work in the informal economy, waive the rights accorded to workers who are lawfully employed.

Why then do workers choose to work illegally? Many workers prefer informal arrangements, despite the risk involved, because the lawful alternative is inadequate. The dense bureaucratic administration of Palestinian work in Israel, and the fact that the regulatory system does not sufficiently ensure workers' rights, renders the formality of obtaining work permits unattractive. Moreover, since the quotas for Palestinian work in Israel have been reduced, and the criteria for obtaining them made more difficult to fulfill, informal work is no longer merely a matter of choice. Informal arrangements are more often initiated and controlled by the employers, so to ask, "why do workers opt for the informal arrangements?" is not enough. Many employers are willing to employ only illegal workers in order to cut down labor costs. The fact that so many workers work informally indicates that the state is not sufficiently interested in formalizing foreign work in Israel. Moreover, given the large number of informal workers that for years have been on the rise without the state's objection, any effort to suddenly decrease their number is translated into an oppressive strategy that cuts off the source of livelihood for some workers.⁵⁷ Rather than trying to formalize informal workers, the state opts for expulsion with only minimal punishment imposed on employers.

The difficult situation of the workers in the informal economy may seem to support the pluralist notion that the principle of equality embedded in the Cabinet decision was at least formally a power-breaking mechanism that sought to avoid individualized negotiations leading to low wages and the absence of benefits. It is thus, more interesting to observe the applicability of the equality principle to those working legally through the labor bureau. For those working legally, the promise of equality has not been fulfilled either.

2. Informational Barriers

Some of the problems leading to unequal pay are a result of informational barriers. The wage system in Israel is complex, multi-tiered, and structured of numerous benefits originating from various normative sources. Palestinian workers, much like their low-waged Israeli counterparts, are not familiar with their rights and do not know

57. This is one of the major arguments voiced by representatives of the left-wing parties in the Knesset debates on the FOREIGN WORKERS LAW (1991). See e.g., The Knesset Records from March 12, 1991, and February 19, 1991.

what they are legally entitled to.⁵⁸ The problems of the Palestinian workers were to be resolved by the channeling of all wages to the Payments Division in the Employment Bureau. Yet, this arrangement is not comprehensive, resulting in an unclear division of responsibilities and the mutual shifting of responsibility between employers and the payments division. The unclear division of responsibility becomes an informational barrier often making workers ignorant of their rights and how to claim them. For example, the payments division decided that some of the social benefits would be paid directly by the employer, including annual leave pay, as mandated by law, or convalescence pay, mandated by collective bargaining agreements and extension orders. Many employers do not pay these sums to the workers, many of whom are not even aware that they are entitled to them, believing that they are fully compensated through the payments division. Even when employers remit sums to the payments division to cover some benefits such as sick-leave, many workers are unaware that they have the right to obtain them when they are sick. The unused funds from the employers' contribution are transferred to the Israeli treasury and marked "surplus revenue."⁵⁹ Similar difficulties may be indicated, whereas workers forfeit their earned pensions or severance pay as mandated by law. Consequently, given the absence of trade union consultation for individual workers and routine supervision of the collective agreements and statutory standards' application to Palestinian workers, many of them forgo some of their benefits unknowingly.

3. Slack Enforcement

Inequality in the pay of Palestinian workers holding a permit, therefore working legally, is frequently due to sheer disregard for the law. Despite the process established by the Cabinet decision, where the workers are being paid through the payments division, their employment preserves some informal economy characteristics. As Nadim's story illustrates, some employers do not report the exact number of work days to the payments division.⁶⁰ They give their workers part of the payment in cash, instead of transferring the full wages, as required, to the payments division. This arrangement seems to benefit both the employer and the employee because they pocket the sums deducted for income tax, equalization tax and trade union agency fees. The employers, however, are the major beneficiaries.

58. Workers' Hotline Bulletin (July, 1993).

59. Workers' Hotline Bulletin (March, 1993).

60. Workers' Hotline Bulletins (March, 1993) (September, 1994).

The workers usually receive their net pay, just as they would if the payments were transferred through the payments division. It is the employer who pockets the discounted labor costs. Moreover, because the work days reported to the payments division serve as the basis for calculating the workers' wages for the purpose of social benefits, pensions, and severance pay, in the end, these sums the workers receive are eventually less than they are entitled.

The problem of enforcement is also complicated by the division of responsibility. For example, the understaffed enforcement division in the Ministry of Labor and Welfare that is in charge of enforcing the minimum wage law, holds the payments division responsible for enforcing the payment of minimum wage to Palestinian workers. The payments division holds the enforcement division responsible.⁶¹ It has been found that workers holding permits did not get their job through the labor bureau, so they received their wages directly from their employer. Other employers who do use the labor bureau and transfer the funds to the payments division, under-report the number of working days. These practices contribute to the fact that Palestinian workers are often underpaid.

Self-enforcement through civil litigation can serve as a substitute for the inadequacy of the state's enforcement agencies. It would seem lawfully employed workers, unlike their illegal counterparts, should have more access to the enforcement agencies when their rights are violated. In the following sections, I shall discuss the legal barriers that made litigation over rights difficult for many workers.⁶² For many, the reason for not turning to the enforcement agencies, even though their wages and benefits are lower than those of the comparable domestic workers, is the risk of losing their jobs. Because a work permit is issued for work with a particular employer, complaining or suing an employer is likely to cost them their jobs and their permits. Given the bureaucratic difficulties in obtaining a new permit, especially since the Gulf War, few have been willing to risk losing the permit they have. Admittedly, this problem is typical of most employment situations. However, while alternative wages for an Israeli worker losing their job may be lower than the wages received from a law breaking employer, for a Palestinian worker there is no opportunity wage at all; only the likelihood of unemployment.

61. Workers' Hotline Bulletin (May, 1994).

62. See *infra* section IIIE.

4. Indirect Discrimination

Palestinian workers are employed in heavily unionized sectors where wages and social conditions are determined by collective bargaining agreements and extension orders. In these agreements, there are numerous arrangements that distinguish workers on the basis of criteria deemed legitimate, but which disproportionately discriminate against Palestinian workers. For example, in the payroll prepared for the Palestinian workers by the payments division, they are defined as "daily workers," although if the sectoral collective agreements were applied to them they would be defined as "monthly workers."⁶³ Some social benefits accorded to workers in collective agreements are limited to monthly workers. Similarly, only monthly workers are entitled to advance notice before dismissals and to safeguards against dismissals without cause. The usual registration of Palestinian workers as "daily workers," is partly because they do not work long enough with one employer to obtain the status of monthly workers, and partly out of disregard for the relevant collective bargaining agreements, despite their applicability.⁶⁴

5. When Law is Translated into Action

In sum, the arrangement by which workers receive their wages from the payments division could potentially act as a power-breaking measure that seeks to establish a supervised exchange point between the employer and the Palestinian employee. Its massive failure when translated into action suggests otherwise. The principle of equality asserted in the Cabinet decision masks a different practice. When assessing the role of law, it is not possible to detach implementation from the content of the law in itself.

The various problems described so far indicate that the decision to equalize wages and benefits has failed because of difficulties that are, for the most part, not unique to the employment of Palestinian workers. Peripheral workers in general are vulnerable to informational barriers and under-enforcement of their rights. Devoid of any basis of power to affect the priorities of enforcement, they have no access to the assumed power-breaking task of labor law. The Cabinet decision's principle of equality, however, also suffers from problems

63. Workers' Hotline Bulletin (March, 1993).

64. There are no recent statistics available regarding the average length of employment, but Emanuel Farjoun reports that during the 1970's-80's, only 33% of the Palestinian workers employed in Israel worked for the same employer for more than two years and only 16% worked with the same employer for more than four years. See Farjoun, *supra* note 13.

that are unique to foreign workers. These can be illustrated by observing the equalization tax that is the subject of the following section.

C. *Equality of What—Labor Costs or Benefits?*

As noted earlier, the Cabinet decision of 1970, achieved a compromise between various interest groups within Israel, among them the Histadrut.⁶⁵ It has been a significant concern for the Histadrut that the influx of Palestinian workers into Israel will undercut domestic workers' wages and decrease the power of the Histadrut itself. Consequently, the 1970 decision asserted the principle of equality in labor costs, both net and gross. Yet, the decision does not stipulate equality in benefits. The difference between equality in costs and equality in benefits is the difference between equality from the insiders' and the outsiders' points of view.

When employers transfer wages to the payments division, three sums are deducted. First of all, the division deducts income tax at rates that are comparable to those of Israeli workers, although some of the credits used for calculating taxes for residents are not taken into account for the calculation of taxes paid by Palestinian workers.⁶⁶ Secondly, trade union agency fees are deducted at the rate of 0.7%, similar to the deduction from Israeli workers who are not members of the Histadrut, but are covered by the collective bargaining agreements it negotiates.⁶⁷ Third, the division deducts an equalization tax at a rate identical to that paid by domestic workers for National Insurance. Although the three, when taken together, result in a net income lower than that of comparable domestic workers, the equalization tax raises the most fundamental concerns.

The purpose of the equalization tax, as the name suggests, is to ensure the equalization of labor costs of Palestinian workers, given that according to the National Insurance Law, they are not entitled to most of the benefits which require residency as a precondition. The law accords them only compensation for occupational injuries, employers' bankruptcy insurance for workers and maternity grant.⁶⁸ Among the benefits the law ties in with the condition of residency are,

65. See *supra* section IIA.

66. See HASS, *supra* note 1, at 150-153.

67. Agency fees are deductions from workers' wages who enjoy the benefits of collective bargaining agreements, but are not members of the representative trade union that negotiated these agreements or of any other union. The purpose of the agency fees is to avoid the "freeriders problem" associated with trade union representation. S. 25(3B) of the WAGE PROTECTION LAW (1958), holds the Minister of Labor and Welfare responsible for prescribing by regulations the maximum trade-union agency fees permitted to be deducted. Secondary legislation prescribed 0.7 % of the wages to be the maximum deduction.

68. NATIONAL INSURANCE LAW (CONSOLIDATED VERSION) (1995).

most notably, the unemployment allowance, children allowance, old age basic pension, accident victims (non-work related) compensation, and long-term care benefits. If the Palestinian workers were required to pay National Insurance fees only for those benefits they are entitled to, only approximately 1% of their wages would be deducted against approximately 12% paid jointly by the employer and the employee in the case of a resident Israeli employee. The equalization tax, which is based on the principle of equality stated in the 1970 Cabinet decision, ensures that the same amounts will be paid by Palestinian workers. Only in 1994, when the Cabinet decision was formally legislated, did this tax gain a clear normative basis. The law further stipulated that, "every amount of equalization levy which the Employment Service routinely collected before May 1994, even if called by a different name, shall be considered to be an equalization levy, that was legally paid and received."⁶⁹ The law thus sought to remove any uncertainty regarding the legality of the equalization tax and the absence of any statutory basis for its collection.

A small portion of the money deducted under the title of the equalization tax is used to fund the National Insurance benefits of which the Palestinian workers are entitled to. The larger portion is transferred to the Israeli treasury for the purpose of funding infrastructure and social development in the territories.⁷⁰ Whether it is actually used for this is not clear. Nor is it clear whether the vague definition of "infrastructure and social development" is adequate to ensure that all programs sponsored with that money are actually to the benefit of the Palestinian people in the territories.⁷¹ However, it is clear that the system through which these funds is administered, with its very low visibility, leaves room for serious objective doubt and for

69. THE LAW IMPLEMENTING THE AGREEMENT ON THE GAZA STRIP AND JERICO AREA (1994), § 34.

70. The Workers Hotline reports, for example, that in 1992, 8 million NIS were transferred to the National Insurance, while 105 million NIS were transferred to the Israeli treasury. See the WORKERS HOTLINE BULLETIN from June, 1992, and December, 1992.

71. The various positions regarding these factual questions are documented in the briefs submitted to the court in the case described *infra*, in this section. See *infra* note 74. See also the discussion by Raffael B. Benkler, *supra* note 6. For further indications on the uncertainty regarding this question see ILO, REPORT OF THE DIRECTOR GENERAL, APPENDICES: REPORT ON THE SITUATION OF WORKERS IN THE OCCUPIED ARAB TERRITORIES ¶ 72-5 (1992). The ILO report continued to refer to this question every year since then. See also THE WORLD BANK, DEVELOPING THE OCCUPIED TERRITORIES AND INVESTMENT IN PEACE Vol. 2, 107-10 (1994).

The Supreme Court, in an unpublished case that was ended in an out-of court settlement, also hinted at the lack of clarity regarding the destination of the money collected as equalization tax. In that case, it was the flower-growers employers' association that contested the equalization tax. The state agreed to refund to the workers part of the equalization tax already deducted and no court decision was provided. The lack of clarity that induced the settlement was resolved in 1994, when the equalization tax was incorporated into primary legislation as described in the text.

the Palestinian workers' subjective impression, that the sums deducted from their wages are not matched by any benefit.

In 1994, the Workers' Hotline, a non-profit organization, filed what was probably the first, and so far the only, lawsuit challenging the legal infrastructure governing Palestinian work in Israel. The Workers' Hotline, representing three Palestinian workers, asked for a declaratory judgement stating that the workers were entitled to all National Insurance benefits or, alternatively, that they were entitled to restitution of the equalization tax that was deducted from their wages without granting them benefits in exchange. While the trial was in its preliminary stages, the statutory provision that retroactively ratified the use of the equalization tax was passed and the district court canceled the case, but did not dismiss it.⁷² The decision to cancel the case was appealed to the Supreme Court which returned the case to the District court to decide it on the merits.⁷³ The District Court will start hearing the case in early 2000, approximately six years after it was filed.

The lawsuit requires a response to a range of legal problems, but at its core, it raises the fundamental question regarding the rights of Palestinian workers in Israel and the relationship between the "insiders" and the "outsiders." It seeks an interpretation of the 1970 Cabinet decision entitling Palestinian workers to the same benefits as their Israeli counterparts. This interpretation holds that the Cabinet decision's principle of equality should be understood as creating individual rights for those working in Israel, rather than merely providing a strategic safeguard against wage undercutting. It further questions the method of deducting money, in addition to income tax, from individuals' wages and providing in return some amorphous obligation to transfer these sums for collective purposes to the territories.

In its decision to cancel the case, the Jerusalem District Court explained its understanding of the Cabinet decision in a sharp statement that seems to reflect quite well the common political diagnosis of the Cabinet decision:

[T]he collection of equalization sums was the State's condition for allowing workers from Judea and Samaria to work in Israel. This condition was necessary in order to prevent a situation where Israeli employers would prefer to employ workers from Judea and Samaria because the cost of their salaries was lower than the cost of the salary of a worker who was a resident in Israel. This is a worthy and

72. The cancellation of a lawsuit enables the plaintiff to file it again while a dismissal does not.

73. *HUSSEIN ABED ELHAFAD ABED ALGANI MASRI & OTHERS v. THE STATE OF ISRAEL*, (unpublished decision, Supreme Court, March 1, 1999).

reasonable purpose which is recognized by the Court, just as the legality of imposing customs taxes is recognized for the purpose of protecting the country's products, all the more so since the equalization payments were transferred to the Civil Administration budget in Judea and Samaria as part of the financing of its budget for the purpose of implementing infrastructure activities and ongoing expenses in the areas of health, welfare and employment.⁷⁴

In the Attorney-General's briefs which were submitted to the Supreme Court in the process of appeal, the Attorney-General provided further explanation of the nature of the equalization tax, holding that:

[T]he [equalization tax] does not entitle the workers to National Insurance benefits. The payment is a known condition for obtaining a work permit in Israel. Entry to Israel is a privilege and not an entitlement. . . . The objective of the Cabinet decision [of 1970] was to prevent a market failure in the Israeli labor market. . . . It was never intended to equalize those who are not equal, and the decision was not intended to create an entitlement to national insurance. The law of national insurance reflects the society's commitment to its own members.

These statements make clear that the nature of the equalization tax, and the principle of equality on which it is based, do not correspond to the traditional view of labor law. In the District Court's explanation of this arrangement, the analogy between customs imposed on imports and the equalization tax is instructive. Imposing customs on imports decreases the demand for imported commodities unless they cannot be substituted by domestic commodities. The exporter has the choice to export to Israel or to seek alternative markets that do not impose protectionist tariffs. Exporters can strategically choose among different venues to increase their profits. For the Palestinian worker, the situation is different for two cumulative reasons. First, it misses the significance of the often-quoted statement in international and Israeli labor jurisprudence, "labor is not a commodity."⁷⁵ Protectionist policy with regard to labor power is different in nature from protectionist policy with regard to commodities. Labor power is intractably linked to the worker himself and therefore workers cannot strategically sell labor power to competing markets. Secondly, the view that the territories and Israel are wholly separate entities ignores the political economy of the region during the last thirty years. Israel

74. HUSSEIN ABED ELHAFAD ABED ALGANI MASRI & OTHERS V. THE STATE OF ISRAEL (unpublished, Jerusalem District Court, May 16, 1995). The translation of the decision was provided by the Workers' Hotline.

75. The statement, which appears in International Documents, most notably the Philadelphia Declaration incorporated into the ILO Constitution, was iterated numerous times in Israeli case law. See e.g., AIR STEWARDS OF EL-AL WORKERS' COMMITTEE V. EDNA HAZIN, 4 Piskei Din Avodah 365 (1973); THE HISTADRUT V. DEAD SEA WORKS INC., 14 Piskei Din Avodah 225 (1983); "AMIT" V. LOCAL GOVERNMENT AUTHORITY, 29 Piskei Din Avodah 61 (1995).

is responsible, in part, for the economy in the territories. For years, its reliance on Palestinian workers in Israel, as well as the desire to prevent the Palestinians' economic independence, were an incentive to discourage employment growth in the territories. The feature of Palestinian work in Israel cannot be captured simply by the notion of free choice and consent to the "known condition" of the equalization tax.

It is, indeed, a difficult moral question whether a state that allows outsiders to work within it must morally provide the guest worker with all the social benefits to which residents or citizens of the state are entitled, including national insurance schemes.⁷⁶ However, in the present context, there is no need to make a strong argument in favor of total equality because Palestinian workers cannot be regarded as the typical guest workers. In fact, both legally and in political culture, Palestinian workers are distinguished from foreign workers. Some have been working in Israel for over two decades, most speak fluent Hebrew and are closely familiar with the Israeli way of life. Yet, their idiosyncratic relationship with Israel further distinguishes them from French workers crossing the border to work in Geneva. Their daily conditions are strongly affected by Israel. Their economy is heavily regulated by Israel.⁷⁷ Their work in Israel is part of a more general approach, as for years the territories were held as captive markets for Israeli commodities. Until the Oslo Agreement, the Palestinian workers had very little impact on the course of development in the territories. To argue that their decision to work in Israel is voluntary and does not undermine the moral legitimacy of differential treatment in terms of benefits received, misses the factual and moral background of their engagement in Israel.

The equalization tax further achieves another goal, which is to erase the Palestinian workers' presence as individuals. It begs us to forget Nadim. The use of deductions from individual workers' wages, for collective purposes, constructs the identity of the Palestinian worker as a generic representative of a group. It is one thing for a community democratically to decide for itself on individual contributions for the purpose of collective programs, but it is quite another to deduct sums from individuals who are not part of the democratic sys-

76. See e.g., the debate in BRIAN BARRY & ROBERT GOODIN, *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY* (1992). On the importance of this question in the Israeli-Palestinian context, see Zeev Rosenhek, *The Politics of Exclusion and Inclusion in the Welfare State, Migrant Workers in Israel*, 56 *SOCIAL SECURITY* 97 (1999) [Hebrew].

77. The reality of the region is best captured by the notion of a world system theory, rather than as a migration between two regions. See SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* (1988).

tem and to use them for collective purposes. The underlying assumption is that the individual worker is only a representative of "his people." The equalization tax thus helps the insiders who wish to forget that each outsider has a name.

Entitlement to national security is an entitlement to dependency on the community. It provides a justification to tell a story to the community: about hardship, inability to compete in accordance with the standards society determines, bad luck, or even bad intentions. National Insurance offices are commonly a venue for painful individual narratives. Making individuals invisible requires that these narratives be unspoken. Even according to the more benign factual assumption, according to which all money deducted is actually used for collective social welfare programs in the territories, the underlying premise is that it is better to administer benefits without having to produce any sense of sympathy for individuals. There is no interest whatsoever in hearing, on a daily basis, individuals account for the reason there is unemployment in the territories and what the consequences are.

Finally, the equalization tax not only demonstrates the assumption of inequality and the desire to ensure the Palestinian workers' absence from the Israeli legal system, it also displays their instrumental position in the grand political debate. After the lawsuit was filed, Israel signed with the Palestinian Entity the Paris Protocol, holding that the equalization tax will be transferred to the Palestinian authorities once they establish a social security fund.⁷⁸ Although the lawsuit does not directly affect this statutory provision and challenges the prevailing practice until 1994, the Palestinian authorities did not support the lawsuit. The lawyers litigating this case encountered a strong objection by agents of the Palestinian authorities to their desire to petition the court to acknowledge the claim as a class action suit.⁷⁹ It would seem that the Palestinian authorities are concerned about any judicial statement that would hold that Palestinians, from whom the equalization tax is deducted and are individually entitled to something (restitution or benefits), could somehow undermine the Palestinian Entity's claim over these sums, retroactively or in the future. In the process of peace-making, individual entitlements may seem too much of an obstacle to the collective good as asserted by the state.

In sum, the common interpretation of the equality principle established by the 1970 Cabinet decision views equality as a method to

78. See *supra* note 22, at ¶ 46 (1999).

79. I am obliged to Professor Frances Raday, who is litigating this case, and to Hanna Zohar of the Workers' Hotline for this information.

ensure that Palestinian workers will not distort Israeli workers' wages and working conditions, but as the Attorney-General noted, it does not seek to turn those who are not equal into equals. The principle of equality does not seek to address the democratic deficit described earlier, nor does it seek to recognize the Palestinian workers' interests as worthy of consideration. Palestinian workers are kept as undeserving outsiders. Thus, unlike the previous section that described the failure of the equality principle as a function of problems that characterize peripheral workers in a capitalist system, the problems described in this section emphasize the difficulty facing the Palestinian workers as outsiders who cannot affect the colonial regime that governs them.

D. *The Law on Palestinian Workers in Israel and its Power-Creating Role*

The Cabinet decision of 1970 held a promise of equality that has not materialized; in part, because it is not enforced, and in part, because it is not intended to ensure the rights of Palestinian workers. The arrangement whereby all Palestinian workers are required to register at the labor bureau and receive their wages from the payments division was shown to provide some security, but also much institutional and bureaucratic complexity. Other power-creating tiers embedded in this arrangement may be indicated and it is possible to distinguish between the three sources of law: statutes, administrative action and case-law.

Although there are two statutes that are concerned with Palestinian workers explicitly, they support the finding of lawlessness. In 1991, for the first time, labor law explicitly addressed the employment of non-domestic workers. The Law on Foreign Workers,⁸⁰ does not seek to secure the workers' rights, but to impose criminal penalties on employers who illegally employ non-permit holders or wish to accommodate their workers overnight in violation of the work permit. The penalties seem to be one-sided for the law holds the employer responsible. Yet, the penalties are in fact incurred by both sides and are shouldered more heavily by the workers. An employer caught employing workers illegally, or accommodating workers overnight, is often fined relatively low sums, ranging around the equivalent of \$1,000 (U.S.) or less, for each illegal worker he employs. This economic sanction is minuscule compared to the economic benefit of employing illegal workers. By contrast, the illegal worker who is caught is detained, fined, deported and left with little prospect of obtaining a

80. THE FOREIGN WORKERS LAW (ILLEGAL EMPLOYMENT) (1991).

new work permit in the future. Labor law's concern with the employer who disregards the law is considerably less penalizing compared with the administrative sanctions imposed on the workers themselves. The law has been amended a number of times, yet its only concern remains, for the most part, with the enforcement of the Israeli public's interest in preventing illegal work.⁸¹

The Foreign Workers Law fails to distinguish between foreign workers and Palestinian workers.⁸² Despite the political and cultural difference between the two groups, well acknowledged in Israel, the legislature opted for an equal treatment of the two groups. The reason lies in the law's limited scope which makes no effort to address the unique problems each group faces. The clustering of the two groups together, however, symbolizes an effort to erase the distinct position of Palestinian workers. The assimilation of Palestinian workers into foreign workers in the 1990s reverses the symbolic effort of the 1970 Cabinet decision. The Cabinet decision sought to open the labor market in 1970 to Palestinian workers at a time when foreign workers were unheard of and in tension with the premises of Zionism. It thus singled out Palestinian workers as an idiosyncratic group and justified their entry on the basis of a geo-political situation. Over two decades later, the law asks the insiders to forget the roots of Palestinian employment in Israel.

The only other law that addresses Palestinian workers explicitly is the law of the Implementation of the Agreement in the Gaza Strip and Jericho area (1994), that for the first time changed the normative status of the Cabinet decision into primary legislation. This law adds

81. The law was amended several times. The 1994 and 1995 amendments added the prohibition to accommodate foreign workers. A 1999 amendment to the law (The Book of Laws 1999, no. 1575, p. 114, amendment from 2.15.1999), holds that a condition for employers who want to receive a permit to employ foreign workers is that they must supply their workers with gas masks for the event there will be a military attack on Israel using unconventional (chemical) weapons. It is unclear, however, to what extent this provision applies to Palestinian workers. According to the case law of the Supreme Court in Israel, the state is still responsible for supplying gas masks to those who are still residing in the territories. The Palestinian authorities are responsible for supplying gas masks to those who reside in the new Palestinian entity. The amendment to the law was a response to the threat of an unconventional attack by Iraq on Israel in 1998. A number of journalists exposed the fact that while many Israelis were preparing for an attack, there is a huge population of legal and illegal foreign workers in Tel-Aviv who are not entitled to protective measures from the state and cannot afford them either. An additional proposed amendment is currently pending. Most of the proposed clauses of the amendment will be relevant only to foreign workers, but not to the Palestinian workers. The proposed amendment states, *inter alia*, that foreign and Palestinian workers are entitled to all the labor standards accorded to domestic workers. This statement, which merely declares the existing legal status of foreign workers, does not give any solutions on how to prevent this law from falling into the abyss of de-facto non-enforceability.

82. The law defines a "foreign worker" as any worker who is not a citizen or a resident of Israel (§ 1).

to the symbolic power of the Law of Foreign Workers. In its retroactive ratification of the equalization tax, it seeks to erase the history of Palestinian work in Israel. It does not seek to correct the failure of the Cabinet decision, entrenching its nature as an instrument that favors the domestic at the price of outsiders' interests.

Given the limited response of statutory law, it is also necessary to examine administrative action. The quota system administered by Israel has been demonstrated to be based on the need to exert control. On the one hand, increasing the number of quotas increases the amount of money transferred through the payments division, the amount of revenue collected through income tax and the amount of money transferred to the Histadrut as trade union agency fees. On the other hand, the number of permits issued, especially since the Gulf War, is a function of political forces.⁸³ Reducing the number of quotas is a means of exerting power on the Palestinian side; fluctuations in the number of quotas thus indicate compromises of conflicting interests within Israel. The quota system also allows more nuanced strategies as permits are occasionally denied to all workers in certain villages where residents suspected of involvement in terrorist attacks are caught. The Association for Civil Rights in Israel (ACRI) and the Workers' Hotline have reported incidents where denial of permits were used as a means of collective punishment for a whole village.⁸⁴ The quota system is therefore an administrative mechanism, with no clear normative basis in visible law, that serves the necessary means for centralized multi-purpose control over the labor market. As noted, only in 1998, was the state willing to relinquish the quota system because the employers themselves did not want to employ Palestinian workers.⁸⁵

In sum, neither the government, the administration nor the legislature seem to take a position of concern for the welfare of the Palestinian worker in Israel. Where a legal provision seems to protect him, it is only a by-product of more coercive interests, such as the need to prevent wage undercutting or the use of permits as an economic means of warfare. It is thus interesting to observe the role of the judiciary. Both the Supreme Court and the National Labor Court are known actively to pursue the development of human rights, although the Supreme Court has been criticized for the low level of protection

83. See *supra* section IIC.

84. Workers' Hotline Bulletin (July, 1997).

85. *Ibid.*

it provides for human rights in the territories.⁸⁶ The democratic deficit that ensures the exclusion of the Palestinian interests in the statutory and administrative regulation of the labor market may benefit from the fact that judges are not democratically elected and are not accountable to immediate political platforms. Can this independence respond to the traditional power-breaking role of labor law or is it infected by the democratic deficit as well?

E. *Law and the Role of the Judiciary*

The District Court decision on the equalization tax outlined was made in what was probably the first attempt to question in the Israeli courts the meta-institutional structure that governs the employment of Palestinian workers in Israel. This is not the typical appearance of Palestinian workers in the Israeli courts. Generally, Palestinian workers are not highly visible in labor case law. Yet, their presence has become more evident since 1991, for two reasons; first is that the reality of frequent closures and a fluctuating and generally decreasing number of permits has led to the discontinuation of employment of many Palestinian workers. As with most workers, the Palestinians' willingness to sue their employer increases once the employment relationship is terminated and the fear of losing their job becomes irrelevant. The second reason is their better access to legal consultation and representation. As part of the Histadrut's emphasis from the early 1990s on legal representation for individual labor disputes, it also increased the number of lawyers available for consultation to Palestinian workers.⁸⁷ In addition, the Workers' Hotline, funded mostly from the contributions of human rights organizations, was established in 1991. This organization represents workers who are, for the most part, outsiders in the industrial relations system: foreign workers, Palestinian workers, workers employed through staffing agencies, and other members of the peripheral workforce. The organization has brought to court hundreds of cases for workers whose rights have been abused. The effect of the Workers' Hotline intervention is even greater than the number of cases they bring to court. Their intervention raised the awareness of the Palestinian workers that litigation against their employers is indeed feasible and that they are entitled to demand fulfillment of their rights. Similarly, it raised the awareness of

86. Gad Barzilai, *Political Institutions and Conflict Resolution: The Israeli Supreme Court and the Peace Process*, in *THE MIDDLE EAST PROCESS: INTERDISCIPLINARY PERSPECTIVES* 87 (Ilan Peleg ed., 1998); Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 *LAW & SOC. REV.* 781 (1990).

87. See MARGALIT, *supra* note 6.

employers that someone is interested in their employees' rights and is willing to take steps to enforce them.

However, access to justice is not easy. In addition to the usual imbalance in the labor court between the low-waged worker and his employer, these workers litigate in an institution that is a branch of the occupier's government. The costs of litigation can be prohibitive as well. A recent decision held that plaintiffs who are residents of the Palestinian autonomy may be required to deposit a guarantee bond to ensure that if they lose, and thus are required to pay the defendant his court costs, the defendant will be able to collect.⁸⁸ This ruling is stricter than the courts' policy prior to the establishment of Palestinian Autonomy, which held that a guarantee bond would be required only in extraordinary situations.⁸⁹ The dialectic nature of undoing colonization, just like the undoing of capitalism, explains why the situation of Palestinian workers worsened after they became residents of the Palestinian autonomy and deemed to be complete strangers in the Israeli judicial system. The Palestinian plaintiffs are held to be like plaintiffs from other countries for which Israel does not have an agreement regarding the execution of verdicts given in foreign jurisdictions. Currently, the common practice in the labor courts is to require the guarantee bond and the sums are often equivalent to the plaintiff's full month's wages. For many potential plaintiffs, who are most likely unemployed and with few employment possibilities, such a cost is prohibitive.

However, when it comes to the substance of the proceedings themselves, the labor court in the last few years has acted as a power-breaking agency. In a series of cases, the labor court refused to release employers from responsibility for paying wages or severance pay following closures and security related absences. In most cases, the labor court has shown much sympathy for the difficulties faced by the Palestinian workers and the economic hardship they experienced during the frequent seal-offs of the territories. The rhetoric of the court seeks to take the blame off the parties for the discontinuation of the employment relationship or its interruption and treats it as a background circumstance. Typical statements of the court hold that, "the occurrences in the Judea and Samaria area and the Gaza Strip have disrupted everyday life in Israel. Many establishments were required

88. The leading case on this issue is HASSAN ABED AL RAHMAN AND OTHERS—RABINTEX INC., 28 Piskei Din Avodah 221 (1995), also followed by ALI AUYB AL HADAYAH—SHARPEN DAVID INC. (Unpublished, National Labor Court, February 5, 1996); ABDALLAH SALIM—MASHAB INC. (Unpublished, National Labor Court, March 2, 1998).

89. Cf. REUVEN—AHMED MAHMAD GONDIA (Unpublished, Jerusalem District Labor Court, 1992).

to cope with unforeseen absences of their employees, commonly without warning. Employees and employers have no choice but to act in good faith under the circumstances of instability and uncertainty.”⁹⁰ The court’s emphasis is on the disruption of life in Israel and not on the disruption of life in the territories. One fails to find in judicial narratives a description of everyday life in the territories or the impact of closures on workers. The court’s narrative focuses on the insiders, while the Palestinian outsiders are still held in most cases as instrumental agents. Nevertheless, the outcomes of these cases apply labor law doctrine as developed for domestic workers to the Palestinian workers, with a grain of latent sympathy for their claims and occasional hostility to their employers’ arguments.

In most cases, the court refuses to place the cost of closures on the workers themselves. From the court’s presentation, it is clear that although the fault for the interruption in the employment relationship cannot be attributed to the parties themselves, one of the parties will still have to bear the costs. Without any legislation addressing this issue, it was thus the courts’ role to assign the costs of closures.⁹¹ The Severance Pay Law (1963), holds that only workers who are dismissed are entitled to severance pay.⁹² To ensure that workers will not be denied severance pay, the court has consistently rejected employers’ arguments, holding that absence caused by closures amounts to abandonment of one’s job. Any employer who did not want to continue to employ his worker after a closure was therefore required to pay severance pay.⁹³ Furthermore, even when the reason for the termination of the employment relationship was that the worker could not obtain a new work permit after a closure was removed, the court held that if the employer had not made the necessary efforts to obtain a new work permit for his worker, the employment relationship was concluded and the worker was entitled to severance pay.⁹⁴ The argument put forward by some employers regarding frustration of the employment

90. MUHAMAD IBRAHIM FARAG—GORDON INC. (Unpublished, National Labor Court, January 30, 1994); YUNESS MUHAMMAD RUHAMMI—FELKO INC. (Unpublished, National Labor Court, September 8, 1997).

91. The court does not mention the law that was proposed in 1995 (but never passed), according to which the state would give severance pay to workers who lost their jobs due to closures.

92. S. 1 of the SEVERANCE PAY LAW (1963). There are a number of irrelevant exceptions to the principle in sections 3-11 of the law.

93. Cf. ABU ARKUB v. THE NATIONAL LABOR COURT, (Unpublished, Supreme Court, May 10, 1994).

94. Cf. YUNES MUHAMMAD RUHAMI—FELKO INC. (Unpublished, National Labor Court, September 8, 1997).

contract because of the closure was rejected as well.⁹⁵ The court adopted the common view in Israeli Contract Law, holding that frustration of contract will be recognized only in the most extreme cases and that a closure is something that ought to be foreseen by the parties.⁹⁶ Only under rare circumstances has the court been willing to subtract severance pay for which the worker was entitled. In one such case, the court emphasized that the duty of good faith required the employee to inform his employer that he could not travel to work, especially in light of the supervisor position that particular worker held.⁹⁷ In most other cases, the worker received full severance pay. In a similar series of cases where the worker did not resign from his work, the court found that sending the worker home without work or pay amounted to a constructive dismissal which allowed the worker to either resign with severance pay or to return to work.⁹⁸

The consistent body of law produced by the labor courts provided relief to the workers who sought its help. As such, it is an example of legal intervention operating against the strong interest groups in Israel. The reason for the labor court's position on the issue of Palestinian workers cannot be limited to the judiciary's independence and must also take into account the unique position of the labor courts in the Israeli judicial system. The labor court system was established in 1969, to provide a tribunal that is more sensitive to the nature of the employment relationship and it has frequently, although not consistently, shown more sympathy towards workers' claims than has the regular court system.⁹⁹ In adjudicating cases brought by Palestinian workers, the labor court system seems to have preserved its power-breaking stance.

At the same time, it is important to bear in mind that the courts' intervention is anecdotal. Although it provides some relief to the plaintiffs, the institutional impact of its decisions is more difficult to discern. On the one hand, the court has placed the economic burden caused by the discontinuation of the employment relationship as a re-

95. S. 18 THE LAW OF CONTRACTS: REMEDIES FOR BREACH OF CONTRACT (1970). The case law on the frustration of contract narrows the doctrine of frustration to the minimum. For example, even the uprising in Uganda was held by the Supreme Court to be a foreseen event by the parties to a contract (in Israel!) and failure to complete the contract could not be excused for the reason that the uprising frustrated performance.

96. Cf. FAHRI ABED AZIZ EL-HASSAN—SALAD MANUFACTURING INC. (Unpublished, National Labor Court, April 30, 1995).

97. MUHAMMAD IBRAHIM FARAG—SINAI GORDON (Unpublished, National Labor Court, January 30, 1994).

98. Cf. SHUKRI SALEM YAKOUB AATSI—LIR WOODWORKS INC., 25 Piskei Din Avodah 38 (1995).

99. Ran Chermesh, *The Role of the Labor Court in Securing Work as a Social Status*, 5 THE LABOR YEARBOOK 111 (1995) [Hebrew].

sult of closures, one-sidedly on the employers. On the other hand, the courts' intervention is limited and clouded by the dialectics of the employment relationship and colonization. First, it increases the economic risk faced by employers who still employ Palestinians and creates a disincentive for continuing their employment. Currently, employers are even more eager to replace their Palestinian workers, and in consequence, the workers continue to lose whatever economic leverage they had in the past. Second, adjudication by nature is limited to the resolution of a particular case, only responding to the issues presented to the court. Courts are further, and roughly, confined to the legislative framework. The cases in which the courts have granted workers severance pay do not seek to assess the causes underlying the problems encountered by Palestinian workers. The cases have nothing to say about the closures that disrupt the source of income for so many workers. They can only respond to the consequences of the discontinuation of the employment relationship using the limited means of severance pay.

The power-breaking role the courts provide is thus limited in scope and in its consequences for the Palestinian workforce as a whole, nor does it impose excessively high costs on employers and certainly not on the state. How much the pluralist role will be applied to the more fundamental challenge currently pending to the Supreme Court remains to be seen. Unlike the severance pay cases, the lawsuit on the equalization tax challenges the premises underlying the engagement of Palestinians in Israel and the expected costs of providing the requested declaratory judgement could be enormous. Compared to the severance pay cases, the price the judiciary would pay in terms of its position in the overall scheme of "separation of powers" would be very high as well.

IV. "MY TURN TO MAKE AN EQUATION: COLONIZATION=THINGIFICATION"¹⁰⁰

Nadim is a pawn in a complex political interaction that uses his livelihood as a pressure device to advance political positions. The labor perspective outlined here takes first and foremost Nadim's perspective. This is not to say that only Nadim's subjective perspective is relevant to understand the engagement of Palestinian workers in Israel. There are narratives of frightened Israelis in bus-stops, of desperate employers who do not know when their Palestinian workers will return to work and of administrators from the Employment Bu-

100. AIME CÉSAIRE, DISCOURSE ON COLONIALISM (1972).

reau in the territories who are working long shifts under very difficult conditions. But unlike the other narratives, Nadim's cannot be voiced in the political debate. The Israelis waiting in the bus stop can vote for one party or another. They can demonstrate in the center of Tel-Aviv. Employers can also exert direct and indirect influence on the Minister of Labor and Welfare. The administrators in the Employment Bureau can go on strike and demand more reasonable working conditions. Nadim needs others to tell his story.

Nadim leads a massively regulated work-life, shaped only by the medley of political interests and not by his free will. To understand the forces that regulate Nadim's work-life, the legal analysis starts with two puzzles. First, there is the tension between what seems to be a regulatory environment and the absence of law. Second, there is the tension between the principle of equality as stated by the law and the indication that Palestinian workers are segregated into low skilled-low waged sectors. They earn less compared to their Israeli counterparts and frequently work illegally. The democratic deficit helps to solve both puzzles. A closer look at the Cabinet decision of 1970, indicated that the alleged tensions are only imaginary. There is no discrepancy between what the law sought to achieve and what it did in fact. As noted, the Cabinet decision did not seek to make those who are unequal into equals. Given that the inequality grounded in the lawless regime was well known, the absence of power-breaking law that can empower the Palestinian workers is an affirmative statement and not a state of lawlessness.

"Law" is not a coherent statement and the "authors of the law" are not a monolithic entity. In the legal analysis, it was demonstrated that for many years the position adopted by the executive branch and the legislature confirmed the presumption of the democratic deficit. The most important non-governmental organization that takes part in governing the Israeli labor market, the Histadrut, also displayed an attitude that corresponded to the presumption of the democratic deficit. Only the judiciary that still enjoys a great level of political independence has displayed a partial concern for Palestinian workers, although its impact on their situation is limited and two-sided. The all-encompassing democratic deficit indicates that Palestinian workers are absent even one formal, or semi-formal, stronghold that could impact the authors of the law.

Once the initial puzzles are accounted for, it is necessary to explore the different components of the law and the interests motivating its various authors. The law regulating the worklife of Nadim is by definition labor law. It was argued that unlike the conventional objec-

tives associated with labor law, labor law has been used to entrench the subordinate position of Palestinian workers in Israel. This can be seen in the interpretation to the Cabinet decision that, according to the Attorney General, seeks to ensure that Palestinian workers will not be equal. Denial of important social benefits associated with waged employment in Israel is indicative of a desire to ensure that Palestinian workers will not gain most rights that tie social citizenship in Israel with work. The enforcement priorities indicate that the denial of rights, de-facto even if not de-jure, is an affirmative policy about segmentation and discrimination. Similarly, the narrow scope of the law on foreign workers indicates that the state is not concerned about these workers' rights, and given the known fact that their rights are too often not enforced, becomes an affirmative statement of neglect.

It was further argued that the law sought to make Nadim invisible. This is most aptly demonstrated by the desire to deny Nadim access to the National Insurance offices. Tying the worker to an employer also removes the Palestinian worker from the labor market. Moreover, where the Cabinet decision in 1970 took the necessary measures to ensure that Palestinian workers will not be viewed as foreign workers in Israel, the Foreign Workers Law (1991) failed to distinguish the Palestinian workers from newly admitted foreign workers. After twenty-five years, the law sought to avoid that particular history that makes sense of their presence in Israel.

The two arguments can be tied together to the third that holds that labor law does not perceive Nadim to be a deserving individual, instead holding him to be an instrumental agent. His equality in the labor market is only to that extent as needed to secure the status of Israeli employees and employers. The labor court, even when acknowledging his rights, ignores his narrative. The number of permits issued for Palestinian workers is not intended to provide them with employment, but to secure the interests of employers (*e.g.*, after the Gulf War) or the government (*e.g.*, during the peace negotiations).

Despite the fact that for the most part Israeli labor law is equally applicable to both domestic and Palestinian workers, its effects on the two groups are the opposite. Labor law's power-entrenching role in the regulation of Palestinian workers serves at the same time a power-breaking role in the regulation of Israeli workers. As shown, the entry of Palestinian workers improved the situation of some domestic workers who climbed up the labor market's hierarchy into better paying jobs and a higher social status. The Cabinet decision from 1970, allowing the entry of Palestinian workers accommodated a compromise

between the three sides of the corporatist triangle in Israel—the employers' associations, the Histadrut and the state. The compromise allowed the state and the employers more control over wage demands, but also enabled them to sustain relatively high standards of pay and working conditions. Palestinian workers, especially the illegal ones, paid the price for these agreements. Employing Palestinian workers reduced total labor costs without having the domestic workers pay the price. Thus, labor law's role in entrenching the inferiority of Palestinian workers in the Israeli labor market provided for greater cohesion among the agents of the Israeli industrial relations system.¹⁰¹

Together, the three arguments indicate that when it comes to the regulation of Palestinian workers, labor law departs from its traditional role and seeks to entrench power relations and not to mediate the power imbalance. It is used as a device in the hands of the dominant class, its purpose being the reproduction of social domination. Law is predominantly power-entrenching in the hands of the host state, utilizing both explicit and ideological coercion.¹⁰² Power-entrenching law cannot suffice with direct coercive instruments as it must also construct the ideological background necessary to legitimize its ends. The regulation of Palestinian workers thus utilizes different dimensions of power, rather than relying merely on direct exertion of control.¹⁰³

The dominant class in the Israeli-Palestinian relationship is one, but the source of domination is twofold. In the employment of Palestinians by Israeli employers, Israel acts as the capitalist and as the colonialist. Labor law seeks, in conjunction with other bodies of law, to subject Palestinian workers to the interests of the state and the private interest groups that succeed in shaping the political, and hence the legal, agenda. Moreover, even where law seems to be a power-breaking mechanism, it conceals latent tiers of domination. The intention of the lawmakers (*i.e.* legislature, judges, and bureaucrats) do not matter because each protective device possesses the inherently dialectic nature of both the employment relationship and colonization. The reliance of employees on the economic well-being of the employer indicates that any regulation that seeks to aid the worker at the expense of the employer can potentially harm the worker himself. Similarly, given the reliance of the Palestinian people on the Israeli economy, any effort to erode the colonial regime has the potential of bringing

101. Guy Mundlak, *International Collective Bargaining*, in *INTERNATIONAL COLLECTIVE BARGAINING* 137-160 (Roger Blanpain ed., 1998).

102. ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY* 17-35 (1993).

103. Steven Lukes, *Introduction*, in *POWER* (1992).

undue hardship on the Palestinians themselves. Consequently, even when labor law adheres to its traditional role, it plays no substantial transformative role. At best, it provides temporary and limited relief.

The two sources of domination intertwine and cannot be separated. The experience of Palestinian workers in Israel is similar, to an extent, to that of domestic peripheral workers. This was most aptly demonstrated with regard to the problem of enforcement. Like the Palestinian workers, low-waged, low-skilled Israeli workers are misinformed about their rights and are often afraid to claim their rights in court because they realistically fear for their job. It could thus be hypothesized that the central problem they encounter is the economic difficulty of all low-waged workers, rather than a political problem attributed to people residing under a state of occupation. At the same time, Palestinian workers in Israel also experience problems that evolve from the state of colonization. The inequality embedded in the Cabinet decision is based on the assumption that they are not entitled to the benefits associated with social citizenship. The number of permits is not based simply on economic interests, but also on political interests. As outsiders, their access to court is more difficult even when compared to domestic low-waged workers.

The two sources of domination account for the fact that the political relations between Israel and the Palestinian workers are not simply the outcome of security considerations, nor of economic considerations. It is the alliance between the two that have succeeded in structuring the system where lawlessness and equality conceal structural subordination. When economic and political interests did not coalesce, as was the case in 1991, there was no change. However, the economic and the security interests often matched each other, leading to an intrinsically coherent set of interests. Both capitalism and colonization benefitted from the democratic deficit and drew on it to advance the interests of the stronger party.

Because the effects of labor law on Palestinian workers must be understood in light of the intersection of colonialism and capitalism, it is arguable that the Palestinian workers' situation is idiosyncratic and there is little in it that can be generalized so as to apply to other situations of cross-border migrations. In fact, Palestinian workers are not migrant workers at all. They return every day to their homes in the territories. A better classification would be that of frontier workers. Yet, their situation is very different from that of the French workers crossing the borders to work in Geneva. Palestinian workers did not seek borders to cross or to migrate; they found the borders coming to their doorstep. Imagine, for example, a worker in Chiapas, Mexico,

who wakes up one day to find the border with the United States a few kilometers away from his house and the opportunity to earn wages ten times as high across the new border. The functioning and effects of Israeli labor law on Palestinian workers cannot be deciphered if we take away at least one of the following components: borders, grave inequality on the two sides of the borders, strict prohibition on immigration, or even lesser modes of absorption such as accommodation of Palestinian workers overnight, and a state of belligerent occupation and ongoing warfare.

Nevertheless, it may be too convenient to distance away the Palestinian workers' story as being a remote problem embedded in the particular circumstances of the Middle East. Migrant workers elsewhere do not pose a security threat. Immigration law or permits for migrant workers are not often used as a weapon in peace negotiations. But when comparing the experience of Palestinian workers in Israel to that of other workers world-wide, it appears that the fate of Palestinian workers cannot be detached from that of other migrant workers worldwide. Underlying the shared fate of many migrant workers is the democratic deficit. Unless they naturalize and remain as citizens of the hosting state, they have no leverage to effect the politics underlying labor law. Migrant workers, legal and illegal, in the United States suffer from much of the same invisibility that Palestinian workers do.¹⁰⁴ Foreign workers in Europe face similar bureaucratic hurdles, discrimination and hostility.¹⁰⁵ Domestic workers in Indonesia do not need to work outside their own state to become a crowd of invisible pawns, as they cater to the interests of more prosperous neighboring countries.¹⁰⁶ Indonesia provides an example where labor law serves the interests of elites who cater to economic interests of transnational economic activity, given the domestic democratic deficit. Black workers in South Africa experienced years of discrimination that utilized law in much the same way that Israeli law discriminates against Palestinian workers.¹⁰⁷ This was a case of internal-colonialization that can be found in other countries where ethnicity serves as a social border that merges with economic stratification. The variations

104. Ruth Buchanan, *NAFTA, Regulatory Restructuring and the Politics of Place*, 2 IND. J. OF GLOBAL LEGAL STUD. 371, 374, 379 (1995).

105. Stacy Hickox, *Labor Market Needs and Social Policy: Guestworkers in West Germany and the Arab Gulf States*, 8 COMP. LAB. L.J. 357 (1987).

106. Katharine H. Woodward, *Neo-Colonialism, Labor Rights and the "Growth Triangle" of Indonesia, Malaysia and Singapore: Who Will Protect the "Hinterland" and Indonesia's Workers?*, 15 DICK J. INT'L L. 171 (1996).

107. Elaine Unterhalter, *Constructing Race, Class, Gender and Ethnicity: State and Opposition in South Africa*, in UNSETTLING SETTLER SOCIETIES 207-240 (1995).

among these examples are tremendous, but they at least support the presumption regarding the democratic deficit, as was presented here.

Transnational workers lose their position as members of a nation-state. They cannot vote, they can rarely effectively organize and they are even denied the slim position of market participants. They become insiders by the force of globalization, but they are constantly held to be outsiders by the power of nationalism. Because of the democratic deficit, the migrant worker is often disempowered, invisible and instrumental. National law tends to construct the foreign worker as a threat and resents the true global view that can provide an alternative ideological background. The global view must transcend the domestic view in order to provide such an alternative.¹⁰⁸ It must take into account the humane interests of those who actually take part in the transnational movement across borders. Globalism requires empowerment of the other, not entrenchment of the asymmetric power relationship between peoples and between labor and capital. According to this view, the continued employment of Palestinians in those market niches that have been reserved for them over the years is a result of an anti-global effort. Under the current circumstances, cutting the umbilical cord between the Palestinian economy and the Israeli labor market undermines the possibility of achieving the state of globalism among equals. The peace process cannot advance as long as the power asymmetry is sustained. The post-colonial goal is not only to define new geographic boundaries, but also to restructure the economic boundaries.

The global alternative to national ideology cannot be reached without a correction of the democratic deficit. This is the deficit that leaves the foreign worker stranded in the political desert that is formed in the space where the domestic and the global meet. The Erez check point where Nadim spends a few hours every work-day is the symbolic representation of this political desert. The long slow walk over the Gaza sand to cross the border is the crossing of a space burdened with the battle between opportunity and disempowerment. This space is threatening to the superordinate because it signifies the fear of losing boundaries and a sense of community altogether. To create a true global space, the insiders must humanize Nadim.¹⁰⁹ Yet

108. Rosemary Coombe, *Interdisciplinary Approaches To International Economic Law: The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL. 791 (1995).

109. Cf. Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996).

domestic law, using ideological and direct power constructs, "thingifies" Nadim and is reluctant to see his face.

Whether cross-national political, and hence legal, arrangements are feasible is a matter outside the scope of this presentation.¹¹⁰ Whether social clauses, international pacts and trade agreements, and other international instruments currently being debated can be applied to the eruptive Middle Eastern region is yet another concern.¹¹¹ This article is more limited in nature and seeks to draw attention to the starting point for such inquiries—Nadim.

110. Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1996).

111. On these questions, see Guy Mundlak, *Labor in Peaceful Middle East: Regional Prosperity or Social Dumping?*, in *PEACE IN THE MIDDLE EAST: INTERDISCIPLINARY PERSPECTIVES* 199 (1998).