Yvonne Schmidt

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ABBREVIATIONS

AAD	Appeal of Administrative Detention
ACRI	Association for Civil Rights in Israel
Add.	Addendum
AHC	Arab Higher Committee
A.J.C.L.	American Journal of Comparative Law
ALA	Arab Liberation Army; 5000 volunteers from Iraq, Syria and Lebanon reached by March 1948 Palestine and were organized as the ALA under Fawzi al Qawuqji.
A.L.R.	Annotated Law Reports; published in Palestine 1943-1947
BLccc/No.	Military Court of Bethlehem
B'Tselem	The Israeli Information Center for Human Rights in the Occupied Territories
C.A.	Civil Appeal
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
C.O.J.	Collection of Judgements
C.P.O.A.	Collection of Proclamations, Orders and Appointments; it constitutes the body of legislation made by the Israeli military commander
Cr.A.	Criminal Appeal
DIP	Department for the Investigation of Police
D.M.I.	Dinei Medinat Israel (Nusach Hadash); revised, updated and binding Hebrew text of pre-State legislation promulgated by the Knesset in a New Version; published in two volumes. See L.S.I. (N.V.)
D.K.	Divrei Ha Knesset; are the Protocols of Knesset Proceedings and Knesset Speeches
D.P.	Deputy President
D.R.	Divorce Reports of the Rabbinical Courts
GA	General Assembly
GH/No.	Military Court of the Golan Heights
GSS	General Security Service; Hebrew terms are Shin Bet or Shabaq; Israeli Secret Service operating inside the State of Israel and the Occupied Territories
Harv.L.Rev.	Harvard Law Review
H.C.	High Court
H.H.	Hatza'ot Hok; Section of Reshumot containing the

	Legislative Bills (including the Explanatory Notes) presented to the Knesset
HTA	Hostile Terrorist Activities
IAF	Israel Air Force
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDF	Israel Defense Force
ILA	Israel Lands Administration
I.L.M.	International Legal Materials
I.R. (Iton Rishmi)	Official Gazette during the term of the Provisional Council of State
Isr.L.Rev.	Israel Law Review; published by the Hebrew University
I.Y.H.R.	Israel Yearbook on Human Rights
IZL (Etzel)	Irgun Zva'i Leumi (National Military Organization)
J.	Justice
JA	Jewish Agency;
JNF	Jewish National Fund; see KKL
K.A.	Kitvei Amana; Israeli Treaty Documents
KKL	Keren Kayemet Le'Israel
K.T.	Kovetz HaTakanot; Section of Reshumot containing the Subsidiary Legislation (i.e. Regulations) issued by Ministries of the Israeli Government -
LHI (Lehi)	Lohamei Herut Yisrael (Freedom Fighters of Israel)
L.P.	Laws of Palestine
L.S.I.	Laws of the State of Israel; authorized English translation of Israeli legislation (S.H.); published by the Ministry of Justice
L.S.I. (N.V.)	Laws of the State of Israel (New Version); authorized English translation of the revised text of pre-state legislation
L. & Soc'y Rev.	Law & Society Review
MK	Member of the Knesset
Misc. App.	Miscellaneous Application
O.G.	Official Gazette; see the explanations given to I.R. (Iton Rishmi)
P.	President
para.	Paragraph
P.D.	Piskei Din (Judgements); official publication of the

	judgements of the Israeli Supreme Court since 1948
P.E.	Pesakim Elyon; is an unofficial publication of judgements of the Supreme Court and of the District Courts ("Pesakim Mehoziim").
PFLP	Popular Front for the Liberation of Palestine
P.G.	Palestine Gazette; the Official Gazette of the British Mandatory Government in Palestine
PICA	Palestine Jewish Colonisation Association
PLO	Palestinian Liberation Organization
PLP	Progressive List for Peace
P.L.R.	Palestine Law Reports; published in Palestine 1920-1947
P.M.	Pesakim Mehoziim; Law Reports of the District Courts since 1949
R/No.	Military Court of Ramallah
SAO	State Attorney's Office
SC	Security Council
S.C.D.C.	Selected Cases of the District Court
S.C.J.	Supreme Court Judgements
S.H.	Sefer Ha Hukim; is a Section of Reshumot containing the Principal Legislation promulgated by the Knesset
Sh/No.	Military Court of Shechem (Nablus)
S.J.	Selected Judgements of the Supreme Court of Israel; official English translation of the judgments of the Supreme Court
S.J.M.C.	Selected Judgements of Military Courts
SLA	South Lebanese Army; Lebanese armed militia allied to Israel
SMC	Supreme Muslim Council
S.T.	Special Tribunal
T.A.Univ.Stud.i.L.	Tel Aviv University Studies in Law
UN	United Nations
UNCC	United Nations Compensation Commission
UNCCP	United Nations Conciliation Commission for Palestine
UNCP	United Nations Commission on Palestine
UNDRP	United Nations Disaster Relief Project
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon
UNRPR	United Nations Relief for Palestine Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Middle East
UNSCOP	United Nations Special Committee on Palestine
WZO	World Zionist Organization

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Y.P.	Yalkut Ha Pirsumim; is a Section of Reshumot containing the Government Notices

GLOSSARY

Aliyah	Literally "Ascent"; aliyah means the return of an individual or an organized group to the Land of Israel; considered as a major Zionist virtue.
Amal	Shi'a militia fighting against Israel's occupation in South Lebanon.
Ashkenazim	Jews of north European and western origins; usually contrasted with "Oriental" Jews, or Sephardim.
dunam	1 dunam = 1/4 of an acre. 1000 dunams is 1 sq.km.
Eretz Israel	Literally "the land of Israel".
Etzel	See IZL
Gahal	"The Herut-Liberal Bloc"; a political alliance formed between the two parties before the elections to the Knesset in 1965.
Haganah	Literally "Defense", the Haganah was a defense organization founded in 1920; after the establishment of the state of Israel the Haganah became the Tzahal, the Israel Defense Force (IDF).
Halakha	Jewish religious law
Harem esh Sherif (Noble Sanctuary)	Arab term for the Temple Mount and the site of the Al-Aksa Mosque, and the Dome of the Rock.
HaPraklit	Law Journal published by the Israel Bar Association.
Herut	"Freedom"; a right-wing political party established in 1948 by Menachem Begin; key party in Gahal and Likud.
Hizbullah	Armed Lebanese Shia militia fighting against Israel's occupation in South Lebanon.
Intifada	Arab term for the Palestinian uprising in the West Bank and Gaza, which started in December 1987.
Iyunei Mishpat	Tel Aviv University Law Review
IZL	Jewish underground military organization which is also known as the Irgun or Etzel; Menachem Begin, Prime Minister of the State of Israel from 1977-1983, had commanded IZL.
Jewish Agency	The Mandate for Palestine given to Britain in 1920 provided for the establishment of a Jewish Agency that would represent the Jewish people before the mandatory

government; Article 4 of the Mandate for Palestine (adopted in 1922) gave the World Zionist Organization the status of a Jewish Agency; was the main political body of the "Yishuv".

Jewish National Fund — see Keren Kayemet Le'Israel

Kach — Literally "Thus! or This is the Way!" Rabbi Meir Kahane's racist and anti-Arab political movement which called for the use of violence against Arabs; is the Israeli successor of the American Jewish Defense League (JDL) which is classed by the FBI as terrorist organization; was outlawed as terrorist organization by Israel's government only in February 1994.

Keren Hayesod — Literally "Basic Fund". Main financial institution of the World Zionist Organization and later of the Jewish Agency; was founded in 1920.

Keren Kayemet Le'Israel — A fund, based on contributions, was established in 1901 by the World Zionist Organization (WZO).

Knesset — Israeli Parliament.

LHI (Lehi) — Jewish underground military organization; is also known as Lehi or Stern Gang; Yitzhak Shamir, Prime Minister of the State of Israel from 1983 to 1984 and from 1986 to 1992, was one of the leading figures of this organization.

Likud (Unity) — Right-wing political bloc; formed in 1973 of Gahal and smaller groups; dominated by Herut; in control of the Israeli government from 1977 to 1992 and 1996 to 1999.

Mapai — "Mifleget Poalei Eretz Yisrael"; a Zionist socialist party established in 1930 and led by David Ben-Gurion; it dominated Israeli politics for over forty years; changed its name to "the Labor Party" after its unification with Achdut Haavodah and Rafi.

Minhelet Ha'Am — Literally "People's Administration"; has been constituted under the Declaration of the Establishment of the State of Israel; functioned as the government in the period after the state of Israel has been declared.

Mishpatim — Student Law Review of the Hebrew University of Jerusalem.

Mishpat Umimshal — Law and Government Review in Israel, published by the University of Haifa, Faculty of Law.

Mizrahi — See National Religious Party.

Mo'etzet Ha'Am — Literally "People's Council"; has been constituted under the Declaration of the Establishment of the State of Israel; functioned as a legislature in the period after the

	state of Israel has been declared.
Moledet	Radical right political party; established in 1987 by General (res.) Rehavam Ze'evi (nickname Gandhi); main proponent of a the idea of a "transfer" (i.e. the eviction) of all native Palestinian Arab inhabitants from the Occupied Territories.
Mossad	Israeli Secret Service responsible for espionage, intelligence gathering and political undercover operations in foreign countries.
National Religious Party	(NRP); Israel's most influential Zionist religious party and a coalition partner in almost all the nation's governments; known earlier as Mizrahi.
Ploni (m)	Literally "Unnamed".
Reshumot	Official Gazette since the inception of the Knesset; it contains the following Sections: Yalkut Ha Pirsumim (Government Notices) Sefer Ha Hukim (Principal Legislation) Kovetz Ha Takkanot (Subsidiary Legislation) Hatza'ot Hok (Bills).
Sephardim	Jews whose ancestors lived in Spain and Portugal; this term is usually applied to the Jewish Oriental population in Israel, in contradistinction to the Ashkenazim.
Shas	An utraorthodox party of Sephardi Jews established in 1984 by former Chief Rabbi, Ovadiya Yosef; very influential and active in national politics.
Shin Bet/Shabaq	General Security Service (GSS); the Israeli Secret Service responsible for undercover operations inside the state of Israel and the Occupied Territories.
Supreme Muslim Council	The institutional power base from which the Grand Mufti of Jerusalem, Hajj Amin al Husayni, won the supreme leadership of the Palestine Arab community; it managed the wakf (the Muslim trusts responsible for holy sites and properties) and the Islamic courts (Shari'a Courts).
Takdin Elyon	Official computerized publication of the judgements of the Israeli Supreme Court.
Tehiya	Literally "Renaissance". A radical right political party that was established in 1979; it tries to bring together secular and religious Jews; most known leaders are: Professor Yuval Ne'eman and Geula Cohen.
Torah	The Pentateuch; broadly the Jewish religious law.
Tzahal	Literally "Tzva Haganah Le'Israel", the Israel Defense Force (IDF); it was set up by order of the provisional

	government a few days after the establishment of the state of Israel in Palestine.
World Zionist Organization	Main instrument in order to carry out the objectives of Zionism as defined in the Basle Program, 1897.
Yishuv	Literally, "settling", "inhabited area"; organized Jewish community of Palestine before the establishment of the state of Israel (1882-1948).

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PREFACE

This work intends to show how civil and political rights in Israel and the Occupied Territories are regulated, which normative standards and spiritual sources nourish them, and how written and unwritten principles are applied and interpreted by the Supreme Court of Israel in pursuance of its self-imposed duty to safeguard the individual's rights and freedoms.

The background and starting point for my examination will be Israel's domestic laws and constitutional framework, Israel's Supreme Court jurisprudence as well as international human rights and humanitarian law.

In a comprehensive Introduction I will first of all outline the most important normative and jurisprudential concepts, aspects and problems which exist within Israel's legal system concerning civil and political rights and freedoms, and which will be discussed in the course of this work. In this Introduction I will also give a short overview of the historical and sociopolitical background of Israel's legal system, constitutional framework and approach towards judicial review in order to prepare the reader for these and other important related issues that will be analyzed in the course of this work.

In Chapter A, I will discuss the most important historical aspects and facts regarding the right to self-determination of the Jewish and the Palestinian Arab people, including the events that lead to the establishment of the state of Israel in Palestine in May 1948. I will analyze in short the history, the basic ideology and the sources of the concept of political Zionism emerging at the end of the 19th century, forming the background for the idea of self-determination of the Jewish people and the decision to establish a "national home" for the Jewish people in Palestine and culminating in the establishment of the state of Israel in 1948. Such an analysis of the concept of political Zionism is necessary since it is this political concept that lays at the very foundations of Israel's legal system and jurisprudence regarding civil and political rights.

In Chapter B then I will deal at great length with the above mentioned conceptional issues regarding Israel's constitutional framework and approach towards judicial review - as far as these issues are relevant for the discussion of civil and political rights. I will cover the period since the establishment of the state of Israel in 1948 up until the recent developments that took place with the enactment of two basic laws on human rights and freedoms in 1992, including some subsequent jurisprudence relating to these laws.

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In the next Chapter C, I shall give an overview over the concept of the state of Israel as a "Jewish state" and its impact on the normative sources and jurisprudential concepts regarding the right to equality, the right to property, the right to citizenship, the right to form associations, and the right to vote and to be voted.

In Chapter D then I will analyze one of the most significant aspects regarding civil and political rights and freedoms in Israel, namely the existence of a permanent state of emergency which is in force since Israel's inception in 1948 and whose compatibility with the idea of a liberal democracy based on human rights and freedoms is highly questionable.

The purpose of Chapter E is to describe in short the legal, judicial and administrative system that emerged in the territories occupied by Israel in the course of the war in June 1967 as well as the legal changes that took place in the context of the signment of the Oslo Agreements.

The whole Chapter F is devoted to the right to freedom of expression, speech and the press, since a vast number of important and still relevant Supreme Court jurisprudence has been developed in the context of this right.

Chapter G deals exclusively with the normative standards and jurisprudential concepts of the right to property - especially the rights to land - since it is mainly the violation of this fundamental right by the Israeli government towards the Palestinian Arab people that lays at the very foundation of the conflict between the Palestinian/Arab and the Israeli/Jewish people.

This work ends with a summary and final conclusions.

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INTRODUCTION

(1) The purpose of this work is to provide an insight into the basic jurisprudential concepts, normative sources, institutions and processes upon which civil and political rights in Israel and the Occupied Territories are founded.

1. Nature and Sources of Israel's Legal System

(2) In order to understand the very complex and highly problematic situation concerning the subject under review it is appropriate to make a short analysis of the historical and sociopolitical background of the state of Israel, the nature and the sources of the legal system as well as Israel's constitutional policy towards civil and political rights and freedoms.

(a) The legal system of a state always displays cultural and religious traditions, economic, social and political credos, tendencies to abstract or concrete thinking as well as the community's approach and commitment towards concepts like individual human rights and freedoms, social welfare, the rule of law, separation of powers, administrative legality and the democratic nature of the whole regime.

(b) The legal system of Israel reflects also unresolved communal conflicts and ambiguities of the state, difficulties connected with the process of nation-building,[1] dilemmas concerning the ethnic and cultural identity of the population, uncertainties in regard to the protection of minorities, ideological contradictions resulting from the relationship between religion and state and from issues like national security and individual physical survival.

1.1. Ottoman Law - British Colonial and Common Law - Israeli Law

(3) Due to the fact that so many different historical, cultural and systemic factors and influences contributed to the development of Israel's legal system, it is not easy to say to which family or tradition this legal order belongs and which jurisprudential philosophy really has been laid down.

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[1] The process of nation-building has not yet ended in Israel due to the facts of a lack of geographical borders, the absence of a clear national consensus about the nature of the state and the constitution. These facts have far-reaching consequences for the protection of human rights and freedoms.

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(a) From 1517 until 1917 Palestine was ruled by the Turks as part of the Ottoman Empire. In 1917 British troops conquered the territory and in 1922 the League of Nations granted to Great Britain the Mandate over Palestine.[2]

(b) After initial links to the Ottoman law, there are long-lasting, deep roots to British common law. During the Mandate in Palestine the law was "Anglicized" through legislation enacted in Palestine.[3]

(c) Following the establishment of the state of Israel in Palestine on 14 May 1948 - an event which lives on in the Palestinian memory as al-Nakba (the Catastrophe) - a large number of British mandatory legislation was absorbed[4] into Israel's legal system. This had - and still has - far-reaching, restrictive implications for the areas of administrative law and the field of human rights and freedoms.

The British mandatory legislation includes security legislation - such as the Defence (Emergency) Regulations, 1945[5] - which empowers military commanders as well as the entirely executive branch of the government to impose severe restrictions on fundamental rights and freedoms.

As I will show in the course of this work, many areas, such as personal freedom, freedom of speech and the right of association and assembly are - despite the enactment of two basic laws on human rights in 1992 - still regulated mainly by British colonial legislation that was never revoked after the establishment of the state of Israel.

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2 Mandate for Palestine, 24 July 1922, entered in force on 29 September 1922, British White Paper, Cmd. 1785, published in The Middle East and North Africa 1980/1981 (28th Edition, Europa Publications Limited 1981) at 66, 67; Daniel Friedmann, The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period, 10 Isr.L.Rev. (1975) 192, at 193, 194, 196

3 Daniel Friedmann, Infusion of the Common law into the Legal System of Israel, 10 Isr.L.Rev. (1975) 324. The process of Anglicization took place by means of statutes based on English legislation or original codifications of the common law. Another important way to implement Common law was by virtue of Article 46 of the Palestine Order-in-Council, 1922, Official Gazette of the Government of Palestine, 1 September 1922. Article 46 provided for the adoption of the substance of the common law and the doctrines of equity in force in England insofar as there were lacunae in the local law, and as the circumstances of Palestine permit. Due to the fact that many leading judges in Palestine were British (the Chief Justice of the Supreme Court was always a British jurist), the courts gave broad interpretation to Article 46 of the Palestine Order-in-Council, leading to a clear distance from the relevant Ottoman legislation. See Yoram Shachar, History and Sources of Israeli Law, published in Introduction to the Law of Israel (edited by A. Shapira and c. De-Witt, 1995) 1, at 6; Allen Zysblat, The System of Government, published in Public Law in Israel (edited by I. Zamir and A. Zysblat, 1996) 1, at 2

4 By virtue of Section 11 of the Law and Administration Ordinance, 1948, 1 L.S.I. (1948) 7

5 Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945) Suppl. II, at 1055

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(d) Additionally, the Knesset (the Israeli parliament) enacted its own security legislation which is often by itself undemocratic and certainly constitutes severe restrictions upon the freedoms and rights of minorities and the individual.[6]

(e) Alongside this formal British and Israeli security legislation, in 1987 a Commission of Inquiry headed by former Supreme Court President Justice Moshe Landau (hereinafter: Landau Commission) was set up and officially granted to the General Security Service (GSS)[7] "special security powers", i.e. the license "to use a moderate measure of physical pressure" in interrogations of suspects in order to obtain information "needed to protect the security of the state and its citizens."[8]

(4) Due to the fact that - since the establishment of the state of Israel in Palestine in 1948 - a permanent state of emergency is in force, the Israeli government is always formally entitled to apply the inherited British mandatory security legislation as well as the own, by the Israeli parliament enacted emergency regulations.

The most important aspects to be discussed in that context is the general definition of the term "state or public security", the scope of persons who benefit from this security and the manner in which a state applies this concept in order to justify the suspension of other values.

It must be stressed at this point that what constitutes for one group of persons "security" (i.e. the Jewish/Israeli population) often means for another group of persons (i.e. the Palestinian Arab population) severe transgressions of their rights and fundamental freedoms.

Numerous Supreme Court judgments discussed in the course of this work will show that such severe transgressions excused in the name of "state or public security reasons" mainly concern the Palestinian Arab people living in Israel and the Occupied Territories.

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6 See for example: Emergency Regulations (Foreign Travel), 1948, 2 L.S.I. (1948) 179; Emergency Regulations (Security Zones), 1949, 3 L.S.I. (1949) 57; Emergency Land Requisition (Regulation) Law, 1949, 4 L.S.I. (1950/51) 3; Emergency Powers (Detention) (Amendment) Law, 1980, 34 L.S.I. (1980) 157

7 The Hebrew term for the General Security Service (GSS) is "Shin Bet", which is the secret service operating within the state of Israel and the Occupied Territories. The "Mossad" in contrast is the secret service responsible for espionage, intelligence gathering and political covert operations in foreign countries. See Menachem Hofnung, Democracy, Law and National Security in Israel (Dartmouth Publishing Company Limited, 1996) at 193

8 Landau Commission Report, Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Excerpts from the English translation published by the Government Press Office in October, 1987 of Part I of the Commission Report), 23 Isr.L.Rev. (1989) 146

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1.2. American Law - Canadian Law - Continental European Law

(5) Returning now to the issue of sources of Israel's legal order concerning human rights and freedoms, it can be observed that despite strong roots to English common law, Israel's legal system as a whole has been moving towards American law and since several years even more and more towards continental European law.

(a) In many decisions concerning civil and political rights and liberties, one can find the big influence of American case law and American legal literature and despite the fact that American cases do not serve as a formal source of law in Israel, one may say that "liberation" from English case-law was achieved with American support. However, with regard to the transplantation of American legal sources concerning human rights and freedoms to the Israeli legal system it must be said that Israel sometimes forgets that the American legal order completely differs from that in Israel. First of all America has a constitution and a constitutional court, but Israel has not. Second America is a federal state while Israel is not.

(b) An interesting aspect concerning the above mentioned influence of continental European law is the fact that it is not French law - like during the Ottoman period - that mainly serves as normative and spiritual source but rather German law. In many decisions concerning human rights and freedoms several judges - especially the former Supreme Court President, Meir Shamgar, but also the current President of this Court, Aharon Barak, as well as the Justices Haim Cohn and Yoel Sussman - base their arguments on the German Constitution and on decisions of the German Constitutional Court.

(c) To mention among the influences upon Israel's legal system regarding human rights and freedoms is also the adoption of principles of the 1982 Canadian Charter of Rights and Freedoms as model for the interpretation of two new basic laws relating to fundamental freedoms, enacted in Israel in 1992.[9]

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[9] Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994); Basic Law: Freedom of Occupation, S.H. No. 1387 (12 December 1992) repealed by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994). The English version of these two basic laws appears in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press, Oxford, 1996) at 154-157

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1.3. Religious Law

(6) An important structural element of Israel's legal order is the fact that there is no system of separation between state and religion in the sense practiced in the USA, France and other western countries.

(a) Israel's legal system has been built upon the duality of secular and religious law - a concept that was inherited from the Ottoman Millet tradition, first by the British Mandatory government and then by the state of Israel.

This duality means that in matters of personal status - such as birth, marriage, divorce, custody of children, adoption, burial and inheritance - the law of the various religious-ethnic-national communities - Jewish, Moslem, Druze and Christian - is applied by the different religious courts. There is also no civil marriage in Israel, and people with different religions have great difficulties to get married or divorced within the state of Israel.[10]

(b) Among the different religious laws, Jewish law has an outstanding significant position in Israel's legal system since it serves as a source of inspiration and interpretation to the legislature and the courts. When the court is faced with a problem that has no answer in statutory or case law and cannot be solved by way of analogy, the courts must resolve that problem by reference to the principles of Jewish heritage.[11]

Important to mention in that context is the fact that - since the establishment of the state of Israel and especially in the last 20 years - the influence of Jewish law and heritage upon Israel's legal order has gradually grown.

(c) The duality of secular and religious law contributes to severe tensions between the different Western ideas, aspects and traditions, such as liberalism, secularism, democracy and human rights, and the special status of religious law within the whole regime. It leads to a permanent legal, political and social conflict about fundamental principles and values of the state.

(d) The specific influence of Jewish law and heritage upon Israel's legal order as a whole has especially discriminatory effect for the non-Jewish population, i.e. mainly the Palestinian Arab people.

(7) The nature of Israel's legal order has been described as part of the Western legal culture - similar to the common law system and influenced by the Romano-German families - but with an independent and unique system due to the particular status of religious law. Supreme Court President Aharon Barak has

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[10] Ariel Rosen-Zvi, Family and Inheritance Law, published in Introduction to the Law of Israel (edited by Amos Shapira and Keren C. DeWitt-Arar, Kluwer Law International, 1995) 75-79

[11] Foundations of Law Act, 1980, 34 L.S.I. (1979/80) 181

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characterized Israel's legal system as mixed jurisdiction similar to that of South Africa, Sri Lanka or Cyprus.[12]

1.4. The Occupied Territories

(8) As I indicated in the title of this work, this study will also include important laws and Supreme Court judgments concerning civil and political rights that relate directly or indirectly to the territories occupied by Israel in the course of the war in June 1967.[13]

(a) In order to place the jurisprudence of the Supreme Court cases related to the Occupied Territories in a legal framework I will therefore briefly delineate the legal regimes which emerged in the Occupied Territories since the June 1967 war. Important to mention at this point is the fact that in the context of the signment of the Declaration of Principles on Interim Self-Governing Arrangements of 13 September 1993,[14] the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 25 September 1995[15] and other documents several important legal changes took place in the Occupied Territories. A detailed discussion of these more recent developments lays, however, outside the scope of this work.

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12 Aharon Barak, The Israeli Legal System is as Solid as a Rock, 17 Justice (1998) 3, at 4. Barak, The Tradition and Culture of the Israeli Legal System, published in European Legal Traditions and Israel, Essays on Legal History, Civil Law and Codification, European Law, Israeli Law (edited by Professor Alfredo Mordechai Rabello, Hebrew University, 1994) 473, at 489-491

13 The term "Occupied Territories" refers to the Sinai Peninsula, the Gaza Strip, the Golan Hights, the West Bank of the Jordan River including the area of East Jerusalem. The term "Occupied Territories" is not the recognized legal usage, used by the Israeli government. The Israeli official terms for these territories are "Areas Administered by Israel" or "Administered Territories." The West Bank is officially called in Israel also "Judea and Samaria" corresponding to the biblical terms for this area. These Israeli official terms will be used in this work as appearing in quoted texts or in formal titles. This work will also use the terms "Occupied Territories," "Military Government," "Occupying Power," and "Occupant" as they are normally used in international law. For more details about the official Israeli position regarding the legal status of the Occupied Territories, see David Yahav (ed.), Israel, The "Intifada" And The Rule Of Law (Israel Ministry Of Defence Publications, Israel 1993) at 21-25

14 Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993 (The DOP), reprinted in Raja Shehadeh, From Occupation to Interim Accords: Israel and the Palestinian Territories (published by CIMEL and Kluwer Law International) 1997, Appendix 6 [also referred to as Oslo I Agreement]

15 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 25 September 1995, reprinted in Raja Shehadeh, From Occupation to Interim Accords: Israel and the Palestinian Territories (published by CIMEL and Kluwer Law International) 1997, Appendix 7 [also referred to as Oslo II Agreement]

(b) Despite the fact that according to international law the legal status of the Occupied Territories[16] is different from that in Israel within the Green Line, the laws and Supreme Court judgments regarding human rights and freedoms in these territories should - according to my opinion - not be considered as disconnected from Israel itself.

(c) The reason which supports this approach is that over the years the legal borders separating Israel proper from the Occupied Territories have gradually been blurred as a consequence of the policy carried out by the Israeli government.[17]

This policy - which at the time being has indeed achieved its goal[18] - always was - and - in spite of the peace process started in October 1991 in Madrid - still is[19] directed at creating "facts" on the ground and at changing the demographic realities in the region through the establishment of civilian settlements and the transfer of population from Israel into the Occupied Territories.

(d) The result of this process was a fundamental legal change in the Occupied Territories with the emergence of two different legal and judicial systems applied on two distinct ethnic and religious groups - the Jewish and Palestinian Arab people - which are actually living on the same territory. This state of affairs -

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16 The West Bank and the Gaza Strip were since 1967 ruled under a regime of belligerent occupation. The Sinai Peninsula was also subjected to a regime of belligerent occupation - until Israel withdrew from this area in 1979 following the peace with Egypt. East Jerusalem and the Golan Heights were since 1967 de facto annexed by Israel. With the signment of the Oslo Agreements in 1993 and 1995, three categories of Areas - namely A, B, C - with different jurisdictions have been established in the West Bank and the Gaza Strip. Only Area A is under the full control of the Palestinian authority, but the Areas B and C are still subject to the law of belligerent occupation.

17 Amnon Rubinstein, The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel, 8 T.A.Univ.Stud.i.L. (1988) 59

18 See David Kretzmer, Domestic Politics, Law and the Peace Process: A View from Israel, published in The Arab-Israeli Accords: Legal Perspectives (1996) 81, at 86

19 B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem (Jerusalem, January 1997); B'Tselem, Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects (Jerusalem, March 1997); B'Tselem, On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement (Jerusalem, July 1999); LAW, House Demolition and the Control of Jerusalem. Case Study of al Issawiya Village, Jerusalem, June 1995; LAW, Fraud, Intimidation, Oppression: The Continued Theft of Palestinian Land. Case Study of Jeensafut Village: One Man's Struggle to Defend His Land, Jerusalem, October 1995; LAW, Bulldozed into Cantons: Israel's House Demolition Policy in the West Bank Since the Signing of the Oslo Agreements. September 1993 to February 1999. First Edition: Parastou Hassouri, February 1999 Revision: Richard Clark; LAW, Netanyahu's Legacy, June 1999; LAW, Land & Settlement Policy in Jerusalem (First Printed June 1999, Reprinted January 2000)

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which affected in the past every aspect of life - definitely constitutes an infringement of the internationally recognized right of equality before the law.

(e) According to my point of view any discussion about the foundations of civil and political rights in Israel's legal system may not disregard the very fact of occupation which took place more than 33 years ago and which was kept alive by nothing and nobody else than the political, judicial and administrative apparatus of the state of Israel itself.

1.5. Israel's Constitutional Framework

(9) Very important for the whole discussion about the foundations of civil and political rights is the fact that Israel lacks a formal written constitution with normative supremacy in relation to ordinary legislation.[20]

(a) A promise to establish a bi-national state and to enact a democratic constitution was the first time expressed in the UN-General Assembly Resolution 181 (II) of 29 November 1947[21] and also appears in the Declaration of the Establishment of the State of Israel of 14 May 1948.[22]

(b) However, instead of the adoption of such a formal document, Israel has decided to take the way of gradual development through the enactment of specific topics in a series of basic laws which at the end of the process shall become a full written constitution. Such basic laws, covering the institutional aspects of Israel's constitutional system have indeed been enacted, but - with the exception of a few entrenched provisions - these laws do not have the force of a superior law which was to control ordinary legislation.[23]

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20 Moshe Landau, I do not believe in Judicial Activism, 16 Justice (1998) 3, at 4; Haim Cohn, The Time Has Come to Write a Constitution, 16 Justice (1998) 10, at 11, 12; Meir Shamgar, The High Court of Justice is Important for all the People in the Country, 16 Justice (1998) 17, at 20; Yaffa Zilbershatz, Highlighting Constitutional Changes in the Israeli Legal System, 7 Justice (1995) 28. Regarding the question whether Israel has a rigid Constitution on the American model the present Supreme Court President Aharon Barak has a different view than the above cited writers. See C.A. 6821/93, 1908/94, 3363/94 *United Mizrachi Bank v. Migdal Cooperative Village,* for a summary and extracts in English from the judgment see 31 Isr.L.Rev. (1997) 764. For more details on Israel's obligations since the establishment of the state to enact a constitution, see infra Chapter B. (Israel's Initial Obligations to Enact a Constitution including a Bill of Human Rights and the Issue of Judicial Review)

21 United Nations General Assembly Resolution 181 (II) on the Future Government of Palestine, 29 November 1947 [Partition Resolution] UN document A/Res/181 (II) (A+B). The Jewish community of Palestine accepted the Partition Resolution. For more details on this issue see infra Chapter A. (Historical Perspectives regarding the Right to Self-Determination of the Jewish and Palestinian Arab People)

22 Declaration of the Establishment of the State of Israel, 14 May 1948, 1 L.S.I. (1948) 3

23 Landau, supra note 20, at 4; Cohn, supra note 20, at 11; Zilbershatz, supra note 20

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(c) Until the enactment of two - partly entrenched - basic laws on civil rights in 1992, there was also no bill of rights in Israel.[24]

Prior to the enactment of these two basic laws on human rights, the task of protection of human rights and freedoms was mainly entrusted to the Supreme Court of Israel, sitting as a High Court of Justice. This fact involves the crucial question if the principle of separation of powers, as requested for democracies, really exists in Israel.

1.6. Israel's Approach towards Judicial Review

(10) The significance of Israel's constitutional framework was - with a few exceptional cases - the long time well-accepted and dominant principle that primary legislation of the Knesset is not subject to judicial review.

Only in limited way there existed judicial review of quasi-judicial and administrative decisions of the Knesset.

(a) With the enactment of the above mentioned new basic laws on human rights the Supreme Court is now given additional power to review the constitutionality of primary legislation.[25]

(b) A further step towards recognition of judicial review of primary legislation repugnant to the two basic laws on human rights was made by a decision of the Supreme Court in 1995.[26]

(c) However, despite the existence of the new basic laws on human rights and the subsequently developed jurisprudence, the main issue now still centers around the way of interpretation and application of these laws in reality.

(d) The crucial question to be answered in the future is, if the said new basic laws on human rights only exist of empty words or if they are applied by the courts in a way to really accomplish their aim - namely to protect human rights and freedoms in a substantive way.

(11) In contrast to the long time practiced reluctance of the Supreme Court to review primary legislation, the Supreme Court of Israel has - on the other hand - elaborated a system of judicial review in regard to many - but not all - activities of the executive branch of government.

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[24] David Kretzmer, The New Basic Laws on Human Rights: A Mini-revolution in Israeli Constitutional Law?, published in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press, Oxford, 1996) 141

[25] Meir Shamgar, Judicial Review of Knesset Decisions by the High Court of Justice, 28 Isr.L.Rev. (1994) 43, at 49-56

[26] The *Mizrahi Bank case*, supra note 20

(a) Until the beginning of 1980 the Supreme Court strictly followed the judicial policy of separation between "security" authorities and other "regular" administrative authorities, and exercised strict self-restraint in reviewing the substantive grounds of security related cases, despite the legal and moral considerations often arising in connection with these cases.[27]

Thus the Supreme Court was quite active in reviewing violation of fundamental rights and freedoms by the "regular" administrative authorities, but exercised only minimal judicial review over the executive power of the so called "security" authorities.[28]

(b) An indication for the adoption of a new judicial policy of judicial review might be seen in the - since 1988 - shown readiness of the Supreme Court to examine not only procedural and formal requirements, such as bad faith or irrelevant considerations but also the merits and the reasonableness of every administrative decision, even when the authority in question is a "security" authority acting out of security considerations.[29]

(c) Nevertheless, it must be stressed at this point that the Supreme Court of Israel has been overly protective of the military government's position in the Occupied Territories.

This is revealed by the fact that the majority of over 500 petitions that were submitted to the Supreme Court by Palestinian Arab petitioners from the Occupied Territories were decided in favor of the considerations of the military government,[30] with the result of denying and violating mainly the basic rights and freedoms of the Palestinian Arab people living in these areas.

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27 For a discussion of the approach of the Supreme Court towards the executive power of security authorities see Baruch Bracha, Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945, 8 I.Y.H.R. (1978) 296, at 309-317; Baruch Bracha, Judicial Review of Security Powers in Israel: A New Policy of the Courts, Stanford Journal of International Law (1991) 39, at 40-41

28 The term "security authorities" includes the two Israeli secret services, i.e. the General Security Service (GSS) (Hebrew "Shin Bet") and the "Mossad"; the Police, the Minister of Defence; the Chief of Staff and the military authorities of the Israel Defence Force (IDF). For details on this issue see Hofnung, Democracy, Law and National Security in Israel, supra note 7, at 188-197; Bracha, Judicial Review of Security Powers in Israel, supra note 27, at 45-47

29 H.C. 680/88, *Schnitzer v. Chief Military Censor,* translated into English in 9 S.J. (1977-1990) 77

30 From 1967 until 1994 only about 20 cases relating to the Occupied Territories were decided in favor of the petitioners.

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1.7. The Declaration of the Establishment of the State of Israel of 1948

(12) One of the most important documents of Israel's constitutional framework is the Declaration of the Establishment of the State of Israel of 14 May 1948 - commonly referred to as Declaration of Independence.[31]

(a) Until 1992, this Declaration was never recognized as the formal constitution of the state of Israel but rather served as an interpretative instrument that expresses the accepted fundamental values of the whole legal system in Israel.

In the past the Supreme Court held that the principles set down in the Declaration shall guide the legislature and the executive branch as well.[32]

(b) However, with the enactment of the two new basic laws on human rights in 1992, the Declaration of the Establishment of the State of Israel was given special - and according to my opinion even constitutional - status.

(c) The Declaration contains three statements that are central in analyzing the human rights situation in Israel:

First, the state was - "by virtue of the natural and historical right of the Jewish people and the Resolution of the United Nations General Assembly - declared to be a Jewish state in Eretz Israel" that would open its doors to every Jew and grant the Jewish people the status of a nation with equal rights among the family of nations.[33]

At the same time, Israel was established on the basis of a democratic concept, since the state committed itself "to foster the development of the country for the benefit of all its inhabitants, that it will be based on freedom, justice and peace as envisaged by the prophets of Israel and that it will ensure complete equality of social and political rights to all its inhabitants, irrespective of race, religion and sex."[34]

And finally the Declaration "appeals to the Arab inhabitants of the state of Israel to preserve peace and to participate in the building of the state on the basis

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[31] The formal title of the "Declaration of Independence" is Declaration of the Establishment of the State of Israel, supra note 22, at 4

[32] H.C. 10/48, *Zeev v. Gubernik,* translated into English in 1 S.J. (1948-1953) 68, at 71-72; H.C. 87/53*, Kol Ha'am Company Ltd. v. Minister of Interior,* translated into English in 1 S.J. (1948-1953) 90; E.A. 2/84, 3/84, *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, translated into English in 8 S.J. (1969-1988) 83, at 150, 164

[33] Declaration of the Establishment of the State of Israel, 1948, supra note 22, at 4

[34] However, it must be said that the word "Democracy" has not been explicitly used in the Declaration of the Establishment of the State of Israel.

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of full and equal citizenship and due representation in all its provisional and permanent institutions."[35]

(d) These three above mentioned statements form the background and starting point for the crucial question, if the concept of Israel as a Jewish state and a democracy can be considered to be truthful or fictional, and if in spite of the commitment made in the Declaration to maintain equality, Israel really adequately managed to cope with the implications of minority rights.

(13) In the course of this work I will show that the strong pronunciation of the Jewish character of the state of Israel has in many fields discriminatory effect to the non-Jewish population, i.e. mainly the Palestinian Arab people, which is not recognized as a minority by the government.

(a) I will demonstrate that the Palestinian Arab citizens of the state of Israel are not full citizens, since the state defines itself as the state of the Jewish people - rather than the state of all its citizens - and since the Palestinian Arab citizens are not authorized to decide in matters relating to the security-concept of the state and its ideological direction.

(b) I will also show that - although the Jewish and Palestinian Arab population is formally equal before the law - different normative and interpretative standards are applied on both groups.

This basic approach underlies Israel's legal, judicial and socio-political system as a whole and must therefore be considered as systematically applied policy of discrimination.

1.8. The Enactment of Two Basic Laws on Human Rights in 1992

(14) Furthermore, I will show that - despite the enactment of the two mentioned basic laws on human rights in 1992 - the discriminatory situation and its underlying conditions did not really change.

I will demonstrate that these two basic laws resulted until now in an almost empty attempt towards a real democratization of Israel's legal order as a whole.

(a) One main reason for this state of affairs is the fact that the object of the two basic laws on human rights is "to entrench the values of the state of Israel as a Jewish and democratic state in a Basic Law."

With this clause not only the democratic values of the state of Israel were given constitutional status but also the Jewish values, which include not only Jewish heritage and Jewish law but also Zionist values.

[35] Supra note 22, at 5

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As I will show in the course of this work, in employing the Jewish values which also include the Zionist values, the democratic values of the state may easily and always be suspended.

(b) Another essential reason lays in the fact that the Basic Law: Human Dignity and Freedom explicitly determines that any law which existed prior to the enactment of the Basic Law shall not be affected.

That means, all the legal instruments that were enacted before the Basic Law: Human Dignity and Freedom and that were never declared invalid remain automatically and totally unchanged in force, despite the fact that they often constitute unjustified and severe infringements of human rights, a breach of international law and universally recognized principles of law.[36]

Important to mention is the fact that, according to Israel's rules of interpretation, Israel's inherited and enacted legislation must be "interpreted in harmony with the new legal environment and normative umbrella which has been developed since the establishment of the state of Israel, and which consists not only of the immediate legal context, but also of accepted principles, basic aims and fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."[37] That means in other words:

All the laws and regulations, that have been enacted over the decades and that were never declared invalid, but express the above mentioned "principles, basic aims and fundamental criteria" which are accepted by the Israeli society and which derive from the sources of Israel's social consciousness - form "the new legal environment or normative umbrella over all legislation" - in spite of the fact that such legal instruments are often illegal, immoral, even a gross violation of international law and universally recognized principles of law and therefore unacceptable.

In accordance with this line of interpretation many totally illegal, undemocratic, immoral and therefore unacceptable legal instruments are still in

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36 There is no room here to mention all the legislative instruments that are still in force and applied by the Israeli executive apparatus, despite the fact that they are highly discriminatory for all non-Jews, i.e. mainly the Palestinian Arab people, and constitute severe infringements of human rights and freedoms and a breach of international law. But see for example the following - still valid and routinely applied - legal instruments: Defence (Emergency) Regulations, 1945, supra note 5; Law of Return, 1950, 4 L.S.I. (1949/50) 114; Absentees' Property Law, 1950, 4 L.S.I. (1949/50) 68; World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952/53) 3; Keren Kayemet Le-Israel Law, 1953, 8 L.S.I. (1953) 35; Basic Law: Israels Land, 14 L.S.I. (1959/60) 48; Israel Lands Law, 1960, 14 L.S.I. (1960/61) 49; Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, 21 L.S.I. (1966/67) 105

37 *Schnitzer v. Chief Military Censor,* supra note 29, at 81, 87-88. (This case will be discussed in detail in Chapter F.4.4. of this work)

force and are - as the reality shows - even regularly applied by the executive apparatus.

(c) A third reason for the empty attempt of the two basic laws on human rights to really enhance the democratic level of Israel's legal system lays in the fact that most of the illegal, immoral and therefore unacceptable jurisprudence, that was developed by Israel's Supreme Court over the decades, has never been overruled or declared as illegal and, therefore, is still in force.[38]

Although it is true that especially during the year 1999, the Israeli Supreme Court has overruled some of its earlier illegal decisions - such as the decisions relating to the Supreme Court's legitimating of torture,[39] which is a gross violation of international human rights law and universally recognized principles of law - most of the illegal, immoral and unacceptable jurisprudence still lays at the very foundations of the Israeli legal system itself, and forms its legal environment.

This is revealed by the following two facts:

1. Israeli judges - as the reality shows - still rely explicitly on such jurisprudence.[40]

2. As already mentioned above Israel's inherited and enacted legislation must be "interpreted in harmony with the new legal environment and normative umbrella which has been developed since the establishment of the state of Israel, and which consists - according to the Israeli Supreme Court - not only of the immediate legal context, but also of accepted principles, basic aims and

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38 Concerning the following issues the jurisprudence has never been overruled or declared as illegal: Expropriations of land owned by Palestinian Arab citizens of Israel or inhabitants of the Occupied Territories, see Chapter G. (The Right to Property); extrajudicial killings and executions of Palestinian Arabs, see infra note 55; deportations and mass deportations of Palestinian Arab civilians in the Occupied Territories, see infra notes 58, 59; demolitions, sealings, forfeitures and seizures of houses belonging to Palestinian Arab civilians in the Occupied Territories, see infra notes 60-63; jurisprudence concerning anti-Arab racism, see supra note 20

39 E.g., H.C. 5100/94, *The Public Committee Against Torture in Israel et al. v. The State of Israel,* discussed in B'Tselem, POSITION PAPER, Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Services (Jerusalem, January 2000)

40 See for example the present Supreme Court President Aharon Barak who relies in paragraph 79 of the *Mizrahi Bank case*, supra note 20, on the decision in the matter of H.C. 73/85, *Kach Faction v. Knesset Speaker,* 39(iii) P.D. 141. (In the Kach Faction case the Supreme Court overturned the decision of the Israeli Broadcast Authority (IBA) and ordered the IBA to broadcast the political opinions of Rabbi Meir Kahane, who was elected to the Knesset on the extremely anti-Arab and racist Kach platform, calling for the exclusion and expulsion of all Palestinian Arab citizens from the state of Israel and the Occupied Territories, for discrimination between Jews and non-Jews, and for outlawing sexual relations between Jews and non-Jews. This case will be discussed in detail in Chapter F.5.2. of this work.)

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fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."[41] That means in other words:

All the jurisprudence that has been developed over the decades and that was never explicitly overruled or declared illegal, but that reflects "the principles, basic aims and fundamental criteria which are accepted by the Israeli society and which derive from the sources of Israel's social consciousness" forms "the legal environment or normative umbrella over all legislation" - in spite of the fact that such jurisprudence is often illegal, immoral, sometimes even a gross violation of international law and universally recognized principles of law and therefore totally unacceptable.

To sum up the situation one may say that - in accordance with the above described line of interpretation - a large part of illegal, immoral and totally unacceptable jurisprudence still enters directly or indirectly, but on a regular and daily basis, Israel's normative system and jurisprudence in all court instances.

1.9. International Law

(15) In addition to the mentioned subjects, this work intends to show which kind of importance has been attached by the Israeli government and the legal apparatus towards international law.

Although in 1991 Israel has ratified all major international conventions, I will nevertheless show in the course of this work, that the mentioned ratification had little impact on the situation of human rights as a whole, due to the fact that - at least until now - most of the provisions of the various covenants were not incorporated into Israel's domestic law.

2. Basic Approaches of Israel's Supreme Court

(16) In the course of this work I will demonstrate that the judgments of the Supreme Court influenced the Israeli Jewish society and the governmental policy in regard to values, standards of morality, and opinions about justice and fairness.

(17) The presented cases delineate political and legal realities, prescribe power allocations and also echo the debate between the members of the Supreme Court concerning judicial techniques and the role of the judiciary within the society.

(18) I will argue that the legal approach of the Supreme Court is predominantly technical, occupied with the application of existing statutes through interpretation of their provisions.

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[41] *Schnitzer v. Chief Military Censor,* supra note 29, at 81, 87-88

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The principal question is "what the law is," rather than "what the law should be" if its constitutionality and compatibility with international law and universally recognized values is to be upheld.

(19) There is also a big tendency of the judges to turn to comparative law sources for assistance in the interpretation of new laws and for justifying their decisions.

(20) But to a large extent the Supreme Court judges also rely on their own, over the decades developed - often illegal, immoral and therefore unacceptable - jurisprudence.

(21) An important aspect of many decisions concerning civil and political rights and freedoms is the big influence of American realism as represented by former U.S. Supreme Court Justice O. W. Holmes and others.

(22) On the other hand one may also find principles based on natural law. Especially in the early years after the state of Israel has been established the Supreme Court founded its decisions on natural law as the famous leading case in the matter *Bejerano v. Minister of Police*, concerning freedom of occupation, shows.[42]

(23) Another feature is the fact that in some decisions the spiritual foundations and sources upon which judges base their arguments are not secular law and secular thinkers but ancient Jewish sources, such as the Talmud and commentaries on that work.[43]

(24) The judgments reflect various philosophical ideas - naturalist approaches as well as realist and positivist conceptions - and different methods of legal reasoning employed by the judges in order to found their opinions.

(a) Supreme Court President Aharon Barak for example, favors the flexible test based on balancing of the competing interests and values involved. In this work I will argue that the balancing test is a vague, not exact and sometimes even unhelpful test.

I will demonstrate that everything depends on the question of which interests are involved and how much weight is assigned to them in a specific situation. Sometimes the balancing test serves to rationalize judicial restraint,[44] while in other cases the same test serves as a rationale for judicial activism.[45]

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[42] H.C. 1/49, *Bejerano v. Minister of Police,* for a summary in English see 8 I.Y.H.R. (1978) 373

[43] H.C. 72/62, *Rufeisen v. Minister of the Interior,* translated into English in a Special Volume of S.J. (1962-69) 1; H.C. 58/68, *Shalit v. Minister of the Interior,* translated into English in a Special Volume of S.J. (1962- 69) 35

[44] H.C. 652/81, *Sarid v. Chairman of the Knesset*, translated into English in 8 S.J. (1969-1988) 52

[45] H.C. 742/84, *Kahane v. Knesset Speaker*, for a summary in English see 22 Isr.L.Rev. (1987) 219, at 222-223

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The discretion placed by the balancing test in the hands of the Court is sometimes too wide and enables the judge any answer he feeds into it. It is therefore almost impossible of assuring impartiality of results.

Furthermore, an important aspect of President Barak's judgments is the fact that he occasionally bases his reasoning on intellectual sources with contrasting conceptions, and consequently develops an own theory of law.[46]

(b) Former Supreme Court President Justice S. Agranat on the other hand preferred to rely on American doctrines, as in the opinion that he wrote for the Supreme Court in the early and well known *Kol Ha'am case*[47] concerning freedom of speech - a fundamental right which, until today, is not incorporated in any written law or statute. In this case Justice Agranat resorted to the Declaration of the Establishment of the State of Israel, 1948 as an instrument for interpretation in order to incorporate freedom of speech into Israel's legal order.

In contrast to the Supreme Court jurisprudence that preceded the *Kol Ha'am case* - in which the Court based its reasoning only on sources that were explicitly recognized in form of legislative acts - Justice Agranat introduced with the *Kol Ha'am case* the concept of extra-statutory rights into Israel's legal order. With the *Kol Ha'am case* Justice Agranat also adopted the "near certainty" or "probable danger" test as general test for resolving situations of conflict between freedom of expression and public order or security. He outlined judicial guidelines that the decision making administrative authorities were expected to follow in imposing restrictions.

(c) Former Supreme Court President Meir Shamgar displays to a great extent Grand Style[48] judicial reasoning. In his decisions he articulates - as it is typical for this style of judicial reasoning - both legal and non-legal arguments in order to explain and to justify his opinions.

His opinions are also characterized by a policy-oriented activism, and in order to shape Israeli law in the area of fundamental rights and freedoms he borrows in many decisions American doctrines.

(d) Deputy President Miriam Ben-Porath's decisions, on the other hand, are characterized by a Formal Style of judicial reasoning. As it is typical for this style of judicial reasoning, she presents the outcome of opinions as following inevitably or mechanically from preexisting rules.

Justice Miriam Ben-Porath demonstrates strong loyalty to English law.

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46 See for instance the decision in the *Mizrachi Bank case,* supra note 20. In this decision President Barak bases his reasoning concerning the Constituent Authority of the Knesset on the positivistic doctrines of Hans Kelsen (Grundnorm-model) and H.L.A. Hart (rule of recognition) as well as on Ronald Dworkin's interpretative concept of law.

47 *Kol Ha'am,* supra note 32

48 For a discussion of the term "Grand Style" see Karl Llewellyn, Jurisprudence, Realism in Theory and Practice (The University of Chicago Press, 1962) 217

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(e) Justice Moshe Landau uses in his decisions a mixture of styles of judicial reasoning, namely a Formal Style and a Grand Style.

(f) And the Justices Haim Cohn, Kister, Menachem Elon and Moshe Silberg often base their arguments on Jewish religious sources.

(25) In analyzing the various leading judicial decisions dealing with the subject of civil and political rights not only the majority opinion of the Court will be presented, but also in some cases selective minority opinions worth being portrayed.

(a) To mention for example in this context is the recent change in the jurisprudence of Justice Mishael Cheshin regarding the demolition of houses of Palestinian Arabs which have been convicted of the murder of Jews. In the past the Supreme Court has consequently rejected the view that demolition and sealing of houses constitutes collective punishment. In two minority opinions in 1992 Justice Cheshin deviated from previous rulings on this issue and held that the security forces should "only destroy those rooms which were actually used by the murderers", but not the whole house "in order to avoid collective punishment."[49] However, this jurisprudence continues to be undemocratic and illegal since in principle it still permits the demolition of houses.

(b) Another example of an important minority opinion worth being mentioned is that of Justice Daliah Dorner, who - in a 2-1 decision handed down in November 1997 - voted against the continued administrative detention of ten Lebanese citizens without charge or trial, solely for the purpose of using them as "human bargaining chips in negotiations with various organizations for advancing the release of prisoners of war."

Nevertheless, her minority opinion is deplorable as well, since she did not reject the legitimacy of holding hostages to attain the release of POWs and MIAs, but rather ruled that the legal basis upon which the state relies - i.e. the Emergency Powers (Detention) Law, 1979 - is inappropriate for this purpose.

Justice Daliah Dorner stated: "I would postpone the release of the appellants for a reasonable period of time, in order to enable the state to examine its authority and interest in holding the appellants by power of another law."[50]

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49 H.C. 4772/91, *Khizran v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 349; H.C. 2722/92, *Al-Amrin v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 337

50 AAD 10/94, *Plonim (i.e. Unnamed) v. Minister of Defence*, para. 5 of Justice Dorner's decision. Translated into English by Amnesty International, http://www.btselem.org/Files/site/english/data/lebanon/detainees.htm. For a summary in English of this case see B'Tselem, The B'Tselem Human Rights Report, Volume 6, Summer 1998, at 9, 14. See also on this issue the detailed report of B'Tselem, Israeli Violations of Human Rights of Lebanese Civilians (Jerusalem, January 2000) at 41-46

Justice Y. Kedmi and the present Supreme Court President A. Barak wrote absolutely illegal, immoral and intolerable opinions in favor of holding the ten Lebanese civilians as

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These are only a few examples of legal techniques and aspects of judicial reasoning of some judges. Of course I will present in the course of this work also arguments of other members of the Supreme Court.

(26) In this analysis I will show that the Supreme Court in his task of protecting the individual's civil and political rights and freedoms has mainly adopted a positivistic, formalistic, dogmatic, authoritarian jurisprudential conception often citing the famous legal philosopher Hans Kelsen as well as other representatives of legal positivism, such as H.L.A. Hart.

This conception is characterized (1) by the belief that the only source of the individual's subjective right is the positive law; (2) by the distinction between "law as it is" and "law as it ought to be"; (3) by the literal application of law within self-imposed limits of a rigid scheme of deductions; and (4) by a complete indifference towards individual human affairs and justice.[51]

(27) I will demonstrate that especially in so called "security matters" involving the Palestinian Arab people living in Israel and the Occupied Territories, the Supreme Court has based its decisions on a strong formalistic and legalistic conception, and thus succeeded - and still succeeds - to escape from dealing with the reality and the substantive issues at stake.

As a result of this conception the Supreme Court approved - and still approves - acts performed by the executive branch of the government[52] in the name of "security reasons" which actually constitute unjustified and severe infringements of human rights, a breach of international law[53] and universally recognized principles of law.[54]

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hostages for the release of POWs. In doing so these High Court judges Kedmi and Barak legitimate war crimes and become themselves part of them.

President A. Barak using again his favored test of "balancing human rights against Israel's interests" wrote as follows: "The point is, that there is no doubt in my mind that returning the POWs and MIAs in and of itself is a goal and interest that falls within the scope of state security..." Ibid., para. 10 of President Barak's opinion.

"However, after thoroughly studying the material before me and the arguments of the sides, I am satisfied that this violation [to human dignity and liberty] - as harsh and painful as it is - is necessitated by the security and political reality, and reflects the proper balance point in the circumstances of the case, between individual freedom and the necessity to protect state security." Ibid., para. 12 of President Barak's opinion.

51 Mieczyslaw Maneli, Juridical Positivism and Human Rights (Hippocrene Books, New York, 1981) at 284-286

52 The executive branch of the government consists of ordinary and military authorities as well as of the security apparatus.

53 Violated are norms of the Hague Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949; the Convention on the Elimination of All Forms of Racial Discrimination, 1966; the International Covenant on Civil and Political Rights, 1966; the International Covenant

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(a) Such severe infringements mainly concern the Palestinian Arab people, living in Israel and the Occupied Territories and are caused by measures, such as extrajudicial killings and executions,[55] administrative detention of civilians without fair trial[56] - sometimes even over years,[57] deportation of civilians[58] - even

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on Economic, Social, and Cultural Rights, 1966; the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984

54 Universally recognized principles of law are binding on all states in accordance with Article 38(1)(c) of the Statute of the International Court of Justice.

55 See the following cases concerning extrajudicial killings and executions:
H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477; H.C. 428/86, *Barzilai v. Government of the State of Israel*, translated into English in 6 S.J. (1986) 1; H.C. 2888/99, *Hollander v. 1. Attorney General, 2. Chief Commander of the Military, 3. Uri Shoham, Attorney General of the IDF, 4. Lieutenant Colonel, Erez*, translated into English by Adalah: http://www.adalah.org/supreme.html
Regarding extrajudicial killings and executions see also B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, Activity of the Undercover Units in the Occupied Territories (Jerusalem, May 1992); B'Tselem, Law Enforcement vis-à-vis Israeli Civilians in the Occupied Territories (Jerusalem, March 1994); B'Tselem, Lethal Training, The Killing of Muhammad Al-Hilu by Undercover Soldiers in Hizmeh Village, Case Study (Jerusalem, March 1997)

56 See the following cases concerning administrative detention:
H.C. 253/88, *Sagdia et al v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 288; H.C. 576/88, *Husseini v. 1) Deputy President of the District Court of Jerusalem, Judge Eliyahu Noam and 2) Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 299; H.C. 769/88, *Oubeid v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 315; H.C. 670/89, *Ouda v. Military Commanders of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 326

57 See the following cases concerning administrative detention over years without fair trial of Palestinian Arab civilians living in the Occupied Territories:
H.C. 6843/93, *Qattamseh v. Military Commander of IDF in the West Bank,* Takdin Elyon 94(2) 2084; *Plonim (i.e. Unnamed) v. Minister of Defence*, supra note 50

58 See the following cases concerning deportation of Palestinian Arab civilians living in the Occupied Territories:
H.C. 97/79, *Abu Awad v. Military Commander of IDF in the West Bank*, for a summary in English see 9 I.Y.H.R. (1979) 343; H.C. 320/80, *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 344; H.C. 698/80, *Kawasme v. Minister of Defence,* for a summary in English see 11 I.Y.H.R. (1981) 349; H.C. 629/82, *Mustafa v. Military Commander of IDF in the West Bank,* for a summary in English see 14 I.Y.H.R. (1984) 313; H.C. 513/85, 514/85, *Nazal v. Military Commander of IDF in the West Bank,* for a summary in English see 16 I.Y.H.R. (1986) 329; H.C. 672/88, *Lavdi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 309; H.C. 765/88, *Shakhshir v. Military Commander of IDF in the West Bank (First and Second Phase)*, for a summary in English see 23 I.Y.H.R. (1993) 311-314; H.C. 792/88, *Matur v. Military Commander of IDF in the West Bank (First and Second Phase),* for a summary in English see 23 I.Y.H.R. (1993) 316-320; H.C. 814/88, *Nassaralla et al. v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 321

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mass deportation,[59] demolition of houses,[60] sealing off houses,[61] forfeitures of houses,[62] seizure of houses[63] and land,[64] restrictions on residence and the right to

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[59] See the following cases concerning mass deportation of Palestinian Arab civilians living in the Occupied Territories:
H.C. 785/87, *Abd al Nasser al Aziz Abd al Aziz al Affo. 2. The Association for Civil Rights in Israel v. Military Commander of IDF in the West Bank;* H.C. 845/87, *1. Abd al Aziz Abd Alrachman Ude Rafia. 2.The Association for Civil Rights in Israel v. 1. Military Commander of IDF in the Gaza Strip. 2. Minister of Defence;* H.C. 27/88, *1. J'Mal Shaati Hindi v. Military Commander of IDF in the West Bank,* translated into English in 29 International Legal Materials (1990) 139 [The Afu case]; H.C. 5973/92, *Association for Civil Rights in Israel v. Minister of Defence*, translated into English in 10 S.J. (1988-1993) 168, for a summary in English see 23 I.Y.H.R. (1993) 353

[60] See the following cases concerning demolitions of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 361/82, *Khamri v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 314; H.C. 698/85, *Dagalis v. Military Commander of IDF in the West Bank,* for a summary in English see 17 I.Y.H.R. (1987) 315; H.C. 897/86, *Jab'r v. Military Commander of IDF Central Command*, for a summary in English see 18 I.Y.H.R. (1988) 252; H.C. 779/88, *Alfasfus v. Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 316; H.C. 796/88, *Ahlil v. Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 320; H.C. 45/89, *Abu Daka v. Minister* of Defence, for a summary in English see 23 I.Y.H.R. (1993) 322; H.C. 610/89, *Bakhari v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 325; H.C. 658/89, *Sanuar v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 329; H.C. 1005/89, *Aga v. Military Commander of IDF in the Gaza Strip,* for a summary in English see 23 I.Y.H.R. (1993) 330; H.C. 2209/90, *Shuahin v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 325; H.C. 4112/90, *Association for Civil Rights in Israel v. Military Commander of IDF in the Southern District,* for a summary in English see 23 I.Y.H.R. (1993) 333; H.C. 5740/90, *Hagba v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 336; H.C. 42/91, *Timraz v. Military Commander of IDF in the Gaza Strip,* for a summary in English see 23 I.Y.H.R. (1993) 337; H.C. 2977/91, *Tag v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 330; *Khizran v. Military Commander of IDF in the West Bank*, supra note 47; H.C. 5139/91, *Zakik v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 334; *Al-Amrin v. Military Commander of IDF in the Gaza Strip*, supra note 49

[61] See the following cases concerning sealing off houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 434/79, *Sakhawil v. Military Commander of IDF in the West Bank*, for a summary in English see 10 I.Y.H.R. (1980) 345; H.C. 22/81, *Khamed v. Military Commander of IDF in the West Bank*, for a summary in English see 11 I.Y.H.R. (1981) 365; *Jab'r v. Military Commander of IDF Central Command*, ibid.; H.C. 387/89, *Ragabi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 329; *Aga v. Military Commander of IDF in the Gaza Strip,* ibid.; H.C. 948/91, *Hodli v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 327; H.C. 5667/91, *Gabrin v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R.

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family unification,[65] restrictions on travel and movement,[66] police supervision,[67] curfews,[68] closures of areas,[69] closures of institutions,[70] control of speech rights,[71]

(1995) 335; H.C. 5510/92, *Turkeman v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 347

62 See the following case concerning forfeitures of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
Zakik v. Military Commander of IDF in the West Bank, supra note 60

63 See the following case concerning seizure of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 401/88, *Abu Ryan v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 296

64 See the following case concerning seizure of land privately owned by Palestinian Arab civilians living in the Occupied Territories:
H.C. 290/89, *Goha v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 323

65 See the following cases concerning restrictions of residence and family unification of Palestinian Arab civilians living in the Occupied Territories:
H.C. 13+58/86, *Shaine v. Military Commander of IDF in the West Bank, Head of the Gaza Strip Civil Administration,* for a summary in English see 18 I.Y.H.R. (1988) 241
See also on this issue B'Tselem, Families Torn Apart, Separation of Palestinian Families in the Occupied Territories (Jerusalem, July 1999) at 125

66 See the following cases concerning restrictions of travel and movement of Palestinian Arab civilians living in Israel:
H.C. 269/60, *Watad v. Military Court (accelerated judicial procedure), Central Region*, 14 P.D. 2418
See also Adalah News, http://www.adalah.org/news.htm (The Supreme Court of Israel Dismisses Adalah's Petition against the IDF for Prohibiting Palestinian Arab Citizen of Israel from Entering the West Bank - 4/26/00)
See the following cases concerning restrictions of travel and movement of Palestinian Arab civilians living in the Occupied Territories:
H.C. 658, 660-62/80, *Taha v. Minister of Interior,* for a summary in English see 11 I.Y.H.R. (1981) 361; H.C. 448/85, *Dahaar Adv. v. Minister of Interior*, for a summary in English see 17 I.Y.H.R. (1987) 301

67 See the following cases concerning police supervision of Palestinian Arab civilians living in Israel and the Occupied Territories:
H.C. 46/50, *Al-Ayubi v. Minister of Defence*, 4 P.D. 222; H.C. 56/65, *Sabri Jiryis v. Military Commander of District A*, 19(i) P.D. 260; H.C. 771/80, *Al-Sayad v. Military Commander of IDF in the West Bank,* for a summary in English see 11 I.Y.H.R. (1981) 364; H.C. 554/81, *Baransa v. Chief of Staff,* for a summary in English see 17 I.Y.H.R. (1987) 300

68 See the following case concerning curfew in Israel:
Appeal 279-283, *Ofer, Malinki, Dahan, Mahluf, Eliahu, Gabriel, Albert, Edmund, v. Chief Military Prosecutor*, 44 Psakim (Judgments of the District Court of Israel) 362; translated into English in 2 Palestine Yearbook of International Law (1985) 71, at 94, 104 [The *Kafr Qassem case*]
See the following cases concerning curfews in the Occupied Territories:
H.C. 1113/90, *Shav v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 332; H.C. 477/91, *Association of Israeli-Palestinian Physicians for Human Rights v. Minister of Defence*, for a summary in English see 23

declaration of associations as unlawful,[72] discrimination in law enforcement[73] and even the use of "methods of psychological and physical pressure" during the interrogations of detained and imprisoned "security" persons.[74]

I.Y.H.R. (1993) 341; H.C. 1358/91, *Arshid v. Minister of Police*, for a summary in English see 23 I.Y.H.R. (1993) 342

See also on this issue B'Tselem, Annual Report 1989: Violations of Human Rights in the Occupied Territories (Jerusalem, December 1989) at 77-83; B'Tselem, Human Rights in the Occupied Territories During the War in the Persian Gulf (Jerusalem, January - February 1991) at 3-4, 15-16; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93 (Jerusalem, 1994) at 93-97

69 See the following cases concerning closures of areas in Israel:
H.C. 220/51, *Asslan v. Military Commander of the Galilee,* 5 P.D. 1480; H.C. 33/52; 288/51, *Asslan v. Military Commander,* 9 P.D. 689
Adalah, The Legal Center for Arab Minority Rights in Israel, Brief: Umm al-Fahm, Focusing on events of 27-29 September 1998; HA'ARETZ, English Edition, 2 October 1998, at B1 (Uzi Benziman, Corridors of Power - A festering sore)

70 See the following case concerning closures of Palestinian institutions located in the Occupied Territories:
H.C. 198/85, *Khamdan v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 316
See also on this issue B'Tselem, Annual Report 1989, supra note 68, at 93-100; B'Tselem, Closure of Schools and Other Setbacks to the Education System in the Occupied Territories (Jerusalem, September-October 1990); B'Tselem, Human Rights Violations in the Occupied Territories 1992/93, supra note 68, at 99-103

71 See the following cases concerning the control of speech rights in connection with the Palestinian Arab people:
H.C. 29/62, *Cohen v. Minister of Defence*, translated into English in 4 S.J.(1961-1962) 160; H.C. 39/64*, El-Ard v. District Commissioner,* 18(ii) P.D. 340; H.C. 415/81, *Ayoub v. District Commissioner,* 38(i) P.D. 750; H.C. 322/81, *Makhoul v. District Commissioner*, 37(i) P.D. 789; Cr.A. 696/81, *Azulai v. State of Israel*, for a summary in English see 19 Isr.L.Rev. (1984) 586; H.C. 541/83, *Asli v. District Commissioner,* 37(iv) P.D. 837; H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477; H.C. 562/86, *Al-Khatib v. Minister of Interior*, for a summary in English see 17 I.Y.H.R. (1987) 317; H.C. 648/87, *Kassem v. Minister of Interior*, for a summary in English see 18 I.Y.H.R. (1988) 254

72 See the following cases concerning the declaration of associations as unlawful involving the Palestinian Arab people:
H.C. 241/60, *Kardosh v. Registrar of Companies*, translated into English in 4 S.J. (1961-1962) 7; F.H. 16/61, *Registrar of Companies v. Kardosh,* translated into English in 4 S.J. (1961-1962) 7; H.C. 253/64, *Sabri Jiryis v. Commissioner of the Northern District,* 18(iv) P.D. 673

73 See the following report concerning the discrimination in law enforcement of Palestinian Arab civilians living in the Occupied Territories:
B'Tselem, Law Enforcement vis-à-vis Israeli Civilians in the Occupied Territories (Jerusalem, March 1994)
See the following report concerning the discrimination in law enforcement of Palestinian Arab civilians living in Israel:
Adalah, News, http://www.adalah.org/news.htm, pages 10-12 [(Attorney General Endorses Police Review of Violence at Umm El Fahm; Forced to Re-Open Investigation after Public Outcry - 2/25/00); Adalah, Annual Report 1999, at 22]

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(b) As already mentioned above, in 1987 the Landau Commission - a Commission of Inquiry which was named after its head Justice Moshe Landau - was set up and confirmed in a Final Report that acts of violence, such as pulling the hair, shaking, throwing to the ground, kicks, slaps and insults, prevention of sleeping for hours had indeed been used in many interrogations of detained and imprisoned persons.[75]

The Report of the Landau Commission discussed at great length the so called "dilemma between the vital need to preserve the very existence of the state and its citizens, and [the need] to maintain its character as a law-abiding state which believes in basic moral principles," [76] and finally concluded that the only solution to the above mentioned "dilemma" is "the truthful road of the rule of law, i.e. the law itself must ensure a proper framework for the activity of the General Security Service (GSS) regarding Hostile Terrorist Activity."

The Report furthermore stated that in cases in which it is essential to extract information from persons in order to protect the security of the state, the interrogators could use "forms of non-violent psychological pressure" and "when these do not attain their purpose, moderate physical pressure" is legitimate.[77]

The kind of methods that may be regarded as "moderate measure of physical pressure" has been laid down and defined in detail in secret governmental guidelines. The Israeli government has never published these guidelines, claiming that suspects will be able to prepare themselves to withstand interrogations. The Landau Commission justified the use of physical force in interrogations by the criminal "defence of necessity" embodied in Section 34 of the Penal Law, 1977.[78]

Since September 1994, following a wave of terrorist attacks committed by Palestinian Arabs,[79] an inter-ministerial committee furnished the GSS even with

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74 See the following cases concerning torture of Palestinian Arab civilians living in the Occupied Territories:
H.C.-V.R. 336//96 (H.C. 7964/95), *Bilbeisi 'Abd al-Halim v. General Security Service*; H.C. 8049/96, *Hamdan Muhammad 'Abdas-'Aziz v. General Security Service;* H.C. 3124/96, *Mubarak v. General Security Service;* all three cases are translated in B'Tselem, Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases, An Annotated Sourcebook (Jerusalem, January 1997) at 5; H.C. 532/91, *X v. The State of Israel,* ibid., at 12

75 *Landau Commission Report*, supra note 8, at 150

76 Ibid., at 182

77 Id., at 184, 185

78 Id., at 186. The *Landau Commission Report,* supra note 8, still mentions the old relevant statute for the "Defence of necessity," namely Section 22 of the Penal Law, 1977. After an Amendment of the Penal Law in 1994, Section 22 became Section 34.

79 On 25 February 1994 an Israeli Jewish settler murdered 29 Palestinian Arab Muslim worshippers in the Cave of the Patriarchs in Hebron and was killed during the course of his attack. See B'Tselem, Captive Corps (Jerusalem, March 1999) at 9
Following this event a wave of terrorist attacks was committed by Palestinian Arab suicide killers, in which dozens of Israelis and Arab civilians were killed and severely

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additional "special permissions" to use "enhanced physical pressure" against members of Hamas and the Islamic Jihad. [80]

Additionally to the mentioned legal justification of criminal law (Section 34 of the Penal Law, 1977), the Israeli government attempted several times to have get approved by the Knesset a Draft Law on the General Security Service (GSS)[81] in order to legally sanction the present methods of interrogation, which constitute torture. Only due to immense pressure by the international community[82] and by Israeli human rights organizations[83] these draft laws were withdrawn or postponed.

But torture was - until the recent highly important decision[84] handed down by the Supreme Court on 6 September 1999 - also effectively legalized by the Israeli Supreme Court, who - in dozens of cases involving individuals (mostly Palestinian Arabs) who had been tortured or ill-treated - accepted the arguments of the state's representative that "moderate physical pressure" used by the GSS does not constitute torture, but that in the case of a "ticking bomb" even torture would be justified by the "defence of necessity" (Section 34 of the Penal Law, 1977).

However, in September 1999, the Supreme Court ruled for the first time that the interrogation methods used by the GSS are illegal, and that these prohibitions are absolute.

(28) I want to stress at this point that even before the above mentioned decision declaring torture as illegal, the use of any physical violence and psychological means of pressure, amounting to torture and ill-treatment, was not only absolutely prohibited by international law, but also constituted a severe

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injured: The first attack of this series occurred on 6 April 1994 in the town Afula, where a Palestinian Arab refugee from the Qabatiyeh refugee camp committed a suicide-bombing attack. In this attack 7 people (6 Israeli Jews and 1 Israeli Arab woman) were killed and 40 people severely injured. Ibid., at 13. The second suicide-bombing attack committed by a Palestinian Arab took place in the same month of April 1994 - this time in the town Hadera. Id. In October 1994, a third suicide-bombing attack was committed by a Palestinian on the Bus No. 5 in Tel Aviv. See B'Tselem, Cooperating against Justice: Human Rights Violations by Israel and the Palestinian National Authority following the Murders in Wadi Qelt (joint report issued by LAW) (Jerusalem, June 1999) at 18

80 B'Tselem, Legitimizing Torture, supra note 74, at 67

81 Draft Law on the General Security Service (GSS) (Hebrew)

82 Amnesty International - News Release, New Draft Law - A Green Light to Torture (MDE 15/12/98, 10 February 1998); Amnesty International - News Release, Israel Should Observe UN Committee Against Torture Call for Immediate Halt to Torture (MDE 15/32/98, 19 May 1998)

83 B'Tselem - Press Release, B'Tselem's Response to the Proposed GSS Law (25 January 1996)

84 H.C. 5100/94, *The Public Committee Against Torture in Israel et el. v. The State of Israel*, supra note 39. In this decision six petitions, which were filed by various human rights organizations challenging the interrogations methods by the GSS, were grouped together.

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breach of Israeli law, namely Section 2 and Section 4 of the Basic Law: Human Dignity and Freedom, and Section 277 of the Penal Law, 1977.

(29) In this context it should also be said that torture falls within the category of those crimes for which according to international law responsibility is imposed not only upon the state, but also upon the individual in a personal capacity for the commission of the act (individual responsibility).

(30) Furthermore, it should be stressed that torture has no place in a democratic and enlightened society, built on the moral belief that the end, not important how good it might be, does not justify the use of any means in order to achieve it.

(31) From my point of view, situations of ethnic or national conflict cannot and may not be resolved by employing repressive and totalitarian measures but rather must be settled through negotiations, with the outcome of agreements - based on universally recognized principles, justice,[85] equity and respect for human rights for all sides of the conflict - that have durability without enforcement through force.

To reach such agreements is - of course - the most difficult task.

3. Questions of the Legitimacy of Israel's Legal Order

(32) In the above mentioned context, the general question arises to what extent the law shall be combined with the deployment of coercive force, i.e. a sanction.

(a) For representatives of classical positivism, such as Jeremy Bentham and John Austin, law depends on the imposition of sanctions. According to this concept of law, the coercive element, along with that of political sovereign command, is the ultimately definitive characteristic of law.

(b) However, Professor H.L.A. Hart, who is another representative of the positivist school, has stressed that law that only depends on sanctions, i.e. coercive force, is unstable.

He has therefore emphasized, that law[86] - as distinguished from regimes of terror - presupposes acceptance of the legitimacy of its underlying authority by most of the people.

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85 In that context the question arises "What is justice?" Justice is - specifically in situations of a conflict - by different groups in different situations perceived differently. Justice depends, inter alia, on the historical experience of a people involved in a conflict.

86 H.L.A. Hart equates "law" with "legal systems". H.L.A. Hart, The Concept of Law (Oxford University Press, 1961)

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The central thesis of Hart's concept of law is that the foundations of a legal system consist in an ultimate rule of recognition providing the authoritative criteria for the identification of valid rules of the system.[87]

Professor Hart emphasized that stable legal systems depend on the beliefs and attitudes among the people, which is subjected to it.

(c) In applying Professor Hart's thesis on the case of the state of Israel I may only observe that the policies and practices - such as extrajudicial killings and executions, torture, administrative detention, deportations, demolition/sealing off/forfeitures/seizures of houses, confiscations of land, restrictions on residence and family unification, restrictions on travel and movement, police supervision, curfews, closures of areas and institutions, control of speech rights, declaration of associations as unlawful and discrimination in law enforcement - that were systematically employed by the Israeli government and which were oppressive and unjust for the main part of the Palestinian Arab people have precisely produced the opposite than a stable legal and governmental system.

Although the said policies and practices were always strictly based on laws and regulations, of course they could neither lead to a real identification of the Palestinian Arab people with the values and rules of Israel's governmental system[88] nor produce much respect for the rule of law, but naturally could only lead to a strengthening of their national feelings.

This is specifically true with regard to the Palestinian Arab people living in the Occupied Territories which opposed at all times since the occupation in 1967 - up until today - the imposition of Israel's rule on them.

The above mentioned issues are the most important and central ones to be mentioned in this work.

(33) However, before dealing in more detail with the foundations of civil and political rights and freedoms in Israel and the Occupied Territories, it seems necessary to me to provide in the following Chapter A some essential information regarding the history, ideology and philosophy of political Zionism, forming the background for the idea and decision towards a "national home" for the Jewish people in Palestine and culminating in the establishment of the state of Israel in Palestine in May 1948.

This background information is highly important for a deeper understanding of Israel's concept of civil and political rights and freedoms in general, and the implications - deriving from the establishment of the state of Israel in Palestine - for the native Arab Palestinians in particular.

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87 Ibid., at 97-98

88 In a small size even the Jewish/Israeli population does not identify with these values.

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At the same time this background information gives an insight into the very beginnings of the conflict between the Israeli/Jewish/Zionist and the Palestinian/Arab people.

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A. HISTORICAL PERSPECTIVES REGARDING THE RIGHT TO SELF-DETERMINATION OF THE JEWISH AND THE PALESTINIAN ARAB PEOPLE

1. Introduction

On 29 November 1947 the United Nations General Assembly adopted Resolution 181 (II) which, inter alia, provided:

1. That the British Mandate for Palestine shall terminate no later than 1 August 1948.[1]
2. That Palestine should be partitioned and that two independent states - an Arab and a Jewish state - which should enter into an Economic Union and Transit - as well as a Special International Regime for the City of Jerusalem shall come into existence in Palestine two months after the end of the Mandate but in any case not later than 1 October 1948.[2]
3. That no later than two months after the end of the Mandate, each state should elect its own Constituent Assembly, which by itself should enact a democratic constitution, guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters, the enforcement of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association.[3]
4. That each state should be established on the conceptual basis of a bi-national state, where Palestinian citizens as well as Arabs and Jews who are not Palestinian citizens, but residing in Palestine outside the city of Jerusalem, shall become citizens of the state in which they are resident and enjoy full civil and political rights.[4]
5. That a declaration shall be made to the United Nations by the provisional government of each proposed state before independence which shall contain clauses regarding the protection of Holy Places, the protection of religious and minority rights and for the "equal protection of the laws" of all persons.[5]

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1 United Nations General Assembly Resolution 181 (II) on the Future Government of Palestine of 29 November 1947 [Partition Resolution] UN document A/Res/181 (II) (A+B), Part I, Section A, para. 1

2 Ibid., Part I, Section A, para. 3 and Section B, para. 11 and Section D

3 Id., Part I, Section B, paras. 9, 10, 10(d) and Section C. The issue of a constitution for each state will be discussed in detail in the following Chapter B. (Israel's Initial Obligation to Enact a Constitution Including a Bill of Rights and the Issue of Judicial Review)

4 Id., Part I, Section C, para. 1

5 Id., Part I, Section C, Chapter 2 (Religious and Minority Rights)

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6. That the admission of each state to membership in the United Nations is conditional upon the signment of the declaration and its undertaking, as envisaged in this plan.[6]

The provisions of the UN Partition Resolution 181 (II), inter alia, provide for the establishment of an Arab and a Jewish state, and constitute the first direct recognition of the indigenous Arab population of Palestine to be entitled to self-determination.[7]

However, the Palestinian Arab community - headed by the exiled Arab Higher Committee (AHC) chief and Grand Mufti of Jerusalem, Hajj Amin al Husayni[8] - as well as the surrounding Arab countries rejected the Partition Plan.[9]

Some of the Jewish Zionist parties of the organized Jewish community in Palestine pre-1948 (i.e. the "Yishuv") also rejected the Partition Plan and based their arguments on the fact that the proposed territory would not encompass "the whole original homeland of the Jewish people."

However, the leaders of the Jewish Agency - which was the main political body of the organized Jewish community in Palestine pre-1948 (i.e. the "Yishuv") - regarded the establishment of a Jewish state in Palestine and Jewish sovereignty over the land and the people of Palestine as the primary interest of the Jewish people.[10]

And due to the fact that the organized Jewish community of Palestine pre-1948 (i.e. the "Yishuv") had already prepared itself for statehood by creating two

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6 Id., Part I, Section F

7 UN Resolution 181 (II) also confirms the right to self-determination of the Jewish population of Palestine by providing authority for the establishment of "the Jewish State". There has not been an explicit recognition of the "Jewish people" by the United Nations because of its discriminatory features. The authors W.T. Mallison and S.V. Mallison argued as follows: "The Zionist 'Jewish people' concept was developed by the Zionist Organization/Jewish Agency prior to the establishment of the state of Israel. (...) The 'Jewish people' concept within the state of Israel accords its members certain privileges and rights on a discriminatory basis which are denied to other [non-Jewish] Israelis. (...) Because of the discriminatory characteristics of the 'Jewish people' concept it would constitute a violation of articles 55 and 56 of the Charter of the United Nations if the General Assembly recognized it." W.T. Mallison and S.V. Mallison, An International Law Analysis of Major United Nations Resolutions Concerning the Palestine Question, New York, United States [study prepared and published at the request of the Committee on the Exercise of the Inalienable Right of the Palestinian People; UN doc. ST/SG/SER.F/4] 1979, quoted in Lex Takkenberg, The Status of Palestinian Refugees in International Law (Clarendon Press - Oxford, 1998) at 257, note 141

8 Benny Morris, The Birth of the Palestinian Refugee Problem, 1947-1949 (Cambridge University Press, 1987) at 6

9 David Kretzmer, The Legal Status of the Arabs in Israel (Boulder Westview Press, 1990) at 2; Musa Buderi, The Victory of Zionism and Its Failure to Solve the Jewish Problem, News from Within, published by the Alternative Information Center vol. XIIII no. 10, Nov. 1998, at 15

10 Kretzmer, ibid., at 2

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governing bodies - namely the People's Council,[11] functioning as a legislature, and the People's Administration,[12] functioning as the government[13] - the UN Partition Resolution 181 (II) was accepted "even for the price of loss of a part of the historic homeland."[14]

So far the position of the Jewish community.

An interesting and frequently discussed question, however, is:

"Why did the Palestinian Arab community reject the UN Partition Resolution 181 (II) despite the fact that it contained a formal statement to establish two bi-national states, where all persons should be treated equally, and where the rights and liberties of minorities residing in each state should be protected?"

In order to give a correct answer to this issue, it seems very necessary for me to provide a brief survey of the history, the institutions and the activities of the Zionist movement in Palestine since its inception in the last decade of the 19th century up until the establishment of the state of Israel in Palestine on 14 May 1948 - an event that lives on in the Palestinian narrative as *al-Nakba* (*the Catastrophe*) and means the deprivation of a large part of the native Palestinian Arab inhabitants (which then constituted the majority of all inhabitants of Palestine) of their right to self-determination.

An analysis of the conceptual-ideological and institutional framework of the Zionist movement before and during the British Mandate period, its underlying philosophy, aspirations and policy regarding the land of Palestine as well as the indigenous Arab inhabitants and their legal status, clearly reveals the reasons for the rejectionist position of the Palestinian Arab people in those days.[15]

Moreover, an analysis of the basic concept of the Zionist movement - whose unchanging political aims are to advance and protect first of all "Jewish national interests" - is also essential for an understanding of all subsequent developments in the highly conflict-loaded relationship between the Jewish and Palestinian Arab people.

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[11] The Hebrew term for "People's Council" is "Mo'etzet Ha'Am". This body has been described in the ISRAEL GOVERNMENT YEARBOOK 5729, at 21 as "representing all existing public bodies, and a faithful expression of national unity in an hour of national crisis." Cited in Melville B. Nimmer, The Uses of Judicial Review in Israel's Quest for a Constitution, 70 Columbia Law Review (1970) 1217, at 1219, NOTE 12

[12] The Hebrew term for "People's Administration" is "Minhelet Ha'Am"

[13] Ruth Gavison, The Controversy over Israel's Bill of Rights, 15 I.Y.H.R. (1985) 113, at 116

[14] Kretzmer, supra note 9, at 2

[15] At this point it should be mentioned that the Palestinian Arab attitude towards the UN Resolution 181 (II) of 29 November 1947 changed over the years. The Declaration of Independence of the State of Palestine of 15 November 1988 explicitly bases the Palestinian right to an independent state on UN Resolution 181 (II) -- which was previously rejected. See the Palestinian Declaration of Independence, 15 November 1988. Text courtesy of PA Ministry of Information, http://www.palestine-net.com/politics/indep.html

As I will show in more detail in the course of this work, the said conflict-loaded relationship between these two peoples is the result of a translation and implementation of political Zionist objectives into the whole fabric of Israel's legal and social order, leading to the situation of a permanently favored treatment of the whole - i.e. the present and the potential (future) - Jewish population at the expense of the indigenous Palestinian Arab people and their fundamental rights and freedoms.

Since the establishment of the state of Israel on 14 May 1948 - up until the very present day of writing this work - the concept of political Zionism is specifically reflected in laws, regulations and court decisions dealing with the right to property[16] (especially land rights), the right to citizenship and nationality,[17] the right to equality,[18] the right to freedom of movement and residence.[19]

It should be stressed at this point that the violations of these rights which occur mainly with regard to the native Palestinian Arab inhabitants - specifically the issue of ownership and sovereignty of land as well as the connected issue of the demographic composition of the whole population living within the same territory - lay at the very foundations of the whole conflict between the Israeli/Zionist and the Palestinian/Arab people.

2. Ideology and Doctrines of the Concept of Political Zionism

The modern concept of political Zionism[20] emerged at the turn of the 19th century[21] in response to the growing anti-Semitism[22] - in the sense of anti-Jewish

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[16] See Chapter G. (The Right to Property)

[17] See Chapter C.4. (The Concept of the State of Israel as a "Jewish State" and its Impact on Legislation and Jurisprudence concerning the Right to Citizenship and Nationality)

[18] See Chapter C.3. (The Concept of the State of Israel as a "Jewish State" and its Impact on Legislation and Jurisprudence concerning the Right to Equality)

[19] See Chapter D. (Israel's Permanent State of Emergency and the Question of its Compatibility with the Concept of a Liberal Democracy based on Human Rights and Freedoms)

[20] Walter Laqueur, A History of Zionism (London: Weidenfeld and Nicholson, 1972) at 590

[21] The idea of political Zionism was - for the first time - established in the Basle Program of 1897. For more details see the following sub-chapter 3.3.1.

[22] Literally the term anti-Semitism means persecution of or discrimination against Jews. The term came into being in the 1870's, and its first use is variously attributed to the German Wilhelm Marr and the Frenchman Ernest Renan. In one aspect the term was from the very beginning a misnomer since, in the jargon of the racial theory of that period, "Semites" were a broad group of non-European ethnic groups including the Arabs, whereas the term anti-Semitism was and is used to mean anti-Jewish racism. See Concise Oxford Dictionary of Politics (Oxford University Press 1996) at 13-14

racism - in Europe and Russia, where in 1881 a series of pogroms directly led to the formation of plans to establish an own state in Palestine.[23]

Political Zionism as a movement intended to offer a solution to the problem of anti-Semitism through Jewish immigration into and colonization of Palestine,[24] accompanied by a change in the legal status of Jewish immigrants in Palestine under public law.[25]

The concept of political Zionism is a special form of the idea of nationalism, which, broadly speaking, turns devotion to the nation into principles or programs and thus contains a different dimension to mere patriotism which is devoid of any project for political action.[26]

Like many types of nationalism[27] also the concept of political Zionism tolerates considerable ideological diversity, and the existence of various doctrines of Zionism, such as left-wing, labor, socialist, capitalist, right-wing, revisionist, synthetical, cultural, religious, secular Zionism actually points to this fact.

A detailed discussion of these different doctrines of political Zionism lays, however, definitely outside the range of the present study.[28]

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23 At the very beginnings of its intentions to establish a Jewish national home, the Zionist movement considered different places in South America and East Africa (Uganda) for the practical implementation. But these suggestions were all dropped in favor of Palestine, which was claimed by the Zionist movement as being "...not only the place with a spiritual bond between God and the Jewish people, but also as an essentially unused, unappreciated territory which was inhabited not by an advanced population but by a backward, dishonest, uneducated and ignorant Arab people."
See the letter of 30 May 1918 from Chaim Weizmann to Lord Balfour, quoted in Edward Said, The Question of Palestine (Vintage Books Edition, 1992. Originally published: New York: Times Books, © 1979) Chapter 1 (The Question of Palestine) at 26-28. See also Laqueur, supra note 20; Zeev Sternhell, The Founding Myths of Israel (Princeton: 1998)

24 Avraham Granovsky, Land and the Jewish Reconstruction in Palestine ("Palestine and Near East" Publications, Jerusalem, 1930) at 119, 120

25 Laqueur, supra note 20; E. Said, supra note 23, Chapter 1 (The Question of Palestine) and Chapter 2 (Zionism from the Standpoint of its Victims); Sternhell, supra note 23; Walid Khalidi and Jill Khadduri (editors), Palestine and The Arab-Israeli Conflict (Institute For Palestine Studies, Beirut, 1974) 59-67 (Chapter II. Historical Background- Origins of Zionism) at 27, 59-67

26 Concise Oxford Dictionary of Politics, supra note 22, at 334-335, 538

27 The definite objectives and strategies of particular nationalisms vary considerably and may range from the aim of maintenance of cultural identity and language, over the aim of preservation of political autonomy, to the aim of establishment of a political unity and independence, and even the aim of territorial expansion or protection of the interests of extraterritorial nationals.

28 For details on the different streams of Zionism see Laqueur, supra note 20, Chapter 6 (dealing with left-wing, socialist Zionism), Chapter 7 (dealing with Jabotinsky and revisionism), Chapter 9, at 481-484 (dealing, inter alia, with religious Zionism), Chapter 8 (dealing with basic anti-Zionist positions and critics to Zionism, namely: 1. the liberal-assimilationalist critique; 2. the Jewish religious, ultra-orthodox critique; 3. the critique exercised by the

Nevertheless, it is important to mention that it was the Jewish labor movement of Palestine that shaped the future state of Israel in all its aspects:

The Jewish labor movement of Palestine has laid down the state's objectives, has established its organizational foundations, and has built the political and economic power structures of the future state of Israel.

The central stream of the Jewish labor movement in Palestine during the 1920s consisted of two parties, namely Ahdut Ha'avoda (United Labor)[29] and Hapo'el Hatza'ir (Young Worker).[30]

In 1920, Ahdut Ha'avoda and Hapo'el Hatza'ir founded the Histadrut (the General Federation of Jewish Workers in Eretz Israel) - a comprehensive social, political and economic organization which taxed its members and provided health service and unemployment allowances.

In 1930, Ahdut Ha'avoda and Hapo'el Hatza'ir fused within the framework of the Mapai Party (the Workers Party of Eretz Israel) - a political party which enjoyed unchallenged domination of the Histadrut, gave it its purpose and basic conception which was directed at "the conquest of land and building it up through extensive immigration."

The Mapai Party had acquired an unquestionable moral, social, and cultural position within the organized Jewish Zionist community in Palestine pre-1948 (i.e. the "Yishuv").

In 1933, the Mapai Party became the dominant party in the Zionist movement, and in 1935, David Ben-Gurion, a leading figure of this party, became chairman of the Zionist Executive and of the Jewish Agency's Executive.

The Mapai Party dominated not only the Histadrut and the "Yishuv", but also provided the ideology upon which the state of Israel should be built, actually was built, and still rests upon.

The original leaders of the Mapai Party, as well as representatives of the second wave (1904-1914) and third wave (1919-1923) of Jewish immigration, founded the state of Israel and shaped the first twenty years.[31]

Important to mention is that the representatives of the Jewish labour movement of Palestine not only formulated the state's ideology but also put this ideology into practice. These representatives were theorists and at the same time also political

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Bundists and the Territorialists; 4. the Marxist critics). For more details in the Jewish religious, ultra-orthodox critique, see Chapter C.2.3. (Historical Background of the "Status Quo" Arrangement) and C.2.4. (The Present Importance of the "Status Quo" Arrangement)

29 The aim of Ahdut Ha'avoda - which was founded in 1919 - was the conquest of land.

30 Hapo'el Hatza'ir was purely nationalist and even violently anti-socialist.

31 For a detailed discussion of the labour movement see Sternhell, supra note 23, at 4-6, 19-22

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leaders who controlled the political, social and economic institutions which were set up by themselves.[32]

The original leaders of the Mapai Party provided the Israeli society with a strong model of economic, cultural and social life, which has never really been changed within the state of Israel - even not after the victory of the revisionist Right in the 1977 elections, and when Menachem Begin, the revisionist leader became prime minister.

The reason for this state of affairs lays in the fact that between the seemingly two extreme streams of Zionism - i.e. the social Zionism of the labor movement and the revisionist Zionism of the Right - there was in reality never any difference over the ideology and the basic objectives of Zionism itself.

As I will demonstrate in the course of this work the differences rather lay in the methods and instruments for the implementation of the objectives themselves.

At the very heart of the conceptual-ideological framework of all positions of Zionism - ranging from left-wing, secular, socialist, labor Zionism to different forms and levels of right-wing, nationalistic and religious Zionism - lays the fundamental aim to advance and protect first of all Jewish national goals and interests. The writings of various Zionist leaders reveal, at the top of the list was always the conquest of land and the creation of a Jewish nation state.[33]

As I will elaborate in more detail in sub-chapter 4.4. (dealing with the establishment of the Jewish National Fund) already at the First Zionist Congress in 1897 one delegate, Zvi Herman Schapira of Heidelberg, proposed the establishment of a fund for the purpose to acquire land in Palestine which should be forever the common and inalienable property of the Jewish people.

In 1904, Menachem Ussishkin, a Zionist leader and the head of the Jewish National Fund, described the main objective of acquisition of land in Palestine as follows:

> "In order to establish Jewish autonomy, or to be more exact -- a Jewish state in Palestine, it is first of all essential that all the land of Palestine, or at least most of it, be the property of the Jewish people. Without the right of land ownership, Palestine will never be Jewish regardless of the number of Jews in it, both in the city and country..." [34]

Avraham Granovsky, another Zionist leader who in 1960 became the president of the Jewish National Fund, wrote in 1936:

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32 Ibid., at 5-6

33 Granovsky, Land and the Jewish Reconstruction in Palestine, supra note 24; A. Granovsky, The Land Issue in Palestine (KEREN KAYEMET LEISRAEL), Jerusalem, 1936

34 Menachem Ussishkin, quoted in Baruch Kimmerling, Land, Conflict and Nation Building: A Sociological Study of the Territorial Factors in the Jewish-Arab Conflict (Department of Sociology and Social Anthropology, Hebrew University of Jerusalem, 1976) at 59

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> "The land question is quite literally one of life or death for Zionism and the Jewish National Home. Zionism proposes to re-establish the Jewish people in the land of its ancestors...If, therefore, the necessary land be kept out of reach, the Zionist goal can never be attained." [35]

The nationalist ideology of the Zionist movement focused on a complete or partially exclusion of the indigenous Palestinian Arab people from resource allocation (land, water, budget) as well as from employment and economic, cultural and social rights and benefits.

It is important to mention at this point that - although Jewish immigration and Jewish enterprise have conferred benefits on Palestine in which the Arab people always shared - these advantages to the Arabs have been accidental to the main purpose of the enterprise and did never form part of the basic aims of Zionism.

These advantages and accidental benefits in which the Palestinian Arab people shared since the implementation of the political concept of Zionism was expressed in a very good way in an interview given by the then-mayor of Jerusalem, Teddy Kollek (Labour Party), to the Hebrew newspaper Ma'ariv immediately after the Temple Mount massacre in October 1990. In this interview, Kollek explicitly stated that the welfare of the Palestinian Arab population was not among the considerations that had guided the municipality in developing the Palestinian neighborhoods:

> "[Kollek:] We said things without meaning them, and we didn't carry them out. We said over and over that we would equalize the rights of the Arabs to the rights of the Jews in the city - empty talk...Both Levi Eshkol and Menachem Begin promised them equal rights - both violated their promise...Never have we given them a feeling of being equal before the law. They were and remain second - and third class citizens.
>
> [Question:] And this is said by a Mayor of Jerusalem who did so much for the city's Arabs, who built and paved roads and developed their quarters?
>
> [Kollek:] Nonsense! Fairy tales! The Mayor nurtured nothing and built nothing. For Jewish Jerusalem I did something in the past twenty-five years. For East Jerusalem? Nothing! What did I do? Nothing. Sidewalks? Nothing! Cultural institutions? Not one. Yes, we installed a sewerage system for them and improved the water supply. Do you know why? Do you think it was for their good, for their welfare? Forget it! There were some cases of cholera there, and the Jews were afraid that they would catch it, so we installed sewerage and a water system against cholera..."[36]

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[35] Granovsky, The Land Issue in Palestine, supra note 33, at 12

[36] Ma'ariv, 10 October 1990 (Hebrew), translated to English and quoted in B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem (Jerusalem, January 1997) at 54

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Except for a few numerically unimportant groups,[37] all streams of Zionism rejected from the very beginning a universalistic aspect and spirit of liberalism, which would have expressed itself in an obligation to defend or at least not to trespass the rights of another people (i.e. the native Palestinian Arab people) and to establish equality and social justice among the Arab and Jewish people.

Contrary to much politicized scholarship and ideological information, Israel's concept of labor Zionism[38] was and actually still is no less committed to the basic principle of an homogeneous Jewish nation-state - in which the Palestinian Arab people, i.e. the second nation of the country, has no real place and does not share the "common good" - than the ideology of right wing Zionism.

Zeev Sternhell, professor of political sciences at the Hebrew University in Jerusalem, has shown in his recently published Book entitled "The Founding Myths of Israel", that the said principle of an homogeneous Jewish nation-state is inherent also in labour Zionism.

He expressed his findings in the following way:

> "[E]ven in the celebrations of the First of May, national principles were dominant. The main objective for which the Jewish worker was struggling was said to be the national objective, not the realization of socialism...[in] the labor system the red flag was a symbol that strengthened the spirit of devotion to the nation rather than weakened it.
> The settlements of the labor movement, its economic enterprises, and its cultural institutions were a bulwark against any contact with the Arab environment. Nobody fought against the Arab worker more vigorously than the Histradut; nobody preached national, economic and social segregation with more determination than the labor movement. Under such circumstances, how could concepts such as workers' solidarity and international brotherhood be taken seriously?"[39]

As already said above, the differences between the left- and right-wing Zionist parties lay in reality not within the ideological-conceptual framework of political

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[37] To this group belong the "Marxists" and the so called "Bund" - a Jewish Socialist organization established one month after the First Zionist Congress in August 1897. Both groups rejected Zionism, stating that as a clear national programme, it was incompatible with the basic approach of internationalism inherent to Socialism. According to the Bund's - somewhat complicated - concept individual Jews wherever they lived could claim a connection with the national collective and have the right to use their own language and develop their own education and culture. The Bund derived its concept of political-cultural autonomy from the writings of the theorists of Austrian Socialism, such as Karl Renner and Otto Bauer, and rejected both assimilation and Zionism. Laqueur, supra note 20, at 270, 274

[38] Israel's labour movement was in power from 1948 until 1977. The leading party of the labour movement was "Mapai" (the Workers' Party of Eretz Israel) - a fusion of two other parties in 1930 - which was re-formed in 1968, then adopting the name "Mifleget Ha'avoda" (the Labour Party), see Sternhell, supra note 23, at 4, 332

[39] Ibid., at 252

Zionism itself but rather in the applied policies, i.e. the kind of methods and instruments which were used in order to fulfill this concept.

The idea of political Zionism - whose aims are to advance and protect first of all "Jewish national interests" - achieved its principal aim on 14 May 1948 with the establishment of the state of Israel in Palestine - or expressed in other words - with the transformation of Arab Palestine into the national home of the Jewish people and when *al-Nakba* (*the Catastrophe*) took place.[40]

3. Sources of the Concept of Political Zionism

The following fundamental documents define the ideological concept of Zionism and also establish the political programme of the Zionist movement.

3.1. The Basle Programme - Declared in 1897

The Basle Programme is the first document in this series and was declared by Theodor Herzl at the First Zionist Congress in Basle on 31 August 1897.[41]

Although the idea of Zionism has been established already a long time before with Leon Pinsker's treatise "Autoemanzipation", Theodor Herzl, a Viennese Jew, is recognized as the founder of political Zionism.[42]

The Basle Programme introduced for the first time the political programme of the Zionist movement and clearly determined that

> "...the aim of Zionism is to create for the Jewish people a home in Palestine secure under public law." [43]

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40 See the forceful analysis about Zionism and its consequences for the native Arab inhabitants, given by Professor Edward Said, a native Palestinian Arab living and teaching today in the United States, in his Book "The Question of Palestine", supra note 23, at 56-114, Chapter 2 (Zionism from the Standpoint of Its Victims)

41 The Zionist Congress, established by Theodor Herzl, was the highest authority in the Zionist Organization. Subsequently the First Congress (1897) the Congresses were held annually until 1901 and then biannually, except for the period of the war years. Due to the fact that during the periods of the Ottoman regime and the British mandatory power the Zionist Congresses could not be convened in Palestine, the Congress delegates met in various European cities. Chaim Simons, International Proposals to Transfer Arabs from Palestine, 1895-1947. A Historical Survey (Ktav Publishing House, Inc., New Jersey, 1988) at 156

42 Theodor Herzl, Der Judenstaat, Neudruck der Erstausgabe von 1896. Mit einem Vorwort von Henry M. Broder und einem Essay von Nike Wagner (Ölbaum Verlag, 1986) at 9-10

43 Basle Program, 31 August 1897, published in The Middle East and North Africa 1980/1981 (28th Edition, Europa Publications Limited 1981) at 62

In order to realize the goal of "creation of a Jewish home in Palestine" the Basle Program also recommended that the following activities should be carried out:

1. Promotion of the settlement of Palestine by Jewish immigration.
2. Organization and binding together of the Jewish people living throughout the world by the means of local and general institutions.
3. Strengthening of Jewish sentiment and national consciousness.
4. Preparatory steps towards obtaining government consent, for the attainment of Zionism.[44]

The Basle Program itself has no legal implication.

Nevertheless its formula of a "home" for the Jewish people was later used in the Balfour Declaration and in the Mandate for Palestine, both of which promised the establishment of a "Jewish national home" without, however, defining the meaning of this term.

Although the Zionist movement has succeeded to gain more and more support during the first years of the new 20th century, the chances of getting a "home" or even a state in Palestine were initially little.

However, new possibilities for the establishment of such a "home" in Palestine started to open up after the destruction of the Ottoman Empire during World War I, especially after the formulation of the Sykes-Picot Agreement in April - May 1916[45] - concluded between Britain and France - wherein the said two powers newly shaped the Middle East and allocated portions of the Ottoman Empire into their spheres of influence and authority.

This development encouraged influential and leading figures of the Zionist movement, particularly Chaim Weizmann,[46] to press Britain for a commitment to provide "a home for the Jewish people in Palestine."

3.2. The Balfour Declaration of 2 November 1917

On 2 November 1917, the efforts by Zionist leaders "to obtain a commitment by Britain to facilitate the establishment of the Jewish national home in Palestine" were finally successful, after Arthur James Balfour, the then British Foreign Secretary acting on behalf of the British government, wrote the "Balfour Declaration" to Lord

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44 Ibid.

45 Sykes-Picot Agreement, April-May 1916, published in The Middle East and North Africa 1980/1981, supra note 43, at 62-63

46 Chaim Weizman played the most important part in paving the way for the Balfour Declaration and in the subsequent negotiations over the British Mandate in Palestine. For more information about Weizman see Laqueur, supra note 20, at 469

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Rothshild, the British Zionist leader who represented Zionist interests for that occasion.

The Balfour Declaration was written in the form of a letter and is the second important document that explicitly mentions the political program of Zionism.

With regard to the nature of the Balfour Declaration it should be stressed at this point that it is a clear statement of policy by the British government[47] that radically altered the course of history if not for the whole world, then at least for the Middle East.

Additionally it has long served as the juridical basis of Zionist claims to Palestine.[48]

The Balfour Declaration, 1917 contains three provisions which are relevant for the present discussion about the foundations of human rights in Israel and the Occupied Territories.

Firstly, the Balfour Declaration stated that Great Britain would

> "...view with favor the establishment in Palestine of a national home for the Jewish people, and will use its best endeavors to facilitate the achievement of this object..." [49]

Secondly, the Balfour Declaration made the promise to support the Zionist cause dependent upon the condition

> "...that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine... " [50]

Thirdly, the Balfour Declaration stated

> "...that nothing shall be done which may prejudice...the rights and political status enjoyed by Jews in any other country." [51]

The Balfour Declaration reflects a big amount of disregard and lack of morality with which the rights and interests of the native Palestinian Arabs were handled by the then British Foreign Secretary Arthur Balfour, due to the following facts:

With the first clause entailed in the Balfour Declaration - referring to the establishment of "a national home for the Jewish people" - a declaration was made by a European nation (i.e. Great Britain) about a non-European territory (i.e. Palestine) - without being in control of or having occupation of that country.[52]

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47 Ibid., at 456

48 E. Said, supra note 23, Chapter 1 (The Question of Palestine) at 15

49 Balfour Declaration, 2 November 1917, published in The Middle East and North Africa 1980/1981, supra note 43, at 63

50 Ibid., at 64

51 Id.

52 This argument was raised by E. Said, supra note 23, at 15-16

The declaration was made in the form of a promise about this same territory (which constituted the homeland of another nation, i.e. the Palestinian Arab people) to the representatives of a people (i.e. the Jewish people) whose majority was not living there - since almost 2000 years.

Furthermore, the British government recognized an unqualified right by "all Jews" in the world to Palestine, without, however having any consent of the indigenous Palestinian Arab inhabitants (which then constituted 92% of the total population) and contrary to the principles of citizenship applicable in the rest of the world whereby a person can claim a right to a homeland only through birth or residence under certain specific conditions.[53]

Concerning the disregard of the presence and the wishes of the native Arab majority residents in Palestine, Lord Balfour explained later on the position of the British government in a Memorandum dated 11 August 1919 where he stated that

> "...in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country...The four great powers are committed to Zionism and Zionism, be it right or wrong, good or bad, is rooted in age-long tradition, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700.000 Arabs who now inhabit that ancient land. In my opinion that is right." [54]

It should be stressed at this point that this Memorandum violates the fundamental principle - as it has been laid down by President Woodrow Wilson's "Fourteen Points" - that the settlement of every territorial question must be made upon the free acceptance by the people immediately concerned, i.e. in the interests and for the benefit of the populations concerned and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.

In his address on 11 January 1919 President Woodrow Wilson explicitly stated that

> "...peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited, of the balance of power: but that every territorial settlement involved in the war must be made in the interests and for the benefit of the populations concerned."[55]

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[53] At the Paris Peace Conference which was opened in January 1919, Sylvain Lévi - a distinguished French Orientalist and non-Zionist Jew - spoke on behalf of the Zionist delegation and argued that though the work of the Zionists was of great significance from the moral point of view, Palestine was a small and poor land with a population of 600.000 Arabs, and the immigrating Jews, having a higher standard of living, would tend to dispossess them. See E. Said, ibid., at 20

[54] Quoted in E. Said, id., at 16-17

[55] Quoted in Sami Hadawi, Palestinian Rights and Losses in 1948, A Comprehensive Study (Saqi Books, 1988) at 21

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The second clause of the Balfour Declaration - prescribing that "nothing shall be done to prejudice the civil and religious rights of the existing non-Jewish communities" - gives a false and erroneous picture regarding the position, the rights and interests of the native Muslim and Christian Arab inhabitants of Palestine, which constituted at this times 92% of the total population.

Despite the overwhelming majority of the native Arab Palestinians, this clause did not use the term "Arabs" but rather relates to them as the "existing non-Jewish communities", this giving the impression that they were an insignificant minority, occupying a position subordinate to the Jewish minority.

Reading through the Balfour Declaration one may easily discern that the duty towards the Jewish people had substantially more weight than the other obligation towards the so called "existing non-Jewish communities" in Palestine.

The Balfour Declaration does not treat the Jewish and Palestinian Arab people equally, since it only defined Britain's responsibility towards building a Jewish national home, without any hint what kind of national home was envisaged.

Additionally, it does not entail any specific safeguard for the political rights of the native Arab inhabitants of Palestine.[56]

With the third provision - stating that "...nothing shall be done which may prejudice ...the rights and political status enjoyed by Jews in any other country" - the Balfour Declaration promised to the Jewish people exactly the same territory which also constituted the homeland for another people - namely the Palestinian Arabs - and additionally safeguarded the rights of the Jews in their countries of origin.

Due to the fact that the term "national home" has not been defined, its exact meaning was open to more than one interpretation,[57] and lead to serious conflicts:

In 1921 a big controversy regarding the exact meaning of the terms used in the Balfour Declaration arose.

The native Arabs of Palestine feared that this term meant the eventual establishment of a Jewish state resulting in the disappearance or the subordination of the Arab population, language or culture in Palestine.

These fears by the native Palestinian Arab population were nourished by a large number of publications (Zionist books and articles in various newspapers) which - in the worst cases - even proposed the transfer of Arabs from Palestine.[58]

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56 This issue is also discussed by Walter Laqueur in his book "A History of Zionism", supra note 20, at 453

57 Ibid., at 235, 347

58 Proposals to transfer the indigenous Arab people from Palestine were made by numerous individual Zionist Jews:
In May 1911, for example, Dr. Arthur Ruppin, a leading Zionist figure, suggested in a memorandum to the Zionist executive a limited population transfer. But this idea was vetoed because it was bound to increase Arab suspicions about Zionist intentions.

Additionally, public statements were made by official organs of the Zionist Organization revealing the attitude and objectives of political Zionism regarding the Palestinian land and their native inhabitants.

Such a statement, for instance, was made by Dr. Eder, the then acting chairman of the Zionist Commission in Palestine, who appeared before a British Commission of Inquiry, which was appointed to investigate the causes of the anti-Jewish riots that took place in May 1921.

At this occasion Dr. Eder clearly stated that

> "... there can be only one National Home in Palestine, and that is a Jewish one, and no equality in the partnership between Jews and Arabs, but a Jewish preponderance as soon as the members of the race are sufficiently increased."[59]

The Haycraft Commission Reports - Published in October 1921

In its Reports of October 1921 the Haycraft Commission commented on Dr. Eder's statements, inter alia, as follows:

> "...Dr. Eder was a most enlightening witness. He was quite unaggressive in manner and free from any desire to push forward opinions which might be offensive to the Arabs. But when questioned on certain vital matters he was perfectly frank in expressing his view of the Zionist ideal. He gave no quarter to the view of the National Home as put forward by the Secretary of State and the High Commissioner... As acting Chairman of the Zionist Commission Dr. Eder presumably expresses in all points the official Zionist creed, if such there be, and his statements are, therefore, most important. There is no sophistry about Dr. Eder; he was quite clear that the Jews should, and the Arabs should not, have the right to bear arms, and he stated his belief that this discrimination would tend to improve Arab-Jewish relations...
> We do not comment upon his opinions because the discussion of the questions raised is not our concern, but it is relevant to our report to show that the acting Chairman of the Zionist Commission asserts on behalf of the Jews those claims which are the root of the present unrest, and differ materially from the declared policy of the Secretary of State and the High Commissioner of Palestine..." [60]

In 1912 and 1914, Leo Motzkin raised the idea of an Arab population transfer.

In 1914, to mention another example, the same idea was suggested by Nahum Sokolow.

Israel Zangwill, an Anglo-Jewish writer, was one of the most consistent advocates for a population transfer. In a series of speeches and articles during and after the First World War he criticised the Zionists for ignoring the fact that Palestine was not empty, and suggested the concept of an "Arab track" to their own Arabian state. See Laqueur, supra note 20, at 231-232. See also Simons, International Proposals to Transfer Arabs from Palestine, 1895-1947. A Historical Survey, supra note 41, Chapter 1 entitled "Proposals By Individual Jews", at 3-85

59 Quoted in the Reports of the Commission of Inquiry With Correspondence Relating Thereto. October 1921, Cmd. 1540, at 57 [Haycraft Commission Reports, 1921]

60 Ibid.

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The Churchill White Paper - Issued in 1922

However, in an attempt to appease[61] the Palestinian Arabs and the opposition of right-wing Tories in Westminster, the British government issued on 3 June 1922 a statement of policy which is known as the Churchill White Paper.[62]

The Churchill White Paper explicitly stated as follows:

> "Unauthorized statements have been made to the effect that the purpose in view is to create a wholly Jewish Palestine. Phrases have been used such as that Palestine is to become 'as Jewish as England is English.' His Majesty's Government...have no such aim in view. Nor have they at any time contemplated, as appears to be feared by the Arab Delegation, the disappearance or the subordination of the Arabic population, language or culture in Palestine. They would draw attention to the fact that the terms of the Balfour Declaration do not contemplate that Palestine as a whole should be converted into a Jewish national home, but only that such a home should be founded in Palestine." [63]

Although, the Churchill White Paper clearly restricted the interpretation of the Balfour Declaration regarding the term "Jewish national home", it did not explicitly oppose the idea of a Jewish state, since it also contained the following passage:

> "So far as the Jewish population of Palestine are concerned, it appears that...His Majesty's Government may depart from the policy embodied in the Declaration of 1917. It is necessary, therefore, once more to affirm that these fears are unfounded, and that the [Balfour] Declaration,..., is not susceptible of change." [64]

Therefore - as I see it - the native Palestinian Arabs were not convinced that their rights and interests were not being prejudiced by the "national home" policy which, as they watched and made all effort to resist, gradually materialized into a Jewish national home.

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61 Laqueur, supra note 20, at 454-455

62 Churchill - Memorandum - White Paper, 3 June 1922, Statement of Policy, Cmd. 1700, London, published in The Middle East and North Africa 1980/1981, supra note 43, at 67-68

63 Ibid., at 67

64 Id., at 68

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3.3. The Mandate for Palestine - Granted to Great Britain in 1922

3.3.1. General Remarks

The diplomatic battle for a Jewish Palestine entered a new stage at the Paris Peace Conference, when on 28 June 1919, the Treaty of Versailles - comprising also the Covenant of the League of Nations[65] - was signed.

Article 22 of the Covenant of the League of Nations established the Mandate system

> "...for those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be the principle that the well-being and development of such peoples form a sacred trust of civilization..."[66]

The task of drawing up the charter of the mandate was left, however, to the mandatory power.

The Balfour Declaration served not only as guideline, but was even explicitly incorporated in the text of the Mandate of Palestine which forms the second main international-legal source upon which the Zionist movement (later also the Declaration of the Establishment of the State of Israel, 1948) relied in order to found territorial claims regarding all parts of Palestine and to exercise the right to self-determination of the Jewish people on that territory.

The exact terms of the Mandate were approved by the Council of the League of Nations on 24 July 1922 and came into force on 29 September 1922.[67]

The Mandate for Palestine embodied two main objectives, namely: 1. to give effect to the provisions of Article 22 of the Covenant of the League of Nations; and 2. to establish the responsibility of the British Mandatory power for putting into effect the Balfour Declaration of 1917.

Article 2 of the Mandate for Palestine states:

> "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions *as will secure the establishment of the Jewish national home*, as laid down in the preamble, and the development of self-governing institutions, *and also* for safeguarding the

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65 Article 22 of the Covenant of the League of Nations, 28 June, 1919, published in The Middle East and North Africa 1980/1981, supra note 43, at 66

66 The conference was opened on 18 January 1919, see Laqueur, supra note 20, at 451

67 Mandate for Palestine, 1922, British White Paper, Cmd. 1785, published in The Middle East and North Africa 1980/1981, supra note 43, at 66-67

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> civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion." [Emphasis added][68]

Article 6 of the Mandate for Palestine states:

> "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish Agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes."[69]

The right to national self-determination was internationally recognized by President Woodrow Wilson's "Fourteen Points" and applied to the break-up of the Austrian-Hungarian and Ottoman Empires after the First World War.

The Mandate for Palestine clearly recognized the right to national self-determination of the Jewish people, but - in spite of Woodrow Wilson's "Fourteen Points" - it did not recognize the same right to the Palestinian Arab people.

In the context of President Woodrow Wilson's "Fourteen Points" and the Mandate for Palestine the general question arises:
"What is the 'self' of a nation and who can express its will?" Or to put it in other words:
"What is the exact content of a right to self-determination and under which circumstances may this right be translated into actions?"

3.3.2. What is the " Self " of a Nation and Who has the Right to Express its Will?

The philosophic idea of "self-determination" originates in the 18th century concern for freedom and the primacy of the individual will.

This idea has been applied to groups which can be said to have collective will, but in the 20th century it was applied primarily to cohesive national groups ("peoples").

The right to self-determination has been defined by Ian Brownlie as:

> "The right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups. The choice may be independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state."[70]

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68 Ibid., at 66
69 Id., at 67
70 Ian Brownlie, Principles of Public International Law, Oxford, Oxford Univ. Press, 1990, at 595, quoted in Takkenberg, supra note 7, at 251

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Until the end of the Second World War the majority of Western jurists was of the opinion that the idea of "self-determination" had no legal content, since it was "an ill-defined concept of policy and morality".[71]

However, with the establishment of the United Nations, Western jurists as well as governments started to generally admit that self-determination is a legal principle.

The principle of self-determination is embodied in a series of prominent resolutions, declarations and other documents adopted by the United Nations, namely:

- The Charter of the United Nations, 1945[72]
- The UN GA Resolution 637 A (VII), 16 December 1952 (entails a recommendation that "the States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations".)
- The Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960[73]
- The Resolution on Permanent Sovereignty over Natural Resources, 1960[74]
- The Declaration on the Inadmissibility of Intervention, 1966[75]
- The International Covenant on Civil and Political Rights, 1966 [hereinafter ICCPR] and the International Covenant on Economic, Social and Cultural Rights, 1966 [hereinafter: ICESCR][76]

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71 Ibid

72 Article 1 of the Charter states as the second purpose of the United Nations, after the maintenance of international peace and security, to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..." Article 55 of the Charter used the same formula and deals with economic and social cooperation. The Charter of the United Nations, 1945, published in Basic Documents on Human Rights, 3rd Edition, Edited by Ian Brownlie, Q.C. (Clarendon Press, Oxford, 1992) 3, at 4, 5

73 UN GA Resolution 1514 (XV), 14 December 1960.
In its first two operative paragraphs the General Assembly declares that:

> "1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World peace and co-operation."
>
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

74 UN GA Resolution 1803 (XVII), 14 December 1962

75 UN GA Resolution 2131 (XX), 14 January 1966

76 Article 1 of the ICCPR and the ICESCR states:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their

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- The Declaration on Principles of International Law concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 1970.[77]

It should be stressed that taken to its most vicious extremes the exercise and accomplishment of national self-determination leads or may lead to the phenomena of "ethnic cleansing".

3.3.3. US President Woodrow Wilson's "Fourteen Points", 1919 and The Mandate for Palestine, 1922: Self-Determination For Whom?

It should be pointed to the fact that the Mandate for Palestine explicitly gave

> "...recognition...to the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home in that country..."

At the same time the Mandate for Palestine completely disregards the same historical connection of the native Palestinian Arabs and their right to national self-determination, which was internationally recognized by President Woodrow Wilson's "Fourteen Points" and applied to the break-up of the Austrian-Hungarian and Ottoman Empires after the First World War.

> economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

ICCPR and ICESCR, published in Basic Documents on Human Rights, supra note 72, at 125, 115

[77] UN GA Resolution 2625 (XXV), 24 October 1970
This 1970 Declaration was adopted by the General Assembly without vote and gives evidence to the consensus among the member states of the United Nations on the meaning and elaboration of a series of principles of the Charter, including the principle of self-determination. The 1970 Friendly Relations Declaration extensively discusses "The principle of equal rights and self-determination of peoples", and comprehensively details the various aspects of the right to self-determination.

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The Jewish national home policy and the sui generis Mandate for Palestine totally run counter the fundamental principle - as it has been laid down by President Woodrow Wilson's "Fourteen Points" - that the settlement of every territorial question must be made upon the free acceptance by the people immediately concerned, i.e. in the interests and for the benefit of the populations concerned and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.

With regard to the non-Turkish nationalities in the territories of the former Ottoman Empire, which were occupied by the Allied Forces, President Wilson said that they should be given "an absolute unmolested opportunity of development".[78]

The Mandate for Palestine recognized the right to self-determination of the Jewish people, but it did completely disregard the same right to national self-determination of the Palestinian Arab people living since generations on the same land.

However, one may say that with the establishment of the terms of the Mandate for Palestine one first aim of Herzl's Basle Programme has been achieved, namely that for the Jewish people "a home" in Palestine "be secured by public law".

3.4. The Biltmore Programme - Established in 1942

Another source of expression of the political programme of the Zionist movement is the Biltmore Programme which was approved by a Zionist Conference held in May 1942 in the Biltmore Hotel in New York.

At this conference some six hundred delegates, representing the main Zionist groups in New York, gathered in order to discuss and reformulate, inter alia, the aims of their movement.[79]

For the first time, the Zionist movement clearly declared that full, independent Jewish statehood was its goal:

> "...Palestine be established as a Jewish commonwealth integrated in the structure of the new democratic world." [80]

The Biltmore Programme reflects a new "militant" thinking of American Zionism whose demands became identical with the sovereignty long demanded by the revisionists.

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78 Hadawi, supra note 55, at 21

79 Laqueur, supra note 20, at 545

80 Biltmore Programme, 11 May 1942, published in The Middle East and North Africa 1980/1981, supra note 43, at 70-71

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3.5. The Jerusalem Programme - Established in 1951

In 1951, at the 23rd Zionist Congress, the task of Zionism was reformulated in the Jerusalem Programme and incorporated into the new constitution of the World Zionist Organization, which entailed the following clause:

> "The task of Zionism is the consolidation of the state of Israel, the ingathering of exiles in Eretz Israel and the fostering of the unity of the Jewish people." [81]

It should be noted here that the Jerusalem Programme explicitly uses the word "Eretz Israel" - and not the word "Palestine" as it was done in the time before the establishment of the state of Israel.

3.6. Revision of the Jerusalem Programme - 1968

In 1968 - shortly after Israel has occupied a large part of territories, namely the Sinai Peninsula, the Gaza Strip, the Golan Heights and the West Bank of the Jordan River including East Jerusalem, during the June 1967 war - the 27th Zionist Congress again pronounced the goals of the Zionist movement and even used the specific formulation of "historic homeland Eretz Israel" in order to include also the previously captured and occupied territories.

The Revised Jerusalem Programme established the aims of Zionism as follows:

> "The unity of the Jewish people and the centrality of Israel to Jewish life; the ingathering of the Jewish people in its historic homeland Eretz Israel through aliyah from all countries; the strengthening of the state of Israel..." [82]

4. Establishment of "Jewish National Institutions" by the Zionist Movement

4.1. Introduction

As already elaborated in a previous sub-chapter, the fundamental political aim of the Zionist movement was to create a national home for the Jewish people in Palestine.

In order to reach this aim the Zionist movement needed to translate its political concept into realities and visible facts. That means, land had to be acquired, owned,

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[81] Cited in Masalha Nur (ed.), The Palestinians in Israel: Is Israel the State of all its Citizens and "Absentees"? (Galilee Center for Social Research, 1993) 44, at 53

[82] Ibid., at 54

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inhabited and economically used (cultivated, leased) by Jewish immigrants - as it was expressed by Avraham Granovsky, a leading Zionist figure.[83]

The main political activities of the Zionist movement therefore concentrated on:

1. Jewish acquisition, ownership and control of Arab owned land in Palestine;
2. Extensive Jewish immigration into Palestine and their settlement on the land;
3. Employment of "Jewish labour".

These activities were carried out by a number of Jewish national institutions - such as:

1. The World Zionist Organization (WZO)
2. The Jewish Agency (JA)
3. The Jewish National Fund (JNF)
4. The Histadrut

All these institutions were created immediately after the adoption of the Basle Program at the First Zionist Congress in 1897 as well as during the Ottoman and British Mandate era up until the establishment of the state of Israel in 1948.

In the era before the establishment of the state of Israel in Palestine the above mentioned Zionist institutions operated as political institutions of the Jewish community in Palestine (i.e. the Yishuv) and their functions were to further exclusively Jewish aims and interests.[84]

Common to these Jewish national institutions is the fact that they are based on a system which is characterized by two basic principles, namely:

1. The principle of "inalienability of land" and
2. The principle of employment of "Jewish labour"

Both principles discriminate in systematical and institutionalized way against the non-Jewish population in general and the native Palestinian Arab people in particular.

It should be stressed here that both principles are still applied today due to the fact that the above mentioned Zionist institutions are carrying out important governmental activities for the state of Israel, not, however, in the interest of *all* its citizens or inhabitants irrespective of their religious or national affiliation, but rather for the sole interest of the Jewish population.

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[83] Granovsky, The Land Issue in Palestine, supra note 33, at 10-18; Granovsky, Land and the Jewish Reconstruction in Palestine, supra note 24, at 105-111, 115-127

[84] Kretzmer, supra note 9, at 91

4.1.1. The Fundamental Principle of "Inalienability of Land"

This principle means that land which has been acquired by Jews as Jewish property and which has passed into Jewish ownership is to remain in perpetuity within the Jewish community.

According to this principle the land has to remain Jewish in that the paramount ownership inheres in a Jewish national institution, which is supposed "to represent the Jewish people."

Furthermore this principle established that not only the ownership but also the use of the land is to be kept within the Jewish sphere, since only Jews may lease and cultivate it.[85]

The principle of "inalienability of land" has its source in the old religious principle of the Torah according to which "...the land shall not be sold for ever for the land is Mine" (Leviticus 25:23).

As I will demonstrate especially in Chapter G (The Right to Property) of this work, the system of acquisition of land by Zionist institutions adhering to the said idea of "inalienability of land" leads to an "extra-territorialisation" of such lands for all non-Jews.[86]

This means that no native Palestinian Arab resident or Palestinian Arab refugee or any other non-Jew may benefit or gain any advantage from this land by way of purchase, lease, cultivation, or even labour either now or at any time in the future.

I want to stress that due to the fact that the said system is carried out only within one national group, namely the Jewish population, it leads to a massive and systematic discrimination against all non-Jewish inhabitants in general and the native Palestinian Arab people in particular.

4.1.2. The Fundamental Principle of "Jewish Labour"

This principle means that in all settlements which were founded on Jewish land (which according to the above mentioned principle became inalienable land) only Jewish persons may legally be employed.[87]

The application of this principle meant a de facto boycott of "Arab labour" and was performed in a persistent and deliberate way.

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85 Granovsky, Land and the Jewish Reconstruction in Palestine, supra note 24, at 110-111

86 This conclusion was drawn already in the Hope Simpson Report, 20 October 1930, Cmd. 3686, London, at 54, quoted in Granovsky, ibid., at 105-107

87 Granovsky, id., at 119-127

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On the long run the application of this principle in combination with the application of the principle of "inalienability of land" lead - and still leads - to the creation of an impoverished landless Arab class and in the worst case to the complete "de-Arabization" of certain regions.[88]

There are no doubts that the discrimination against the native Palestinian Arabs - which occurred in connection with the mentioned basic tenets of the Zionist institutions - was one of the main reasons why they could never believe that the immigrating Zionist Jews came with friendship and goodwill.

4.1.3. The "Jewish National Institutions" and their Significance for the State of Israel

The below described Zionist institutions are of utmost importance, due to the fact that up until today the whole concept of the State of Israel rests upon them.

Almost from the very beginning, these institutions were created with an eye to conversion into institutions of a later state and not for nothing they were considered as institutions of the "state on the way."[89] And so it happened, that at the moment when the state of Israel was established in Palestine, all those institutions which are necessary for the functioning of a state were already in place and ready to take over.[90]

After the establishment of the state of Israel in Palestine in 1948, the Knesset passed laws[91] that granted official status and the sole authority to the below described Zionist institutions - the World Zionist Organization (WZO), the Jewish Agency (JA) and the Jewish National Fund (JNF) - to carry out important activities

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88 For more details see Chapter G. (The Right to Property)

89 Kretzmer, supra note 9, at 91

90 The Jewish Agency, for instance, with its various departments (political, finance, settlement, immigration, etc.) became the government of the state of Israel. The departments converted into ministries, and the Jewish Agency Executive and, subsequently, the "People's Administration" (Minhelet Ha'Am) became the Cabinet. The Haganah (the defense organization of the "Yishuv") became the Israel Defence Forces (IDF). Special taxes were instituted to purchase weapons for the Haganah and for the absorption of new immigrants. The Histadrut (trade union federation) taxed its members to provide health service and unemployment allowances; the Jewish National Fund (JNF) taxed for settlement and afforestation. See Morris, supra note 8, at 16

91 The World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952-1953) 3; Keren Kayemet Le-Israel Law, 1953, 8 L.S.I. (1953) 35. This law is also known as the "Jewish National Fund Law". For more details on this law see Chapter C. (The Concept of the State of Israel as a "Jewish State" and its Impact on the Right to Equality and other Civil and Political Rights) and Chapter G. (The Right to Property) of this work.

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which are by their nature state/governmental activities par excellence - namely immigration, settlement and funding.[92]

It should be stressed at this point that the special legal status was granted to these Zionist institutions without changing their original historical mandate according to which only Jewish aims and interests should be advanced but not the interests of non-Jewish inhabitants of Palestine - a fact which mainly concerns the native Palestinian Arab residents.

As a result the Zionist institutions of the pre-state era - after having received the official authority - are carrying out important governmental activities[93] for the state of Israel, not, however, in the interest of *all* its citizens or inhabitants irrespective of their religious or national affiliation but rather for the sole interest of the Jewish population.

This state of affairs persists up until today, despite the fact that Israel formerly committed itself in the Declaration of the Establishment of the State of Israel of May 1948 to complete equality of political and social rights for all its citizens, regardless of race, religion or sex.

Due to their utmost importance until today and their discriminatory effects for all non-Jewish inhabitants, i.e. mainly the native Palestinian Arab people, the three main Zionist institutions - the World Zionist Organization (WZO), the Jewish Agency (JA) and the Jewish National Fund (JNF) - will be discussed in the following sub-chapters 4.2 - 4.4.

4.2. The World Zionist Organization (WZO) - Established in 1897

The World Zionist Organization (WZO) - originally called Zionist Organization - was founded by Theodor Herzl at the First Zionist Congress held in Basle in August 1897.

The WZO was the *main political and official organ* of Zionist movement and carried out all Zionist political activities in Palestine and abroad in the era of the Ottoman period and later during the British Mandate.[94]

The Basle Program of 1897 entails one of the best definitions of the concept of political Zionism. It establishes the aims of the Zionist movement and also the means by which the WZO - as main organizational framework - should achieve its objectives. These means are:

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[92] Kretzmer, supra note 9, at 92

[93] Ibid., at 92

[94] Id., at 90; Sternhell, supra note 23, at 396

1. The defense of the Zionist cause before the different governments.
2. The encouragement of Jewish immigration into Palestine.
3. The promotion of Jewish settlement in Palestine.[95]

Additionally, the WZO devoted most of its financial resources (based on contributions) to the mentioned activities.

Until today, the WZO operates as the formal framework of the Zionist movement. The governing organs of the WZO are comprised of representatives of Zionist movements in Israel and the Diaspora.[96]

4.3. The Jewish Agency (JA) - Established formally in 1922 Constituted in 1929

The Jewish Agency (JA) was formally established by the Mandate granted to Great Britain by the League of Nations for Palestine in 1922 and operates until today. The JA should act as an *official body for* the purpose of *representing the Jewish people*, and advising and cooperating with the British Mandate government, provided that the mandatory power would facilitate Jewish immigration and settlement.[97]

Important to mention is the fact that no such body existed or was any time established for the Palestinian Arab people living in Palestine or elsewhere.

Article 4 of the Mandate for Palestine gave the WZO the status of a JA and provided that

> "...an appropriate Jewish Agency shall be recognized as a public body for the purpose of advising and cooperation with the administration of Palestine in such matters as may affect the establishment of the Jewish National Home and the interests of the Jewish population in Palestine, and subject always to the control of the Administration, to assist and take part in the development of the country.
> ...The Zionist Organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognized as such agency. It shall take steps in consultations with His Britannic Majesty's Government to secure the cooperation of all Jews who are willing to assist in the establishment of the Jewish national home."[98]

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95 Basle Program, 1897, supra note 43, at 62
96 Kretzmer, supra note 9, at 90. For more details regarding the WZO see Chapter G. (The Right to Property)
97 Mandate for Palestine, 1922, supra note 67, at 67
98 Ibid.

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The JA was the main political body of the "Yishuv" - i.e. the organized Jewish community in Palestine pre-1948 - and it played a key role in the whole events which led up to the establishment of the State of Israel in Palestine in May 1948.[99]

From 1922 until 1929 the WZO functioned as the JA, that means the two bodies were merged.[100]

From 1929 until 1942 the JA became a separated body, and its membership was expanded in order to include also non-Zionist Jewish leaders of the Diaspora.[101]

The Constitution of the separated JA was signed on 14 August 1929 in Zurich. Regarding acquisition of land and employment of Jewish labour Article 3 provides as follows:

> "(d) *Land* is to be acquired as Jewish property, and..., the title to the lands acquired is to be taken in the name of the Jewish National Fund, to the end that the same *shall be held as the inalienable property of the Jewish people*.
>
> (e) The Agency shall promote agricultural colonization based on Jewish labour, and in all works or undertakings carried out or furthered by the Agency, *it shall be deemed to be a matter of principle that Jewish labour shall be employed...*" [Emphasis added][102]

Reading through these passages one may easily discern the discriminatory effect for all non-Jewish, i.e. the indigenous Palestinian Arabs left on such land that was transferred to the control of the mentioned JNF and JA. These two principles make the political and economic position of any native Palestinian Arabs left on such land most difficult and almost impossible, since these native Arabs are driven out by Jewish economic pressure in almost as distrastrous a way as if they would be removed by force.

From 1942 until 1971 the WZO and the JA were merged again.[103]

In 1971, the WZO and the JA became again separated bodies and the functions of each body were defined.[104]

Nevertheless, the WZO and the JA are still working in close cooperation.[105]

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99 The local leadership of the Jewish Agency was regarded as the leadership of the "state on the way", see Kretzmer, supra note 9, at 91

100 Ibid., at 91

101 Id., at 91

102 Quoted in Hadawi, supra note 55, at 61

103 Section 3 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 91; see also Kretzmer, supra note 9, at 91

104 See also Chapter G. (The Right to Property)

105 Section 1 of the World Zionist Organization and Jewish Agency for Israel (Status) (Amendment) Law, 30 L.S.I. (1975/76) 43; see also Kretzmer, supra note 9, at 91

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4.4. The Jewish National Fund (JNF) - Established in 1901

The Jewish National Fund (JNF) - a land fund based on monetary contributions from all over the world - was established at the 5th Zionist Congress in 1901.[106]

The JNF was the main official organ of the WZO in the era before the establishment of the state of Israel in Palestine whose aims were to purchase and acquire land in Palestine (but not to sell it) and to finance Jewish communal settlements.[107]

Important to mention is the fact that detailed proposals to set up such a fund for land purchases in Palestine were placed before the Zionist leadership as early as the First Zionist Congress in Basle on 31 August 1897.

Before the opening of the Congress the Zionist delegates received a memorandum which informed them that Zvi Herman Schapira of Heidelberg (1840-1898), a member of the Lovers of Zion movement, a rabbi and professor of mathematics, proposed the establishment of a fund for the purpose to acquire land in Palestine.[108]

Although there were also other proposals submitted to the First Zionist Congress, it was only Schapira's proposal that was finally presented, discussed and also published in the Congress Proceedings.[109]

According to Schapira the proposed land fund must have two qualities:

1. The fund itself must be perpetual.
2. The land must be forever the common and inalienable property of the Jewish people.

Schapira's proposal provides in this regard as follows:

> "A Fund must be set up by the Jewish people of the world to redeem the soil of Eretz Israel. It is imperative that every Jew young or old, rich or poor, without distinction, should be able to participate in this general Jewish fund. The land thus purchased shall be forever the property of National Fund...and shall not be

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106 Sternhell, supra note 23, at 394; Laqueur, supra note 20; Khalidi-Khadduri, supra note 25 (Chapter II. Historical Background - Origins of Zionism)

107 Kretzmer, supra note 9, at 61, 91

108 Joseph Klausner, Land and Soul: The Life and Actions of Professor Zvi Herman Shapira (1966) (Hebrew); Maximilian Hurwitz, The Father of the National Fund, in Eretz Israel: Jubilee Volume of the Jewish National Fund (1932) at 24; both authors are quoted in: Yifat Holzman-Gazit, Private Property, Culture, and Ideology: Israel's Supreme Court and the Jurisprudence of Land Expropriation (unpublished dissertation submitted to the school of law and the committee on graduate studies of Stanford University in partial fulfillment of the requirements for the degree of doctor of the science of law, May 1997) at 146, note 25

109 Hannah Bodenheimer, The Statutes of the Keren Kayemeth: A Study of Their Origins Based on the Known as well as the Hitherto Unpublished Sources, in 6 Herzl Yr. Book (1964) at 153, quoted in: Holzman-Gazit, ibid., at 146, note 27

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> sold to individuals but rather be leased to those who work it for a period of no more than 49 years..." [110]

Schapira's proposal - which gained wide support among the delegates to the First Zionist Congress - reflects several old biblical and Jewish traditional principles.

However, Max Bodenheimer (1865-1940), a lawyer from Cologne and later the chairman of the JNF insisted that at first a Jewish bank should be established and only then a land fund.

The First Zionist Congress finally issued a resolution which stated as follows:

> "The assembly declares that in principle it regards as essential the creation of a national Fund and the establishment of a Jewish bank and to these ends, the Actions committee to be elected present to the next congress a carefully prepared plan." [111]

However, due to legal and organizational difficulties the proposed land fund, i.e. the JNF, was only established in 1901 at the 5th Zionist Congress.

In 1907 the JNF was separately incorporated in England as a Limited Liability Company[112] and all the lands purchased by the JNF were registered in the name of this private company[113] which - according to Article 3 of its Memorandum of Association - was not permitted any more to divest itself from the paramount ownership of such land - leading to the complete "extra-territorialisation" of such lands for all non-Jews, i.e. mainly the indigenous Palestinian Arab people.

Article 3 of the Memorandum of Association of the JNF[114] reveals the objectives and the whole ideology upon which the JNF - which after the establishment of the state of Israel in Palestine became an important organ vested with governmental functions - is built:

> "3. The objects for which the Association is established are (subject as hereinafter expressly provided) as follows:
>
> (1) To purchase, take on lease or in exchange, or otherwise acquire any lands, forests, rights of possession and other rights, easements and other immovable property in the prescribed regions (which expression shall in *this Memorandum mean Palestine, Syria and other parts of Turkey in Asia and*

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110 Schapira's proposal was originally written in German and appears in the OFFICIAL PROTOCOLS OF THE ZIONIST CONGRESS IN BASLE 1897 (1978) (Hebrew). The passage is quoted in Holzman-Gazit, id., at 147

111 Bodenheimer, The Statutes of the Keren Kayemeth: A Study of Their Origins Based on the Known as well as the Hitherto Unpublished Sources, in 6 Herzl Yr. Book (1964) at 157, quoted in Holzman-Gazit, id., at 147-148

112 CERTIFICATE OF INCORPORATION No. 92825, Keren Kayemeth Leisrael Limited, reprinted in Vol. II The Palestine Yearbook on International Law (1985) at 194 [hereinafter: The Palestine Yearbook]

113 Kretzmer, supra note 9, at 61

114 Memorandum of Association of the Jewish National Fund, 1907, reprinted in The Palestine Yearbook, supra note 112, at 195

the Peninsula of Sinai) or any part thereof [115] for the purpose of settling Jews on such lands.

(3) To let any land or other immovable property of the Association to any Jew or to any unincorporated body of Jews or to any company..., *having regard to the identity of the person or persons controlling the majority of the voting-power and to the nature of the actual or intended operations of the Company,* the Board is of the opinion that the following conditions are satisfied, that is to say: (1) the Company is a Company under Jewish control and (2) the Company is engaged or intends to engage in the settlement of Jews in the prescribed region,... provided that no lessee or lessees shall be invested with the right of selling, assigning, mortgaging, charging, or by way of sub-letting [116]...

(5) To make any donations, either in cash or other assets which may be deemed...to promote the interests of Jews in the prescribed region...

(6) To purchase or otherwise acquire, and to sell, dispose of, work develop, deal with and otherwise turn to account mines and mining rights and property...in any part of the prescribed region, but so that *nothing in this sub-clause contained shall enable the Association to divest itself of the paramount ownership of any of the soil of, work, develop, deal with and otherwise turn to time acquire.* [117]

(11) To sell, mortgage, grant licenses, easements and other rights..., but so that *nothing in this sub-clause contained shall enable the Association to divest itself of the paramount ownership of any of the soil of the prescribed region* which it may from time to time acquire *save only that the Association may from time to time transfer the paramount ownership of such lands as it may deem necessary to a Corporation in Israel having the primary objects similar to the primary objects of the Association.*

(12) To borrow or raise money on any terms and conditions, ..., both present and future, but so that *nothing in this sub-clause contained shall enable the Association to divest itself of the paramount ownership of any of the soil of the prescribed region* which it may from time to time acquire.

(18) To make advances to any Jews in the prescribed region upon any security which be thought fit...".[Emphasis added]

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115 This is an expression of the very early Zionist territorial designs of what the "Jewish State" would be. The definite territorial plan was submitted by the WZO to the Paris Peace Conference in 1919. For the text of this plan see II Herewitz, Diplomacy in the Near and Middle East - Documentary Record: 1914 - 1956, at 45 (1956), quoted in The Palestine Yearbook, supra note 112, at 195, note 1

116 This restriction led to a closed settlers economy in Palestine where - after the land has been acquired as Jewish property - labour must also be Jewish. Thus a native Palestinian Arab is deprived for ever from the employment of that land. It should be recalled at this point that Article 3(e) of the 1929 Constitution of the JA also dictated that it "shall be deemed to be a matter of principle that Jewish Labour shall be employed." This policy is still strictly adhered to in Israel. For more details on this issue see Chapter G.2. [The Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, 21 L.S.I. (1966/67) 105]

117 This phrase is repeat several times in the text of these documents and is in conformity with Article 3(d) of the 1929 Constitution of the JA. See sub-chapter 4.3. (The Jewish Agency (JA) - Established in 1922 - Constituted in 1929)

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The complete and permanent control of the JNF was vested in the members of the Action Committee of the Zionist Organization,[118] which is known today as the Zionist General Council. It is elected by the Zionist Congresses and reflects the composition of the Congresses.[119]

It should be mentioned at this point that the Hebrew name for "Jewish National Fund" is *Keren Kayemet Le'Israel,* which literally means "Perpetual Fund for Israel", and thus emphasizes the nature and the intentions of the fund.

The Hebrew name of the fund derives from the talmudic dictum about good deeds "...the fruits of which man enjoys in this world, while the capital remains [*Keren Kayemet*] for him in the world to come." (Mishnah Pe'ah 1,1).

Considering the already in sub-chapter 4.3. elaborated fact that the 1929 Constitution of the Jewish Agency (JA) provides in its Article 3 (d) and (e) that

> "(d) Land is to be acquired as Jewish property, and... to be taken in the name of the Jewish National Fund, to the end that the same [land] shall be held as the inalienable property of the Jewish people"

and that

> "(e) ...in all works or undertakings carried out by the Agency, it shall be deemed to be a matter of principle that Jewish labour shall be employed..."

one may easily understand that these two principles make the political and economic position of any native Palestinian Arabs left on such land (that was transferred to the control of the mentioned Jewish national institutions, i.e. the JNF and the JA) most difficult and almost impossible, since these native Arabs are driven out by Jewish economic pressure in almost as distrastrous a way as if they were removed by force.

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[118] Articles of Association, reproduced in The Palestine Yearbook, supra note 112, at 200

[119] Encyclopedia of Zionism and Israel (Rapael Patai ed., 1971) at 1273, quoted in Holzman-Gazit, Private Property, Culture, and Ideology: Israel's Supreme Court and the Jurisprudence of Land Expropriation, supra note 108, at 148

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5. Palestinian Arab Opposition to Political Zionism in the 1920's and 1930's: Major Events Leading to the Rejection by the Palestinian Arab People of the UN GA Resolution 181 (II) of 29 November 1947

5.1. The Period from 1880 until 1919

Jewish immigration into Palestine started from about 1880 on and was initially met with little opposition by the indigenous Palestinian Arab population, since the Jewish immigrants were small in number and the then Jewish community of Palestine was not regarded as having nationalistic or political ambitions.[120]

However, with the rise of political Zionism in the end of the 19th century - whose central aim was "the establishment in Palestine of a national home for the Jewish people" - it became clear for all sides involved that the Zionist movement understood this aim in the sense as to change the demographical composition and land ownership in favor of the immigrating Jewish population.

These developments lead to a growth of Palestinian Arab opposition against the policy of the Zionist movement, since the indigenous Palestinian Arab population had become more and more anxious about its economic and political future and very existence in Palestine.

Although Palestinian opposition was already voiced in 1891,[121] 1897[122] and 1905[123] anti-Zionist resentment had found no organized political expression until 1908.

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[120] Sami Hadawi, a Palestinian Arab who was selected in 1952 to act as Land Specialist to the Palestine Conciliation Commission (PCC), writes in a comprehensive study that

> "...the objectives of the early Jewish immigrants to Palestine were not regarded by the Arab inhabitants as nationalistic or politically motivated. They were considered as purely religious and philanthropic; therefore the indigenous inhabitants harbored no animosity or opposition to them."
>
> "...because of their ordeal in Russia and Europe, the Arabs even felt sympathy for the 'People of the Book', as the Holy Koran of Islam describes the Jews and Christians. Zionist ambitions were then not generally known, while the inhabitants felt secure in their homes and property."

Hadawi, supra note 55, at 6.
Nevertheless, Hadawi also points to the fact that the relationship between the Jewish community and the local Arab population of Palestine was by no way untroubled. Ibid., at 7; see also Laqueur, supra note 20, at 212

[121] In 1891, the first act of political opposition to Zionism occurred when a group of Muslim notables from Jerusalem sent a petition to the Turkish Vizier that "Russian Jews should be prohibited from entering Palestine and from acquiring land there." Hadawi, supra note 55, at

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The year 1908 marked, however, a turning point insofar as an organized Palestinian Arab anti-Zionist movement started to emerge and to engage in specific activities in order to combat Zionism: People who cooperated with Zionists were denounced; anti-Zionism played a prominent role in the campaign of most candidates in the elections to the Turkish Parliament;[124] newspapers were extremely vocal against Zionism.

In the subsequent years several newspapers were established - such as "El-Carmel"[125] in Haifa (founded in 1908), "Falestin" in Jaffa (founded in 1911) and "Al-Muntada" in Jerusalem (began to appear in 1912) - all with the express purpose of combating Zionism.[126]

At this point it is important to stress that not only the Zionist movement had a claim to Palestine and wished to establish an independent political entity, but also the native Arab inhabitants wanted to reach independence.

Therefore the Palestinian Arab leadership also engaged in political activities with Great Britain culminating in a British promise to support also their goals.

5.1.1. The Henry McMahon - Sharif Hussein Correspondence (1915 - 1916)

In the period from July 1915 to March 1916 a correspondence of ten letters passed between Sharif Hussein of Mecca, the representative of the Arab peoples, and Sir Henry McMahon, the British High Commissioner in Cairo at that time.

Sharif Hussein offered Arab help in the war against the Turks if Britain would support the principle of an independent Arab state.

The most important letter is that of 24 October 1915 from Sir Henry McMahon to Sharif Hussein. In this letter Sir Henry McMahon wrote in the name of the government of Great Britain as follows:

> "The two districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama, Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded.

7

122 In 1897, the Mufti of Jerusalem presided over a commission which scrutinized applications for transfer of land in the area and was able to stop all purchases by Jews for the next few years. See Hadawi, supra note 55, at 7

123 In 1905, Neguib Azoury, a Christian Arab and previously an assistant to the Turkish pasha of Jerusalem, had written that it was the fate of the Arab and the Jewish national movements to fight until one or the other prevailed. Quoted in Laqueur, supra note 20, at 215

124 Hadawi, supra note 55, at 7-8; Laqueur, supra note 20, at 214-215

125 Laqueur, supra note 20, at 215

126 Ibid., at 221

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> With the above modification, and without prejudice to our existing treaties with Arab chiefs, we accept those limits.
>
> As for those regions lying within those frontiers wherein Great Britain is free to act without detriment to the interests of her ally, France, I am empowered in the name of the Government of Great Britain to give the following assurances and make the following reply to your letter:
>
> (1) Subject to the above modifications, Great Britain is prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.
>
> I am convinced that this declaration will assure the sympathy of Great Britain towards the aspirations of her friends the Arabs and will result in a firm and lasting alliance, the immediate results of which will be the expulsion of the Turks from the Arab countries and the freeing of the Arab peoples from the Turkish yoke, which for so many years has pressed heavily upon them..."[127]

However, while Great Britain was promising to Sharif Hussein Arab independence, it was at the same time secretly working with the French government on a plan as how to divide the liberated Arab territory between them.

The outcome of these negotiations was the already mentioned Sykes-Picot Agreement in April - May 1916,[128] wherein the said two powers newly shaped the Middle East and allocated portions of the Ottoman Empire into their spheres of influence and authority.

Furthermore, in November 1917, the then British Foreign Secretary Arthur Balfour made the already mentioned declaration to facilitate the establishment in Palestine of a national home for the Jewish people.

The defeat and surrender of the Ottoman Empire in the First World War brought at first jubilation to the Arabs who looked forward to a bright future of freedom and independence.

But very soon this enthusiasm diminished, as rumors began to spread that the Allied Powers had no intention of fulfilling the promises given to Sharif Hussein, but rather a "Mandate system" - which was considered by Arabs as new form of colonialism - supervised by the League of Nations was going to be prepared for them.[129]

This caused Sharif Hussein to demand an explanation by the British government, which responded in the form of several assurances and affirmations to support the fulfillment of the promises regarding Arab political freedom and independence.[130]

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127 McMahon Correspondence, 24 October 1915, Cmd. 5957, published in The Middle East and North Africa 1980/1981, supra note 43, at 62

128 Sykes-Picot Agreement, 1916, supra note 45, at 62-63

129 Hadawi, supra note 55, at 19

130 These supportive documents are:
1. The Hogarth Message of 4 January 1918, infra note 131
2. The Bassett Letter of 8 February 1918

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On 4 January 1918, two months after the Balfour Declaration was issued, a message which became known as the Hogarth Message was delivered from Commander D. G. Hogarth of the Arab Bureau in Cairo to King Hussein of the Hejaz at Jeddah. This message explicitly stated that:

> " 1.)...the Arab race shall be given full opportunity of once again forming a nation in the world. This can only be achieved by the Arabs themselves uniting...
> 2.) So far as Palestine is concerned, we are determined that no people shall be subject to another...
> 3.) Since the Jewish opinion of the world is in favor of a return of Jews to Palestine, and inasmuch as this opinion must remain a constant factor, and further, as His Majesty's Government view with favor the realization of this aspiration, His Majesty's Government are determined that in so far as is compatible with the freedom of the existing population, both economic and political, no obstacle should be put in the way of the realization of this ideal."[131]

The Anglo-French Declaration of 7 November 1918 stressed again that:

> "[T]he object aimed by France and Great Britain...is the complete and definite emancipation of the peoples so long oppressed by the Turks and the establishment of national Governments an Administrations deriving their authority from the initiative and free choice of the indigenous populations..."[132]

However, at the end of the First World War, it turned out that all above mentioned high-minded promises made by Great Britain and the Allied Powers to the Arabs became subject to the post-war realities of power satisfying only British and French aims in the region.[133]

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3. The Declaration of the Seven of 16 June 1918
4. The Anglo-French Declaration of 7 November 1918, infra note 132

[131] Hogarth Message, 4 January 1918, published in The Middle East and North Africa 1980/1981, supra note 43, at 64

[132] Anglo-French Declaration, 7 November 1918, published in The Middle East and North Africa 1980/1981, supra note 43, at 64

[133] In 1939, the Maugham Commission was appointed in order to study the Hussein-MacMahon correspondence and to express its opinion as to whether or not Palestine was included. Sir Michael Mc Donnell, former Chief Justice of Palestine, participated in the meetings of the Commission and expressed the opinion that "Palestine was included". The findings of the Maugham Commission were that Great Britain was not free to dispose of Palestine without regard for the wishes and interests of the inhabitants of Palestine and that these statements must be taken into account in any attempt to estimate the responsibilities which Britain has incurred toward these inhabitants as a result of the Correspondence. Hadawi, supra note 55, at 13-14

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5.1.2. The King-Crane Commission - Established in August 1919

At this point it seems important to point to the fact that the Balfour Declaration was not only a matter of concern for the local Palestinian Arab population, but - in those days - also for the United States (!) which regarded the strategies and goals of the Zionist movement with grave concern and doubts - as it was expressed in the Report of the King-Crane Commission of 1919.[134]

The King-Crane Commission was set up by the then U.S. President Wilson in 1919 with the purposes to visit the area of Syria - which then included Palestine and Lebanon - to investigate the situation and to make recommendations

The King-Crane Commission clearly stated that - despite the fact that the Balfour Declaration was in principle supported by all the wartime allied states - the extreme Zionist program must be greatly modified, and the project for making Palestine distinctly a Jewish State should be given up.

In order to explain and to justify its recommendations the following arguments were put forward by the King-Crane Commission:

> "(3) The Commission recognized that definite encouragement had been given to the Zionists by the Allies in Mr. Balfour's often-quoted statement, in its approval by other representatives of the Allies.
>
> If, however, the strict terms of the Balfour Statement are adhered to - favoring 'the establishment in Palestine of a national home for the Jewish people', 'it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine' - it can hardly be doubted that the extreme Zionist program must be greatly modified.
>
> For, 'a national home for the Jewish people' is not equivalent to making Palestine into a Jewish State; nor can the erection of such a Jewish State be accomplished without the gravest trespass upon the 'civil and religious rights of existing non-Jewish communities in Palestine'.
>
> The fact came out repeatedly in the Commission's conference with Jewish representatives, that the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase.
>
> ...in July 1918 President Wilson laid down the following principle as one of the four great 'ends for which the associated peoples of the world were fighting': 'The settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or

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134 King-Crane Commission, Recommendations, 28 August 1919 (U.S. Department of State, Papers Relating to the Foreign Relations of the United States. The Paris Peace Conference 1919, Washington, DC, 1944, vol. 12) published in The Middle East and North Africa 1980/1981, supra note 43, at 64

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people which may desire a different settlement for the sake of its own exterior influence or mastery.'

If that principle is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine - nearly nine-tenths of the whole - are emphatically against the entire Zionist program. The tables show that there was no one thing upon which the population of Palestine were more agreed than upon this.

To subject a people so minded to unlimited Jewish immigration, and to steady financial and social pressure to surrender the land, would be a gross violation of the principle just quoted, and of the people's right, though it kept within the forms of law.[135]

...the feeling against the Zionist program is not confined to Palestine, but shared very generally by the people throughout Syria, as our conferences clearly showed...[136]

The Peace Conference should not shut its eyes to the fact that the anti-Zionist feeling in Palestine and Syria is intense and not lightly to be flouted.

No British officer...believed that the Zionist program could be carried out except by force of arms...That of itself is evidence of a strong sense of the injustice of the Zionist program, on the part of the non-Jewish populations of Palestine and Syria. Decisions requiring armies ...are surely not gratuitously to be taken in the interests of serious injustice.

For the initial claim, often submitted by Zionist representatives, that they have a 'right' to Palestine, based on an occupation of 2.000 years ago, can hardly be seriously considered.[137]

...It must be believed that the precise meaning in this respect of the complete Jewish occupation of Palestine has not been fully sensed by those who urge the extreme Zionist program."[138]

After having considered the very facts on the ground and the aims of the Zionist program, the King-Crane Commission recommended:

"[5.]...serious modifications of the extreme Zionist programme for Palestine of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish State.[139]

...[that] only a greatly reduced Zionist program be attempted by the Peace Conference, and even that, only very gradually initiated. This should have to mean that Jewish immigration should be definitely limited, and that the project for making Palestine distinctly a Jewish commonwealth should be given up."[140]

135 Ibid., at 65
136 Id.
137 Id.
138 Id.
139 Id., at 64
140 Id., at 66

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From the above quoted words one may easily discern the early warnings and the complete awareness by the United States that the Zionist program was to be carried out by use of arms and force.

However, the recommendations of the King-Crane Commission went unheeded by the 1919 Paris Peace Conference and the League of Nations which proceeded to implement the provisions of Article 22 of the Covenant as if all was well. As the reality later on - during the 1930's but also after the establishment of the state of Israel in May 1948 up until today - showed, all the predictions expressed in the Report of the King-Crane Commission have been proved to be true.

The above quoted passages of the King-Crane Commission Report lead me to the definite conclusion that - already in 1919 - there existed strong doubts and concerns regarding:

1. The historical right to Palestine claimed by Zionist representatives.
2. The morality of the ideological and political program of Zionism.
3. The loyalty and willingness of the Zionist movement to respect the civil and religious rights of existing non-Jewish communities - i.e. mainly the Arab inhabitants - in Palestine as it was demanded in the Balfour Declaration.

5.2. The Disturbances in Palestine in the Years 1920, 1921, 1925 and 1929

The opposition by the indigenous Palestinian Arab population to Zionism grew after the Balfour Declaration of November 1917 - when Palestinian Arabs demanded a stop to Jewish immigration and also called for the prohibition of land sales to Jews - but even more after the League of Nations granted the Mandate over Palestine to Great Britain in 1922.[141]

The first outbreaks of disorder and anti-Jewish riots by local Arab Palestinians occurred in 1920,[142] 1921[143] and 1925.[144] Waves of violence broke out again in

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[141] Mandate for Palestine, 1922, supra note 67

[142] The Palin Commission dealt with the disturbances that took place in 1920 and attributed the anti-Jewish riots to the following circumstances:

> 1. Arab disappointment regarding the non-fulfillment of promises made to them.
>
> 2. Arab belief that the Balfour Declaration implied a denial of Arab rights.
>
> 3. Palestinian fear that the establishment of a Jewish national home on Palestine land would lead to their economic and political subjection to the Jews.

Quoted in Hadawi, supra note 55, at 69 (A Survey of Palestine 1945-1946, Cmd. 1785, Jerusalem, Vol.I, at 17)

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August 1929, when Palestinian Arab guerrillas stormed a number of Jewish communities in Palestine. In the course of the 1929 riots 133 Jewish residents were killed - sixty-seven alone in the towns Hebron and Jerusalem[145] - and another 339 were wounded. On the Palestinian Arab side 116 persons were killed and 232 wounded, mostly by British troops which were brought in to re-establish law and order.[146]

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143 The Haycraft Commission investigated the causes of the anti-Jewish riots, that took place in May 1921, and in which a total of 95 persons was killed - 48 Arabs and 47 Jews - and a total of 219 was wounded - 73 Arabs and 146 Jews. See Haycraft Commission Report, supra note 59, at 60. The Report of the Haycraft Commission resumed that "the fundamental cause of the whole riots and acts of violences was a feeling among the Arabs of discontent with, and hostility to, the Jews, due to political and economical causes, and connected with Jewish immigration, and with their conception of Zionist policy as derived from Jewish exponents." Ibid., at 59. In more detail the Haycraft Commission Report stated that the principal reasons for the Arab hostility towards Jews was the popular feeling among them:

> "(a) That Great Britain was led by the Zionists to adopt a policy mainly directed towards the establishment of a National Home for the Jews, and not to the equal benefit of all Palestinians.
>
> (b) That in pursuance of this policy the Government of Palestine has, as its official advisory body, a Zionist Commission, bound by its ideals and its conception of its role to regard Jewish interests before all others, and constituted by its singular prerogatives into an imperium in imperio.
>
> (c) That there is an undue proportion of Jews in the Government service.
>
> (d) That a part of the programme of the Zionists is the flooding of Palestine with a people which possesses greater commercial and organising ability than the Arabs, and will eventually obtain the upper hand over the rest of the population.
>
> (e) That the immigrants are an economic danger to the population because of their competition, and because they are favoured in this competition.
>
> (f) That immigrant Jews offend by their arrogance and by their contempt of Arab social prejudices.
>
> (g) That owing to insufficient precautions immigrants of Bolshevik tendencies have been allowed to enter the country, and that these persons have endeavored to introduce social strife and economic unrest into Palestine and to propagate Bolshevik doctrines."

Ibid., at 51

144 For more details see the description of events in the Peel Commission Report, 22 July 1937, Report of the Palestine Royal Commission, Cmd. 5479, London, published in The Middle East and North Africa 1980/1981, supra note 43, at 68-69; Chapter III (Palestine from 1920 to 1936). Summary of Report, at 4. See also Lex Takkenberg, supra note 7, at 9

145 Ibid.

146 Pnina Lahav, Governmental Regulation of the Press: A Study of Israel's Press Ordinance, Part I, 13 Isr.L.R. (1978) 230

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5.2.1. The Shaw Commission - Established in 1929

In order to "enquire into the immediate causes which led to the recent outbreak in Palestine and to make recommendations as to the steps necessary to avoid a recurrence" a Commission of Inquiry under the chairmanship of Sir Walter Shaw was established. In its final Report, the Shaw Commission gave a detailed survey of the history of the events in 1929 and arrived at the conclusion that in conjunction with immediate causes[147] - such as Jewish and Moslem demonstrations, incitement by the Arab and Hebrew Press, propaganda among the less-educated Arab people, enlargement of the JA, inadequacy of the military forces and the belief that the decision of the Palestine Government could be influenced by political considerations - Jewish immigration[148] as well as Zionist land acquisition[149] were the foremost causes for the outbreak of disturbances:

> "The fundamental cause... is the Arab feeling of animosity and hostility towards the Jews consequent upon the disappointment of their political and national aspirations and fear for their economic future... based on the twofold fear of the Arabs that by Jewish immigration and land purchase they may be deprived of their livelihood and in time pass under the political domination of the Jews."[150]

The Shaw Commission noticed that the Arab position was acute, due to the following facts:

> "...Between 1921 and 1929 there were large sales of land in consequence of which numbers of Arabs were evicted without the provision of other land for their occupation... The Protection of Cultivators Ordinance of 1929 ...does nothing to check the tendency towards the dispossession of cultivators from their holdings... There is no alternative land to which persons evicted can remove. In consequence a landless and discontented class is being created. Such a class is a potential danger to the country. Unless some solution can be found to deal with this situation, the question will remain a constant source of present discontent and a potential cause of future disturbance..."[151]

The Shaw Commission also issued several recommendations and attached the most importance to the first one, namely

> "...that the Government of Palestine should issue a clear statement of policy containing (a) a definition of the meaning of the passages in the Mandate providing for the safeguarding of the rights of the non-Jewish communities in that country and (b) directions more explicit as to the conduct of policy on such vital issues as land and immigration."[152]

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[147] Shaw Commission Report, Report of the Commission On the Palestine Disturbances of August 1929, Cmd. 3530, London, 1930, Chapter XIV (Summary of findings and recommendations) at 164

[148] Ibid., at 161

[149] Id., at 161-162

[150] Id., at 163-164

[151] Id., at 162

[152] Id., at 164-165

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The native Palestinian Arabs considered the findings of the Shaw Commission Report as a triumph, whereas the Zionists were outraged.[153] The result of the Shaw Commission Report was the appointment of Sir John Hope Simpson, who was charged to report on the economic conditions of Palestine and to investigate issues of immigration, land settlement, and development.

5.2.2. The Hope Simpson Report - Published in October 1930

The Hope Simpson Report was published in October 1930, and pointed to the small size of Palestine, of which more than three quarters were "uncultivable" by current methods of cultivation and therefore unavailable for agricultural settlement by new immigrants. The Hope Simpson Report also stated that large land sales by Jews resulted in the displacement of the indigenous Arabs, an issue which has not been resolved.

Regarding future immigration, the Report stated that with comprehensive development there would be room for not less than 20.000 families of settlers from outside. Among the recommendations issued by the Hope Simpson Report there was the need for a more methodical agricultural development system.[154]

5.2.3. The Passfield White Paper - Published in October 1930

Concurrently with the Hope Simpson Report, the British government issued in October 1930 a further Statement of Policy - which became known as the Passfield White Paper.[155]

The Passfield White Paper reaffirmed the findings of the Shaw Commission Report, postponed any statement of future policy on immigration, land settlement and development, and did not accept the recommendations for economic development contained in the Hope Simpson Report.

In more detail the Passfield White Paper was, inter alia, especially critical concerning the discriminatory orientation, organization and operation of the Jewish Agency[156] which has been established in 1922 and constituted in 1929.
The Passfield White Paper states on this issue as follows:

> " 18. ...the effect of Jewish colonisation on the Arabs in the neighborhood has been advantageous,...relating to Colonies established by the P.I.C.A. [Palestine

[153] Laqueur, supra note 20, at 491
[154] Ibid., at 492; Sir John Hope Simpson Report, 20 October 1930, Cmd. 3686, London, at 141
[155] Passfield White Paper, October 1930, Statement of Policy, Cmd. 3692
[156] For more details regarding the Jewish Agency and other Zionist institutions see sub-chapter 4. (Establishment of "Jewish National Institutions" by the Zionist Movement)

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> Jewish Colonisation Association] before colonisation financed from the Palestine Foundation Fund, which is the main financial instrument of the Jewish Agency, came into existence.
> Some of the attempts which have been made to prove that Zionist colonisation has not had the effect of causing the previous tenants of land acquired to join the landless class have on examination proved to be unconvincing, if not fallacious.
>
> 19. Moreover, *the effect of Jewish colonisation on the existing population is very intimately affected by the conditions on which the various Jewish bodies hold, utilise and lease their land.* It is provided by the Constitution of the Enlarged Jewish Agency, signed at Zürich on the 14th August, 1929 (Article 3 (d) and (e)), that *the land acquired shall be held as the "inalienable property of the Jewish people,"* and that in "all the works or undertakings carried out or furthered by the Agency, *it shall be deemed to be a matter of principle that Jewish labour shall be employed.*" Moreover, by Article 23 of the draft lease, which ist is proposed to execute in respect of all holdings granted by the Jewish National Fund, *the lessee undertakes to execute all works connected with the cultivation of the holdings only with Jewish labour. Stringent conditions are imposed to ensure the observance of this undertaking.*
> *...These stringent provisions are difficult to reconcile with the declaration at the Zionist Congress of 1921 of "the desire of the Jewish people to live with the Arab people in relations of friendship and mutual respect, and, together, with the Arab people, to develop the homeland common to both into a prosperous community which would ensure the growth of the peoples."*
>
> 20. The Jewish leaders have been perfectly frank in their justification of this policy. The Executive of the General Federation of Jewish Labour, which exercises a very important influence on the direction of Zionist policy, has contended that such restrictions are necessary to secure the largest possible amount of Jewish immigration and to safeguard the standard of life of the Jewish labourer from the danger of falling to the lower standard of the Arab.
> However logical such arguments may be from the point of view of a purely national movement, it must, nevertheless, be pointed out that they take no account of the provisions of *Article 6 of the Mandate* [for Palestine of 1922], which *expressly requires that,* in facilitating Jewish immigration and close settlement by Jews on the land, the Administration of Palestine must ensure that *"the rights and position of other sections of the population are not prejudiced*"."
> [Emphasis added] [157]

The issuance of the Passfield White Paper constituted a major defeat for the Zionist movement, due to the fact that - for the first time - the Jewish leaders had not been kept informed of London's plans.[158]

The Passfield White Paper can be considered as a clear attempt by the British government to reverse the policy initiated by Arthur Balfour and Lloyd George in 1917, and therefore it was also heavily attacked by the Zionist movement.

[157] Passfield White Paper, 1930, supra note 155, at 17-18
[158] Laqueur, supra note 20, at 492

5.2.4. The Ramsay MacDonald Letter - Issued in 1931

However, under pressure from all sides, the British government decided in 1931 to issue a new Statement of Policy - known as the Ramsay MacDonald Letter - which annulled the provisions of the Passfield White Paper.[159]

5.3. The General Strike in 1936 and the Open Rebellion from 1936 to 1939

The situation in Palestine continued to deteriorate after Hitler's rise to power in Germany in 1933 and after the Jews had began to emigrate from Europe and to come to Palestine.

In these new immigration waves the native Palestinian Arabs saw a new danger resulting in the presentation of a joint memorandum by five Arab parties in November 1935 calling, inter alia, for the establishment of a democratic government, the prohibition of the transfer of Arab lands to Jews, the immediate cessation and the investigation of Jewish immigration into Palestine.[160]

But none of these demands were fulfilled with the result that the native Palestinian Arabs declared a general strike for six full months.

It should be stressed at this point that the then Zionist leadership of Palestine had totally recognized that Jewish immigration and the purchase of land by Jews constituted the very reasons for the negative attitude of the Palestinian Arab community and the conflict with them.

Thus, for instance, Avraham Granovsky, a leading figure of the JNF, noted in 1936:

> "It has long been recognized that Jewish immigration and the acquisition of land by Jews is the apple of discord between the two peoples of Palestine. It is no accident that the Arab nationalists have set the stoppage of Jewish immigration in the forefront of their claims, and coupled it with a demand for a ban on the purchase of land by Jews."[161]

Nevertheless, immigration of Jews into Palestine and purchase of land by Jews continued, leading - among other factors - to the open rebellion by Palestinian Arabs in 1936, which lasted three years until the outbreak of World War II in 1939.[162]

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159 Ramsay MacDonald Letter to Chaim Weizmann, dated 13 February 1931, The Times (London), 14 February 1931; quoted in Laqueur, supra note 20, at 493

160 Quoted in Hadawi, supra note 55, at 73

161 Granovsky, The Land Issue in Palestine, supra note 33, at 10

162 Pnina Lahav, Governmental Regulation of the Press: A Study of Israel's Press Ordinance, Part II, 13 Isr.L.R. (1978) 489; Hadawi, supra note 55, at 73

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5.3.1. The Royal (Peel) Commission - Established in 1936

With the rebellion in progress, the British mandatory government established another Commission of Inquiry - i.e. the Peel Commission - which reached in its final Report in 1937 the conclusion that under the existing Mandate (or even a scheme of canonization) there was no possibility of solving the Palestine problem.

The Commission therefore recommended the termination of the present Mandate and put forward a plan for the partition of Palestine into two independent states - an Arab State and a Jewish State.[163]

The 1937 Peel Commission Report also included a criticism of the Palestine administration and recommended that, if the Mandate were to continue without partition, sales of land to Jews should be prohibited in certain areas and immigration be limited to 12.000 persons for five years.[164]

The 1937 Peel Partition Plan was accepted as a basis for negotiations by the Zionist leadership of Palestine, but was rejected by the Arab High Committee under Haj Amin al-Husseini, the Mufti of Jerusalem, acting on behalf of the Palestinian Arab majority.[165]

5.3.2. The MacDonald White Paper - Issued in 1939

The Palestinian Arab revolt continued with widespread terror, arson and general strikes - directed against the Jewish population and the British mandatory government - and could only be put down with the use of British tanks and aircraft.[166]

Under the said circumstances the British mandatory government decided a dramatical shift in its policy and issued in May 1939 a Statement of Policy - which became known as the MacDonald White Paper[167] - wherein the idea that Palestine should become a Jewish State was abolished.

The 1939 MacDonald White Paper decided, inter alia:

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[163] Peel Commission Report, 1937, supra note 144

[164] Ibid.

[165] Laqueur, supra note 20, at 515

[166] For the period from 1936 to 1939 the following numbers regarding killings and casualties exist: On the Palestinian Arab side 3.000 were killed; 6.000 were imprisoned and 110 executed. On the British side 150 persons died. On the Jewish side 517 persons died. See Takkenberg, supra note 7, at 9

[167] MacDonald White Paper, 17 May 1939, Statement of Policy, Cmd. 6019, London, published in The Middle East and North Africa 1980/1981, supra note 43, at 69-70

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1. That an independent state should be established in which Arabs and Jews share in government as to ensure that the essential interests of each community are safeguarded;[168]
2. That Jewish immigration to Palestine would be limited up to 75.000 for five years and afterward it should be contingent on Arab acquiescence;[169]
3. That after the period of five years the British government was under no obligation to facilitate the further development of the Jewish national home by immigration regardless of the wishes of the Arab population;[170]
4. That - due to the natural growth of the Arab population and the steady sale in recent years of Arab land to Jews - there is now in certain areas no room for further transfers of Arab land, whilst in some other areas such transfers of land must be restricted if Arab cultivators are to maintain their existing standard of life and a considerable landless Arab population is not soon to be created.[171]

In spite of these restrictions Jewish immigrants began to arrive by boatloads, since this was the only way for them to escape from Nazi persecution and Nazi extermination in Hitler Germany and Europe, and to survive the Holocaust where 6 millions of Jews were murdered in the concentration camps and their gas chambers.

The 1939 MacDonald White Paper was totally rejected by the Jewish community and its leadership living in Palestine at this time, and one day after its publication the JA issued the following statement:

> "The Jewish people views this policy as a breach of faith, a surrender to Arab terror, the delivery of British friends to her enemies, the creation of a schism between the Jews and the Arabs, and the destruction of any chance to peace in Palestine. The Jewish people will not accept this policy. The new regime as announced in the white paper is solely and simply a government founded on force, bereft of any moral basis and opposed to international law, and it will not arise except by force."[172]

As it has been expressed by Pnina Lahav, an Israeli jurist and professor of constitutional law at the Boston Harvard University, the 1939 MacDonald White Paper virtually constituted the "casus belli" for the Jewish community living then in Palestine.

In an article dealing with Israel's Press Regulations, she describes the events of those days in the following way:

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168 Ibid., at 69

169 Id., at 70

170 Id.

171 Id., at 70. In conformation with this provision the Land Transfer Regulations, 28 February 1940, Great Britain, Parliamentary Papers, Cmd. 6180, was enacted in order to cover the restriction of the sale of Arab land to Jews. For details on these Regulations see Hadawi, supra note 55, at 58-60

172 Published in Kretzmer, supra note 9, at 45, NOTE 2

> "Harassed by the Arab terror and total lack of internal security, exasperated over Nazi persecution of Jews in Europe, and anxious over mounting indications that Britain was about to forsake their cause, the Jews declared war against the Mandatory regime. And so, with the exception of several months when the parties focus on the drama of the Second World War, Palestine turned into a battleground where Jews and Arabs fought each other and against the British, while the regime desperately tried to ward off the attack on all fronts."[173]

5.4. The Period from 1940 until the Adoption of the United Nations General Assembly Resolution 181 (II) of 29 November 1947

Since the issuance of the 1939 MacDonald White Paper the Arab political activities and rebellion came to a complete halt during the war years, while Zionist terrorist activities against the British mandatory government increased.

The anti-British Jewish terrorist groups Irgun Zvai Leumi (also called "IZL" or "Etzel") and the Lohamei Herut Yisrael (also called "Lehi" or "Stern group") started to engage in violent terrorist attacks against British officials and security forces.

The British authorities responded with harsh methods, arresting dozens of Jews and transferring them without trial to prison camps in Palestine and Eritrea.

This development reached its peak in July 1946 with the explosion of the King David Hotel in Jerusalem which was serving as the central offices of the civilian administration. It caused the death of 91 people and was one of the most violent and bloody terrorist act against the British mandatory government performed by the Jewish underground.[174]

The above mentioned Arab and Jewish revolts and acts of terrorism, the constant efforts by Great Britain to stop or limit Jewish immigration, as well as the moral and political pressure exercised by the Holocaust and by the growing pro-Zionist American involvement convinced the British government that the termination of the Mandate and withdrawal from Palestine would be inevitable.

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[173] Pnina Lahav, Governmental Regulation of the Press: A Study of Israel's Press Ordinance, Part II, 13 Isr.L.R. (1978) at 489 - 490. On 14 May 1948 - the day of the establishment of the state of Israel - the Provisional Council of State declared that such provisions of the law that arise form the MacDonald White Paper, 1939 - i.e. certain sections of the Immigration Ordinance, 1941 and the Defence (Emergency) Regulations, 1945 as well as the whole Land Transfers Regulations, 1940 - are null and void. See Proclamation, 14 May 1948, 1 L.S.I.(1948) 6

[174] Takkenberg, supra note 7, at 10. For more details on this issue see Chapter D.5. (The British Mandatory Defence (Emergency) Regulations; 1945)

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Subsequently, Great Britain brought the matter before the United Nations and called for a special session of the General Assembly should prepare a study on the question of Palestine.[175]

This special session took place on 28 April 1947 where the General Assembly established the United Nations Special Committee on Palestine (UNSCOP) which was composed of eleven member states. [176]

The mandate of UNSCOP was to ascertain and record facts, and to investigate all questions and issues relevant to the problem of Palestine; to prepare a report to the General Assembly and to submit proposals for the solution of the problem of Palestine to be considered by the regular session of the General Assembly which should take place in September 1947.[177]

At this special session the Jewish case was presented by the Jewish Agency (JA) for Palestine,[178] while the Arab Higher Committee (AHC) spoke for the Palestinian Arabs.[179]

It is important to mention at this point that five Arab member states[180] tried to include in the agenda of this special session an item:

1. Which would address the question of Palestine's independence.
2. Which would separate the issue of European Jewish refugees from the question of Palestine.

But the United Nations had refused to address these questions, leading to the situation that the Palestinian leadership in the Arab Higher Committee did neither cooperate with UNSCOP nor participate in its final deliberations.

The Palestinian Arabs were of the opinion that their natural rights were self-evident and cannot be subjected to investigation.

After a three month investigation, during which the members of UNSCOP visited Palestine, Lebanon, Syria, Transjordan, as well as the displaced persons camps in Europe which were packed with Holocaust survivors, it finally completed its work on 31 August 1947.[181]

In their Report the UNSCOP members agreed on the issues of termination of the British Mandate, on the principle of independence and the role of the United

[175] Morris, supra note 8, at 6

[176] Takkenberg, supra note 7, at 10.

[177] United Nations General Assembly Resolution 106 (S-1), 15 May 1947, Creating a Special Committee on Palestine (UNSCOP)

[178] United Nations General Assembly Resolution 104 (S-1), 5 May 1947, Granting a Hearing to the Jewish Agency

[179] United Nations General Assembly Resolution 105 (S-1), 7 May 1947, Granting a Hearing to the Arab Higher Committee

[180] Egypt, Iraq, Lebanon, Saudi Arabia and Syria

[181] Takkenberg, supra note 7, at 11

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Nations, but they did not reach any consensus on a settlement of the question of Palestine itself.[182]

The majority of the members of UNSCOP (Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden and Uruguay) recommended that Palestine be partitioned into an Arab and a Jewish state, with Jerusalem as a corpus seperatum.[183]

The minority of the members of UNSCOP (India, Iran and Yugoslavia) proposed an independent federal state comprising an Arab and Jewish state, with Jerusalem as the capital of the federation.[184]

Only one member (Australia) abstained from voting on either plan because it believed that the recommendations exceeded the Committee's terms of reference.[185]

After a two-month-long debate, the General Assembly of the United Nations adopted finally Resolution 181 (II) which recommended - with some minor changes - the adoption and implementation of the majority UNSCOP - Plan of Partition with Economic Union.

The Arab community of Palestine as well as the surrounding Arab states rejected the Partition Plan on the grounds that it violated the provisions of the United Nations Charter, which granted to all peoples the right to self-determination, i.e. the right to decide their own destiny.[186]

5.5. The Period after the Adoption of the United Nations General Assembly Resolution 181 (II) of 29 November 1947 until the Signment of Armistice Agreements in 1949

Following the adoption of the United Nations Partition Resolution 181 (II) by the General Assembly on 29 November 1947, a mixture between a civil and guerrilla warfare between the Palestinian Arab and the Jewish communities broke out.[187]

This civil war became an international conflict on 15 May 1948 one day after the leadership of the Jewish community of Palestine had declared the establishment of the State of Israel, causing the invasion of the neighboring Arab countries - Transjordan, Syria, Lebanon, Egypt and Iraq - which had sent troops in order to defend the Palestinian civilian population.[188]

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182 UNSCOP-Report, Report of the United Nations Special Committee on Palestine, 31 August, 1947, UN document A/364, GAOR 2nd Sess., Supplement No. 11, Volumes I-IV
183 Ibid.
184 Id.
185 Takkenberg, supra note 7, at 11
186 Ibid., at 10
187 Morris, supra note 8, at 7
188 Id., at 7

It must be stressed at this point that the Jewish community of Palestine was militarily and administratively enormously superior to the native Palestinian Arab community which, at that time, was mainly a rural society based first of all on the village rather than the district or the country.[189]

The Palestinian villages tended to be economically self-sufficient as well as socially and politically self-centered and self-contained. Consequently the Palestinian Arab rural society was - beyond the village structure - largely apolitical and uninvolved in national-political affairs.[190]

The mentality of the native Arab inhabitants of the villages was basically not offensive, but rather defensive. In contrast to them, however, the Jewish settlements were marked by a pioneering and frontier spirit, built not only with defence in mind, but also with trenches, bunkers and shelters.[191]

During April and May 1948 the main Jewish militia - the Haganah (the Defence) - could therefore easily switch to the offensive, causing the Palestinian masses in each area conquered to flee from their towns and villages.[192]

In the course of the war in 1948 following the establishment of the state of Israel and in early 1949, the Israeli army conquested parts of Palestine which - according to the Partition Plan - were never allotted to the Jewish state.[193]

In 1949 after the signing of General Armistice Agreements[194] between Israel and the neighboring countries, the state of Israel was established on 72 % of the whole

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189 Id., at 9

190 The deeper reasons for this state of affairs are complex and lay in the British rule and administration which existed in Palestine from 1917 to 1948, furthermore in an almost complete absence of local, district and national Palestinian political and administrative institutions, as well as in the lack of democratic structures and non-representation of the rural Palestinian society. See Morris, supra note 8, at 9

191 Id., at 10

192 Id., at 7

193 Id.

194 Between February and July 1949, General Armistice Agreements were signed between Israel, on the one hand, and the neighboring Arab countries (Egypt, Lebanon, Jordan and Syria) on the other hand. The General Armistice Agreement with Egypt was signed on 24 February 1949, see United Nations Treaty Series No. 654, at 251 (UN document S/1264/Rev.1); the General Armistice Agreement with Lebanon was signed on 23 March 1949, see United Nations Treaty Series No. 655, at 287 (UN document S/1296/Rev.1); the General Armistice Agreement with Jordan was signed on 3 April 1949, see United Nations Treaty Series No. 656, at 303 (UN document S/1302/Rev.1; the General Armistice Agreement with Syria was signed on 20 July 1949, see United Nations Treaty Series No. 657, at 327 (UN document S/1353/Rev.1).
It should be stressed that the Armistice Agreements were solely based on military considerations and do not prejudice the rights, claims and positions of the parties with regard to the ultimate settlement of the Palestine question.

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formerly British Mandatory Palestine, and included parts of Palestine which were previously inhabited by a majority of native Palestinian Arabs.

The majority of these former native Palestinian Arab residents of the conquered villages and towns - approximately two third of the then Arab population living in the area - were expelled or took flight.

In several cases - as it happened for example with the villages of Khisas,[195] Qazaza,[196] Deir Yassin,[197] Khirbet Nasir ad Din,[198] Beit Daras,[199] Ad Dawayima[200] - the Palestinian Arab inhabitants were even massacred by Jewish Zionist forces.[201]

In the massacre at the village of Deir Yassin - it lays on the western outskirts of Jerusalem - 250 unarmed civilian Arab men, women and children were killed by the two Jewish terrorist organizations Irgun Zvai Leumi (IZL) and Lehi, in cooperation with the Hagana commander in Jerusalem. This massacre took place on 9 April 1948 and had become a symbol of Zionist aggression against the Palestinian Arab population.

The massacre was broadcasted by the Arab media of Palestine for days and weeks in all its atrocity and terrible details, and had a tremendous psychological impact on many other Arab communities of Palestine. Without doubt this massacre was an accelerating factor in the general evacuation and expulsion of Palestinian Arabs.

Menachem Begin - who in 1977 became Prime Minister of the state of Israel - was the commander of the Irgun Zvai Leumi (IZL) at the time when the massacre took place. In his book "The Revolt" he wrote in this context that

> "...the Deir Yassin massacre helped in particular in the expulsion policy in Tiberias and Haifa."[202]

As the reality later on showed, most of the indigenous Palestinian Arab refugees have never been permitted to return to their towns and villages, despite the fact that since the spring of 1948 (and later on during the years of 1949-1950) they strongly tried to do so.[203]

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195 In this massacre, which took place in mid-December 1947, about one dozen of native Arab civilians (including four children) had been killed. For more details see Morris, supra note 8, at 33, 34

196 Morris, supra note 8, at 212

197 Ibid., at 113-115; See also Sabri Geris, Les Arabes en Israël, précédé de "Les juifs et la Palestine" par éli lobel (Librairie François Maspero, 1969) at 146-148

198 Morris, supra note 8, at 72

199 Ibid., at 69

200 In this massacre, which occurred on 29 October 1948, the Israel Defence Forces (IDF) killed about 80-100 Arab men, women and children. For more details on this issue see Morris, supra note 8, at 222

201 Ibid., at 193

202 Id., at 113-115

203 Morris, supra note 8, at 132-154 Chapter 4 (Deciding against a return of the refugees, April-December 1948)

Since summer 1948 the Israeli government was even subjected to strong international pressure - first by the later murdered United Nations Mediator Count Folke Bernadotte, and, then, by the United States - in favor of mass repatriation of the refugees.[204]

Count Folke Bernadotte, the President of the Swedish Red Cross, was appointed to the post of the United Nations Mediator for Palestine on 20 May 1948, and was primarily involved in efforts to mediate between the parties and to promote a truce.

Nevertheless, he also dealt with the refugee problem and made suggestions to the Israeli government for the return of at least a limited number of refugees to their homes. But all these proposals were refused.[205]

In June 1948, the Israeli government dealt with this issue and definitely decided to block any return of the Palestinian Arab refugees.[206]

Additionally, on 1 August 1948, two and a half months after the declaration of the state of Israel, the then Minister for Foreign Affairs of the Provisional Government of Israel, Moshe Shertok, sent a letter to the United Nations Mediator, Count Folke Bernadotte, and announced Israel's policy towards the Palestinian Arab refugees as follows:

> "When the Arab states are ready to conclude a peace treaty with Israel this question [of refugees] will come up for constructive solution as part of the general settlement, and with due regard to our counterclaims in respect of the destructions of Jewish life and property, the long-term interest of the Jewish and Arab populations, the stability of the State of Israel and the durability of the basis of peace between it and its neighbours, the actual position and fate of the Jewish communities in the Arab countries, the responsibilities of the Arab governments for their war of aggression and their liability for reparation, will all be relevant in the question whether, to what extent, and under what conditions, the former Arab residents of the territory of Israel should be allowed to return."[207]

Nevertheless, in his Report to the Security Council on 1 August 1948, and again in his Progress Report on this issue of 16 September 1948, Count Folke Bernadotte explicitly stated that "notwithstanding the view expressed by the Provisional Government of Israel", the right of the refugees to return to their homes should be *affirmed*. The use of the expression "affirmed" - rather than be established - suggests that Count Bernadotte was of the opinion that the right of refugees to return already formed part of existing international law.[208]

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204 Takkenberg, supra note 7, at 16

205 Ibid., at 22

206 Morris, supra note 8, at 132-154 Chapter 4 (Deciding against a return of the refugees, April-December 1948), and at 155-287 Chapter 5 (Blocking a return)

207 Progress Report of the United Nations Mediator on Palestine, 16 September 1948, UN document A/648, GAOR 3rd Sess., Supplement No. 11, at 28

208 Takkenberg, supra note 7, at 243

In more detail and especially with regard to the political[209] and legal aspects of the Palestinian Arab refugee issue, Count Folke Bernadotte stated as follows:

> "It is, however, undeniable that *no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home* from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which, under the Assembly resolution of 29 November, was to be included in the Jewish State. *The exodus of Palestinian Arabs* resulted from panic created by fighting in their communities, by rumors concerning real or alleged acts of terrorism, or expulsion. *It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries*." [Emphasis added] [210]

> "...*The right of the Arab refugees to return* to their homes in Jewish-controlled territory at the earliest possible date should be *affirmed* by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission..." [Emphasis added] [211]

But the efforts of the United Nations Mediator Count Folke Bernadotte ended when he was assassinated on 17 September 1948 by Jewish terrorists - only one day after he had submitted the last Progress Report to the Security Council.[212]

Two months later, on 11 December 1948, Count Folke Bernadotte's recommendations concerning the refugee issue were approved and accepted by the United Nations in the General Assembly Resolution 194 (III).[213]

Paragraph 11 of this Resolution 194 (III) deals specifically with the right to return of the Palestinian refugees by stating that the General Assembly

> "Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of

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209 The humanitarian and administrative aspects of the Palestinian Arab refugee problem were dealt with in Part III of the Progress Report, UN document A/648, supra note 207, at 47-57

210 Ibid., at 14

211 Id., at 18

212 Takkenberg, supra note 7, at 22, 23

213 United Nations General Assembly Resolution 194 (III) Establishing a UN Conciliation Commission for Palestine (UNCCP) and Resolving that the Refugees should be permitted to return to their Homes, 11 December 1948; UN document A/Res/194 (III). This Resolution was adopted with 35 votes in favor, 15 against, including Egypt, Iraq, Lebanon, Saudi Arabia, Syria and Yemen, and 10 abstentions. For more details on this issue see Takkenberg, supra note 7, at 24, 242-250

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> international law or in equity should be made good by the Governments or authorities responsible.
>
> Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief and Works Agency for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations."

Originally the Arab states voted against Resolution 194 (III), but by spring 1949 they began to reverse their position and became its strongest advocates, and Paragraph 11 became the standard reference point of the Palestinian refugees' cries for justice.[214]

Shortly after the establishment of the state of Israel a series of legal measures - mostly in the initial form of emergency regulations - were adopted in order to institutionalize the blockage of Palestinian return by declaring many of the Palestinian Arab refugees as "absentees"[215] and by legalizing the expropriation of so called "abandoned Arab property".[216]

Moreover, most of the conquered and emptied villages were systematically destroyed by the Israeli government, Arab fields were cultivated and/or destructed, Arab owned lands were shared-out to Jewish settlements, Jewish settlements were established on Arab owned abandoned lands and Jewish immigrants were settled in empty Arab houses.[217]

All these actions on the ground totally changed the physical and demographical face of Palestine, and taken collectively, they made the possibility of a return of the refugees more and more difficult, until, by mid-1949, it became almost inconceivable.[218]

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[214] Takkenberg, ibid., at 24, 244

[215] This declaration as "absentees" took place according to the following legal instruments: Emergency Regulations (Absentees' Property), 1948, I.R. No. 37 (12 December 1948) Suppl. II, at 59; Emergency Regulations (Absentees' Property) (Extension of Validity), 1948, 4 L.S.I. (1949) 13; Absentees Property Law, 1950, 4 L.S.I. (1949/50) 68. For more details on this issue see Chapter G.2.2. (Declaration of Palestinians as "Absentees" and Confiscating their Land and Movable Property)

[216] The expropriation of so called "abandoned Arab property" took place according to the following legal instruments:
Abandoned Areas Ordinance, 1948, 1 L.S.I. (1948) 25; Emergency Regulations Concerning the Cultivation of Waste Lands and the Use of Unexploited Water Resources, 2 L.S.I. (1948/49) 71; Regulation 125 of the Defense (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945), Suppl. II, 1055; Emergency Regulations (Requisition of Property), 1948, I.R. No. 39 (24 December 1948), Suppl. II, at 87; Emergency Regulations (Requisition of Property) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 37. For more details on this issue see Chapter G.2. (The Right to Property)

[217] Takkenberg, supra note 7, at 17

[218] Morris, supra note 8, at 155; Takkenberg, ibid., at 17

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Benny Morris, a British historian who provided the most detailed account of the exodus of Palestinian refugees in his study "The Birth of the Palestinian Refugee Problem, 1947-1949" wrote in this context as follows:

> "About 350 Arab villages and towns were depopulated in the course of the 1948-9 war and during its immediate aftermath. By mid-1949, the majority of these sites were either completely or partly in ruins and uninhabitable."[219]

Israel Shahak, professor of chemistry at the Hebrew University, has calculated that almost 400 Palestinian Arab villages were eliminated - during the war in 1948 and in early 1949 - and that they were

> "...destroyed completely, with their houses, garden-walls, and even cemeteries and tombstones, so that literally a stone does not remain standing, and visitors are passing and being told that 'it was desert."[220]

None of the destroyed Palestinian Arab villages have ever been built up again,[221] but rather in their place on the same land and on their ruins, the new state of Israel - with new settlements conceived this time, however, solely for Jewish immigrants - has been built.[222]

In addition to the laws which were enacted and applied regarding the right to property, two other laws concerning the right to citizenship - namely the Law of Return, 1950[223] and the Nationality Law, 1952[224] - were enacted.

These laws established a legal regime that guarantees all Jews virtually automatic right to emigrate to Israel and to become Israeli citizens, while denying the same

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[219] Morris, ibid., at 155

[220] Quoted in E. Said, supra note 23, at 14

[221] Morris, supra note 8, at 169

[222] Regarding this issue Moshe Dayan - the military governor of Jewish Jerusalem in mid-March 1949 - stated many years later in an article in the Hebrew newspaper Ha'aretz from 4 April 1969 as follows:

> "We came to this country which was already populated by Arabs, and we are establishing a Hebrew, that is a Jewish state here. In considerable areas of the country we bought the lands from the Arabs. Jewish villages were built in the place of Arab villages. You do not even know the names of these Arab villages, and I do not blame you, because these geography books no longer exist; not only do the books not exist; the Arab villages are not there either. Nahalal [Moshe Dayan's own village] arose in the place of Mahalul, Gevat - in the place of Jibta; [Kibbutz] Sarid - in the place of Haneifs and Kefar Yehoshua - in the place of Tell Shaman. There is no one place built in this country that did not have a former Arab population."

Quoted in E. Said, supra note 23, at 14

[223] Law of Return, 1950, 4 L.S.I. (1949/50) 114; as amended by 8 L.S.I. (1953/54) 144; as amended by 24 L.S.I. (1969/70) 28

[224] Nationality Law, 1952, 6 L.S.I. (1951/52) 50; as amended by 34 L.S.I. (1980) 254

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right to the hundreds of thousands of Palestinian Arabs who fled in the course of the events of the establishment of the state of Israel in 1948.

The Israeli decision not to allow the refugees to return lead to the creation of the huge number of Palestinian Arab refugees who until today live in temporary camps built up by the United Nations in the surrounding countries of Lebanon, Syria, Jordan, as well as the West Bank and the Gaza Strip.

These Palestinian Arab refugees find themselves until today disconnected from the land which is equally important for their national identity as for many Jews.

There exist different numbers of Palestinian Arab refugees emerging out of the war that took place in the years from 1947 to 1949.[225]

- 520.000 — this is the lowest number; it is given as official number by the Israeli government;
- 600.000 up to 760.000 — this is the contemporary formula given by the British Foreign office;
- 800.000 — this is the number given by the United Nations Relief and Works Agency for Palestine Refugees in the Middle East (UNRWA).[226]

However, it is important to mention that within the borders of Israel under the 1949 Armistice Agreements,[227] there only remained 158.000 (!) native Palestinian Arabs[228] (compared with more than 780.000 Palestinian Arabs that lived in the same area prior to the war).

In the course of this work I will show that - after the establishment of the state of Israel in Palestine - the policies of the Zionist movement in Palestine had turned into the policies of an independent and sovereign state, which could now use all its law-making monopoly in order to restrict basic rights and freedoms.

Although, the relatively small number of Palestinian Arabs that remained within the borders of Israel under the 1949 Armistice Agreements became Israeli citizens, they were regarded as the "real or potential enemies" of the newly created state of Israel, since they represented the members of "the other collective" in the decades old struggle between the two collectives (i.e. the Jewish and the Arab) in Palestine.

In accordance with this basic approach towards these Palestinian Arab citizens, the Israeli government subjected the regions, where they resided to the regime of

225 E. Said, supra note 23, at 297-298

226 By 1998, due to natural population growth, the number of refugees registered with UNRWA had increased to nearly 3.5 million, out of a total number of Palestinians world-wide of approximately 6.9 million.

227 General Armistice Agreements, supra note 194

228 Statistical Yearbook of Israel (Central Bureau of Statistics) No. 49 (1998) at 2-7

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Military Government in order to control them and to limit their fundamental rights and freedoms.[229]

The discriminatory approach towards the native Palestinian Arab people is especially reflected in the use of laws, regulations and Supreme Court decisions dealing with the right to ownership of land,[230] the right to citizenship and nationality,[231] the right to equality,[232] the right to freedom of movement[233] and in so called "security matters."[234]

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229 Sabri Jiryis, The Arabs in Israel (Translated from the Arabic by Inea Bushnaq) (Monthly Review Press, New York, 1976) Chapter 1 (For Security Reasons) especially at 15-16, 19-20; Kretzmer, supra note 9, at 3-4. For more details on this issue see Chapter D.5.2.3. (The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966)

230 The following legal instruments were explicitly enacted by the state of Israel in order to come into possession of Arab owned land:
Emergency Regulations (Absentees' Property), 1948, supra note 215; Emergency Regulations (Absentees' Property) (Extension of Validity), 1948, supra note 215; Absentees Property Law, 1950, supra note 215; Abandoned Areas Ordinance, 1948, supra note 216; Emergency Regulations (Requisition of Property), 1948, supra note 216; Emergency Regulations (Requisition of Property) (Extension of Validity) Law, 1949, supra note 216; Emergency Regulations Concerning the Cultivation of Waste Lands and the Use of Unexploited Water Resources, supra note 216
The following legal instruments dating back to the British mandatory period were used in order to come into possession of Arab owned land:
Land (Acquisition For Public Purposes) Ordinance, 1943, P.G. No. 1268, at 463; Regulation 125 of the Defense (Emergency) Regulations, 1945, supra note 216
For more details regarding these issues see Chapter G. (The Right to Property)

231 Law of Return, 1950, supra note 223; Nationality Law, 1952, supra note 224
With regard to the still prevailing policy by the Israeli government to reduce the number of Palestinian Arabs living in Israel and the Occupied Territories see the following reports by:
B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, The Quiet Deportation, Revocation of Residency of East Jerusalem Palestinians (Jerusalem, April 1997); B'Tselem, The Quiet Deportation Continues, Revocation of Residency and Denial of Social Rights of East Jerusalem Palestinians (Jerusalem, September 1998); B'Tselem, Injustice in the Holy City Jerusalem, Spring 2000

232 For more details regarding the right to equality see Chapter C. (The Concept of the State of Israel as a "Jewish State" and its Impact on the Right to Equality and other Civil and Political Rights)

233 For more details regarding the right to freedom of movement see Chapter D.5.2.3. (The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966)

234 For more details regarding the so called "security matters" see Chapter D.3. (Israel's Concept of "State Security" and the Question of its Compatibility with the Ideas of a "Liberal Democracy and Human Rights") and Chapter D.4. (Israel's Formal "Security" and "Emergency" Legislation: Legal Sources and Justifications)

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6. Summary and Conclusions

1. The state of Israel is based on the political ideology of the Zionist movement, which emerged at the end of the 19th century in response to the growing anti-Jewish racism in Europe and Russia. The concept of political Zionism intended "to establish a Jewish national home in Palestine" in order to solve the problem of anti-Semitism in the West.

The traditional aims of the concept of political Zionism were to promote Jewish immigration and to ensure exclusive Jewish ownership of and sovereignty over the land in Palestine.

The concept of political Zionism is a special form of the idea of nationalism and manifests itself in several forms.

Ian Lustick, professor of sociology at the Hebrew University, expressed the ideology, the aims and the activities of the Zionist movement during the Ottoman and British Mandate period in the following way:

> "...the central objective of the Zionist movement in the pre-state era was the creation of the economic, social and political infrastructure of the Jewish state. ...the creation of an autonomous Jewish economy with the capacity for sustained growth and large-scale immigrant absorption. ...an economy, with a solid agricultural and industrial foundation, ... built with Jewish capital, by Jewish labor, using Jewish expertise, and for a Jewish market [because only] in this way it would be secure from Arab boycotts, strikes, or other sanctions."[235]

2. The Balfour Declaration, 1917 - which was later also incorporated into the text of the Mandate for Palestine in 1922 - conferred upon Great Britain the responsibility to exercise a dual policy towards two different peoples which both claimed the same territory as their "own" land - their "homeland".

Although the Balfour Declaration, the British Mandate for Palestine, as well as several other documents provided for a concept of political equality by asserting that

> "...nothing shall be done to prejudice the civil and religious rights of the existing non-Jewish communities..."

this statement was actually not equivalent to the promise of

> "...the establishment of a national home for the Jewish people..."

which was made to the leaders of the Zionist movement and which - in reality - meant the promise to realizing the right to self-determination of the Jewish people alone and at the expense of the Palestinian Arab people and their right to self-determination.

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235 Ian Lustick, Arabs in the Jewish State, Israel's Control of a National Minority (University of Texas Press, Austin, 1982) at 152

Considering the real nature and content of these above mentioned promises,[236] I come to the conclusion that the responsibilities conferred upon Great Britain could never be truly reconciled.

The reason for this state of affairs lays in the fact that the "national home" policy's underlying concept was Zionism, an ideological and political concept that always was - and still is - characterized by an almost total disregard for the native Arab and/or non-Jewish population in most of the conceptual terms - or expressed in less drastic words - by an extraordinary unevenness in the care for the Jewish population compared with the native Arab inhabitants and/or non-Jewish population of the state.

To sum up the concept of Zionism, one may say that whatever was - and still is - looking positively from the Zionist point of view was - and still is - looking absolutely negatively from the native Arab Palestinian point of view.

For, the latter group - i.e. the native Arab Palestinians - never could (and actually never can) really fit equally into the concept of the Zionist movement and its "vision" of a Jewish nation-state.

3. The results of my comprehensive researches lead me to the conclusion that the Palestinian Arab people understood from the very beginning the essential points of the Balfour Declaration and the Mandate for Palestine.

These two documents are the most important ones which acknowledged the idea of political Zionism - leading to the realization of the right to self-determination of the Jewish people - while at the same time reducing the political status and the chances to self-determination of the native Palestinian Arab inhabitants in relating to them merely as "the existing non-Jewish communities".

A vast number of historical documents prove that the Palestinian Arab people clearly understood that the Jewish Zionist community in Palestine was not looking just for a "cultural centre", but that it rather wanted to establish a position of power and an own state.

These documents also prove that the indigenous Palestinian Arabs understood that the Jewish immigrants intended to become eventually a majority and one day - through their superior organizations, such as the WZO, the JA and the JNF with their enormous economic strength nourished by many rich Jews/Zionists all over the world - the masters of the country.

The vast number of historical documents also show that the indigenous Palestinian Arab inhabitants feared that - as a result of the mentioned developments - they would be reduced to the status of a minority[237] or even be transferred to the neighboring Arab countries.[238]

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[236] For details on the Balfour Declaration, 1917, see supra sub-chapter 3.2.

[237] Laqueur, supra note 20, at 227, 228

[238] Transfer proposals were made by numerous individual Jews and Zionist leaders - such as Theodor Herzl, David Ben-Gurion, Chaim Weizman, Nachman Syrkin, Arthur Ruppin, Leo

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As I clearly see it, this understanding was not simply drawn from the increased Jewish immigration and acquisition of land by the Zionist movement, but could specifically be learned from various writings and speeches of Zionist leaders and opinion makers, which - from the very beginnings of the existence of political Zionism - suggested the idea of an Arab population transfer.[239]

The specific demand for a "national home for the Jewish people" seemed to - and later actually really did - totally exclude the indigenous Palestinian Arab population from its political, territorial and economic concept.

The vast number of historical documents show that the indigenous Palestinian Arabs rejected the activities of the Zionist movement and the Balfour Declaration not because they feared "proletarization", but because they anticipated that there was no place for them in the concept of political Zionism.

The extensive researches that I conducted with regard to the attitude of the native Arab people towards immigrating Jews to Palestine, lead me to the conclusion that the Palestinian Arab opposition was not directed against the individual Jew,[240] but rather was this opposition directed against the concept of political Zionism which

> "...aimed to create a society that could never be anything but 'native' (with the minimal ties to a metropolitan center) at the same time that it determined not to come to terms with the very natives it was replacing with new (but essentially European) 'natives'."

Motzkin, Israel Zangwill, Vladimir Jabotinsky, Menachem Ussishkin, Moshe Shertok (Sharett), Abraham Sharon (Schwadron), Edward Norman, Joseph Weitz, Ernest Frankenstein, Victor Gollancz - throughout all times. See on this subject especially Simons, International Proposals to Transfer Arabs from Palestine, 1895-1947. A Historical Survey, supra note 41, Chapter 1 entitled "Proposals By Individual Jews", at 3-85. See on this subject also Laqueur, supra note 20, at 231-232. See also Morris, supra note 8, at 23-28, 135-138, 140, 149, 160-165, 168, 190

Various individual non-Jews - such as Franklin D. Roosevelt, Herbert Hoover, Leopold Amery, Norman Angell, Edwyn Bevan, Ely Culbrtson, John Gunther, Walter Clay Lowdermilk, Richard Meinertzhagen, James Parkes, Harry St. John Philby - also suggested population transfers. See Simons, ibid., Chapter 2 entitled "Proposals By Individual Non-Jews", at 87-121

239 Ibid. See also the examples regarding Arab population transfer given in supra note 58

240 See for example the Report of the Haycraft Commission which stated as follows:

> "...we feel convinced that there would be no animosity [of Arabs] towards the Jews as such: that there is no inherent anti-Semitism in the country, racial or religious. We are credibly assured by educated Arabs that they would welcome the arrival of well-to-do and able Jews who could help to develop the country to the advantage of all sections of the community..."

Report of the Haycraft Commission, supra note 59, at 54

See also Bernard Joseph, British Rule in Palestine (Public Affairs Press, Washington, 1948)

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- as it was well expressed by Edward W. Said, professor of English and Comparative Literature at Columbia University.[241]

4. The results of my researches lead me to the further conclusion that the Zionist movement was - from the very beginnings and throughout all times of its activities in Palestine - fully aware of the existence[242] of the native Palestinian Arab population as well as of their growing opposition towards the project of political Zionism with its aim "to establish a Jewish national home in Palestine".

The Zionist movement also clearly understood - throughout all times - that these native Palestinians would never accept any transformation of Arab Palestine into a Jewish national home.[243]

Numerous speeches,[244] articles[245] and books[246] written and published by leading Zionist figures throughout all times, the recommendations of the King-Crane

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241 E. Said, supra note 23, at 88

242 In 1895, Theodor Herzl wrote in his Diaries that something ought to be done about the Palestinian Arab inhabitants:

> "We shall have to spirit the penniless population across the border by procuring employment for it in the transit countries, while denying it any employment in our country. Both the process of expropriation and the removal of the poor must be carried out discreetly and circumspectly."

Quoted in E. Said, ibid., at 13

243 In 1891, Ahad Ha'am, a leading Zionist figure, went to Palestine and warned in an article that:

> "...The Arabs, and above all the town dwellers among them, were quite aware of Jewish activities and desires, but pretended not to notice them so long as they seemed to constitute no real danger. But if one day the Jews were to become stronger and threaten Arab predominance, they would hardly take this quietly."

Quoted in Laqueur, supra note 20, at 210

244 In 1905, Yitzhak Epstein, for example, held a speech in which he stated that the so called "Arab question" was well known as

> "...the most important of all the problems facing Zionism."

(The speech was published only in 1907. The expression "Arab question" was commonly used in order to describe the Palestinian opposition to the goals of the Zionist movement, which completely ignored the existence, the national rights and interests of several hundred thousands of Arabs living in Palestine at that time and constituting the majority of the local population.)

In his speech, Yitzhak Epstein, inter alia, warned

> "...that Zionism should enter into alliance with the Arabs"; that "the Jews who returned to their country should do so not as conquerors"; and that "they [the Jews] should not violate the rights of a proud and independent people such as the Arabs, whose hatred, once aroused, would have the most dangerous consequences."

Quoted in Laqueur, ibid., at 215, 216

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Commission in 1919,[247] as well as the reports of numerous commissions of inquiry established by the British mandatory government of Palestine[248] give evidence to the above mentioned facts namely: The Zionists' awareness of the existence of the native Palestinian Arab people and their growing opposition towards political Zionism and their absolutely negative approach towards any transformation of Arab Palestine into a Jewish nation state.

Zeev Sternhell, professor of political sciences at the Hebrew University, also points to these facts. In his already mentioned book "The Founding Myths of Israel" he writes as follows:

> "The building of the Yishuv was accompanied by a constant struggle with a stubborn Arab opposition to Zionist goals. Contrary to the claim that is often made, *Zionism was not blind to the presence of Arabs in Palestine. Even Zionist figures who had never visited the country knew that it was not devoid of inhabitants*. At the same time, neither the Zionist movement abroad nor the pioneers who were beginning to settle the country could frame a policy toward the Palestinian national movement. The real reason for this was not a lack of understanding of the problem but *a clear recognition that there was an insurmountable contradiction between the basic objectives of the two sides*. *If Zionist intellectuals and leaders ignored the Arab dilemma, it was chiefly because they knew that this problem had no solution within the Zionist way of thinking...*
> ...in general *both sides understood each other well and knew that the implementation of Zionism could be only at the expense of the Palestinian Arabs*. The leadership of the Yishuv did not conceal its intentions, nor was it able to do so. Similarly, *the Arabs, who knew from the beginning that Zionism's*

In order to solve the problems, Epstein envisaged a charter between Jews and Arabs, and urged that there should be no rivalry between those "two old Semitic peoples" which should assist each other. Epstein also issued several recommendations - such as the opening of Jewish hospitals, schools, kindergartens and reading rooms for Arabs - in order to improve the relations with them. He also stressed that the intention should not be to proselytize the Arabs but to help them find their own identity, and that the Jews should take account of the psychological situation of the Arabs, something which had been utterly neglected in the past.

[245] In 1909, a Hebrew journal published a story of an Arab woman working at Wadi Chanin, a bulk of land that was recently acquired by Jews. The Hebrew paper wrote as follows:

> "...suddenly she started weeping, and when asked by those working with her why she was crying she answered that she had recalled that only a few years earlier this very plot had belonged to her family."

Quoted in Laqueur, id., at 214

[246] E.g., Granovsky, The Land Issue in Palestine, supra note 33, at 10

[247] King-Crane Commission, Recommendations, 1919, supra note 134, at 64

[248] In the period between 1920 until 1939 five commissions of inquiry were appointed in order to investigate the causes of disturbances between the native Palestinian Arab and the immigrant Jewish community: See the Palin Commission in 1920; the Haycraft Commission in 1921; the Shaw Commission in 1929; the Peel (Royal) Commission in 1937; the Woodhead (Partition) Commission in 1939

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> *aim was the conquest of land, made perfectly clear the refusal to pay for the Jewish catastrophe*."[Emphases added] [249]

Nevertheless, it is evident that the most Zionists chose to ignore these facts and preferred to rely on historical rights, religious determination, and economic means to acquire the land of Palestine whether the Palestinian Arabs agreed or not.

5. Since the early days of the Zionist movement and their settlement activities in Palestine - up until today - everything between the two communities involved in the conflict - i.e. the Israeli/Jewish/Zionist and the Palestinian/Arab - centers around two basic and interrelated issues:

The one issue concerns the demographic realities on the ground, i.e. the question which community constitutes the majority within the whole population.

The other issue concerns the territorial realities on the ground, i.e. the question which community has sovereignty and ownership over the land.

Physical control and sovereignty over the historic land of Palestine ["Eretz-Israel"] constitutes one of the basic elements for the national identity of the Palestinian Arab and the Jewish people.

Hence, the sovereignty and ownership over this land was and still is the ultimate goal in the political concept of both peoples.

a. For the Jewish people the land in question is called "Eretz-Israel" and means their ancient homeland from which this people has been exiled 2000 years ago.

From the point of view of political Zionism, the return of the Jewish people to their ancient homeland, and the establishment of a "national home" was seen as revolutionary steps liberating the Jewish people from their status as persecuted minority in the Diaspora.[250]

b. For the Palestinian Arab people on the other hand, exactly the same land is called "Palestine", and means their ancient homeland on which this people was living from times immemorial until the days when *al-Nakba (the Catastrophe)* took place - i.e. when the majority of the Palestinian Arabs took flight or were expelled in the course of the war that broke out after the UN-GA Resolution 181 (II) of 29 November 1947 was adopted and implemented, and after the state of Israel was established in Palestine.

From the point of view of the Palestinian Arab people the whole Zionist enterprise, the settlement activities, the ideological basis and the political program of a Jewish national state was (and still is) - from the very beginnings - seen as a threatening and aggressive movement or simply as an invasion.[251]

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[249] Sternhell, supra note 23, at 43, 44

[250] Laqueur, supra note 20, at 589-591

[251] See especially the forceful analysis about Zionism given by E. Said, supra note 23, Chapter 2 (Zionism from the Standpoint of Its Victims)

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6. In its Report of 31 August 1947, the United Nations Special Committee on Palestine (UNSCOP), i.e. the body which drew up the Partition Plan of Palestine, considered both above mentioned issues, namely the demographic as well as the land issue.

Regarding the demographic composition of the whole population of mandatory Palestine this Report states that there were:

- 498.000 Jews and 497.000 Arabs (90.000 Bedouins) in the area allotted to the Jewish state;
- 10.000 Jews and 725.000 Arabs in the area allotted to the Arab state;
- 100.000 Jews and 105.000 Arabs in the city of Jerusalem.[252]

Reading these numbers one may easily discern that according to the UNSCOP Plan there was only a majority of 1000(!) Jews (=498.000) in the proposed Jewish state, while a large part of the native Palestinian Arab inhabitants (=497.000) should have come under Jewish rule.

7. Important to mention is the fact that the right to self-determination of one part of the Arab people of Palestine was recognized - for the first time - only by the UN-GA Resolution 181 (II) of 29 November 1947, while the right to self-determination of the Jewish people was already recognized by Great Britain in the Balfour Declaration, 1917 - which was later also incorporated into the text of the Mandate for Palestine in 1922.

However, reading the UN-GA Resolution 181 (II) one may easily discern that - seen from the Palestinian Arab perspective and considering the facts on the ground - the therein established "Partition Plan" could not be considered as really fair for the Palestinian Arabs people. This is revealed by the following facts:

In the year 1947 there lived in British mandatory Palestine:

- ≈ 1.2 to 1.3 million Palestinian Arabs,[253] and
- ≈ 608.000 Jews

The UN-GA Partition Resolution 181 (II) - which was based upon the majority UNSCOP Plan of Partition with Economic Union - provided that:

- The proposed Jewish state should comprise 56,47%, = 15,261,648 dunams land of the total land area of mandatory Palestine.[254]
- The proposed Arab state should comprise 42,88% = 11,589,868 dunams land of the total land area of mandatory Palestine.[255]
- Almost 497,000 Palestinian Arabs would have come under Jewish rule.[256]

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252 UNSCOP-Report, 1947, supra note 182, at 30

253 65-70% of all Palestinians were living in 800-850 villages. The remaining 30-35% lived in cities and towns. Morris, supra note 8, at 8

254 Klein, La Démocratie d' Israel (Editions du Seuil, Paris, 1997) at 42, NOTE 1; Hadawi, supra note 55, at 79 [1 dunam = ~1/4 of an acre. 1000 dunams = 1 sq.km]

255 Klein, ibid., at 42, NOTE 1; Hadawi, ibid., at 80

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For the Palestinian Arab people - living for generations in the same land which according to the UN Partition Resolution 181 (II) should become a Jewish state - the partition of Palestine meant the very realization of the concept of political Zionism - which as we have seen in the earlier sub-chapters - was aimed towards the deprivation of a large part of the native Arab inhabitants of Palestine of their lands and their right to self-determination.

Therefore - from the Palestinian point of view - it was only a logical reaction to reject any proposals for a partition of Palestine, and to consider such an act as illegal, despite the fact that the UN Partition Resolution 181 (II) of 29 November 1947 contained a formal statement to establish two bi-national states, where all citizens should be treated equally.

In that context it should be mentioned that the Israeli government commonly claims that the events of 1948 occurred *because* the Palestinian Arab people rejected the UN Partition Resolution 181 (II), *thus* causing their dispersion and hardship.

But - considering the ideological and political concept of Zionism - it becomes evident that these claims are a falsification of facts, since the UN Partition Resolution 181 (II) was a blatant violation of the right to self-determination of the Palestinian Arab people which only exercised its right to protest.

Although Jewish immigration and Jewish enterprise have conferred benefits on Palestine in which the Arab people always shared, these advantages to the Arabs have been accidental to the main purpose of the enterprise and did never form part of the basic aims of Zionism.

8. The historical sources as well as the legal and judicial material of the later state of Israel give evidence to the fact that the native Arabs of Palestine anticipated all the negative developments and events which - after the state of Israel had come into being - indeed materialized themselves in the worst form.

9. The aim of all positions of Zionism was to achieve possession and ownership of all the lands of Palestine - which were considered by the Zionist movement as the "historical lands of Eretz Israel" - at the expense of the native Arab inhabitants and their fundamental rights and freedoms.

Many writings and speeches of Zionist leaders as well as the establishment of specific Zionist Institutions - such as the World Zionist Organization (WZO), the Jewish Agency (JA) and the Jewish National Fund (JNF) based upon the principles of "inalienability of land" and the employment of solely "Jewish labour" - prove, that the concept of political Zionism aimed to create a national home in Palestine for the Jewish people alone from which the indigenous Palestinian Arabs - as belonging

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[256] UNSCOP-Report, 1947, supra note 182, at 30

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to a not eligible group - should be excluded, at best be discriminated, but certainly not be treated equally.

10. The concept of political Zionism is in fact - until today - an unchanged and uniform concept, since the basic aim to occupy as much land as possible and whenever there is an opportunity to it - without, however, taking into consideration the basic human rights and freedoms of the Palestinian Arab inhabitants regarding this land - still prevails.

This is revealed by the following facts:

a. On 14 May 1948 - the day that Israel declared itself a state - it legally owned approximately 1,734,000 dunams land, that is 6,59% of the total area of the land of mandatory Palestine.[257]

In the course of the war in 1948 - following the establishment of the state of Israel - and in early 1949, the Israeli army conquested parts of Palestine which - according to the Partition Plan - were never allotted to the Jewish state.

In 1949 after the signing of Armistice Agreements[258] between Israel and the neighboring countries, the state of Israel was established on 72 % of the whole formerly British Mandatory Palestine, and included parts of Palestine which were previously inhabited by a majority of native Palestinian Arabs which was expelled or took flight and was never allowed to return.

Within these borders of Israel according to the 1949 Armistice Agreements there only remained 158.000 (!) native Palestinian Arabs.

b. In the course of the war in June 1967, Israel enlarged its territory again and occupied the Sinai Peninsula, the Gaza Strip, the Golan Heights and the West Bank of the Jordan River, including East Jerusalem.

In these territories, during the last 33 years of occupation, the Israeli government has expropriated hundreds of thousands of dunams of land from Palestinian Arabs on which a large number of civilian settlements were built.[259]

Additionally a huge number of Jewish immigrants were brought and settled in these Occupied Territories.[260]

At the same time the Palestinian Arab inhabitants of their land were - and still are expelled or dispossessed - especially in East Jerusalem[261] - by conditions which no

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[257] Morris, supra note 8, Chapter 5 (Blocking a return) at 155

[258] General Armistice Agreements, supra note 194

[259] In 1997 approximately 194 settlements existed in the occupied Gaza Strip, the West Bank and East Jerusalem. See Jerusalem Media and Communication Centre, Signed, Sealed, Delivered: Israeli Settlement and the Peace Process (January 1997) at 1

[260] In 1997 more than 300.000 Jewish settlers lived in the occupied Gaza Strip (~5000 settlers), the West Bank (~140.000 settlers) and East Jerusalem (~170.000 settlers). Ibid., at 1, 51

[261] B'Tselem, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem, 1997, supra note 36

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longer make it possible for many of them to stay "lawfully" and in dignity on their lands and places of birth.[262]

The goal of this settlement policy was - and still is - to create political facts on the ground and to change the demographic realities of the regions.

The various Israeli governments did - and until today do - all this in patent and systematic violation of the language and the spirit of international human rights and international humanitarian law - especially in contradiction to the Hague Regulations, 1907[263] and the Fourth Geneva Convention, 1949[264] - according to which an occupying power is explicitly prohibited from confiscation of private land[265] unless for military use,[266] from creating permanent changes not intended for the benefit of the local population,[267] and from transferring population from its territory into the territory it occupies.[268]

But violated by this settlement policy is not only international law but also international agreements to which Israel is party.

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262 B'Tselem, The Quiet Deportation, 1997, supra note 231; B'Tselem, The Quiet Deportation Continues, 1998, supra note 231; B'Tselem, Injustice in the Holy City Jerusalem, 2000, supra note 231; LAW, House Demolition and the Control of Jerusalem. Case Study of al Issawiya Village, Jerusalem, June 1995; LAW, Netanyahu's Legacy, June 1999; LAW, Land & Settlement Policy in Jerusalem (First Printed June 1999, Reprinted January 2000)

263 Hague Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907

264 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949

265 Article 46 of the Hague Regulations, 1907

266 Article 52 of the Hague Regulations, 1907 allows the occupying power to take land for compensation, but only to meet its military needs. Requisition of the land, contrary to confiscation, is temporary by definition, and the occupying power does not obtain ownership.

A fundamental principle of international humanitarian law relating to territory subject to belligerent occupation is, according to the commentary of the International Committee of the Red Cross (ICRC), that "the occupation of territory in wartime is essentially a temporary, de facto, situation." See Jean S. Pictet (ed.), Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958) at 275. The temporary nature of occupation entails limitations imposed on the occupying power regarding the creation of permanent facts in the occupied territory.

267 Article 47 of the Fourth Geneva Convention, 1949 explicitly stipulates:

> "Protected persons who are in occupied territory shall not be deprived in any case or in any manner whatsoever of the benefits of the present Convention by any change introduced as the result of the occupation of territory, into the institutions of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying power, nor by annexation of the latter of the whole or part of the occupied territory."

268 Article 49 of the Fourth Geneva Convention, 1949 explicitly stipulates:

> "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

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As I will demonstrate in more detail in Chapter E and Chapter G of this work, the said settlement policy (i.e. the establishment of permanent settlements and the change of the demographic composition of the Occupied Territories) was approved by the Israeli Supreme Court, who in most of the cases refused to view these violations for what they are, and order their cessation.

Instead of, the Supreme Court preferred to grant a pretext of "legitimacy" to:

- Civilian settlements under the guise of "military-security action".
- Requisitions of land under the guise of "safeguarding the safety of public property".
- Transfers of requisitioned land to the permanent possession of settlers under the guise of "administration of government property" or temporary "enjoyment of the fruits".[269]

c. Another recent example that points to the above mentioned basic aim and unchanging approach of the Zionist movement to occupy as much land as possible without, however, taking into consideration the basic human rights and freedoms of the Palestinian Arab inhabitants regarding this land, is given in the recent Combined Initial and Second Report Concerning the Implementation of the International Covenant on Economic, Social and Cultural Rights, submitted on 28 November 1997 to the United Nations.[270]

This 1997 Combined Initial and Second Report by Israel to the United Nations defines on the one hand the area of the state of Israel as comprising 10,840 square miles - a calculation which includes all the Occupied Territories.[271]

The ICRC's commentary to this article states that the article "is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories." See Pictet, Commentary, supra note 266, at 283

[269] B'Tselem, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem, 1997, supra note 36; B'Tselem, Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects (Jerusalem, March 1997); B'Tselem, On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement (Jerusalem, July 1999); LAW, House Demolition and the Control of Jerusalem, 1995, supra note 262; LAW, Fraud, Intimidation, Oppression: The Continued Theft of Palestinian Land. Case Study of Jeensafut Village: One Man's Struggle to Defend His Land, Jerusalem, October 1995; LAW, Bulldozed into Cantons: Israel's House Demolition Policy in the West Bank Since the Signing of the Oslo Agreements. September 1993 to February 1999. First Edition: Parastou Hassouri, February 1999 Revision: Richard Clark; LAW, Netanyahu's Legacy, June 1999; LAW, Land & Settlement Policy in Jerusalem (First Printed June 1999, Reprinted January 2000)

[270] Combined Initial and Second Report Concerning the Implementation of the International Covenant on Economic, Social and Cultural Rights [ICESCR]. The Report was submitted on 28 November 1997 to the UN and circulated as UN document E/1990/5/Add. 39

[271] Ibid., para. 3

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But on the other hand the 1997 Combined Initial and Second Report by Israel to the United Nations totally excludes about 2,5 millions Palestinian Arabs living on these Occupied Territories from the population statistics that were provided in the same report.[272]

After the discussion in Chapter A - which intended to provide some bagckground information regarding the history, the philosophy and the ideological concept of political Zionism - I will now go over to Chapter B, where I shall deal with the issue of Israel's obligations to enact a constitution including a bill of human rights.

[272] Id., para. 5

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B. ISRAEL'S INITIAL OBLIGATIONS TO ENACT A CONSTITUTION INCLUDING A BILL OF HUMAN RIGHTS AND THE ISSUE OF JUDICIAL REVIEW

1. Introduction

Israel's legal system - like that of Great Britain - does not have one single written instrument that can be considered as a formal "constitution" or as the "higher law of Israel" with normative supremacy in relation to ordinary legislation.

Until the enactment of two - partly entrenched - basic laws in 1992[1] dealing the first time with certain fundamental rights and civil liberties there existed also no formal "bill of rights".

However, the obligation to enact a democratic constitution, guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters, was the first time already expressed in the United Nations General Assembly Resolution 181 (II) of 29 November 1947[2] which states as follows:

> 1. No later than two months after the end of the Mandate, each state should elect its own Constituent Assembly, which by itself should enact a democratic constitution, guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters, the enforcement of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association.[3]
> 2. Each state should be established on the conceptual basis of a bi-national state, where Palestinian citizens as well as Arabs and Jews who are not Palestinian citizens, but residing in Palestine outside the city of Jerusalem, shall become citizens of the state in which they are resident and enjoy full civil and political rights.[4]

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[1] Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation, S.H. No. 1454 (10 March 1994); Basic Law: Freedom of Occupation, S.H. No. 1387 (12 December 1992) repealed by Basic Law: Freedom of Occupation, S.H. No. 1454 (10 March 1994). The English version of these two basic laws appears in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press, Oxford, 1996) 154-157

[2] United Nations General Assembly 181 (II) on the Future Government of Palestine of 29 November 1947, [Partition Resolution] UN document A/Res/181 (II) (A+B)

[3] Ibid., Part I, Section B, paras. 9, 10, 10(d) and Section C

[4] Id., Part I, Section C, para. 1

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3. A declaration - the text of which was set forth in Resolution 181 (II) in Part I Section C - shall be made to the United Nations by the provisional government of each proposed state before independence. This declaration shall contain clauses regarding the protection of Holy Places, the protection of religious and minority rights and for the "equal protection of the laws" of all persons.[5]
4. The constitutions of the states shall embody chapters 1 and 2 of the above mentioned declaration.
5. The admission of each state to membership in the United Nations is conditional upon the signment of the declaration and its undertaking, as envisaged in this plan.[6]

The Declaration of the Establishment of the State of Israel of 14 May 1948[7] [hereinafter also: The Declaration] is the second important document which not only clearly mentions fundamental rights and freedoms to be observed by the state of Israel but which also declared that a Constitution shall be adopted by an elected Constituent Assembly not later than 1 October 1948.

The Declaration states in its second part[8] (ending with the words "...the Jewish state to be called Israel"[9]) that

> "...elected, regular authorities of the state [shall be established] in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948[10]..."

The third part of the Declaration (ending with the words "...it [the state of Israel] will be faithful to the principles of the Charter of the United Nations" [11]) describes all those fundamental values and principles which should guide the state and upon

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5 Id., Part I, Section C, Chapter 2 (Religious and Minority Rights)

6 Id., Part I, Section F

7 The Declaration of the Establishment of the State of Israel of 14 May 1948 is commonly referred to also as "Declaration of Independence", but the formal title is "Declaration of the Establishment of the State of Israel", see 1 L.S. I. (1948) 3

8 The Declaration of the Establishment of the State of Israel, 1948 consists of four main parts. The first part of the Declaration - ending with the words "...the right of the Jewish people to establish their State is irrevocable" - is an introduction to the history and tragedy of the Jewish people. This first part speaks of the catastrophe which befell the Jewish people by the Holocaust - the massacre in which millions of European Jews were murdered - and which provides - according to the Declaration of the Establishment of the State of Israel - the moral basis for the urgency of solving the problem of the homelessness of the Jewish people by establishing the Jewish state. This first part also expresses the international recognition of the right of the Jewish people to establish their state. See Amnon Rubinstein, The Constitutional Law of the State of Israel (5th ed., Shocken Press, Jerusalem, Tel Aviv, 1996) (Hebrew) 45

9 Declaration of the Establishment of the State of Israel, supra note 7, at 4

10 The date of 1 October 1948 was also the outside date previously designated in the UN Resolution 181 (II) of 29 November 1947 for the creation of independent Arab and Jewish states, and the Special International Regime for the City of Jerusalem. See UN Resolution 181 (II), supra note 2, Part I, Section A, para. 3

11 Declaration of the Establishment of the State of Israel, supra note 7, at 4

which the constitutional regime of the state of Israel - especially in regard to fundamental rights and freedoms - should be built.

These fundamental values and principles establish Israel as "Jewish state" and at the same time on the basis of a "democratic state"[12] that will act in accordance with the principles of the Charter of the United Nations.

With regard to these fundamental values and principles the Declaration provides in its third part that the state of Israel

> "...will be open for Jewish immigration and the Ingathering of the Exiles";
>
> "...will foster the development of the country for the benefit of all its inhabitants";
>
> "...will be based on freedom, justice and peace as envisaged by the prophets of Israel";
>
> "...will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex and will guarantee freedom of religion, conscience, language, education and culture";
>
> "...will be faithful to the principles of the Charter of the United Nations."[13]

This third part of the Declaration is - as far as it concerns the question of the foundations of civil and political rights in Israel and the Occupied Territories - undoubtful the most important one and therefore I will refer to it many times.

As I will demonstrate in more detail in the course of this work, the above mentioned fundamental values and principles have been laid down in explicit statutory expressions and have been developed over decades by the jurisprudence of the Supreme Court.

In 1992, two basic laws on human rights - namely the Basic Law: Human Dignity and Freedom[14] and the Basic Law: Freedom of Occupation[15] - were enacted, which explicitly state that their purpose is "to protect human dignity and freedom in order to entrench the values of the state of Israel as a Jewish and democratic state."

However, despite the fact that the above mentioned two fundamental documents - i.e. the United Nations General Assembly Resolution 181 (II) and the Declaration of the Establishment of the State of Israel, 1948 - entail clear obligations to enact an entrenched constitution including a bill of rights, this duty - to produce such a written formal instrument with superior status - has not been fulfilled since the day of the establishment of the state of Israel in Palestine in 1948 up until today.

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12 To mention, however, is the fact that, although the state of Israel was established on the basis of a democratic state, the explicit word "democracy" was never used in the Declaration of the Establishment of the State of Israel. See Declaration of the Establishment of the State of Israel, supra note 7

13 Ibid., at 4

14 Basic Law: Human Dignity and Freedom, supra note 1

15 Basic Law: Freedom of Occupation, supra note 1

As a certain compromise solution Israel has chosen to go the way of a "chapter by chapter" - process. The First Knesset adopted in June 1950 the so called "Harari Resolution"[16] proposing that the written constitutional norms should be formulated in a series of "Basic Laws" which shall be assembled at the end of the process and become the future constitution.

But, in spite of their designation as "Basic Laws", these laws are adopted by the Knesset in the same manner as other legislation, and their constitutional meaning is only derived from their nature, and - in some cases - from the inclusion of "entrenched clauses" whereby a special majority is required to amend them.[17]

Most of the provisions of these basic laws are - despite their intended prime significance - not entrenched and may be amended by a regular majority vote of 61 members of the Knesset.[18]

Until today - in accordance with the above mentioned Harari Resolution - eleven basic laws have been enacted:

Nine of these basic laws were enacted in the period of 1957 to 1992 and they solely deal with the institutional and territorial aspects of the state of Israel, namely the Knesset (i.e. the Israeli parliament),[19] the Government,[20] the President,[21] the Army,[22] Judicature,[23] the State Comptroller,[24] the State Economy,[25] Jerusalem as Capital of Israel[26] and Israel's Land.[27]

Two further basic laws were - as already mentioned above - enacted in 1992 and deal the first time expressly with certain fundamental rights and freedoms.[28]

It should be mentioned at this point that the question of whether Israel should have an entrenched constitution including a bill of rights has been discussed within

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[16] Harari Resolution, 5 D.K. 1743 (14 June 1950)

[17] See the considerations of the basic laws in the Combined Initial and Second Report Concerning the Implementation of the International Covenant on Economic, Social and Cultural Rights [ICESR]. The Report was submitted on 28 November 1997 to the UN and circulated as UN document CESR/E/1990/5/Add. 39 [Combined Initial and Second Report on the Implementation of the ICESCR, 1997] para. 39

[18] There are all in all 120 members in the Knesset. Entrenched sections are for instance: Sections 4, 44 and 45 of the Basic Law: The Knesset, 12 L.S.I. (1957/58) 85

[19] Basic Law: The Knesset, ibid.

[20] Basic Law: The Government, 22 L.S.I. (1968) 257

[21] Basic Law: The President of the State of Israel, 18 L.S.I. (1964) 118

[22] Basic Law: The Army, 30 L.S.I. (1976) 150

[23] Basic Law: Judicature, 38 L.S.I. (1984) 101

[24] Basic Law: The State Comptroller, 42 L.S.I. (1988) 30

[25] Basic Law: The State Economy, 29 L.S.I. (1975) 273

[26] Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. (1980) 209

[27] Basic Law: Israel Lands, 14 L.S.I. (1960) 48

[28] Basic Law: Human Dignity and Freedom, supra note 1
Basic Law: Freedom of Occupation, supra note 1

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the Israeli society as well as in the Knesset since the establishment of the state of Israel in Palestine in 1948 up until today.

However, due to the fact that the Israeli society is strongly divided in its mentality and priorities it was never possible to overcome the gaps between the various parties in the Knesset in order to enact a fully entrenched constitution which comprehends all fundamental rights and freedoms protected in international documents and other modern constitutions and which would constitute the source of "higher law" in Israel.

One main concern in regard to such a document was expressed by the religious parties, which feared that religious norms would not meet the standards of a modern bill of rights.

But strong opposition to such a legislation also came from an other powerful circle within the government, namely the defence (military) establishment, which realized that much of the Israeli and British mandatory emergency legislation would never stand the test of judicial review. In order to prevent the enactment of a constitution and bill of rights this group therefore employed the argument of security reasons.[29]

Nevertheless there have been several major debates in the Knesset[30] upon this issue as well as several attempts in the Knesset to enact to enact a constitution or at least a bill of rights.

In 1973[31] and 1983[32] an introduced draft bill even passed the first reading in the Knesset.

Another attempt to enact a comprehensive constitution was made in 1987, when a group of Tel Aviv University law professors drafted a proposal for a constitution.[33]

However, none of these proposed bills and constitutions has ever been introduced into legislation.

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29 David Kretzmer, The New Basic Laws on Human Rights: A Mini-revolution in Israeli Constitutional Law?, published in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, 1996) at 141, 146

30 The first general discussion regarding a bill of rights was in 1950, preceding the Harari Resolution. The second major debate was in 1964, when Liberal MK, Professor Klinghoffer, proposed a private member's Bill of Rights (See the discussion in 38 D.K. 784-794; the draft bill is discussed at 798-802). The third discussion was in 1973 (See 70 D.K. 1565-1588, 1752-1762; 71 D.K. 2484-2500, 2731-2739 [1974]). Another general discussion was held in 1982 (see 92 D.K. 2680, 2 June 1982). For more details on this issue see Ruth Gavison, The Controversy over Israel's Bill of Rights, 15 I.Y.H.R. (1985) at 123-124

31 Proposed Basic Law: Rights of Citizen and Man, 1973, H.H. No.1085 (12 August 1973) 448

32 Proposed Basic Law: Charter of Human Rights, 1983, H.H. No.1612 (2 February 1983) 111

33 Proposed Constitution for the State of Israel, 1987, drafted by Dean Uriel Reichman (chairperson), the Professors Baruch Bracha, Ariel Rosen-Zvi and Amos Shapira, in collaboration with other Israeli and foreign scholars.

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Between the years 1989 and 1990 the Ministry of Justice prepared a comprehensive basic law on human rights,[34] which - although having passed the first reading in the Knesset - became stuck again in 1990.[35]

In 1991, in the outgoing 12th Knesset, however, the civil rights lobby in the Knesset realized that it was impossible for political reasons to legislate this general constitutional bill of rights,[36] and therefore reached the conclusion that it might be better to enact a bill of rights that deals at least with those rights which were considered to be less controversial from a political point of view, than not to have any bill of rights at all. Hence, the above mentioned comprehensive basic law on human rights was divided into four legislative pieces.[37]

Since then only two of these laws have been enacted in the form of basic laws dealing the first time expressly with certain assumed less politically controversial fundamental rights and freedoms. These basic laws came into being in March 1992[38] and were both fundamentally amended in 1994.

One of them is the Basic Law: Human Dignity and Freedom[39] and explicitly protects a person's life, body and dignity. The other is the Basic Law: Freedom of Occupation[40] and explicitly protects the right of every citizen and resident in Israel to hold any occupation or profession.

At the time of writing this work there exist three additional draft basic laws dealing with human rights and freedoms which wait for a passage through the Knesset.[40A]

These three basic laws are as follows:
The Draft Basic Law: Due Process Rights[41]
The Draft Basic Law: Social Rights[42]

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34 Proposed Basic Law: Fundamental Human Rights, (1989) published in I. Gal-Nor and M. Hofnung, Government of the State of Israel (Jerusalem: Nevo Publishing House, 1993) 1135

35 Dan Meridor, Zionism and Democracy are the Only Way to Rule the Country, 21 Justice (1999) 3, at 4

36 Frances Raday, Religion, Multiculturalism and Equality: The Israeli Case, 25 I.Y.H.R. (1995) 211

37 Meridor, supra note 35, at 4

38 Ibid.

39 Basic Law: Human Dignity and Freedom, supra note 1

40 Basic Law: Freedom of Occupation, supra note 1

40A http://www.knesset.gov.il/knesset/knes/eng_mimshal_yesod25.htm (Basic Laws in the Process of Enactment)

41 Draft Basic Law: Due Process Rights, H.H. No. 2256 (7 March 1994) 335; Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights [ICCPR]. The Report was submitted in June 1998 to the UN Human Rights Committee and circulated as UN document CCPR/C/81/Add.13 [hereinafter: Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998], paras. 35, 43, 411

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The Draft Basic Law: Freedom of Expression and Association[43]

The ultra-orthodox parties, particularly Shas and United Torah Judaism, are principally opposed to the mentioned draft basic laws since these parties fear that the Supreme Court will interpret them in a way unacceptable from the point of view of orthodox Jewish religion.[44]

The arguments and reasons for the objection of a constitution including a bill of rights will be discussed in more detail in sub-chapter 4.3. of this work.

But despite the fact that until 1992 there was no bill of rights or any unitary piece of legislation of preferential status, setting the constitutional legal principles and defining the basic rights of man and citizen, the Israeli legal system tried to secure certain basic rights and freedoms for at least a certain segment of the whole population (i.e. the Jewish population).

The task of protecting fundamental rights has been entrusted - like in England - to the Supreme Court of Israel, who - sitting as a High Court of Justice - developed in a large number of decisions a jurisprudence on certain basic civil and political rights, such as freedom of speech, freedom of association, freedom of demonstration, freedom of movement and freedom of religious worship.

Nevertheless, I have to stress at this point that - up until today - most of these civil and political rights have only been applied on specific segments of the population, namely the Jewish population.

These civil and political rights were never equally applied in regard to the Palestinian Arab citizens of Israel and certainly not towards the Palestinian Arab people living in the Occupied Territories.

As I will show in the course of this work, the Palestinian Arab citizens of Israel - compared with the Jewish population - experience to this day many restrictions, discriminations and violations of their basic rights and freedoms in various fields.

Even worse, however, was - and still is - the situation for the Palestinian Arab people living in the Occupied Territories, since it suffers from severe violations of fundamental rights and freedoms, caused by the application of an own created legal,

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42 Draft Basic Law: Social Rights Bill, H.H. No. 2256 (7 March 1994) 337; Combined Initial and Second Report on the Implementation of the ICESCR, 1997, supra note 17, para. 41, para. 46 (contains the main provisions of the Draft Basic Law: Social Rights Bill), para. 47 (points to the fact that the Draft Basic Law: Social Rights Bill is only "symbolically important"). It should be mentioned that - if enacted in this form - the Draft Basic Law: Social Rights Bill (para. 46) may only be considered as *declaratory in nature*, since it does not really show the extent and the depth of Israel's commitment to the rights covered in it.

43 Draft Basic Law: Freedom of Expression and Association, H.H. No. 2256 (7 March 1994) 336; Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 41, paras. 35, 411

44 HA'ARETZ, English Edition, 29 September, 1998, at A3

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judicial and administrative system. The status and legal order of the Occupied Territories will be discussed in Chapter E of this work.

Turning now back to the two, above mentioned, new basic laws on human rights passed by the Knesset in March 1992 one may say that - at least theoretically, i.e. from a constitutional and conceptional point of view - they brought certain changes into Israel's legal system regarding the status of human rights and freedoms.

The said basic laws on human rights are partly entrenched, enjoy the status of constitutional laws, and require special majorities in order to change them.

Until the enactment of those new basic laws on human rights in 1992, fundamental human rights did not enjoy any normative superiority over other Knesset-enacted legislation and, as a consequence of that situation, the Knesset could restrict the fundamental freedoms without being bound to any superior law.

Moreover, since in the past there was no law which regulated the normative relationship between normal laws and the status of human rights, the different courts as well as all other authorities had to enforce any law (after it has been enacted by the Knesset and published in the Official Gazette) and judicial review only existed in rare cases and out of formal reasons.[45]

However, as already mentioned above, with the enactment of the above mentioned basic laws on human rights certain structural changes within the Israeli legal system occurred, which - at least at first sight - give or better gave some hope for fundamental changes.

Based upon the new Basic Law: Human Dignity and Freedom an appeal was made to the Supreme Court in the matter *United Mizrahi Bank v. Migdal Cooperative Village*.[46] In this case the Supreme Court confronted itself with the direct question whether an Israeli Court is competent to annul a regular Law on grounds of violating a substantive provision of a Basic Law on Human Rights, namely the Basic Law: Human Dignity and Freedom.

The Supreme Court also considered the normative relationship between basic laws and regular laws.[47]

The majority of the Supreme Court judges in the *Mizrahi Bank* case held that:

1. Both new basic laws - i.e. the Basic Law: Human Dignity and Freedom as well as the Basic Law: Freedom of Occupation - are superior to that of ordinary legislation and have formal constitutional status.

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45 Yaffa Zilbershatz, Highlighting Constitutional Changes in the Israeli Legal System, 7 Justice (1995) at 28, 31

46 C.A. 6821/93, 1908/94, 3363/94, *United Mizrachi Bank v. Migdal Cooperative Village,* 49(iv) P.D. 221; for a summary and extracts in English from the judgment see 31 Isr.L.Rev. (1997) 764; for a discussion of the case see also Yaffa Zilbershatz, The Israeli Constitution after Mizrahi Bank v. Migdal (The Gal Amendment Decision), 10 Justice (1996) 22

47 The Court also examined other intertwined questions such as if the Knesset has the authority to legislate a bill of rights and if so, on what legal basis.

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2. The courts have the power to review legislation and to invalidate legislation that does not meet the demands of these Basic Laws.[48]
3. In this specific case the normal law in principle violates one of the protected right, namely the right to property entailed in the Basic Law: Human Dignity and Freedom.

Despite these seemingly positive results, the decision in the *Mizrahi Bank* case is nevertheless - as I see it - disappointing due to the fact that the Supreme Court finally came to the conclusion that the said normal law, i.e. the "Gal Law" meets the requirements of Section 8[49] of the Basic Law: Human Dignity and Freedom, with the consequence that the said normal law was in fact not invalidated.

As I will demonstrate in the course of this work, the decision in the *Mizrahi Bank* case is only one of a big series of judgments wherein the Supreme Court pronounces the existence of rights and also admits the violation of rights, but finally came to the conclusion that - in light of other more important interests - the violation of the said right is justified.[50]

However, before treating in more detail the *Mizrahi Bank* case and other important and relevant decisions, it seems necessary to me to provide some background information regarding the following issues:

The role of the Israeli Supreme Court in the sphere of civil and political rights (sub-chapter 2).

The nature and legal status of the Declaration of the Establishment of the State of Israel, 1948 (sub-chapter 3).

Israel's obligation to enact a constitution and a bill of rights as requested by the Declaration of the Establishment of the State of Israel, 1948 (sub-chapter 4).

The attitude of the Israeli Supreme Court towards judicial review of primary legislation of the Knesset in human rights cases (sub-chapter 5).

The normative relationship between basic and ordinary laws (sub-chapter 6).

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[48] Until then the Court only declared a law void if it has been enacted in a manner inconsistent with a Basic Law, i.e. only for procedural reasons.

[49] Section 8 of the Basic Law: Human Dignity and Freedom states that the rights according to this Basic Law may not be infringed except by a statute 1. which accords with the values of the state of Israel as a Jewish and democratic state, 2. which was intended for a fitting/worthy purpose, and 3. only to the extent necessary. A real problematic issue is - as I see it - the reference to the values of the state of Israel (to be a Jewish and democratic state) due to the following two facts: First, the definition of the state of Israel as a "Jewish state" emphasizes the national character of the state, and is not only a sociological description but rather an ideological one that finds its expressions in the constitutional framework (statutes and jurisprudence) of the state. Secondly, Section 8 has to be read in connection with Section 1A of the Basic Law: Human Dignity and Freedom referring to the values of the state of Israel as a "Jewish and democratic state" and stating that the purpose of this Basic Law is to protect human dignity and freedom in order to entrench these values. For more details on this issue see sub-chapter 8

[50] The *Mizrahi Bank* case will be discussed in more detail below in sub-chapter 8

2. The Role of the Israeli Supreme Court in the Sphere of Civil and Political Rights

2.1. General Remarks

As already mentioned in the introduction to this Chapter B, Israel's legal system does not have one single written instrument that can be considered as a formal "constitution" or as the "higher law of Israel" with normative supremacy in relation to ordinary legislation.

Until the enactment of the two partly entrenched basic laws on human rights[51] in 1992 there was also no bill of rights and the Supreme Court of Israel did not have the power to review the constitutionality of primary Knesset legislation.

Nevertheless, the Israeli legal system tried to secure certain basic rights and freedoms for at least a certain group - i.e. the Jewish population group - within the whole population.

In a large number of decisions, starting with the often cited decision in the matter of *Kol Ha'am v. Minister of Interior*[52] the Supreme Court of Israel produced what is commonly also termed as a "judicial bill of rights".[53]

This chapter intends to discuss in short and general way the role and the main judicial stances of the Israeli Supreme Court in the field of human rights.

Before stepping, however, into the said issues I will first of all provide a short overview about the institutional organization of Israel's judicial system operating within the Green Line.

2.2. The Institutional Organization of Israel's Judicial System

The judicial system that is operating in Israel within the Green Line consists of several court systems which for the most part have independent areas of original

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51 Basic Law: Human Dignity and Freedom, supra note 1; Basic Law: Freedom of Occupation, supra note 1

52 H.C. 73/53, *Kol Ha'am Company Ltd. v. Minister of Interior,* translated into English in 1 S.J. (1948-1953) 90

53 David Kretzmer, Israel's Basic Laws on Human Rights, Israeli Reports to the XV International Congress of Comparative Law (Sacher Institute, Jerusalem 1999, ed. by A. M. Rabello) 293, at 296

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jurisdiction.[54] However, according to the scope of their particular jurisdiction, the Israeli judicial system has been divided into two main categories.[55]

The first main category within the Israeli judicial system consists of general courts of law, which are also known as civil or regular courts.

The second main category within the Israeli judicial system consists of tribunals and other authorities that are vested with judicial powers.

2.2.1. General/Civil/Regular Courts of Law

The general courts of law enjoy general jurisdiction,[56] and there exist three instances, namely Magistrates Courts, District Courts and the Supreme Court.[57]

The Magistrates[58] and the District[59] Courts have original jurisdiction over civil matters and criminal offenses.[60]

The Supreme Court is the highest court of appeal on rulings of lower tribunals, and has original jurisdiction also over other matters. Due to its constitutional and political importance in the area of human rights and freedoms the Supreme Court will be discussed in more detail below in sub-chapter 2.3.

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54 Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 41, para. 347

55 Asher Maoz, The Institutional Organization of the Israeli Legal System, published in Introduction to the Law of Israel (edited by Amos Shapira and Keren C. DeWitt-Arar, Kluwer Law International, 1995) at 31

56 Ibid.

57 Section 1(a) of the Basic Law: Judicature, supra note 23

58 Within the framework of the Magistrates Courts there also operate Youth Courts. Under recent legislation, special Family Courts have been set up within the Magistrates Court system. For more details see Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 41, paras. 351, 352

59 There exist five judicial districts and accordingly five District Courts exist in the following five towns: Jerusalem, Tel-Aviv, Haifa, Bersheba and Nazareth. Ibid., para. 349

60 Sections 40 and 51 of the Courts Law [Consolidated Version], 1984, S.H. (1984) 198

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2.2.2. Tribunals and Authorities Vested with Judicial Powers

This category enjoys limited jurisdiction with respect to the subject-matter and the people who are subordinate to their authority. To this second category of tribunals and courts belong: Military Courts/Tribunals, Religious Courts and Labour Courts.

The Military Courts/Tribunals were established according to two main legal sources,[61] namely the Military Justice Law, 1955[62] and the Defence (Emergency) Regulations, 1945.[63]

The Military Justice Law, 1955[64] empowers Courts Martial to try soldiers for military offenses. According to this law six Courts Martial of first instance[65] were created, namely the District Courts Martial,[66] the Naval Court Martial,[67] the Field Court Martial,[68] the Special Court Martial[69] and the Traffic Court Martial.[70]

The District Courts Martial, the Special Court Martial and the Traffic Court Martial are permanently established. The Naval Court Martial and the Field Court Martial are established ad hoc for each case.

The decisions of all of the above mentioned Courts Martial are appealable to the Appeals Court Martial.[71] Until 1986, judgments of the Appeals Court Martial were appealable on restricted procedural and administrative grounds to the Supreme Court sitting as a High Court of Justice. However, since the 1986 amendment of the Military Justice Law, judgments of the Appeals Court Martial may be appealed to

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61 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 41, para. 356-360

62 Military Justice Law, 1955, 9 L.S.I. (1954/55) 184

63 Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945) Suppl. II, at 1055. For more details on this issue see Chapter D.5.2.3. (The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966)

64 Military Justice Law, 1955, supra note 62

65 Section 183 of the Military Justice Law, 1955, ibid.

66 The District Courts Martial sit in three- or five judge panels; the majority of them are officers, and at least one of them is a legally-trained military judge. Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 41, para. 356

67 The Naval Courts Martial may be constituted on a naval vessel outside the coastal waters of Israel to try soldiers for an offense committed on that vessel, if the postponing of the trial could severely harm discipline on that vessel and if the vessel in not expected to return within 21 days. Naval Courts Martial always sit as a three-judge panel, at least one of them must be an officer. Ibid.

68 The Field Courts Martial are constituted only in periods of actual combat. Id.

69 The Special Court Martial is empowered to try officers of the rank of Lieutenant-Colonel. or higher on any charge, and any soldier charged with an offense punishable by death. Id.

70 A Traffic Court Martial always sits as a single judge. Id.

71 The Appeals Court Martial generally hears cases in a three-judge panel. Id., para. 357

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the Supreme Court only when "the case raises legal questions of significant novelty or complexity."[72]

The Defence (Emergency) Regulations, 1945[73] is the other main source according to which Military Courts are established. The Military Courts established under the Defence (Emergency) Regulations, 1945 are competent solely for the trial of offenses mentioned in these regulations. Decisions of the Military Courts established under the Defence (Emergency) Regulations, 1945 may be appealed to the Appeals Court Martial.[74]

Another category of courts that enjoys only limited jurisdiction with respect to the subject-matter and the people who are subordinated to their authority are the Religious Courts of the various religious communities. The Religious Courts have jurisdiction in matters of personal status, such as marriage, divorce, and to a certain extent in matters of maintenance, guardianship and the adoption of minors.

The following Religious Courts have been established for the various religious communities: The Rabbinical Courts,[75] the Moslem Religious Courts (Sharia Courts),[76] the Druze Religious Courts,[77] the juridical institutions of the ten officially recognized Christian communities[78] and the juridical institutions of the Baha'i community living in Israel.

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72 Id., para. 358

73 Defence (Emergency) Regulations, 1945, supra note 63. For more details on this issue see Chapter D.5.2.3. (The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966)

74 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 41, para. 359

75 Dayanim Law, 1955, 9 L.S.I. (1954/55) 74. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. (1952/53) 139

76 Qadis Law, 1961, 15 L.S.I. (1960/61) 123. An overview of the jurisdiction of Moslem *Sharia* Courts in Israel, the practiced law and applicable legal theory in these Moslem *Sharia* Courts, as well as the situation that exists because of the Israeli legislative interventionism is given by Ahmad H. Natour, Qadi and President of the High Sharia'a Court of Appeal, Moslem Sharia'a Court Should be Left to its Own Creative Devices, 17 Justice (1998) 16

77 Druze Religious Courts Law, 1962, 17 L.S.I. (1963/64) 27; Druze Religious Courts (Special Provisions), 1967, 21 L.S.I. (1967) 134. An overview of the jurisdiction of Druze Religious Courts in Israel, the Druze legal system and applicable law in these courts is given by Naim Henu, Qadi and Head of the Druze Religious Courts in Israel, Druze Religious Courts do not Intervene in Social Life but Modernization has its Repercussions, 17 Justice (1998) 23

78 For more details regarding the recognized Christian communities see Chapter C.2.1. (The Relationship between State and Religion - General Remarks)

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2.3. The Supreme Court of Israel

2.3.1. The Jurisdiction of the Supreme Court

The Israeli Supreme Court is seated in Jerusalem,[79] and its jurisdiction derives from Section 15 of the Basic Law: Judicature of 1984.[80]

The Supreme Court of Israel has a dual function:

According to Section 15(b) of the Basic Law: Judicature of 1984 the Supreme Court is primarily an appellate court, considering appeals of trial court judgments and appellate decisions of the District Courts.[81]

According to Section 15(c) of the Basic Law: Judicature of 1984 the Supreme Court also sits as a High Court of Justice hearing disputes between the individual and the state.

Section 15(c) of the Basic Law: Judicature of 1984 states as follows:

> "The Supreme Court shall sit also as a High Court of Justice. When so sitting, it shall hear matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court (beit mishpat or beit din)."[82]

Anyone - i.e. a citizen of Israel as well as any person under Israel's jurisdiction - who believes to be infringed in his human rights or freedoms has the possibility to launch a direct petition to the Supreme Court.

In its capacity as High Court of Justice, the Supreme Court has original jurisdiction over virtually all branches of the government, and sits as a trial court from which there is no appeal. In this case the jurisdiction of the High Court of Justice is parallel to that of the English High Court of Justice.

In contrast to the continental law countries, Israel's legal system has neither a separate branch of administrative law nor a separate system of administrative courts.

State authorities are subject to general rules of law, and litigation involving such authorities is conducted in the regular courts of law.[83]

According to Section 15(d)(2) of the Basic Law: Judicature of 1984, the Supreme Court, sitting as a High Court of Justice is also competent to issue orders in the nature of the British prerogative writs (habeas corpus, mandamus, prohibition, certiorari and quo warranto) and injunctions against all public authorities (state or

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79 Section 15(a) of the Basic Law: Judicature, supra note 23
80 Section 15 of the Basic Law: Judicature, Ibid.
81 Section 15(b) of the Basic Law: Judicature, id.
82 Section 15(c) of the Basic Law: Judicature, id.
83 Maoz, supra note 55, at 34

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municipal), their officials and other bodies or persons which fulfill public functions by virtue of law.

Section 15(d)(2) of the Basic Law: Judicature of 1984 states as follows:

> "Without prejudice to the generality of the provisions of subsection (c), the Supreme Court sitting as a High Court of Justice shall be competent...
>
> (2) to order State or local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting."[84]

In that capacity the Supreme Court serves in principle as administrative court.[85]

Important to mention is at this point is the fact that the access to the Supreme Court - sitting as a High Court of Justice - is quick, the filing fees are low-priced, and standing (locus standi) is liberally decided.[86]

2.3.2. Judicial Activism and Judicial Restraint

The absence of a formal and entrenched constitution and the permanent potentiality of the Knesset to override any decision of the Supreme Court, contributed to the development of judicial activism of the Supreme Court in certain fields, such as freedom of speech, freedom of association, freedom of demonstration, freedom of movement and freedom of religious worship.

Until the enactment of the two basic laws on human rights in 1992, the Supreme Court of Israel has been the most decisive instrument[87] in creating and implementing certain civil and political rights at least with regard to a specific group of population of Israel - i.e. the Jewish population.

In a large number of judgments - starting in 1953 with Justice Agranat's decision in the *Kol Ha'am* case[88] - the Supreme Court developed fundamental principles and standards, which in other countries are protected by written constitutions or bill of rights.

This was done by using the judicial instruments of interpretation of the Declaration of the Establishment of the State of Israel of 1948, of legislative

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[84] Section 15(d)(2) of the Basic Law: Judicature, supra note 23

[85] Asher Maoz, The System of Government in Israel, 8 T.A.Univ.Stud.i.L.(1988) 9, at 49, 50

[86] Zeev Segal, The Locus Standi at the Supreme Court of Israel (Second Ed., 1993) (Hebrew)

[87] Pnina Lahav, Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy, 24 Isr.L.Rev. (1990) 211, at 251-258; Itzhak Zamir, Human Rights and National Security, 23 Isr.L.Rev. (1989) 375, at 392-405; Baruch Bracha, The Protection of Human Rights in Israel, 12 I.Y.H.R.(1982) 110; Amos Shapira, The Status of Fundamental Individual Rights in the Absence of a Written Constitution, 9 Isr.L.Rev. (1974) 497

[88] *Kol Ha'am,* supra note 52

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enactments and other general principles underlying democratic systems of government.

Already in the first years of Israel's existence the Supreme Court has developed the presumption that civil rights may not be limited or infringed, except by an unequivocal expression of a contrary intention of the legislature, i.e. an explicit provision in a particular law.[89]

In some decisions the Supreme Court established the principle that - in the absence of such an unequivocal statutory authorization directing or permitting an administrative body to act in an other manner - the said authority must be guided by the philosophy of respecting the personal freedom and may not deprive the individual's basic human rights.[90]

The Supreme Court also held that if it comes to the situation that the interpretation of the law leads to two different results, the Court shall prefer the construction that upholds the basic rights.[91]

It should be mentioned at this point that - despite the enactment of the above mentioned two basic laws on human rights in 1992 - the jurisprudence that was developed by the Israeli Supreme Court over the decades and that has not been overruled or declared as illegal or invalid, forms still the main source and legal environment for human rights and freedoms.

The Supreme Court was extremely influential in the creation of non-written legal norms and standards - i.e. norms and standards not expressly provided by legislation - in the area of freedom of speech. Several judgments of the Supreme Court established the principle that "Israel as a democracy is committed to the principle of freedom of speech."[92]

As I will show in detail in the context of two important and representative civil and political rights - namely the right to freedom of expression and the right to property - the Supreme Court has exercised judicial activism as well as judicial restraint with regard to different legal sources applied on two different groups of population - i.e. the Jewish and the Palestinian Arab people living in Israel and the Occupied Territories.

Regarding the right to freedom of speech - which will be discussed in Chapter F of this work - the Supreme Court has shown strong judicial activism, when it came

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89 H.C. 1/49, *Bejerano v. Minister of Police,* for a summary in English see 8 I.Y.H.R. (1978) 373; H.C. 144/50, *Sheib v. Minister of Defence,* translated into English in 1 S.J. (1948-1953) 1, at 14

90 H.C. 243/62, *Israeli Film Studios Ltd. v. Levi Geri and the Film and Theater Censorship Board,* translated into English in 4 S.J. (1961-1962) 208, at 216; H.C. 262/62, *Peretz v. The Local Council of Kfar Shmaryahu,* translated into English in 4 S.J. (1961-1962) 191, at 205

91 H.C. 98/69, *Bergman v. Minister of Finance,* translated into English in 8 S.J. (1969-1988) 13, at 18

92 *Kol Ha'am*, supra note 52; *Israel Film Studios Ltd v. Levi Geri*. supra note 90

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to the application and interpretation of Section 19 of the Press Ordinance, 1933[93] - a legislative source which was used mainly with regard to the Hebrew press and the Jewish population.[94]

At the same time, the Israeli Supreme Court has shown strong judicial restraint, rigid formalism and mechanical jurisprudence with regard to the application and interpretation of Regulation 94(2) of the Defence (Emergency) Regulations, 1945[95] - a legislative source which was and is mainly used against the Palestinian Arabic press and speakers.[96]

Regarding the right to property - which will be discussed in Chapter G of this work - the Supreme Court has almost always shown judicial restraint in cases relating to violations of the right to property by the Israeli government towards the Palestinian Arab people remaining or trying to return to Palestine after the establishment of the state of Israel in May 1948.[97]

The same judicial restraint was exercised by the Supreme Court in cases involving the right to property of the Palestinian Arab people living in the Occupied Territories.[98]

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93 Press Ordinance, 1933, reprinted in M. Doukhan, Laws of Palestine, 1932, 243-266

94 For details see Chapter F.3.2. (Supreme Court Cases concerning Section 19(2) of the Press Ordinance, 1933)

95 Defence (Emergency) Regulations, 1945, supra note 63

96 For details see Chapter F.3.3. (Supreme Court Cases concerning Regulation 94(2) of the Defence (Emergency) Regulations, 1945)

97 See for example the below described cases - involving the Palestinian Arab minority in Israel within the Green Line - concerning the following issues:
Expropriation of private land owned by Palestinian Arab citizens of Israel:
H.C 30/55, *Nazareth Lands Defence Committee v. Minister of Finance*, 9 P.D. 1261;
H.C. 181/57, *Ahmad Kassam v. Minister of Finance*, 12 P.D. 1986
Declaration of Palestinians as "Absentees" and Confiscating their Land:
C.A. 58/54, *Habab v. The Custodian of Absentees' Property,* 10 P.D. 912; C.A. 440/60, *Natzara v. Custodian of Absentees Property,* 17(ii) P.D. 1345; C.A. 1397/90, *Diab v. Custodian of Absentees' Property,* 46(v) P.D. 789; C.A. 3747/90, *Custodian of Absentees' Property v. Mussa*, 46(iv) P.D. 361; H.C. 32/62, *Custodian of Absentees' Property v. Shariah Court*, 16(iii) P.D. 1942; C.A. 434/62, *Beria v. Custodian of Absentees' Property,* 17(iii) P.D. 1538
Retrospective validation of expropriations of Palestinian Arab owned lands, that was used or assigned for purposes of so called "security" (which means for military purposes or for development of existing or newly established Jewish settlements):
H.C. 5/54, *Yonas v. Minister of Finance*, 8 P.D. 314; H.C. 14/55, *Al-Nadaf v. Minister of Finance*, 11 P.D. 785; H.C. 158/58, (*Tsch*-) *Uda v. Competent Authority*, 12 P.D. 1513

98 See the below described cases involving the Palestinian people in the Occupied Territories:
Requisition of Palestinian Arab private land for the establishment of military bases and Jewish civilian settlements:
H.C. 606/78, *Ayub v. Minister of Defence*, for a summary in English see 9 I.Y.H.R. (1979) 337 [The Beth El case]
Expropriation of Palestinian Arab private land for the construction of highways:

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In the context of this work I will also show that the Supreme Court has nearly always refused to interfere in so called "security matters" and/or generally in cases dealing with the violation of the fundamental rights of the Palestinian Arab people living in Israel and the Occupied Territories.[99]

H.C. 393/82, *Askan (Cooperative Society Lawfully Registered in the West Bank Region) v. Military Commander of IDF in the West Bank,* translated into English in Public Law in Israel (ed. by Itzhak Zamir and Allen Zysblat, Clarendon Press Oxford, 1996) 396, at 407
Demolitions of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 361/82, *Khamri v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 314; H.C. 698/85, *Dagalis v. Military Commander of IDF in the West Bank,* for a summary in English see 17 I.Y.H.R. (1987) 315; H.C. 897/86, *Jab'r v. Military Commander of IDF Central Command*, for a summary in English see 18 I.Y.H.R. (1988) 252; H.C. 779/88, *Alfasfus v. Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 316; H.C. 796/88, *Ahlil v. Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 320; H.C. 45/89, *Abu Daka v. Minister* of Defence, for a summary in English see 23 I.Y.H.R. (1993) 322; H.C. 610/89, *Bakhari v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 325; H.C. 658/89, *Sanuar v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 329; H.C. 1005/89, *Aga v. Military Commander of IDF in the Gaza Strip,* for a summary in English see 23 I.Y.H.R. (1993) 330; H.C. 2209/90, *Shuahin v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 325; H.C. 4112/90, *Association for Civil Rights in Israel v. Military Commander of IDF in the Southern District,* for a summary in English see 23 I.Y.H.R. (1993) 333; H.C. 5740/90, *Hagba v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 336; H.C. 42/91, *Timraz v. Military Commander of IDF in the Gaza Strip,* for a summary in English see 23 I.Y.H.R. (1993) 337; H.C. 2977/91, *Tag v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 330; H.C. 4772/91, *Khizran v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 349; H.C. 5139/91, *Zakik v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 334; H.C. 2722/92, *Al-Amrin v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 337
Sealing off of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 434/79, *Sakhawil v. Military Commander of IDF in the West Bank*, for a summary in English see 10 I.Y.H.R. (1980) 345; H.C. 22/81, *Khamed v. Military Commander of IDF in the West Bank*, for a summary in English see 11 I.Y.H.R. (1981) 365; *Jab'r v. Military Commander of IDF Central Command*, ibid.; H.C. 387/89, *Ragabi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 329; *Aga v. Military Commander of IDF in the Gaza Strip,* ibid.; H.C. 948/91, *Hodli v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 327; H.C. 5667/91, *Gabrin v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 335; H.C. 5510/92, *Turkeman v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 347

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Forfeitures of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 5139/91, *Zakik v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 334
Seizure of houses belonging to Palestinian Arab civilians living in the Occupied Territories:
H.C. 401/88, *Abu Ryan v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 296
Seizure of land owned by Palestinian Arab civilians living in the Occupied Territories:
H.C. 290/89, *Goha v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 323

[99] Extrajudicial killings and executions of Palestinian Arab civilians by special (undercover) units of the Israeli army:
H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477; H.C. 428/86, *Barzilai v. Government of the State of Israel*, translated into English in 6 S.J. (1986) 1; H.C. 2888/99, *Hollander v. 1. Attorney General, 2. Chief Commander of the Military, 3. Uri Shoham, Attorney General of the IDF, 4. Lieutenant Colonel, Erez*, translated into English by Adalah: http://www.adalah.org/supreme.html
Administrative detention of Palestinian Arab civilians living in the Occupied Territories:
H.C. 253/88, *Sagdia et al v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 288; H.C. 576/88, *Husseini v. 1) Deputy President of the District Court of Jerusalem, Judge Eliyahu Noam and 2) Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 299; H.C. 769/88, *Oubeid v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 315; H.C. 670/89, *Ouda v. Military Commanders of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 326
Administrative detention and taking of hostages over years without fair trial of Palestinian Arab civilians living in the Occupied Territories:
H.C. 6843/93, *Qattamseh v. Military Commander of IDF in the West Bank,* Takdin Elyon 94(2) 2084; AAD 10/94, *Plonim (i.e. Unnamed) v. Minister of Defence*. Translated into English by Amnesty International:
http://www.btselem.org/Files/site/english/data/lebanon/detainees.htm
For a summary in English of this case see B'Tselem, The B'Tselem Human Rights Report, Volume 6, Summer 1998. See also on this issue the detailed report of B'Tselem, Israeli Violations of Human Rights of Lebanese Civilians (Jerusalem, January 2000) at 41-46
Deportation of Palestinian Arab civilians living in the Occupied Territories:
H.C. 97/79, *Abu Awad v. Military Commander of IDF in the West Bank*, for a summary in English see 9 I.Y.H.R. (1979) 343; H.C. 320/80, *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 344; H.C. 698/80, *Kawasme v. Minister of Defence,* for a summary in English see 11 I.Y.H.R. (1981) 349; H.C. 629/82, *Mustafa v. Military Commander of IDF in the West Bank,* for a summary in English see 14 I.Y.H.R. (1984) 313; H.C. 513/85, 514/85, *Nazal v. Military Commander of IDF in the West Bank,* for a summary in English see 16 I.Y.H.R. (1986) 329; H.C. 672/88, *Lavdi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 309; H.C. 765/88, *Shakhshir v. Military Commander of IDF in the West Bank (First and Second Phase)*, for a summary in English see 23 I.Y.H.R. (1993) 311-314; H.C. 792/88, *Matur v. Military Commander of IDF in the West Bank (First and Second Phase),* for a summary in English see 23 I.Y.H.R. (1993) 316-320; H.C. 814/88, *Nassaralla et al. v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 321
Mass deportation of Palestinian Arab civilians living in the Occupied Territories:

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2.3.3. The Normative Status of Human Rights Case Law

As already elaborated in the previous sub-chapter 2.3.2., until the enactment of the two basic laws on human rights in 1992, in a large number of judgments the Supreme Court developed fundamental principles and standards, which in other countries are protected by written constitutions or bill of rights.

While studying the cases and decisions of the Israeli Supreme Court one may observe, that the formulations of these "non-written" - i.e. not expressly provided by legislation - fundamental principles and standards relating to human rights and freedoms and the rule of law vary in their style, that they are sometimes vague and have no definite jurisprudential conception.

Just to mention a few, one may find for example phrases such as:

"...the vision of the people...(and) its faith..."[100]

"...the mirror of our national life..."[101]

"...fundamental principles upon which our State is founded..."[102]

"...unwritten rights which derive directly from the democratic freedom-loving character of our State"[103]

"...constitutional factors..." and "...extra-statutory legal norms, standing not only above an ordinary law but also above the constitution...basic, supra-statutory norms..."[104]

H.C. 785/87, *Abd al Nasser al Aziz Abd al Aziz al Affo. 2. The Association for Civil Rights in Israel v. Military Commander of IDF in the West Bank;* H.C. 845/87, *1. Abd al Aziz Abd Alrachman Ude Rafia. 2.The Association for Civil Rights in Israel v. 1. Military Commander of IDF in the Gaza Strip. 2. Minister of Defence;* H.C. 27/88, *1. J'Mal Shaati Hindi v. Military Commander of IDF in the West Bank,* translated into English in 29 International Legal Materials (1990) 139 [The Afu case]; H.C. 5973/92, *Association for Civil Rights in Israel v. Minister of Defence*, translated into English in 10 S.J. (1988-1993) 168, for a summary in English see 23 I.Y.H.R. (1993) 353

Imposition of censorship on the press and published materials in connection with the Palestinian Arab people:

H.C. 619/78, *Al-Talia Weekly Magazine v. Minister of Defence*, for a summary in English see 10 I.Y.H.R. (1980) 333; H.C. 322/81, *Makhoul v. District Commissioner*, 37(i) P.D. 789; H.C. 415/81, *Ayoub v. District Commissioner,* 38(i) P.D. 750; H.C. 541/83, *Asli v. District Commissioner,* 37(iv) P.D. 837; H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477

[100] H.C. 10/48, *Zvi Zeev v. The Acting District Commissioner of the Urban Area of Tel Aviv (Gubernik),* translated into English in 1 S.J. (1948-1953) 68, at 72

[101] *Kol Ha'am*, supra note 52, at 105. In the original Hebrew text the term "Mirror" is translated as "in the light of".

[102] *Peretz v. The Local Council of Kfar Shmaryahu*, supra note 90, at 204

[103] *Israel Film Studios Ltd v. Levi Geri*, supra note 90, at 216

[104] E.A. 1/65, *Yeredor v. Chairman of the Central Elections Committee for the 6th Knesset*, 19(iii) P.D. 365, at 385, 389-90

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"...this unwritten principle is the soul of our entire constitutional regime..."[105]

As for the question of the normative nature of these "unwritten" extra-statutory principles for a long period the judges in Israel regarded them as "extra-legal principles" transcendending the limits of positive law.[106]

This approach is rooted in the positivistic conception that only rules, which are already formulated and declared by legal institutions really constitute "law." This conception equates "law" with hard and fast rules framed in legislative enactments or judicial decisions.

Professor Ronald Dworkin explains this understanding with the tendency of lawyers to associate laws and rules and to think of "the law" as a collection of system of rules. He bases this assumption on Roscoe Pounds diagnosis, that English speaking lawyers were tricked into it by the fact that the English language uses the same word, changing only the article, for "a law" and "the law", while other languages use the word "loi" and "droit", and "Gesetz" and "Recht". He furthermore argues that the principal reason to associate laws with rules lies in the conventional legal education, which idolizes the reciting of specific rules.[107]

Professor Lon Fuller on the other hand says that those rules of morality are far from being "extra legal" but are rather organically connected with the functioning of the legal order.[108]

Later on with the decision of *Ha'aretz v. Israel Electric Corporation*[109] handed down in 1974, the Supreme Court adopted a positivistic conception concerning the normative quality of these "non-written standards and principles" of human rights and ruled that "they form an integral part of the law prevailing in Israel."

The then Chief Justice Meir Shamgar stated in this context as follows:

> "[T]he law in Israel embraces, according to our understanding and concepts, basic rules concerning the existence and protection of freedoms of the individual... [B]asic laws are protected and first and foremost among these, is the freedom of expression, and they form a substantive part of the law of Israel. The integration of these rights into our laws, as is well known, the consequence of the system of government which we so coveted, but the obligation to honor them is not merely a political or social-moral one; it also has legal status."[110]

David Kretzmer, Professor for Constitutional Law at the Hebrew University characterized the normative status of fundamental rights in Israel - prior to the

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105 *Bergman v. Minister of Finance,* supra note 91, at 18

106 Amos Shapira, A Proposal for Constitutional Judicial Review in Israel, 11 T.A.Univ.Stud.i.L. (1992) 123

107 Ronald Dworkin, Taking Rights Seriously (Duckworth 1977) 14, at 39

108 Lon Fuller, The Law in Quest of Itself (1940) 136

109 C.A. 723/74, *Ha'aretz, Ltd. v. Israel Electric Corporation,* translated into English in 9 S.J. (1977-1990) 226

110 Ibid., at 242

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enactment of the new basic laws relating to human rights - as that of soft legal principles.[111] According to his interpretation, they were legal principles because of their definite role in the decision-making process of the courts and other law-applying organs, since 1. government authorities may not restrict them without express statutes; 2. all authorities must be guided by them in interpretation of statutes; and 3. government authorities have to give them appropriate weight when exercising administrative discretion.

On the other hand Professor Kretzmer called the legal status of these principles "soft" because they do not bind the legislative power of the Knesset. This is revealed by various decisions of the Supreme Court where this court refused to annul primary legislation of the Knesset that curtails those basic rights which are recognized as legal principles.[112]

Even if the new basic laws on human rights are a sign of progress in the human rights field in Israel, there is - as I will show in detail in the further chapters - nevertheless still very much to do in order to really bring a democratization of Israel's legal order as a whole.

2.3.4. Summary and Conclusions

1. According to the above mentioned rules established by the Supreme Court in the decisions[113] - at least in theory - the Supreme Court has always to act on the presumption that the legislature was aware of the basic rights of the individual and is intended to value them. The judicial instrument to implement this policy is the process of interpretation of existing enactments by the Supreme Court.

According to the above mentioned presumption, the starting point for every statutory interpretation is that the legislature's intention was cognizant of fundamental individual rights when it created the statute.

This presumption favoring fundamental rights and liberties has been described as the strongest presumption of Israel's constitutional system, that empowers the Supreme Court to develop procedural and substantive rules respecting the rights of the individual.[114]

2. However, despite the above mentioned self-perceived role of the Supreme Court "to be a defender of human rights and freedoms", the Court has in reality played a role, which - due to the following facts - deserves sharp criticism.

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[111] David Kretzmer, Demonstrations and the Law, 19 Isr.L.Rev. (1984) 47, at 64-65; Kretzmer, supra note 29, at 143

[112] H.C. 450/70, *Rogozinsky v. State of Israel*, 26(i) P.D. 129 (1972); H.C. 142/89, *Tnuat Laor v. Speaker of the Knesset,* 44(iii) P.D. 529, at 554

[113] *Bejerano v. Minister of Police,* supra note 89; *Sheib v. Minister of Defence*, supra note 89

[114] Zeev Segal, Administrative Law, published in Introduction to the Law of Israel (eds. Amos Shapira and Keren C. DeWitt-Arar) (Kluwer Law, Boston, 1995)

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a. In most of the cases relating to the Palestinian Arab minority living in Israel within the Green Line, the Supreme Court has translated the discriminatory approach of the governmental policy into judgments.

b. In cases relating to the Palestinian Arab people living in the Occupied Territories the Court has played the role of an "agent" of the military government, defending harsh restrictions and serious violations of fundamental rights and freedoms. The majority of the hundreds of cases related to the Occupied Territories were decided by the Supreme Court in favor of the considerations of the military government.

3. The Supreme Court of Israel - sitting in its capacity as a High Court of Justice - has become an important and powerful policymaker in Israel's society.

3. The Nature and Legal Status of the Declaration of the Establishment of the State of Israel, 1948

3.1. General Remarks

As far as the legal status and the enforceability of the Declaration of the Establishment of the State of Israel, 1948 is concerned, the following situation exists:

Until the enactment of the above mentioned two basic laws on human rights[115] in 1992, the Declaration of the Establishment of the State of Israel was neither considered as part of the constitutional system nor as having the force of a law. In other words, it did not confer any individual rights to the citizen of the state of Israel nor did it impose any legal duty on to the Israeli government.

Nevertheless, the Declaration of the Establishment of the State of Israel was - since the Supreme Court decision handed down in 1953 in the matter *Kol Ha'am v. Minister of Interior*[116] - considered as an instrument of legal interpretation.

In 1992 however, with the enactment of the said basic laws on human rights, the situation changed insofar as the two mentioned basic laws on human rights explicitly refer to the Declaration of the Establishment of the State of Israel.

Both basic laws on human rights declare:

> "The fundamental rights of a person in Israel...shall be honored in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel."[117]

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[115] Basic Law: Human Dignity and Freedom, supra note 1; Basic Law: Freedom of Occupation, supra note 1

[116] *Kol Ha'am* case, supra note 52

[117] Section 1A of Basic Law: Human Dignity and Freedom, supra note 1

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However, it is not yet clear, to what extent the Declaration of the Establishment really has become an integral part of the said basic laws on human rights or not.

Before discussing this issue in more detail in sub-chapter 8 of this work, it is, however, very important to take a glance at the very early Supreme Court jurisprudence regarding the nature and status of the Declaration of the Establishment of the State of Israel.

This jurisprudence ranges from considerations regarding the status of the Declaration as a political instrument - as it happened for example with the decision in the matter *Zeev v. Gubernik*[118] - to the determination of the Declaration as an interpretative instrument - as it happened with the often cited decision in the matter *Kol Ha'am v. Minister of Interior*[119]

3.2. Supreme Court Jurisprudence

3.2.1. The Declaration of the Establishment of the State of Israel - Considered as "Political Instrument"

3.2.1.1. Zvi Zeev v. Gubernik (1948)

The Facts of the Case

In this case an order of requisition of an apartment for the use of the second respondent - a governmental official (i.e. the Director of the Financial and Control Section of the Ministry of the Interior) - was issued by the Acting District Commissioner of Tel Aviv.[120]

Against the said requisition order which was based on Regulation 48(1) of the British mandatory Defence Regulations, 1939[121] the landlord of the apartment brought a petition before the District Court of Tel Aviv.[122]

Section 2 of Basic Law: Freedom of Occupation, supra note 1

118 *Zvi Zeev v. Gubernik,* supra note 100, at 72

119 *Kol Ha'am case*, supra note 52

120 *Zeev v. Gubernik,* supra note 100, at 68

121 Regulation 48(1) of the Defence Regulations, 1939 states as follows:

> "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of public safety, defence or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may five such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

See Defence Regulations, 1939 P.G. No. 914 (26 August 1939) Suppl. III, 659, at 689

On a factual basis the petitioner protested against the maladministration and corruption which was involved in the governmental act of the first respondent who issued the requisition order.[123]

Additionally, the petitioner challenged the validity of the Defence Regulations, 1939. Normatively he based the petition with regard to this reason on two grounds, namely first that the said Defence Regulations, 1939 had been impliedly repealed by Section 9(a) and (c) of the Law and Administration Ordinance, 1948[124] and second that they were inconsistent with the Declaration of the Establishment of the State of Israel of 14 May 1948 which declared in its third part, that "...the State of Israel shall be based on freedom, justice and peace as envisaged by the prophets of Israel."[125]

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122 The District Court of Tel Aviv exercised at then the powers of the High Court of Justice.

123 The facts of the case revealed that prior to issuing the requisition order, the petitioner (the landlord) had sought to negotiate a rent agreement with the second respondent (the Director of the Financial and Control Section of the Ministry of the Interior). However, the negotiations were unsuccessful because the Director of the Financial and Control Section of the Ministry of the Interior regarded the amounts requested by the landlord as excessive. Nevertheless the second respond (the Director of the Financial and Control Section of the Ministry of the Interior) used personal connections in order to obtain the apartment.

124 Section 9 of the Law and Administration Ordinance, 1948, states as follows:

> "(a) If the Provisional Council of State deems it expedient to do so, it may declare that a state of emergency exists in the State, and upon such declaration being published in the Official Gazette, the Provisional Government may authorize the Prime Minister or any other Minister to make such emergency regulations as may seem to him expedient in the interests of the defense of the State, public security and the maintenance of supplies and essential services.
>
> (c) An emergency regulation shall expire three months after it is made, unless it is extended, or revoked at an earlier date by an Ordinance of the Provisional Council of State, or revoked by the regulation-making authority."

See Law and Administration Ordinance, 1948, 1 L.S.I.(1948) 7, at 8-9

125 *Zeev v. Gubernik,* supra note 100, at 68, 70-71

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The Decision of the Supreme Court

The then President of the Supreme Court, Justice Moshe Smoira, handing down the judgment for the Court, rejected the petition.

In a formalistic and legalistic style of reasoning - that means without looking at the substantive issues of administrative discretion and the real facts of the case such as the maladministration and corruption involved in the governmental act - he held that the said Defence Regulations, 1939 remained in force since they were not repealed by Section 9(a) and (c) of the Law and Administration Ordinance, 1948.[126]

With regard to the idea that the Declaration of the Establishment of the State of Israel could have any constitutional status and thus serve as a normative basis of fundamental rights or freedoms,[127] the then Justice Moshe Smoira held as follows:

> "...the only object of the Declaration of Independence was to affirm the foundations and the establishment of the state for the purpose of its recognition by international law. It [the Declaration] gives expression to the vision of the people and its faith, but it contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal."[128]

The same line of interpretation regarding the legal status and nature of the Declaration of the Establishment of the State of Israel was also adopted in the judgment handed down by the Supreme Court in the case of *El-Karbutli v. Minister of Defence.*[129]

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126 Justice Smoira stated as follows:

> "Section 9 [of the Law and Administration Ordinance, 1948] put an end to the operation of the earlier statutes as a source of power to make regulations in the future, but that source [*i.e. Regulation 48 of the Defence Regulations, 1939* upon which the first respondent (the acting authority) based its decision] as part of the "law in force" in accordance with Section 11 [of the Law and Administration Ordinance, 1948] remained effective." [Emphasis added]

See ibid., at 73

127 Pnina Lahav argued that behind the concrete conflict between the parties the case dealt with the confrontation between a government committed to utilitarianism and a liberal model of government committed to values such as due process, separation of powers and fundamental freedoms. See in this regard Lahav, Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy, supra note 87, at 229

128 *Zeev v. Gubernik,* supra note 100, at 71-72

129 H.C. 7/48, *El-Karbutli v. Minister of Defence*, 2 P.D. 5

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3.2.1.2. El-Karbutli v. Minister of Defence (1948)

The Facts of the Case

In this case a Palestinian Arab inhabitant of Yaffo was administratively detained for more than a month without knowing the reason for his arrest.

The said detention order was based on Regulation 111 of the Defence (Emergency) Regulations, 1945[130] and issued by the Military Government, which was imposed on most of the Palestinian Arab villages within the Green Line of the state of Israel during the period from 1948 and 1966.[131]

The petitioner raised two arguments for filing the petition against the said detention order.

The first argument was that since Regulation 111 of the Defence (Emergency) Regulations, 1945 is contradictory to the Declaration of the Establishment of the State of Israel of 1948, also the detention order was invalid.[132]

With regard to this argument, Justice Itzhak Olshan, handing down the judgment for the Supreme Court, relied on the *Zeev v. Gubernik* case and directly applied the therein established rule.

With regard to this argument, he explicitly stated that while the Declaration of the Establishment of the State of Israel, 1948 defines the basic credo of the state, it is not a constitutional law which in practice determines whether ordinances and laws are valid or invalid.[133]

The second argument was that the detainee was deprived of his right to file an appeal to an advisory committee, due to the fact that such a committee was not yet appointed.

It should be said that the non-establishment of such an advisory committee did not have any immediate implication since in any case it was not empowered to act as an appeal court and all it could was to give its recommendations to the Military Government.

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[130] Defence (Emergency) Regulations, 1945, supra note 63

[131] For more details regarding the issue of the system of military government within Israel from 1948-1966 see infra Chapter D.5.2.3. (The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966)

[132] *El-Karbutli*, supra note 129, at 15

[133] Ibid., at 13

The Decision of the Supreme Court

The Supreme Court accepted the second argument of the petitioner and - considering the non-establishment of an advisory committee as technical or formal defect - decided to annul the detention order.

The Supreme Court used a legalistic and formalistic style of reasoning and - insisted that governmental organs comply with the letter of law and with legal rules. As it is typical for this style of reasoning, the Court refused to examine the substantive issues of the governmental action nor to question the validity of the anti-democratic Defence (Emergency) Regulations, 1945.

Summary and Conclusions

The two above discussed Supreme Court cases are characterized by the following jurisprudential conceptions and styles of reasoning:

1. Consideration of the Declaration of the Establishment of the State of Israel, 1948 solely as political instrument to be used in the international sphere to affirm the foundation and the establishment of the State of Israel.[134]
2. Strong legalistic and formalistic style of judicial reasoning.
3. Preference of the principle of separation of powers and the supremacy of the legislature by the Supreme Court, and thus rejection of the petition to uphold the Declaration of the Establishment of the State of Israel, 1948 as a "higher law" that determines the validity of primary legislation, i.e. statutes passed by the Knesset or the British mandatory legislator.
4. Establishment of the clear concept not to undertake judicial review on the validity of primary legislation.

3.2.2. The Declaration of the Establishment of the State of Israel - Considered as "Instrument of Interpretation"

Some years later, however, the Supreme Court reconsidered its attitude towards the status of the Declaration of the Establishment of the State of Israel, 1948.

In 1953, in the often cited decision handed down by the Supreme Court in the matter of *Kol Ha'am v. Minister of Interior,*[135] the Declaration of the Establishment of the State of Israel, 1948 has been treated as an instrument of interpretation.

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[134] Shlomo Guberman, Israel's Supra-Constitution, 2 Isr.L.Rev. (1967) 455, at 457

[135] *Kol Ha'am case*, supra note 52

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The Declaration of the Establishment of the State of Israel, 1948 has important implications on the constitutional framework of the state of Israel, in the sense that it provided a fount of inspiration.

Before stepping, however, into a discussion of the said issue and other relevant problems, I want first of all discuss in more detail the jurisprudential concepts and normative sources upon which the above mentioned *Kol Ha'am* case rests*,* since this case is widely considered as a "landmark case" within Israel's jurisprudence regarding civil and political rights and as having set the cornerstone of constitutional law within Israel's legal system.[136]

3.2.2.1. Kol Ha'am Company Limited v. Minister of Interior (1953)

The Facts of the Case

In this case[137] the Supreme Court was called upon to define the relationship between the right to freedom of the press and the power of the competent authority (i.e. the Minister of the Interior) to place a limit on the use of the right to suspend the publication of articles according to Section 19(2) (a) of the British Press Ordinance, 1933.[138]

Section 19(2) (a) of the Press Ordinance, 1933 empowers the competent authority to suspend the publication of articles:

> "...if any matter appearing in a newspaper is, in the opinion of the High Commissioner-in Council [i.e. the Minister of Interior], likely to endanger the public peace."

The Minister of Interior exercised his authority and suspended two communist newspapers - i.e. *Kol Ha'am* and *Al-Ittihad* - which published articles on the Korean war.

The Decision of the Supreme Court

The Supreme Court upheld the petition and ruled that the orders of suspension had been wrongly issued and should be set aside.[139]

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[136] David Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, Israeli Reports to the XIII International Congress of Comparative Law (ed. Celia Wasserstein Fassberg) The Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem 1990, 183, at 192

[137] I will discuss this case in more detail in Chapter F.3.2. (Supreme Court Cases concerning Regulation 19(2) of the Press Ordinance, 1933)

[138] Press Ordinance, 1933, supra note 93, 243-266

[139] *Kol Ha'am case*, supra note 52, at 90

Justice Agranat, who wrote the opinion for the Court in this well known case concerning freedom of speech, adopted the "near certainty" or "probable danger" test as general test for resolving situations of conflict between freedom of expression and public order or security. He outlined judicial guidelines that the decision making administrative authorities were expected to follow in imposing restrictions.

He held, that in order to suspend a newspaper, the Minister of Interior must show that it is probable that as a consequence of the publication a danger to the public peace exists. He clearly established that a bare tendency in that direction will not suffice.[140]

Justice Agranat also held that:

> "...the case that reached the court raises some fundamental problems, demanding the reconsideration of ancient and well-worn principles. Freedom of the press, regarded as specific form of freedom of expression, is closely bound up with the democratic process."[141]

In this regard Justice Agranat gave a long and well-founded opinion about the meaning of democracy - being a government by will of the people and by consent - and about the task of the democratic process of investigating the truth and selecting the common aims of the people through the means of negotiation, discussion, open debate and free exchange of ideas.

In support of his conclusions Justice Agranat relied on famous British cases, such as *Attorney-General v. De Keyser's Royal Hotel, Limited*[142] and on the writings of British philosophers, such as William Blackstone and John Stuart Mill.[143]

Furthermore, Justice Agranat adopted American doctrines and the views of prominent American thinkers, such as Professor Chafee, as well as the American jurisprudence of *Abrams v. U.S.*,[144] *Whitney v. People of the State of California*,[145] *Dennis v. U.S.*[146] and others.[147]

To found his opinion, Justice Agranat also relied on the Declaration of the Establishment of the State of Israel when it came to interpret the laws of the state.

He held as follows:

> "The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover the matters set forth in the Declaration of Independence, especially as regards the basing of the State "on foundations of freedom" and the securing of freedom of conscience, mean that Israel is a

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140 Ibid., at 115
141 Id., at 90
142 *Attorney-General v. De Keyser's Royal Hotel, Limited* (1920) A.C. 508
143 *Kol Ha'am case*, supra note 52, at 97, 98
144 *Abrams et al. v. United States* (1919) 40 S.Ct.Rep. 17
145 *Whitney v. People of the State of California* (1926) 47 S.Ct. Rep. 641
146 *Dennis et al. v. United States* (1951) 71 S.Ct. Rep. 857
147 *Kol Ha'am case*, supra note 52, at 96-102

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> freedom-loving state. It is true that the Declaration "does not consist of any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws" (Zeev v. Gubernik [(1948) 1 P.D. 85] but insofar as it "expresses the vision of the people and its faith" (ibid), we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning of the laws of the state, including the provisions of a law made in the time of the Mandate and adopted by the state after its establishment, through the channel of Section 11 of the Law and Administration Ordinance, 1948; for it is a well-known axiom that the law of a people must be studied in the light of its national way of life." [148]

Summary and Conclusions

1. In the *Kol Ha'am* case the Supreme Court resorted the first time to the Declaration of the Establishment of the State of Israel, 1948 as an instrument for interpretation in order to incorporate freedom of speech law into Israel's legal order.
2. Regarding the legal nature of the Declaration of the Establishment of the State of Israel, 1948 one can observe that - although in the *Kol Ha'am* case it was not declared to be a constitutional law - it has been considered not only as a statement of ideology and political belief. Far more the Declaration started - as a result of the decision in the *Kol Ha'am* case - to serve as an instrument of legal interpretation, especially in the field of civil and political rights of individuals.
3. In contrast to most of the jurisprudence that preceded and followed the *Kol Ha'am* case, the Supreme Court used *in this* specific case a liberal/libertarian, legal realist and sociological jurisprudential conception which is characterized by the recognition of the principle of free speech as an important condition for the existence and the proper functioning of a democracy. This approach also recognizes that law reflects historical, political, economical, social and other events, theories and trends.
4. In accordance with the mentioned conception, the Supreme Court interpreted the Press Ordinance, 1933 narrowly, and thus restricted the discretion of the Minister of Interior according to this specific statute.

Other Cases and Final Conclusions

The Supreme Court used the Declaration of the Establishment of the State of Israel as an instrument of interpretation of statutes also in numerous other cases related to civil rights - such as in the decisions of *Rufeisen v. Minister of the Interior*[149], *Israeli Film Studios Ltd. v. Levi Geri and the Film and Theater Censorship Board*[150] and *Peretz v. Chairman, Council and Inhabitants of Kfar*

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[148] Ibid., at 105

[149] H.C. 72/62, *Rufeisen v. Minister of the Interior,* translated into English in a Special Volume of S.J. (1962-69) 1, at 22

[150] *Israeli Film Studios Ltd. v. Levi Geri,* supra note 90, at 216

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Shmaryahu,[151] *Yeredor v. Chairman of Central Elections Committee,*[152] *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*[153] to mention only a few of them.

Shlomo Guberman argued that in the above mentioned cases the Supreme Court could have come to the same conclusions even without invoking the Declaration of the Establishment of the State of Israel as interpretative instrument, only by relying on general principles of natural justice and equity.[154]

After this discussion of the nature and legal status of the Declaration of the Establishment of the State of Israel, 1948, I shall proceed now with the issue of Israel's unfulfilled obligation to enact a comprehensive, formal and written constitution including a bill of rights as requested in the Declaration of the Establishment of the State of Israel, 1948 and the question of the power of the Knesset to enact a constitution.

I will describe the process of attempts and achievements in forming a constitution and a bill of rights.

This process clearly reflects the big gap and disagreement in the society of Israel concerning the state’s fundamental principles, values and standards that lie behind and beneath the whole system.

However, a brief survey of Israel’s constitutional policy at the beginning of the state helps to clarify the present discussion and the still unresolved problems.

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151 *Peretz v. Local Council of Kfar Shmaryahu*, supra note 90, at 195

152 *Yeredor v. Central Elections Committee for the 6th Knesset,* supra note 104, at 386

153 E.A. 2/84, 3/84, *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, translated into English in 8 S.J. (1969-1988) 83, at 158

154 Guberman, supra note 134, at 458

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4. Israel's Obligation to Enact a Constitution including a Bill of Rights as Requested by the Declaration of the Establishment of the State of Israel, 1948

4.1. The Elections to the Constituent Assembly and its Transformation into "The First Knesset"

The Declaration of the Establishment of the State of Israel, 1948 clearly specified in its second part

1. that a Constituent Assembly - which shall adopt a Constitution - should be elected no later than 1 October 1948,[155] and

2. that the first election to regular authorities should take place pursuant to this Constitution.[156]

The words of the Declaration of the Establishment of the State of Israel, 1948 clearly prove that the intention of the so called "founding fathers" of the state of Israel was to distinguish between a constitutive and legislative power, and to restrict the powers of the Constituent Assembly to the framing of a constitution including a bill of rights.

However, as already elaborated, the adoption of the United Nations General Assembly Resolution 181 (II) in November 1947 lead to a massive flight and expulsion of hundreds of thousands of local Palestinian Arabs and to the outbreak of a civil and guerrilla warfare between the Arab and the Jewish Zionist community in Palestine.[157] Moreover, the establishment of the state of Israel in May 1948 caused the involvement of the newly created state of Israel in a full-fledged war with all Arab neighbors which had sent troops in order to defend the Palestinian Arab civilian population.[158]

The result of the mentioned situation of war and turmoil in Palestine was that the requested elections to the Constituent Assembly did not take place within the scheduled period of time, but were postponed, and took place only on 25 January 1949.[159]

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155 Declaration of the Establishment of the State of Israel, supra note 7, at 4

156 Ibid.

157 For details on this issue see Chapter A.5.4. (The Period from 1940 until the Adoption of the United Nations General Assembly Resolution 181 (II) of 29 November 1947)

158 For details on this issue see Chapter A.5.5. (The Period after the Adoption of the United Nations General Assembly Resolution 181 (II) of 29 November 1947 until the Signment of Armistice Agreements in 1949)

159 Melville B. Nimmer, The Uses of Judicial Review in Israel's Quest for a Constitution, 70 Columbia Law Review (1970) 1217, at 1219

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The Declaration of the Establishment of the State of Israel, 1948 also specified in its second part that - until the establishment of the elected, regular authorities of the state - the People's Council[160] shall act as Provisional Council of State.[161]

On the same day of the declaration of the state of Israel the Provisional Council of State constituted itself as temporary legislative branch of the newly created state of Israel.[162]

The first legislative act of the said Provisional Council of State was the enactment of the Law and Administration Ordinance[163] in May 1948.

Section 7(a) of this Law and Administration Ordinance provides that the Provisional Council of State would itself be the legislative authority, and the laws enacted by the Provisional Council of State shall be called "Ordinances".[164]

Further important legislative enactments of the Provisional Council of State were the Constituent Assembly Elections Ordinance, 1948[165] and the Constituent Assembly (Transition) Ordinance, 1949.[166]

On 25 January 1949, in accordance with the above mentioned two laws, the Constituent Assembly was elected.

As already said above, according to the words of the Declaration of the Establishment of the State of Israel, 1948 the intent was to establish two elected bodies which should have distinguished functions. Thus the original designation of the Constituent Assembly was to draw up a constitution including a bill of rights.

However, on 13 January 1949, twelve days prior to the election of the Constituent Assembly, the Provisional Council of State enacted the above mentioned Constituent Assembly (Transition) Ordinance, 1949.[167]

In contradiction to the Declaration of the Establishment of the State of Israel, 1948 - which explicitly spoke of two distinguished elected authorities - the Constituent Assembly (Transition) Ordinance, 1949 provided that all of legislative powers of the Provisional Council of State (i.e. the non-elected temporary legislative power of Israel) shall be delivered in advance to the Constituent Assembly. The following two sections of the Constituent Assembly (Transition) Ordinance, 1949 established this new order:

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160 The Hebrew term for "People's Council" is "Mo'etzet Ha'Am". It functioned as legislature within the organized Jewish community in Palestine pre-1948 (i.e. the Yishuv). For details see Chapter A.1. (Historical Perspectives regarding the Right to Self-Determination of the Jewish and the Palestinian Arab People - Introduction)

161 For details on this issue see Chapter A.1. (Introduction)

162 Proclamation, 14 May 1948, 1 L.S.I.(1948) 6

163 Law and Administration Ordinance, 1948, supra note 124

164 Ibid., at 8

165 Constituent Assembly Elections Ordinance, 1948, 2 L.S.I. (1948/49) 24

166 Constituent Assembly (Transition) Ordinance, 1949, 2 L.S.I. (1948/49) 81

167 Ibid.

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Section 1 of the Constituent Assembly (Transition) Ordinance, 1949 explicitly declared that

> "The Provisional Council of State shall continue [to be] in office until the convening of the Constituent Assembly of the State of Israel; upon the convening of the Constituent Assembly the Provisional Council of State shall dissolve and shall cease to exist."[168]

Section 3 of the Constituent Assembly (Transition) Ordinance, 1949 established at the same time that

> "The Constituent Assembly shall, so long as itself otherwise decide, have all the powers vested by law in the Provisional Council of State."[169]

The Provisional Council of State was in fact replaced by the Constituent Assembly, which became the legislative body of the newly established state of Israel.

Important to mention is that the Constituent Assembly (Transition) Ordinance, 1949 does not mention anything about the Constituent Assembly's power to formulate a Constitution as it was explicitly required by the Declaration of the Establishment of the State of Israel, 1948.

Conclusions

From Section 1 and Section 3 of the Constituent Assembly (Transition) Ordinance, 1949 the following important conclusions can be drawn:

1. The Constituent Assembly (Transition) Ordinance, 1949 does not mention anything about the Constituent Assembly's power to formulate such a Constitution - despite the fact that the Declaration of the Establishment of the State of Israel explicitly provided that the Constituent Assembly should frame a Constitution.
2. Looking through the Constituent Assembly (Transition) Ordinance, 1949 one may easily observe that the formulations used in this ordinance are very vague, and, as I see it, this vagueness of the Constituent Assembly (Transition) Ordinance, 1949 could in fact create a confusion with regard to the nature of the body that should be elected.
3. Due to this vagueness, it must be doubted whether the electors in fact realized that in reality they were electing a legislature, and not (only) a constitution making body,[170] despite the fact that according to the Constituent Assembly (Transition) Ordinance, 1949 the electors, i.e. the Israeli citizens, were technically informed to elect a legislator and not (only) a constitution making body.

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[168] Id.
[169] Id.
[170] Nimmer, supra note 159, at 1219

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4.2. The Harari Resolution - Adopted in 1950

The first legislative act of the Constituent Assembly was the enactment of the Transition Law, 1949.[171] In this law it was declared that the legislative body of the state of Israel shall be called "Knesset," [172] and that the Constituent Assembly shall be called "The First Knesset." [173]

This First Knesset, which was also the Constituent Assembly, referred the considerations of a constitution to the Constitutional Legislative and Judicial Committee,[174] which - after not having reached any final conclusions - reported the matter back to the full chamber of the Knesset.[175]

Important to mention at this point is the fact that the debates in the Constitutional Legislative and Judicial Committee were in fact not so much about the *substance* of a constitution, but rather about the *preliminary question*, whether a constitution, in the sense of one unified document, was desirable for Israel at all, or at least, in the immediate future.

Dealing mainly with the latter mentioned question, the First Knesset of Israel finally did not adopt any constitution or bill of rights, but in its place it accepted in 1950 the Harari Resolution, named after its initiator.

The Harari Resolution states as follows:

> "The First Knesset charges the Constitutional, Legislative and Judicial Committee to prepare a draft constitution for the state. The constitution shall be composed of individual chapters in such a manner that each in itself constitute a basic law in itself. The chapters shall be brought before the Knesset to the extent which the Committee will terminate its work and all chapters together will form the state constitution." [176]

With the Harari Resolution, the Knesset has decided to take the way of gradual development through the enactment of specific topics in a series of basic laws which at the end of the process shall become a full written constitution.

During the first four decades of Israel's existence, such basic laws have indeed been enacted regarding the institutional aspects of Israel's constitutional system, but these laws - with the exception of a few entrenched provisions - do not have the force of a superior law which was to control ordinary legislation.[177]

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[171] Transition Law, 1949, 3 L.S.I. (1949) 3
[172] Knesset is the Hebrew term for "assembly"
[173] Section 1 of the Transition Law, 1949, supra note 171
[174] Nimmer, supra note 159, at 1219
[175] Ibid., at 1220
[176] Harari Resolution, supra note 16. The translation of the Harari Resolution from Hebrew into English is contained in Professor Nimmer's article entitled "The Uses of Judicial Review in Israel's Quest for a Constitution", supra note 159, at 1220
[177] See the basic laws enumerated in this Chapter B., supra notes 19-27

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However, not until 1992, any basic law was enacted in the field of fundamental human rights and freedoms, and only then two - partly entrenched - basic laws[178] dealing with certain civil rights were enacted.

Until today - i.e. more than 52 years after the establishment of the state of Israel in Palestine - the initial obligations of the Knesset to enact a comprehensive constitution including a bill of rights has still not been successfully fulfilled.

Especially the right to equality and the rights of the Palestinian Arab minority in Israel have never been sufficiently protected until the very day of writing this work.

Commenting on the developments that lead to the adoption of the Harari Resolution Professor Ruth Gavison of the Hebrew University noted that "the decision to transform the Constitution Assembly into the First Knesset - as it happened according to the Transition Law, 1949 - may be seen as the first step away from a constitution and a bill of rights, because it created the temptation to invoke the sovereignty of the Knesset and to decide that a constitution was not needed after all".[179]

Professor Claude Klein of the Hebrew University, on the other hand, called the Harari Resolution as a classical example of parliamentary tactics, in the sense that "those who oppose the act proposed, succeed in having it referred to a committee."[180]

As for the question of the legal status of the Harari Resolution it must be said that it does not have the power of a law but it is rather an internal document.

Important to mention is the fact that the Harari Resolution is vague and left a lot of important issues open, namely:

1. It does not deal with the question of the normative nature of the basic laws that should compose the future constitution of Israel. That means in other words the Harari Resolution did not deal with the question of whether the different basic laws have preferred normative status over other regular legislative acts of the Knesset, or if such a supreme status would be conferred only with the consolidation of the separate chapters into one single document.[181]

2. It does not say anything as to what form these basic laws finally take, and if only general norms and principles regarding the structures and powers of the executive, legislative and judiciary or if also normative, ideological rules including the political and social aims of the state, should be encompassed in the final constitution.

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178 Basic Law: Human Dignity and Freedom, supra note 1; Basic Law: Freedom of Occupation, supra note 1

179 Gavison, supra note 30, at 152

180 Claude Klein, A New Era in Israel's Constitutional Law, 6 Isr.L.Rev. (1971) 376, at 381

181 Maoz, supra note 85, at 10

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4.3. Arguments Raised Against the Enactment of a Constitution including a Bill of Rights

4.3.1. General Remarks

As already mentioned in the Introduction to this Chapter B, the question of whether Israel should have an entrenched formal constitution including a comprehensive bill of rights has been discussed within the Israeli society as well as in the Knesset since the establishment of the state of Israel in Palestine in 1948 up until today.

The first general Knesset debate concerning the issue of the enactment of a constitution including a bill of rights took place preceding the adoption of the Harari Resolution in 1950.[182]

Other major and interesting Knesset debates regarding this issue took place in 1964, 1973 and 1982.

All mentioned debates over a constitution and/or a bill of rights contain theoretical arguments and reflect the political realities at that specific time.

The main ideological controversies that had divided the population - from the very beginning since the existence Israel - concerned the following three issues:

1. The relationship between state and religion.
2. The economic concept of the state.
3. The legal status of the Palestinian Arab people that had remained in Israel.[183]

However, a detailed discussion of all mentioned debates lays definitely outside the range of the present work.[184]

The purpose of this sub-chapter 4.3. is, far more, directed at a discussion of the arguments and reasons that were raised against a constitution and bill of rights during the first general Knesset debate preceding the adoption of the Harari Resolution in 1950.

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182 See the following speeches of different Knesset Members concerning the enactment of a constitution including a bill of rights: 4 D.K. 714-719 (1 February 1950); 4 D.K. 725-745 (7 February 1950); 4 D.K. 766-784 (13 February 1950); 4 D.K. 794-804 (14 February 1950); 4 D.K. 821-827 (20 February 1950); 5 D.K. 1257-1279 (2 May 1950); 5 D.K. 1306-1332 (8 May 1950); 5 D.K. 1628-1629 (6 June 1950); 5 D.K. 1711-1722 (13 June 1950); 5 D.K. 1741-1743 (14 June 1950)

183 It should be recalled at this point that in 1949, after the signment of the Armistice Agreements between Israel and the neighboring countries, the state of Israel was established on 72 % of the whole formerly British mandatory Palestine. Within these 1949 Armistice borders remained only 158.000 (!) native Palestinian Arabs.

184 For more details regarding these debates see also Gavison, supra note 30, at 123-124

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In the course of this debate three main and divergent approaches regarding the issue of the enactment of a constitution had become apparent and thus lay behind the adoption of the Harari Resolution in June 1950:[185]

(1) The first approach consisted of an opposition bloc to any written constitution. This view was represented by the then Prime Minister David Ben Gurion and the various religious parties.

(2) A second main approach within the Knesset supported the enactment of a written constitution.

(3) The third approach was in favor of a "chapter by chapter" gradual process of written constitutional norms in order to be able to taking into consideration the social, cultural and political developments within the Israeli society.

4.3.2. The View of David Ben Gurion

The then Prime Minister Ben Gurion[186] as well as other members[187] of the Knesset argued that it was wrong and a mistake to bind future generations to a constitution at a time when a large part of the Jewish people was not (yet) in Israel.

This argument shows clearly that - from the very beginnings of Israel's existence - Israel was not conceived primarily to be a country that intents to ensure equality of social and political rights to all its inhabitants (Jews and non-Jews - i.e. Palestinian Arabs) irrespective of religion, race or sex - as it was requested by the Declaration of the Establishment of the State of Israel, 1948.

As Professor Ruth Gavison of the Hebrew University puts it Ben Gurion's argument shows that

> "...the idea [was] that Israel should primarily be the state of the Jewish people..."

and that

> "...the apparent persuasiveness of this vision of Israel [being primarily the state of the Jewish people], without awareness of the potential tensions in introduces into Israel's democracy, points to one of the serious problems in Israel. It suggests a tendency on the part of the legislator not to accord enough importance to the status and rights of the non-Jews [i.e. mainly the Palestinian Arab people] in Israel."[188]

As a matter of fact, this issue - namely the strict concept of Israel as the state of the Jewish people - has arisen especially in the context of the right of Arab political parties to participate in the political process and to run for election to the Knesset if

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185 Meir Shamgar, On the Written Constitution, 9 Isr.L.Rev. (1974) 467, at 470
186 Gavison, supra note 30, at 135
187 See the Knesset Speech of Knesset Member Kossoi, 4 D.K. (1950) 783 (13 February 1950)
188 Gavison, supra note 30, at 135, 136

groups were involved which did not accept the said strict concept of Israel to be primarily the state of the Jewish people.[189]

However, additionally to the argument raised by David Ben Gurion, there always existed other arguments against the enactment of a constitution including a bill of rights.

Such an argument employed against a written constitution was that Israel's constitution should be a bridge between the past and the future of the Jewish people, and that the constitution should not be a bare imitation of other foreign sources, but represent viable rules based on the needs and experiences of Israel.[190]

4.3.3. The View of the Religious Parties

One decisive reason for the complicated task of enacting a constitution or at least a fully entrenched bill of human rights lies within the Israeli society which is - since the very first days of Israel's existence - strongly divided over the "Jewishness" of the state and the place of religion within Israel's legal system.

Until today secular and orthodox[191] Jews interpret the "Jewishness" of the state of Israel differently:

For secular Jews the "Jewishness" of the state means the whole fabric of Jewish heritage and culture which may be separated from Jewish religious law.

Orthodox Jews on the other hand interpret the "Jewishness" of the state without exceptions in religious terms - that means with all dictates, obligations, duties and restrictions of the Halacha, the five Books of Moses and the developed traditions - and reject in principle any positive relationship between the state, law and religion.

Orthodox Jews are of the opinion that the "true happiness" of a human being can only be found in the real happiness of the soul, and that can only be achieved

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[189] H.C. 241/60, *Kardosh v. Registrar of Companies,* translated into English in 4 S.J. (1961-1962) 7; *Yeredor v. Central Elections Committee for the 6th Knesset*, supra note 104. For more details see Chapter C.6. (The Concept of Israel as a "Jewish State" and its Impact on Legislation and Jurisprudence concerning the Right to be Voted)

[190] Shamgar, supra note 185

[191] The Jewish religious population in Israel is overwhelming Orthodox. The non-Orthodox streams are fairly new in Israel, and were generally founded by recent immigrants from Anglo-Saxon countries, mainly from the United States, and by Israelis who have been exposed to these non-Orthodox streams when living prolonged periods of time there. Despite the fact that non-Orthodox groups are spreading in Israel, their numbers are still small. For more details see Asher Maoz, Religious Human Rights in the State of Israel, published in Religious Human Rights in Global Perspective - Legal Perspectives (Edited by J.D. van der Vyver and J. Witte, Jr., Kluwer Law International, 1996) 349, at 350

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through divine law in an ideal Jewish state, which is viewed as the perfection of man's body and soul.[192]

Therefore the religious parties were by a general position against such a constitution including a general bill of rights that would comprehend also the right to equality and freedom of religion.

In the first general debate in 1950, the religious members of the Knesset argued that only the Torah could serve as a constitution and any constitution would be weaker than the law of God.[193]

According to their opinion, a constitution - providing for equality and freedom of religion and conscience - would enable the Supreme Court to exercise judicial review over legislation in general, and would finally cause the annulment of certain religious legislation that was passed because of the strategic position of the religious parties in Israel's coalition system.[194]

This strategic position of the religious parties exists due to the fact that no political party has ever acquired a majority necessary to rule in a parliamentary democracy, making it necessary that every government in Israel has been a coalition government, usually composed of the Labour or the Likud party and one or more of the smaller religious parties.[195]

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[192] The Orthodox Jewish population may, broadly speaking, be divided into the National Religious movement and the Haredi Ultra-Orthodox stream. The latter is subdivided into dozens of sects, each concentrating around a rabbi. In general, the differences between the National Religious movement and the Ultra-Orthodox streams is expressed in their attitude towards the state of Israel. In more detail the characteristics of the National Religious movement are that it has adopted the concept of political Zionism, intermingles with the non-religious population, fully participate in national projects of the state of Israel, and also take an active part in Israel's political life. The Haredi-Ultra-Orthodox groups on the other hand tend to live a segregated life, and are non-Zionist, even anti-Zionist, in their philosophy. Nevertheless, also the Ultra-Orthodox movements take an active part in Israel's political life and are represented through their own political parties in the Israeli parliament (i.e. the Knesset) and participate in its coalition governments. Only the most extreme Haredi Ultra-Orthodox groups do not recognize the legitimacy of the state of Israel, disregard its authorities and institutions, and thus also boycott the elections to the Knesset. See Maoz, ibid., at 350
According to Professor Englard, most of the Ultra-Orthodox citizens have a basically positive attitude towards the state of Israel, because they see the selective and partial reception of Jewish law as an intermediate stage, necessary for the people's spiritual and national renaissance in its course towards Messianic times. See Izhak Englard, Law and Religion in Israel, 35 A.J.C.L. (1987) 185, at 188, 204

[193] Gavison, supra note 30, at 148, FN 114

[194] Kretzmer, supra note 29, at 142

[195] David Kretzmer, Domestic Politics, Law and the Peace Process: A View from Israel, published in The Arab-Israeli Accords: Legal Perspectives (edited by Eugene Cotran and Chibli Mallat, Kluwer Law International, 1996) 81, at 82

Nevertheless, it must be mentioned that, in the first two years of Israel's existence - as long as the religious bloc thought that there was an overwhelming majority in the Knesset voting in favor of a constitution - they even actively participated in elaborating detailed solutions to different problems concerning the constitution.[196]

Only later, in the debate in 1950, the religious parties changed their policy after having realized that there might be a chance to enlist a majority against the idea of a constitution.

And - despite the fact that the religious parties had an ambivalent position towards the legitimacy and validity of the state[197] - the secular members of the ruling majority party, which was the Mapai - Prime Minister Ben Gurion's party - preferred at that time a coalition with the religious parties to a coalition with the extreme right party "Heruth", the left party "Mapam" and the Communists.[198]

From an ideological point of view the decision not to adopt a constitution made it possible for the religious parties to avoid allegiance to a secular document, even if it recognized the privileged status for religion and Judaism. And pragmatically it effectively delayed the declaration of the principle of freedom of religion.

As already said above, secular Jews interpret the term "Jewishness" differently and according to their view Jewish heritage and culture may be separated from Jewish religious law.

However, it is important to mention that, even the most left-wing and secular Jews have never completely divorced the term "Jewishness" from Jewish religious law.

The reason for this state of affairs lies in the fact that - according to the Jewish faith - religious and national aspects are almost inextricable intertwined, and thus Jewish law is regarded to be both, the religious law as well as the national law of the Jewish people. This means in other words: To be part of the Jewish people is, implicitly, to be part of the Jewish religion.[199]

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[196] Gavison, supra note 30, at 149

[197] At the beginning of the Zionist movement (at the turn of the 19th and the early 20th century), the leading orthodoxy in Germany, Hungary and the countries of eastern Europe regarded the concept of political Zionism as a heretical attempt to establish a Jewish state, which was the privilege of the Messiah. According to their tradition Jews had to hope and pray for their return to Zion, but actively to accelerate the establishment of such a state was a sin and strictly prohibited. Later on, however, the Jewish religious orthodoxy began to modify its approach. For details see Chapter C.2.3.1. (The Doctrine of Ultra-Orthodox Judaism and its Original Position towards Political Zionism) and Chapter C.2.3.2. (The Changing Position of Ultra-Orthodox Judaism towards the Concept of Political Zionism)

[198] Gavison, supra note 30, at 148, 149

[199] For details see Chapter C.2.5.3. (The Nature of Jewish Law)

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The national character of Jewish law manifests itself in the fact that most of the non-religious Israeli Jews accept the Jewish religious order as part of Israel's legal order.

In this context it is also important to mention that Jewish religion - as well as historical mystique - have also been the central components of the conceptual-ideological framework of all streams of political Zionism, ranging from right-wing religious to left-wing secular Zionism.[200]

This is revealed by the fact that even the most secular, left-wing and labour Zionist parties always preserved religious myths and symbols among their central symbols.

Before the establishment of the state of Israel in Palestine in 1948, the biblical connection to the land and the connection between Jewish religion and national identity was strongly emphasized.

After the establishment of the state of Israel in Palestine in 1948, the ruling secular Zionist parties saw Jewish religion not only as a central component for the creation and cultivation of a national unity and identity, but also as a source of legitimation for the exclusive territorial rights regarding all parts of Palestine.[201]

Although the so called "founders of the state of Israel" had a preference for a secular character of the state, there was never any intention on their part to completely separate the national identity of the state from the Jewish religious identity, and to dissociate themselves from traditional Jewish concepts and biblical laws.

As I will show in the course of this work it is exactly this double character of Jewish law - being at the same time the religious and national law of the Jewish people - that brings all the problems within Israel's legal system regarding the concept of democracy, human rights and freedoms generally, and equality and social justice specifically.

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[200] For details see Chapter A.2. (Ideology and Doctrines of the Concept of Political Zionism)
[201] From the very beginning, the Zionist movement based its territorial claims on biblical law.

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4.3.4. Other Arguments Raised Against the Enactment of a Constitution including a Bill of Rights

Some Knesset members argued that a constitution was unnecessary and a real democracy could subsist without a formal rigid instrument.[202]

Another argument not to enact a constitution and a bill of rights was Israel's so called urgent security and economic situation. Especially Ben Gurion stressed this argument and talked about "the dangers of non-Jewish as well as Jewish minorities which wish to destroy the state".[203]

Strong opposition to a constitution including a bill of rights came also from the defense (military) establishment, which - realizing that much of the Israeli security and British mandatory emergency legislation would never stand the test of judicial review against a democratic constitution - employed so called "security reasons" and argued that in light of "the dangers of its very existence, Israel cannot afford a constitution including a bill of rights and if Israel should adopt one, it must be narrow in scope."[204]

Since the Harari Resolution had no constitutional effect itself, the remaining question was that of the constituent power of the second and any further Knesset after the dissolution of the First Knesset.

I shall discuss this fundamental problem in sub-chapter 4.4., since the question of the nature of the basic laws depends on it.

4.4. The Power of the Knesset to Enact a Constitution

4.4.1. Background

In order to understand the whole, still ongoing discussion about the questions if the Knesset has the power to adopt a constitution - including a bill of rights - which will be the "supreme law of the land", if the Knesset can bind itself and if the doctrine of judicial review operates in Israel it is necessary to recall the main problems and to present the different arguments that have been brought up by politicians and academic writers, especially at the very beginnings of Israel's statehood.

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202 Zilbershatz, supra note 45, at 29. See the Knesset Speeches 4 D.K. (1950) 716

203 Gavison, supra note 30, at 137

204 Ibid.

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It has to be stressed that the question of the constituent power of the Knesset was - and still is - not merely a legal, but rather a political one. As we will see below, the decisions were in fact been made on a political level.

According to the words of the Declaration of the Establishment of the State of Israel, 1948 the original intention of the so called "founding fathers" of the state of Israel was to distinguish between legislative and constitutive powers: The Constituent Assembly should only have the power to frame a constitution including a bill of rights.

Following the facts, that the Constituent Assembly was transformed into a legislature (i.e. the First Knesset) and that the First Knesset did not adopt a constitution at all, a controversy among scholars and politicians broke out.

The controversy concerned the so called "key-questions" whether the authority to enact a constitution - including an entrenched bill of rights - was conferred also to the second and any future Knesset or if the original power vested in the Constituent Assembly expired with the convening of the First Knesset.

There was never any doubt among the scholars and politicians that the First Knesset was vested with constituent and legislative powers.

The First Knesset was also authorized to decide not to enact a constitution, but did it really intend to transfer its constituent power to the Second and any further Knesset and if so, was it authorized to do so?

Is the statement of intend to transfer the power sufficient - as Professor Melville B. Nimmer has put the question?[205]

4.4.2. The Opinion of Legal Scholars

4.4.2.1. Professor Melville B. Nimmer's Opinion

According to the opinion of Melville B. Nimmer, who wrote an interesting article in the 1970 Columbia Law Review about that question, the problem of the transmission of the constituent power involves the question of the legitimacy and the effectiveness of the transfer of this power.

He argued that the constituent power is not "a kind of property which the owner can freely transfer to others."[206]

Professor Nimmer argued that the constituent power lies only in the people and not in an Assembly and he expressed doubt concerning the legitimacy of the transfer of the constituent power to further Knessets.

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[205] Nimmer, supra note 159, at 1239

[206] Ibid.

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Thus, he rejected the superiority and the effectiveness of the concept of the basic laws, because - according to his view - unlike the First Knesset, the second Knesset had not the power to enact "superior laws".

He further argued that an unconstitutional enactment does not become valid merely because it is effectively enforced.[207]

4.4.2.2. Professor Claude Klein's Opinion

This point of view was rejected by Professor Klein, who - eventhough letting the question of legitimacy open - argued that politically another line of development might have been preferable - such as a referendum for instance - but that the reality could not be denied, therefore the Knesset still has constituent power. He argued that since the Knesset is in fact wielding constituent power and since the basic laws are enforced, the discussion relating to the constituent power of the Knesset is just a theoretical and academic one.[208]

Concerning the argument of Professor Nimmer that the basic laws lack effectiveness, Professor Klein stated that "this would create a vacuum and an absurd situation."

Professor Klein based his opinion on Hans Kelsen's analysis of the problem of "Concordance or Disconcordance between Statute and Constitution - the Unconstitutional Statute". Kelsen expressed the rule that if no organ different from the legislative is called upon to inquire into the constitutionality of statutes, the question whether or not a statute is constitutional has to be decided only by the legislative organ itself.[209]

Additionally, Professor Klein used Kelsen's theory about the principle of effectiveness, according to which efficacy of a norm is a condition and not the reason of validity. A norm is valid if the order to which it belongs is on the whole efficacious.[210]

Professor Klein was of the opinion that the Knesset maintained the legislative as well as the constituent power and the fact that the Knesset has another identity makes it possible that it may act in two different capacities.

He argued that such a body must always express in which capacity it is acting. Therefore the Knesset may not, in its ordinary capacity, amend any provision of a basic law including an entrenched clause.

[207] Id., at 1240
[208] Klein, supra note 180, at 384, 386
[209] Hans Kelsen, General Theory of Law and State (1949) 156
[210] Ibid., at 42

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He also argued that the rule "lex posterior derogate lex priori" does not apply between basic laws and ordinary laws.[211]

4.4.2.3. Professor Amnon Rubinstein's Opinion

Professor Rubinstein on the other hand has - from the very early years of the establishment of the state - argued that the Knesset is still under a legal obligation to enact a constitution, because the part of the Declaration of the Establishment of the State of Israel dealing with the constitution was accorded the status of law and the Knesset never enacted a law releasing itself from this duty.[212]

4.4.2.4. Professor Eliahu Likhovski's Opinion

Professor Eliahu Likhovski argued in two articles[213] in 1968 and 1969 that the system of government adopted in Israel intended to be based on the doctrine of the sovereignty of the Knesset as the ultimate source of the law of the constitution.

To support his assumptions he points out 1. that at the end of 1948 the public opinion, represented by the majority of the Provisional Council of the State, seems to have rejected the idea of an immediate adoption of a written rigid constitution, and 2. that all later discussions in the Knesset related to the enactment of basic laws only clinged to the ambivalent language of the Harari Resolution without determining the exact nature - constitutional law or not - of the endproduct.

Professor Eliahu Likhovski furthermore emphasized that the concept of sovereignty of the Knesset was to be understand in the sense of the English doctrine of parliamentary sovereignty as used by the supporters of the orthodox theory of common law, so that the Knesset cannot bind itself.

Professor Eliahu Likhovski argued that according to the orthodox English view this rule cannot itself be changed by statute for it is one of the ultimate legal principles forming the basis of the system of government. This rule - so Likhovski - is unique and unchangeable by the parliament, and is rather changed by revolution and not by legislation.

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211 Klein, supra note 180, at 392; Klein's view was dismissed by the Supreme Court in H.C. 60/77, *Ressler v. Chairman of the Central Elections Committee*, 31(ii) P.D. 556, at 560. But see H.C. 337/84, *Hokma v. Minister of Interior*, 38(ii) P.D. 826, where the Supreme Court indicated that it may reconsider its position on the status of basic laws.

212 Rubinstein, The Constitutional Law of the State of Israel, supra note 8, at 53

213 Eliahu Likhovski, The Courts and the Legislative Supremacy of the Knesset, 3 Isr.L.Rev. (1968) 345, at 360-362; Can the Knesset adopt a Constitution which will be the supreme law of the Land, 4 Isr.L.Rev. (1969) 61, at 64, 67-68

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4.5. Summary and Conclusions

1. Considering the political realities under which the state of Israel was established,[214] considering furthermore the fact that a legal system always reflects the aims and the political program of a state - the political program in the case of Israel is Zionism - I come to the conclusion that from the very beginnings of Israel's existence, there was no real intention by the great majority of the Knesset members to enact a formal written and entrenched constitution including a bill of rights. This conclusion can be drawn from the following facts:

a. Shortly after the establishment of the state of Israel in Palestine in May 1948, a series of legal measures - mostly in the initial form of emergency regulations - were adopted in order to institutionalize the blockage of any return of the Palestinian refugees by declaring many of them as "absentees"[215] by legalizing the expropriation of land that was previously owned by Palestinian Arabs by declaring it "abandoned Arab property",[216] and by enacting laws concerning the right to citizenship.[217]

b. The discussions in the Knesset and in the Constitutional Legislative and Judicial Committee during the first two years up until the adoption of the Harari Resolution in 1950 were not so much about the desired substance of a constitution, but rather on the preliminary question, whether a constitution, in the sense of one unified document, was desirable at all, or at least, in the immediate future.

c. All the discriminatory laws that were enacted during the British mandatory period[218] and then adopted immediately after the state of Israel was established, as well as the enactment of own discriminatory laws by the Israeli legislator in the first months and years reveal that there was no real intention by the competent authorities to enact a constitution including a bill of rights.

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214 For details see Chapter A.5.5. (The Period after the Adoption of the UN-GA Resolution 181 (II) of 29 November 1947 until the Signment of Armistice Agreements in 1949)

215 This declaration as "absentees" took place according to the following legal instruments :
Emergency Regulations (Absentees' Property), 1948, I.R. No. 37, Suppl. II, at 59 (12 December 1948); Emergency Regulations (Absentees' Property) (Extension of Validity), 1948, 4 L.S.I. (1949) 13; Absentees Property Law, 1950, 4 L.S.I. (1949/50) 68
For more details on this issue see Chapter G.2.2. (Declaration of Palestinians as "Absentees" and Confiscating their Land)

216 This took place according to the following legal instruments:
Abandoned Areas Ordinance, 1948, 1 L.S.I. (1948) 25; Emergency Regulations Concerning the Cultivation of Waste Lands and the Use of Unexploited Water Resources, 2 L.S.I. (1948/49) 71; Emergency Regulations (Requisition of Property), 1948, I.R. No. 39, Suppl. II, at 87 (24 December 1948); Emergency Regulations (Requisition of Property) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 37; Regulation 125 of the British Defense (Emergency) Regulations, 1945, supra note 63
For more details on this issue see Chapter G. (The Right to Property)

217 Law of Return, 1950, 4 L.S.I. (1949/50) 114

218 Defence (Emergency) Regulations, 1945, supra note 63

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For, if the requested constitution including a bill of rights guaranteeing complete equality to *all* its inhabitants would have existed, all the discriminatory laws that were applied especially towards the Palestinian Arab people could have hardly exist.

2. After having reviewed Israel's laws, the Supreme Court jurisprudence as well as the speeches and debates in the Knesset, I could observe that - although the opposition of the religious parties was one of the strongest reasons not to enact a constitution - in reality the arguments raised by the defence establishment were the most effective and decisive ones which - up until today - prevented the enactment of an entrenched constitution including a comprehensive bill of rights, guaranteeing equality and democratic rights and freedoms for all citizens of the state.

5. The Attitude of the Israeli Supreme Court towards Judicial Review of Primary Legislation of the Knesset in Human Rights Cases

5.1. Background

At the very beginning of Israel's constitutional regime there existed the principle that primary legislation of the Knesset is not subject to judicial review.[219]

Although the Supreme Court had created a few exceptions from this strict doctrine with three decisions - namely in 1969 with the decision of *Bergman v. Minister of Finance*,[220] and then again in 1981 and 1982 with the decisions of *Agudat Derekh Eretz v. Broadcasting Authority,*[221] and *Rubinstein v. Chairman of the Knesset*[222] - these judgments could not be considered as real acceptance of judicial review over Knesset legislation.[223] The reasons for this state of affairs were twofold, namely:

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219 In numerous decisions the Supreme Court has stressed this principle. See for example the following decisions: H.C. 5/48, *Leon v. Gubernik,* translated into English in 1 S.J. (1948-1953) 41, at 53; *El-Karbutli,* supra note 129; *Zeev v. Gubernik,* supra note 97; H.C. 188/63, *Bassul v. Minister of Interior*, 19(i) P.D. 337, at 349; C.A. 450/70, *Rogozinsky v. State of Israel,* for a summary in English see 5 I.Y.H.R. (1975) 366; H.C. 306/81, *Flatto-Sharon v. Knesset Committee*, 35(iv) P.D. 118, at 135; H.C. 669/85, *Kahane v. Speaker of the Knesset,* 40(iv) P.D. 393, at 399

220 *Bergman*, supra note 91

221 H.C. 246/81, *Agudat Derekh Eretz v. Broadcasting Authority,* translated into English in 8 S.J. (1969-1988) 21

222 H.C. 141/82, *Rubinstein v. Chairman of the Knesset*, translated into English in 8 S.J. (1969-1988) 60

223 I will discuss the jurisprudence of the *Bergman case* and the two other cases as well as the implications of this jurisprudence on further developments below in more detail.

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1. In all three decisions the Knesset statutes under review were only declared invalid by the Supreme Court for procedural reasons, i.e. because they were not enacted with the required majority.

2. All three judgments explicitly stated not to create a precedent regarding the involved constitutional issues, such as justiciability, the power of the Knesset to bind itself and the normative relationship between a basic law and regular law.[224]

In the early 1980's, however, the Supreme Court gradually started to interfere in various other parliamentary decisions and recognized judicial review also over quasi-judicial decisions - as it happened in the case of *Flatto-Sharon v. Knesset Committee*[225] - and over administrative decisions concerning the inner procedural workings of the Knesset - as it happened in the case of *Sarid v. Knesset Speaker.*[226]

It should be stressed at this point that - although the Supreme Court started to display more and more *judicial activism* in the above mentioned areas of quasi-judicial and administrative decisions - the court's approach in the field of primary legislation was - with the exceptional case of entrenched clauses in basic laws - not to place external limits on the legislative power of the Knesset, but rather to exercise self-restraint.[227]

A certain turning point regarding the issue of judicial review of primary legislation only occurred in 1995 after the Supreme Court handed down the decision in the matter *United Mizrahi Bank v. Migdal Cooperative Village*.[228] In this case the existence of judicial review of primary legislation, which was repugnant to the two basic laws on human rights enacted in 1992, was for the first time explicitly recognized.[229]

The purpose of this sub-chapter 5 is to analyze the guiding principles, normative sources and underlying theoretical concepts for the long practiced principle of "no review over Knesset decisions" and the self-restraint exercised by the Supreme Court. Another aim of this sub-chapter is directed at the discussion of the exceptions and developments regarding judicial review over Knesset legislation that occurred until the above mentioned *Mizrahi Bank* case.

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224 *Bergman,* supra note 91, at 15-16*; Agudat Derekh Eretz*, supra note 221, at 24-25; *Rubinstein*, supra note 222, at 66-67

225 The subject of this petition was the decision of the Knesset Committee to suspend the petitioner's (Shmuel Flatto-Sharon's) membership to the Knesset
Flatto-Sharon v. Knesset Committee, supra note 219; Meir Shamgar, Judicial Review of Knesset Decisions by the High Court of Justice, 28 Isr.L.Rev. (1994) 43, at 45

226 H.C. 652/81, *Sarid v. Knesset Speaker,* translated into English in 8 S.J. (1969-1988) 52; Shamgar, ibid., at 47

227 David Kretzmer, Judicial Review of Knesset Decisions, 8 T.A. Univ.Stud.i.L. (1988) 95, at 118

228 *United Mizrahi Bank*, supra note 46

229 Ibid., at

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5.2. Initial Arguments and Reasons for the Objection to Judicial Review

5.2.1. The Doctrine of Sovereignty of the Israeli Parliament

In the early years after the establishment of the state of Israel in Palestine in May 1948, the influence of British legal concepts was dominant and it looked as if Israel's constitutional regime - in formal as well as in institutional manner - might develop like in England according to the orthodox doctrine of common law on the sovereignty of parliament.

The formal legal basis for the attachment to English law and to the principle of equity was Section 11 of the Law and Administration Ordinance, 1948 which provided as follows:

> "The law which existed in Palestine on the 5th Iyar, 5708 (14th May 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."[230]

This section included indirectly Article 46 of the Palestine Order in Council, 1922 which stated that gaps of the existing law shall be filled by resort to English common law and equity so far as the circumstances of Palestine and its inhabitants permit and subject to such qualification as the local circumstances make it necessary.[231]

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[230] Law and Administration Ordinance, 1948, supra note 124, at 9

[231] Article 46 of the Palestine Order in Council, 1922 states as follows:

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the *Ottoman Law* in force in Palestine on the 1st, 1914, and such later *Ottoman Laws* as have been or may be declared to be in force by Public Notice, and such *Orders-in-Council*, *Ordinances* and *regulations* as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the *common law,* and the *doctrines of equity* in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said *common law* and *doctrines of equity* shall be in force in Palestine so far only as the *circumstances of Palestine* and *its inhabitants* and the limits of His Majesty's jurisdiction permit and subject to such qualification as *local circumstances* render necessary."[Emphasis added]

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Article 46 of the Palestine Order in Council, 1922 was in force until the enactment of the Foundations of Law Act[232] in 1980.

After the establishment of the state of Israel in 1948 many practices and attitudes of the British mandatory Supreme Court were transported into the "new" Israeli Supreme Court by way of citing mandatory or British precedents.[233]

As a consequence of the doctrine of the sovereignty of the Israeli parliament (i.e. the Knesset), the attitude of the Supreme Court in the first years was strictly based on the principle of separation of powers.

This legal-philosophical approach underlying the judicial reasoning of the Supreme Court had over a long period straight influence on the Court's refusal to entertain judicial review of primary legislation.[234]

Another reason for the strict refusal of the Supreme Court in the early years of the state's existence was the fact, that most of the first justices were educated in England or Continental Europe where the concept of judicial review was quite unfamiliar.[235]

The first cases[236] relating to judicial review over primary legislation which were brought before the Supreme Court attempted to attack the validity of emergency regulations - such as the Defence Regulations, 1939 and the Defence (Emergency) Regulations, 1945 [237] - that had been absorbed into the Israeli legal system by virtue of the above mentioned Section 11 of the Law and Administration Ordinance, 1948 and subsequently remained in force.

Palestine Order in Council, 1922, published in Official Gazette of the Government of Palestine, 1 September 1922, at 6-7

232 Foundations of Law Act, 1980, 34 L.S.I. (1979/80) 181

233 Yoram Shachar, History and Sources of Israeli Law, published in Introduction to the Law of Israel (eds. Amos Shapira and Keren C. DeWitt-Arar) (Kluwer Law, Boston, 1995) 1, at 6-9

234 Kretzmer, supra note 227, at 103

235 Chief Justice Moshe Smoira, born and educated in Germany; Justice Itzhak Olshan, born in Russia and educated in Palestine-Eretz Israel and London; Justice Menachem Dunkelblum, born in Poland and educated in Austria and Holland; Justices Joel Sussman and Alfred Witkon, born and educated in Germany; Justice Moshe Landau, educated in Germany and in London. For more details see Kretzmer, supra note 227, at 100; Lahav, Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy, supra note 87, at 219

236 H.C. 1, 2/48, *Dr. Herzl Kook and Ziborah Wienerski v. Minister of Defence*, 3 P.D. 307; quoted in English in B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada (Jerusalem, October 1992) at 22-23. See also Sabri Jiryis, The Arabs in Israel (Translated from the Arabic by Inea Bushnaq) (Monthly Review Press, New York, 1976) at 13-14; *Leon v. Gubernik,* supra note 219, at 53; *El-Karbutli,* supra note 129; *Zeev v. Gubernik,* supra note 100

237 For more details on the undemocratic British Defence (Emergency) Regulations, 1945 still forming an organic and valid part of Israel's legal system see Chapter D.5.2. (The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within Israel since 1948) and Chapter D.5.3. (The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within the Occupied Territories since 1967)

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In one of these very first cases - *Leon v. Gubernik*[238] - the Supreme Court refused to undertake judicial review and based its arguments on the doctrine of separation of powers.

5.2.2. The Principles of Separation of Powers and Democracy

5.2.2.1. Leon v. Gubernik (1948)

The Facts of the Case

In this case the Acting District Commissioner of Tel Aviv (Yehoshua Gubernik), as the competent authority under the Defence Regulations, 1939,[239] issued an order of requisition for a flat situated in Tel Aviv.[240]

The requisition was for the benefit of the Attorney General who, previously had resided in Haifa, but who upon his recent appointment to that office, found it necessary to reside in Tel Aviv, where he had been unable to find a suitable flat.[241]

The requisition order was based upon Regulation 48(1) of the Defence Regulations, 1939 (Amendment No. 2 of 1945).[242]

The petitioners based their arguments, inter alia, on the ground that the Defence Regulations, 1939 had never been in force in Palestine or if ever in force, their validity has ceased to exist upon the establishment of the state of Israel.

Normatively, the argument of the petitioner rested on the second restriction of Section 11 of the Law and Administration Ordinance, 1948, which makes the reception of British Mandatory law "subject to such modifications as may result from the establishment of the State and its authorities".[243]

The petitioners claimed that Defence Regulations, 1939 were made on the basis of an English statute, namely the Emergency Powers (Defence) Act, 1939, which possess a dictatorial - even anti-Jewish - character, and since the "state of Israel is a democratic and a Jewish state" there have come about "modifications which make it impossible for these statutes to be given validity in Israel."[244]

238 *Leon v. Gubernik*, supra note 219
239 Defence Regulations, 1939, supra note 121
240 *Leon v. Gubernik*, supra note 219, at 41, 45
241 Ibid., at 42
242 Regulation 48(1) of the Defence Regulations, 1939 (Amendment No.2 of 1945), P.G. No. 1394 (1 March 1945) Suppl. II, at 161. Cited in *Leon v. Gubernik*, supra note 219, at 54
243 *Leon v. Gubernik*, ibid., at 46, 48
244 Id., at 48

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The petitioners furthermore argued that, since the validity of the above mentioned English Emergency Powers (Defence) Act, 1939 has ceased to exist, there is also no longer any legal basis for the Emergency Regulations, 1939.[245]

The Decision of the Supreme Court

The Supreme Court rejected the petition and ruled that the Defence Regulations, 1939 are not dictatorial, and can be recognized in the democratic state of Israel.[246]

With regard to the word "modifications" as referred to in Section 11 of the Law and Administration Ordinance, 1948, the Court stated that restrictive interpretation is to be given to the word "modifications" which means "technical" modifications without which the law in question could not be applied after the establishment of the state. The Supreme Court explicitly stated that it was not the Court's duty to determine whether the establishment of the state of Israel has brought about some change and if there is a change to determine the nature of this change, and whether this change requires that a particular law be invalidated. The Court stated that this was precisely the duty of the legislator and that the legislature, in using the word "modifications", did not intend to refer to modifications which demand "special considerations", and did not intend to delegate part of its duties to the courts.[247]

The Supreme Court furthermore held that it was not the Court's duty to examine and to decide upon the validity of legislation, since this task was one of the legislature alone. The Court considered its involvement in the said case as damage to the principle of separation of powers. The then President of the Supreme Court, Moshe Smoira, giving the judgment, used a very positivistic and legalistic line of interpretation when he expressed this basic principle in the following way:

> "[W]e desire, in concluding this part of our judgment, to add a few general comments on the duty of a judge when he comes to interpret the law. The doctrine of the division of powers within the state is no longer as rigid and immutable as it was when once formulated by Montesquieu. In the field of jurisprudence the opinion has prevailed that in cases to which neither law nor custom applies it is for the judge to fulfill the function of the legislature rather than to force the facts before him into the narrow confines of the existing law, which in truth contains no provision applicable to them. This conception has found its classic expression in the first section of the Swiss Code which provides expressly that if the judge can find neither law nor custom which applies to the case before him, is to lay down the law as if he himself were the legislature. But this principle only applies where in fact no law exists. It is far cry from this to require that judges, in the exercise of their powers, should repeal laws which undoubtedly do exist but which are unacceptable to the public. We are not prepared to follow this course, for in so doing we would

[245] Id.
[246] Id., at 51
[247] Id., at 52-53

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> infringe upon the rights of the existing legislative authority in the country, the Provisional Council of State."[248]

5.2.2.2. Other Decisions and Arguments of the Supreme Court

A number of other decisions show that the Supreme Court of Israel remained over the years loyal to the principle that there is no judicial review of parliamentary legislation. This judicial doctrine was also expressed in the case of *Tewfik Said Bassul v. Minister of Interior,* which is dealing with the right to freedom of occupation and the restrictions which were inflicted upon this right by the Prohibition of Raising Pigs Law which was enacted by the Knesset in 1962.[249]

However, besides the declaration of the Supreme Court that judicial review of primary legislation would violate the rights of the legislative power in the state, the Court employed in the mentioned *Bassul* case also another argument, namely the so called "democratic principle". The rationale of this principle is that the legislature is an elected body which represents the people, while judges are not elected and cannot be removed if their decisions are unpopular.

In the mentioned *Bassul* case Justice Silberg held as follows:

> "... in a democratic regime the powers are divided and 'one kingdom does not impinge upon another even to the smallest degree'... The judge must refrain from exceeding his authority and wearing the mantle of the legislature."[250]

Another argument for the refusal of the Supreme Court to exercise judicial review was "the lack of jurisdiction and justiciability". One of the most significant example of this kind of decisions is the ruling of the Supreme Court in the matter of *Jabotinsky* v. *Weizmann*.[251]

The objection to judicial review was also based on the lack of a formal constitution or a bill of rights.[252]

Strong opposition to judicial review of Knesset legislation in general came by Justice Moshe Landau[253] and Justice Moshe Silberg.[254] The adherents to this view based their objections on "the fear that, as there can be no objective standards of review, the decisions of the judges will necessarily be influenced, if not dictated, by their personal political and social outlooks". According to this opinion this will lead

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248 Id., at 53-54

249 *Bassul v. Minister of Interior*, supra note 219

250 Ibid., at 343. The same line of interpretation was employed in the case of H.C. 3/62, *Minister of Interior v. Moussa*, 16(iv) P.D. 2467, at 2471

251 H.C. 65/51, *Jabotinsky v. Weizmann*, translated into English in 1 S.J (1948-1953) 75

252 Kretzmer, supra note 227, at 103, 149

253 Moshe Landau, A Constitution as the Superior Law of Israel?, 27 HaPraklit 30 (1969), quoted in Kretzmer, ibid., at 107, note 58

254 *Minister of Interior v. Moussa*, supra note 250, at 2471

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to the "politicization of the judiciary, which could in turn inspire a legislative reaction aimed at undermining its independence."[255] Justice Moshe Silberg expressed in the decision of *Minister of Interior v. Moussa* the strongest objection to judicial review when he stated as follows:

> "If the judge will be allowed to prefer his private 'desired' to the 'desired' of the legislature, the neutrality, lack of bias and nonpartisan character of the country's judges will come to an end. The law will become a function of the judge... There is only one guarantee to the impartiality of the judge and that is his total submission to the clear will f the legislature."[256]

5.3. First Exceptions towards Judicial Review over Primary Legislation: Entrenched Clauses in Basic Laws

5.3.1. The Basic Law: The Knesset (1958)

Independent political existence of the state of Israel lead to the withdraw from the total acceptance of British law and British concepts which were more and more viewed as resting on their own foundations of history, custom and tradition.[257] The first step to depart from the orthodox doctrine of sovereignty of the parliament might be seen in the Basic Law: The Knesset[258] which was adopted by the Knesset in 1958. The Basic Law: The Knesset was the first piece of legislation with the qualification "basic" and it was the first law that contained a few entrenched provisions, namely the Sections 4, 44 and 45.

Section 4 of the Basic Law: The Knesset - which is the most important one in the context of the present work dealing with civil and political rights - states:

> "The Knesset shall be elected in general, national, direct, equal, secret and proportional elections, according to the Knesset Elections Law; this section may not be amended, except by a majority of Knesset members."[259]

The majority referred to in this law is an absolute majority of Knesset members, i.e. at least 61 of the 120 members, in all three readings. (The general rule is that a simple majority in Knesset voting is sufficient.)

The first exception from the doctrine that primary legislation of the Knesset is not subject to judicial review occurred in 1969 with the judgment of the Supreme Court in the *Bergman* case, dealing with the principle of equality established in Section 4 of the Basic Law: The Knesset as it relates to public financing of elections.[260]

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255 Landau, supra note 253, at 33, quoted in Kretzmer, supra note 227, at 107
256 *Minister of Interior v. Moussa*, supra note 250, at 2471
257 Shamgar, supra note 185, at 472
258 Basic Law: The Knesset, supra note 18
259 Section 4 of the Basic Law: The Knesset, ibid.
260 *Bergman,* supra note 91

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Due to the fact that in the Israeli legal community this case is widely considered as one of the most important "landmark" cases in the Israeli legal system, comparable to the decision of *Marbury v. Madison* handed down by the U.S. Supreme Court in 1803,[261] I will discuss this case now in more detail.

5.3.2. Bergman v. Minister of Finance (1969)

The Facts of the Case

In this case some months before the 1969 general elections for the seventh Knesset, the Knesset enacted the Financing Law which provided for state funding of the election campaign. According to the provisions of this Law, which was not passed by an absolute majority, every party represented in the outgoing Knesset that ran for re-election, would be entitled to funding from the state budget. The sum each party would receive would be dependent on its relative strength in the outgoing Knesset.

Dr. Bergman, a Tel Aviv lawyer, brought a petition before the Supreme Court and applied for an order preventing the Minister of Finance from making any payments according to the elections funding statute. The petitioner contended that the funding provisions of the new Law are void for two reasons: First the Law was initiated by several members of the Knesset as a private bill, whereas legislation that imposes a financial burden on the Treasury must be initiated by the government. Secondly by providing public financing only for existing party groups (i.e. groups represented in the outgoing Knesset), the Financing Law infringes upon the requirements in Section 4 of the Basic Law: The Knesset that elections be "equal", and as the Financing Law was not passed by the absolute majority required under Section 46 of the Basic Law,[262] i.e. a majority of the members of the Knesset at each state of the legislation, it was invalid.[263]

He claimed that the Financing Law created an inequality between parties since the financing system attributed public aid only to parties which were already represented in the outgoing Knesset, but not to new lists, what was a clear disadvantage for them.

In this case three main questions are relevant, namely:

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[261] Marbury v. Madison (1803) 5 U.S. (1Cranch) 49

[262] Section 46 of the Basic Law, which was added to the Basic Law in 1959 states that "the majority required under this Law to amend sections 4, 44 or 45 will be required for resolutions of a plenary meeting of the Knesset at every stage of the legislation, other than the debate upon a motion for the agenda of the Knesset. For the purpose of this section 'amendment' - either express or implied."

[263] *Bergman,* supra note 91, at 13

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1. Did the entrenchment provision in the Basic Law: The Knesset in fact do what it purported to, i.e. bind future legislative acts of the Knesset?
   (The question of the power of the Knesset to bind itself)
2. Assuming that the answer to the first question is positive, did a court have the power to rule that a statute which did not meet the demands of the entrenchment clause was invalid?
   (The question of the power of the court to judicial review)
3. What is the exact meaning of the equality requirement in Section 4, and is the Financing Law which had not been enacted with the special majority inconsistent with Section 4 of the Basic Law: The Knesset?

The Decision of the Supreme Court

Important to mention is the fact that the Supreme Court did not deal with the first two questions, which raised serious issues of principle. The Court only dealt with the third question and finally upheld the claim of the petitioner that the Financing Law of 1969 was incompatible with the principle of equality established in Section 4. The Court stated however at the same time that nothing in its decision should serve as a precedent particularly with regard to the issue of justiciability.[264]

It was argued that the *Bergman* case established the right of the Courts to review statutes in the light of the entrenched clauses of the Basic Law: The Knesset and clarified the capacity of the Knesset to bind itself.[265]

It was also argued that the *Bergman* case is "Israel's *Marbury v. Madison* case," due to the fact that like the U.S. Constitution, nowhere in the Basic Law: The Knesset or in any other statute, is the power given to the Supreme Court to rule on the validity of a statute which does not meet constitutional requirements.[266]

Conclusions

At first sight the *Bergman* case seems to mark a turning point in the whole discussion of the Knesset's authority, insofar as the Knesset seemed to accept the principle that it has the power to limit itself and responded in the way that it declared the law, regulating the financing system of the election, as inconsistent with the entrenched provisions of Section 4 of the Basic Law: The Knesset requiring that elections must be equal.

However, despite this positive result this judgment should - as I see it - not be considered as real acceptance of judicial review over Knesset legislation, since 1. the Financing Law was only declared invalid for procedural reasons (i.e. because it was

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264 Ibid., at 15

265 Ibid.; Asher Maoz, Constitutional Law, in The Law of Israel: General Surveys (edited by Itzhak Zamir, Sylviane Colombo, Jerusalem, 1995) 5, at 11

266 Kretzmer, supra note 227, at 111

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not enacted with the required majority), and since 2. the Court explicitly stated not to create a precedent regarding the involved constitutional issues, such as justiciability, the power of the Knesset to bind itself and the normative relationship between a basic law and a regular law.

Aftereffects of the Bergman Decision

The Knesset responded to the decision by amending the law and by including financing power for new groups. This amendment was passed by an absolute majority of the Knesset members. At the same time the Knesset enacted a second Law by an absolute majority, which retroactively confirmed the validity of all legislation concerning election procedures previously enacted, in order to prevent judicial review of all such legislation.[267]

According to the most scholars this action suggests that the Knesset did not wish to challenge its own power to bind itself by entrenchment.[268]

Two later cases also deal with the requirement of equality of public financing of elections.[269]

6. Normative Relationship between Basic Laws and Regular Laws

As for the question of the general status of basic laws and the normative relationship between basic laws and regular laws it must be said that - up until today - no law deals specifically with the said problem.

In two decisions - the first was handed down in 1973 and the second in 1977 - the Supreme Court has held that in the case of an absence of express provisions granting them preferred status, basic laws are not superior to ordinary legislation and the usual rules of interpretation are applied when determining a conflict between the two types of legislation.[270]

In the decision handed down by the Supreme Court in 1973 in the matter of *Negev v. State of Israel* the Court furthermore held that in the event of a clash between a special provision in ordinary Knesset legislation and a general provision in a basic law, the former prevails.[271]

267 *Bergman,* supra note 91, at 14
268 Gavison, supra note 30, at 121, 122;
269 *Agudat Derech Eretz*, supra note 221; *Rubinstein,* supra note 222
270 H.C. 148/73, *Kaniel v. Minister of Justice*, 27(i) P.D. 794; for a summary in English see 9 Isr.L.Rev. (1974) 142*; Ressler v. Chairman of the Central Elections Committee,* supra note 211
271 H.C. 148/73, *Negev v. State of Israel,* 28(i) P.D. 640

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Furthermore the Knesset may amend a provision in a basic law by ordinary legislation passed with a simple majority. The only exception to this rule recognized by the Supreme Court[271A] is the case of amendment of entrenched provisions in certain basic laws, such as Section. 4 of the Basic Law: The Knesset.

In the below described *United Mizrahi Bank* decision handed down in November 1995, the Supreme Court however held for the first time that the two basic laws on human rights enacted by the Knesset in 1992 are superior to ordinary legislation and have constitutional status. This issue will be discussed in more detail in the next sub-chapters 7 and 8 of this work.

7. The Enactment of two Basic Laws on Human Rights in 1992 and Their Impact on the Israeli Legal System

7.1. General Remarks

As already mentioned in a previous part of this chapter,[272] the comprehensive Basic Law: Fundamental Human Rights, as originally prepared by the Ministry of Justice between the years 1989-1990, could due to political reasons not be enacted. However, the mentioned comprehensive basic law on human rights was divided into several pieces of legislation and in 1992 two basic laws - namely the Basic Law: Human Dignity and Freedom[273] and the Basic Law: Freedom of Occupation[274] - were as a sort of compromise solution enacted.

It was assumed then that these two basic laws on human rights (in their originally version) would deal with the less politically controversial human rights.

In 1993, however, soon after the legislation of the two mentioned basic laws, the Supreme Court handed down the decision in the matter of *Mitrael Ltd. v. Minister of Commerce and Industry.*[275] In this affair the Court ruled that import restrictions on meat that has not been certified as kosher (i.e. meat that does not comply with the dietary laws of the Jewish religion) violated the right of freedom of occupation. The Supreme Court decision in the *Mitrael* case shows, that the hypothesis, freedom of occupation would not be controversial on the political level - especially concerning the relation between state and religion - was not correct.

[271A] *Bergman,* supra note 91

[272] See Chapter B.1. (Israel's Initial Obligations to Enact a Constitution including a Bill of Human Rights and the Issue of Judicial Review - Introduction)

[273] Basic Law: Human Dignity and Freedom (1992), supra note 1. The original English version of this basic law appears in 26 Isr.L.Rev. (1992) 248

[274] Basic Law: Freedom of Occupation (1992), supra note 1. The original English version of this basic law appears in 26 Isr.L.Rev. (1992) 247

[275] H.C. 5871/92, *Mitrael Ltd. v. Minister of Commerce and Industry*, 47(i) P.D. 521

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After this decision the original Basic Law: Freedom of Occupation was repealed and in 1994 re-enacted. The 1994 version of the Basic Law: Freedom of Occupation[276] includes now a provision, i.e. Section 8, allowing for a parliamentary override of the restrictions set up in Section 4 of this Basic Law.

Section 8 of the Basic Law: Freedom of Occupation (1994) states as follows:

> "A provision of law which violates freedom of occupation shall be valid notwithstanding that it does not accord with Section 4, if it is incorporated in a Law enacted by a majority of Knesset members and it expressly declares that it is valid notwithstanding the provisions of this Basic Law; a Law as aforesaid will cease to be valid at the end of four years from the date it comes into force, save where an earlier termination date is provided therein."

This override clause was exploited by the Knesset, already immediately after the 1994 version of the Basic Law: Freedom of Occupation was published, in order to enact the Import of Frozen Meat Law, 1994;[277] a law which prohibits import of meat that has not been certified as kosher.[278]

Additionally to the re-enactment of this Basic Law: Freedom of Occupation (1994) other amendments were introduced also to the original version of the Basic Law: Human Dignity and Freedom (1992).[279]

Important to mention is the fact that the two mentioned basic laws on human rights do not cover all fundamental human rights and freedoms protected in other modern bills of rights and under the International Covenant on Civil and Political Rights, 1966 [hereinafter: ICCPR].

Despite these and other defects these basic laws on human rights fulfill various principal normative functions within the whole legal order of Israel:

First of all they enumerate in two special documents those basic rights that are explicitly recognized and protected by the system.

Secondly they basically define the extent of protection of the recognized rights by setting up criterions for legitimate restrictions.

And finally they determine the constitutional status of the recognized rights, i.e. whether a certain legislative act may be judicially reviewed on substantive grounds because it violates the recognized rights.[280]

However the definite scope, application and interpretation of the two mentioned basic laws on human rights are to some extent uncertain.

Professor Kretzmer noted in an article published in 1999 that on the one hand the amendments to these laws in 1994 strengthen the arguments in favor of a judicial

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[276] Basic Law: Freedom of Occupation (1994), supra note 1

[277] Import of Frozen Meat Law, 1994, S.H. No. 1456 (22 March 1994)

[278] Kretzmer, supra note 53, at 295, 310

[279] Basic Law: Human Dignity and Freedom, supra note 1

[280] Kretzmer, supra note 53, at 295

interpretation of the basic laws that extent their application to rights that were deliberately disregarded in the original versions.[281]

On the other hand he argued that due to the structure of the basic laws on human rights and the clear political aim not to "constitutionalize" all fundamental rights, the Supreme Court may develop a jurisprudence around the notion of human rights specifically mentioned, but not to include all restrictions on rights that were intentionally excluded from the basic laws.[282]

The scope of the rights protected under the basic laws will therefore mainly depend on the way, the Supreme Court will interpret the rights themselves, and only time will tell what the Court will decide when called upon to review laws outside the scope of the human rights protected under the basic laws.

Nevertheless it should be mentioned that the enactment of the two basic laws on human rights mark - at least on the theoretical and conceptual level of the legal system in Israel - a certain change.

As already elaborated in the previous sub-chapters 5 and 6, until recently the Supreme Court did not consider himself competent to annul a law for substantive reasons even if its content conflicted with one of the very fundamental basic rights.

The only basis for judicial review of legislation recognized by the Supreme Court was a procedural failure to respect an entrenched clause in a basic law.

Thus the Supreme Court exercised judicial review only to ensure that legislation inconsistent with entrenched provisions was indeed enacted with special majority as required by those provisions.

The main conceptional contributions of the two new basic laws to the constitutional regime of Israel are therefore

1. the enhancement of the status of fundamental rights and freedoms by placing explicit limits on the Knesset's legislative power to restrict them;
2. the opening of the way for judicial review in order to control if the limits are indeed respected.[283]

The present Supreme Court President Aharon Barak has described the establishment of the two basic laws on human rights as having created a

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281 Ibid., Section 1 of both basic laws now states: "Fundamental human rights in Israel are founded on recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration on the Establishment of the State of Israel."

282 Id. This approach has also been adopted by the Supreme Court Justice Dorner in the case H.C. 4541/94, *Alice Miller v. Minister of Defence*, dealing with gender discrimination in accepting candidates for pilot training in the Israel Air Force. Justice Dorner held that discrimination on some grounds may not be degrading and would therefore not be covered by the concept of human dignity. For a summary in English see 7 Justice (1995) 46

283 Kretzmer, supra note 53, at 296-297

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"constitutional revolution",[284] a view which is completely rejected by Supreme Court Justice Menachem Elon.[285]

As legal source for the said "constitutional revolution" Justice Barak mentions two sections, namely Section 8 of the Basic Law: Human Dignity and Freedom (1992) and Section 4 of the Basic Law: Freedom of Occupation (1994).[286]

Professor Kretzmer on the other hand considers the adoption of the basic laws only as a "mini-revolution" due to the following three facts:

The Basic Law: Human Dignity and Freedom is not entrenched and may be amended by a simple majority (i.e. 61 members) of the Knesset.

The two basic laws on human rights do not mention important human rights.

Judicial review under both basic laws is restricted to legislation passed after they were enacted.[287]

With regard to the mentioned presumed "constitutional revolution" or "constitutional mini-revolution" the questions to answer are: For whom do these basic laws constitute a "revolution"; of what quality and for which intent is it considered as a "revolution".

After this short introduction, I will discuss in more detail in the following two sub-chapters the provisions of the Basic Law: Human Dignity and Freedom (1992) and of the Basic Law: Freedom of Occupation (1994).

7.2. The Basic Law: Human Dignity and Freedom, 1992 (Amended in 1994)

The Basic Law: Human Dignity and Freedom of 1992 in its amended version of 1994[288] defines the following fundamental rights and also establishes the legislative restrictions upon them:

- The right to life, bodily integrity, and human dignity
- The right to property
- The right to liberty against arrest and imprisonment
- The right to leave and enter the country

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284 President Barak expresses this view in a line of articles: Democracy in our Times, 20 Justice (1999) 8, at 9; Human Dignity as a Constitutional Right, 41 HaPraklit 271; Interpretation in Law, Volume III, Constitutional Interpretation (1994) at 444; *United Mizrahi Bank v. Migdal Cooperative Village,* supra note 46, at 352-355

285 Menachem Elon, We are Bound to Anchor Decisions in the Values of a Jewish and Democratic State, Justice, 17 (1998) 10, at 13

286 His arguments will be discussed in detail in the following sub-chapter 8

287 Kretzmer, supra note 53, at 311

288 Basic Law: Human Dignity and Freedom, supra note 1

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- The right to privacy and personal confidentiality

The right to life, bodily integrity, and human dignity and the right to protection of these rights are regulated in Section 2 and Section 4 of the Basic Law: Human Dignity and Freedom.

Section 2 of the Basic Law: Human Dignity and Freedom states as follows:

> "No injury may be caused to the life, person or dignity of a human being as a human being."

Section 4 of the Basic Law: Human Dignity and Freedom states as follows:

> "Every person has the right to protection of his life, his person and his dignity."

The term human dignity is not explicitly defined in the Basic Law, and the question arises which rights may be included within the concept of "human dignity". The answer to this question is not yet resolved and the opinions regarding the exact scope of the "concept of human dignity" vary.

The right to property is regulated in Section 3 of the Basic Law: Human Dignity and Freedom, which states as follows:

> "No injury shall be caused to the property of a person."

The right to liberty against arrest and imprisonment is regulated in Section 5 of the Basic Law: Human Dignity and Freedom, which states as follows:

> "The freedom of a person shall not be removed or restricted by detainment, imprisonment, confinement or in any other way."

The right to leave and to enter the country is regulated in Section 6 of the Basic Law: Human Dignity and Freedom, which states as follows:

> "(a) Every person is free to leave Israel.
> (b) Every Israeli citizen located abroad has the right to enter Israel."

The right to privacy and personal confidentiality is regulated in Section 7 of the Basic Law: Human Dignity and Freedom, which states as follows:

> "(a) Every person has the right to privacy.
> (b) The private domain of a person shall not be infringed without permission.
> (c) No searches shall be conducted in the private domain of a person, on his person, in his person or in his belongings.
> (d) The privacy of a person's conversation, writings or works shall not be infringed."

The enactment of only two basic laws was meant to overcome the political opposition issuing forth from the religious parties and the military establishment. Thus, the Basic Law: Human Dignity and Freedom did not include those civil and political rights which were considered to be far more "problematical"[289] despite the fact that these rights are protected by international human rights declarations,

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[289] Meridor, supra note 35, at 4

treaties and modern constitutions, and are the very foundations of democracy. Not included are the following basic human rights:

- The right to equality
- The right to freedom of expression
- The right to freedom of demonstration, assembly, and association
- The right to freedom of religion and conscience

The Basic Law: Human Dignity and Freedom is - opposed to the Basic Law: Freedom of Occupation - not entrenched and can be amended/modified by a simple majority. Professor Kretzmer stressed that a comparison between the two new basic laws may lead to the conclusion that freedom of occupation is more important than other fundamental rights, such as the right to life, bodily integrity, dignity and personal liberty.[290]

At first sight the provision of Section 8 of the new Basic Law: Human Dignity and Freedom seemed that this law was meant to place restrictions on the legislative power of the Knesset.

Section 8 of the new Basic Law: Human Dignity and Freedom states:

> "The rights conferred by this Basic Law shall not be infringed save where provided by a law which accords with the values of the State of Israel, which was intended for a fitting purpose, and only to the extent necessary, or by a law as aforesaid by virtue of an express authorization therein."
> *[Amendment inserted by Basic Law: Freedom of Occupation - 1994]*

But due to the existing jurisprudence of the Supreme Court and the fact that the basic law itself is not entrenched doubts came up.[291] As I will demonstrate below, these doubts were tried to be dismissed with the already mentioned Supreme Court decision in the matter of *United Mizrahi Bank Ltd. v. Migdal Cooperative Village:*[292] In this decision the majority of the judges held that the two basic laws on human rights have formal constitutional status, superior to that of ordinary legislation and that all legislation passed after the basic laws must meet their demands. This decision also stated that the courts have the power to review legislation in order to examine whether it does indeed meet the required demands.[293]

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290 Kretzmer, supra note 53, at 298

291 Ibid.

292 Id.

293 Id., at 223-224. The petitioners (the creditors) argued that the amendment to the Family Agricultural Sector Law, 1992 violates their property right, protected under Section 3 of the Basic Law, and that it does not meet the requirements of Section 8. The Supreme Court held unanimously that the property rights of the creditors are indeed violated by the said legislation, but not to an extent greater than necessary (i.e. the Family Agricultural Sector Law, 1992 meets the requirements of Section 8 of the Basic Law: Human Dignity and Freedom.) The amendment to the Family Agricultural Sector Law, 1992 was therefore not overturned. The Court could have avoided to address the topics relating to the binding force of the Basic Laws and the power of judicial review over incompatible legislation.

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As for the scope of protection of the Basic Law: Human Dignity and Freedom it may be said that according to the accepted standards of international law, some rights, such as freedom from torture and from slavery, enjoy absolute protection. But also according to international law the most rights are relative rights and may be legitimately restricted if there is a need for protection of other rights and interests.

For this purpose Section 8 of the Basic Law: Human Dignity and Freedom provides a general balancing test that follows the balancing approach of the Canadian Charter of Rights and Freedoms. It should be mentioned that - although the individual human rights enumerated in the Basic Law: Human Dignity and Freedom are defined in absolute terms[294] - the general balancing test provided by Section 8 must be employed in all cases.

Section 8 states that the rights according to this Basic Law may not be infringed except by a statute which accords with the values of the state of Israel as Jewish and democratic state, which was intended for a fitting purpose and only to the extent necessary. The issues of a worthy purpose and the necessary extent were treated in other jurisdictions, such as the Canadian and German jurisprudence and the Supreme Court of Israel has looked to them and adopted already an interpretation of the "necessary extent" which is similar to the proportionality test developed by the competent Courts in those countries.[295]

A real problematical issue is the clause entailed in Section 8 of the Basic Law: Human Dignity and Freedom which refers to "the values of the state of Israel". Important to mention at this point is that Section 8 has to be read together with Section 1A of the amended Basic Law: Human Dignity and Freedom referring to the values of the state of Israel as a "Jewish and a democratic state" and stating that the purpose of this Basic Law is to protect human dignity and freedom in order to entrench these values.

Section 1A of the new Basic Law: Human Dignity and Freedom states:

> "The object of this Basic Law is to protect human dignity and freedom, in order to entrench the values of the State of Israel as a Jewish and democratic State in a Basic Law."

The first principle, defining Israel as a Jewish state, emphasizes the national/ethnic character of the state and is not only a sociological description but - as I will demonstrate in more detail in the following chapters of this work[296] - rather

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Nevertheless - as it will be elaborated in the following sub-chapter 8 - some of the judges dealt with these questions at great length.

294 No one's life, body or human dignity (Section 2); no one's property shall be violated (Section 3) and other sections.

295 Kretzmer, supra note 53, at 303; *United Mizrahi Bank*, supra note 46, at 436 and others

296 See especially Chapter C. (The Concept of the State of Israel as a "Jewish State" and its Impact on the Right to Equality and other Civil and Political Rights) and Chapter G. (The Right to Property)

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an ideological one that finds its expressions in the whole constitutional and normative framework of the state.

The second principle on the other hand stresses universal democratic values and should have implied that the state of Israel serves the needs of all its citizens.

Although this basic law clearly considers the value of the state of Israel as a "democratic state" as one of the basis for the preservation of human rights, this law does specifically not only not enumerate the right to equality but rather totally ignores the fact that Israel is not made up only of Jews alone but rather also of 20% native Palestinian Arab citizens.

According to my point of view this latter clause relating to the values of the state of Israel will be the true test if Israel really considers itself to be committed to democracy, which is based upon the principle of respect for human rights and freedoms for individuals and minorities, upon gender equality (which the religious parties very strongly oppose) and upon the principle of equality before the law, which, if applied honestly, would finally make the Palestinian Arab citizens living within the state of Israel really full citizens.

However, my predictions are not too optimistic that the concept of democracy based on equality for *all* citizens will be the winning one, since the most Israeli legal scholars and Supreme Court judges - ranging from the liberal, secular to the conservative, religious spectrum - do not acknowledge the tension and inherent antagonism between the two notions of Israel's nationhood.

The current President of the Supreme Court, Aharon Barak - who for instance is considered to represent the liberal, secular approach within Israel's legal community - views the Jewish state as one that not only includes Jewish heritage and Jewish law but also Zionist values.[297]

As I have elaborated in detail in the previous Chapter A[298] of this work - the concept of political Zionism in all its appearing, seemingly different, doctrines always focuses on a complete exclusion of the indigenous Palestinian Arab people from resource allocation (land, water, budget), from employment as well as from cultural, social and economical rights and benefits. I come therefore to the conclusion, that as long as such an exclusionary concept - as it is formulated by Zionism - lays at the very foundations of the whole legal and governmental system itself the concept of "democracy" is not at all taken seriously by the state of Israel. For it is not enough just to "proclaim a democratic state" formally and to write down such a proclamation in a law that is called "Basic" without however doing anything in order to incorporate this concept on a substantial level into the whole legal and institutional system itself.

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[297] Barak, Interpretation in Law, Vol. III, supra note 284, at 330

[298] See especially Chapter A.2. (Ideology and Doctrines of the Concept of Political Zionism), Chapter A.3. (Sources of the Concept of Political Zionism) and Chapter A.4. (Establishment of "Jewish National Institutions" by the Zionist Movement)

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President Barak has interpreted the term "Jewish state" also in the following way:

> "*...The Jewish state is, therefore, the state of the Jewish people*...it is a state in which every Jew has the right to return... it is a state where its language is Hebrew and most of its holidays represent its national rebirth... a Jewish state is a state which developed a Jewish culture, Jewish education and *a loving Jewish people*...a Jewish state derives its values from its religious heritage, the Bible is the basic of his books and Israel's prophets are the basis of its morality. A Jewish state is also a state where the Jewish Law fulfills a significant role... *a Jewish state is a state in which the values of Israel, Torah, Jewish heritage and the values of the Jewish Halacha are the bases of its values.*" [Emphasis added][299]

Reading through this passage one may easily discern that Justice Barak's interpretation of the concept of a "Jewish state" entails a strong exclusionary message to all non-Jewish people, i.e. mainly the indigenous Palestinian Arab people, from being able to join the group of those eligible to the "common good".

This is revealed by the fact that Justice Barak strongly emphasizes the religious-ethnic aspect, not however in the sense of a sociological description of the state of Israel to be a "Jewish state", but rather in the sense of an ideological description and direction of the state. In line with his ideologically oriented religious/ethnic/national concept regarding the existence of the state of Israel, Justice Barak explicitly stresses that "...the Jewish state is the state of the *Jewish people...* a state which developed a *Jewish culture*, *Jewish education* and a *loving Jewish(!) people*".

Justice Barak does not give any hint to the idea that a state if it really wants to be a democracy should always be the state of *all* the people which are lawfully and legitimately living in this state. He does not say anything about the fact that the state of Israel is in reality a bi-national state and that the same territory that is called Israel forms also the homeland for another nation, namely the Palestinian Arab people, which before 1948 constituted the large majority, but which was expelled and never allowed to return. Justice Barak does not say for example - as it would be appropriate for someone who really wants to proclaim a concept of democracy which is based on equality and not on distinction due to religion or ethnicity - that Israel is the state of the Jewish people and equally the state of *all* its Palestinian Arab citizens. The Palestinian Arab people is not mentioned in one word in Barak's interpretation. Considering President Barak's interpretation of a "Jewish state", the concept of a "democratic state" - which is based upon the principle of respect for human rights and freedoms for *all* individuals and minorities, and upon the principle of equality before the law, which, if applied honestly, would finally make the Palestinian Arab citizens living within the state of Israel really full citizens - can hardly have any significant place.

Although President Barak is commonly presented as someone who belongs to the liberal secular Zionists within the legal community in Israel, the above quoted

[299] Barak, Interpretation in Law, Vol. III, supra note 284, at 332

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passage of his interpretation of the term "Jewish state" is rather very similar to the religious perception of the Bible and tradition as the sovereign authority on the life of the Jews. This is revealed by the fact that if one compares President Barak's interpretation with that of Supreme Court Justice Menachem Elon - who in the majority of his cases applies Jewish law - the same basic tenets may be discerned.

Justice Menachem Elon expressed with regard to the values of the state of Israel as a Jewish and democratic state the following view:

> "...a significant element of the term 'Jewish' includes Jewish law. Every judge who is faced with a constitutional problem, is now bound to anchor his decision in the values of a Jewish and democratic state, and *the term 'Jewish' precedes 'democratic'*. Of course, *the term 'Jewish' also includes Zionist values*, but one cannot say that it does not include the Talmud. That would be nonsense. Regrettably, an opinion was expressed that it only included Jewish values which were accepted by the world. *Today it is agreed that Jewish values are not necessarily universal values...*" [Emphasis added][300]

In summary one can say that the content and the way of interpretation of the values of the state of Israel as a "Jewish and democratic state" is going to be the biggest challenge for the future jurisprudence of the Supreme Court and the biggest question if "democracy" remains to be a proclaimed but empty concept.

On the one hand the Supreme Court will have to decide whether a law that restricts basic rights is directed towards a worthy purpose and that the restrictions on those rights do not exceed what is necessary.

On the other hand the Supreme Court will have to state if such legislation accords with the values of the state of Israel as a Jewish and democratic state.

Another essential defect of the Basic Law: Human Dignity and Freedom lays in the existence of Section 10 which explicitly determines that any law which existed prior to the enactment of the Basic Law shall not be affected.

Section 10 of the Basic Law: Human Dignity and Freedom states:

> "This Basic Law shall not derogate from the validity of any law existing on the eve of this Basic Law coming into force."

This section clearly reveals that the Basic Law: Human Dignity and Freedom directly effects only laws enacted after March 1992 with the result that all the discriminatory laws (especially the laws relating to the right to immovable property, i.e. land) that were enacted until then stay in force. That means, all the legal instruments that were enacted before the Basic Law: Human Dignity and Freedom and that were never declared invalid remain automatically and totally unchanged in force, despite the fact that they often constitute unjustified and severe infringements

300 Menachem Elon applied in the majority of his cases Jewish law, irrespective whether the issues were related to public law, criminal law, law of torts, or to marriage, divorce and Shabbat. See also Elon, supra note 285

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of human rights, a breach of international law and universally recognized principles of law.[301]

At this point two rules of interpretation of law declared by the present Supreme Court President Aharon Barak should be mentioned:

The one states that "previous legislation has to be interpreted in accordance with the spirit of the new Basic Law: Human Dignity and Freedom."[302]

The other states that "Israel's inherited and enacted legislation must be interpreted in harmony with the new legal environment and normative umbrella which has been developed since the establishment of the state of Israel, and which consists not only of the immediate legal context, but also of accepted principles, basic aims and fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."[303] That means in other words: All the laws and regulations that reflect the principles, basic aims and fundamental criteria - which are accepted by the Israeli society and which derive from the sources of Israel's social consciousness - form "the legal environment or normative umbrella over all legislation" - in spite of the fact that such legal instruments are often a gross violation of international law and universally recognized principles of law. Thus, all the illegal, immoral and therefore unacceptable laws, that have been enacted over the decades and that were never declared invalid, but that express the above mentioned "by the Israeli society accepted principles, basic aims and fundamental criteria" form "the new legal environment which has been developed since the establishment of the state of Israel."

Section 10 of the Basic Law: Human Dignity and Freedom constitutes the immunity from judicial review of prior legislation under the standards of the said law. This limiting clause weakens the significance and the influence of the Basic Law: Human Dignity and Freedom, since all the legal instruments that were enacted

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301 There is no room to mention all legislative tools, but see for example the following legal instruments, which are still in force and which are - although not all of them - also applied on a regularly basis by the Israeli executive apparatus, despite the fact that they are highly discriminatory for the non-Jewish, i.e. mainly the Palestinian Arab people, and constitute severe infringements of human rights and freedoms and a breach of international law. But the following important pieces of legislation shall nevertheless be mentioned:
Defence (Emergency) Regulations, 1945, supra note 63; Law of Return, 1950, supra note 217; the Absentees' Property Law, 1950, supra note 215; World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952/53) 3; Keren Kayemet Le-Israel Law, 1953, 8 L.S.I. (1953) 35; Basic Law : Israels Land, 14 L.S.I. (1959/60) 48; Israel Lands Law, 1960, 14 L.S.I. (1960/61) 49; Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, 21 L.S.I. (1966/67) 105

302 Aharon Barak, The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law, 31 Isr.L.Rev. (1997) 3, at 11

303 H.C. 680/88, *Schnitzer v. Chief Military Censor,* H.C. 680/88, translated into English in 9 S.J. (1977-1990) 77, at 81, 87-88. (This case will be discussed in detail in Chapter F.4.4. of this work)

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before this law and that were never declared invalid remain automatically and totally unchanged in force, despite the fact that they often constitute unjustified and severe infringements of human rights, a breach of international law and universally recognized principles of law.[304]

To sum up the situation one may say that many totally illegal, undemocratic, immoral and therefore unacceptable legal instruments may be - and as the reality shows are still - regularly applied by the executive apparatus.

Some justices of the Supreme Court have, nevertheless, expressed the view that "the enactment of the basic laws on human rights has fundamentally changed the status of the protected rights which have now as constitutional rights more weight than they had before, and therefore the Courts should reconsider their interpretations on the rights."[305]

Commenting on this jurisprudence, Professor Kretzmer wrote that if this approach is followed, the Basic Law: Human Dignity and Freedom may have influence on prior incompatible legislation even if such legislation cannot be annulled.[306]

To mention is further Section 11 of the Basic Law: Human Dignity and Freedom which expressly provides that all governmental authorities are bound to respect the rights protected under this law.

Section 11 of the Basic Law: Human Dignity and Freedom states as follows:

> "Every authority of the government authorities is under a duty to respect the rights conferred by this Basic Law."

Section 12 of the Basic Law: Human Dignity and Freedom determines that when there exists a state of emergency in the country the rights protected by this basic law may be denied or restricted.

Section 12 of the Basic Law: Human Dignity and Freedom states as follows:

> "Nothing in any emergency regulations shall be effective to alter this Basic Law, to suspend its validity temporarily or to stipulate conditions to it; however, where the State is in a state of emergency by virtue of a declaration under

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[304] There is no room to mention all legislative tools, but see for example the following legal instruments, which are still in force and which are - although not all of them - also applied on a regularly basis by the Israeli executive apparatus, despite the fact that they are highly discriminatory for the Palestinian Arab people, constitute severe infringements of human rights and freedoms and a breach of international law:
Defence (Emergency) Regulations, 1945, supra note 63; Law of Return, 1950, supra note 217; Absentees' Property Law, 1950, supra note 215; World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 301; Keren Kayemet Le-Israel Law, 1953, supra note 301; Basic Law: Israels Land, supra note 301; Israel Lands Law, 1960, supra note 301; Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, supra note 301

[305] See the opinions of Justice Daliah Dorner in the case *Alice Miller*, supra note 282, and the majority opinion in the case H.C. 537/95, *Ganimat v. State of Israel,* 49(iii) P.D. 355

[306] Kretzmer, supra note 53, at 299

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> Section 9 of the Law and Administration Ordinance 1948, emergency regulations may be promulgated under the said Section which will have the effect of revoking or restricting rights under this Basic Law, provided however that the revocation or restriction shall be for a fitting purpose and for a period and to an extent which shall not exceed what is required."

Due to the fact that this section makes no distinction between relative and absolute rights, i.e. rights that may be limited and those that may not, Section 12 of the Basic Law: Human Dignity and Freedom is repugnant to Article 4(2) of the ICCPR.[307]

Nevertheless it should be mentioned that one day after the enactment of the Basic Law: Human Dignity and Freedom, the Knesset legislated another basic law, namely the Basic Law: The Government,[308] restricting the emergency powers of the Government.[309]

Professor David Kretzmer of the Hebrew University has argued that the interpretation of the provisions relevant to emergency regulations should lead to the conclusion that emergency measures that are inconsistent with Article 4(2) of the ICCPR are unconstitutional.[310]

7.3. The Basic Law: Freedom of Occupation, 1992 - Re-enacted 1994

Freedom of occupation is one of the most important civil rights and was already recognized in 1949 with the decision in the matter of *Bejerano v. Minister of Police,*[311] one of the first judgments of the Israeli Supreme Court.

Justice Cheshin, handing down the judgment for the Supreme Court, stated:

> "...it is a vital principle that each person has the natural right to engage in whatever trade or profession he selects, as long as such a trade or profession is not prohibited by statute. The right is a legal right that cannot be prohibited

307 Section 4 of the ICCPR states that even in a state of emergency Section 6 (the right to life); Section 7 (the rights against torture); Section 8 (the right against slavery); Section 11 (non-imprisonment for contractual debt); Section 15 (non-retroactivity of criminal offenses); Section 16 (the right to recognition as a person before the law) and Section 18 (freedom of thought, conscience and religion).

308 Basic Law: The Government, 1992, S.H. No. 1396 (14 April 1992) 214

309 The sections of the Basic Law: The Government relevant to emergency legislation are Section 50(e), stating that the measures provided for in emergency legislation may not exceed those demanded by the emergency situation, and Section 50(d) providing that emergency legislation may not restrict access to the courts, provide for retroactive punishment or permit violation of human dignity. Ibid.

310 Kretzmer, supra note 53, at 308

311 *Bejerano v. Minister of Police*, supra note 89

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> except by law. It is a natural right which has not been inscribed in any book but stems from the natural right of each individual to seek a source of income."[312]

According to the words of the Supreme Court, the existence of the principle of freedom of occupation was founded on a natural-right basis.

Professor Pnina Lahav, however, stated in a critical comment in the Israel Law Review that despite the fact that the Supreme Court described in this case the right to an occupation of one's choice as a "natural", "unwritten" and "fundamental" right, it would be a mistake to see it as a rejection of legal positivism. According to her opinion "all the Court did was to endorse the classical liberal position that one is at liberty to do whatever the law does not prohibit."[313]

The new Basic Law: Freedom of Occupation[314] represents a conceptual change insofar as 1. it protects the right of every Israeli citizen to engage in any profession or business, and as 2. it takes into account the existence of the many legislative acts in force prior to its enactment which conflict with the freedom of occupation.

It should be mentioned that this basic law deals with a right that is not explicitly mentioned in many constitutions and human rights documents in Western democracies.

However, as the Basic Law: Human Dignity and Freedom also this Basic Law contains a general balancing test (Section 4) and a parallel provision (Section 2) to Section 1A of the Basic Law: Human Dignity and Freedom referring to the "values of the state of Israel as a Jewish and democratic state."[315] The Basic Law: Freedom of Occupation also emphasizes the ethnicity of the state of Israel to be "a Jewish state" and not a state of *all* its citizens. Thus, this basic law also totally ignores the fact that the state of Israel is not made up of Jews alone but rather exists of 20% of native Palestinian Arab citizens.

The basic law is entrenched and can be changed only by another Basic Law enacted by a majority of the Knesset members. The entrenchment of this basic law is stronger than the entrenchment in Section 4 of the Basic Law: The Knesset[316] due to the requirement that the change is valid only by an absolute majority and by a basic law. (Section 7)

On the other hand the Basic Law: Freedom of Occupation contains in Section 8 an override clause that allows the Knesset to include a provision in an ordinary law that violates freedom of occupation even if this law is inconsistent with the balancing test provision (Section 4). The said legislation shall be valid if it was

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312 Ibid.

313 Lahav, supra note 87, at 230

314 Basic Law: Freedom of Occupation (1994), supra note 1

315 See also Chapter C. (The Concept Israel as a "Jewish State" and its Impact on the Right to Equality and other Civil and Political Rights)

316 Basic Law: The Knesset, supra note 18

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passed with an absolute majority in which it was expressly stated that it would be valid notwithstanding this Basic Law. The validity of such a law will automatically lapse after four years. The override clause follows the model of the Canadian Charter of Rights and Freedoms.[317]

Section 9 provides a two - year grace period during which such conflicting laws may be adjusted to comply with the Basic Law or be declared invalid. After the lapse of the period of two years the Basic Law will apply to all existing legislation, beginning with the day of enactment of the new version of the law in 1994. Even during this grace period such enactments will be interpreted in the spirit of the Basic Law.

After this short overview about the main provisions, characteristics and defects of the two new basic laws on human rights I shall now turn to the 1995 decision in the matter of *United Mizrahi Bank v. Migdal Cooperative Village*.

8. United Mizrahi Bank v. Migdal Cooperative Village

8.1. General Remarks

In November 1995 the Supreme Court of Israel handed down the decision in the matter of *United Mizrahi Bank v. Migdal Cooperative Village*[318] concerning the validity of an amendment to the Arrangements in the Family Agricultural Sector Law[319] - a law dealing with financial regulations in the Jewish agricultural sector of the Kibbutzim located on the Golan Heights, the Jordan Valley and in several other areas.

In the legal community of Israel the Arrangements in the Family Agricultural Sector Law is - according to the Knesset member who introduced it - called the "Gal Law"; the Supreme Court decision is known as "Gal Amendment Decision". However, I will relate to this decision as *United Mizrahi Bank* decision/case.

The said decision resulted from a District Court decision that annulled the above mentioned amendment to the Arrangements in the Family Agricultural Sector Law on the ground that the amendment violated Section 3 of the new Basic Law: Human

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317 See Section 33 of the Canadian Charter, which contains some significant differences compared to Section 8 of the Basic Law: Freedom of Occupation. According to Section 33 the restricting legislation loses its effect after five years, and the legislature that enacted the overriding statute may re-enact the overriding declaration at the end of the five year period.

318 *United Mizrahi Bank*, supra note 46

319 Family Agricultural Sector Law, 1992, S.H. No. 118; Family Agricultural Sector Law (Amendment), 1993, S.H. No. 178

Dignity and Liberty. The matter was appealed before the Supreme Court, which overturned the District Court decision.[320]

The *United Mizrahi Bank* case is considered to have contributed to a major constitutional development in Israel, since it is the first decision of the Israeli Supreme Court that deals in detail with the parameters of the new basic laws on human rights, and the first case in which the question of the constitution in Israel received detailed examination by the Supreme Court.

The question about the constitution in Israel comprehends a few intertwined questions such as (1) the Knesset's authority to enact a constitution, and the authority to place limits upon the power of future Knessets; (2) the issue of judicial review, i.e. the remedy of invalidating of laws; (3) the normative relationship between basic laws and regular statutes.

In the previous sub-chapters 5. and 6. of this work I have demonstrated that although these questions have been discussed by scholars and politicians since the establishment of the state of Israel, they have never been treated in a direct and substantive way by the Supreme Court. I have also demonstrated that - although in the past the Supreme Court annulled certain laws for procedural reasons (i.e. if these laws had not been enacted with the required majority)[321] - no court in Israel had ever overturned a law for substantive reasons, i.e. on the ground that it was repugnant to fundamental principles. When an ordinary law had got the required majority in the Knesset, then the Supreme Court refused to annul such a law on the substantive ground of violating basic principles.

Due to the assumed importance of the mentioned questions for the future development in the field of Israel's constitutional regime, including the issue of fundamental human rights in Israel, a bench of nine judges of the Supreme Court heard the appeal in the *United Mizrahi Bank* case.

Despite the seemingly positive results regarding the constitutional matters, the decision in the *United Mizrahi Bank* case is nevertheless - as I see it - disappointing due to the fact that it can not be considered to be an obiter dictum, inasmuch as Judge Barak and all other judges - including the judges Shamgar and Cheshin - finally decided, for *political* reasons, not to overturn the amendment to the Gal Law. This decision is only one of a long line of judgments wherein the Supreme Court pronounces the existence of fundamental human rights and also admits the violation of a basic right, but finally comes to the conclusion that - in light of other more important interests - the violation of the said right is justified.

In sub-chapter 8.4., I will elaborate in short the different approaches of the judges that decided on this matter. First of all I will, however, provide an overview about the facts of the case and the decision of the District Court.

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[320] *United Mizrachi Bank v. Migdal Cooperative Village,* 31 Isr.L.Rev. (1997) 764

[321] *Bergman*, supra note 91; *Agudat Derech Eretz*, supra note 221; *Rubinstein,* supra note 222

8.2. The Facts of the Case

On 12 March 1992, the Arrangements in the Family and Agricultural Sector Law - the Gal Law - went into effect. The said law was enacted after a severe economic crisis had affected the Jewish agricultural sector and after several previous attempts to solve the problems had failed.[322]

The object of the Arrangements in the Family and Agricultural Sector Law was to rehabilitate the Jewish agricultural sector and to prevent its liquidation. The method chosen to achieve this goal was to place the burden of rehabilitation upon the creditors, including the *United Mizrahi Bank* and other appellants. The law established that creditors could recover their debts neither in the courts nor in the execution office but only by the rehabilitator, called "HaMeshakem". The rehabilitator was a special body created for that purpose and was granted broad powers to reschedule debts, liquidate a debtor's assets and force creditors to forgive part of the debt.[323]

As already said above the original Arrangements in the Family and Agricultural Sector Law - the Gal Law - entered into force on 12 March 1992. It dealt with all debts which were created on or before 31 December 1987. The amendment to the Arrangements in the Gal Law was passed on 13 August 1993 and extended the original cut-off date to 31 December 1991. The arrangement to debts incurred during an additional four-year period after the period established in the original law was applied.[324]

The Supreme Court decision under review does not concern the original Gal Law but only the amendment to it, that was passed on 13 August 1993. The reason for the limitation to the amendment is the existence of Section 10 of the Basic Law: Human Dignity and Freedom, stating that this basic law shall not affect the validity of any law in force prior to the commencement of the Basic Law. The Basic Law: Human Dignity and Freedom entered into force on 25 March 1992, only a few days later than the Gal Law, so that the validity-of-law-principle applied and the constitutionality of the original Gal Law could not be challenged under the basic law.

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[322] *United Mizrahi Bank*, supra note 46; Zilbershatz, supra note 46, at 23

[323] Zilbershatz, ibid.

[324] Id.

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8.3. The Decision of the District Court

The District Court - as well as later the Supreme Court - considered whether an amendment to the original Gal Law formed part of the pre-existing law or whether it is a new law that could be constitutionally reviewed. Both courts came to the conclusion that an amendment should be viewed as a new law that is not subject to the validity of laws principle. The District Court examined the amendment in light of the basic law and found that it infringed the property rights protected under Section 3 of the Basic Law: Human Dignity and Freedom. The rehabilitator being responsible for carrying out the arrangements, was authorized to cancel part of a debt, to reschedule repayment of a debt over an extended period, and to order the partial realization of a debtor's property in a different manner than that employed in execution proceedings. Therefore the creditor would not recover all his money and his property rights would suffer.[325]

Then the District Court examined the infringement of the property rights in light of the criteria established in Section 8 of the Basic Law and concluded that it did not meet the requirements of that section.

According to Section 8 rights that are recognized under the Basic Law: Human Dignity and Freedom can be violated only by a law which accords with the values of the state of Israel, which was intended for a fitting purpose, and only to the extent necessary.

The District Court concluded that the amendment was out of the following reasons unconstitutional: (1) The amendment was inappropriate to the values of the state of Israel because it violated two aspects of the equality principle, namely: It placed the burden of rehabilitation exclusively upon the creditors and created arrangements for only part of the agricultural sector rather than for the entire sector. (2) The amendment law did not serve a "proper purpose" and did not meet the condition of "proportionality", since it had not been proved that the amendment did not exceed what was required according to Section 8 of the Basic Law.[326]

According to the opinion of the District Court the amendment to the Gal law should therefore be annulled. This decision of the District Court constituted a new development in the Israeli legal system, because it invalidated a law by reason of its being repugnant to a substantive provision of the Basic Law: Human Dignity and Freedom.

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325 Id.
326 Id.

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8.4. The Decision of the Supreme Court

After the decision of the District Court an appeal was brought before the Supreme Court, where nine judges decided over the comprehensive issue of the constitution of Israel. The question with which the Supreme Court confronted itself for the first time was if an Israeli court was competent to invalidate a law of the Knesset for repugnance to substantive principles that were established in a Basic Law. The Supreme Court examined (1) the normative status of basic laws in relation to regular laws passed by the Knesset; (2) the question if the basic laws formed a constitution; (3) the question if the Knesset has the power to enact a constitution and on what basis it could do this.[327]

In this case three judges, namely Meir Shamgar, Aharon Barak and Mishael Cheshin wrote very detailed decisions. The other six judges - Bach, Goldberg, Zamir, Tal, Levin, Matza - wrote shorter opinions, concurring in principle with their colleagues, but elaborating some distinctions of their own to the decision.

The majority of the judges held that the two Basic Laws: Human Dignity and Liberty, and Freedom of Occupation have formal constitutional status and that their status is therefore superior to that of ordinary legislation. Thus all legislation passed after the basic laws must meet their demands.

The majority of the judges also stated that the courts have the power to review legislation in order to examine whether it does indeed meet the required demands.

Regarding the legal-theoretical basis for the Knesset's authority to pass constitutional laws which have superior status to ordinary legislation, the judges Barak, Shamgar and Cheshin had different point of views.

Five judges concurred with judge Barak's position, that the Knesset has legislative and constituent authority and that the constitutional enactments stand above its legislative acts. According to Barak's position the Knesset's legislative power continues for all time, but its constituent authority is temporary and will cease when the Knesset, as Constituent Assembly, declares that it has completed the process of framing the constitution.[328] In the past President Barak's theory of the constituent power of the Knesset was rejected by the Supreme Court.

Justice Shamgar did not agree with Barak's theory of the constituent authority of the Knesset, but basically came to the same result, since he held that the Knesset as a sovereign legislative body has the authority to ascribe constitutional status to basic laws.

Justice Cheshin was the only judge of the Court who refused to recognize the power of the Knesset to enact legislation which has superior constitutional status, or

[327] Id., at 24

[328] *United Mizrahi Bank,* supra note 46*,* 49(iv) P.D. 221, at 390

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to bind its legislative power in a way that exceeds the majority rule in a parliamentary democracy.[329]

Despite the fact that Barak’s opinion formed a majority of the bench and that the Knesset’s constituent authority can be said to be a matter of decided law, the decision in the Gal matter on the whole can not be considered to be an obiter dictum, inasmuch as Judge Barak and all other judges - including the judges Shamgar and Cheshin - decided, for *political* reasons, not to overturn the amendment to the Gal Law.

After this short introduction to the case I will analyze the legal-philosophical foundations of the three main approaches, namely those of the judges Barak, Shamgar and Cheshin. I will start with President Barak’s opinion because the majority of the judges adopted his opinion concerning the question of the Knesset’s power to enact a constitution and concerning judicial review.

8.4.1. The Opinion of Supreme Court President Barak

Supreme Court President Barak opened his detailed opinion[330] in the *United Mizrahi Bank* matter with a strong general introduction about the "constitutional revolution" that - according to his opinion - occurred in 1992 in Israel’s legal system when the Knesset enacted the two new Basic Laws: Human Dignity and Freedom and Freedom of Occupation. He stated that with the enactment of these laws in March 1992 human rights in Israel have become the status of constitutional rights.[331] He also stressed that Israel belongs now to the circle of democratic states - among them United States, Canada, Germany, Italy, South-Africa - which possess a bill of rights. He wrote that the "constitutional revolution" expresses itself in various ways, namely: (1) In the change of the constitutional status of human rights and fundamental principles being now declared in a bill of rights. (2) In the fact that basic laws stand on a supreme normative plane above that of normal laws and the fact that there exists now judicial review of regular Knesset legislation. (3) In the fact that the Knesset can restrict its legislative power when it passes a basic law and acts in its constituent authority.[332]

8.4.1.1. The Knesset’s Authority to Enact a Constitution

President Barak furthermore held that the questions of the Knesset’s power to enact a constitution and the source of this authority form "key questions" which can

[329] Ibid., at 481
[330] Id., at 352
[331] Id.
[332] Id., at 353, 354

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be answered in different ways based upon different legal-philosophical conceptions.[333] According to his opinion the Knesset has the authority to frame a constitution. He stressed that the source of the Knesset's constituent authority does not come from a basic law or any other law enacted by the Knesset itself, because the Knesset can not create the constituent power by itself. Therefore - so President Barak - the source of this power always has to lie outside the legislative body, at a certain existing Archimedes relation point, that by itself is nourished by the whole people, because only the people has the sovereignty.

President Barak concluded that the Knesset's constituent authority therefore only comes from the people's sovereignty. From this source the Knesset derives two functions - figuratively spoken the Knesset wears two hats - a legislative and a constituent one: When the Knesset enacts basic laws that form part of the state's constitution it exercises its constituent authority. In all other instances, when it exercises its lawmaking power it wears its legislative hat.[334]

President Barak based the Knesset's power to enact a constitution mainly on the doctrine of the constituent authority which has its fundaments in H. Kelsen's theory of a basic norm (Grundnorm).

But he also noted that - beside Kelsen's theory - there exist two other legal theoretical models, namely H.L.A. Hart's rule of recognition model and R. Dworkin's empirical model, which can be employed to explain the foundation of the constituent authority of the Knesset. He stated that all three models - which I will analyze below in more detail - result in the same conclusion, namely that "the Knesset has the constituent authority to enact a constitution."[335]

According to President Barak the mentioned three models "do not form the private opinion of the judge himself" but rather are "an objective interpretation of the constitutional history of the state of Israel." According to Barak's opinion "the three models are based upon a number of objective constitutional facts that contribute in different way to the existence of the three models and therefore to the constituent authority of the Knesset." As "constitutional facts" Barak mentions the following elements: (1) The various circumstances of the constituent continuity, which forms an important element for the first model, based upon Kelsen's Basic norm; (2) The view of the Knesset of itself, an empirical fact that serves the court to base his conclusions on all three models; (3) The opinion of Israel's legal academics and commentators, an important circumstance especially for the second and the third model; (4) The decisions of the Supreme Court.[336]

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[333] Id., at 355
[334] Id., at 356
[335] Id., at 355-358
[336] Id., at 359

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The first model upon which President Barak bases the Knesset's power to enact a constitution is, as above mentioned, Kelsen's basic norm or Grundnorm model.[337] This model shall be discussed in the following sub-chapter in more detail.

8.4.1.2. Kelsen's Basic Norm or "Grundnorm" Model

President Barak is of the opinion that in application of "Kelsen's Basic Norm or 'Grundnorm' model the Knesset derives its constituent authority from the constitutional continuity that began with the Declaration of the Establishment of the state of Israel."[338] Therefore - so Barak's line of argumentation - "the starting point for the whole discussion of the constitutional continuity is the 15 May 1948, i.e. the day after the state of Israel was established in Palestine.

Following Kelsen's system in the Pure Theory of Law[339] "the basic norm of Israel lies" - according to Barak - "in the fact that the Provisional Council of the State constituted the highest authority of the state of Israel."

Barak argued that "the Peoples Council, that proclaimed the establishment of the state of Israel in the Declaration of the Establishment of the State of Israel on 14 May 1948, declared to act as the Provisional Council of the State and provided that an Elected Constituent Assembly should frame a Constitution for the country. The Provisional Council of the State enacted in May 1948 the Law and Administrative Ordinance,[340] where in Section 7(a) was established that the Provisional Council of State would itself be the legislative authority."

As already elaborated in Chapter B.3. of this work, until 1992 - the Declaration of the Establishment of the State of Israel did not have any legal status, but rather formed a political, declaratory document and an instrument for the interpretation of statutes and laws.

According to Barak's concept, "the nature of the Declaration of the Establishment of the State of Israel (of not having legal status) does not harm for constituting the source for the whole legal system in Israel." Barak far more argues that "since - according to Kelsen's Grundnorm-model - the basic norm of a system standing above all other norms never forms part of the positive law but rather constitutes the foundation of all legal norms of the regime, this highest norm gives a legal basis for all existing legal norms in the country, but is by itself not part of the positive law."[341]

In order to explain the nature of the assumed "basic norm of Israel" and the "constitutional continuity" President Barak cited in his opinion various legal academics, which have devoted themselves in the past to that subject. Barak

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337 Id., at 356

338 Declaration of the Establishment of the State of Israel, supra note 7

339 Hans Kelsen, Pure Theory of Law (Knight trans. 1967) 193

340 Section 7(a) of the Law and Administration Ordinance, supra note 124

341 *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 356, 359

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mentioned for example Professor Klinghofer who wrote in 1952 an article about the basic norm of the law in Israel, stating that "in order to document the constituent continuity in Israel's legal system, one may trace back the transfer of the power to the document of the Declaration of the Establishment of the State of Israel of 1948 wherein the People's Council declared to act as the Provisional Council of State." Professor Klinghofer sees in this phrase that transforms the People's Council into a Provisional Council of State, the basic norm of the state of Israel.[342]

Another legal academic cited in Barak's opinion is Amnon Rubinstein, Knesset member and professor for constitutional law at the Tel Aviv University, who wrote that "the People's Council which conferred upon itself the authority to act as the Provisional Council of State, i.e. as the legislator, had no previous source where from it could derive this authority, therefore the act of the Provisional Council of State was the first creating step characterizing the way of the new political regime which did not derive its existence from a previous system."[343]

According to Barak "the constitutional continuity of the Knesset's power to enact a constitution manifests itself in further steps of the legal history of Israel."

Barak explains as follows: "The elections for the Constituent Assembly which were to be held on 1st October 1948. The original plan was that the Constituent Assembly and the Provisional Council of State should be two different bodies holding two different functions. The solely function of the Constituent Assembly was to frame a constitution for the country. For only this body consisted of members being elected in universal, equal, direct and secret elections where all inhabitants of the state, who attained the age of 18 years had a right to vote. The Provisional Council of the State - on the other hand - was not established by general elections but rather consisted of appointed persons whose names were set out in the Schedule of the Law and Administrative Ordinance, 1948. Therefore this body should only enact regular laws necessary for the time being."[344]

President Barak continues to explain in saying that "according to the Declaration of the Establishment of the State of Israel the Provisional Council of State and the Provisional Government should stay in power until the establishment of the elected, regular authorities of the state in accordance with the new Constitution.[345] Due to the war that broke out between Israel and its neighboring Arab states the elections were not held on time, but rather took place on 25 January 1949. With the election of the Constituent Assembly, the Provisional Council of State decided to dissolve and all powers vested by law in the Provisional Council were transferred to the Constituent Assembly.[346] Before its dissolvement there were discussions within the Provisional Council of State if the mandate of the Constituent Assembly to frame a constitution

342 Ibid., at 359

343 Id., at 360; *Rubinstein*, supra note 11, at 49

344 *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 360

345 Declaration of the Establishment of the State of Israel, supra note 7, at 4

346 Sections 1 and 3 of the Constituent Assembly (Transition) Ordinance, supra note 166

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within a certain time limit. should be established by law. But finally the majority of the members of the Provisional Council decided not to limit the Constituent Assembly's function and term.[347]The dissolvement of the Provisional Council and the transfer of its powers to the Constituent Assembly constitutes therefore the second step within the line of constitutional continuity."[348]

According to the 'Grundnorm' model of Kelsen, as interpreted by President Barak in the *United Mizrahi Bank* decision, the Constituent Assembly had two principle powers, namely the power to enact a constitution and the legislative power.[349]

The original idea to establish two different bodies with two different functions was not realized and from that time there was only one unified body i.e. the Knesset holding two principal functions. There was never any doubt among scholars and politicians that the Constituent Assembly was vested with the power to enact a Constitution. The controversy which arose in the past[350] was related to the fact, that with the dissolvement of the Provisional Council of State the Constituent Assembly collapsed into a legislature.

President Barak stressed in his opinion that the mere fact of the transfer of regular legislative power to the Constituent Assembly did not deprive it of the authority to enact a Constitution.[351]

To found his conclusion President Barak cited various legal philosophical academics.[352]

First of all Barak relied upon Hans Kelsen, who stated that although "it is possible that the organ, which is specifically and formally authorized to create, abolish or amend constitutional statutes, is different from the organ authorized to create, abolish, or amend ordinary statutes, usually both functions are performed by the same organ."[353]

Another legal academic upon which Barak heavily relied in order to construct and elaborate his concept is Bruce Ackerman, who wrote the following passage in his 1992 published book: The Future of Liberal Revolution: "There is nothing sacrosanct about a special constitutional convention. Although such a convention is likely to take the task of constitutional formulation seriously, many plausible texts have also been produced by constituent assemblies that have exercised plenary power on normal legislative matters as well."[354]

The most important constitutional step, according to Barak's theory of the "constitutional continuity", occurred with the enactment of the Transition Law,

347 *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 362
348 Ibid., at 362
349 Id., at 356, 363
350 See the discussion in Chapter B.1.4.1.
351 *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 363
352 Ibid. The others are the opinions of the Professors Akzin and Klein.
353 Id.; Kelsen, supra note 339, at 223
354 Id., Bruce Ackerman, The Future of Liberal Revolution (1992) 59

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1949[355] by the Constituent Assembly less than one month after its election. There - so Barak - it was established that Israel's legislative body would be called the Knesset and that the Constituent Assembly would be called the First Knesset.[356] Barak stressed in his opinion, that nobody at this time had claimed that the Constituent Assembly, i.e. the First Knesset would not have the power any more to enact a constitution for the state. The Transition Law - so Barak - did not affect the double authority, i.e. the constituent and legislative, of the First Knesset.[357]

As discussed in a previous sub-chapter[358] the First Knesset, i.e. the Constituent Assembly had numerous debates about the question of a constitution, but finally did not enact one. Instead it adopted on 13 June 1950 the Harari Resolution which charged the Constitution, Law and Judiciary Committee with the task of drafting a constitution. The constitution was to be composed of chapters, each chapter being a separate basic law, that would all together form the constitution.

Barak noted that the Harari Resolution did not intend to deny the Knesset's authority to enact a constitution, but rather decided that "the state's formal constitution would be drawn up in a continuing process." According to Barak it was clear to everybody at that time that this process would not be a fast one which would end with the dissolution of the First Knesset. For Barak the whole discussion about the first, second and any further Knesset was merely theoretical and reflects the first steps of Israeli "parliamentarianism". Principally the Knesset is one and the same body that is not affected by elections bringing about a personal change of the members,[359] but - so Barak - because of the fact that this conception of the Knesset was not yet cleared up at the end of the First Knesset's legislative period, the First Knesset enacted - just as a precaution - the Second Knesset (Transition) Law, 1951 by which it transferred its powers to the second Knesset any subsequent Knesset.[360] Barak stressed that any other conclusion would not take into consideration the national experience of the state of Israel, namely that over forty years the Knesset continued to see itself as authorized to enact a constitution, that the Knesset actually enacted entrenched basic laws, that over the years legal academics considered the Knesset as having constitutional power and that the Supreme Court pointed out in many decisions that the entrenched basic laws have constitutional power.

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355 Transition Law, 1949, supra note 171

356 Section 1 of the Transition Law, 1949, ibid.; *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 364, 365

357 Ibid., at 365

358 See sub-chapter 4.2. (The Harari Resolution - Adopted in 1950)

359 *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 365

360 Second Knesset (Transition) Law, 1951, 5 L.S.I. (1950/51) 94. Section 5 states that the Second Knesset shall have all the powers which the First Knesset had. Section 10 states that this Law shall apply to the transition to the Third and any subsequent Knesset.

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Based on Kelsen's model of a basic norm, Barak derives the conclusion that "the constituent continuity was not interrupted when the constituent power of the Constituent Assembly i.e. the First Knesset was passed to the second Knesset."[361]

8.4.1.3. Hart's "Rule of Recognition" Model

The second model, employed by President Barak in order to put the Knesset's constituent authority on a legal foundation is H.L.A. Hart's rule of recognition model.[362] This model does not rely upon the constitutional continuity, but rather asks for the constitutional construction that existed at a specific time. Professor Hart differs in his conception of a legal system between primary and secondary rules.[363] According to this legal-theoretical model primary rules are the most basic type of rules. They establish a particular set of norms that regulate the life of the individual in the society. Primary rules also impose rights and duties. Secondary rules on the other hand establish ways how primary rules are to be recognized (rule of recognition), changed (rules of change) or decided (rules of adjudication). They confer public or private powers.

The central thesis of Hart's concept of law is that the foundations of a legal system consist in an ultimate rule of recognition providing authoritative criteria for the identification of valid rules of the system.[364] The rule of recognition establishes how primary rules are produced, what their normative status is, what the supreme and what the lowest norms are. The rule of recognition is established/applied by the court, but the court does not create it out of nothing. The court rather reflects the concept of the society about the way how to create norms - including constitutional norms- within the whole system.

Barak elaborated in his opinion the idea that, in application of Hart's concept of law, "the rule of recognition of the state of Israel is that the Knesset has constituent and legislative authority."

According to Barak "this is not a subjective judicial position, but rather reflects an objective position" - namely "the national way of life of the state of Israel." Today - so Barak - there exists "a broad national consciousness that the Knesset is empowered to enact a constitution." Barak says that the legal consequence of the rule of recognition of the state of Israel is that when the Knesset acts as constituent authority and passes a basic law it can restrict the legislative powers of the Knesset.[365] The restriction of the legislative powers of the Knesset can take the form of substantive entrenchment when a basic law provides that every governmental authority, including the Knesset, must abide by the principles established in the

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[361] *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 357, 368-369
[362] Ibid., at 357
[363] H.L.A. Hart, The Concept of Law (1961) at 78, 79
[364] Ibid., at 97, 98
[365] *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 357

basic laws, or when a basic law provides that it cannot be varied except in accordance with the express criteria that it establishes. Entrenchment can also be of a formal nature, as when a basic law provides that it cannot be changed by a regular law, or that it can be amended only by a special majority (e.g. 61,70, 80 members of the Knesset) or both formal requirements together.[366]

8.4.1.4. Dworkin's Empirical Model

The third model upon which President Barak relies in order to found the Knesset's constituent authority, is Ronald Dworkin's empirical model. This model asks for the best interpretation of the whole social and legal history of a system, which was established at a specific time. According to this model a certain body (e.g. the parliament) is authorized to frame a constitution for a country if this is the best interpretation of the social and legal history of that country.[367]

Barak stated in his opinion that "the fittest interpretation of the social and legal history of the state of Israel since its establishment is that the Knesset has the power to enact a constitution." He stressed that "if one interprets the social and legal history of the state of Israel - behind the background of the Declaration of the Establishment of the State of Israel of 1948, the convening of the Constituent Assembly, the Harari Resolution, the 12 basic laws that have been enacted in the mean time, the Supreme Court decisions with the legislative reaction of the Knesset to them, and the view of the legal community - he has to come to the conclusion that the fittest interpretation of the country's history is that the Knesset has constituent power." Furthermore - so Barak - "the fittest interpretation of the power of the Knesset is, that basic laws cannot be varied except by another basic law and in accordance with the express criteria that it establishes."

Relying upon Dworkin's model, Barak stated that "because of the fact that there exists a deep social and legal consciousness among the Israeli society, that the Knesset is empowered to enact a constitution for Israel, the notion of the Knesset's constituent authority is the best interpretation of the social and legal history of the state of Israel." This interpretation is - according to Barak's assumptions - "part of the political culture of Israel since the establishment of the state until now."[368]

Five other judges, namely Levin,[369] Zamir,[370] Goldberg,[371] Matza,[372] and Tal[373] concurred with Barak.

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366 Zilbershatz, supra note 46, at 25

367 *United Mizrahi Bank,* supra note 46, 49(iv) P.D. 221, at 358

368 Ibid.

369 Id., at 450

370 Zilbershatz, supra note 46, at 23

371 Ibid.

372 Id.

373 Id.

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8.4.2. The Opinion of Supreme Court Justice Shamgar

The former President of the Supreme Court, Meir Shamgar had in various aspects concerning the theoretical basis a different approach to that of the majority opinion, given by President Barak and shared by five other judges.[374]

Nevertheless it must be stated that in the result of his opinion, Shamgar came to the same conclusions as Barak does, namely that the two Basic laws enacted in 1992 have formal constitutional status and that the courts have the power to judicial review.

Shamgar wrote in his opinion that the Knesset has the authority to establish a constitution. In that principal aspect he is conform with Barak's opinion. Only in relation to the source of this authority Shamgar has a different approach, for he based the Knesset's constituent power on the doctrine of the Knesset's unlimited sovereignty.[375] Shamgar is of the opinion that the Knesset is sovereign and its sovereignty allows it to enact any law, i.e. primary legislation, secondary legislation and also constitutional legislation. According to his opinion the Knesset can enact supra-statutory laws in form of basic laws and in form of a constitution in its entirety. The Knesset can establish any norm, it can also establish norms that restrict its own power and that of ensuing Knesset's, because that is the meaning of authority. The Knesset can restrict its power substantively and formally.

The other members of the bench did not concur with judge Shamgar.

8.4.3. The Opinion of Supreme Court Justice Cheshin

Concerning the question of the Knesset's authority to enact a constitution and concerning the issues of the normative relationship between basic laws and regular laws and judicial review over legislation, Justice Cheshin issued a dissenting opinion which did not win the support of any other judge and therefore stands as one-man dissent.

Cheshin does not disagree with the positions of Barak and Shamgar that the First Knesset was authorized to frame a constitution, but he is of the opinion that the Knesset's power was not transferred to the subsequent Knessets.[376] According to Cheshin the transition laws established continuity only in regard to the process of enacting ordinary laws. Cheshin stressed that when the First Knesset dissolved without having enacted a constitution the Knesset's right to frame a constitution ended. Cheshin mentioned the following reasons for this state of affairs:

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[374] Id., at 26

[375] Id

[376] Id.

(1) The authority to frame a constitution was granted by the people in the elections to the Constituent Assembly, but the Constituent Assembly that subsequently became the First Knesset ceased to exist. In order to frame a comprehensive constitution a new mandate must be obtained from the people.[377]
(2) The Transition Law, 1949[378] is a regular law, which can not transfer constituent authority. In order to transfer its constituent power, the First Knesset had to do so as a constituent body by means of a basic law and not by means of a regular law.
(3) Quotations of members of the First Knesset show that it was never intended that constituent power be transferred to subsequent Knessets.
(4) The Harari Resolution of 1950[379] was a compromise and did not create a continuity of constituent power. The said resolution established that basic laws should be enacted which would, in the future, become the constitution. It is not clear how this was to be achieved or when, or what the legal status of the basic laws would be. The answers to these questions remain unclear, they have yet to be considered and the Harari Resolution provides no answers whatsoever.
(5) The Declaration of the Establishment of the State of Israel of 1948[380] spoke of a constitution. But in the debates and disagreements of the First Knesset one may find that even then it was unclear whether the intent of the Declaration was a formal constitution or merely a material constitution that would delineate the basic guidelines of the state. If this was already unclear to the First Knesset, it could not empower future Knessets to draft a constitution.

(6) Justice Cheshin also rejects the complex of legal circumstances[381] - the Knesset's view of itself, the position of legal writers and commentators, and the approach of the Supreme Court - as a basis for the Knesset's constituent power. According to justice Cheshin the constituent authority must be absolutely clear and unequivocal. He stressed that Barak relies entirely upon debatable sources.

(7) Cheshin shows that there were members of the First Knesset who opposed the constituent authority, there were scholars who did not agree[382] to it, and the Supreme Court did not provide a consistent body of case law that would support such authority.

(8) Cheshin stressed that relating to the question of a constitution the evidence of authority to establish it must be solid.

(9) Cheshin points out that the First Knesset did not establish a constitution because it was unclear that the people wanted one. Since the First Knesset, there has been no clear statement by the public as a whole that it its ready to accept a constitution and that it grants the Knesset the authority to provide that constitution.

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377 Id.
378 Id.; Transition Law, 1949, supra note 171
379 Id.; Harari Resolution, supra note 16
380 Id.; Declaration of the Establishment of the State of Israel, supra note 7
381 Id.
382 Id., Professors Nimmer, Izhak Englard

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The basic laws were not always passed by overwhelming consensus. Even when basic laws concerning such central issues as human rights were present for the vote on Basic Law: Human Dignity and Liberty. Only 32 voted in favor of the Basic Law, 21 voted against it, and one abstained. Cheshin argued that the absence of the other 66 members of Knesset on that momentous occasion of adding a central chapter on human rights to the state's constitution should be sufficient to deny it any such status.

For judge Cheshin a constitution has to be enacted in full awareness, with consent, publicly, and with a direct mandate from the people, and should not be enacted like the basic laws concerning human rights, in haste, and with neither awareness nor appreciation of their significance and importance.

(10) According to judge Cheshin an absolute majority, i.e. 61 members of the Knesset is democratic as it represents a true majority. It is only by reason of convenience that the Knesset's rules establish that, unless otherwise stated, a simple majority - i.e. a majority of those present - is sufficient. A majority of 61 cannot restrict the power of the Knesset.

8.4.4. The Opinion of Supreme Court Justice Bach

Judge Bach neither adopted Shamgar's nor Barak's approach in regard to the Knesset's constituent power, but agreed with the result of both approaches, namely that the Knesset had the authority to establish a constitution. He argued that the instant case did not require that the Court decide upon the question of the source of that authority and that it was sufficient for the present to hold that the Knesset possessed the authority.[383]

8.5. The Significance of the United Mizrahi Bank Case

The significance of the Supreme Court decision in the matter of *United Mizrahi Bank v. Migdal Cooperative Village* is - although it entails a few hundred pages - purely academic, since the District Court's decision, which for the first time annulled a law[384] on the ground to be repugnant to a fundamental right safeguarded in a Basic Law, was finally overturned and the petitioned law was held to be constitutional by the Supreme Court.

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383 Id.

384 I.e. the Family Agricultural Sector Law (Amendment), 1993, supra note 319

Regarding the future implications of this decision, it must be noted that the laws involved in this decision - i.e. the Family Agricultural Sector Law, 1992 and the Family Agricultural Sector Law (Amendment), 1993 - were fiscal laws.

Although the Supreme Court gives the impression that it has the authority to overturn unconstitutional laws, in reality however, it will not do so lightly, particularly when the claim is that it's unconstitutionality derives from an infringement of property rights.

Finally, it must be noted that due to the existence of Section 10, the constitutional impact of the Basic Law: Human Dignity and Freedom is, for the time being, prospective, that means, it is binding only as regards later legislation.

9. Conclusions and Recommendations

1. When the political parties drafted the Declaration of the Establishment of the State of Israel, 1948[385] they produced a political document, signed by the representatives of almost every political party. Among the signatories of the Declaration of the Establishment of the State of Israel, 1948 were representatives of all Zionist parties, liberals, labor Zionists, communists and even members of "Agudat Israel". The Agudat Israel is an ultra-orthodox religious Jewish group that had previously - i.e. until shortly before the establishment of the state of Israel - been strongly anti-Zionist and had even refused to cooperate with the Zionist parties in Palestine on the ground that it believed that the concept of political Zionism was incompatible with the Jewish religion. But the murder of religious orthodox, anti-Zionist Jews in the towns of Hebron, Safed and Jerusalem during the riots of 1929 and later on the Nazi rule and the Holocaust in Europe - where millions of Jews were murdered in concentration camps and gas chambers - caused a change in thinking of Agudat Israel, leading to its compromising with Zionism after the end of the Second World War.[386]

2. The Declaration of the Establishment of the State of Israel, 1948 reflects a certain compromise among all the groups that were politically active at that time:

On the one hand the Declaration establishes Israel as a "Jewish state" on the basis of the historical, spiritual, religious attachment to the country providing a natural and legal title of the Jewish people for the territory in Palestine.

On the other hand the Declaration provides for social and political equality for *all* inhabitants of the country - including the Palestinian Arab of Israel.

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385 Declaration of the Establishment of the State of Israel, supra note 7

386 For more details on this issue see Chapter C.2.2.1. (The Doctrine of Ultra-Orthodox Judaism and its Original Position towards Political Zionism) and 2.2.2. (The Changing Position of Ultra-Orthodox Judaism towards the Concept of Political Zionism)

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3. Until the enactment of the two basic laws on human rights - namely the Basic Law: Human Dignity and Freedom[387] and the Basic Law: Freedom of Occupation[388] - the Declaration of the Establishment of the State of Israel, 1948 was neither considered as a legally binding document and also not as a supreme or higher basic norm in the sense that Knesset laws must conform with it. That means it did not confer any individual rights to the citizen of the state of Israel nor did it impose any legal duty on to the Israeli government.

Although the Declaration has served as an instrument for legal interpretation and for the purpose of shaping the legal system of Israel, the vision "to live in a State based on freedom, justice, peace and equality between all citizens..." - as entailed in the Declaration has not been fulfilled at all in Israel. Israel still has a severe test to pass in this regard - and that is especially true in the fields of so called "security matters" as well as in matters concerning equality rights for its national/ethnic/religious/linguistic minority - namely the Palestinian Arab citizens - which comprises almost 20% of the total population of the state of Israel.

Until the enactment of the above mentioned two basic laws on human rights in 1992 the significance of the Declaration of the Establishment of the State of Israel, 1948 on the real-political and social level remained limited.

4. The first legislative act by the Provisional Council of State - after the establishment of the State of Israel in 1948 - was the Law and Administrative Ordinance, 1948.[389] Through this channel previous British Mandatory legislation - such as the draconian Defence (Emergency) Regulations, 1945[390] - which allow for serious infringements on all freedoms of the individual - entered the Israeli legal system. Instead of repealing these and other regulations, the Israeli legislator enacted additional legislation - mainly in the form of emergency regulations that were later transformed into permanent Knesset laws - which granted additional far-reaching powers to the executive authorities. This legislation is often discriminatory, does not meet the minimum standards of international law and universally recognized principles of law.

5. The said Israeli and mandatory legislation could have been eliminated, if a constitution, giving superior status to human rights and freedoms of the individual and minorities, would have been enacted during the last 51 years of Israel's existence. An obligation to enact a constitution was established not only by the Declaration of the Establishment of the State of Israel but also by the UN Resolution 181 (II) of 29 November 1947. However, despite this initial obligation to enact a constitution, the coalition of the newly established state - headed then by the Mapa'i

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387 Basic Law: Human Dignity and Freedom, supra note 1
388 Basic Law: Freedom of Occupation, supra note 1
389 Law and Administration Ordinance, 1948, supra note 124
390 Defence (Emergency) Regulations, 1945, supra note 63

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party - decided not to enact a constitution but rather to rely on a gradual enactment of basic laws, without any commitment to completing them within a specific time-frame. As a consequence, until today no comprehensive formal and entrenched constitution including a bill of human rights exists.

The main reasons for the this state of affairs lay in the ideological controversies that exists among the population of Israel when it comes to decide fundamental questions such as status of religion within a secular legal system (i.e. the relationship between religion and state), the status of the Arab Palestinian people living in Israel and the issues of the Occupied Territories.

6. Nevertheless it must be mentioned that there were several attempts to enact a bill of rights that would deal with the issue of fundamental human rights and freedoms of individuals and minorities.

The Basic Law: Fundamental Human Rights[391] was proposed to the 12th Knesset and related to the said topics, but due to political reasons it was spliced into five separate basic laws, mainly due to the opposition of the religious parties.

Since then only two of these basic laws have been enacted in 1992, namely the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Freedom, while the Draft Basic Law: Due Process Rights,[392] the Draft Basic Law: Social Rights[393] and the Draft Basic Law: Freedom of Expression[394] are - at the time of writing this work - still pending.

7. Several Israeli Supreme Court judges have taken the view that the enactment of the said Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Freedom has fundamentally changed the status of the protected rights in the sense that they rights enumerated therein have now constitutional status and thus more weight than before.

Supreme Court President Aharon Barak even spoke of the two basic laws as having created a "constitutional revolution".

Professor David Kretzmer on the other hand considers the two basic laws only as "mini-revolution".

8. After having reviewed numerous Supreme Court judgments which were decided after the enactment of these two basic laws on human rights I come rather to the conclusion that these laws are no "revolution" at all, since they did not bring any real "democratization" of the constitutional regime and legal order as a whole. Or to say it in other words: They did not bring any manifest improvement of the human rights situation in Israel and the Occupied Territories.

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391 Proposed Basic Law: Fundamental Human Rights (1989), supra note 34

392 Draft Basic Law: Due Process Rights, supra note 41

393 Draft Basic Law: Social Rights, supra note 42

394 Draft Basic Law: Freedom of Expression, supra note 43

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The reason for this state of affairs lays in the fact that these basic laws suffer from several serious defects:

a. The first defect concerns the Basic Law: Human Dignity and Freedom and relates to the fact that this law lacks any clauses guaranteeing

(1) The right to equality of all citizens;
(2) The right to freedom of religion and conscience;
(3) The right to freedom of expression and the press;
(4) The right to freedom of demonstration, assembly and association.

Although these rights lay at the very foundations of a liberal democracy, they were explicitly not incorporated into the Basic Law: Human Dignity and Freedom, and thus do certainly not have the same legal and constitutional status as the other enumerated rights.

b. The second deficiency concerns the Basic Law: Human Dignity and Freedom and relates to the fact that this law may be amended by a simple majority (i.e. 61 members) of the Knesset.

c. The third deficiency concerns both basic laws and relates to the fact that these laws explicitly declare that the "...fundamental rights of a person...shall be honored in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel." It is not clear yet whether and to what extent the Declaration of the Establishment of the State of Israel has become a binding document and thus an integral part of the basic laws, and if so whether it has been raised to constitutional level or not. With regard to this issue there exist - until now - two main approaches within Israel's legal community:

One school of thinking is of the opinion that with the above cited phrase the Declaration became an integral part of the basic law, and was raised to a constitutional level. According to this approach the Declaration will not only serve as an interpretative instrument - as it was in the past - but rather as a binding constitutional document against which the Knesset cannot enact legislation repugnant to these laws. According to this approach the right to equality is part of the basic laws, due to the fact that the Declaration of the Establishment of the State of Israel expressly refers to equality.[395]

The second school of thinking is that the Declaration of the Establishment of the State of Israel has not become a binding document, but rather "expresses the vision of the people and its faith"[396] and serves as interpretative guideline - as it was in the past.

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[395] This approach is represented by the following representatives of the Israeli legal and political community: Meridor, supra note 35, at 7; Barak, Democracy in our Times, supra note 284, at 9; Meir Shamgar, Pluralism by Consent, 20 Justice (1999) 13, at 14-15; Maoz, supra note 191

[396] This approach is represented by Menachem Elon, supra note 285, at 12; and Yaffa Zilbershats, Social Justice in the Israeli Legal System, 17 Justice (1998) 35

d. The fourth reason to criticize both basic laws relates to the fact that they declare that their purpose is to protect the rights set out "...in order to entrench the values of the state of Israel as a Jewish and democratic state in a Basic Law." While the second value mentioned in this clause points to the universal democratic character of the state, aiming to serve the needs of all its citizens, emphasizes the first value the Jewish-national character of the state, and thus completely disregards the existing bi-national character of the state.

The "Jewish character" of the state of Israel means not only a sociological description, but rather relates to the ideological and political objectives of the state, which find expression in the constitutional regime and the whole legal order. The "Jewish character" of the state is reflected in Israel's jurisprudence and legislation relating to the following important issues:

i. Demographic composition and related policies of the state of Israel.[397]
ii. Central rule of Jewish national - i.e. Zionist - institutions.[398]
iii. Questions concerning land-ownership.[399]
iv. Celebration of Jewish holidays as national holidays.[400]
v. Design of the state's flag, the state's emblem and the state's anthem.[401]
vi. Issues of education.[402]

The clause relating to the state of Israel as "a Jewish state" discriminates against the second "nation" - i.e. the Palestinian Arab people - due to the fact, that according to common interpretations - ranging from the religious to the secular spectrum - the "Jewish values" always consist of Zionist values and objectives.[403]

e. The fifth main defect concerns the Basic Law: Human Dignity and Freedom and relates to the fact that it does not apply to legislation that was passed before the enactment of this basic law. Such existing legislation can therefore not be abolished, a fact which leads to the situation that even the most draconian laws - such as the Defence (Emergency) Regulations, 1945 - and many other laws which often does not meet the minimum standards of international law, are still valid and regularly applied.

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397 Law of Return, 1950, supra note 217, amended by Law of Return (Amendment No.2) § 1, 24 L.S.I. (1969-1970) 28. The Law of Return bestowed automatic citizenship upon any Jew who wishes to immigrate to Israel

398 World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 301. This law recognizes the central role of Zionist institutions in the immigration of Jews to Israel and in Jewish settlement.

399 Basic Law: Israels Land, supra note 27; State Property Law, 1951, 5 L.S.I. (1950/51) 45

400 Days of Rest Ordinance, 1948, 1 L.S.I. (1948) 18 (This Ordinance is part of the Law and Administration Ordinance, supra note 124)

401 Flag and Emblem Law, 1949, 3 L.S.I. (1949) 26

402 State Education Law, 1953, 7 L.S.I. (1952/53) 113

403 Meridor, supra note 35; Elon, supra note 285

f. The sixth main defect concerns both basic laws and relates to the fact that all the jurisprudence, that was handed down prior to the enactment of these laws, is not effected and remains in force.

9. The final conclusion that I have drawn from the above mentioned arguments is that the clause relating to the Declaration of the Establishment of the State of Israel, 1948 in fact entrenches the superior status of the Jewish majority and completely ignores the Palestinian Arab people living within the state of Israel as well as in parts of the Occupied Territories.

10. The significance of the Supreme Court decision in the matter of *United Mizrahi Bank v. Migdal Cooperative Village* is - although it entails a few hundred pages - purely academic, since the District Court's decision was finally overturned and the petitioned law was held to be constitutional by the Supreme Court. Although the Supreme Court gives the impression that it has the authority to overturn unconstitutional laws, in reality however, it will not do so lightly, particularly when the claim is that it's unconstitutionality derives from an infringement of property rights.

11. The 1992 enacted basic laws on human rights should be amended so as to make clear that the constitutional guarantees contained in these laws and under international law supersede ordinary legislation.

All legislation that was enacted before the 1992 enacted basic laws on human rights should be reviewed.

All jurisprudence that was handed down before the 1992 enacted basic laws on human rights should be reviewed and in the event that it does not meet the requirements of the said basic laws it should be declared invalid.

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C. THE CONCEPT OF THE STATE OF ISRAEL AS A "JEWISH STATE" AND ITS IMPACT ON THE RIGHT TO EQUALITY AND OTHER CIVIL AND POLITICAL RIGHTS

1. Introduction

The Declaration of the Establishment of the State of Israel of 14 May 1948 [hereinafter: The Declaration] called for the establishment of

> "...a Jewish state in Eretz Israel, that would open its gates to every Jew and confer upon the Jewish people the status of a fully-privileged member of the comity of nations."[1]

At the same time the Declaration called for the establishment of the state of Israel on the basis of a democratic concept, committed

> "...to foster the development of the country for the benefit of all its inhabitants...; to ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex...; to guarantee freedom of religion, conscience, language, education and culture...; and to be faithful to the principles of the Charter of the United Nations."[2]

The substantive and exact meaning of the statement in the Declaration of the Establishment of the State of Israel, 1948 that Israel should be a "Jewish state" is nowhere exactly delineated and constitutes until the present day a matter of major controversy within the Israeli society and the Jews in the diaspora as well.[3]

As already elaborated in Chapter B of this work, the Declaration of the Establishment of the State of Israel, 1948 was never recognized as the formal constitution of the state of Israel.

In 1948, shortly after the founding of the state of Israel in Palestine, the Israeli Supreme Court held that the Declaration only expresses the basic credo and "the vision of the people and its faith."[4]

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1 Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. (1948) 3, at 4

2 Ibid.

3 Within the Israeli legal community there exist different interpretations concerning the substantive meaning of Israel's self-definition as a Jewish state: The so called "minimalist approach" views the Jewish majority in the country and the right of every Jew to immigrate to Israel as being the only necessary elements that makes the state of Israel to a Jewish state. The so called "Messianic vision" on the other hand regards the state of Israel itself as an instrument of bringing the millennium. See David Kretzmer, Constitutional Law, published in Introduction to the Law of Israel (eds. Amos Shapira and Keren C. DeWitt-Arar) (Kluwer Law International, 1995) at 40-41

4 H.C. 10/48, *Zvi Zeev v. The Acting District Commissioner of the Urban Area of Tel Aviv,* translated into English in 1 S.J. (1948-1953) 68, at 72. For more details on this issue see

In 1953, a few years later, beginning with the decision in the matter *Kol Ha'am v. Minister of Interior*[5] - and then in numerous other decisions[6] - the Supreme Court started to consider the Declaration of the Establishment of the State of Israel, 1948 as an interpretative instrument that expresses the accepted fundamental values of the whole legal system in Israel.

Furthermore, in these decisions the Supreme Court emphasized that the Knesset's statutes and legislative enactments must be interpreted in light of the principles of the Declaration of the Establishment of the State of Israel, 1948 and that every public authority - in the use of its powers - must be guided by these principles.

In 1992, with the enactment of the two new basic laws on human rights and freedoms[7] a certain turning point occurred with regard to the official status of the Declaration of the Establishment of the State of Israel, 1948.

These two basic laws - which form now a part of the future constitution of Israel[8] - give the Declaration of the Establishment of the State of Israel, 1948 a special constitutional status and explicitly recognize the values of the state of Israel as a "Jewish and democratic state."

While the term "Jewish and democratic state" at first sight seems to imply that there can be no contradiction between the two tenets, and that a conception of the

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Chapter B.3.2.1. (The Declaration of the Establishment of the State of Israel - Considered as "Political Instrument")

5 H.C. 87/53, *Kol Ha'am Company Ltd. v. Minister of Interior,* translated into English in 1 S.J. (1948-1953) 90, at 105. For more details on this issue see Chapter B.3.2.2. (The Declaration of the Establishment of the State of Israel - Considered as "Instrument of Interpretation")

6 H.C. 72/62, *Rufeisen v. Minister of the Interior,* translated into English in a Special Volume of S.J. (1962-69) 1, at 22; H.C. 243/62, *Israeli Film Studios Ltd. v. Levi Geri and the Film and Theater Censorship Board,* translated into English in 4 S.J. (1961-1962) 208, at 216; H.C. 262/62, *Peretz v. Chairman, Council and Inhabitants of Kfar Shmaryahu*, translated into English in 4 S.J. (1961-1962) 191, at 195; H.C. 1/65, *Yeredor v. Chairman of the Central Elections Committee for the 6th Knesset,* 19(iii) P.D. 365, at 386. This case will be discussed in infra sub-chapter 6.2. (Supreme Court Cases concerning the Right to Political Participation). E.A. 2/84, 3/84, *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, translated into English in 8 S.J. (1969-1988) 83, at 158 [The *Neiman I* case]. This case will be discussed in infra sub-chapter 6.2. (Supreme Court Cases concerning the Right to Political Participation)

7 Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation, S.H. No. 1454 (10 March 1994); Basic Law: Freedom of Occupation, S.H. No. 1387 (12 December 1992) repealed by Basic Law: Freedom of Occupation, S.H. No. 1454 (10 March 1994)

8 C.A. 6821/93, 1908/94, 3363/94, *United Mizrahi Bank v. Migdal Cooperative Village,* for extracts from the judgment and a summary in English see 31 Isr.L.Rev. (1997) 76. [The Mizrahi Bank case]. For an analyzes of the significance of the Declaration of the Establishment of the State of Israel, 1948 see Chapter B.3.(The Nature and Legal Status of the Declaration of the Establishment of the State of Israel, 1948)

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Jewish state that is inconsistent with democratic values must be rejected,[9] one must nevertheless bear in mind two other very important laws, namely the Basic Law: The Knesset as amended in 1985[10] and the Political Parties Law, 1992.[11]

Both laws state that a political party list shall be precluded from participating in elections to the Knesset "...if its objectives or actions, expressly or by implication, negate the existence of the state of Israel as the state of the Jewish people."[12]

The crucial question with regard to the two mentioned values, contained in the Declaration of the Establishment of the State of Israel, 1948 as well as in the 1992 enacted new basic laws on human rights, is if these values can honestly coexist, or to put it in other words: "Can a Jewish state be at the same time a democracy based on the principle of equality and the respect for civil and political rights?"

The opinions which were expressed by the academic legal community and some Supreme Court judges in relation to the compatibility of the "Jewish and democratic values" are very different and range from the view that there is no contradiction[13] between a Jewish and a democratic state, to the statement that a Jewish state cannot be at the same time a democracy.[14]

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[9] David Kretzmer, Israel's Basic Laws on Human Rights, Israeli Reports to the XV International Congress of Comparative Law (Sacher Institute, Jerusalem 1999, ed. by A. M. Rabello) 293, at 305

[10] Basic Law: The Knesset, 12 L.S.I. (1957/58) 85

[11] Political Parties Law, 1992, S.H. No. 1395, at 190

[12] Section 7A of the Basic Law: The Knesset (1985), supra note 10
Section 5(1) of the Political Parties Law, 1992, ibid.

[13] Asher Maoz, professor for constitutional law at the Tel Aviv University, wrote in an article that "the Jewishness of the State of Israel does not contradict its democratic nature. Israel has, from the start, been both a Jewish and a democratic state, dedicated to equality and basic freedoms." See Asher Maoz, Religious Human Rights in the State of Israel, published in Religious Human Rights in Global Perspective - Legal Perspectives (Edited by J.D. van der Vyver and J. Witte, Jr., Kluwer Law International, 1996) 349, at 358
Supreme Court Justice Elon for instance argued that the Western notions of human rights and democratic values have derived their substance from the Bible and classic Judaic sources. He emphasized in a number of decisions that the spirit and substance of the Torah and Halakha has been an inexhaustible source of inspiration in the struggle for the rights of individuals and groups and for contemporary enlightened democratic regimes. E.g., *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset,* supra note 6, at 143; Cr.A. 2145/95, *State of Israel v. Guetta*, 46 (5) P.D. 704, at 716

[14] Noam Chomsky, a prominent writer on the issue of Palestine, argues that

> "The Zionist Dream is to construct a state which is as Jewish as England is English and France is French. At the same time, this state is to be a democracy on the Western model. Evidently, these goals are incompatible. Citizens of France are French, but citizens of the Jewish state may be non Jews, either by ethnic or religious origin or simply by choice... To the extent that Israel is a Jewish state it cannot be a democratic state. If the respects in which the state is Jewish are marginal and symbolic, the departure from

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The concept of the state of Israel as a "Jewish and democratic state" has various dimensions and may be discussed on a political, philosophical, legal (constitutional, statutory and judicial), social and religious level.

The present chapter is mainly concerned with the legal-philosophical dimensions and the constitutional implications of the "Jewish state" concept related to the subject of civil and political rights in Israel and the Occupied Territories.

In this chapter I will provide an overview of the most important Knesset legislation and the jurisprudence of Israel's Supreme Court that give expression to the concept of the state of Israel as a "Jewish state".

I will demonstrate that all those Knesset laws and statutes which relate to national institutions, symbols, official state holidays and the national identity of the state of Israel are characterized by a strong domination of Jewish values and the ideology of political Zionism.

The mentioned legislation will show that the Jewish character of the state of Israel expresses itself in a large number of fundamentally important laws which clearly suspend the democratic values of the state. The legislation discussed in this chapter definitely constitutes a violation of the right to equality and non-

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> democratic principles may be dismissed as insignificant. But the state is Jewish in respects that are quite fundamental."

See the Forward written by Noam Chomsky in Sabri Jiryis, The Arabs in Israel (Translated from the Arabic by Inea Bushnaq) (Monthly Review Press, New York, 1976)
David Kretzmer, professor for constitutional law at the Hebrew University and a member of the United Nations Human Rights Committee, also points to the contradiction that exists with regard to Israel's definition of a "Jewish and a democratic state". In his criticism of the Supreme Court's interpretation of Section 7A of the Basic Law: The Knesset, supra note 10, he wrote

> "...that on the decidedly fundamental level of identification and belonging there cannot be total equality between Arab and Jew in Israel" since "the state is the state of the Jews, both those presently resident in the country as well as those resident abroad. Even if the Arabs have equal rights on all other levels the implication [of Section 7A of the Basic Law: The Knesset] is abundantly clear: Israel is note *their* state."

See David Kretzmer, The Legal Status of the Arabs in Israel (Boulder Westview Press, 1990) at 31
The conclusion that Israel as a Jewish state cannot be at the same time a democracy may also be learned from Justice D. Levine's minority opinion in the case of E.A. 2/88, *Ben Shalom v. Central Elections Committee for the Twelfth Knesset,* 43(iv) P.D. 221; for a summary in English see 25 Isr.L.Rev. (1991) 219. In this case he argued that a list that demands total equality between Jews and Arabs in Israel, on the group as well as on the individual level, should be excluded under Section 7A of the Basic Law: The Knesset. [This case will be discussed in infra sub-chapter 6.2. (Supreme Court Cases concerning the Right to Political Participation)]

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discrimination of the Palestinian Arab people living in Israel and the Occupied Territories.

With regard to the jurisprudence developed by the Supreme Court regarding the concept of Israel as a "Jewish state" I unfortunately reach the same conclusions as with regard to the Knesset legislation, namely that in its main patterns it constitutes a violation of the right to equality of the non-Jewish population - i.e. mainly the Palestinian Arab people.

The discrimination against the Palestinian Arab people living inside Israel happens despite the fact that the Declaration of the Establishment of the State of Israel of 14 May 1948 explicitly recognizes them as distinct ethnic, religious, linguistic group, and in spite of the fact that this Declaration expresses the willingness of the state to implement the General Assembly Resolution 181 (II) of 29 November 1947 with all its implications regarding the right of the Palestinian Arab citizens as minority and their right to equality.[15]

Before discussing the specific impact of the "Jewish state" concept upon the right to equality and other civil and political rights, I will first of all deal in general way with the relationship between state and religion in Israel.

2. The Relationship between State and Religion in Israel

2.1. General Remarks

The state of Israel is characterized by the fact that there is no separation between religion and state in the sense practiced in the United States, France and other western countries. Due to the special relationship that exists between the state and religion, Israel may therefore be considered as a half-theocratic Jewish state.[16]

This state of affairs is mainly a consequence of the definition of Israel as a "Jewish state"[17] and the eclectic adoption of Jewish law and various other religious

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15 Declaration of the Establishment of the State of Israel, 1948, supra note 1

16 See for instance the opinion of Tikva Honig-Parnass, Under the Chains of Clericalism, News from Within, published by the Alternative Information Center vol. XIIII no. 6, June 1998, at 17. An other author, Rebecca Kook, in contrast, argues that, despite the lack of separation between religion and state, Israel is no theocracy, since the so called "founding fathers" of Israel had in mind a more secular, ethnonational understanding of a Jewish state, whose parameters and definitions derived from the secular Zionist ideology. Rebecca Kook, Dilemmas of Ethnic Minorities in Democracies: The Effect of Peace on the Palestinians in Israel, Politics & Society, Vol. 23, No. 3, Sept. 1995, 309, at 317

17 The Declaration of the Establishment of the State of Israel, 1948, supra note 1, as well as the two basic laws concerning human rights - namely the Basic Law: Human Dignity and Freedom, supra note 7; Basic Law: Freedom of Occupation, supra note 7 - explicitly define Israel as a "Jewish state".

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laws of those religious-ethnic-national communities[18] that are officially recognized by the Israeli government into Israel's legal system.

Israel's legal system has been built on the duality of religious and secular law, which generally spoken means that there exist two separate and parallel legal orders and court systems. In more detail this means that:

1. In matters of personal status (i.e. birth, marriage, divorce, maintenance, custody of children, adoption, burial, inheritance, education and charitable affairs) the law of the various religious-ethnic-national communities is applied by the different judicial institutions and religious courts of these communities.
2. In all other areas of law the existing secular law of the state is applied by the general courts.

This duality of religious and secular law has its roots in the Ottoman Millet system,[19] which has been inherited first by the British mandatory government - by virtue of Article 46 of the Palestine Order in Council, 1922[20] - and then by the state of Israel - by virtue of Section 11 of the Law and Administration Ordinance, 1948.[21]

Important to mention at this point is the fact that - at the time of the establishment of the state of Israel in Palestine in May 1948 - only in matters of personal status the religious law of the different recognized communities (i.e. Jewish, Moslem, Druze and Christian law) was officially incorporated into the state's secular system.

Despite the fact that the Declaration of the Establishment of the State of Israel, 1948 defines Israel as a "Jewish state", Jewish law was not officially incorporated in any other area of the state's legal system.[22]

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[18] Beside the Jewish community, the Israeli regime recognized the Moslem, the Druze, various Christian denominations and the Bahai'i faith. For more details on this issue see below sub-chapter 2.2.3.

[19] Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights [hereinafter: Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998]. The Report was submitted in June 1998 to the UN Human Rights Committee and circulated as UN document CCPR/C/81/Add.13, para. 457. The Ottoman Empire ruled over the whole area including that part of historic Palestine, which is today the state of Israel, more than 400 years - from 1516 until the end of the First World War.

[20] Article 46 of the Palestine Order in Council, 1922, Official Gazette of the Government of Palestine, 1 September 1922, at 6. See also Menachem Elon, Jewish Law: History, Sources, Principles (The Jewish Publication Society, Philadelphia, Jerusalem 1994) Volume IV, at 1611-1612

[21] Section 11 of the Law and Administration Ordinance, 1948, 1 L.S.I.(1948) 7, at 9. Article 46 of the Palestine Order in Council, 1922 was received into Israeli law in accordance with Section 11 of the Law and Administration Ordinance, 1948. See Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1620. For more details on this issue see sub-chapter 2.7. (The Official and Actual Position of Jewish Law in Israel's Legal System)

[22] Of course no other religious law was incorporated into the Israel's legal system. For details see Elon, Jewish Law: History, Sources, Principles, ibid., at 1620-1623

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The newly established state of Israel rather adopted - by virtue of Section 11 of the Law and Administration Ordinance, 1948[23] - the entire existing legal system of mandatory Palestine and also left the operation of this legal system - at least in the first years - unchanged.[24]

Section 11 of the Law and Administration Ordinance, 1948 included indirectly Article 46 of the Palestine Order in Council, 1922 which explicitly stated that gaps (lacunae) of the existing law shall be filled by resort to English common law and equity so far as the circumstances of Palestine and its inhabitants permit and subject to such qualification as the local circumstances make it necessary.[25]

A fundamental change in the whole concept regarding the official position of religious law - and this time solely with regard to Jewish law - occurred in 1980[26] with the enactment of the Foundations of Law Act.[27] The Foundations of Law Act, 1980 abrogated Article 46 of the Palestine Order in Council, 1922, which required recourse to English equity and common law to fill gaps, and instead explicitly requires the Israeli courts in a situation of a gap to reach a decision "...in the light of the principles of freedom, justice, equity, and peace of the Jewish heritage."[28]

Thus, with the enactment of the Foundations of Law Act, 1980, Jewish law was granted official position within Israel's secular legal system.

To mention is further more the enactment of the two basic laws dealing with human rights - i.e. the Basic Law: Human Dignity and Freedom[29] and the Basic Law: Freedom of Occupation[30] - which explicitly refer to a "Jewish and democratic state".

Although the official doctrine by the Israeli government is that there is no established religion in Israel, properly-so called,[31] I will nevertheless demonstrate in the course of this work that Jewish law and laws influenced by Jewish values have - compared with the laws of the different other religious-ethnic-national communities - an outstanding and even unique superior position within Israel's legal system.

As far as I see it, Jewish religion may therefore be considered as the dominant and even "unofficially" established religion in the state of Israel.

Nonetheless, it must be said that it was not "religious coercion" as such which turned Israel into a half-theocratic Jewish state.

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23 Section 11 of the Law and Administration Ordinance, 1948, supra note 21, at 9
24 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1620
25 Article 46 of the Palestine Order in Council, 1922, supra note 20, at 6-7
26 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1624
27 Foundations of Law Act, 1980, 34 L.S.I. (1979/80) 181
28 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1624
29 Basic Law: Human Dignity and Freedom, supra note 7
30 Basic Law: Freedom of Occupation, supra note 7
31 This statement was explicitly made in the Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 456

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The reasons for the rejection of the principle of separation between state and religion in general and the specific influence of Jewish law in particular go far more back to a political decision about one year before the establishment of the state of Israel in Palestine in May 1948. This political decision - which is still the most important factor responsible for this prevailing situation of non - separation between state and religion - has the form of the so called "status quo" arrangement.[32]

The basic content of the "status quo" arrangement is the maintenance of the actual relationship between state and religion in matters of personal status (i.e. birth, marriage, divorce, maintenance, custody of children, adoption, burial, inheritance, education and charitable affairs), Shabbat, education and kashrut (i.e. the dietary laws of the Jewish religion) as established during the British mandatory period, including all the legal modifications made after the establishment of the state of Israel in Palestine.

However, the religious parties, joining every government[33] in the coalition system and thus possessing a powerful strategic position, have always insisted on the inclusion of that arrangement in the various coalition agreements.[34]

Before discussing in more detail the historical background and the present importance of the said "status quo" arrangement - which will be done in sub-chapter 2.3. - I shall take a more detailed glimpse at the Ottoman Millet system and its adoption by the British mandatory and then by the Israeli government.

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32 Claude Klein, La Démocratie d' Israel (Editions du Seuil, Paris 1997) at 256-264

33 The fact that no political party has ever acquired a majority necessary to rule in a parliamentary democracy made it necessary that every government in Israel has been a coalition government, usually composed of the Labour or the Likud party and one or more of the smaller religious parties.

34 Izhak Englard, Law and Religion in Israel, 35 A.J.C.L. (1987) 185, at 192

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2.2. The Ottoman Millet System and Its Adoption by the British Mandatory Regime and the Israeli Government

2.2.1. The Ottoman Period

From 1517 until 1917 Palestine was ruled by the Turks as part of the Ottoman Empire. During that era, Islam was the established religion of the Empire, including the region of Palestine.

Muslim law drew a distinction between "heathens" and the so called "religions of the book", i.e. the Jewish and Christian religions that were based upon the Sacred Book (the Kitabaia). The Turkish Sultan seriously restricted the so called "heathens," but established a Millet system for the "religions of the book".[35]

The Ottoman Millet system was grounded in a social structure in which the non-Islamic recognized groups belonging to the "religions of the book" - the so called "millets" - were treated as "nations".[36]

These recognized homogenous religious groups were led by religious notables who were responsible to the Turkish Sultan, and generally enjoyed a fairly high degree of autonomy in managing their internal communal and religious affairs. The said autonomy included the maintenance of an independent legal order with a prescribed jurisdiction.

The Ottoman Millet system was built upon the following three basic principles:

1. Application of religious law in matters of personal status.
2. Communal jurisdiction; that means religious courts and judicial institutions of the specific community have jurisdiction in matters of personal status.
3. Preferential treatment of foreign nationals.

In more detail this means that in all cases involving Muslims, Muslim courts applied Muslim law (i.e. the Sharia) to all questions of personal status - such as birth, marriage, divorce, maintenance, custody of children, adoption, burial, inheritance, education and charitable affairs.[37]

In cases involving non-Muslim communities - which were recognized by the Ottoman system - the relevant religious law of the community to which the individual belonged was applied to all questions of personal status. The jurisdiction in such cases was granted to the religious courts and institutions of the specific community involved.[38]

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35 Maoz, Religious Human Rights in the State of Israel, supra note 13, at 354

36 Izhak Englard, Religious Law in the Israel Legal System (Alpha Press Jerusalem, 1975) at 13

37 Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant of the ICCPR, 1998, supra note 19, para. 457

38 The Jewish and Christian communities were not automatically recognized, but they rather needed to obtain a special charter from the Turkish Sultan, which defined the legal status of

In cases involving foreign nationals who were subject to the consular courts, Ottoman law was not applied and Muslim courts were not granted jurisdiction.[39]

One of the principal problems of the Ottoman Millet system was that it did only provide for persons who belonged to the recognized religious communities.

2.2.2. The British Mandatory Period

As already mentioned above, the British mandatory authorities adopted the Ottoman system and kept the so called "status quo" arrangement - i.e. the actual relationship between state and religion with full autonomy in matters of personal law[40] and communal jurisdiction - principally, although with some differences, in force.

The British mandatory government dealt differently with each of the recognized religious community and introduced the following important modifications:

1. The recognized communities were given exclusive jurisdiction over their internal constitution and their administration of religious donation foundations (wakfs).[41]
2. Muslim religious courts no longer served as state courts, though continued to enjoy broader jurisdiction than the Jewish and Christian courts, and exercised jurisdiction over all members of their communities.[42]
3. All Christian communities - with the exception of the Greek Orthodox community, which was regulated by Ottoman regulations dating back to 1875 and further mandatory ordinances - were organized on an internal basis, and were largely left alone by the British mandatory government.
   Christian religious courts exercised jurisdiction over all members of their communities.[43]
4. The Jewish community on the other hand was more closely regulated by the High Commissioner.
   Rabbinical courts were allowed to operate only over persons who had voluntarily subjected themselves to its jurisdiction by registering in the register of the Jewish community.[44]

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the community and the jurisdiction of the religious courts and institutions. Thus, the jurisdiction of these community courts varied according to the scope of rights granted to the specific community. Maoz, Religious Human Rights in the State of Israel, supra note 13, at 354

39 Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 457

40 Articles 47, 51-57 of the Palestine Order in Council, 1922, supra note 20

41 Maoz, Religious Human Rights in the State of Israel, supra note 13, at 355

42 Ibid.

43 Id.

44 Id.

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5. In 1921, by a special order, the Supreme Muslim Council was formed and became responsible for the religious affairs of the Muslim communities as well as for the administration of Muslim wakfs. Later on the administration of Muslim wakfs was placed in the hands of a specially appointed committee.[45]
6. Matters of personal status affecting foreign nationals whose national law did not make them subject to Muslim religious jurisdiction were handed over to the newly-established District Courts, unless the foreign national consented to the jurisdiction of a religious court.[46]
(This was a modification of the Ottoman system)
7. The entire religious system came under supervision of the High Court of Justice.[47]
(This was a modification of the Ottoman system)

The British mandatory regime granted to eleven religious communities autonomy in matters of personal law and communal jurisdiction, namely to the Jewish and the Muslim communities and to nine Christian denominations (i.e. the Eastern Orthodox, the Roman (Latin) Catholic, the Gregorian Armenian, the Armenian Catholic, the Syrian Catholic, the Chaldean Uniate, the Greek Catholic Melkite, the Maronite and the Syrian Orthodox).[48]

The Anglican Church nor any other religious community was recognized, in spite of the power conferred upon them.[49]

2.2.3. The Establishment of the State of Israel

The establishment of the state of Israel in Palestine on 14 May 1948 did not bring any changes in the Millet system itself and the Israeli parliament (the Knesset) maintained the above mentioned underlying principles[50] of the "status quo" arrangement.

Nevertheless, some principal changes occurred following the establishment of the state of Israel in Palestine in May 1948, namely:

1. The transformation of the Jewish communal religious institutions into official state bodies, with authority over the entire Jewish population.
2. The enactment into legislation of certain religious practices under Jewish religious law (Halakha).

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45 Id.

46 Articles 64-65 of the Palestine Order in Council, 1922, supra note 20. See also Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 458

47 Englard, Religious Law in the Israel Legal System, supra note 36, at 13

48 Maoz, Religious Human Rights in the State of Israel, supra note 13, at 354

49 Ibid.

50 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1620

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3. The Jewish population became the majority religious group within the total population of the newly established state, and the issue of preservation of the "status quo" arrangement became a matter of concern for all non-Jewish religious communities.[51]

The Israeli government granted to the following fourteen religious communities autonomy in matters of personal law and communal jurisdiction, namely: The Jewish[52] and the Muslim[53] communities and to the above mentioned nine Christian denominations,[54] the Druze community,[55] the Evangelical Episcopal Church[56] and the Baha'i faith.[57]

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51 Englard, Religious Law in the Israel Legal System, supra note 36, at 13

52 The Jewish religious population in Israel is overwhelming Orthodox, and only a small number of groups is non-Orthodox (Reform and Conservative movements). The Orthodox Jewish population may be divided into the National Religious movement and the Haredi Ultra-Orthodox stream. The main differences between the National Religious and the Ultra-Orthodox movements lays in their attitude towards the state of Israel. For more details see Chapter B.4.3.3. (Arguments Raised Against the Enactment of a Constitution including a Bill of Rights - The View of the Religious Parties)
The Karaites, also called the "people of the Scriptus", are a Jewish sect that departed from the mainstream of Rabbinical Judaism in the eighth century C.E. They observe only the Commandments of the Torah and disregard post-Biblical Halakha. They have their own synagogues and religious institutions. They are Jewish, although rabbis of Askenazi (European) origin will not marry them to Jews, while rabbis of Sephardi (Oriental) origin tend to be more moderate on the matter. They are a small group with about 25.000 people. For more details on this issue see Maoz, Religious Human Rights in the State of Israel, supra note 13, at 351
The Samaritans follow numerous Jewish customs in their religious practice, yet they are not regarded as Jewish by the Israeli government. Today there are about 600 Samaritans, half living in the Israeli township of Holon, and half in Nablus in the West Bank, near the holiest site of their religion, Mt. Grizim. They are led by priests headed by the elder priest, called the Great Priest. Maoz, Religious Human Rights in the State of Israel, ibid., at 351-352

53 Most of the Muslims in Israel follow the Sunnite Islam, which has four schools of faith. The Shafi'i mazhab school is the most common among rural Muslims, the Hanafi mazhab is dominant in urban areas. The Sharia religious courts of the Muslims follow the Hanafi mazhab school. Maoz, id., at 352

54 I.e. the Eastern Orthodox, the Roman (Latin) Catholic, the Gregorian Armenian, the Armenian Catholic, the Syrian Catholic, the Chaldean Uniate, the Greek Catholic Melkite, the Maronite and the Syrian Orthodox. Maoz, id., at 352-353

55 The Druze community is a small but significant Middle Eastern Islamic sect professing an initiatory faith derived from the Ismã΄ïliyya. They call themselves *Muwahhidun*, "unitarians". The faith originated in the closing years of the reign of al-Hãkim, Fãtimid Caliph of Egypt (386-411/996-1021). According to the Ismã΄ïli Shi'i faith then officially received in Egypt, al-Hãkim, as *imãm,* was the divinely appointed and authoritative guardian of Islam, holding position among men which answered to that of the cosmic principle *al-'akl al-fa' ãl*, the active intellect, and unquestionable head of the Ismã΄ïli religious hierarchy. The Encyclopaedia of Islam (New Edition, 1965) Volume II, at 631-637. The Druze community does not accept converts. Most of the Druze are concentrated in Syria (~350.000), in Lebanon (~300.000), and in Israel (~90.000) where they constitute 1,7% of Israel's population. Maoz, id., at 353. The Druze community was recognized by the Israeli government in 1957. Ibid., at 355

Several other religious communities - such as the Anglicans, the Church of Scotland, the Lutherans, the Unitarians, the Baptists, the Quakers - are not officially recognized by the state of Israel.[58]

As a result of the inherited Ottoman Millet system, persons who do not belong to any of the recognized communities - either because they espouse no religion or abandon the religion into which they were born, or because their religion was and is not practiced in Palestine, or although practiced, it is not recognized - no local religious tribunal or institution has jurisdiction over their members in matters of personal status.

This has the consequence that such persons are deprived of many rights, to mention among them the right to receive government funding for their religious services (as do many of the recognized communities) and the right to marry in the state of Israel according to its legal system.

2.3. Historical Background of the "Status Quo" Arrangement

The "status quo" arrangement has its origins in a letter which was sent by David Ben Gurion and other Zionist leaders of the Jewish Agency for Palestine to the ultra-orthodox religious party "Agudat Israel" on 19 June 1947 - about one year before the establishment of the state of Israel.

The said letter contained an "understanding" that was reached between the Zionist leaders in Palestine and "Agudat Israel" on certain issues of special importance, such as observance of the Sabbath and the kashrut (i.e. the dietary laws of Jewish religion), the laws on education and the laws of marriage and divorce.[59]

In order to understand the reasons how and why this letter of understanding has been issued, it seems appropriate at this point to make a short glimpse at the doctrine of the ultra-orthodox religious Jews and their position regarding the idea of the

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56 The Evangelical Episcopal Church was recognized by the Israeli government in 1970. Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 460

57 The Baha'i Faith originated in Islam, but disconnected itself from it. the international centre is located in Haifa where the religious leadership convenes. In Israel, there are some 300 Bahai'is, most of them foreign citizens who serve in the community's institutions. Maoz, Religious Human Rights in the State of Israel, supra note 13, at 354. The Baha'i Faith was recognized by the Israeli government in 1971. Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, ibid., para. 460

58 Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, id.

59 The text of this letter of 19 June 1947 is reproduced in French in Klein, La Démocratie d' Israel, supra note 32, at 256-258

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establishment of a state of Israel in Palestine - whose fulfilling was the utmost aim of political Zionism.

2.3.1. The Doctrine of Ultra-Orthodox Judaism and its Original Position towards Political Zionism

At the beginning of the Zionist movement (at the turn of the 19th and the early 20th century), the leading orthodoxy in Germany, Hungary and the countries of eastern Europe regarded Zionism as

> "...an unmitigated disaster, a poisonous weed, more dangerous even than Reform Judaism, which hitherto was regarded as the main danger." [60]

In order to be able to fight more effectively the Zionist movement "Agudat Israel" was founded in 1912, uniting leading rabbis and orthodox layman.[61]

Important to mention is the fact that the doctrinal position of the ultra-orthodox religious Jews was somewhat complicated, due to the fact that according to the Torah it is the duty[62] of every faithful Jew to settle in the Holy Land.

However, some of the ultra-orthodox rabbis - who argued strictly against Zionism - stated that the duty to settle in the Holy Land was only one out of 248 religious duties which could clash with others no less or even more important ones.

The spiritual leader of German Jewish orthodoxy in the 19th century, Samuel Raphael Hirsch, for example, had stated even before the rise of political Zionism that Jews had to hope and pray for their return to Zion, but actively to accelerate the "redemption" was a sin and strictly prohibited.

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[60] For a collection of the sayings of leading rabbis against Zionism, see M. Blach (ed.), Dovev sifte yeshenim (3 vols.), New York, 1959, quoted in Laqueur, A History of Zionism (London: Weidenfeld and Nicholson, 1972) at 407

[61] Ibid.

[62] The Hebrew term for this duty is "Mitzvat Yishuv Eretz Israel"

At this time the ultra-orthodox rabbis considered the ideology of political Zionism as

> "...the most recent and the most dangerous phase in the continuing Satanic conspiracy against the House of Israel, the most recent and the least reputable of a long series of catastrophic pseudo-messianic attempts by human action to hinder the redemption."[63]

According to the ultra-orthodox belief, the concept of political Zionism was a heretical attempt to establish a state, a Jewish kingdom, which according to their tradition was the privilege of the Messiah - which has not yet come to this day. The ideologists of the ultra-orthodox Jews regarded the Jews as a religious nation, i.e. a nation different from all others inasmuch as religion was its only content.

In this context, Dr. Isaac Breuer, a lawyer and representative of the ultra-orthodox ideologists, argued in a book in 1918 that

> "...Zionism wanted to leave religion out of the national revival and as a result the nation would become an empty shell, but without religion the whole of Jewish history over thousands of years lacked any purpose."

According to Breuer's doctrine, the Jewish nation had refused to perish because it wanted to save its religion and, controversly, religion had saved the Jewish nation.

The concept of political Zionism - so Breuer - was depriving the Jewish nation of its real cultural content by borrowing modern nationalism from western Europe, and thus it had initiated the worst kind of assimilationism.[64]

To the argument that greater capacities than such as Spinoza and Marx could emerge if the situation of diaspora of the Jewish nation would be replaced by a Jewish state, Breuer replied that these speculations were no longer based on historical experience, nor would they give legitimacy to Jewish national claims.[65]

2.3.2. The Changing Position of Ultra-Orthodox Judaism towards the Concept of Political Zionism

With the new realities created in Palestine (at the turn of the 19th and the early 20th century) with the growing immigration and settlement activities - especially by the youth organization and the workers section founded in Poland in 1922 - the Jewish religious orthodoxy also began to modify its approach with regard to settlement activities in and immigration to Palestine.

Even the Hebrew language, which was considered as the language of the literature of "Torah", and which previously has been "a taboo" as the language of

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63 Laqueur, A History of Zionism, supra note 60, at 407

64 Dr. Isaac Breuer, quoted in ibid., at 408

65 Id., at 409

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everyday life and the marketplace, was more and more spoken also in these circles in daily life.[66]

The murder of religious orthodox, anti-Zionist Jews by local Palestinian Arab guerrillas in the towns of Hebron, Safed and Jerusalem during the riots of 1929[67] also caused a change in thinking of "Agudat Israel", and made this religious party more ready to cooperate with Zionists in some fields, although it refused to join the National Council of Palestinian Jewry[68] which was set up in the 1920's.[69]

Additionally, the Nazi rule and the Holocaust - where millions of Jews were murdered in concentration camps and gas chambers - also caused confusion and a deep split in the ranks of "Agudat Israel".

Due to the above mentioned factors the previously anti-Zionist oriented religious party "Agudat Israel" was more and more compromising with Zionism after the end of the Second World War, which finally led to the above mentioned "status quo" agreement between them and the Palestinian Zionist leaders as expressed in the above mentioned letter of understanding dated 19 June 1947.[70]

2.4. The Present Importance of the "Status Quo" Arrangement

As already mentioned above the basic content of the "status quo" arrangement is the maintenance of the actual relationship between religion and state in matters of personal status, Shabbat, kashrut (i.e. the dietary laws of the Jewish religion) and education.

Matters of personal status comprehend the lack of civil marriage[71] and divorce; matters of Shabbat comprehend restrictions of the public transport and the opening of business, and matters of kashrut comprehend limitations on the raising of pigs and sale of pork.

During the last 52 years since the state of Israel was established, the existing system has been defended by the politically effective argument that a change in the "status quo" arrangement would endanger the unity of the Jewish people - an

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[66] Elon, Jewish Law: History, Sources, Principles, supra note 20, Chapter 41 II.E. 1. (The Restoration of the Hebrew Language as the Language of Daily Life). Only the extremist wing among the orthodoxy persisted to use Yiddish exclusively.

[67] For more details on this issue see Chapter A.5.2. (The Disturbances in Palestine in 1920, 1921, 1925 and 1929)

[68] The Hebrew term for the "National Council of Palestinian Jewry" is "Va'ad Leumi"

[69] Laqueur, A History of Zionism, supra note 60, at 410-411

[70] Ibid.

[71] Due to the fact that there is no civil marriage in Israel, people with different religions have great difficulties to get married or divorced within the state of Israel and its legal system.

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utilitarian objective upon which, however, a large consensus exists among the different political parties of Israel.[72]

A powerful step not just to stabilize politically the "status quo" arrangement on religious matters, but also to correct any future breach of it, was made in September 1994 with the signement of a coalition agreement between the Labor party and the Shas[73] party.[74]

Against this coalition agreement a petition - based on the argument that it was not legal - was filed to the Supreme Court.

The Supreme Court, by a majority of three to two, rejected to intervene and to invalidate the agreement.

Justice Meir Shamgar wrote the majority opinion for the Supreme Court and held that the agreement definitely breaches the constitutional balance by entrenching limits on matters of religion, while other fundamental individual liberties are not entrenched. Despite these clear words, Justice Shamgar nevertheless stated that the procedure to halt this trend was through the democratic process and not through the Supreme Court.[75]

Finally, the mentioned coalition agreement, however, did not become effective due to the fact that the Shas party left the government.[76]

Nevertheless, as it was well expressed by Professor Frances Raday, this agreement clearly shows

> "...the nature of decision-making which has produced the regulation of religion and law in Israel, and the acceptance of religious coercion by political expedience and judicial hesitation."[77]

Due to the above described importance that is attached to religious law - i.e. Jewish, Moslem, Druze and Christian law - in matters of personal status, and due to the fact that Jewish law has the most important influence upon the state's secular system in almost all matters, including civil and political rights, the next sub-

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72 Englard, Law and Religion in Israel, supra note 34, at 202. Aharon Kirschenbaum, Bible and State - About the Place of Religion, Judaism and Zionism in the Proposed Constitution, 15 T.A.Univ.L.Rev. (1990) 63, at 82. Professor Kirschenbaum argues in this article that the existing legal framework provides a so called "modus vivendi" for religious and secular circles and its disruption would mean an irresponsible invitation to a conflict between [Jewish] brothers.

73 Shas is the political party of Orthodox Sephardic Jews.

74 Klein, La Démocratie d' Israel, supra note 32, at 263

75 H.C. 5364/94, *Welner v. Chairman of the Israeli Labour Party*, 49(i) P.D. 758. The Justices Barak and Orr dissented. Justice Barak based his opinion entirely on the principle of independence of the judiciary and regarded the fact that the question involved the religious "status quo" as irrelevant.

76 Klein, La Démocratie d' Israel, supra note 32, at 264

77 Frances Raday, Religion, Multiculturalism and Equality: The Israeli Case, 25 I.Y.H.R. (1995) 193, at 241

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chapters 2.5. to 2.7. will deal with the nature and official position of religious law in general, and the nature and official position of Jewish law in matters of civil and political rights, and of personal status in particular.

2.5. The Nature of Religious Law in Israel's Legal System

2.5.1. General Remarks

Many problems, peculiarities and phenomenas in the Israeli legal system and society can only be understood in the light of the circumstances of the establishment of the state, the special status of religious law within the state's secular legal system in general, and the specific nature and official position of Jewish law within the state's legal system in particular.

Despite the fact that in matters of personal status a number of systems of religious law apply today in Israel, it is first of all Jewish law that influenced and influences the Israeli general and secular legal system.

The ideological conflict concerning the nature of the state of Israel and the relationship between state and religion in Israel centers therefore mainly around the official position of Jewish law within the state's general and secular system.

The reasons for this ideological conflict lay (1) in the specific character of Jewish law - which according to the Jewish faith - is both the religious law as well as the national law of one, i.e. the Jewish people,[78] and (2) in the way Jewish law has influenced Israel's state secular system.

Due to the special character of Jewish law - according to which the religious and national aspects are almost inextricable intertwined - many political, social and legal conflicts in Israel relating to the issue of the relationship between religion and state in general, and to human rights and freedoms in particular have therefore unique features in Israel and the Occupied Territories.

Important to mention, however, is the fact that Israeli law is neither identical to Jewish law nor does it constitute an integral part of Jewish law. The reason for this state of affairs lays in the different character of Israeli and Jewish law, both reflecting two different and independent sources of validity.

Israeli law is secular law since it draws its normative force from the Israeli parliament (the Knesset) which is a non-religious legislative body.[79]

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[78] Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1588, 1590-1991

[79] Brahyahu Lifshitz, Israeli Law and Jewish Law - Interaction and Independence, 24 Isr.L.Rev. (1990) 507; Izhak Englard, The Problem of Jewish Law in a Jewish State, 3 Isr.L.Rev. (1968) 254, at 259

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Jewish law in contrast is characteristically a religious law, because - according to the Jewish faith - the ultimate source of Jewish law is divine revelation[80] and its validity is limited neither in time nor in space.[81]

Despite the above mentioned fact that Israeli law is not identical to Jewish law, nor does it constitute an integral part of Jewish law, one may, nevertheless, observe that Israeli law is to a great extent influenced by Jewish law.

Central for the present discussion about the relationship between law and religion in Israel are therefore two interrelated questions, namely:

1. To what extent has the state of Israel actually established Jewish religion by means of laws?
2. To what extent has Jewish law influenced Israel's secular legal order with regard to civil and political rights and freedoms?

The question of the nature and status of Jewish law within Israel's secular legal order has on the one hand aspects, sharing with other religious systems in the framework of the entire Israeli system, on the other hand does the nature of Jewish law indeed strongly differ from almost all other religious legal systems.

In order to understand the whole problems and aspects involved it is therefore helpful to take also a glance at the legal nature of ecclestical law and to present some arguments and approaches of legal philosophy, such as the conceptions of the Positivist and Normativist School, towards the issue under review.

2.5.2. The Question of the Legal Nature of Canon Law

The Approach of the Positivist School of Jurisprudence regarding the Question of the Legal Nature of Canon Law

The Positivist School of Jurisprudence is primarily known for its denial of natural and international law and it also influenced the debate on the status of Canon Law.

John Austin, a representative of classical positivism, expressed the idea that the law of the state is the only law having a positive character since it is the expression of a sovereign command.[82]

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80 Menachem Elon, The Sources and Nature of Jewish Law and its Application in the State of Israel, 2 Isr.L.Rev (1967) 515, at 517, 518

81 Englard, The Problem of Jewish Law in a Jewish State, supra 79, at 256; Eliav Shochetman, Israeli Law and Jewish Law - Interaction and Independence: A Commentary, 24 Isr.L.Rev. (1990) 525

82 John Austin, Lectures on Jurisprudence (5th ed., London 1885) Lecture VI, 330

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Other legal philosophers - such as Von Jhering and Lasson - postulate that the only body capable of creating law is the state; and outside the state no legal order could exist.[83]

Denying the legal character of Canon law paved the way for a dogmatic basis of a general conception of the supremacy of the state over the church.[84]

Hans Kelsen

Hans Kelsen, one of the most important representatives of legal positivism, wrote in his book "The Pure Theory of Law" that the law and the state are identical, since the state is nothing else than the legal order. But - he also argued - that not every order is a state.[85]

According to Hans Kelsens theory, the state is a legal system because of the developed structure - in contrast to international law. He furthermore argued that it depends on the centralization of power that justifies an actual state.

About the Catholic Church, Hans Kelsen said that - "If the Church is legal order, then it is State." This assertion can be understood in the sense that the strong hierarchical structure of the Catholic Church justifies its being as a state.[86]

However, according to Hans Kelsens theory, central importance is always attached to the criterion of enforcement as the vital element of every legal order, which - according to his theory - makes it in practice impossible that religious law in general can be regarded as a positive law.

Hans Kelsen argues in this regard that due to the fact that in reality always the state has a monopoly in the exercise of physical force, religious law manifests itself either as moral order (without physical coercion) or as part of state law (thus enforcement may be achieved by the state's organs).

Izhak Englard

Izhak Englard raised another argument against the legal nature of Canon law. He assumes that as a social ordering, the essential purpose of law is the settlement of interpersonal disputes.[87]

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83 Von Jhering, Der Zweck im Recht (2.Aufl., Leipzig 1884) 1. Band, 320; Lasson, System der Rechtsphilosophie (Berlin 1882) at 37, 335, 412

84 Englard, Religious Law in the Israel Legal System, supra note 36, at 19; Lasson, System der Rechtsphilosophie, ibid., at 335, 590

85 Hans Kelsen, The Pure Theory of Law (Berkeley 1970) 286

86 Hans Kelsen, Allgemeine Staatslehre, in Enzyklopädie der Rechts- und Staatswissenschaft, Abt. Rechtswissenschaft, XXIII (Berlin 1925) at 133. "Ist die Kirche Rechtsordnung, dann ist sie Staat."

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In determining whether a religious norm is to be regarded as a religious legal norm, he follows the criterion of enforcement, and maintains that "the legal quality of every religious norm is to be ascertained by its sanction."[88]

In Izhak Englard's concept of law, which basically follows Kelsen's notion of a legal system, the determinative factor of the legal character of a norm is that the society is prepared to enforce compliance upon the individual.[89] He states that "the legal character is not in the least diminished if the norm subsumes a transcendent concept. It follows, that all such religious norms as are attended by a societal sanction - as opposed to a purely transcendent sanction - constitute together a legal system."

Summary and Conclusions

1. In view of the central importance which Hans Kelsen attaches to the criterion of enforcement as the vital element of every legal order, no religious law can in practice be regarded as a positive law.

2. Due to the fact that in reality the state has a monopoly in the exercise of physical force, religious law manifests itself either as moral order (without physical coercion) or as part of state law (where enforcement may be achieved by the state's organs).

3. In contrast to the above mentioned arguments raised against the legal character of religious law, Izhak Englard argues that religious norms may constitute a legal system as long as they are accompanied by a societal - as opposed to a purely transcendent - sanction.

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87 Englard, Religious Law in the Israel Legal System, supra note 36, at 22, 23

88 Ibid., at 24

89 Id., at 23

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2.5.3. The Nature of Jewish Law

The Religious Nature of Jewish Law

As already mentioned above, Israeli law is secular law since it draws its normative force from the Israeli parliament (the Knesset) which is a non-religious legislative body.[90]

Jewish law on the other hand is characteristically a religious law, because - according to the Jewish faith - the ultimate source of Jewish law is divine revelation[91] and its validity is limited neither in time nor in space.[92]

Jewish law does not limit itself to the sphere of relations between man and man, but rather places the relationship between man and God in legal categories, applies legal terms and juridical concepts on them.[93] During thousands of years, the Jewish legal system was closely tied to religious law, and the entire Jewish culture bore a religious stamp. Jewish law provided the foundation for a unique religious culture.

The National Nature of Jewish Law

According to the Jewish faith, Jewish law is not only a religious law, but also the national law of the Jewish people,[94] wherein the problematical significance within the Israeli legal system lies.

Jewish law is the national law of the Jewish people, because it is considered to have been evolved in an entire chain through the creative invention of the Jewish people all over the world.[95]

In this regard Jewish law differs from almost all other religious legal systems - Moslem or Canon Law - which are considered to have been fashioned by the believers among different peoples, whereas Jewish law is, according to the Jewish faith, believed to have been developed by one single - i.e. the Jewish people.

From the Jewish religious point of view, the Jewish law - i.e. the Talmud, the Posakim (responsae), the great codifications of the 12th century (Maimonides), the 14th century (the Toor), the 16th century (the Schulchan Aruch), and the later

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90 Lifshitz, Israeli Law and Jewish Law - Interaction and Independence, supra note 79; Englard, The Problem of Jewish Law in a Jewish State, supra note 79, at 259

91 Elon, The Sources and Nature of Jewish Law and its Application in the State of Israel, supra note 80, at 517, 518

92 Englard, The Problem of Jewish Law in a Jewish State, supra note 79, at 256; Shochetman, Israeli Law and Jewish Law - Interaction and Independence: A Commentary, supra note 81

93 Englard, Religious Law in the Israel Legal System, supra note 36, at 24; Silberg, Law and Morals in Jewish Jurisprudence, 75 Harv.L.Rev. (1961-1962) 306, at 309

94 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1588, 1590-1991

95 Ibid.

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responsae - has completely grown on foreign territory, and its main goal was to retain and to protect the national nature of the Jewish people from assimilation into the foreign cultural milieu.

In accordance with this main goal, every rule and regulation that was produced, was primarily examined from the point of view of its usefulness of the defense of - solely - the Jewish people and the Jewish culture.

According to the Jewish faith, the Jewish people, after having been exiled from the historical homeland, confined itself within the Halacha in order to retain its national character until the return to the land of "the fathers" - i.e. "the day of redemption" would have come.[96] Jewish law was the basis for a clearly distinctive national life and truly fashioned the pre-modern Jewish community into "a nation within a nation".

Today in the state of Israel, the national nature of Jewish law manifests itself, inter alia, in the fact that even most of the non-religious Israeli Jews consider the religious order as a legal order.[97]

In the matter *Skornik v. Skornik*,[98] the Supreme Court explicitly relied on the above described national character of Jewish law in respect of all Jews all over the world and wherever they may be.

Justice Agranat, handing down the judgment for the Supreme Court, stated as follows:

> "During the long period, however, in which the Jews were compelled, in the lands of their dispersion, to confine themselves within the Ghetto walls, Jewish law soon assumed to a growing degree a religious form. But it never cease, for this reason, to be the national law of the Jews, even after a breach had been made in the walls of the Ghetto and the Jews entered the world outside those walls. And this is also true of those Jews who, having "tasted enlightenment" and having acquired civil and political rights in the countries in which they lived, began to regard some of the provisions of Jewish law, and perhaps many of those provisions, as foreign to their spirit."[99]

The Legal Nature of Jewish Law

Regarding the question of the legal nature of Jewish law, it is important to mention that Jewish law differs significantly from ecclestical law.

The school of Christianity makes a distinction between temporal/worldly matters, belonging to the state, and spiritual/divine matters, belonging to the religious

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96 Silberg, Law and Morals in Jewish Jurisprudence, supra note 93, at 321

97 Englard, Religious Law in the Israel Legal System, supra note 36, at 26

98 C.A. 191/51, *Skornik v. Skornik,* translated into English in 2 S.J. (1954) 327. The case deals with the recognition of a marriage between Jews celebrated outside of Israel, according to civil law, without a religious ceremony.

99 Ibid., at 373

authority. The wellknown conciliatory advice "Render to Caesar the things that are Caesar's, and to God the things that are God's" was created by the Christian Church.[100]

This separation between temporal/worldly matters, coming within the realm of political authority, and spiritual/divine matters, being under the jurisdiction of religious organs, is alien to Judaism.[101] Furthermore, the view of an irreconcilable contrast between law, as a coercive order, and religion, as requiring the accomplishment of acts of faith, without coercion, does not exist in Jewish law.

Izhak Englard stated in this context that "the Jewish religion manifests itself by the establishment of its own (religious) law," and that therefore the relationship between Jewish law and state law is not one of exclusions and separation, but rather of competition which seeks to present alternatives to state legislation.[102]

Historically the center of Judaism lies in the Jewish religious law - the Halacha - which makes no functional difference between temporal/worldly matters, and spiritual/divine matters. According to this concept, human affairs as well as religious matters were - from the very beginning, i.e. when the Jewish people were given the ten commandments on Mount Sinai - encompassed.[103] Therefore, the Talmud - the Orthodox Judaism as established by the Rabbinical tradition - also accepted without any doubt the legal character of the Jewish religious law - i.e. the Halacha.

This lead to the situation that - when in May 1948 the state of Israel was established in Palestine - nobody raised the question of the legal nature of Jewish religious law - the Halacha.[104]

Due to the fact that the state of Israel inherited the Millet system from the Ottoman tradition, which recognized the autonomy of the various religious communities, religious law was not conceived as being different from any other national law.

The Israeli legislator[105] - as already before the mandatory lawmaker[106] - included into the concept of "personal status" both religious and national (foreign) law.[107]

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[100] Matthew XXI, 21

[101] Asher Maoz, State and Religion in Israel, International Perspectives on Church and State, M. Mor ed. (Omaha 1993) 239, at 241; Silberg, Law and Morals in Jewish Jurisprudence, supra note 93, at 321

[102] Englard, Religious Law in the Israel Legal System, supra note 36, at 186

[103] Maoz, State and Religion in Israel, International Perspectives on Church and State, supra note 101, at 242; Englard, Religious Law in the Israel Legal System, supra note 36, at 24

[104] In this context it should be mentioned that Israeli law - as it is influenced by the Anglo-American system - tends to avoid to discuss abstract theoretical questions, having no immediate practical significance.

[105] By virtue of Section 11 of the Law and Administration Ordinance, 1948, supra note 21, the British mandatory legislation was absorbed into Israeli law.

[106] Sections 47, 64 of the Palestine Order in Council 1922, supra note 20

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So far my short analyze about the nature of Jewish religious law. In the next sub-chapters, I will discuss in more detail the position of Jewish law within Israel's legal system.

2.6. Historical Background regarding the Position of Jewish Law in Israel's Legal System

In the 18th century, with the advent of the emancipation and the termination of Jewish autonomy in general and of Jewish juridical autonomy in particular, Jewish law has lost its significance among the Jewish population of Western and Central Europe.[108]

The largest and most important areas of Jewish law - i.e. civil, criminal, administrative and public law - were no longer applied in practice at this time and became a matter of study for theoretical contemplation but not practicable application.

The only branch of Jewish law that was still actually applied was the portion of family law dealing with marriage and divorce.[109]

However, at the beginning of the 20th century, with the rise of the Zionist movement - whose political aim was to establish a national home for the Jewish people in Palestine - a radical change also in the attitude towards Jewish law took place. [110]

Among certain circles of Jewish jurists and intellectuals, together with others from all segments of the Jews, the restoration of Jewish law in a Jewish society was viewed as having national significance, and a new movement that called for the renewal of Jewish law began to grow.[111]

In 1918, around one year after the Balfour Declaration, the "Jewish law society" was founded in Moscow, whose objectives were "to conduct scientific research into Jewish law and its development from its beginnings to the present time, to make it compatible with the legal systems of the West and the East, and to formulate proposals for legislation prescribing the future governance of the Land of Israel."[112]

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107 In this context Itzhak Englard has argued, that the use of the single word "personal law", which included both foreign and religious - Jewish, Moslem and Christian - law, is an evidence for the fact that an extreme positivist notion of law was alien to the spirit of the local system. See Englard, Religious Law in the Israel Legal System, supra note 36, at 26

108 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1576, 1578-1579

109 Ibid., at 1583-1584

110 Id., at 1588

111 Id.

112 Id., at 1589, 1591

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Another significant practical expression of the new movement to apply Jewish law to practical life, was the organization of the "Jewish Court of Arbitration" in 1909-1910 in Jaffa, which coexisted with other judicial institutions, such as the rabbinical courts, the courts of the Ottoman Empire and, later, those of the British mandatory power.

Although during 1920-1930 a considerable number of disputes were submitted to this "Jewish Court of Arbitration" it could - due to its weakness in important areas - not adequately take the place of a regular judicial system.[113]

In the period preceding the establishment of the state of Israel in Palestine, Jewish law was also developed by the rabbinical court system by way of judicial interpretation, and by the 1921 established "Chief Rabbinate" by way of legislative enactments (takkanot) in the field of judicial process and personal status.[114]

2.7. The Official and Actual Position of Jewish Law in Israel's Legal System

As already mentioned at a previous point of this Chapter C,[115] at the time of the establishment of the state of Israel in Palestine in May 1948 no religious law was - with the sole exception of religious law in matters of personal status - officially incorporated into the state's secular system.

Despite the fact that the Declaration of the Establishment of the State of Israel, 1948 defines Israel as a "Jewish state", also Jewish law[116] was - with the sole exception of the law of personal status - not officially incorporated in any other area of the state's legal system.[117]

It should be mentioned, however, that - already soon after the establishment of the state of Israel in Palestine - the intention to officially incorporate Jewish law or at least to link the secular legal system of the Jewish state with Jewish law was vehemently proposed.[118]

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[113] Id., at 1592-1596

[114] Id., at 1597-1599, 1753

[115] See Chapter C.2.1. (The Relationship between State and Religion in Israel - General Remarks)

[116] Of course no other religious law was incorporated into the state's legal system.

[117] That means the legal principles of the state of Israel were not officially grounded on the principles of Jewish law, nor was there any type of link between the new state's secular legal system and Jewish law that required recourse to Jewish law in order to fill gaps in the existing law or for any similar purpose. Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1623-1624

[118] Ibid., at 1621

But the opponents of these proposals successfully argued in those days that (1) there is no assurance that Jewish law can provide a ready solution for the problems for which Israeli law cannot afford any clear answer, and (2) the vast majority of lawyers and judges were not sufficiently knowledgeable and proficient to be able to research the sources of Jewish law.[119]

As a result of this situation the newly established state of Israel decided to adopt - by virtue of Section 11 of the Law and Administration Ordinance, 1948[120] - the entire existing legal system of mandatory Palestine, with all its diverse sources and tendencies. It was also decided to leave the operation of this legal system - at least at first - unchanged.

Section 11 of the Law and Administration Ordinance, 1948 states as follows:

> "The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."[121]

Section 11 of the Law and Administration Ordinance, 1948 included indirectly Article 46 of the Palestine Order in Council, 1922 which explicitly stated that gaps (lacunae) of the existing law shall be filled by resort to English common law and equity so far as the circumstances of Palestine and its inhabitants permit and subject to such qualification as the local circumstances make it necessary.[122]

Article 46 of the Palestine Order in Council, 1922 states as follows:

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on the 1st, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders-in-Council, Ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."[123]

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119 Id., at 1622

120 Law and Administration Ordinance, 1948, supra note 21, at 9

121 Ibid.

122 Article 46 of the Palestine Order in Council, 1922, supra note 20, at 6-7

123 Ibid.

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Thus, in 1948 - the time of the establishment of the state of Israel in Palestine - the legal system in Israel remained to be linked officially to English law.

In 1980, however, a fundamental change in the whole concept regarding the official position of religious law - solely, however, with regard to Jewish law[124] - occurred with the enactment of the Foundations of Law Act.[125]

The Foundations of Law Act, 1980 abrogated Article 46 of the Palestine Order in Council, 1922 which - as demonstrated above - required recourse to English equity and common law to fill gaps, and instead explicitly requires the Israeli courts in a situation of gap to reach a decision "...in the light of the principles of freedom, justice, equity, and peace of the Jewish heritage."[126]

Thus, with the enactment of the Foundations of Law Act, 1980, Jewish law was granted official position within Israel's secular legal system.[127]

To mention at this point is also the enactment in 1992 of the two basic laws dealing with human rights - namely the Basic Law: Human Dignity and Freedom[128] and the Basic Law: Freedom of Occupation[129] - which both of them have constitutional status and which both explicitly refer to a "Jewish and democratic state".

Although the official doctrine by the Israeli government is that there is no established religion in Israel, properly-so called,[130] in important areas of Israeli law - such as civil, criminal and public law, including all those areas which are relevant in the context of civil and political rights - a considerable number of Israeli legislation and jurisprudence of the Supreme Court is based on principles of Jewish law.

A great number of Knesset legislation and Supreme Court jurisprudence regarding civil and political rights, is to a lesser or greater degree based on the source of Jewish law. In some cases, Jewish law was the pivotal influence on the basic concept of a statute, while in other cases, Jewish law has directly influenced some of the specific provisions of a statute. These developments - which concern every area of the legal order including the legislation and jurisprudence concerning civil and political rights - may be described as an ongoing "Judaization" of the whole Israeli legal system.

In contrast to the above mentioned official Israeli doctrine that there is no established religion in Israel, properly-so called, I come rather to the conclusion that

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124 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1624
125 Foundations of Law Act, 1980, supra note 27
126 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1624
127 For more details see sub-chapter 3.2.10 (The Foundations of Law Act, 1980)
128 Basic Law: Human Dignity and Freedom, supra note 7
129 Basic Law: Freedom of Occupation, supra note 7
130 This statement was explicitly made in the Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 456

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the Jewish religion may be considered as the - although unofficially established - official religion in the state of Israel.

In the following sub-chapters, I will demonstrate that with regard to civil and political rights Jewish law has shaped Israel's legal system in a gradual and consistent manner. This state of affairs has - at it will be demonstrated - discriminatory effect for all non-Jewish citizens and inhabitants of Israel and the Occupied Territories, i.e. mainly the Palestinian Arab people living in the mentioned areas.

I want to stress at this point that I do not intend to give here an exhaustive enumeration of all those laws and legislative enactments as well as Supreme Court jurisprudence concerning civil and political rights and freedoms that are based on Jewish law as laid down in the Torah and then developed up to the present time.

I will far more show in the specific context of certain very important fields of civil and political rights and freedoms that Jewish law has - compared with the laws of the different other religious-ethnic-national communities - an outstanding and even uniquely superior position within Israel's legal system in general and with regard to civil and political rights in specific.

In the following sub-chapters 3.,4.,5. and 6., I will deal with those legislative enactments and jurisprudence which relate to the right to equality, the right to citizenship, the right to form associations and the right to participate in the political process and which reflect the discriminatory character of Israel.

3. The Concept of Israel as a "Jewish State" and its Impact on the Right to Equality and Minority Rights

3.1. General Remarks

The right to equality and non-discrimination means the prohibition of treating individuals or groups differently on the sole ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The right to equality is one of the most important condition for the existence of a democratic society and this right is embodied in a series of international declarations and conventions:

Article 1 of the Universal Declaration of Human Rights, 1948 [hereinafter: UDHR] states:

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[131]

[131] Article 1 of the UDHR, 1948, published in Basic Documents on Human Rights, 3rd Edition, Edited by Ian Brownlie, Q.C. (Clarendon Press, Oxford, 1992) 21, at 22

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Article 26 of the International Covenant of Civil and Political Rights, 1966 [hereinafter: ICCPR][132] entails a provision for the right to equality and the protection of all individuals against discrimination:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[133]

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 [hereinafter: ICERD][134] states in a similar way:

> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...political rights...civil rights...economic, social and cultural rights..."[135]

Important to mention is the fact that, according to international law, states are not only required to guarantee equal rights to all citizens as individuals, including all persons belonging to minorities, but also to enable to the members belonging to minorities to enjoy, to practice and to use their specific minority rights.

The purposes of the protection of minority rights are 1. to keep and maintain the identity, the language, the religion and the culture of persons belonging to minority groups, thus enriching the fabric of society as a whole; and 2. to promote peace and justice on a group level, without harming individual human rights.

Minority rights are not - and should not be seen as - an alternative to the equal enjoyment of all individual human rights with the citizens of the majority group.

Article 27 of the ICCPR, 1966 is the relevant international provision and entails the moral and legal obligation of states to protect the cultural rights of persons belonging to minorities, including the right to use their lands and resources:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

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132 The ICCPR was signed by Israel in 1966, but ratified only on 18 August 1991. The Covenant entered in Israel in force on 3 January 1992. See Israel's Reporting Status Concerning the ICCPR, UN High Commissioner for Human Rights, Reporting Status 2

133 Article 26 of the ICCPR, 1966, published in Basic Documents on Human Rights, supra note 131, at 134

134 The ICERD was ratified by Israel on 3 January 1971. See Israel's Reporting Status Concerning the ICERD, UN High Commissioner for Human Rights, Reporting Status 2

135 Article 5 of the ICERD, 1966, published in Basic Documents on Human Rights, supra note 131, at 151-152

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> the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[136]

States are required to take an active role in safeguarding the denial of rights of persons belonging to minorities. To enable the full enjoyment of the rights enumerated in Article 27, it is essential that states adopt legislative and administrative measures.

Affirmative actions are often required for states to close the gap that discriminatory policies used in the past created between the majority and persons belonging to minorities.

Positive measures of protection are required also against the acts of other parties within the state.

Thus, the implementation of Article 27 calls for an active and sustained intervention by states.

3.2. The Impact of the "Jewish State" Concept on the Right to Equality and Palestinian Arab Minority Rights

3.2.1. The Absence of a Constitutional and Ordinary Law Protecting the Right to Equality and Minority Rights and The Non-Recognition of the Arab Community in Israel as National (Palestinian) Minority

In Israel the right to equality has never enjoyed formal protection on the constitutional level through a superior normative source.

Although the Declaration of the Establishment of the State of Israel defined Israel as both a Jewish and a democratic state, committed to the "ingathering of exiles" and "to ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex..." the said Declaration was - at least until 1992 - never recognized as the formal constitution of the state of Israel.

In 1992, the Knesset enacted the Basic Law: Human Dignity and Freedom and the Basic Law: Freedom of Occupation, which, for the first time contain a protection of some civil rights and fundamental liberties, and which authorize the courts to exercise judicial review of Knesset laws. However, even with the passage of these two basic laws on human rights, there exists no law in Israel that protects the right to equality for *all* citizens on a constitutional level.

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[136] Article 27 of the ICCPR, 1966, supra note 133, at 134

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On the contrary, both basic laws[137] emphasize the ethnicity of the state of Israel as a Jewish state establishing that "the object of this Basic Law is to protect human dignity and freedom/freedom of occupation in order to entrench the values of the state of Israel as a Jewish and democratic state in a Basic Law." Due to this strong emphasis on the ethnic character of the state of Israel to be "a Jewish state" these basic laws are discriminatory in their nature and totally ignore the fact that not the entire population of the state of Israel is made up of Jews, but rather exists of one fifth - i.e. approximately 20% - of Palestinian Arab citizens.[138]

In assigning an ethnic character to the state and its institutions, Israel also assigns first class citizenship to the Jewish population, thus reducing the civil and political rights of its Palestinian Arab citizens of Israel. This is definitely incompatible with the idea of modern liberal democracies, and illegal under international human rights treaties to which Israel is a signatory.

Although laws exist which protect the equal rights of disadvantaged groups such as women[139] and the disabled,[140] no general law relates to the right to equality and non-discrimination for all citizens.

There is also no law that specifically protects equal rights for the Palestinian Arab minority in Israel, in spite of the fact that according to several international human rights conventions, which were recently ratified by Israel, the Arab community of Israel constitutes a national (Palestinian), as well as an ethnic (Arab), linguistic (Arabic), and religious (Muslim, Christian, Druze) minority, and as such is to be afforded minority rights protection.

The Israeli government does not recognize the Palestinian Arab citizens (approximately 20% of the total population) as national minority, but rather refers to them as "Israeli Arabs" or by their religious affiliation (Moslem, Christian, Druzes).[141]

Important to mention is the fact that up until today all Israeli governments discriminated and still discriminate against the Palestinian Arab minority in a systematic way and in all fields.

All Israeli governments attempted - and still attempt - to maintain tight control over the community in order to suppress the Palestinian Arab identity and to split the community within itself into "minorities within a minority" through educational curricula, employment and academic opportunities, and through the selective

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137 Article 1A of the Basic Law: Human Dignity and Freedom, supra note 7; Section 2 of the Basic Law: Freedom of Occupation, supra note 7. For more details see Chapter B.7.

138 Adalah, The Legal Center for Arab Minority Rights in Israel, Annual Report 1999, at 4

139 Woman's Equal Rights Law, 1951, 5 L.S.I. (1950/51) 171

140 Law of Equality for People with Disabilities, 1998

141 http://www.adalah.org/histlegal.htm (Historical & Legal Overview)

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conscription of Druze and some Bedouin men to military service, which however, do not prevent discrimination against them.[142]

With regard to the jurisprudence involving equal and minority rights of the Palestinian Arab citizens of Israel, I could observe that - although Israel's Supreme Court has delivered several forward-thinking decisions in anti-discrimination involving the rights of women,[143] homosexuals, the disabled and other groups - the Supreme Court, since 1948, has actually not ruled in favor of equal rights of the Arab citizens of the state, but rather considers the "differences" between Arabs and Jews to be relevant factors in justifying privileges granted to only Israeli Jews.

The Supreme Court systematically rules that discriminatory state policies are not invalid and discriminatory because they legitimate distinctions, and thus the Court has failed to protect the equal rights of the Arab minority in Israel.

That the right to equality of the Palestinian Arab citizens as individuals and as minority is definitely not on the agenda of Israel's law maker is also revealed by the following facts:

In November 1999, two legal advisors to the Knesset recommended the disqualification of a bill, initiated by the Arab MK Mohammed Baraka of the Jebha/Hadash party, that would guarantee equal rights for the Palestinian Arab citizens of Israel.[144]

The bill entitled "The Basic Law on the Equality of the Arab Population" primarily articulates the idea that the rights of the Palestinian Arab citizens of Israel should be "founded on the recognition of the principle of equality."

The bill's second clause provides that the aim of the bill is "to anchor in a basic law the values of the state of Israel as a democratic and multi-cultural state."[145]

The legal advisors to the Knesset argued that the bill's reference to Israel as "a democratic and multi-cultural state" denied Israel's existence as the state of the Jewish people, thus violating the Basic Law: The Knesset and the spirit of the Declaration of the Establishment of the State of Israel of 1948.[146]

In an attempt to stop the disqualification of the bill, and to demonstrate the illegality of such an action, the General Director of Adalah - The Legal Center for Arab Minority Rights in Israel, Mr. Hassan Jabareen, wrote to the Chairman of the Knesset, MK Abraham Burg, a letter in which he raised the fact that the principles embodied by Baraka's proposal are no different than those articulated in the platform

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142 Ibid.

143 H.C. 4541/94, *Alice Miller v. Minister of Defence*, 49(iv) P.D. 94; for a summary in English see 7 Justice (1995) 46

144 Adalah, Annual Report 1999, supra note 138, at 29. See also http://www.adalah.org/news.htm (Legal Advisors Tell Knesset to Disqualify "Arab Equality" Bill - 11/5/99)

145 Adalah, ibid.

146 Id.

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of his party, Jebha/Hadash, or other Arab parties. Given that these parties continue to participate in Israel's highest legislative body, logic dictates that their platforms are not illegal.

With this in mind, Mohammed Baraka's bill is no more worthy of disqualification than the parties to which he and the other Arab MKs belong.[147] As a result of this letter, in January 2000, the Knesset Chairman decided to permit the introduction of the bill for voting.

However, in the end the proposed bill "The Basic Law on the Equality of the Arab Population" was defeated by a vast majority of Knesset Members.[148]

Despite the fact that Israel has ratified the ICCPR, 1966 as well as the ICERD, 1966 the Palestinian Arab citizens of the state of Israel are discriminated against in a variety of forms and denied equal individual and minority rights because of their national and religious affiliation.

This discrimination is politically motivated and - due to the deep connections between politics and law - Israel's legal system gives clear expression to these political objectives.

The law in Israel subjects the Palestinian Arab citizens to three types of systematic discrimination, namely: 1. Direct discrimination against non-Jews within the law itself. 2. Indirect discrimination through so called "neutral" laws and criteria which apply principally to Palestinians. 3. Institutional discrimination through a legal framework that facilitates a systematic pattern of privileges.

Until today, the Supreme Court of Israel remains unwilling to rule in cases which challenge the dominant political ideology of the state, and/or which require fundamental changes in Israel's society or political culture, even when these cases are grounded on strong legal reasoning.

The discussion of the laws and the Supreme Court jurisprudence provided in the following sub-chapters 3.2.2. - 3.2.11., 3.3., sub-chapter 4. (dealing with the right to citizenship and nationality), sub-chapter 5. (dealing with the right to associations) and sub-chapter 6. (dealing with the right to political participation) will provide an insight into these patterns of direct, indirect and institutional discrimination.

The mentioned sub-chapters as well as other chapters[149] of this work will show that Israel's legal system and governmental policies definitely constitute violations of Articles 2, 4, 5 and 7 of the ICERD and of Articles 26 and 27 of the ICCPR.

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[147] http://www.adalah.org/news.htm, supra note 144

[148] Adalah, Annual Report 1999, supra note 138, at 29

[149] See Chapter D. (Israel's Permanent State of Emergency and the Question of Its Compatibility With the Concept of a Liberal Democracy Based on Human Rights and Freedoms), Chapter F. (The Right to Freedom of Expression, Speech and the Press) and Chapter G. (The Right to Property)

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3.2.2. The Flag and Emblem Law, 1949

The Flag and Emblem Law, 1949[150] provides that the national flag and emblem will be those decided upon by the Provisional Council of State on 28 October 1948. According to this decision the flag adopted at the First Zionist Congress as the flag of the Zionist movement should be the official flag of Israel.[151] The state flag is blue and white and inspired by the colors of the traditional Jewish prayer shawl, the tallit, and includes the symbolic Shield of David.[152] The state emblem is the seven-branched menorah, one of the prominent features in the Tabernacle and in the First and Second Temples.[153] The flag and emblem of the state of Israel did not incorporate any sign of a "collective identity" of the two national groups - i.e. the Jewish and the Arab people - living in the state, but rather represents exclusively Jewish religious and Zionist symbols with which the native Palestinian Arab citizens can not identify. The flag and emblem of the state of Israel only expresses the history, religion and political ideologies of the Jewish population of the state, but ignores the existence and the culture of the native Palestinian Arab citizens of the state which comprise approximately 20% of the total population within Israel.[154]

3.2.3. The National Anthem of Israel

The national anthem of Israel is the "Hatikva"[155] and was the hymn of the Zionist movement that expresses the desire of the Jewish people to be a free people in its own land. Although the national anthem is played and sung on state occasions and national events, the anthem has no legal status.[156] The national anthem of Israel is a singularly Jewish anthem that has not only no significance for non-Jewish citizens, but rather completely ignores the existence of the native Palestinian Arab citizens of the state and reminds them of *al-Nakba* (*the catastrophe*) - i.e. the day when the state of Israel was established in Palestine which caused the flight and expulsion of a

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[150] Section 1 of the Flag and Emblem Law, 1949, 3 L.S.I. (1949) 26

[151] Adalah, The Legal Center for Arab Minority Rights in Israel, Legal Violations of Arab Minority Rights in Israel, A Report on Israel's Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination, March 1998 [hereinafter: Adalah, Legal Violations of Arab Minority Rights in Israel] at 64

[152] Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 21

[153] Ibid.

[154] The Flag and Emblem Law was amended in 1997 stating in Article 2A(a) that all public buildings have to raise the flag of Israel. Thus, also all Arab public institutions - Schools, local councils - must raise the flag, even if the flag itself ignores the Arab culture. See Flag and Emblem Law (Amendment No. 3) 1997, S.H. No. 1631 (24 July 1997) 194

[155] This is the Hebrew word for "hope".

[156] Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 21

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large part of the then majority of native Arab inhabitants from Palestine[157] and the deprivation of the majority of their right to self-determination in their homeland.

3.2.4. The State Stamp Law, 1949

The state stamp includes the same symbols as the State's emblem, namely the seven-branched menorah. The State Stamp Law, 1949[158] provides that the state stamp shall be placed on all official documents. The stamp of the state of Israel did not incorporate any sign of a "collective identity" of the two national groups - i.e. the Jewish and the native Palestinian Arab people - living in the state, but rather represents exclusively Jewish religious and Zionist symbols, with which the second national group can definitely not identify. The state stamp ignores the existence and the culture of the native Palestinian Arab minority of the state.

3.2.5. The Days of Rest Ordinance, 1948

Article 1 of the Days of Rest Ordinance, 1948[159] - which is still in force - provides that the Sabbath, all Jewish holidays and the so called Israeli "Independence Day" (i.e. the 14 May 1948) which is the day of the establishment of the state of Israel in Palestine shall be the official holidays in the state of Israel.

According to the law non-Jews have the right to observe their own "Sabbath" and their festivals as days of rest. It must be stressed that the official holidays in Israel are designated solely for the Jewish population, while the religious holidays of the Arab population are totally ignored as official holidays.

Moreover, not only that there exists no official state holiday for the native Palestinian Arab citizens of Israel, the 14 May 1948 marks for almost every Palestinian Arab the day of *al-Nakba* (*the catastrophe*) and certainly not a day of celebration.

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157 Shortly before the implementation of the UN General Assembly Resolution 181 (II) of 29 November 1947, there lived in British mandatory Palestine between 1.2 and 1.3. million Palestinian Arabs and 608.000 Jews. For more details see Chapter A.6. (Summary and Conclusions)

158 Stamps Ordinance, 1948, 1 L.S.I. (1948) 13

159 Days of Rest Ordinance, 1948, 1 L.S.I. (1948) 18. Section 1 of this Ordinance is part of the Law and Administration Ordinance, 1948, supra note 21, and shall be inserted in it as Section 18A.

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3.2.6. The Martyrs and Heroes Remembrance Day Law, 1959

The Martyrs and Heroes Remembrance Day Law, 1959[160] states that the 27 of Nissan[161] is devoted to the "commemoration of the disaster which the Nazis and their collaborators brought upon the Jewish people and of the acts of heroism and revolt performed in those days". There is no law that is devoted to the commemoration of the day of *al-Nakba* - the Palestinian *catastrophe*.

3.2.7. The Yad Yitzhak Ben-Zvi Law, 1969 and The Mikve Yisrael Agricultural School Law, 1976

Both laws give statutory recognition to cultural and educational institutions, and define their aims as developing and fulfilling Zionist goals.

Section 2 of the Yad Yitzhak Ben-Zvi Law, 1969[162] establishes that the objects of Yad Yitzhak Ben are

> "...to deepen the people's consciousness of the continuity of Jewish settlement in Eretz Yisrael and for that purpose to foster research on the history of that settlement."

Even if this law refers to the general and neutral term "people" there is clearly meant only the Jewish public.

Section 2 of the Mikve Yisrael Agricultural School Law, 1976[163] states that the objects the Mikve Yisrael Agricultural School are

> "...to educate youth in Israel for a life of agriculture and settlement and to impart to it a general education, as well as Jewish culture and a Hebrew education in accordance with Israel's heritage, as customary in educational institutions in the State."

Important to mention is the fact that there does not exist any law which provides recognition to existing privately-run Palestinian Arab cultural or educational institutions. In this context the case *Abu-Gosh v. Minister of Education and Culture*[164] - which will be discussed below - must be mentioned.

Due to the fact that there does not exist any law which provides recognition to existing privately-run Palestinian Arab cultural or educational institutions, the state of Israel totally ignores the fact that within the entire population of the state of Israel there exist approximately 20% of indigenous Palestinian Arab citizens. Thus the state of Israel discriminates against this one fifth of the total population.

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160 Martyrs and Heroes Remembrance Day Law, 1959, 13 L.S.I. (1958-1959) 120
161 Nissan is the month in the Jewish lunar calendar that usually corresponds with April.
162 Yad Yitzhak Ben-Zvi Law, 1969, 23 L.S.I. (1968/69) 206
163 Mikve Yisrael Agricultural School Law, 1976, 30 L.S.I. (1976/76) 219
164 H.C. 175/71, *Abu-Gosh v. Minister of Education and Culture*, for a summary in English see 2 I.Y.H.R. (1972) 336

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3.2.8. The State Education Law, 1953

The State Education Law, 1953[165] established in Israel two separate independent educational systems, namely state secular and state religious schools, in order to satisfy the needs of the Jewish community. This law also codified the objectives of the educational system, which serve only to advance Jewish culture and Zionist ideology.

Although Palestinian Arab and Jewish students study in separate schools through the high school level, there does not exist an autonomous Palestinian Arab- run educational system, neither secular nor religious, in order to meet the needs of the Arab community as a distinct group with a common language, history, culture and national identity.[166]

Although Section 1 of the State Education Law, 1953[167] establishes state religious schools, recognizing the distinct and special needs of the Jewish religious community, no such institutions were established for the Palestinian Arab religious communities.[168]

Section 2 of the State Education Law, 1953 establishes the aims and goals of the state education system as follows:

> "...the object of state education is to base elementary education in the state on the values of Jewish culture and the achievements of science, on love of the homeland and loyalty to the state and the Jewish people, on practice in agricultural work and handicraft, on chalutzik (pioneer) training, and on striving for a society built on freedom, equality, tolerance, mutual assistance and love of mankind."[169]

Important to mention is the fact that the passages of "pioneer training" and "striving for agricultural work and handicraft" specifically point to the part of the values which were emphasized by the Zionist movement in the era before the establishment of the state of Israel in Palestine in 1948. Section 1 totally ignores the fact that not the entire population of the state of Israel is made up of Jews, but rather exists of approximately 20% of Palestinian Arab citizens.

It should also be mentioned that the State Education Law, 1953 does not entail any section that aims to further the democratic principles, which would address all citizens of the state of Israel.

Moreover, in 1996, when the Israeli government was led by the Likud party under the then Prime Minister Benjamin Netanyahu, special "policy guidelines" regarding education were formulated and implemented in order to entrench the Jewish national

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165 State Education Law, 1953, 7 L.S.I. (1952-1953) 113
166 Adalah, Annual Report 1999, supra note 138, at 10-11
167 Section 1 of the State Education Law, 1953, supra note 165
168 Adalah, Legal Violations of Arab Minority Rights in Israel, supra note 151, at 73
169 Section 2 of the State Education Law, 1953, supra note 165

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(Zionist) and Jewish religious values within the educational system. The "Education Section" of these guidelines states as follows:

> "Education will be grounded in the eternal values of the Jewish tradition, Zionist and Jewish consciousness, and universal values. The Book of the Books, the Bible, the Hebrew language, and the history of the Jewish people are the foundation stones of our national identity, and will take their rightful place in the education of the young generation."[170]

Looking through this passage, one may easily discern that the interests of the Arab community are completely excluded from the educational objectives. Due to new elections held in 1998, the Israeli government is currently led by the Labor party, which did not fully implement the above mentioned guidelines.

An important provision in the State Education Law, 1953 is Section 4 which states that "in non-Jewish educational institutions, the curriculum shall be adapted to the special conditions thereof."[171] Yet, despite the existence of this provision, no Arab body is involved in the decision-making process regarding the curriculum for Arab schools. In fact Palestinian Arab students devote more time reading the Torah than studying Arab religious studies, and they are examined on Judaism but not Islam, Christianity or Druze in the matriculation test. Arab students are assigned to read Zionist history and poetry, but not Palestinian history, literature and Arab classics, which are studied throughout the Arab world.[172]

Moreover, Palestinian Arab schools in Israel are also severely underfunded and special programs to assist academically weak students or to enrich the studies of gifted students are disproportionately awarded to Jewish schools. As a consequence of the government's separate but unequal strategies 84% of students who drop out from school are Palestinian Arabs, and only 30% of Arab students pass their matriculation examinations as compared to 45% of Jewish students.[173]

In this context the recent Supreme Court decision in the matter of *Follow-Up Committee for Arab Education in Israel & Others v. Ministry of Education & Others*[174] - which will be discussed in more detail in sub-chapter 3.3.4. - shall be mentioned.

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170 See Adalah, Legal Violations of Arab Minority Rights in Israel, supra note 151, at 74

171 Section 4 of the State Education Law, 1953, supra note 165

172 Adalah, Legal Violations of Arab Minority Rights in Israel, supra note 151, at 74-75

173 Adalah, Annual Report 1999, supra note 138, at 11

174 H.C. 2814/97, *Follow-Up Committee for Arab Education in Israel & Others v. Ministry of Education & Others*, translated into English in http://www.adalah.org/supreme.html

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3.2.9. The Broadcasting Authority Law, 1965

Section 3(1)(c)(g) of the Broadcasting Authority Law, 1965[175] states that the State Broadcasting Service shall strengthen the ties with, and deepen the knowledge of the Jewish heritage and its values, and further the aims of state education as formulated in the above mentioned State Education Law.

To mention, however, is the fact that Section 3 (3) of the law also states that the Broadcasting Authority also has to operate broadcasts in the Arabic language for the requirements of the Arabic-speaking population and broadcasts for the promotion of understanding and peace with the neighboring states in accordance with the basic tendencies of the state.[176]

3.2.10. The Chief Rabbinate of Israel Law, 1980 and The Kashrut (Prohibition of Deceit) Law, 1983

These two laws are further expressions of the idea of a Jewish state, and not of a state of all its citizens.

The Chief Rabbinate of Israel Law, 1980[177] defines the composition and functions of the Chief Rabbinate Council and provides for its election and the election of the two Chief Rabbis.

The Kashrut (Prohibition of Deceit) Law, 1983[178] grants the Chief Rabbinate the sole power to certify kashrut, i.e. that restaurants and food products are kosher, or to authorize local rabbis who may give such certification.

No law in Israel grants a non-Jewish religious body statutory status similar to that of the Chief Rabbinate. Only Orthodox rabbis are recognized by the Chief Rabbinate.

Adherents of non-Orthodox streams of Judaism, i.e. Reform and Conservative Jews are free to practice Judaism according to their own conceptions, but their institutions do not enjoy official recognition and may not officiate at marriages and divorces between Jews, regardless if they are Orthodox, Conservative, Reform, or secular.

Due to the fact that no law in Israel grants a non-Jewish religious body statutory status similar to that of the Chief Rabbinate, the non-Jewish population, i.e. mainly the Palestinian Arab people, is definitely discriminated.

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175 Broadcasting Authority Law, 1965, 19 L.S.I. (1964-1965) 103
176 Ibid.
177 Chief Rabbinate of Israel Law, 1980, 34 L.S.I. (1979-1980) 97
178 Kashrut (Prohibition of Deceit) Law, 1983, 37 L.S.I. (1982-1983) 147

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3.2.11. The Foundations of Law Act, 1980

As already elaborated at a previous point[179] of this work, at the time of the establishment of the state of Israel in Palestine, Jewish law was - with the sole exception of the law of personal status - not officially incorporated into the secular legal system of the state of Israel.

The newly established state of Israel rather decided to adopt - by virtue of Section 11 of the Law and Administration Ordinance, 1948 - the entire existing legal system of mandatory Palestine, with all its diverse sources and tendencies. It was also decided to leave the operation of this legal system - at least at first - unchanged.[180]

Although, most of the previous legal order was replaced by Israeli legislation, some important pieces of Ottoman[181] and British legislation[182] remained in force, having the result that three different systems of law - namely Ottoman, British and Israeli law - from three different periods of time were in force.[183]

Moreover, at the time of the establishment of the state of Israel in Palestine in 1948 up until 1980, the legal system in Israel remained to be linked officially to English law.[184]

Nevertheless, one may observe that since the day of the establishment of the state of Israel an increasing number of Knesset legislation and Supreme Court jurisprudence is directly or indirectly based on the source of Jewish law or reflects the concept of Israel to be a "Jewish state".

This state of affairs - which concerns every aspect of the legal order including the legislation and jurisprudence concerning civil and political rights - reveals that the nature of the Israeli legal system more and more changed and that an ongoing "Judaization" of the whole legal system including the Supreme Court jurisprudence took and takes place.

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179 See supra sub-chapter 2.7. (The Official and Actual Position of Jewish Law in Israel's Legal System)

180 Ibid.

181 See for example the Ottoman Mejelle (upon which the law of sales, suretyship, and pledges which derived from the was based); the Ottoman Code of Civil Procedure, 1897 (upon which the law of damages for breach of contract was partly based). For more details see Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1612. The Ottoman Land Law of 1858. Ibid., at 1709

182 See for example the Palestine (Defence) Order in Council, 1937, P.G. No. 675 (24 March 1937) Suppl. II, at 267; the Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945) Suppl. II, at 1055; the Press Ordinance, 1933, reprinted in M. Doukhan, Laws of Palestine, 1932, 243-266

183 Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 12

184 See supra sub-chapter 2.7. (The Official and Actual Position of Jewish Law in Israel's Legal System)

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At the very foundations of these developments lay the debates in the Knesset on the various draft proposals of laws in the early 1950's.

These Knesset debates were concerned not only with the substance of the proposed laws, but also, to a considerable extent with two questions, namely: 1) what kind of legislative policy should the Knesset adopt with regard to Jewish law as the source of legislative enactments; and 2.) how will the specific source of a provision affect the statutory interpretation by the courts.[185]

These fundamental questions were "resolved" by specifying the legislative policy in so called "basic guidelines" which were entailed in the 1952 Draft Succession Bill. The said guidelines stated 1.) that the goal of the Israeli legislator was to achieve legal self-sufficiency and to end dependence on any foreign legal system; 2.) that Jewish law is regarded as the primary (although not the sole or binding) source for legislation by the Knesset; and 3.) that foreign law should be the secondary source.[186]

The first Likud-led government of Prime Minister Begin, which was formed in 1977, sought to entrench the Jewish character of the state of Israel and its legal system, and enacted in 1980 the Foundations of Law.[187]

Section 2 of the Foundations of Law Act, 1980 abrogated Article 46 of the Palestine Order in Council, 1922 - which, as demonstrated in sub-chapter 2.7. required recourse to English equity and common law to fill gaps - and instead explicitly requires the Israeli courts in such situations of gaps to reach a decision "...in the light of the principles of freedom, justice, equity, and peace of the Jewish heritage."[188]

Section 1 of the Foundations of Law Act, 1980 establishes a new normative order and details the sources of law to be used by the courts in situations of gaps, and replaces the previous required reference to foreign law with that of "Israel's heritage".[189] Section 1 states as follows:

> "Where the court, faced with a legal question requiring decision, finds no answer to it in statute law, case law or analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage."[190]

Thus, with the enactment of the Foundations of Law Act, 1980 a fundamental change in the whole concept regarding the official position of religious law - this

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185 Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1625

186 Ibid., at 1626

187 Foundations of Law Act, 1980, supra note 27

188 Section 2 of the Foundation of Law Act, 1980, ibid.

189 In Hebrew, the term "Israel's heritage" means only the "Jewish heritage". This difference is important due to the fact that the term "Jewish heritage" by definition excludes all non-Jewish citizens of the state.

190 Section 1 of the Foundations of Law Act, 1980, supra note 27

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time solely, however, with regard to Jewish law - occurred, since Jewish law was granted official position within the state's secular legal system.

Commenting on Section 1 of the Foundations of Law Act, 1980, the current Supreme Court President Barak stressed that the said provision does not explicitly rank the interpretation methods, but that "an interpretation according to the order set in this provision would seem appropriate."

He furthermore stated that first of all the court has to examine if there exists a statutory norm; and only secondly if there is a case law.

If the judge found that none of the two possible sources provide for a solution he may turn to analogy, and if this method also fails "the judge shall decide in the light of the principles of freedom, justice, equity and peace of Israel's heritage"[191]

The last part of Section 1 of the Foundations of Law Act, 1980 referring to "...the principles of freedom, justice, equity and peace of Israel's heritage" is very vague and constitutes a source of major controversy within Israel's legal community:

Some members of this community interpret the term "Israeli heritage" as synonymous with Jewish law - i.e. the Halachah.

Other members of Israel's legal reject this interpretation and argue that the term refers to the Halachah in addition to the nationalist-secular heritage of the Jewish people inclusion the recent past and the present.[192]

It should be mentioned that the Foundations of Law Act, 1980 and the interpretations offered by Israeli legal scholars and judges regarding the term "Israel's heritage" exclude all non-Jews.

This law grants superior status to one national group - i.e. the Jewish population - and thus is definitely discriminatory for the second national group living in Israel, namely the native Palestinian Arab people.

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191 Aharon Barak, Judicial Discretion (Yale University Press 1989) (originally published in Hebrew as: Shikul Daat Shiputy, 1987) at 89

192 See the opinions of Supreme Court Justice Menachem Elon and former Supreme Court President Landau in the case H.C. 13/80, *Handels v. Kupat Am Bank*, 35(ii) P.D. 785. See also Aharon Barak, Judicial Creativity: Interpretation, the Filling of Gaps (Lacunae) and the Development of Law, 39 HaPraklit (1990) 267; Aharon Barak, The Lacunae in Law and the Foundation of Law Act, 20 Mishpatim (1990) 233, at 282; Gad Tadsiki, The Abolishment of Article 46 of the Palestine Order in Council, 8 Mishpatim 180

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3.2.12. Other Legislation

The Basic Law: Human Dignity and Freedom[193] and the Basic Law: Freedom of Occupation (1994)[194] as well as the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952[195] and the Basic Law: Israels Land (1960)[196] also belong to the group which subjects the Palestinian Arab people to systematically applied direct, indirect and/or institutionalized discrimination.

The Basic Law: Human Dignity and Freedom (1992) and the Basic Law: Freedom of Occupation (1994) were already discussed in Chapter B.7. of this work. The World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952 and the Basic Law: Israels Land (1960) will be discussed in detail in Chapter G.2.9. of this work.

3.3. The Impact of the "Jewish State" Concept on Jurisprudence relating to the Right to Equality and Minority Rights for Palestinian Arab Citizens in Israel

Although in reality an enormous number of administrative acts and activities concerning all areas of life is exercised by the Israeli government in discriminatory way, only a few cases relating to discriminations in state policies and in law against Palestinian Arab citizens were and are actually brought before the Supreme Court.

The reasons laying behind this state of affairs of non-filing petitions against discriminations are numerous, but - as I see it - one of the most determining factor is surely the lack of confidence by Palestinian Arabs in the Israeli judiciary, since for decades it is a proved fact that in almost all cases that were ever brought before the Supreme Court, Jewish interests are favored over Arab interests and the differences between Arabs and Jews are considered to be relevant factors in justifying privileges granted to only Israeli Jews.

In the following sub-chapters 3.3.1. - 3.3.4., I will give four significant examples of Israel's judicially approved policy of discrimination against the Arab minority relating to the areas of education, culture, religion and state funding.

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193 Basic Law: Human Dignity and Freedom (1992), supra note 7
194 Basic Law: Freedom of Occupation, supra note 7
195 World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952/53) 3
196 Basic Law: Israels Land, 14 L.S.I. (1959/60) 48

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3.3.1. Abu-Gosh v. Minister of Education and Culture (1971)

A prominent example to mention in the context of discriminatory jurisprudence is the Supreme Court decision in the matter of *Abu-Gosh v. Minister of Education and Culture.*[197]

In this case a Palestinian Arab cultural group tried to organize an Arab music festival and requested funds from the Ministry of Education which had previously declared its support for "educational and art institutions." The Ministry of Education rejected the application of the group on the ground that the festival included Christian music. The said Palestinian Arab cultural group filed a petition to the Supreme Court challenging the decision of the Ministry.

The Supreme Court dismissed however the petition with the argument that the state was not required to support institutions which promote Christian Church music.[198]

3.3.2. Watad v. Minister of Finance (1983)

Another example of Supreme Court jurisprudence justifying discriminatory state policies is the decision in the matter of *Watad v. Minister of Finance.*[199]

In this case Arab Knesset Members challenged Israel's governmental policy of paying benefits, reserved by law for those who served in the army, to yeshiva students who had not served in the army. The petitioners argued that this policy violated the principle of equality and constituted discrimination because it exempted most of the Arab students who do not serve in the army[199A] but benefited non-enlisted yeshiva students.

The Supreme Court dismissed the petition and ruled that special treatment for yeshiva students was justified because of the traditional place of the study of Torah in the Israeli society.

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[197] *Abu-Gosh v. Minister of Education and Culture*, supra note 164

[198] The majority opinion was handed down by Justice Kister (joined by Justice Sussman). Justice Haim Cohn issued a dissenting opinion.

[199] H.C. 200/83, *Watad v. Minister of Finance*, 38(iii) P.D. 113

[199A] Important to mention is the fact that - while *some* Arab citizens of Israel, i.e. Druze and Bedouin men, do serve in the Israeli army - the majority of the Arab population does not serve because the Minister of Defence has so decided.

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3.3.3. Adalah & Others v. Minister of Religious Affairs and Minister of Finance (1998)

A third example for this phenomenon of discriminatory jurisprudence is the Supreme Court decision in the matter of *Adalah & Others v. Minister of Religious Affairs and Minister of Finance*.[200]

In this case a petition was filed against the Religious Ministry and the Finance Ministry, asking the Court to declare unconstitutional four provisions of the Knesset Budget Law (1998) which allotted to the Arab religious communities (Christian, Moslem, Druze) only 1,86% of the total budget (US $430 million) of the Religious Ministry.

The petitioners argued that Israel's Muslim, Christian and Druze religious communities should receive funding proportional to their percentage of the population which constitutes almost 20% of Israel's total population.

The Supreme Court's 26-page decision, written by Justice Mishael Cheshin confirmed that the 1998 Budget of the Ministry of Religious Affairs did indeed constitute a *prima facie* discrimination against the Arab religious communities of Israel.

However, in spite of this confirmation in a written decision, the petition was finally dismissed on the grounds that it was to general, since it did not provide sufficient information for an examination of the religious needs of each particular community, and that it did not request a concrete remedy.

Additionally, the Court ruled that it lacks the authority to declare four articles of the Budget Law (1998) unconstitutional, as this would require the Court to assume legislative power.[201]

It should be said that this is one of a number of disappointing judgments where the Supreme Court admits the violation of a fundamental human right, but finally declines to award the requested remedy or to set a strong precedent regarding the violated right.

3.3.4. Follow-Up Committee for Arab Education in Israel & Others v. Ministry of Education & Others (1997)

Another judgment where the Supreme Court admits the discriminatory policies of the Israeli government but finally declines to award the requested remedy is the decision in the matter of *Follow-Up Committee for Arab Education in Israel &*

[200] H.C. 240/98, *Adalah & Others v. Minister of Religious Affairs and Minister of Finance*, summary translation by Julia Kernochan and Jamil Dakwar, Advocate (Adalah The Legal Center for Arab Minority Rights in Israel)

[201] Ibid.

Others v. Ministry of Education & Others.[202]

In this case - in May 1997 - the Follow-Up Committee for Arab Education in Israel and the Coalition of Parents' Groups in the Negev filed a petition to the Supreme Court against the Ministry of Education, seeking to compel the Ministry to provide "Shahar" academic enrichment programs equally to Palestinian Arab and Jewish students.

The highly successful Shahar programs, which aim to equalize academically weak students from low-income backgrounds, are not offered in any Arab communities.

The petitioners argued that the Ministry's continued discriminatory implementation of the "Shahar" programs violated the principle of equality of educational opportunities.

Additionally the petitioners claimed that the Ministry of Education intentionally discriminated against Arab students.[203]

Following the submission of the petition to the Supreme Court, the Ministry of Education admitted that, for more than a decade, it had not dealt at all with the Arab and Druze sector, and offered a variety of gradual remedies beginning in 1998.

The petitioners rejected these proposed remedies on the grounds that *any delay* in extending the programs to all students would effectively sanction the historical and intentional discrimination admitted already by the Ministry.

In May 1998, the Court stated that it would issue a written decision on the question of whether a gradual or immediate remedy is requested in cases of historical and intentional discrimination.

The Supreme Court did not offer any timetable for its decision.

After having permitted that the examination of the petition be postponed several times the Supreme Court "successfully" delayed the decision over more than 3 years,[204] only to confirm in its final judgment, handed down in July 2000, the findings of May 1998, namely that "...education in the Arab sector had been oppressed for many years and that steps had to be taken to improve the situation."[205]

Instead of granting immediate remedies on the ground through quick allocation of educational resources to end discrimination, the Supreme Court rather fully accepted the recommendations of a public commission which did not consist of independent experts, but was appointed by the Minister of Education and Sport and worked in a slow and unhelpful manner.

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202 *Follow-Up Committee for Arab Education v. Ministry of Education*, supra note 174; for a summary of the petition see Adalah, Annual Report 1999, supra note 138, at 15

203 Ibid.

204 In February 1999, the Court requested further information from the Ministry of Education and again failed to issue a decision. In January 2000 the petitioners submitted new evidence to the Court, demonstrating the respondents' failure to implement their previous promise to reach total equality in allocations within five years.

205 *Follow-Up Committee for Arab Education*, supra note 174, para. 7

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4. The Concept of Israel as a "Jewish State" and its Impact on the Right to Citizenship and Nationality

4.1. General Remarks

Nationality is defined as the principal link between the individual and the state and for that matter between the individual and the international law, statelessness is an anomaly.[206]

Having no nationality means that one is stripped of even the right to have rights, there being no foundation from which other rights might reliably flow.[207]

The issue of granting, denying and revoking nationality is generally spoken a matter of domestic concern - provided a state's action does not conflict with international law.

However, since the Second World War the development of international human rights law has considerably restricted the freedom of states concerning matters of nationality.

The right to nationality is a fundamental human right that is protected by all modern human rights instruments.

Article 15(1) of the Universal Declaration of Human Rights, 1948 [hereinafter: UDHR] states as follows:

> "Everyone has the right to nationality."[208]

Article 15(2) of the UDHR, 1948 also states:

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206 Lex Takkenberg, The Status of Palestinian Refugees in International Law (Clarendon Press - Oxford, 1998) at 175, quoting Weis, P., The United Nations Convention on the Reduction of Statelessness, 1961, 11 ICLQ 1073 (1962). Weis distinguishes between original and subsequent statelessness:" A person may either be stateless by birth, as a result of the fact that he does not acquire a nationality at birth according to the law of any State, or he may become stateless subsequent to birth by losing his nationality without acquiring another." Weis, P., Nationality and Statelessness in International Law, 1979, at 162, quoted in Takkenberg, ibid., at 175-176. Another distinction that is often made is that between *de jure* statelessness, which refers to the situation of a person that did not acquire a nationality at birth or that lost the nationality without acquiring another one, and *de facto* statelessness, which refers to persons who without having been deprived of their nationality no longer enjoy the protection and assistance of their national authority (i.e. the lack of an effective nationality). This distinction was introduced by a study made in 1948 by the United Nations Economic and Social Council (ECOSOC) on the phenomenon of statelessness and distinguished between stateless persons who are also refugees, and the ones who are not - focusing primarily on the first category. UN document E/1112 (1 February 1949); E/1112/Add. 1 (19 May 1949), quoted in Takkenberg, id., at 176-178, note 2

207 Takkenberg, id., at 175, quoting Batchelor, C.A., Stateless Persons: Some Gaps in International Protection, 7 IJRL 232 (1995)

208 Article 15(1) of the UDHR, 1948, supra note 131, at 24

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> "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[209]

From this provision the conclusion was drawn that while there may not necessarily be a positive duty on states to confer nationality there is, however, arguably, a negative duty not to create statelessness, and accordingly any denationalization must be accompanied by strict rules of procedure and should not result in statelessness.[210]

Although, the UDHR is considered to be customary international law and thus contains an effective provision for the protection of the fundamental right to nationality, it does not indicate upon whom the obligation falls to grant nationality.[211]

A number of human rights instruments attempt to close this gap: The Convention of the Rights of the Child of 1989 for example states that children have the right to acquire nationality and that they must acquire that of the state of birth if they would otherwise be stateless.[212]

The right to nationality is also protected by two other international human rights documents:

Article 24(3) of the International Covenant of Civil and Political Rights, 1966, [hereinafter: ICCPR] states:

> "Every child has the right to acquire a nationality."[213]

Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 [hereinafter: ICERD] states as follows:

> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...the right to nationality."[214]

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209 Article 15(2) of the UDHR, 1948, ibid.

210 Takkenberg, supra note 206, at 177, quoting Chan, J.M.M., Nationality as a Human Right, 12 HRLJ 11 (1991)

211 Takkenberg, ibid., at 176

212 Articles 2 and 7 of the Convention on the Rights of the Child, 1989, published in Basic Documents on Human Rights, supra note 131, at 182

213 Article 24(3) of the ICCPR, 1966, supra note 133, at 133

214 Article 5(d)(iii) of the ICERD, 1966, supra note 135, at 151-152

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4.2. The Impact of the "Jewish State" Concept on Legislation relating to the Right to Citizenship and Nationality

4.2.1. The Law of Return, 1950 and The Nationality Law, 1952

In Israel citizenship can be acquired by: (1) return; (2) residence; (3) birth and (4) naturalization. Israeli citizenship laws are based on the principle of *Us sanguinis* (blood relations) rather than on the principle of *Jus soli* (territory). That means the primary factor in deciding the questions of acquisition of Israeli citizenship is the ethnic and religious identity of a person, while the factors of place, territory or residency are much less important.

In Chapter A of this work I have already elaborated that the establishment of a Jewish national home - i.e. a Jewish Zionist state - in Palestine could only be achieved with a Jewish majority and Jewish owned land for settlements, therefore the efforts of the Zionist movement during the Ottoman and British mandatory period in Palestine were directed at ensuring a flow of Jewish immigration and acquisition of Arab owned land.

After the state of Israel was established in Palestine, the official policy was to prevent the Palestinian Arab refugees from returning to their homes from which they fled or were expelled.

At the very foundations of the Jewish state lays the political idea of Zionism expressing itself in a different policy with regard to the native Palestinian Arab and Jewish inhabitants.

This different policy reflecting the ideology of political Zionism is expressed in the Declaration of the Establishment of the State of Israel of 1948 which clearly speaks of "... a Jewish state in Eretz Israel, that would open its gates to every Jew and confer upon the Jewish people the status of a fully-privileged member of the comity of nations."[215]

In paragraph 708 of its Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, which was submitted in June 1998 to the UN Human Rights Committee, Israel admits that "... there is clear difference in the treatment of Jews and non-Jews regarding the issue of citizenship."[216]

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215 Declaration of the Establishment of the State of Israel, 1948, supra note 1, at 4

216 Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 708

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The Law of Return, 1950 and the Nationality Law, 1952 give statutory recognition to the political aim of Zionism to connect the Jewish people all over the world with the state of Israel.[217]

4.2.1.1. Acquiring Citizenship by Return

Section 1 of the Law of Return, 1950[218] states that

> "Every Jew has the right to come to this country [Israel] as an oleh."[219]

The Law of Return, 1950 is closely tied to Jewish law and reflects Jewish history and Jewish national-religious philosophy.[220] In the Supreme Court case of *Ben Shalom v. Central Elections Committee for the Twelfth Knesset*[221] the Law of Return, 1950, its halakhic, historical and jurisprudential basis as well as the Knesset debates and the Jewish legal sources which they cited, were extensively discussed by the then Deputy President Menachem Elon. In this case - which will be discussed in sub-chapter 6.3. dealing with the impact of the "Jewish state" concept on the jurisprudence concerning the right to political participation - Justice Elon stressed "...the importance of the Law of Return, 1950 for Israel".

The right given to Jews in the Law of Return, 1950 to immigrate to Israel is one of the rare cases in Israeli legislation in which an *overt distinction* is made between Jews and non-Jews.

While Jews have an explicit right to come into the country and settle there, may non-Jews only enter the country and settle there if they are granted permission under the Entrance to Israel Law, 1952.[222]

Section 2 of the Nationality Law, 1952 states that

> "Every *oleh* under the Law of Return, 1950 shall become an Israeli national."[223]

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217 When these laws were presented to the Knesset, the then Prime Minister David Ben Gurion, declared that they determine the special character and purpose of the state of Israel which carries the Zionist message of the so called "redemption of the land of Israel". See 6 D.K. 2036-37

218 Law of Return, 1950, 4 L.S.I. (1949-1950) 114

219 Section 1 of the Law of Return, 1950, ibid. "*Aliya* means immigration of Jews, and *oleh* (plural: *olim*) means a Jew immigrating into Israel." The Hebrew expression for *"to immigrate"* is "*la'alot",* lit. "to go up".

220 The Law of Return, 1950 entails the idea - expressed by Nahshon Gaon in the ninth century in Babylonia, the so called "geonic period" - that the land of Israel was and will always remain the property of every single Jew, wherever he may be. Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1647

221 *Ben Shalom v. Central Elections Committee for the Twelfth Knesset,* supra note 14

222 Entry into Israel Law, 1952, 6 L.S.I. (1951/52) 159

223 Section 2(a) of the Nationality Law, 1952, 6 L.S.I. (1951-1952) 50

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Although the Nationality Law, 1952 is framed in a neutral language, it applies different rules to the process of acquiring of citizenship by Jews and Arabs/non-Jews.[224]

The connection between the Law of Return, 1950 and the Nationality Law, 1952 has strong implications on the rights of the Palestinian Arab residents of the state of Israel, due to the fact that all Jews who immigrated to Israel at any time, or were born in Israel, are considered to have the rights under the Law of Return and thus are entitled to citizenship.

The native Palestinian Arab residents on the other hand cannot acquire citizenship by way of return; they must do so by residence, birth or naturalization according to Sections 3-5 of the Nationality Law, 1952. But the cumulative conditions for acquiring citizenship according to the latter sections were and are not always easy to meet for the native Palestinian Arab people.

Israel's argument concerning the Law of Return is that the said law deals with the immigration policy of the state of Israel, and therefore has nothing to do with rights of the Arabs in Israel. Moreover, some legal scholars argue that the Law of Return, 1950 does not discriminate against any group, it rather privileges members of one group, i.e. the Jewish people.[225] The Jewish people, however, and this is important to mention, constitutes the majority group within the state.

It was correctly counterargued that the mentioned argumentation of legal scholars "that a law is not discriminatory because it privileges any group including the majority group" is invalid, since it would make the meaning of the equality principle insignificant, and would consider "the tyranny of the majority" as non-discriminatory towards the minority group.[226]

In any case has the Law of Return, 1950 discriminatory effect for the Palestinian Arab people since it allows any Jew to immigrate to Israel, while - at the same time - it deprives all native Palestinian Arab refugees residing outside the borders of the state of Israel of their fundamental right to return to their homes and villages from

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224 Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 36

225 Amnon Rubinstein cites the Convention on the Elimination of All Forms of Racial Discrimination which specifically provides that nothing in the convention should be interpreted to invalidate laws of states relating to nationality or citizenship, provided those laws do not discriminate against a specific nation. He argues that since the Law of Return does not discriminate against any racial group, but merely grants members of one group, i.e. the Jewish people, a privilege, the Law of Return is not discriminatory. In order to justify his argumentation Rubinstein mentions another country with a law of return, namely the Federal Republic of Germany. Article 116(1) of the Basic Law of 1949 grants the basic rights to "Germans" who include persons of "German descent" who entered the territory of the German Reich as it was in 1937 as refugees or displaced persons. See Amnon Rubinstein, The Constitutional Law of the State of Israel (Schocken, 1980) at 180-181. See also C. Klein, The Right of Return in Israeli Law, 13 T.A.Univ.Stud.i.L. (1997) at 53-55

226 Adalah, Legal Violations of Arab Minority Rights in Israel, supra note 151, at 35, note 35

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which they were expelled or took flight in the course of the 1948 war that broke out because of the establishment of the state of Israel.

4.2.1.2. Acquiring Citizenship by Residence

Section 3 of the Nationality Law, 1952 defines a cumulative set of conditions that must be fulfilled in order to receive nationality (i.e. citizenship) by residence:

> "(a) A person who, immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israel national under section 2, shall become an Israel national with effect from the day of the establishment of the State if -
>
> (1) he was registered on the 1st March 1952 as an inhabitant under the Registration of Inhabitants Ordinance, 1949; and
>
> (2) he is an inhabitant of Israel on the day of the coming into force of this Law; and
>
> (3) he was in Israel, or in an area which became Israel territory after the establishment of the State, from the day of the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.
>
> (b) A person born after the establishment of the State who is an inhabitant of Israel on the day of coming into force of this Law, and whose father or mother becomes an Israel national under subsection (a), shall become an Israel national with effect from the day of his birth."[227]

Section 3 of the Nationality Law, 1952 applies to all persons who did not acquire citizenship under Section 2, i.e. to non-Jews, mainly Palestinian Arabs, which are not entitled to citizenship by way of return.

The rationale behind the conditions in Section 3 was to prevent acquiring of citizenship by Arabs who had fled from their homes or were expelled during the 1948 war and had then returned "illegally".

In 1980, the Nationality Law, 1952 was amended. This amendment[228] leaves the original version of Section 3 intact but adds Section 3A, which distinguishes between persons born before and after the establishment of the state of Israel.

The mentioned amendment to the Nationality Law, 1952 somewhat eased the difficult process of acquiring citizenship, since it waived the condition laid down in Section 3(a)(3) - that a person was in Israel from the establishment of the state of Israel until the Nationality Law, 1952 came into force.

Nevertheless it must be said that the amendment leaves in force the distinction between the conditions of acquiring citizenship for Jews as compared to non-Jews, even if both candidates for citizenship have a similar history of leaving and re-entering the state of Israel.

227 Section 3 of the Nationality Law, 1952, supra note 223
228 Nationality (Amendment No. 4) Law, 1980, 34 L.S.I. (1980) 254

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It also retains the requirement of Palestinian citizenship for persons born before the establishment of the state of Israel. Thus Arabs born before the establishment of the state of Israel who were not Palestinian citizens may only acquire Israeli citizenship by naturalization.

4.2.1.3. Acquiring Citizenship by Birth

Section 4(a)(1) of the Nationality Law, 1952 provides that a person born in Israel whose father or mother is an Israeli citizens will be a citizen by birth.

According to sub-section (2) of Section 4(a), a person born out of Israel whose mother or father is an Israeli citizen by way of return, residence, naturalization, or birth under sub-section (1) will also be an Israeli citizen by birth.[229]

4.2.1.4. Acquiring Citizenship by Naturalization

Since Jews are entitled to citizenship by way of return the law of naturalization is generally only relevant in the case of Arabs or other non-Jews who did not acquire citizenship by residence or birth.

Acquiring citizenship by naturalization is not a right but a privilege dependent on the discretion of the Minister of Interior.

According to Section 5(a) of the Nationality Law, 1952 - which governs the process of naturalization - the person who applies to become a naturalized citizen must fulfill six conditions, namely: (1) he must be in Israel; (2) he must have been in Israel for three of the five years prior to his/her application; (3) he must be entitled to settle in Israel as a permanent resident; (4) he must have settled in Israel or intends to do so; (5) he must have some knowledge of Hebrew language; (6) and he must have renounced his/her foreign citizenship.

Section 5(b) provides that "if ... he has fulfilled the above conditions, the Minister of Interior will grant him [citizenship], if the Minister chooses."

To be naturalized in Israel will occur only in extraordinary cases, and citizenship is almost never granted to non-Jews. This policy was confirmed by the Minister of Interior in 1989 when he clarified that his office prefers to offer the solution of residency status rather than citizenship to non-Jews.[230]

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229 Section 4 of the principal Nationality Law, 1952, supra note 223, was replaced by a new version as entailed in the Nationality (Amendment No. 4) Law, 1980, ibid., at 256

230 Adalah, Legal Violations of Arab Minority Rights in Israel, supra note 151, at 38

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4.2.2. Conclusions

The Law of Return, 1950 and the Nationality Law, 1952 are the most important manifestation of the idea of Israel to be a "Jewish state," since they define the concept of citizenship according to religious criterias, and give a special status to all Jews in the world to settle in Israel and to acquire Israeli nationality.

Against the norms of other modern nation-states, in which the concept of citizenship is defined in universal terms of political allegiance, these two laws determine the right to "membership" to the "national" collective of the state of Israel according to the religious criteria of national affiliation.

While these laws allow any Jew to immigrate to Israel and to automatically become a citizen, a the same time, they deprive all Palestinian Arab refugees residing outside the borders of the state of Israel of their fundamental and internationally recognized right to return to their homes and villages from which they were expelled or took flight in the course of the establishment of the state of Israel in 1948 or during any other crisis involving the Palestinian people.

These two laws show clearly that the state of Israel is not defined as a state of all its citizens, but rather as the state of the entire Jewish people.

4.3. The Impact of the "Jewish State" Concept on Jurisprudence relating to the Right to Citizenship/Nationality

As already mentioned several times in this work, in the war that broke out in 1948 in the context of the establishment of the state of Israel in Palestine, many native Palestinian Arabs were expelled or fled from their homes.

In line with the political program of Zionism which aimed at a total exclusion of the native Palestinian Arab people from its territorial, economical and political conception, every native Palestinian Arab was regarded as "a risk for the national security" of the state of Israel, which was built on the ruins of almost 400 completely destroyed Palestinian Arab villages and hundreds of thousands destroyed houses, and the official governmental policy was - from the very beginning - to prevent the Palestinian Arab refugees from returning and only a small number was allowed to come back under the title of family reunification.

Nevertheless, there were numerous Palestinian Arab refugees that had managed to return to their homes in some way, but subsequently were often anxious to

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formalize their status[231] and to demand the recognition and registration in the Population Register - both necessary conditions under Section 3 of the Nationality Law, 1952 for acquiring citizenship.

As a consequence of this state of affairs, many native Palestinian Arabs that had returned to their homes lacked a "legal" status in the new state and thus were not entitled to citizenship according to the law.

Volumes of Supreme Court cases from the early 1950's give evidence to the fact that native Palestinian Arabs, that had fled or had been expelled, had returned to their homes in Palestine, but whose requests to be registered as residents or citizens were denied. Often they even faced the danger of deportation - as it happened for instance in the case of *Bader v. Minister of Police.*[232]

Important to mention is the fact that the Supreme Court jurisprudence concerning the issue of acquiring citizenship by Palestinian Arab refugees who managed to return is not at all consistent, sometimes it greatly differs and is even contradictory.

The Supreme Court jurisprudence is characterized by a very positivistic approach, a formal review of the administrative procedures and a formalistic and technical style of judicial reasoning.

Thus, in cases where deportation orders existed the Israeli Supreme Court only reviewed the formal and technical aspects of the deportation orders, but did not address the merits (i.e. the substantial aspects) of the cases. This happened for instance in the decision of *Al-Jalil v. Minister of Interior.*[233] In this case the Supreme Court rejected the petition on the formal ground of its delay and did not consider the petitioner's claims that the original deportation had been unlawful.

This positivistic approach and technical style of judicial reasoning lead sometimes also to the situation that deportation orders were declared invalid on the ground of formal defects or excess of authority - as it happened for instance in the decisions of *Al-Rachman v. Minister of Interior*[234] and *Bader v. Minister of Interior*.[235] However, despite the petitioner's success, their ultimate fate - as well as the fate of other petitioners in similar cases - was not as positive, since the involved authorities regarded the Court's decision as "guidelines" specifying how unwanted persons could be deported "lawfully", and issued new deportation orders in accordance with the rules set down in the decisions.[236]

Another approach was that "persons, who had been deported from the country but returned within a reasonable time and had not delayed to file their petitions, did

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231 During the years 1949-1950 the Israeli army carried out many operations of locating and deporting Palestinian Arab refugees who returned without permission to their villages.

232 H.C. 64/54, *Bader v. Minister of Police,* 8 P.D. 970

233 H.C. 25/52, *Al-Jalil v. Minister of Interior,* 6(i) P.D. 110

234 H.C. 240/51, *Al-Rachman v. Minister of Interior*, 6(i) P.D. 364

235 H.C. 8/52, *Bader v. Minister of Interior*, 7(i) P.D. 366

236 H.C. 18/54, *Al-Rachman v. Commander of Yagur Prison*, 8 P.D. 473; *Bader v. Minister of Police,* supra note 232

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not lose their residency status and were entitled to registration in the Population Register, even if they crossed the border back into Israel illegally."[237]

A further approach by the Supreme Court was that if a person left Palestine "voluntarily"[237A] and had crossed over illegally into enemy territory he was not allowed to re-enter Israel and the authorities were allowed to deport him.[238]

In some other cases the Supreme Court held that "if a person left the area (of Palestine) out of his free will and before the state of Israel was established, but had returned without permission he was not entitled to be registered in the Population Register and could also 'lawfully' be deported."[239]

5. The Concept of Israel as a "Jewish State" and its Impact on the Right to Association

5.1. General Remarks

The right to form associations and organizations is a political right that lays at the very foundations of a modern liberal democracy.

The recognition of this right is one of the key features which distinguishes a democratic government from a totalitarian regime.

In a democracy it is acknowledged that single individuals are almost helpless against the state's apparatus and therefore must come together and form associations in order to protect their rights and interests.

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[237] See for example the following cases: H.C. 138/51, *Al-Ta'a & 17 Others v. Minister of Interior*, 7(i) P.D. 160; H.C. 155/51, *Khaldi v. Minister of Interior*, 6(i) P.D. 52; H.C. 157/51, *Abad v. Minister of Interior,* 5(ii) P.D. 1680; H.C. 184/51, *Abu Ras v.* Military Governor of the Galilee, 6 P.D. 480; H.C. 227/52, *Al-Khalil v. Minister of Police,* 7(i) P.D. 49; H.C. 282/52, *Abu Da'ud v. Minister of Interior,* 7(ii) P.D. 1081; H.C. 155/53, *Kiwaan v. Minister of Interior*, translated into English in 2 S.J. (1954-1958) 320

[237A] It should be recalled at this point that the exact interpretation of the term "voluntary" is greatly disputed, considering the circumstances surrounding the establishment of the state of Israel in Palestine in May 1948. For more details on the history of the establishment of the state of Israel in Palestine see Chapter A. (Historical Perspectives Regarding the Right to Self-Determination of the Jewish and the Palestinian Arab People)

[238] See for example the following cases: H.C. 125/51, *Hassin & Others v. Minister of Interior,* 5(ii) P.D. 1386; H.C. 177/51, *Al-Badawi v. Military Governor of the Galilee*, 5 P.D. 1241; H.C. 145/51, *Abu Ras v. Military Governor of the Galilee,* 5(ii) P.D. 1476; H.C. 219/51, *Abu Iyash v. Military Governor of the Galilee*, 6(i) P.D. 221; H.C. 120/53, *Ploni (i.e. Unnamed) v. Police Inspector of Haifa,* 8(i) P.D. 229; H.C. 130/54, *Na'amna v. Inspector of Zevulon Prison,* 8(iii) P.D. 1439

[239] See for example the following cases: H.C. 97/52, *Navroui v. Minister of Interior*, 6(i) P.D. 424; H.C. 112/52, *Halaff v. Minister of Interior*, 7(i) P.D. 185; H.C. 24/52, *Hakeem v. Minister of Interior*, 6(i) P.D. 638

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Totalitarian regimes on the other hand regard each person as an individual "atom" that should devote all its energies and existence to the "good of the state".

Thus totalitarian regimes try to secure a monopoly over all organizations and to subject them to the common objective of the state, as defined by the political leadership.[240]

The right to form associations and organizations is embodied in a series of modern international human rights instruments.

Article 20(1) of the Universal Declaration of Human Rights, 1948 [hereinafter: UDHR] states as follows:

> "Everyone has the right to peaceful assembly and association."[241]

Article 23(4) of the UDHR, 1948 states as follows:

> "Everyone has the right to form and to join trade unions for the protection of his interests."[242]

Article 22(1) of the International Covenant of Civil and Political Rights, 1966 [hereinafter: ICCPR] also guarantees the right to form and join associations:

> "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."[243]

Article 5(d)(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 [hereinafter: ICERD] protects the rights to freedom of peaceful assembly and association:

> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...the right to freedom of peaceful assembly and association."[244]

Important to mention is that the right to association is not an absolute right and limitations on it are basically also allowed according to international law.

Article 22 (2) of the ICCPR, 1966 entails such a limitation clause and states:

> "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful

240 Menachem Hofnung, Democracy, Law and National Security in Israel (Dartmouth Publishing Company Limited, 1996) at 159

241 Article 20(1) of the UDHR, 1948, supra note 131, at 25

242 Article 23(4) of the UDHR, 1948, ibid.

243 Article 22(1) of the ICCPR, 1966, supra note 133, at 133

244 Article 5(d)(ix) of the ICERD, 1966, supra note 135, at 152

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> restrictions on members of the armed forces and of the police in their exercise of this right."[245]

Both the language of Article 22(2) of the ICCPR as well as the international jurisprudence to it make it clear that any restrictions must meet a strict tree-part test[246] which requires that any restriction must: 1. be provided by law; 2. have the goal to safeguard one of the legitimate interests in Article 22(2); and 3. be necessary to achieve this goal.

Thus it is clear that the proper approach to review a particular restriction is not to balance the various interests involved but to ascertain whether the restriction meets the above mentioned strict test.[247]

Article 4(1) of the ICCPR entails the following clause according to which

> "[I]n time of public emergency which threatens the life of the nation..., the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant..."

including the right to association.[248] The Israeli government introduced with regard to Article 4 of the ICCPR the following derogation clause:

> "[S]ince its establishment the State of Israel has been the victim of constant threats and attacks on its very existence ...a public emergency within the meaning of article 4(1) of the Covenant exists [which makes it necessary for the Government] to take measures to the extent strictly required by the exigencies of the situation, for the Defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention, [and] insofar these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."[249]

It follows that in Israel the right to association as established in Article 22(1) of the ICCPR must be read in connection with the above mentioned derogation clause and is subject to restrictions.

Nonetheless are such restrictions of the right to association - in accordance with Article 4(1) of the ICCPR - subject to the principles of proportionality and necessity,

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245 Article 22 (2) of the ICCPR, 1966, supra note 133, at 133

246 This test was also confirmed by the Human Rights Committee of the United Nations, for more details see UN Doc. A/49/40, para. 9.7

247 In the context of the right to freedom of expression the European Court has held that in evaluating restrictions it is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted. See *Sunday Times v. United Kingdom,* Judgment of 26 April 1979, Series A, No. 30, 2 EHRR 245, para. 65

248 According to Article 4(2) of the ICCPR no derogation may be made from Article 6 (right to life), Article 7 (prohibition of torture), Article 8(1) and (2) (prohibition of slavery and servitude), Article 11 (prohibition of imprisonment for contractual obligation), Article 15 (nulla poena sine lege), Article 16 (right to recognition as a person) and Article 18 (freedom of thought, conscience and religion)

249 Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 19, para. 106

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and must comply with other obligations under international law, and may not be discriminatory solely on the ground of race, color, sex, language, religion or social origin.

Regarding the constitutional status of the right to association it must be said that in Israel this right has never enjoyed formal protection through a superior normative source. Although the 1992 enacted Basic Law: Human Dignity and Freedom,[250] defines a number of fundamental rights, it does not explicitly refer to the right to association, therefore leaving the normative quality of this right - in light of the existing Basic Law: Human Dignity and Freedom - still very much in question.

Recently a new Draft Basic Law: Freedom of Expression and Association[251] has been prepared by the Ministry of Justice, but it still waits for being approved by the Knesset.[252] This draft basic law articulates a fundamental right to freedom of expression and opinion, and also deals with related rights such as freedom of assembly, procession, demonstration and association.

Despite the fact that there exists no constitutional piece of legislation which contains an explicit provision protecting the right to association, in a series of decisions the Supreme Court has recognized this right.[252A]

In Israel the right to freedom of association is governed (or better restricted) by several non-constitutional statutory provisions setting out rules which govern the membership and forms of association.

The purpose of this sub-chapter 5. is to give an overview of the most important legislation and to provide an insight into the impact of the "Jewish State" concept on the jurisprudence and into the recent developments that occurred in the context of the right to association.

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250 Basic Law: Human Dignity and Freedom, supra note 7

251 Draft Basic Law: Freedom of Expression and Association, H.H. No. 2256 (7 March 1994), at 336; Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 19, para. 43

252 http://www.knesset.gov.il/knesset/knes/eng_mimshal_yesod25.htm (Basic Laws in the Process of Enactment)

252A H.C. 241/60, *Kardosh v. Registrar of Companies*, and F.H. 16/61, *Registrar of Companies v. Kardosh*, translated into English in 4 S.J. (1961-1962) 7

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5.2. The Impact of the "Jewish State" Concept on Legislation and Jurisprudence relating to the Right to Association

As already mentioned above the right to form associations in Israel is regulated by a series of statutory provisions and laws, setting out the rules for the forms of associations, their registration and membership as well as rules and punishments concerning the offenses carried out in the context of an association.

In some of these laws, such as the Companies Ordinance (Consolidated Version), 1983[253] and the Cooperative Associations Ordinance, 1937,[254] so called "security considerations" are not directly relevant, while in many other pieces of legislation the issue of "security" plays an important and even determining role with regard to the limitations imposed on the right to freedom of association.

Such "security legislation" was mainly enacted prior to September 1948 - either still by the British mandatory legislator or by the Israeli legislator immediately following the establishment of the state of Israel in May 1948 - and remained in force, as it was and with no substantial changes, until the beginning of the 1980's.

To this group of legislation belong the statutes that are discussed in sub-chapters 5.2.1. and 5.2.5. and which deal with the issues of "prohibited associations" and the "declaration of associations as unlawful":

5.2.1. The Prevention of Terrorism Ordinance, 1948

The Prevention of Terrorism Ordinance, 1948[255] deals - broadly speaking - with the issue of "terrorist organizations", is Israeli legislation and had originally a very short-term political objective which was realized within a few months.

The Prevention of Terrorism Ordinance, 1948 was passed - following the murder of the President of the Swedish Red Cross, Count Folke Bernadotte, by the two Jewish right wing underground organizations Lehi (i.e. the Stern Gang) and Etzel (i.e. the Irgun Zvai Leumi) on 17 September 1948[256] - for the specific purpose to dissolve the mentioned organizations in Jerusalem and to eliminate their existence as independent paramilitary organizations.[257]

Since 1950 up until 1980, the provisions of the Prevention of Terrorism Ordinance, 1948 were not used.

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[253] Companies Ordinance (Consolidated Version), 1983, D.M.I. (1983) 764

[254] Cooperative Associations Ordinance, 1937, L.P., vol. 1, at 336 (Heb.), 360 (Eng.)

[255] Prevention of Terrorism Ordinance, 1948, 1 L.S.I. (1948) 76

[256] For details on this issue see Chapter A.5.5. (The Period after the Adoption of the United Nations General Assembly Resolution 181 (II) of 29 November 1947 until the Signment of Armistice Agreements in 1949)

[257] For more details see Hofnung, supra note 240, at 161-163

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In 1980, however, the Prevention of Terrorism Ordinance, 1948 was amended[258] in order to promote the political objectives of the right wing Likud party.

At this point it should be mentioned that the Likud party served as a political umbrella for exactly those same people against whom the Prevention of Terrorism Ordinance, 1948 originally had been directed, namely: Menachem Begin (the former leader of Etzel) and Yitzhak Shamir (the former leader of the Stern Gang).[259]

The political content of the Prevention of Terrorism Ordinance, 1948 is based upon four basic principles which had not been incorporated in any other piece of legislation and which cause severe infringements not only on the right to freedom of association but also on other basic human rights, such as due process rights.

The following four principles are entailed in the below described sections:

(1) Section 8 of the Prevention of Terrorism Ordinance, 1948 grants the Israeli government the power "to declare a body of persons as terrorist organization". This declaration "shall serve, in any legal proceeding, as proof that the body of persons is a terrorist organization, unless the contrary is proved."[260]

(2) Section 12 of the Prevention of Terrorism Ordinance, 1948 provides that a military court, whose members are appointed by the Chief of Staff, was to preside over matters under the said Ordinance.[261]

(3) Section 15 of the Prevention of Terrorism Ordinance, 1948 grants the Minister of Defence the power to confirm a judgment; to confirm a conviction and reduce the punishment; to quash judgments and acquit the accused; to quash judgments and remit the case for retrial by a different court.[262] Section 18 of the Prevention of Terrorism Ordinance, 1948 grants the Minister of Defence the power to reconsider any convicting judgment of a military court, even if it has been confirmed by himself, and to reduce the punishment or to replace it by a lighter punishment.[263]

(4) Section 16 of the Prevention of Terrorism Ordinance, 1948 provides that a military court judgment will be final and no appeal shall be possible to any court or tribunal.[264]

The provisions of the Prevention of Terrorism Ordinance, 1948 enabled the Israeli government to control every stage of the legal proceeding as well as the execution of the judgment.

According to the Prevention of Terrorism Ordinance, 1948 the Minister of Defence could at his will propose to the government that a certain organization be

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258 Prevention of Terrorism Ordinance (Amendment) Law, 1980, 34 L.S.I. (1979/80) 211
259 Hofnung, supra note 240, at 161
260 Section 8 of the Prevention of Terrorism Ordinance, 1948, supra note 255, at 78
261 Section 12 of the Prevention of Terrorism Ordinance, 1948, ibid., at 79
262 Section 15 of the Prevention of Terrorism Ordinance, 1948, id., at 79-80
263 Section 18 of the Prevention of Terrorism Ordinance, 1948, id., at 80
264 Section 16 of the Prevention of Terrorism Ordinance, 1948, id.

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declared as "terrorist organization" and in doing so, he could create an evidence which could only be refuted in a legal proceeding.

The appointment of the military court was indirectly controlled by the Minister of Defence through the Chief of Staff, and the Minister of Defence could interfere in the judgment - including the punishment - which was often handed down in accordance with the dictates of political considerations.[265]

The Prevention of Terrorism Ordinance, 1948 in fact constituted one of the most draconian law and a specific drastic form of political involvement in the judicial proceedings. As it was correctly commented by Menachem Hofnung of the Hebrew University "independence of judges is really difficult to imagine under such a legal regime."[266]

The Prevention of Terrorism Ordinance, 1948 was only used until the late 1950's and solely against Jewish organizations which aspired to bring about a change in government through violent means. Since then - up until 1980 - the said Ordinance was not used at all.[267]

In order to limit the right to freedom of association of Palestinian Arab organizations, which were suspected of seeking the destruction of the state of Israel, a different legal basis was used, namely the British mandatory Defence (Emergency) Regulations, 1945.[268]

The reason for the use of this legal source was that most of the Palestinian Arab citizens of Israel lived under the control of a military government which was imposed upon most of the Arab villages located in Israel within the Green Line from 1948 up until 1966. [269]

The turning point in legislation and restrictions on association came with the changeover in Israel's government in 1977 - the year when the government was led for the first time by the right wing Likud party.

The changes in legislation and its implementation stemmed both from the ideological stand of the ruling Likud party and from alterations in the patterns of political organization of Palestinian Arab citizens of Israel and Palestinian Arabs of the Occupied Territories.

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265 It should be mentioned that especially Prime Minister Ben-Gurion, who also held the office of Minister of Defence, made havy use of the Prevention of Terrorism Ordinance, 1948. Hofnung, supra note 240, at 163

266 Ibid.

267 See the following decisions handed down in this matter: H.C. 116/53, *Heruti v. Minister of Police,* 7 P.D. 615 and Cr.A. 49/58, *Heruti v. Attorney General,* 12 P.D. 1541; quoted in id., at 164-165, note 140. Cr.A. 11/58, *Menkes v. Attorney General,* 12 P.D. 1905; quoted in id., at 165, note 141

268 Defence (Emergency) Regulations, 1945, supra note 182

269 See Chapter D.5.2.3. [The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966]

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Up until 1977 some forms of identification with the PLO were tolerated in the Occupied Territories and also the Palestinian Arab people inside Israel succeeded for the first time, in March 1976, on the so called "Land Day" - which is since then held every year - to form a national political protest movement.[270]

At the end of the 1970's, identification with the PLO became especially on Israeli University campuses a common occurrence.

In the years preceding 1977 the political leaders showed at least some readiness to reach a compromise regarding the Occupied Territories, and Yitzhak Rabin, when serving as Prime Minister from 1974 to 1977, allowed members of opposition groups to hold meetings abroad with members of the PLO and even received reports of these meetings.[271]

Since 1977 - after the Likud party had come to power - the Israeli government supported the idea of a "Greater Israel" (i.e. annexing the Occupied Territories to Israel) and many Jewish settlements were expanded to areas of large Arab population.

The presence of the Jewish settlers - which are living since then on in the settlements that were built on expropriated Arab owned land[272] - brought - and brings - about great friction between Jews and Arabs in the Occupied Territories.

Within a short period of time opposition to Jewish presence and calls for the liberation of the Occupied Territories by the Palestinian Arab people became more and more noticeable.[273]

Under the Likud-led government, however, any pro-PLO utterances, calls for the liberation of the Occupied Territories and also meetings with PLO members were not only not allowed, but rather regarded as "supporting terrorism."[274]

The new political realities led in mid-1980 to the enactment of two pieces of legislation - one of them was the Non-Profit Societies Law, 1980[275] the other was the Prevention of Terrorism Ordinance (Amendment) Law, 1980[276] - whose main objectives were: (a) to prevent, by means of controlled registration, the founding of new bodies which support PLO objectives; (b) to keep control over the activity of

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270 Hofnung, supra note 240, at 168
271 Ibid., at 168-169
272 Id., Chapter 7 (The Settlements), at 238-260. See also B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects (Jerusalem, March 1997); B'Tselem, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem (Jerusalem, January 1997); Jerusalem Media and Communication Centre, Signed, Sealed, Delivered: Israeli Settlement and the Peace Process, January 1997
273 Hofnung, supra note 240, at 169
274 Ibid.
275 Non-Profit Societies Law, S.H. (1980) 210
276 Prevention of Terrorism Ordinance (Amendment) Law, 1980, supra note 258

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old organizations by creating a new offence, namely "identifying publicly with the enemies of the state." In both laws, ideological and party-political objectives were given preference over the right to freedom of association.[277]

The provisions of the Prevention of Terrorism Ordinance (Amendment) Law, 1980 repealed several parts of the original Ordinance, namely:

The above mentioned provisions granting wide powers to the Minister of Defence, the Chief of Staff and other army officers, were eliminated.

Also repealed was the choice given to the prosecution to have civilians accused of committing offenses under the ordinance to stand trial in a military court, and the right to appeal was now granted to people who had been convicted.[278]

As mentioned above the Prevention of Terrorism Ordinance (Amendment) Law, 1980 created the new offence, namely "identifying publicly with the enemies of the state". Section 4(g) - which was added by the Prevention of Terrorism Ordinance (Amendment) Law, 1980 - defines this offence as follows:

> "A person who ... does any act manifesting identification or sympathy with a terrorist organization in a public place or in such manner that persons in a public place can see or hear such manifestation of identification or sympathy, either by flying a flag or displaying a symbol or slogan or by causing an anthem or slogan to be heard, or any other similar act clearly manifesting such identification or sympathy as aforesaid."[279]

The meaning of this provision was that any political statement that expresses identification with Palestinian liberation organizations would from then on be regarded as criminal offense, even if there was no call for an uprising or active opposition to the government in power.[280]

These intentions reveal the discriminatory approach of the Israeli legislator when it comes to the rights of the Palestinian Arab people in Israel and the Occupied Territories, which is living since decades under conditions of oppression and deprivation of the most fundamental human rights and freedoms.

Important to mention is the fact that the Prevention of Terrorism Ordinance (Amendment) Law, 1980 was never equally applied to the Arab and Jewish population. This is revealed by the following facts: Two months after the enactment of the amendment in 1980, 14 Palestinian organizations were declared as "terrorist organizations" by the Israeli government and, consequently, every act of identification with one of these organizations in a public place became an offence

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277 Hofnung, supra note 240, at 169

278 Sections 12 and 21 of the Prevention of Terrorism Ordinance, 1948, supra note 255, were repealed and other sections were amended.

279 Section 4(g) of the Prevention of Terrorism Ordinance (Amendment) Law, 1980, supra note 258

280 Hofnung, supra note 240, at 171

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under the said law.[281] Moreover, in 1986 the government proclaimed 21 Palestinian and Lebanese organizations to be "terrorist organizations."[282]

In contrast, after Jewish settlers, who were members of the Jewish Underground[283] were arrested, charged and convicted of murdering three Arabs and of being members of a terrorist organization,[284] a big campaign supporting the activities of the group was carried out throughout Israel. People identified with the group by holding mass rallies, signing petitions, placing stickers on cars and even initiating pardon bills to free the prisoners. Not only no one was prosecuted for identifying with a terrorist organization, but the acts of identifying with this terrorist organization and the requests for pardon gained the support of well-known figures in the Israeli establishment and the Cabinet, including the then Prime Minister Yitzhak Shamir.[285]

Moreover, the racist and anti-Arab "Kach" and "Kahane Chai" organizations, which for many years called in its publications, inter alia, to use violence against Arabs, were outlawed as Terrorist Organizations by the Israeli government only in February 1994, after the Jewish settler and "Kach" activist Baruch Goldstein from Kiryat Arba - a Jewish settlement near Hebron and Kach's most aggressive stronghold - massacred 29 Muslim worshippers in the Cave of the Patriarchs.[286]

5.2.2. The Penal Law, 1977

The Penal Law, 1977[287] defines in Sections 145-150 the basic elements of "unlawful associations", and establishes offenses and their punishments.

Section 145 of the Penal Law, 1977 defines an "unlawful association" as:

> "(1) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates, incites or encourages any of the following unlawful acts:
>
> (a) the subvesion of the political order of Israel by revolution or sabotage;

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281 Ibid.

282 Id., note 168

283 The 27-member Jewish Underground was active from 1980-1084, booby-trapped cars of West Bank mayors, attacked Hebron's Islamic College, placed bombs on Arab buses and plotted to blow up the Islamic shrines on the Temple Mount. See the article in The Jerusalem Report, 28 September 1998, by Peter Hirschberg "Murder in the Air", at 18 and the Column by Freda Covitz, Fire From the Right, at 21

284 Cr.A. 678/85, *Nir & 4 Others v. State of Israel,* (unpublished), quoted in id., at 172

285 Hofnung, id., at 172-173

286 Zeev Segal, Outlawing "Kach" and "Kahane Chai": On reasonableness and proportionality, 2 Justice (1994) 29, at 30. For a detailed discussion of the cultural background as well as the ideological, political and institutional concept of the Jewish Underground in general and the "Kach" and "Kahane Chai" movements in particular see Ehud Sprinzak, The Ascendance of Israel's Radical Right (Oxford University Press, 1991)

287 Penal Law, 1977, L.S.I. (1978) Special Volume

> (b) the overthrow by force or violence of the lawful government of Israel or of any other state, or of organized government;
> (c) the destruction or injury of property of the state or of property used in commerce within the state or with other countries;
>
> (2) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having as its declared or implied object sedition within the meaning of Article 1 [of the Penal Law];
>
> (3) any body of persons, incorporated or unincorporated, which does not notify its rules as required by law or continues to meet after being dissolved by law;
>
> (4) any body of persons, incorporated or unincorporated, which is or appears to be affiliated with an organization which advocates or encourages any of the doctrines or practices specified in this section;
>
> (5) any branch, center, committee, group or faction of an unlawful association and any institution or school managed or controlled by it."[288]

It should be noted that sub-section (4) relating to an association that "appears to be affiliated" with an unlawful organization includes a potential infringement on the right to freedom of association, since this section does not require those affiliated with an unlawful association to have actual subversive intent in order to fulfill the therein established offense.

5.2.3. The Non-Profit Societies Law, 1980

Until 1980, non-profit organizations in Israel were regulated by the Ottoman Law of Associations, (1909),[289] as amended by mandatory and Israeli legislation. Under this law no permit as a condition for their formation was required.[290]

The Non-Profit Societies Law, 1980[291] created a new institution - the Registrar of Non-Profit Societies - and required the registration of every new non-profit society in the Non-Profit Societies Register.

Section 3 of this law prohibits the registration of a non-profit society "if any of its objects negates the existence of the state of Israel or the democratic character of the state of Israel, or if there are reasonable grounds for concluding that the non-profit society will be used as a cover for illegal activities." The Registrar may also ask for the dissolution of a non-profit society on a number of grounds, such as denying the existence of the state of Israel or its democratic character.[292]

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[288] Section 145 of the Penal Law, 1977, ibid.

[289] Ottoman Law of Associations, no. 121 of 1327 (1909), quoted in Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 19, para. 552

[290] Ibid.

[291] Section 2 of the Non-Profit Societies Law, 1980, supra note 275

[292] Section 49 of the Non-Profit Societies Law, 1980, ibid.

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The Registrar's decision on these matters can be appealed in the court.[293]

Section 66 of the Non-Profit Societies Law, 1980 provides that the Minister of Interior may, with the approval of the Knesset Committee on Constitution, Law and Justice, set down in regulations that the law was not to apply to certain types of non-profit associations.[294]

Moreover, Section 67 of the Non-Profit Societies Law, 1980 is not applicable to associations and organizations (i.e. political parties, trade unions and employer organizations) that existed before the coming into force of this law and were created under the Ottoman Law.[295]

The two mentioned provisions make an application of this law according to ideological and political objectives imminent and thus definitely enable the government to an authorized unequal application of the law - i.e. an application only to political opponents, and the exemption of existing non-profit organizations. With these provisions restrictions on rival associations in general and political opponents in particular are legitimized by the law itself, which becomes a tool of social and political control, instead of promoting universal values and democratic rights.

5.2.4. The Political Parties Law, 1992

Prior to the enactment of the Political Parties Law, 1992,[296] political parties were governed either by the Ottoman Law of Associations, 1909 or by the Non-Profit Societies Law, 1980.

Section 5 of the Political Parties Law, 1992 prohibits the registration of a political party (a) if its aims negate the existence of the state of Israel as a Jewish and democratic state; (b) if it incites to racism; (c) if there are reasonable grounds for concluding that the party will be used as a cover for illegal activities.[297]

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293 Sections 6 and 52 of the Non-Profit Societies Law, 1980, id.
294 Sections 66 of the Non-Profit Societies Law, 1980, id.
295 Sections 67 of the Non-Profit Societies Law, 1980, id.
296 Political Parties Law, 1992, supra note 11
297 Section 5 of the Political Parties Law, 1992, ibid.

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5.2.5. The Defence (Emergency) Regulations, 1945

Regulations 84-85 of the Defence (Emergency) Regulations, 1945[298] grant the Minister of Defence absolute discretion to declare any body of persons as "unlawful association" and to prosecute members of this group by way of a special shortened procedure.

Regulation 84 of the Defence (Emergency) Regulations, 1945 served between 1964 and 1980 as common means to ban Palestinian Arab organizations which challenged the idea of the state of Israel as a "Jewish state" but did not advocate or use violence.

In the context of Regulation 84 of the Defence (Emergency) Regulations, 1945 the decision of the Supreme Court in the matter of *Sabri Jiryis v. District Commissioner of Northern District*[299] handed down in 1964 must be mentioned.

It is one of the most prominent cases dealing with the right to freedom of association and the discriminatory impact of the "Jewish state" concept on this right when political movements of the Palestinian Arab people - to be registered as associations - are involved.

5.2.5.1. Jiryis v. District Commissioner of Northern District (1964)

The Facts of the Case

This case is dealing with the El-Ard[300] movement[301] which - although having succeeded in 1960 in registering an association as commercial company under the name "El-Ard Limited"[302] - was declared an "illegal association" under Sub-

298 Defence (Emergency) Regulations, 1945, supra note 182

299 H.C. 253/64, *Sabri Jiryis v. District Commissioner of Northern District*, 18(iv) P.D. 673

300 *El-Ard* is the Arabic word for "the Land".

301 The following Supreme Court cases at that time relate to the El-Ard movement and involve civil and political rights:
H.C. 241/60, *Kardosh v. Registrar of Companies*, and F.H. 16/61, *Registrar of Companies v. Kardosh*, supra note 252A. [This case concerns the right to freedom of association and the issue of registration of a company/association.]; H.C. 39/64, *El-Ard v. District Commissioner*, 18(ii) P.D. 340 (1964) [This case concerns the right to freedom of speech - Publication of a weekly magazine - and is discussed in Part II Chapter 8 3.3.]
H.C. 56/65, *Jiryis v. Military Commander of District A,* 19(i) P.D. 260 [This case is dealing with the restrictions that are imposed on the right to freedom of movement of the Palestinian Arab lawyer Sabri Jiryis, one of the leaders of the El-Ard movement, by a police supervision order.]; *Yeredor v. Chairman of the Central Elections Committee for the 6th Knesset,* supra note 6 [This case concerns the right to participation in the political process and is discussed in sub-chapter 6.3.1.]

302 *Kardosh v. Registrar of Companies*; *Registrar of Companies v. Kardosh*, ibid.

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regulation 84(1)(b) of the Defence (Emergency) Regulations, 1945 after it tried to be registered as a political party and to run in Knesset elections.

Among the defined aims of the El-Ard movement were, inter alia:

> "(c)...finding a just solution to the problem of Palestine - while seeing it as an indivisible unit - according to the wishes of the Palestinian Arab people, a solution which will meet its interests and aspirations, restore its political existence, ensure its full legal rights, and see it as the party with the primary right to determine its own future within the framework of the highest aspirations of the Arab nation.
>
> (d)...support for the movement of liberation, unity and socialism in the Arab world, by all lawful means, while seeing that movement as the decisive force in the Arab world which requires Israel to relate to it positively."[303]

The District Commissioner refused to register the El-Ard movement as political association on the ground that it was established for the purpose of acting against the existence of the state of Israel and its integrity.[304] The District Commissioner's decision not to register El-Ard as association was challenged by Sabri Jiryis, an Arab lawyer and one of the leaders of the El-Ard movement.

The Supreme Court dismissed Jiryis' petition.

The Decision of the Supreme Court

Justice Witkon held that "since the platform does not accord recognition to the fact that Israel had been established in parts of Palestine" this can be understand as intention of the El-Ard movement to refuse to accept the right of the Jews to their own state. But he did not rest on this point alone and went on to say:

> "Which simpleton would believe that this program [of the El-Ard movement to solve that Palestinian question] can be achieved by persuasion and peaceful means, and that it does not mean subversive and hostile activity? It is hardly surprising, therefore, that the El-Ard movement has won enthusiastic praise from Arab nationalistic propaganda organs, which constantly urge the destruction of Israel..."[305]

Justice Landau took a somewhat other line of argumentation, which in the result lead to the same decision of the Supreme Court, namely the rejection of the petition. Justice Landau placed his emphasis on the above quoted sub-section (d) of the El-Ard movement's platform, and held that identification with the "movement of liberation, unity and socialism in the Arab world" would clearly mean the

303 *Jiryis v. District Commissioner,* supra note 299, at 675; quoted in English in Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 23

304 *Jiryis,* ibid.; Kretzmer, ibid.

305 *Jiryis,* at 677-678; Kretzmer, id.

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identification with the enemies of Israel which aimed at its physical destruction by using force.[306]

During the course of argument, the judges saw fit to ask the counsel for the petitioners, whether his clients "recognize the sovereign state of Israel, together with its principles and aims, including free Jewish immigration and the return of the Jewish people to its homeland."

The Supreme Court issued a highly undemocratic and discriminatory judgment, and considered the identification with the so called "enemies of the state" as sufficient factor to deligitimize any political activity of the El-Ard movement, despite:

1. the petitioner counsel's positive answer[307] to recognize the sovereignty of Israel, together with its principles and aims, including free Jewish immigration and the return of the Jewish people to its homeland";
2. the fact that the above quoted passage (d) clearly speaks about "...lawful means" with which "...the movement of liberation, unity and socialism" was to accomplish its aim; and
3. the fact that "...no evidences were found that action had been taken actively to promote the use of force".[308]

Reasons behind this case and Conclusions

Before this decision was issued, the authorities were quite reluctant to ban the El-Ard movement since there existed an earlier judgment,[309] which had allowed El-Ard to be registered as a limited liability company.

However, the attempts of the El-Ard movement to operate as a political association - and not merely as a limited company - nourished the Israeli government with great fears that granting the El-Ard movement the permission to be registered as political association would generally enable the Palestinian Arabs of Israel to create lawfully independent political associations - a development which, according to the view of the Israeli government, was to be prevented by all effective means.

Due to the fact that no real legal basis existed which enabled the government to accomplish these aims, a decision by the Supreme Court was needed in order to have such a "legal" basis for dealing with the El-Ard movement.

This was the reason why the decision of *Jiryis v. District Commissioner of Northern District* came into being.

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306 Id., at 679-681; Kretzmer, at 23-24
307 Id., at 678
308 Id., at 673
309 See *Kardosh,* supra note 252A

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It provided the Israeli government with the requested "legal" - although extra-statutory - basis for dealing in the future with the El-Ard movement and other potentially similar Palestinian Arab movements that tried to form independent political associations challenging the nature of the state of Israel as a "Jewish state".

And as a matter of fact, already six days after the decision was handed down, the Minister of Defence, by using his powers under Regulation 84 of the Defence (Emergency) Regulations, 1945, declared the El-Ard movement as illegal organization.[310]

Commenting on this judgment Professor David Kretzmer of the Hebrew University wrote in his book "The Legal Status of the Arabs in Israel" as follows:

> "Given the emphasis in the opinions of both Witkon and Landau JJ. on the identification with the enemies of Israel bent on its *physical* destruction, one cannot regard the El-Ard precedent as holding that a movement which rejects the notion of Israel as a "Jewish state" is *per se* unlawful."[311]

6. The Concept of Israel as a "Jewish State" and its Impact on the Right to Political Participation

6.1. General Remarks

Ancient Athens called itself a democracy (from c.500 BC to c.330 BC) because all citizens could take part in political decisions. But "all citizens" did non mean "all adults".

Women, slaves, and resident aliens (including people from other Greek cities) had no rights to participate. Citizens were thus less than a quarter of the adult population.

When the word "democracy" started to be used again in the 18th century most of the people were in reality opposed to what was called "democracy".

Many modern writers have, nevertheless, accepted the self-description of classical Athens as "democracy".

Similarly, many political theorists have often accepted the claim that a modern regime, in which most or at least a large number of people have the right to vote, is already a "democratic" government.[312]

That means in other words, since in modern times the connotations of the words "democracy" and "democratic" are so overwhelmingly favorable, it is at the same time too often forgotten that many regimes which have no right at all to use these

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310 Y.P. 1134, 1965, at 638 (23.11.1964). The order was issued on 17. 11. 1964; Hofnung, supra note 240, at 167, note 150

311 Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 24

312 Concise Oxford Dictionary of Law (Oxford University Press, third edition, 1994) at 129

terms have appropriated them. Then, however, they did or do use them emptily and/or solely for propaganda reasons.[313]

However, elections are a central mechanism for participating in a political system and for translating popular preferences into the choice of public officeholders.

Moreover, elections are the fundamental attribute that in principle differentiates democratic governments from other types of regimes.

According to international law the right of a citizen or a party to be elected and the right of a citizen to vote, cannot be limited as a generally accepted principle.

Article 21 of the Universal Declaration of Human Rights, 1948 [hereinafter: UDHR] states as follows:

> "Everyone has the right to take part in the government of his country directly or through freely chosen representatives."[314]

Article 25(b) of the International Covenant of Civil and Political Rights, 1966 [hereinafter: ICCPR] protects the right to vote and to be elected in similar way:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[315]

Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 [hereinafter: ICERD] also guarantees the right to vote and to stand for elections:

> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal sufferage and equal sufferage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service."[316]

In Israel, the parliament which makes the laws - i.e. the Knesset - shall be elected every four years[317] by general, national, direct, equal, secret and proportional elections.[318]

The Knesset shall, upon its election, consist of 120 members.[319]

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[313] E.g., "German Democratic Republic", "Democratic Kampuchea", see ibid.
[314] Article 21(1) of the UDHR, 1948, supra note 131, at 25
[315] Article 25(b) of the ICCPR, 1966, supra note 133, at 134
[316] Article 5(c) of the ICERD, 1966, supra note 135, at 151-152
[317] Section 8 of the Basic Law: The Knesset (1958), supra note 10
[318] Section 4 of the Basic Law: The Knesset (1958), ibid.
[319] Section 3 of the Basic Law: The Knesset (1958), id.

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Section 5 of the Basic Law: The Knesset (1958) regulates the right to vote in Knesset elections and states as follows:

> "Every Israeli national of or over the age of 18 years shall have the right to vote in elections to the Knesset, unless a court has deprived him of that right by virtue of any Law; the Elections Law shall determine the time at which a person shall be considered to be 18 years of age for the purpose of the exercise of the right to vote in elections to the Knesset."[320]

Section 6 of the Basic Law: The Knesset (1958) regulates the right to be elected to the Knesset as follows:

> "Every Israeli national who on the day of the admission of a candidate's list containing his name is 21 years of age or over shall have the right to be elected to the Knesset, unless a court has deprived him of that right by virtue of any Law"[321]

Due to the existence of open, regular and secret elections, Israel is often considered of being a "democracy".

In this sub-chapter 6 - as well as in other chapters of this work[322] - I will demonstrate that Israel only complies with the formal-institutional aspects of a democracy, characterized by the fact that 1. elections are held since the establishment of the state, and 2. representatives to the Knesset are elected from a number of competing political parties.

Yet on a substantial level the state of Israel does not meet the standards of a democracy. This is, inter alia, revealed by the following facts:

1. The state of Israel is defined not only as a "democratic state" but also as a "Jewish state". The aims of the "Jewish state" concept, however, are to promote Zionist goals - i.e. the values, rights and interests of the Jewish population alone - excluding the non-Jewish population - i.e. mainly the native Palestinian Arab people - from resource allocation (land, water, budget), from citizenship as well as from social and economic rights and benefits.[323] As I will demonstrate in this sub-chapter, the ethnic - i.e. "Jewish" - character of the state may - according to the legal regime and the developed Supreme Court jurisprudence - not be challenged.

Any political act or activity that might strengthen the national rights and interests of the native Palestinian Arab people living in Israel and the Occupied Territories - such as political expressions of Palestinian identity, non-violent activity in political

320 Section 5 of the Basic Law: The Knesset (1958), id.

321 Section 6 of the Basic Law: The Knesset (1958), id.

322 See Chapter D. (Israel's Permanent State of Emergency and the Question of Its Compatibility With the Concept of a Liberal Democracy Based on Human Rights and Freedoms), Chapter F. (The Right to Freedom of Expression, Speech and the Press) and Chapter G. (The Right to Property)

323 For details see Chapter A.2. (Ideology and Doctrines of the Concept of Political Zionism)

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movements or parties - is almost always interpreted as threat to the "security" of the state of Israel.[324]

"Security", however, does not mean the security of *all* people living on the same territory, but only means the security of the Jewish population living in Israel and the Occupied Territories.

In assigning this unchallangeable ethnic - i.e. "Jewish" - character to the state of Israel, severe infringements of international law are committed by the Israeli government and a systematic policy of discrimination is applied against the native Palestinian Arab people living in Israel.

2. Since 1967 until January 1996 - when the first elections to the Palestinian Authority took place - the native Palestinian Arab people living in the Occupied Territories were never allowed to participate in elections to the Knesset despite the fact that (a.) the Knesset and government ministries did enact laws and regulations directly applicable to the Occupied Territories; and (b.) the operative government policies created a unified infrastructure applicable to the Occupied Territories and to Israel.[325]

Thus - for almost 30 years - millions of native Palestinian Arab inhabitants of the occupied Gaza Strip, the Golan Heights, and the West Bank including East Jerusalem, were completely deprived of their fundamental rights to participate in the political process (i.e. the rights to vote and to be voted). In doing so, the state of Israel committed severe breaches of international law and a systematically applied policy of discrimination against the native Palestinian Arab people living in the Occupied Territories.

6.2. The Impact of the "Jewish State" Concept on Legislation and Jurisprudence relating to the Right to Political Participation

6.2.1. The Period from 1949 to 1985

Upon the establishment of the state of Israel in Palestine in 1948 up until 1985, there has been no legal provision limiting the right to vote or to be elected to public office in Israel.

As already cited above, the Basic Law: The Knesset broadly declared the rights to vote and to be elected. In the original 1958 version of the said basic law, both rights

324 Sabri Jiryis, Democratic Freedom in Israel (translated from the Arabic by Meric Dobson) (The Institute for Palestine Studies, 1972) at 9

325 For more details see Chapter E. (The Administrative, Legal and Judicial System in the Occupied Territories)

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were unlimited, the only exception being when a court deprived that right by virtue of any law.[326]

Despite the fact that during the 1950's and 1960's there has been no formal legal restriction on the right to be elected, the executive authorities have, nonetheless, prevented any possibility of the formation of independent Palestinian Arab national political associations or organizations.[327]

Political associations of the native Palestinian Arab citizens of Israel were only tolerated under the authority of Zionist[328] parties or within the Israeli Communist[329] party.

By selectively applying restrictions on freedom of movement and by using stick and carrot tactics through the mediation system of military government[330] - which was applied upon most of the Arab villages located inside Israel from 1948 to 1966 - the ruling "Mapai" party mobilized the majority of the Palestinian Arab voters in support of specifically created so-called "independent" Arab parties, based on religious and geographical representation.[331]

But, the so called "independent" Arab parties were controlled by the "Mapai" party which was not open to Arabs.

Thus one may say that the Palestinian Arab's right to be voted was - from the very beginning since Israel's existence - limited through the application of different and more or less "sophisticated" forms of persecution.

In 1965 two important events happened:

1. The Communist party was split into two factions - the faction retaining the old name was mainly composed of Jewish members, and the other faction, the New Israel Communist party or Rakah,[332] was the one political party to which Palestinian Arabs have had effective access and in which their participation has been relatively heavy. But due to Rakah's anti-Zionist stance, the participation of the Palestinian

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326 Sections 5 and 6 of the Basic Law: The Knesset (1958), supra note 10

327 See the previous sub-chapter 5.2.5.1. [Jiryis v. District Commissioner of Northern District (1964)]

328 Through their control of the government, the Histadrut, and the organs of the Zionist movement, the Zionist political parties create a coordinated network of all "national institutions of Israel" in which the channels for recruitment, demands, and effective participation are open almost solely to Jews. Ian Lustick, Arabs in the Jewish State, Israel's Control of a National Minority (University of Texas Press, Austin, 1982) at 110

329 The Israeli Communist party was not a Zionist party but openly advocated, under Moscow's guidance, Israel's right to exist. Hofnung, supra note 240, at 177, note 187

330 Chapter D.5.2.3. [The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966]

331 Hofnung, supra note 240, at 177; Lustick, supra note 328, at 113

332 Hofnung, ibid.

Arabs in the Communist party has had almost no consequences as far as introducing Arabs into positions of status and power in Israeli society.[333]

2. The Supreme Court handed down the decision in the matter of *Yeredor v. Chairman of Central Elections Committee*[334] which shall be discussed in more detail in the following sub-chapter. This is one of the most important cases where the fundamental right to be elected was restricted due to the preference that was given to the concept of the state of Israel as a "Jewish state."

6.2.1.1. Yeredor v. Central Elections Committee for the 6th Knesset (1965)

The Facts of the Case

This case deals with the attempt of the "Socialists List" to run as a national Arab party in the 1965 elections to the Knesset. The list of candidates had ten names; at least six of them, including the first three, were Palestinian Arab citizens of Israel and former members of the El-Ard group[335] which was - as elaborated in a previous sub-chapter[336] - outlawed in 1964 because of its aims.[337]

The Central Elections Committee refused to approve the Socialists List on the ground that the Socialists list of Palestinian Arab candidates "... is an unlawful association, since its founders deny the integrity of the state of Israel and even its right to exist."[338]

Important to mention is the fact that at the time of the *Yeredor* decision there was no legal ground for a decision based on the above mentioned arguments, due to the

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333 Lustick, supra note 328, at 113

334 *Yeredor v. Chairman of Central Elections Committee,* supra note 6

335 The following six Arab candidates were members of the El-Ard movement and appeared also on the Socialists List (they are listed here according to their position on the Socialists List): Salah Baransa (No.1), Habib Kawagy (No.2), Sabri Jiryis (No.3), Ali Rafa (No.5), Mahmoud Abed el-Hamid Miari (No.9), Manzur Kardosh (No.10); see ibid., at 369

336 See sub-chapter 5.2.5.1. [Jiryis v. District Commissioner of Northern District (1964)]

337 The El-Ard group's defined aims - that are relevant in this context - were:
"(c)... finding a just solution to the problem of Palestine - while seeing it as an indivisible unit - according to the wishes of the Palestinian Arab people, a solution which will meet its interests and aspirations, restore its political existence, ensure its full legal rights, and see it as the party with the primary right to determine its own future within the framework of the highest aspirations of the Arab nation."
"(d)...support for the movement of liberation, unity and socialism in the Arab world, by all lawful means, while seeing that movement as the decisive force in the Arab world which requires Israel to relate to it positively." See *Jiryis v. District Commissioner,* supra note 299, at 675; quoted in English in Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 23

338 *Yeredor,* supra note 6, at 365, 369

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fact that the Knesset Elections Law, 1959[339] did not include any provision that authorized the Central Elections Committee to test the qualifications of lists according to their substance and objectives and to disqualify a list on the basis of its ideology. The Knesset Elections Law, 1959 limited the authority to disallow a list for participation in the elections solely to formal and procedural requirements - which in the case of the Socialist List were met.[340]

In addition, the Elections Committee was not presented with any convincing evidence to prove a threat or danger to the state or its institutions.[341]

The Committee's decision was entirely based on former activities of the list's candidates and their membership in the outlawed El-Ard movement.[342]

Against the decision to disqualify the Socialists List an appeal was launched to the Supreme Court, which upheld the Committee's decision.

The Decision of the Supreme Court

The reason given by the Supreme Court for approving the decision of the Elections Committee which disqualified the Socialist List was the fact that six of its members were previously associated with the El-Ard movement - a political opposition movement of Palestinian Arab citizens in the late 1950's and early 1960's - which was declared as an illegal association.[343]

Due to the lack of a legal ground which enabled the Elections Committee to bar the Socialist List, the Supreme Court resorted to so called "supra-constitutional principles" in order to justify its reasoning.

The then Supreme Court President Agranat and Justice Sussman wrote the majority opinion. Justice Haim Cohen wrote a minority opinion.

President Agranat's opinion was the leading opinion in favor of dismissing the appeal. Although he admitted that there was no positive law which enabled the Central Elections Committee to bar the Socialists List, he considered the problem before the court as "constitutional question of primary importance with which it must be dealed"[344] and held that Israel's existence as a "Jewish state" is a "fundamental constitutional fact", that may not be challenged by any authority of the country, and any party list that rejects this fact may therefore not participate in parliamentary elections.[345] President Agranat clearly emphasized Israel's existence

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339 Knesset Elections Law, 1959, 13 L.S.I. (1959) 121 (This law defined the powers of the Central Elections Committee)

340 Sections 18-23 of the Knesset Elections Law, 1959, ibid.; *Yeredor,* supra note 6, at 376

341 *Yeredor,* ibid, at 381

342 Ibid., at 365

343 Id., at 365-366

344 Id., at 385

345 Id., at 385-386

as "Jewish state", and moreover declared this condition as a "fundamental constitutional fact" justifying the limitation of the right to participate in elections.

When the laws of the state are interpreted - so Agranat - one constitutional fact should always be considered, namely "the fact that the state of Israel is a living state and its existence and continuity cannot be challenged." Hence - so Agranat - taking into consideration the aims of the Socialists List, the Central Elections Committee was obliged to bar the list from participating in the elections.[346] President Agranat's opinion is mainly based on the additional factor of the alleged "identification" of the members of the Socialists List with the meanwhile disqualified and illegally declared El-Ard movement.[347]

According to President Agranat this factor justifies that "Israel, like any other democratic state, refuses to recognize a group" that - in his opinion - "only acts in the democratic system in order to overthrow the system."[348]

Justice Sussman also approved the decision of the Elections Committee. He acknowledged the basic "supra-constitutional" principles - namely "the right of the society to defend itself" - as a constitutional source to bar a list.[349] In order to found his opinion Justice Sussman recognized the existence of extra-statutory unwritten factors, emanating from natural law and staying above regular and constitutional norms. He also referred to a decision of the Supreme Court of Germany, in 1953[350] as a lesson learned from the fall of the Weimar Republic, established after the first World War in Germany. Basing his arguments on the existence of "natural law principles" Justice Sussman stressed that Israel was a "defensive democracy" in which the means to defend the existence of the state are in the hands of the Court even if they are not detailed in the Elections Law.[351]

Justice Haim Cohn wrote a strong dissenting opinion and sharply criticized the notion of the existence of "natural law principles". He argued that in the absence of any statutory provision granting the Elections Committee the power to exclude a list on the basis of its program and ideology, it had no power to do so.[352] He held:

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346 Id., at 386-387

347 Professor Rubinstein took the view that the *Yeredor* decision of President Agranat holds that "the mere denial of Israel as a Jewish state is, of itself, already a factor that would justify the disqualification of a party list to the Knesset elections." Rubinstein, The Constitutional Law of the State of Israel, supra note 225, at 155-159, 177. Professor Kretzmer on the other hand is of the opinion that this is not the only possible reading of Agranat's opinion. Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 26

348 President Agranat relied in this context upon Ernest Barker's Book "Reflections on Government" and also cited words from a Congress-Speech of the former American President Abraham Lincoln. *Yeredor,* supra note 6, at 388

349 Ibid., at 389-390

350 VRG 11/53 (Gutachten) 347 L (BGH) Z 11, at 34, 40

351 *Yeredor,* supra note 6, at 389-390

352 Ibid., at 368-384

> "... in a country where the rule of law prevails, a person may not be deprived of any right, be he the most dangerous criminal and despicable traitor, except and only by in accordance with the law. Neither the Election Committee nor the Court legislate in this state. The Knesset is the sole legislative authority and it empowers designated bodies, if it wishes to do so. In the absence of such legislative authorization, neither common sense, necessity, love of country nor any other consideration whatever, justify taking the law into one's own hands and depriving another person of his right."[353]

He furthermore held that:

> "In certain countries the security of the state, the sanctity of religion or the achievements of the revolution and the dangers of the counter-revolution, and all other similar values, cover up all crimes and expiate all deeds committed without authority and against the law. In some places they have invented a 'natural law' which is above any law and, if need arises, sets aside the law, following the saying, 'when the time comes for action, you may break the law.' These are not the ways of the state of Israel; its ways are the ways of the law, and the law is given by the Knesset or by him whom the Knesset has given its express authorization."[354]

In order to found his opinion Justice Cohn referred to a number of statutory provisions in English law, the American constitution and the German Basic Law, all imposing limitations on the right to be elected. He showed that in England and the United States general limitations are related only to the candidate's criminal record.[355] Justice Cohn also showed that Article 21(2)[356] of the German Basic Law, 1949 (Grundgesetz) - the Constitution of the Federal German Republic - contains on the other hand an express provision for the prohibition of political parties also affecting the right to campaign for election.[357]

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[353] Id., at 379

[354] Id., at 382. [In discussing the *Yeredor* case Shlomo Guberman also argued that the task to fight against subversion lies primarily in the legislature and not the courts. He noted that "...the judgment has created a feeling of uncertainty by introducing a supra-constitution at a time when even an ordinary constitution is missing" and he stressed that "the need for legislative action has become acute." Shlomo Guberman, Israel's Supra-Constitution, 2 Isr.L.Rev. (1967) 455, at 460. See also the critical opinion of Amos Shapira, The Status of Fundamental Individual Rights in the Absence of a Written Constitution, 9 Isr.L.Rev. (1974) 497, at 504-505]

[355] *Yeredor,* supra note 6, at 382-383

[356] Article 21(2) of the German Basic Law, 1949 (Grundgesetz) states that parties oriented by their purposes or the conduct of their supporters towards impairing the fundamental order of a free democracy or the removal or endangerment of the existence of the Republic, are unconstitutional, and entrusts the resolution of the unconstitutionality question to the Constitutional Court. See Basic Law of 23rd May 1949 (Grundgesetz - BG B1 5.1)

[357] *Yeredor,* supra note 6, at 383-384

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Conclusions

1. The *Yeredor* decision emphasized the "fundamental credo of Israel as a Jewish state" and used the theory of a "defensive democracy" - in which the means to defend the existence of the state are in the hands of the courts even if they are not detailed in the law - as justification for restricting the political rights of Palestinian Arab opposition groups that supported forces in the Arab world.
2. The *Yeredor* decision held that new parties which did not accept the rules of the game - i.e. the declared constitutional fact that Israel is a living and a Jewish state - were not guaranteed an automatic right to participate in Knesset elections.
3. The *Yeredor* decision established that the concept of Israel as a "Jewish state" could serve as the legal basis for the exclusion of a party - consisting of Palestinian Arab citizens of Israel - to run in Knesset elections.
4. The *Yeredor* decision was only applied to new parties, but it was not enforced on parties already represented in the Knesset, even when it was proved that their ideology denied the legitimacy of the state of Israel - as it was the case with some ultra-orthodox Jewish parties.
5. In the case of *Neiman v. Central Elections Committee for the Elections to the 11th Knesset*[358] (hereinafter: *Neiman I* case) - which will be discussed in short in the following sub-chapter - it became clear that the *Yeredor* ruling - namely the power of the Supreme Court to act without express statutory provision - was applied narrowly and only to Arab lists which challenged the nature of Israel as a "Jewish state". It was not applied to Jewish racist party lists, such as the extreme racist and anti-Arab "Kach" party, lead by Rabbi Meir Kahane who openly called for the use of violence against the Palestinian Arab people.

6.2.1.2. Neiman v. Central Elections Committee for the 11th Knesset (1984)

The Facts of the Case

In this case the Central Elections Committee disqualified two party lists from participating in the elections to the 11th Knesset.

One list was the "Progressive List for Peace" (PLP) a joint Palestinian Arab-Jewish list, which was disqualified by the Elections Committee on the ground that it contained within it so called "subversive elements which conducted themselves in a manner that identified with the enemies of the State."[359]

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[358] *Neiman I,* supra note 6, 8 S.J. (1969-1988) 83. For a critical analysis of this case see Claude Klein, The Defence of the State and the Democratic Regime in the Supreme Court, 20 Isr.L.Rev. (1985) 397

[359] *Neiman I,* ibid., at 87-88

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The political program of the PLP was that it called for the establishment of an independent Palestinian state and viewed the PLO as the legitimate representative of the Palestinian Arab people. The PLP was a completely nonviolent party list, did not challenge the existence of the state of Israel and did not deny the right of the Jewish people to an independent state. More than that, the PLP was composed of an equal number of Arab and Jewish candidates, and the second candidate on the list was the reserve army General Matti Peled.[360]

The other list was the extreme anti-Arab "Kach" list which was disqualified by the Elections Committee on the ground that it advocates racist and anti-democratic principles, that it openly supports terrorist acts and that it seeks to encourages enmity and hatred between different segments of the population.[361]

At this point it seems appropriate to make a short glance at the political ideology and program of Rabbi Meir Kahane's movement.

Professor Ehud Sprinzak of the department of political sciences at the Hebrew University extensively researched on Israel's Jewish Underground, the Radical Right and Rabbi Meir Kahane.

In his book entitled "The Ascendance of Israel's Radical Right" - published in 1991 - Professor Sprinzak elaborated Rabbi Kahane's attitude towards the Palestinian Arab people. He wrote as follows:

360 Hofnung, supra note 240, at 180-181

361 *Neiman I*, supra note 6, at 88

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" The Arabs:
No political issue occupied and obsessed Rabbi Meir Kahane more than the question of the Arabs in Israel and the occupied territories, even before he moved to Israel. When the JDL [Jewish Defense League] embarked on its violent course in late 1969, it demonstrated and protested at the Arab U.N. delegations in New York. After he came to Israel in 1971, the Arabs became Kahane's prime target, both for polemics and for aggressive actions.
Kahane's profound internalization of the age-old suffering of the Jews, and his consequent hostility to the Gentiles had been the most dominant force in his political psychology. And for Kahane, the Arabs were the ultimate Gentiles...
Kahane stated his theory in a nutshell by saying that the Arabs are 'thorns in our eyes.' 'They are vicious and mortally dangerous, and they ought to be expelled from the Jewish state by any means.'
Kahane's theoretical discussion of the Arab problem has two aspects, religious fundamentalism and secular nationalism: Like writers of Gush Emunim, Kahane addresses two major questions: First, do the Arabs have any collective or individual rights in the state of Israel? Second, what should the government of Israel do about the answer to this question? ...Kahane's fundamental proposition is that all authoritative Jewish sources make it clear that the Promised Land was given to the chosen people in a specific way. They were not offered a choice, but were commanded to live and shape *Am Segula* (A special nation) in isolation, with no interference from others... Kahane does not make the usual nationalistic argument - that the land is Jewish property because it belonged to the Jews before they were forced into exile, since they never gave it up willingly. Instead he argues that the land is owned by the Jews because they *expropriated* it in the name of God and his sovereign will - an act that can be repeated today with no remorse, since God's will has not changed... Kahane's position is that 'aliens in general and Arabs in particular have no *a priori* rights in the country whatsoever. Whatever rights they may enjoy depends on the goodwill of the Jews, the full owners of the country. And these rights are limited at best, for the Halakha instructs that alien residents can never be equal members of the community and enjoy full political rights.'
Thus, [so Kahane] even Muslims who qualify for some rights can never become full citizens of the state of Israel. A Muslim may remain on the land as an alien resident, pay special taxes, submit to special labor regulations, and swear allegiance to the state. But even then, he will not be able to live in Jerusalem, will occasionally be checked for his loyalty, and in general must be humble and low.'
The Arabs who are not ready to live according to these rules, and thus remain hostile to the Jews, will in Kahane's scheme be treated according to the biblical regulations applied by Joshua Ben-Nun to the ancient Canaanites. Joshua, Kahane reminds us, sent the Canaanites letters offering them three alternatives: leave the land, fight for it and bear the consequences, or peacefully surrender to the Jews and obtain the status of loyal resident alien."[362]

[362] Sprinzak, The Ascendance of Israel's Radical Right, supra note 286, at 224-225

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Professor Sprinzak continued his research about Kahane's readiness to use violence against Palestinian Arabs and wrote as follows:

> " Kahane never denied his penchant for violence, and in his own account of the Jewish Defense League, he devoted a whole chapter to the justification and rationalization of its violence. While making the usual argument that 'violence against *evil* is not the same as violence against *good,*' and that violence for self-defense is fully legitimate, Kahane reached his famous conclusion that since Jews have been victimized for so long, 'Jewish violence in defense of Jewish interest is *never* bad.' Jewish violence, according to this theory, is nothing but an extension of Jewish love, *Ahavat Yisrael...*".[363]

After the disqualification of the PLP and the Kach party by the Elections Committee, members of both lists appealed to the Supreme Court, which allowed the petitions and reversed both decisions of the Elections Committee. Thus the extremely racist and anti-Arab "Kach" party was allowed to run in the elections to the 11th Knesset.

The Decision of the Supreme Court

The decision of the Supreme Court in the *Neiman I* matter is a joint decision of both appeals and was handed down by five judges. The leading opinion of this judgment was written by the then Supreme Court President Meir Shamgar, with whom two other judges, Moshe Bejski[364] and Menachem Elon[365] basically agreed.

The majority opinion of the Supreme Court explicitly ruled that the statutes and rulings that limit fundamental rights should be construed narrowly, in spite of the fact that the *Yeredor* precedent established the Central Elections Committee's authority to disqualify a list even without the existence of a specific provision, only on the basis of the list's ideology, denying the Jewish nature of the state.

In the majority opinion it was held that in the absence of any parliamentary legislation, one should not deduce from the *Yeredor* precedent that the Supreme Court considered the Elections Committee or itself competent to expand the

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[363] Ibid., at 235

[364] *Neiman I,* ibid., at 174-185. Justice Bejski's reasoning advocates the idea of non application of the *Yeredor* jurisprudence to anti-democratic lists. He explicitly distinguished between the negation of the existence of the state and the injury of the democratic character. Due to the lack of statutory authorization for the Committee to disqualify the list on the grounds that it denied the democratic nature of the state, there is no justification to expand the *Yeredor* ruling. Justice Bejski based his ruling on the "reasonable possibility" test, which was advocated by Justice Aharon Barak. Id., at 178

[365] *Neiman I,* id., at 136-154. Justice Elon pronounced the rule of law as being paramount in the Israeli legal system and held that the Elections Committee does not have any discretion to disqualify a list for other reasons as set forth in the Elections Law. In his reasoning Justice Elon surveyed at great length Jewish law sources - Torah and Halakha - and the principles of Jewish heritage. Id., at 143-153

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grounds for disqualifying a list to so called "less extreme" circumstances, such as the anti-democratic and racist lists.

Those lists could - according to the majority opinion in this *Neiman I* case - not be excluded from the electoral process only on the basis of ideology.[366]

The *Neiman I* decision by the Supreme Court lead to the situation that the said "Kach" party was allowed to run in the elections to the 11th Knesset, in which Rabbi Meir Kahane won a seat as Knesset Member.

Conclusions

The *Neiman I* ruling is - as far as it concerns the permission of Kahane's "Kach" party - illegal, absolutely unacceptable and immoral:

1. In complete disregard of Israel's Penal Code, 1977[367] and in total violation of the ICERD, 1966[368] to which Israel is a party and which outlawed all forms of racism as being an obstacle to friendly and peaceful relations, and as being contradictory to the ideas of any human society, the Supreme Court decided in the *Neiman I* ruling that the *Yeredor* ruling - namely the power of the Court to act without express statutory provision - should be applied narrowly only to lists which denied the very existence of the state, but not to racist party lists, such as the extreme anti-Arab "Kach" party.

2. Comparing the *Yeredor* ruling with the *Neiman I* ruling one may discern the following disparities in the Supreme Court's perception of "who is entitled" to have fundamental political rights and "which values and interests" is the Court willing to defend:

a. In the *Yeredor* ruling the Supreme Court acted without express statutory provision and used the "Jewish state" concept to bar the right to political participation of a Palestinian Arab opposition group, despite the fact that all evidences proved that the said party did not use or advocate violence, did not form a threat or danger to the state or its institutions, and did only challenge the discriminatory nature of the state of Israel as a "Jewish state".

b. In the *Neiman I* case on the other hand the Supreme Court refused to apply the principles that were established in the *Yeredor* ruling to the extremely racist, anti-Arab and anti-democratic "Kach" party, despite the fact that sufficient evidences existed before the Court that this party called for the use of violence against the Palestinian Arab people living in Israel and the Occupied Territories.

3. The Supreme Court's permission of Rabbi Meir Kahane to participate in the elections to the Knesset, to participate in the public and political life of Israel and to present his views had especially harmful effect to the whole Israeli society.

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[366] Id., at 83, 93

[367] Sections 144, 173, 214 of the Penal Law, 1977, supra note 287

[368] ICERD, 1966, supra note 135

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Over the years Kahane's racist, anti-Arab and anti-democratic ideas were more and more implanted into Israel's political and legal culture, with the result that - as I have personally witnessed many times - there exists a deep-seated racism against the Palestinian Arab people among large parts of Israel's religious and secular Jewish population.

Moreover, anti-Arab governmental policies and practices are legally and judicially justified,[369] laws are not enforced when it comes to anti-Arab criminal offenses and anti-Arab speeches made by public religious and/or political figures are tolerated without any legal sanctions.[370]

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369 See supra sub-chapter 3. (The Concept of Israel as a "Jewish State" and its Impact on the Right to Equality and Minority Rights), sub-chapter 4. (The Concept of Israel as a "Jewish State" and its Impact on the Right to Citizenship and Nationality), sub-chapter 5. (The Concept of Israel as a "Jewish State" and its Impact on the Right to Association) and Chapter G. (The Right to Property)

370 See the following examples:
(1) On 10 October 1997, it was published that Mr. A Aryav, the Mayor of Nazareth Illit, had stated publicly that he did not want apartments in Nazareth Illit to be sold to Arabs. The Legal Center for Arab Minority Rights in Israel sent a letter to the Attorney General asking that the Mayor should be investigated and criminally prosecuted for hate speech propagated by public officials. The Attorney General refused to open an investigation against the Mayor of Nazareth Illit. See Equal Rights and Minority Rights for the Palestinian Arab Minority in Israel, A Report to the UN Human Rights Committee on Israel's Implementation of Articles 26 & 27 of the ICCPR, submitted by: Arab Human Rights Organizations (Adalah: The Legal Center for Arab Minority Rights in Israel and The Arab Association for Human Rights (HRA)), Nazareth, July 1998
(2) Similarly, Mr. Ozi Cohen, the Deputy Mayor of Ranana, stated in a newspaper interview: "There is a hygienic problem with the Arabs. They are dirty. What a smell, God help us." On 28 June 1997, MK Dr. Azmi Bishara requested that the Attorney General criminally charge Mr. Cohen for arousing racial hatred against the Arab minority of Israel, but the Attorney General did not charge Mr. Cohen. Ibid., at 28
(3) In the Saturday night sermon on 5 August 2000, Rabbi Ovadia Yosef, the spiritual leader of the ultra-orthodox Shas party (which has 17 seats in the Knesset) called the Palestinian Arab people as "snakes" and in taking Prime Minister Barak to task for trying to make peace with "snakes" he stated as follows: "Where are this man's [Barak's] brains? He runs after them [the Palestinians] like someone running amok...Why are you bringing them close to us? You bring snakes next to us. How can you make peace with a snake?" Rabbi Yosef went on to term the Palestinians "Ishmaelites" and said: "They are all accursed, wicked ones. They are all haters of Israel. It says in the Gemara [religious text] that the Holy One, blessed be He, is sorry he created these Ishmaelites."
http://www3.haaretz.co.il/engl/scripts/article.asp?mador (7 August 2000)
No legal actions against Rabbi Ovadia Yosef were taken until today.

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6.2.2. The Basic Law: The Knesset (Amendment No. 9) (1985)

In 1985- following the Supreme Court decision in the matter of *Neiman v. Elections Committee for the* 11th *Knesset* - the Basic Law: The Knesset was amended by adding Section 7(A) which provides as follows:

> "A candidates list shall not participate in elections to the Knesset if its objectives or actions entail, explicitly or by implication, one of the following:
> (1) denial of the state of Israel as the state of the Jewish people
> (2) denial of the democratic nature of the state;
> (3) incitement to racism."[371]

Sub-section (1) of Section 7A - relating to "the state of Israel as the state of the Jewish people" - is a further expression of the aim of Israel to be first of all the state of the Jewish people, and not the state of *all* its citizens and inhabitants - including the native Palestinian Arab people - living on the same territory.

The first sub-section of Section 7A is problematic and discriminatory, insofar as it grants legal status to the idea of Israel as "being the state of the Jewish people" alone and not of *all* its citizens, Arab and Jewish alike.

The discriminatory nature of this provision for the native Palestinian Arab people of Israel was best expressed in the debates held in the Knesset in connection with the adoption of Section 7A(1) of the Basic Law: The Knesset. Tewfik Toubi, a Palestinian Arab Knesset member, described the discriminatory nature as follows:

> "To say today in the law that the state of Israel is the state of the Jewish people, means saying to 16%[372] of the citizens of the state of Israel that they have no state and they are stateless, that the state of Israel is the state only of its Jewish inhabitants, and that Palestinian Arab citizens who reside and live in it on sufferance and without rights equal to those of Jewish citizens... Don't the people who drew up this version realize that by this definition they tarnish the state of Israel as an apartheid state, as a racist state?"[373]

Tewfik Toubi MK proposed that instead of the version of the "existence of the state of Israel as the state of the Jewish people", the proposed amendment to the Basic Law: The Knesset should only contain the sentence

> "...denial of the existence of the state of Israel."

Another proposal was submitted by the Jewish Knesset member Peled of the Progressive List for Peace (PLP), who suggested to refer to Israel as

> "...the state of the Jewish people and its Arab citizens."[374]

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[371] Section 7A of the Basic Law: The Knesset (Amendment No.9) 1985, 39 L.S.I. (1984/85) 216

[372] In 1999 the Palestinian Arab citizens of Israel constituted already nearly 20% of the total population.

[373] 42 D.K. 3899-3900 (31.07.1985)

[374] Ibid., at 3906

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However, both suggestions were refused with the argument - put forward by the Chairman of the Knesset Constitution and Law Committee - that "the Declaration of the Establishment of the State of Israel of 1948 would clearly speak of the establishment of a Jewish state in Eretz-Israel."[375]

Thus Section 7A(1) of the Basic Law: The Knesset became legally effective and grants legal status to the idea that Israel is solely the state of the "Jewish people" - instead of being the state of "all its citizens".

The discriminatory approach of this amendment became specifically evident three years later - in 1988 - in connection with the interpretation of Section 7A(1) of the Basic Law: The Knesset by the Israeli Supreme Court in the matter of *Ben Shalom v. Central Elections Committee for the 12th Knesset*.[376]

The two concrete questions answered by the Supreme Court in this case were:

1. What conditions must be met in order for a list to be regarded as "denying the existence of Israel as the state of the Jewish people."
2. Was sufficient evidence brought before the Elections Committee in order to justify the disqualification of a party list from participating in Knesset elections according to Section 7A(1).

6.2.2.1. Ben-Shalom v. Central Elections Committee for the 12th Knesset (1988)

The Facts of the Case

In 1988, right-wing activists of the Likud and Techiya[377] parties requested the Elections Committee not to allow the participation of the Jewish-Arab party list "Progressive List for Peace (PLP)" to run in the elections to the 12th Knesset.

The petitioner's argument was that the PLP does not fulfill the conditions set up in Section 7A(1) of the Basic Law: The Knesset.

The general message which emerged from the PLP's official party platform was one of opposition to Israel's nature as the state of the "Jewish people", connected with the party's ideological commitment to the establishment of a democratic, secular, bi-national state composed of and belonging to both its Jewish and Arab citizens, with both groups to be granted equal rights in all spheres of life.

The PLP's party platform stated in this regard as follows:

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375 Id.

376 E.A. 2/88, *Ben Shalom v. Central Elections Committee for the 12th Knesset,* 43(iv) P.D. 221; for a summary in English see 25 Isr.L.Rev. (1991) 219. See also Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 30

377 The Tehiya (Renaissance) party is a radical right political party and was established in 1979. It tries to bring together secular and religious Jews and their most known leaders are: Professor Yuval Ne'eman and Geula Cohen. See Sprinzak, supra note 286, at 318

"The PLP will struggle for another Israel, an Israel that is for all its citizens."[378]

The Elections Committee rejected the request to disqualify the party from participating in the upcoming elections, leading to the situation that a petition against this decision was filed to the Supreme Court on behalf of the Likud and Techiya parties.[379]

The Supreme Court - by a hesitant majority of 3-2 - decided to reject the petition and to uphold the decision of the Elections Committee and to allow the PLP to participate in the elections.[380]

The Decision of the Supreme Court

The majority opinion was delivered by the then Supreme Court President Meir Shamgar, and the two justices Shlomo Levine and Moshe Bejski.

Two of the majority judges were unwilling to enter into "unneeded ideological definitions" and did not discuss the meaning of Section 7A(1).

They held that at a minimum, the definition of "Israel as the state of the Jewish people" is based on three fundamental principles:

1. The Jews form the majority of the state of Israel.[381]
2. The Jews are entitled to preferential treatment - e.g. the Law of Return.[382]
3. A reciprocal relationship between the state and the Jews outside of Israel.

Any list that rejects these fundamentals must be disqualified.[383]

Two judges - namely Meir Shamgar and Shlomo Levine - rested their decision on the conditions laid down in the *Neiman II*[384] case for the disqualification of a list under the Section 7A(1).[385] These conditions include:

1. The "disqualifying grounds" must be a central aim of the list.
2. The list must act to promote that aim and see that it materializes.

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378 *Ben Shalom,* supra note 376, 43(iv) P.D. 221, at 275-276; 25 Isr.L.Rev. (1991) at 220

379 Ibid.

380 Id., 25 Isr.L.Rev. (1991) at 221

381 In that context the frightening question arises what measures will the Israeli governments develop and apply (in addition to the already existing Law of Return, 1950 which gives to every Jew living throughout the world the right to immigrate) in order to accomplish the goal that the existing minority - the Palestinian Arab people - remains a minority also in the future? According to moderate estimates in population growth carried out by the Israeli Central Bureau of Statistics, by the year 2010 the Arabs will constitute 25% of the total population of Israel. See Kretzmer, supra note 14, at 6, note 8

382 Four of the judges agreed that a list that advocates repeal of the Law of Return, 1950 must be disqualified. For the discriminatory nature of the Law of Return regarding the Palestinian Arab people see sub-chapter 4.2.1. (The Impact of the "Jewish State" Concept on Legislation relating to the Right to Citizenship and Nationality)

383 Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 30

384 E.A. 1/88, *Neiman v. Central Elections Committee for the 12th Knesset*, 42(iv) P.D. 177 [The *Neiman II* case]

385 *Ben Shalom,* supra note 376, 25 Isr.L.Rev. (1991) at 221

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3. The participation in the elections must be a means of achieving the disqualifying aim or furthering the activities of the list to promote it, and the disqualifying aim must be given extreme expression.

In order to find out if the mentioned conditions exist, Justice Shamgar applied the "clear and present danger test" and held that - in the specific case - there was no clear and present evidence that the said conditions have been met with regard to the Progressive List for Peace (PLP).[386]

The minority opinions were delivered by the two justices Dov Levine and Menachem Elon, which both agreed that any attempt to define Israel as the state of *all* its citizens is tantamount to the denial of the existence of the state itself.

Justice Dov Levine argued in his opinion that a list or political party that demands total equality between Jews and Arabs - on the group as well as on the individual level - should be excluded in accordance with Section 7A(1) of the Basic Law: The Knesset. His discriminatory and anti-democratic words sound as follows:

> "The PLP asks for absolute equality between the Arabs and Jews in Israel. It asks to apply this request [for equality] on the Jewish character of the state and such a list [or political party] should be outside the Knesset."[387]

He held that the evidences brought before the court and described and analyzed by him revealed that the PLP's views and ideology were undoubtedly such as to negate the existence of the state of Israel as the state of the Jewish people, since the PLP demands total equality between Jews and Arabs in Israel.

In complete disregard of the reality - namely the bi-national character of the state - Justice Menachem Elon added in his minority opinion that the state of Israel is not a Jewish-Arab state but that "it is the state of and for the Jewish people only."[388]

Although the Supreme Court split as to the result, there was general agreement among the justices in the majority and the minority that a political party may be disqualified under Section 7(A)(1) of the Basic Law: The Knesset, if it rejects the ideology of "Israel as the state of the Jewish people" - even if there is no "subversive element" participating in the party and no danger to the "security" of the state exists.

Conclusions

1. In the *Ben Shalom* case the Supreme Court interpreted Section 7A(1) of the Basic Law: The Knesset in such a way as to afford primary status to the Jewish character of the state of Israel. Participation in the parliamentary process is denied to a list that challenges the discriminatory nature of "Israel as the state of the Jewish

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386 Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 34, note 42

387 *Ben Shalom,* supra note 376, 43(iv) P.D. 221, at 240

388 Ibid., at 272

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people", even if the list is committed to achieving a change in the "Jewish state" concept through the parliamentary process alone.

2. In doing so, the Supreme Court ruled in contradiction to the principles of a democracy and limited the rights of Arab political parties from participating in the election process. Professor David Kretzmer of the Hebrew University and a member of the UN Human Rights Committee stated in his criticism of the Court's interpretation of Section 7A(1) of the Basic Law: The Knesset as follows:

> " The implications of section 7A(1), as interpreted [by the Supreme Court] in the PLP case, must be discussed on two levels. The first, ... implies a model of Israel as a Jewish state that is quite different from the 'Frenchness of France.' Four of the judges in the PLP case explicitly agreed that a list that advocates repeal of the Law of Return must be disqualified. Would a French political party that objected to a French law granting immigration privileges to persons of French origin be denied the right to run for election on the grounds that it denied the Frenchness of France?
> The wider implications of section 7A(1) are even more significant than its implications in the electoral context. These wider implications, which were articulated in the most radical fashion by the dissenting justices, are that on the decidedly fundamental level of identification and belonging there cannot be total equality between Arab and Jew in Israel. The State is the state of the Jews, both those presently resident in the country as well as those resident abroad. Even if the Arabs have equal rights on all other levels the implication is abundatly clear: Israel is not *their* state."[389]

6.2.3. The Political Parties Law, 1992

Section 5(1) of the Political Parties Law, 1992[390] also disqualifies, *inter alia,* the registration of a political party

> "...if there exists in one of its aims or actions, expressly or impliedly, the negation of the existence of the state of Israel as a Jewish and democratic state."

Section 5(1) corresponds to Section 7A(1) of the Basic Law: The Knesset. Thus, the above discussed *Ben Shalom* case also provides the precedent regarding the interpretation of Section 5(1) - as it happened in *Yaseen v. Yamin Israel.*[391]

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389 Kretzmer, The Legal Status of the Arabs in Israel, supra note 14, at 31

390 Political Parties Law, 1992, supra note 11

391 *Ganem Yaseen v. Yamin Israel*, 50(II) P.D. 45; for excerpts in English of this case see Adalah, Legal Violations of Arab Minority Rights in Israel, supra note 151, at 105

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6.2.3.1. Ganem Yaseen v. Yamin Israel (1995)

In this case the followers of Rabbi Meir Kahane and other ultra-Orthodox religious groups succeeded to register a political party which called in its platform for the expulsion of the Arab citizens from Israel. The aims of the party were:

> "Article 2. All the land of Israel belongs to the people of Israel and to them alone, and it cannot be divided.
> Article 5. The constitution and the law of the state of Israel will be based on the Jewish law.
> Article 6. The right to vote and to be elected to the Knesset would be conditioned in an oath of loyalty for the state of Israel as a Jewish state. The completion of population exchange that started in the late forties by absorbing most of the Jews from the Arab countries would be gained by settling the enemies of Israel in their lands."[392]

Not only that non of the individuals on the party list were ever prosecuted for incitement to racism, the Supreme Court rather dismissed an appeal against the permission of the registration of the said party. Supreme Court President Aharon Barak, who wrote the judgment for the court, explained as follows:

> "Article 2 of Yamin Israel's platform is general. It determines that all of Israel's land belongs only to the people of Israel, and that does not indicate a breach of the rights of the non-Jewish minority...this is a political statement, that within it we can maintain the democratic nature of the state of Israel."[393]

As to Article 5, Justice Barak commented:

> "The ambition to change the laws of the state, by itself, is not sufficient to prevent the registration of a political party ...This aim does not contradict the democratic existence of the state of Israel at all. Indeed the Jewish religious law is an asset of our national culture. It joined the Jewish people together its long history...the Jewish religious law inspires the formation of our legislation and its interpretation in keeping with the democratic and Jewish features of the state as one."[394]

As to Article 6, Justice Barak explained:

> "The demand for an oath of loyalty to the state of Israel as a Jewish state - without a denial of an oath to the state as a democratic state - is not an illegal aim and is not racist...as for the second part of Article 6 of the aims, indeed this aim is problematic. Yet, the need to give a narrow interpretation to Article 5 of the Poltical Parties Law, and the necessity to use it in extreme situations only, I find it suitable to confirm the Registrar's decision...no matter what the attitude is for this aim, it should be examined politically."[395]

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392 Adalah, ibid.
393 Id., at 106
394 Id.
395 Id., at 106-107

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In the case of *Yaseen v. Yamin Israel* the Supreme Court once again refused to accept that a political party which calls for the expulsion of the native Palestinian Arab citizens of the state of Israel is racist, dangerous and unjust, and an absolute obstacle to friendly and peaceful relations between the two involved population groups - i.e. the Jewish and the Arab people.

Thus, by allowing the registration of a racist political party, the Supreme Court once again issued a totally illegal, immoral and unacceptable judgment that violates Israeli law (Penal Law, 1977) and international law (ICERD, 1966).

Conclusions

1. Section 5(1) of the Political Parties Law, 1992 limits the registration of political parties on the basis of the state's preference for one national group - the Jewish population. This section ensures the perpetuation of discrimination against all non-Jews in Israel, i.e. mainly the native Palestinian Arab people, since a political party platform, which calls upon the state of Israel to provide full and equal rights to the Palestinian Arab citizens, and thus challenges the "Jewish state" concept of Israel, will be disqualified from running in the Knesset elections.

2. The consequence of this legal reality is that the Palestinian Arab people as well as those Israeli citizens of the state which are not committed to the concept of Israel as a "Jewish state" have no political right to freedom of expression and self-organization and cannot change the government in a democratic way.

7. Summary and Conclusions

1. Despite Israel's real nature of a bi-national (Jewish-Arab) state and its commitments to accord equal rights to the Arab minority living in Israel, from the very beginning the nature of the state of Israel to be a "Jewish state" was strongly emphasized and determined the power relations within the state.

2. The definition of the state as "Jewish state" played the most important role in establishing the status of civil and political rights. The political and ideological importance of the concept of Israel as "Jewish state" manifests itself in many legal provisions and judicial decisions, due to the fact that the "Jewish values" were directly translated into case law and legally binding norms, which explicitly benefit the rights and interests of the Jewish population at the expense of the Palestinian Arab population.

The legal description of the country as "Jewish state" affects all aspects of rights and freedoms, but certainly has specific negative impact on the Palestinian Arab's right to equality, citizenship, property (especially land and housing rights), freedom of speech, cultural and political associations, participation of political groups in

Knesset elections, if such groups challenge Israel's nature as a "Jewish state" and propose "a state of *all* its citizens".

3. Although the Declaration of the Establishment of the State of Israel, 1948 defines Israel as a "Jewish state", and the recent Basic Law: Human Dignity and Freedom refers to a "Jewish and democratic state", the official doctrine by the Israeli government is that there is no established religion in Israel, properly-so called.

Nevertheless, Jewish law and laws influenced by Jewish values have - compared with the laws of the different other religious-ethnic-national communities - an outstanding and even unique position within Israel's legal system. As a result of my researches, I come therefore to the conclusion that the Jewish religion is without doubt the dominant and even officially established religion in the state of Israel.

4. Except for matters of personal status, religious law does - in principle - not order the entirety of public and private life. The state accepts basic values of democracy and grants - theoretically - to all citizens basic democratic rights.

Since there are no express provisions, which define the state in a religious way, it cannot be said that the character of the state must be defined religiously.

As the reality of the legal system of Israel, however, shows the fact is that there is in important fields a clear priority to Jewish, Moslem, Druze and Christian religious values with the effect of infringement of fundamental rights.

Negatively affected by this priority to religious values are many aspects of life, such as the principle of equality, the principle of freedom of movement and the right of freedom from religion.

From a pure secular understanding of the legal and political concept of a state, where separation of religion and state is a constitutional precept - as it is in USA and France - the promotionism of religion as it is the case in Israel is in essence inegalitarian and leads to discriminatory situation.

5. The notion of Israel as the state of the "Jewish people" became insofar a "constitutional fact" as a party list that rejects this fact was never and still is not allowed to participate in the elections to the Knesset.

6. The strong emphasis on and the legal description of the "Jewish" nature of of Israel encourages discrimination and racism against the Palestinian Arab people and makes them in every aspect of life to secondd and third class citizens.

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D. ISRAEL'S PERMANENT STATE OF EMERGENCY AND THE QUESTION OF ITS COMPATIBILITY WITH THE CONCEPT OF A LIBERAL DEMOCRACY BASED ON HUMAN RIGHTS AND FREEDOMS

1. Introduction

Since the establishment of the state of Israel in Palestine in May 1948 the issue of "state security" is considered as the most important objective of Israel's political system, and one may say that this objective also found intense reflection in the legal and judicial system of the state of Israel.

The purpose of this chapter is to provide an insight into the ideological foundation, the value-content and the spirit of Israel's concept of "state security", which is based upon the existence of a permanent state of emergency continuously in force since the inception of the state in May 1948. In short, one may say that the ideologically determining and substantially important factors of Israel's "state security" concept are 1. the definition of the state of Israel as "a Jewish state" and its Zionist foundation; 2. the rejection of the legitimacy of the Jewish Zionist state by most of the Arab world; and 3. the nature of the conflict between the Jewish Zionist state with the native Palestinian Arab people living in Israel and the Occupied Territories.[1]

Another purpose of this chapter is to examine the methods and forms which have been employed by the Israeli legislator and government in order to create emergency and security legislation, and in order to translate the "state security" concept into legally binding norms. In general, Israel's security and emergency legislation may be characterized by the following facts:[2]

1. It exists in an enormous quantity[3] and was created during a period of 52 years.

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1 Kretzmer, The Legal Status of the Arabs in Israel (Boulder Westview Press, 1990) at 136

2 Hofnung, Democracy, Law and National Security in Israel (Dartmouth Publishing Company Limited, 1996) at 48-51

3 In addition to the following examples of emergency legislation, which is to a large part still valid within Israel's legal system, there exist much more such legislation: Emergency Regulations (Absentees' Property), 1948, I.R. No. 37 (12 December 1948) Suppl. II, at 59; extended by the: Emergency Regulations (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 6; Emergency Regulations (Absentees' Property) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 38; Emergency Regulations (Absentees' Property) (Extension of Validity) (No. 2) Law, 1949, 3 L.S.I. (1949) 111; Emergency Regulations (Absentees' Property) (Extension of Validity) Law, 1949, 4 L.S.I. (1950/51) 13; and then replaced by the Absentees' Property Law, 1950, 4 L.S.I. (1949/50) 68;

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Emergency Regulations (Requisition of Property), 1948, I.R. No. 39 (24 December 1948) Suppl. II, at 87; extended by the: Emergency Regulations (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 6; Emergency Regulations (Requisition of Property) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 37; Emergency Regulations (Requisition of Property) (Extension of Validity) (No. 2) Law, 1949, 3 L.S.I. (1949) 46; Emergency Regulations (Requisition of Property) (Extension of Validity) (No. 3) Law, 1949, 3 L.S.I. (1949) 111; and then replaced by the Emergency Land Requisition (Regulation) Law, 1949, 4 L.S.I. (1950/51) 3; Emergency Land Requisition (Regulation) (Amendment) Law, 1953, 8 L.S.I. (1953/54) 47;
Emergency Regulations (Security Zones), 1949, K.T. No. 11 (27 April 1949) 169; extended by the: Emergency Regulations (Security Zones) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 47; Emergency Regulations (Security Zones) (Extension of Validity) (No. 2) Law, 1949, 3 L.S.I. (1949) 56; Emergency Regulations (Security Zones), 1949, 3 L.S.I. (1949) 57; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1960, 14 L.S.I. (1960) 11; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1962, 17 L.S.I. (1963/64) 26; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1971, 26 L.S.I. (1971/72) 29;
Emergency Regulations Concerning the Cultivation of Waste Lands and the Use of Unexploited Water Resources, 2 L.S.I. (1948/49) 71; extended by the: Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, 2 L.S.I. (1948/49) 70;
Emergency Regulations (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 6;
Emergency Powers (Detention) Law, 1979, 33 L.S.I. (1979) 89; Emergency Powers (Detention) (Amendment) Law, 1980, 34 L.S.I. (1980) 157;
Emergency (Essential Labour Services in Hospitals) Regulations, 1948, K.T. No. 2706 (18 June 1971) 1240; extended by the: Emergency (Essential Labour Services in Local Authorities) Regulations, 1984, K.T. No. 4727 (11 November 1984) 214;
Emergency Regulations (Registration of Inhabitants) (Extension of Validity) Ordinance, 1948, 2 L.S.I. (1948/49) 8;
Emergency Regulations (Foreign Travel), 1948, 2 L.S.I. (1948) 17; extended by the: Emergency Regulations (Foreign Travel) (Amendment) (Extension of Validity) Ordinance, 1948, 2 L.S.I. (1948) 16; Emergency Regulations (Foreign Travel) (Amendment) (Extension of Validity) Law, 1957, 12 L.S.I. (1957) 41; Emergency Regulations (Foreign Travel) (Amendment) (Extension of Validity) Law, 1960, 14 L.S.I. (1960) 9; Emergency Regulations (Foreign Travel) (Amendment) Law, 1961, 15 L.S.I. (1960/61) 179;
Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law, 1957, 12 L.S.I. (1957) 41; Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law, 1960, 14 L.S.I. (1960) 9; Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law, 1971, 25 L.S.I. (1970/71) 108; Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law, 1976, 31 L.S.I. (1976/77) 40; Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law, 1978, 33 L.S.I. (1978/79) 29;
Emergency Regulations (Control of Ships) (Amendment) (Extension of Validity) Law, 1957, 15 L.S.I. (1960/61) 178; Emergency Regulations (Control of Ships) (Amendment) (Extension of Validity) Law, 1970, 25 L.S.I. (1970/71) 18;
Emergency Regulations (Regulation of Guardservice in Settlements) (Extension of Validity) (No. 2) Law, 1960, 14 L.S.I. (1960) 56;
Emergency (The Shekel Coin) Regulations, 1980, K.T. No. 4095 (24 February 1980) 1080;
Emergency Order (Submission of Printed Matter for Prior Approval and Prohibition of

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2. It grants to the executive (to both the civilian and the military arm) greater powers than to the legislative and judicial branches of the government.

3. It was and is not only used in times of war and conflict, but rather as an additional administrative instrument of dealing with all spheres of daily life and routine problems which every democracy faces.

4. Most of it has remained in force until today.

5. It created a system of permanent emergency legislation which became a fundamental and effective part of Israel's legal order.

However, since the state of Israel considers itself as "a modern liberal democracy", the crucial question arising in this context is whether the permanent state of emergency together with the existing and routinely used formal emergency and security legislation (including other measures), indeed complies with the basic requirements of a liberal democratic legal order, based upon the principles of the rule of law and respect for basic individual and minority rights.

The mentioned issues will be treated in the course of this work.

Prior to these topics I will discuss on a theoretical level the relationship between the concept of "state/national security" and the governmental model of a Western liberal democracy, in order to establish a general framework against which Israel's political, legal, judicial and executive system concerning human rights and freedoms shall be measured.

The following sub-chapter 2 shall provide some considerations and definitions regarding the terms "state", "nation", "nation-state", "western democracy", "liberalism" and the "rule of law".

In this chapter I shall give an overview about the circumstances and situations which constitute the existence of public emergency in a democracy, and I shall analyze the types of emergency powers and measures which may be granted to a

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Printing and Publishing), 1988, K.T. No. 5135 (18 September 1989) 31;
Emergency Regulations (Offenses Committed in Israel-Held Areas - Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1967, 22 L.S.I. (1967/68) 20; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1970, 25 L.S.I. (1970/71) 19; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1971, 26 L.S.I. (1971/72) 28; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Continuance in Force) Law, 1974, 28 L.S.I. (1973/74) 41; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Amendment) Law, 1975, 29 L.S.I. (1974/75) 306; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Continuance in Force) Law, 1976, 30 L.S.I. (1975/76) 180; Emergency Regulations (West Bank, Gaza Region, Golan Heights, Sinai and Southern Sinai - Criminal Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1980, 34 L.S.I. (1979/80) 45

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democratic form of government acting in accordance with the principles of international law.

The here established criteria shall then also form the background and starting point for all further, in the course of this work performed, examinations of infringements on human rights and freedoms which have been committed in the name of "state security" by the Israeli government and justified by the Israeli Supreme Court.

2. Theoretical Discussion of "National Security" and "Liberal Democracy"

International human rights law accepts the view that in times of public emergency a state may take extraordinary measures and may suspend or limit basic human rights.

However, a number of common requirements which have to be respected, were established by several international treaties, namely:[4]

1. A state of emergency be one which threatens the life of the nation.
2. The measures which derogate from the state obligations be strictly required by the exigencies of the situation.
3. Certain basic human rights, such as the right to life, the prohibition of slavery, torture and retroactive criminal laws may not be derogated from.
4. Derogations may not be inconsistent with any other obligation under international law.
5. Prompt reports regarding derogations be made.

The terms "national security",[5] "public order",[6] "state security", "reasons of national security", "security considerations", "security needs", "public emergency",[7] "cases of emergency or calamity threatening the life or well-being of the community",[8] "state of emergency" and "emergency powers" are somewhat vague terms, and despite the fact that these expressions appear quite often in international

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4 Article 4 of the International Covenant on Civil and Political Rights, 1966 [hereinafter: ICCPR]; Article 15 of the European Convention on Human Rights, 1950 [hereinafter: ECHR]; Article 27 of the American Convention on Human Rights, 1969 [hereinafter: ACHR]

5 Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966 [hereinafter: ICESCR]; Articles 12, 19, 21, 22 of the ICCPR. It should be mentioned here that international conventions dealing with the issue of state security always accord to the existence of the state, i.e. the interest of organized society, the overriding importance above any other competing interests, such as human rights and freedoms.

6 Article 8 of the ICESCR; Articles 12, 18, 18, 21, 22 of the ICCPR

7 Article 4 of the ICCPR

8 Article 8 of the ICCPR

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law and academic literature it is almost impossible to establish a standard definition of them.

However, for specific purposes and in special situations it is important to know according to which criterias a "state of emergency" is proclaimed by a particular state, which emergency powers are given to the authorities of this state, and how the scope of persons who shall benefit from that "security concept" is identified.

The crucial question in this context is therefore how to determine the concept of "state security" of a specific state.

The point of departure for my analysis of the said issue is that the exact meaning and the scope of a "state security" concept can be identified and determined only after the following three factors have been taken into consideration, namely:

1. The specific nature and type of government in a given society or state.
2. The definition of the situation, which justifies the declaration of a state of emergency, i.e. the types of threats.
3. The type of emergency powers and measures, granted to the government, i.e. the kind and substance of discretion.

With regard to the first criterion, it may be said that the specific "state security" concept always depends on the underlying ideology of the state, on the nature of the state's political, economic, social and cultural system, as well as on the definition of the values and principles the state is willing to uphold.

Therefore in order to identify and to define those values and principles which shall be protected by the state under the pretext of "national security", the starting point must always be the entire theoretical framework and fundamental components of the state in question, comprising the underlying philosophy, the institutional-formal foundations, the laws and procedures of the state, and the basic values and principles.

One set of criterias to be determined is whether the concept of the state is built upon the idea of a "nation-state", a "bi-national" state, or a "multi-national", i.e. "pluralistic" state. Another set of criterions to be determined is whether the society is built upon the ideas of democracy, liberalism, capitalism, socialism or any other type of government.

The concept of a "state" primarily refers to a sovereign political organization that displays sovereignty within geographic borders and in relation to other sovereign entities;[9] while a society built upon the concept of a "nation-state" refers rather to the population living within a territory, sharing a common identity in terms of language, ethnicity and culture, as well as their shared historical experience, legend, mythology and religion.[10]

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9 Concise Oxford Dictionary of Politics (Oxford University Press 1996) at 331

10 Ibid., at 331, 335-336

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A "bi-national" state may be defined as sovereign entity over a specific territory, which recognizes the existence of two different "national" groups which form the whole population within this state.

In the case of a "multi-national" or "pluralistic" state, the country is legitimately composed of several distinct ethnic and/or religious groups.

The term "democracy" has its roots in ancient Greece.[11] The classical definition of "democracy" is the "rule by the people". Due to the fact that the "people" are rarely unanimous, "democracy" as a descriptive term may be regarded as synonymous with "majority rule".[12]

The term "democracy" and its synonym "majority rule" has various controversial aspects relating to the following issues: 1. Who is to count as "the people". 2. What is a "majority" of them. 3. Why should majorities rule over minorities (i.e. the issue of the "tyranny of the majority"). 4. Direct versus representative democracy. These subjects point to the existence of serious tensions between the idea of democracy and the concept of liberty. The basic criterias of a restrict concept of "democracy", as it was reinvented in the 18th century, are 1. that the people rule themselves through representatives, which are openly elected at regular intervals from a number of competing political parties; 2. that the persons are elected to the parliament (or House of Representatives); and 3. that the parliament makes the law.

A liberal democratic state on the other hand is characterized by the fact that it is built not only on the precept of majority rule as only method of limitation of governmental powers but also on the principles and values of liberalism, such as equality before the law and equal opportunity for all, the rule of law, division of powers, constitutionalism, individual human rights and freedoms as well as minority rights against the possible tyranny of the majority.[13]

With regard to the concept of the "rule of law" it must be said that although it became a fundamental part of the definition of a liberal democracy, the term itself may not be defined in a strict sense for it has different meanings in different legal systems and traditions, and even within the same legal system there exist numerous definitions and interpretations.[14]

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[11] From about 500 B.C. to 330 B.C. the ancient city-state of Athens called itself a democracy because all citizens could take part in political decisions. It was a direct democracy due to the fact that every citizen had a reasonable chance of being chief executive for one day. Ibid., at 24, 25

[12] Id., at 129

[13] Id., at 286-287

[14] In England the term "rule of law" has another meaning than the French terms "la principe de la legalite´" and "la regle du droit", or the term "der Rechtsstaat" in Austria and Germany. See Lon Fuller, The Morality of Law (New Haven, Yale University Press, 1964), Chapter II; Hans Kelsen, General Theory of Law and State (Boston, Harvard University Press, 1949); The Rule of Law in a Free Society: A Report for the International Congress of Jurists (New Delhi, 1959) at 191; The Rule of Law and Human Rights: Principles and Definitions (International Commission of Jurists) (Geneva, 1966)

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The specific value-content of the concept of the rule of law always depends on the political beliefs and the values of a state, and this is true also with regard to the legal system of Israel, where one may find many definitions for this term.[15]

However, despite its vagueness, the term "rule of law" can be understood as a framework, composed of certain rules and principles that may be tested and evaluated individually and which form the background of a specific legal order.

The absence of one or more of these components does not mean that the rule of law does not exist any more, but it rather constitutes an infringement of the rule of law. It is possible to identify certain principles which have become inseparable components of the rule of law as it is understood in Western liberal democracies.[16]

The starting point for every categorization is the distinction between the formal or institutional and the substantive aspect of the rule of law.

Within this classification are the principles such as that every power be based in law and exercised according to the law; that the norm granting the power was enacted by the elected legislator; the existence of primary legislation defining the purposes and the principles of the law; that the enforcement of the law, i.e. acts contravening the law be met by sanctions; the existence of an independent judiciary; the existence of an internal administrative review for decisions which are likely to affect individual human rights and freedoms; the existence of judicial review; formal and substantive equality before the law; respect for individual human rights and the rules of due process of law.[17]

The last three mentioned principles - namely the formal and substantive equality before the law, individual human rights and due process of law - are closely connected and are specifically relevant with regard to this work, dealing with the foundations of civil and political rights in Israel's legal system.

The principle of substantive equality has two aspects, namely first the equality between individuals, dealing with the question if existing legal arrangements discriminate between individuals. And second, the equality between individuals and the state, dealing with the question if legal arrangements exclude external reviews of acts of the state in the name of state/national security or national interests.

The principle of due process of law includes further rights and aspects, namely:

1. The presumption of innocence until guilt is proven in court.

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15 Hans Klinghoffer, Secondary Legislation and the rule of Law, The Constitutional Law of Israel (4th ed.) (Jerusalem, Schoken Press, 1991) at 262-342 (Hebrew); Itzhak Zamir, The Rule of Law in Israel, HaPraklit, Special Issue Published on the 25 Anniversary of the Israel Bar (1987) at 61-74 (Hebrew); Aharon Barak, The Rule of Law, in S. Shetreet (ed.), Compilation of Lectures from the Seminar of Judges (Jerusalem: 1976) at 15 (Hebrew)

16 Hofnung, supra note 2, at 5

17 Ibid., at 5 - 10

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2. The basic rights of an arrested person (the right to be informed at the time of arrest of the reasons for the arrest).
3. The right to legal counsel.
4. The right to be brought promptly before a judge.
5. The right to have access to all evidences in order to be able to prepare the legal defence.
6. The right to be able to counter allegations by providing the accused with all the evidential material in the possession of the prosecution and by bringing all of the evidence in possession of the prosecution before the court.
7. The prohibition of forced self-incrimination during investigation and interrogation or in court.
8. The prohibition of searches of a person's home without a warrant from a competent court.
9. The prohibition of electronic wiretapping without a court's permission.

According to the above elaborated criterias, a modern liberal democracy is characterized by the commitment to respect certain "red lines", i.e. certain limitations in the use of methods when it comes to resolve political conflicts.

The respect for human rights and freedoms of everybody may therefore not be considered as an obstacle, but rather as a precondition for a "secure" liberal democratic society. If a state is based upon the concept of a liberal democracy security considerations may never be the only and ultimate objective the state should try to ensure, otherwise the liberal democracy becomes an empty concept and does not really exist any more.

An emergency situation can therefore be considered as the test-case for the state's commitment to the concept of "liberal democracy" based upon the existence and respect of human rights and freedoms of individuals and minorities.

However, as mentioned above, the determination of the value-content of the concept of "state security" and its boundaries depends on the underlying ideology and formal-institutional system of the state, and always involves a judgment of those values and principles which the society aims to advance and to protect.[18]

Therefore the logic consequence is that every competing goal and interest of the state/nation - be it a national, social or economical objective - may be defined as protected interest or security need.

As the reality of many countries show the cover of "security needs" is often used in order to promote purposes which are not related to state/national security.

Many undemocratic and totalitarian states justify under the pretext of "state security" the adoption of exceptional measures and allow for atrocities to be carried

[18] Id., at 12

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out in the name of this concept for the purpose of dealing with the political opposition in the country. Isn't the state of Israel among them?

This leads me already to the second element that influences the value-content of the "security concept" of a state, namely the definition of the circumstances and situations which constitute the existence of public emergency, i.e. the types of threats a state faces.[19]

This element concerns the criterias and the requirements which justify the declaration of a state of emergency and the adoption of emergency powers.

Based upon the established premises to analyze here the concept of a liberal democratic state, I will distinguish between two basic types of challenging circumstances or situations, which form the main criterion for the determination if a state of emergency exists:

1. The situation of a direct threat to the political independence or territorial integrity of the state or its central institutions, which exists in the cases of a war, i.e. an attack by an external power or an invasion, a rebellion, i.e. the violate protest by a large number of citizens against the existing order, and a serious economic crisis.[20] Acts which constitute such a direct threat are the attack by an external power, espionage, sabotage, gorilla warfare, incitement, revolt, terrorism and subversive organizations.[21]
2. The situation of a non-violent and peaceful challenge to the social and economic order, which does not constitute a threat.[22]

The declaration of certain circumstances as threat to "state security" means that - at least according to the subjective interpretation of the decision making body speaking in the name of "state/national security"[23] - an exceptional set of circumstances exists which may be defined as a state of emergency, and thus justifies the adoption of far-reaching emergency powers.[24]

The definition of a situation or of specific circumstances as "emergency situation" or "state of emergency" is to a certain degree always a political decision or an act of a political judgment.

Due to the fact that in a liberal democracy there does not exist a predetermined economic or social order, and a mechanism for the allocation of power, resources and social benefits, a peaceful challenge to the said order does - in principal - not constitute a threat to state/national security.[25]

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19 Id., at 13
20 Id., at 28
21 Id., at 13
22 Id.
23 Id., at 15
24 Id., at 26, 28, 39-41
25 Id., at 13

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Nevertheless, it must be stressed that although many countries in the world declare to be "democratic", they at the same time employ the concept of "state or national security" in order to justify the adoption and use of exceptional harsh measures when dealing with the political opposition in the given country. Isn't the state of Israel among them?

The third factor relevant for the determination of the value-content of the "security concept" of a state concerns the type of emergency powers and the substance of discretion which is granted to a government.[26]

Emergency powers consist for example of the adoption and use of specific measures and institutions, such as the establishment of military courts, the replacement of the regular police forces by military forces, and the suspension of civil rights, individual freedoms and basic principles.[27]

In practice, however, everything centers around this factor of "discretion," which determines how much special powers are given to the executive branch of the government in order to cope with situations of a threat to "state security".

In order to prevent arbitrariness and the danger of applying the term "state/national security considerations" as a cover for the achievement of all kind of public and political purposes, not really relevant to state/national security, there should exist certain principles and guidelines which circumscribe the criteria of security considerations by setting down minimal requirements.[28]

After these general and conceptional considerations on national security, democracy and the rule of law, I shall turn now to the characteristics of Israel's "state security" concept.

3. Israel's Concept of "State Security" and the Question of its Compatibility with the Ideas of a "Liberal Democracy and Human Rights"

Many provisions of the Israeli legal system use the term "state/national security" but only a few of them clearly define this expression.[29]

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[26] Modern types of emergency powers, such as the concept of "martial law" and the "state of siege" model, began to emerge at the end of the 18th century, and are still relevant in different legal systems, *inter alia*. also in the Israeli legal system. For more details on this issue see Hofnung, supra note 2, at 34-41

[27] Ibid., at 29-30

[28] Id., at 15

[29] The Israeli legislator has often employed the terms "considerations of state security" or "reasons of security" but only very few pieces of legislation clearly define "security needs". See for example the Civil Defence Law, 1951, 5 L.S.I. (1952) 72, which clearly defines "time

However, in order to identify the exact value-content of Israel's security concept, as well as the scope of persons who benefit from this concept, it is necessary to look at the nature of Israel's social and political system.

The specific meaning of "security of the state" is always dependent on the ideological concept of the state, i.e. the values and interests the state aims to protect, and the exact borders within which the state's legal order is to be applied.

Other relevant factors are the types of threats or situations which justify the declaration of a state of emergency and the type of emergency powers and measures, granted to the government, i.e. the kind and substance of discretion.

3.1. Ideological Foundations of Israel's Concept of "State/National Security"

Israel's concept of "state/national security" is strongly connected with the ideological basis of the state to be a Jewish state, whose political aims are to advance and protect Zionist goals and values.[30]

The implementation of these Zionist values into Israel's social and legal order is carried out through the use of a specific formula for allocating political powers, social and economical benefits, as well as resources (first of all land and water, budget) - with the result that the said order favors the Jewish population.

One may say that the Palestinian Arab people does not share the "public good" as perceived by the Jewish majority in power, with the consequence that also the concept of "state/national security" cannot be shared by most of the Palestinian population living in Israel and the Occupied Territories as well.

It should be stressed here that the most important determining factor of the conceptual-ideological concept of "state security" is the nature of the conflict with the Palestinian Arab population living in Israel and the Occupied Territories.[31]

This factor involves not only territorial and ideological questions, but also religious and national issues,[32] and is strongly connected to the definition of the state

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of war" and "time of attack" when the members of the civil defence are given special powers. But even in academical literature and international law the term "security needs" is often used without much effort to define its meaning.

[30] For more details regarding the ideological concept, the basic foundations and the aspirations of the Zionist movement in Palestine before the establishment of the state of Israel, i.e. during the 19th and early 20th century, see Chapter A.2. Regarding the concept of the state of Israel as a Jewish state and the Jewish values see Chapter C (The Concept of the State of Israel as a "Jewish State" and its Impact on the Right to Equality and other Civil and Political Rights and Freedoms)

[31] Kretzmer, supra note 1, at 136

[32] Hofnung, supra note 2, at 75

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of Israel as "Jewish state", which aims to promote first of all Zionist goal, i.e. "Jewish national interests".

Since the establishment of the state of Israel up until today, a wide consensus exists among the Zionist political parties that the country's sovereignty and very existence of the state is subject to an external threat.[33]

Additionally, the issue of national security has and had from the very beginning of the existence of the state of Israel an internal dimension, arising out of the struggle between the Jewish and Palestinian national movements that preceded the establishment of the state of Israel, and out of the definition of the state of Israel to be a Jewish nation-state, and the aim of the Israeli authorities to promote Jewish national goals and to strengthen the Jewish collective of the state.[34]

Against this background and the fact that most of the Jewish public still regards the "Palestinian Arab population living in Israel as a real or potential threat" Israel's concept of national security has been formulated.

As various examples in this chapter will show, severe restrictions of human rights and freedoms occur in the name of "state/national security" in order to protect the specific value-content of Israel's nation-state concept.

In practice, however, the main problems with regard to the exact meaning of "security considerations" concern the scope of discretion accorded to decision-making bodies and exercised in the name of state/national security.

As already mentioned in previous chapters wide powers are granted to the executive branch of the Israeli government which may - in the name of security considerations - restrict human rights and freedoms in all its forms.

3.2. The Concept of Balancing Interests in "Security Matters"

According to the jurisprudence of the Supreme Court, in situations of a conflict between the rule of law in general - and individual human rights and freedoms as a specific aspect of the rule of law - and state/national security considerations, these two interests must be carefully weighed against each other according to the concept of a proper balance of interests.

33 See for example the following Knesset Debates: 6 D.K. 2180-2183 (12 May 1950); 15 D.K. 402-403 (21 December 1953); 20 D.K. 2192-2197 (3 July 1956); 47 D.K. 90-92, 107-119 and 178-185 (24 October 1966, 25 October 1966 and 1 November 1966); 83 D.K. 3954-3967 (2 August 1978)

34 Kretzmer, supra note 1, at 135-136

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The reference point at which the interest of state/national security is weighed against the interest of human rights and freedoms, i.e. the rule of law, may be called balancing point.[35]

However, the concept of balancing the interests entails inherent dangers,[36] since - as already mentioned above - the exact value-content of national security rests upon the political concept of the state/nation, therefore also the exact meaning of this balancing point depends on the underlying political ideology of a state/nation.

The danger lies therein that a situation or activity, which by itself is not inherent dangerous for state/national security but is defined politically as a serious threat to state/national security, may serve as justification for the adoption of drastic legal steps and limitations on basic human rights according to changing conditions.

Due to the fact that everything depends on the definition of the "security concept" of a state/nation, the balancing of interest often leads to strong violations or even suspension of certain or all basic rights and freedoms.

3.3. Israel's Rules of Evidence in "Security Matters"

The Israeli legal system regarding evidence is characterized by the fact that the person against which a decision in a so called "security issue" has been issued, is generally not informed of the detailed reasons for this decision.

And in the case that the said person petitions the High Court of Justice in an attempt to challenge the decision, he is - in most of the security cases - confronted with a Certificate of Privileged Evidence (CPE) issued by the Minister of Defence, stating that all, or part of the evidence upon which the decision is based is privileged on grounds of "state security".

Until the 1980's the executive authorities - when dealing with so called "security issues" - did principally not reveal the grounds for the decision, but since then[37] the practice concerning the issue of disclosing the reasons and the evidence has changed in the following way:

In cases where the revoked a license or refused to grant one to a certain applicant, who subsequently challenged this decision in the Supreme Court, the Commissioner submitted to the Court - pursuant to Section 44(a) of the Evidence Ordinance (New

35 Hofnung, supra note 2, at 11

36 Ibid.

37 See the following Supreme Court cases:
H.C. 322/81, *Makhoul (i.e. also Mahul) v. Jerusalem District Commissioner*, 37(i) P.D. 789; H.C. 606/78, *Ayub v. Minister of Defence*, for a summary in English see 9 I.Y.H.R. (1979) 337 [The Beth El case]; H.C. 541/83, *Asli v. Jerusalem District Commissioner*, 37(iv) P.D. 837

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Version), 1971[38] - a Certificate of Privileged Evidence (CPE), also called Certificate of Immunity, signed by the Minister of Defence.

Such a Certificate of Privileged Evidence (CPE) states that the evidence, on which the commissioner based his decision, is privileged for security reasons and may not be disclosed to the petitioner.

Section 44 of the Evidence Ordinance (New Version), 1971 states as follows:

> "(a) A person is not bound to give, and the court shall not admit, evidence regarding which the Prime Minister or the Minister of Defence, by certificate under his hand, has expressed the opinion that its giving is likely to impair the security of the State, or regarding which the Prime Minister or the Minister of Foreign Affairs, by certificate under his hand, has expressed the opinion that its giving is likely to impair the foreign relations of the State, unless a Judge of the Supreme Court, on the petition of a party who desires the disclosure of the evidence, finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.
>
> (b) Where a certificate as referred to in subsection (a) has been submitted to the court, the court may, on the application of a party who desires the disclosure of the evidence, suspend the proceedings of a period fixed by it, in order to enable the filing of a petition for disclosure of the evidence or, if it sees fit, until the decision upon such a petition." [39]

Section 46(a) of the Evidence Ordinance, (New Version), 1971, gives the petitioner the possibility to file a petition for disclosure of the evidence. For the purpose of deciding upon the petition, the evidence is then examined by the Supreme Court in camera, and may only be disclosed if the Court "finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure." [40]

Section 46(a) of the Evidence Ordinance (New Version), 1971, states as follows:

> "(a) A petition for the disclosure of evidence under section 44 or 45 shall be heard in camera. For the purpose of deciding upon the petition, the Judge of the Supreme Court or the Court, as the case may be, may demand that the evidence or its contents be brought to his or its knowledge, and he or it may receive explanations from the Attorney-General or his representative, and from a

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[38] Sections 44 of the Evidence Ordinance (New Version), 1971, 2 L.S.I. [N.V.] (1972) 198

[39] Ibid.

[40] According to the Evidence Ordinance (New Version), 1971 such a petition is dealt with by one justice, but in practice the petitioner has the choice between two possibilities:

1.) The petition for revealing the evidence is heard by *a judge who* will *not* sit on the bench that hears the main petition; or

2.) The *judges* who *hear the main petition also* see all the evidence; that means they rule on the issue of the *privileged evidence* and the main issue.

For more details see David Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, Israeli Reports to the XIII International Congress of Comparative Law (ed. Celia Wasserstein Fassberg, Sacher Institute, Jerusalem 1990) 183, at 202

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> representative of the Ministry concerned, even in the absence of the other parties." [41]

In an article published in the Israel Yearbook on Human Rights, Professor Shimon Shetreet is of the opinion that in cases involving a Certificate of Privileged Evidence, the Court "in fact reviews whether the evidence indeed supports the decision based on security reasons."[42]

According to my opinion this argument is not correct, because - at the first step - the Court only examines if the evidence may be disclosed to the petitioner, and in cases where not all evidence is disclosed by the Court, it is impossible for the petitioner to analyze the substantive aspect of the case and to prepare his legal Defence in the form of submission maybe additional evidence or explanations in order to prove the opposite.

As a result in a procedure involving privileged evidence which is not completely revealed to the petitioner the Court actually does not know if all evidence is provided, and therefore the Court cannot review whether the evidence really supports the decision. Such a court procedure comes in serious conflict with the principle of due process of law which includes, inter alia, that all of the evidence is brought before the Court.

With the exception of the first two judgments discussed below, the District Commissioner routinely submitted to the Court a Certificate of Privileged Evidence, signed by the Minister of Defence, and the Supreme Court without exceptions refused to disclose the evidences.

Numerous judgments[43] that are discussed in the course of this work will demonstrate, that the Supreme Court principally applied a strong formalistic approach of judicial restraint in cases where revocations or refusals of permits of Arabic newspapers or magazines were based on Regulation 94 of the Defence Emergency Regulations, 1945.

In these cases the Court did not intervene[44] and thus allowed that the subjective discretion of the executive branch prevailed over substantive judicial reasoning.

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41 Sections 46(a) of the Evidence Ordinance (New Version), 1971, supra note 38

42 Shimon Shetreet, The Scope of Judicial Review of National Security Considerations in Free Speech and Other Areas - Israeli Perspective, 18 I.Y.H.R. (1988) 35, at 44, 45

43 The Supreme Court has dismissed several petitions where the authorities based their decisions on security reasons. See for example the following cases:
H.C. 39/64, *El-Ard v. Commissioner of the Northern District*, 18(ii) P.D. 340; *Makhoul;* supra note 37, *Ayoub*, supra note 37; *Asli,* supra note 37.
The Supreme Court has adopted this attitude also towards other articles in the Defence Emergency Regulations, 1945, for example, the deportations, house demolitions, administrative detentions.

44 This issue is also discussed by Article 19 World Report 1988 (ed. Kevin Boyle) (Times Books, United States) Israel and the Occupied Territories, at 261-271

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The first case in this series was handed down by the Supreme Court in 1964 in the matter *El-Ard v. District Commissioner*.[45]

3.4. Israel's Permanent State of Emergency: Legal Sources and Justifications

Since its inception in May 1948 until the very day of writing this work, the State of Israel has remained in an officially-proclaimed and never revoked state of emergency.[46]

This state of affairs has far-reaching and restrictive consequences for the basic democratic nature of the state in general and for the rule of law and human rights in particular.

Israel's permanent state of emergency has its original legal foundation in a proclamation of the Provisional Council of State,[47] issued on May 19, 1948.

On this day the Provisional Council enacted the Law and Administration Ordinance, 1948, which authorizes in Section 9(a)[48] the Provisional Council of State to declare a state of emergency, which was done so on the same day without serious debate, and without considering the implications of such a decision for the foreseeable future.[49]

Until 1996 the said proclamation of a state of emergency and Section 9(a) also constituted the legal foundation for the huge number of security and administrative

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45 *El-Ard v. Commissioner of the Northern District;* supra note 43

46 Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights [ICCPR]. The Report was submitted in June 1998 to the UN Human Rights Committee and circulated as UN document CCPR/C/81/Add.13, para. 106

47 The *Provisional Council* of State was the *legislative authority* after the establishment of the state of Israel. For more details on this issue see Chapter B.

48 Section 9(a) of the Law and Administration Ordinance, 1948, 1 L.S.I. (1948) 7, at 8. For the full text of Section 9 see infra sub-chapter 4.3.2. (Israeli "Security" and "Emergency" Legislation)

49 The full text of the decision of the Provisional Council of State to proclaim a state of emergency is as follows:

> "The Prime Minister, David Ben-Gurion, proposed that the following proclamation be promulgated:
> "By virtue of Section 9(a) of the Law and Administration Ordinance, 1948, the Provisional Council of State hereby proclaims that a state of emergency is in force in the state".
> A vote was taken and the proposition was adopted."

Provisional Council of State Minutes, Session B 19.5.1948, at 10; quoted in Hofnung, supra note 2, at 49

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emergency legislation, that was created since the establishment of the state during a period of almost five decades.

The Israeli Government has ideologically justified the permanent state of emergency on the pretext of external and internal security needs, and remains until today on the position that the said exceptional conditions continuously prevail.

However, an analysis and survey of the use of emergency regulations clearly shows, that this legislation was from the very beginning not limited to the regulation of matters requiring instant legislation but that it was rather used as routine administrative instrument.[50]

In June 1996 a new version of the Basic Law: The Government,[51] entered into force and completely replaced the above mentioned Section 9 of the Law and Administration Ordinance by a new constitutional arrangement regarding the declaration of a state of emergency and the use of emergency powers.

With this Basic Law new methods and procedures concerning duration and power to declare a state of emergency, as well as concerning value-content and application of emergency regulations were established.

The new regulations intend to circumscribe the powers of the executive branch, to protect human rights and to grant the courts the necessary tools to enforce the borders on executive discretion.[52]

The following changes are relevant:

According to Section 49 of the new Basic Law: The Government the official state of emergency no longer continues automatically, but rather must be declared by the Knesset. Such a state of emergency, can last for a maximum period of one year,[53] and must be declared then again.

The government may also declare a state of emergency, which has to be approved by the Knesset after seven days of its declaration, otherwise it expires. Only in the case that the Knesset cannot assemble, the government can make further declarations of emergency.[54]

It must be stressed here, however, that - despite the fact that the said new Basic Law: The Government has theoretically established new arrangements, procedures and limitations concerning the existence and the nature of the state of emergency - the situation in practice has not changed at all. Israel still finds itself in a permanent

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50 For more details see infra sub-chapter 4. (Israel's Formal "Security" and "Emergency" Legislation: Legal Sources and Justifications)

51 Basic Law: The Government, S.H. No.1396 (14 April 1992) at 214

52 See the statement by the Israeli government concerning the new Basic Law: The Government (1992) in the Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 46, para. 111

53 Section 49(a) and (b) of the new Basic Law: The Government (1992), supra note 51

54 Section 49(c) of the new Basic Law: The Government (1992), ibid.

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state of emergency, due to the declarations made by the Knesset every year since the mentioned basic law came into force in June 1996.[55]

The current state of emergency exists by force of the declaration of the Knesset in mid-1998 and is valid for a period of up to twelve months.[56]

As already said above, Israel justifies and excuses its ongoing need for a formal state of emergency with the "political reality" in which the state finds itself since its inception.

"Political reality" means in this context - according to the definition provided by the Israeli government - that there exists "a permanent existential threat from within and some of its neighbors." [57]

According to an official governmental declaration Israel will give up about the state of emergency only after the signment and the implementation of formal peace agreements in the whole region.[58]

However, at the time of writing this work, the realization of the intention of having peace agreements in the whole region seems still very far away. This has the consequence that the state of emergency - with its very harmful effects on the whole constitutional system, the principles of the rule of law, and specifically on the status of human rights and freedoms - will continue to be an unhappy part of Israel's legal and political system.

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55 Combined Initial and First Periodic Report Concerning the Implementation of the ICCPR, 1998, supra note 46, para. 107

56 I.R. (Official Gazette) 1998

57 In connection with the ratification of the 1966 International Covenant on Civil and Political Rights, which took place in 1991, the state of Israel made the following declaration regarding the existence of a state of emergency:

> "Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant."

Cited in: Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 46, para. 106 FN*

58 Ibid., para. 123

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Foundations of Civil and Political Rights in Israel and the Occupied Territories

4. Israel's Formal "Security" and "Emergency" Legislation: Legal Sources and Justifications

4.1. Background

As already mentioned in the introduction to this chapter, one of the fundamental characteristics of the Israeli legal system is that greater powers are granted to the executive (civilian and military) branch of the government than to the legislature (the Israeli Parliament i.e. the Knesset) or to the judiciary.

Moreover, the use of these far-reaching powers has not been confined to times of emergency, but was and is rather utilized as an additional administrative means or mechanism of dealing with routine matters of daily life and problems which every democracy faces from.

Based upon the existence of a permanent state of emergency an enormous volume of security and emergency legislation exists within the Israeli legal system which consists of British emergency legislation that has been absorbed as well as of emergency legislation that has been enacted by the executive branch since the establishment of the state of Israel in 1948.

In the course of this work I will demonstrate that this state of affairs, i.e. the existence of a permanent state of emergency and the routine use of emergency legislation in daily life situations, constitutes a severe infringement on human rights and freedoms, and a serious threat to the principles of the whole democratic regime.

However, before dealing with such specific violations of rights and freedoms, I shall make a short glance to the sources and the nature of the different emergency legislations that exist today as part of Israel's legal order.

For the purpose of this analysis I will differ between two periods of time during which the whole body of security and emergency legislation was enacted.

According to this criteria, the first group of emergency legislation originates from the British mandatory period, the second group of emergency legislation stems from enactments after the establishment of the state of Israel in Palestine in 1948.

Furthermore I will differ between five distinct legislative sources upon which the most important existing emergency legislation in Israel - that is relevant for the area of human rights and freedoms - may be based.[59]

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[59] Baruch Bracha, Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945, 8 I.Y.H.R. (1978) 296, at 298-305. Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 46, paras. 108, 111

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4.2. British Mandatory "Emergency" Legislation

This group of British mandatory emergency legislation has its legal source mainly in the Palestine (Defence) Order in Council, 1937[60] but also in the Emergency Powers (Colonial Defence) Order in Council, 1939, which applied the Emergency Powers (Defence) Act, 1939 to various parts of the British Empire, including Palestine.[61]

By virtue of the Emergency Powers (Colonial Defence) Order in Council, 1939, which applied the Emergency Powers (Defence) Act, 1939 the Defence Regulations, 1939[62] were enacted.

By virtue of Article 6 of the above mentioned Palestine (Defence) Order in Council, 1937,[63] numerous emergency or defence regulations - among them the Defence (Emergency) Regulations, 1945[64] which are the most important emergency regulations in the context of this work dealing with the foundations of human rights - were enacted.

These Defence (Emergency) Regulations, 1945 [65] were absorbed in 1948 into the Israeli legal system,[66] furthermore, they grant the executive authorities extremely broad powers and are still in force in Israel as well as the Occupied Territories.

Due to their far-reaching restrictive implications on the status of human rights and freedoms, these regulations will be discussed in more detail in the following sub-chapter 5.

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60 Palestine (Defence) Order in Council, 1937, P.G. No. 675 (24 March 1937) Suppl. II, at 267

61 H.C. 5/48, *Leon v. Acting District Commissioner of Tel Aviv* translated into English in 1 S.J. (1948-1953) 41, at 47, 56

62 Defence Regulations, 1939, P.G. No. 914 (26 August 1939) Suppl. II, at 659. These Defence Regulations, 1939 - derive their validity from Article 3 of the Emergency Powers (Colonial Defence) Order in Council, 1939 and the Emergency Powers (Defence) Act, 1939 - were continually modified and developed until they were published in the present form of the Defence (Emergency) Regulations, 1945. For details see Sabri Jiryis, The Arabs in Israel (Translated from the Arabic by Inea Bushnaq) (Monthly Review Press, New York, 1976) at 9-11

63 Palestine (Defence) Order in Council, 1937, supra note 60, at 267

64 Defence (Emergency) Regulations, 1945, P.G. No. 1442 (27 September 1945) Suppl. II, at 1055, 1058

65 Ibid.

66 By virtue of Section 11 of the Law and Administration Ordinance, 1948, supra note 48. For the full text of Section 11 see infra sub-chapter 5. (The British Mandatory Defence (Emergency) Regulations, 1945)

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4.3. Israeli "Security" and "Emergency" Legislation

As mentioned above, the second group of emergency legislation stems from enactments after the establishment of the state of Israel in Palestine in 1948.

Within this group two categories of emergency legislation whose legal sources and nature completely differ may be discerned:

- One category of emergency legislation - which will be discussed below in sub-chapter 4.3.1. - has been enacted by the primary Israeli legislator, namely the Israeli Parliament (the Knesset), as normal law and has effect during an officially declared state of emergency like any other emergency legislation.[67]
- The other category of emergency legislation - which will be discussed below in sub-chapter 4.3.2. - has its legal basis in Section 9 of the Law and Administration Ordinance, 1948 and in Section 50 of the new Basic Law: The Government of 1992.

4.3.1 "Emergency" Legislation Enacted by Israel's Parliament

To this category belongs one of the most important statutes to be discussed in the context of this dissertation, namely the Emergency Powers (Detention), Law, 1979[68] which laid down specific procedures for administrative detention, including judicial supervision over the actions of the executive.[69]

The Emergency Powers (Detention), Law, 1979 is frequently applied by the Israeli government and due to its importance I will discuss this law and the most important jurisprudence that developed in the context of this law in more detail in sub-chapter 6.

67 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 46, para. 114

68 Emergency Powers (Detention) Law, 1979, supra note 3; see Hofnung, supra note 2, at 62

69 Before 1979, administrative detentions were regulated by Regulation 111 of the Defence (Emergency) Regulations, 1945, supra note 64

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4.3.2 "Emergency" Legislation Based on: The Law and Administration Ordinance, 1948 and The new Basic Law: The Government (1992)

As already mentioned above the other category of emergency legislation has its legal basis in:

Section 9 of the Law and Administration Ordinance, 1948 [70] and in

Section 50 of the new Basic Law: The Government[71] of March 1992 (which went into force in 1996).

Section 9 of the Law and Administration Ordinance, 1948 gives to the Prime Minister and every minister - in times of emergency - broad powers to enact emergency regulations. Furthermore this section provides that the emergency regulations expire after three months, unless they are extended by Knesset enactment or replaced by new regulations.

Section 9 of the Law and Administration Ordinance, 1948, states as follows:

> "(a) If the Provisional Council of State deems it expedient to do so, it may declare that a state of emergency exists in the State, and upon such declaration being published in the Official Gazette, the Provisional Government may authorize the Prime Minister or any other Minister to make such emergency regulations as may seem to him expedient in the interests of the defence of the State, public security and the maintenance of supplies and essential services.
>
> (b) An emergency regulation may alter any law, suspend its effect or modify it, and may also impose or increase taxes or other obligatory payments.
>
> (c) An emergency regulation shall expire three months after it is made, unless it is extended, or revoked at an earlier date by an Ordinance of the Provisional Council of State, or revoked by the regulation-making authority.
>
> (d) Whenever the Provisional Council of State thinks fit, it shall declare that the state of emergency has ceased to exist, and upon such declaration being published in the Official Gazette, the emergency regulations shall expire on the date or dates prescribed in such declaration." [72]

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70 After the establishment of the state of Israel new emergency regulations could only be enacted by virtue of the authority granted in Section 9 of the Law and Administration Ordinance, 1948, supra note 48

In a very early decision the Supreme Court expressly ruled as follows:

> "Section 9 [of the Law and Administration Ordinance, 1948] put an end to the operation of the earlier statutes as a source of power to make regulations in the future, but that source [i.e. Regulation 48 of the Defence Regulations, 1939 upon which the first respondent (the acting authority) based its decision] as part of the "law in force" in accordance with Section 11 [of the Law and Administration Ordinance, 1948] remained effective."

See H.C. 10/48, *Zeev v. The Acting District Commissioner of the Urban Area of Tel Aviv,* translated into English in 1 S.J. (1948-1953) 68, at 73

71 Basic Law: The Government (1992), supra note 51

72 Section 9 of the Law and Administration Ordinance, 1948, supra note 48, at 8-9

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It should be mentioned that the established three months time-limitation could not effectively ensure that the broad discretion given to the executive was not abused. On the contrary, especially in the early years a huge number of legislation was initially enacted by ministers and took only the form of emergency regulations, but after the expiration of the three months time limit the validity of this regulations was extended by legislations with fixed periods.

And once these periods have lapsed the same legislations, which were by their nature still only secondary enactments, constituted the basis for permanent legislation.

Many spheres of civil life - such as foreign travel,[73] movement of citizens within the country,[74] property rights and specifically questions relating to land[75] owned by Palestinian Arabs who were expelled or fled as a consequence of the establishment of the state of Israel, labour disputes,[76] economic policy matters[77] - were initially regulated by provisional emergency legislations.

Most of these provisional emergency regulations were extended several times, and later on replaced by permanent legislation, and thus became an inherent part of Israel's legal system, which, until today, governs the state of Israel.[78]

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73 Emergency Regulations (Foreign Travel), 1948, supra note 3

74 Emergency Regulations (Security Zones), supra note 3

75 Emergency Regulations (Absentees' Property), 1948, supra note 3; Emergency Regulations (Requisition of Property), 1948, supra note 3; Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, supra note 3

76 Emergency (Essential Labour Services in Hospitals) Regulations, 1971, supra note 3; Emergency (Essential Labour Services in Local Authorities) Regulations, 1984, supra note 3. For more details regarding the phenomenon of handling labour disputes by emergency legislation see Hofnung, supra note 2, at 54-55, 59-61

77 Emergency (The Shekel Coin) Regulations, 1980, supra note 3. For more details regarding the use of emergency regulations for the implementation of economic policy see Hofnung, supra note 2, at 54-55, 59-61

78 The following examples of important emergency regulations whose validity was first extended and which were then replaced by permanent legislation shall be mentioned here:
1.) Emergency Regulations (Absentees' Property), 1948, supra note 3, extended by the: Emergency Regulations (Extension of Validity) Law, 1949, supra note 3; Emergency Regulations (Absentees' Property) (Extension of Validity) Law, 1949, supra note 3; Emergency Regulations (Absentees' Property) (Extension of Validity) (No. 2) Law, 1949, supra note 3; Emergency Regulations (Absentees' Property) (Extension of Validity) Law, 1949, supra note 3; and then replaced by the Absentees' Property Law, 1950, supra note 3
2.) Emergency Regulations (Requisition of Property), 1948, supra note 3; extended by the: Emergency Regulations (Extension of Validity) Law, 1949, supra note 3; Emergency Regulations (Requisition of Property) (Extension of Validity) Law, 1949, supra note 3; Emergency Regulations (Requisition of Property) (Extension of Validity) (No. 2) Law, 1949, supra note 3; Emergency Regulations (Requisition of Property) (Extension of Validity) (No. 3) Law, 1949, supra note 3; and then replaced by the Emergency Land Requisition (Regulation) Law, 1949, supra note 3

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It was exactly this mechanism of enacting emergency legislation according to Section 9 of the Administration Ordinance, 1948 which enabled that provisional secondary legislation could be transformed into permanent primary legislation, without having been subjected to any serious external and parliamentary control.

There existed only an internal control-mechanism by the executive over its own activity.[79]

As the reality showed, this state of affairs led to the enactment of a large number of emergency regulations, which have specifically harmful effect for the whole concept and the general status of basic human rights and freedoms of individuals and minorities.

In practice, however, it was mostly the Palestinian Arab population who suffered under the existing legislation, their application by the authorities and interpretation by judges of the Supreme Court.

In June 1996, after the elections to the 14th Knesset, the new Basic Law: The Government of March 1992 went in force.

Section 50 of this new Basic Law: The Government provides that emergency regulations have to be enacted by the government as a whole[80] but not by individual ministers (as it was the case in the past according to Section 9 of the Law and Administration Ordinance, 1948).

Only if there exists an immediate and critical need to enact such emergency regulations and the government as a whole cannot be convened, the Prime Minister or individual ministers may enact such emergency regulations.[81]

According to this new arrangement "different levels" of a state of emergency have been recognized, bringing a certain "democratization" into the whole system.

Important to mention is, however, the fact that the enacted emergency regulations may have the power to change any law, to suspend any law temporarily or to set up conditions, and to impose taxes.[82]

Also relevant is Section 64 of the new Basic Law: The Government, according to which all emergency legislation, including that of previously-enacted laws extending the force of emergency regulations under Section 9 of the Law and Administration Ordinance, remains in force if a state of emergency has been declared.

3.) Emergency Regulations (Security Zones), 1949, supra note 1; extended by the Emergency Regulations (Security Zones) (Extension of Validity) (No.2) Law, 1949, supra note 3; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1962, supra note 3; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1971, supra note 3

79 Hofnung, supra note 2, at 55-57

80 Section 50(a) of the new Basic Law: The Government (1992), supra note 51

81 Section 50(b) of the new Basic Law: The Government (1992), ibid.

82 Section 50(c) of the new Basic Law: The Government (1992), id.

Although the validity of all emergency legislation now depends on the decision of the Knesset whether to declare a new state of emergency at the end of each twelve-month period, nevertheless - by virtue of this section - several undemocratic and repressive emergency regulations, such as the Defence (Emergency) Regulations, 1945, dating back to the British mandatory period, "survived" and still constitute a vital part within Israel's legal system.

5. The British Mandatory Defence (Emergency) Regulations, 1945

5.1. Historical Background and Normative Nature of the British Defence (Emergency) Regulations, 1945

In 1945 the British High Commissioner in Palestine enacted - based on the powers vested in him by Article 6 of the Palestine (Defence) Order in Council, 1937[83] - the Defence (Emergency) Regulations, 1945. [84]

The Defence (Emergency) Regulations, 1945 allow for the imposition of martial law[85] and grant to every military commander[86] absolute discretion to exercise legislative, judicial and executive powers within its area, for the purpose of ensuring the control of public security, the defence of Palestine, the maintenance of public order, the suppression of uprisings and disturbances, and the constant supply of necessary goods and public services.

The Defence (Emergency) Regulations, 1945 grant excessive and unlimited powers to the competent authorities in deciding on civil liberties, and authorize them, inter alia, to declare associations as unlawful,[87] to issue orders to censorship,[88] restrictions on movement,[89] police supervision,[90] detention[91] and deportation,[92]

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83 Palestine (Defence) Order in Council, 1937, supra note 60, at 268

84 Defence (Emergency) Regulations, 1945, supra note 64, at 1058

85 For more details on the concept of martial law see Hofnung, supra note 2, at 34

86 According to Regulation 6(2) of the Defence (Emergency) Regulations, 1945, supra note 64, military commanders, that have been appointed for specific areas or places, have all the powers and duties vested in military commanders by these Regulations.

87 Regulation 84 of the Defence (Emergency) Regulations, 1945, supra note 64

88 Regulations 86-107 of the Defence (Emergency) Regulations, 1945, ibid.

89 Regulation 109 of the Defence (Emergency) Regulations, 1945, id.

90 Regulation 110 of the Defence (Emergency) Regulations, 1945, id.

91 Regulation 111 of the Defence (Emergency) Regulations, 1945, id.
In 1979, Regulation 111 concerning administrative detention was revoked by Section 12 of the Emergency Powers (Detention) Law, 1979, supra note 3

92 Regulation 112 of the Defence (Emergency) Regulations, 1945, supra note 64
In 1979, Regulation 112 concerning the deportation of civilians was revoked by Section 12 of

requisition of land and other property,[93] destruction and sealing of houses,[94] curfew,[95] closing of areas,[96] as well as many other measures.

With regard to their normative nature Professor Rubinstein argued that the Defence (Emergency) Regulations, 1945 have - due to the fact that they were promulgated by the High Commissioner himself under the Order in Council[97] - the normative status of primary legislation.[98] This empowers the competent authorities to enact wide-ranging secondary regulations which may deviate from laws of the Knesset[99] and even restrict human rights and freedoms in a serious way.

Prior to the establishment of the state of Israel, the Defence (Emergency) Regulations, 1945 were used by the British mandatory power against the Palestinian Arab population as well as against the growing Jewish resistance movement in Palestine.[100]

In the 1940's until the establishment of the state of Israel in 1948, dozens of members of the Jewish underground organizations "Lehi" and "Etzel" as well as popular leaders of the Jewish population in Palestine were - by virtue of the Defence (Emergency) Regulations, 1945 - arrested, transferred to detention centers and prison camps in Palestine and East Africa (Eritrea), and held without trial, sometimes even over years.[101]

Other measures taken by the British mandatory power - in accordance with the said Defence (Emergency) Regulations, 1945 - in order to fight against the different Jewish underground groups were curfews, searches and closures of the Jewish press.[102]

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the Emergency Powers (Detention) Law, 1979, supra note 3

93 Regulations 114-118 of the Defence (Emergency) Regulations, 1945, supra note 64

94 Regulations 119-121 of the Defence (Emergency) Regulations, 1945, ibid.

95 Regulation 124 of the Defence (Emergency) Regulations, 1945, id.

96 Regulation 125 of the Defence (Emergency) Regulations, 1945, id.

97 Amnon Rubinstein, The Constitutional Law of the State of Israel (5th ed., 1996) at 1172

98 Ibid., at 810

99 See Regulation 5 of the Defence (Emergency) Regulations, 1945, supra note 64

100 Bracha, Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945, supra note 59, at 299

101 On 29 June 1946 (this day is also called "Black Sabbath") the British authorities undertook an operation aimed at uncovering secret ammunition supplies and arrested 2718 persons which were placed in administrative detention. Among those detainees were popular leaders of the Jewish population, such as Rabbi Y.L. Fishman (Acting Chairman of the Board of the Jewish Agency), David Remez (Chairman of the National Committee), Bernard Joseph and Yitzhak Greenbaum (both member of the Board of the Jewish Agency). On July 22, 1946, 700 persons were administratively detained after members of the Jewish underground had bombed the King David Hotel in Jerusalem. See B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada (Jerusalem, October 1992) at 19-21

102 Ibid.

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The Defence (Emergency) Regulations, 1945 led to strong anti-British protests among the Jewish population and were described by many Jewish lawyers as being colonialist and fascist.

On 7 February 1946, a special conference of the Jewish Bar Association, where 400 Jewish lawyers participated, was held in Tel Aviv in order to protest against the Defence (Emergency) Regulations, 1945.[103]

The conference was opened by Dr. Menachem Dunkelblum, who later became a judge at the Israeli Supreme Court. He stated, inter alia, as follows:

> "*...There is a violation here of elementary concepts of law and justice.* The Regulations give sanction to absolute arbitrariness of the administrative and military authorities. This arbitrariness, even if it is authorized by a legislative establishment, is anarchy... The Defence Regulations abolish the rights of the individual and grant unlimited power to the administration..." [Emphasis added] [104]

Dr. Bernard Joseph, a leading member of the Palestine Bar Association and Legal Adviser of the Jewish Agency for Palestine, who subsequently became the Minister of Justice in the Israeli Government, described the situation under the Defence (Emergency) Regulations, 1945 in the following way:

> "*...By virtue of the provisions of the Palestine (Defence) Order in Council, 1937 and the Defence (Emergency) Regulations 1945, the country has been deprived of the elementary protection which the laws of any civilized country afford its inhabitants.* On the contrary, the Regulations expressly reintroduce provisions such as were known in Europe before the era of liberty and, in recent times, in totalitarian states..." [105]
>
> "*...Liberty of the individual is a thing of the past, or the future, in Palestine.* Any soldier or police officer *may arrest without warrant any person 'whom he reasonably suspects* of having committed an offense' (Section 72, paragraph 1). *This provision entitled any soldier to arrest practically anyone. He need only 'suspect' a person of belonging to an illegal group, or pretend that he suspects him, in order to justify an arrest."*
>
> *"Similarly, the military and police have a right to enter and search, without a warrant,* premises which they have 'reason to suspect of being used or having recently been used for any purpose prejudicial to the public safety, the defence of Palestine, etc...or in which he may suspect that there is any persons who has committed an offense... of any goods, article, document or thing liable to seizure under Regulation 74, and may search any such premises...and any person therein..."(Section 75.) They also have the right to detain an search

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103 2 HaPraklit (1946) 58 (Hebrew)

104 Ibid.; for an English translation of this passage see Jiryis, supra note 62, at 11

105 Bernard Joseph, British Rule In Palestine (Washington: Public Affairs Press, 1948) at 222. For the full comments of Bernard Joseph on the Defence (Emergency) Regulations, 1945, see ibid., at 218-232

without warrant any person whom they have reason to suspect of using or carrying any article liable to seizure (Section 76)..."[106]

"...The officer making the detention order need give no reason for so doing other than that 'he is of the opinion that it is necessary or expedient to make an order for securing the public safety, the defence of Palestine, the maintenance of public order or the suppression of mutiny, rebellion or riot.' (Section 111). *Once the officer making the order states that this is his opinion the order cannot be challenged in a court of law. This abolishes, in effect, the principal safeguard of the liberty of the individual,* namely the writ of Habeas Corpus..."

"The Regulations also *confer upon the High Commissioner the extraordinary power to deport from Palestine anyone he pleases,* even though that person be a native-born citizen. What is more, *the High Commissioner has power to order wholesale deportations of groups of persons without specifying their names* in his order of deportation (Section 112)..."[107]

"...The Regulations also entail a singular departure from the accepted rule of English law that a person is innocent until he is proved guilty, and that the burden of proving guilt is upon the prosecuting authority...*Section 2(3) of the Defence Regulations, for example, ordains that there shall be a presumption of guilt...*" [Emphasis added][108]

"...As for these Defence Regulations, the question is: *Are we all to become victims of officially licensed terrorism* or will the freedom of the individual prevail? Is the administration to be allowed to interfere in the lives of the people with no protection for the individual?.."

"As it is, *there is no guarantee to prevent a citizen from being imprisoned for life without trial.* There is no protection for the freedom of the individual: there is no appeal against the decision of the military commander, no means of resorting to the Supreme Court..."

"A citizen should not have to rely on the good will of an official, our lives and our property should not be placed in the hands of such an official.
There is no choice between freedom and anarchy. In a country where the administration itself inspires anger, resentment, and contempt for the laws, one cannot expect respect for the law. It is too much to ask a citizen to respect a law that outlaws him." [Emphasis added] [109]

Yaacov Shapira, who later also became Minister of Justice in the Israeli government, also participated at the conference and portrayed the Defence (Emergency) Regulations, 1945 with the following sharp words:

"...The established governmental regime in Palestine is - since the publication of the Defence (Emergency) Regulations - *unparalleled in any enlightened country... Only the status of an occupied country can be compared with these circumstances.* Although they [the British Mandatory Regime] console us in saying that the Regulations are intended only against criminals and not against

106 Id., at 226
107 Id., at 227
108 Id., at 228
109 HaPraklit, supra note 103, at 60. An English translation of this passage is provided in Jiryis, supra note 62, at 11-12

> the entire population, *the Nazi governor in occupied Oslo also declared that no evil would come to a citizen who was only going about his business...*
>
> "*...It is our duty to tell the whole world that the defence regulations passed by the government in Palestine destroy the very foundations of justice* in this land. It is a mere euphemism to call the military courts 'courts.' They are in fact nothing else than 'Military Judicial Committees Advising the Generals.'
>
> "*No government has the right to draw up such laws...*" [Emphasis added] [110]

At the end of the conference the *Jewish Lawyers Association* explicitly condemned the Defence (Emergency) Regulations, 1945 and declared that

> "...they deprive the human being of his basic rights...

and that

> "...they undermine law and justice, and constitute a serious danger to the life and freedom of the individual, establishing a regime of violence and arbitrariness without any judicial supervision."[111]

Additionally a resolution was passed at the above mentioned conference, demanding the nullification of the said Regulations and the restoration of the authority of the regular courts and the rule of law.[112]

5.2. The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within Israel since 1948

5.2.1 The Validity of the Defence (Emergency) Regulations, 1945

Despite the above mentioned fact that the Defence (Emergency) Regulations, 1945 were so strongly criticized by the Jewish population living in Palestine during the British mandatory power, and despite their undemocratic and totalitarian nature, they were - with the establishment of the state of Israel in May 1948 - by virtue of Section 11 of the Law and Administration Ordinance, 1948 incorporated into Israeli law.

Section 11 of the Law and Administration Ordinance, 1948 states:

> "The law which existed in Palestine on the 5 Iyar, 5708 (14 May 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities." [113]

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[110] HaPraklit, ibid.; for an English translation of this passage see Jiryis, supra note 62, at 12

[111] HaPraklit, supra note 103, at 62; Jiryis, supra note 62, at 13

[112] Ibid.

[113] Law and Administration Ordinance, 1948, supra note 48, at 9. For a discussion and more

The same Jewish lawyers - who only two years before demanded the repeal of the Defence (Emergency) Regulations, 1945 - changed over night their attitude to these norms, since it was now they who, as judges or legal advisors to the government, could develop and interpret them in such a way as to increase the power of the authorities.

5.2.2. Challenges to the Validity of the Defence (Emergency) Regulations, 1945

Nevertheless, it must be mentioned that especially in the earliest stages of Israel's statehood some petitions[114] were launched to the Supreme Court in order to challenge the validity of the applied Defence (Emergency) Regulations, 1945 and to have them declared invalid.

However, these attempts were not successful due to the fact that the Supreme Court adopted a very formalistic and legalistic style of reasoning and rejected all of them.

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details about the problems surrounding the exact meaning and interpretation of the term "Law" in Section 11, see Baruch Bracha, Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945, supra note 59, at 300-302

It should be mentioned at this point that three days before the end of the British Mandate in Palestine, the King in Council enacted the Palestine (Revocations) Order in Council, 1948 with the intention to cancel the Orders related to Palestine which were in those British law books concurrently with the end of the British control in Palestine. This Palestine (Revocations) Order in Council, 1948 revoked as of 14 May 1948 a number of Orders in Council concerning Palestine, including the Palestine (Defence) Order in Council, 1937, under which the Defence (Emergency) Regulations, 1945 were previously promulgated. This means that formally the Defence (Emergency) Regulations, 1945 were also revoked by the mentioned Palestine (Revocations) Order, 1948. However, the said Palestine (Revocations) Order in Council, 1948 was enacted in England by the King in Council, and became effective in England on its publication there, but it had not become effective in Palestine, because it was not officially published by the Mandatory authorities in the Palestine Gazette. This had the consequence that with the expiration of the British Mandate in Palestine at midnight between 14 and 15 May 1948, the Palestine (Defence) Order in Council, 1937 - including the Defence (Emergency) Regulations, 1945 - remained in the law books of Palestine.

For more details on this issue see David Yahav (Ed. in Chief), Israel, The "Intifada" And The Rule Of Law (Israel Ministry Of Defence Publications, 1993) at 47

114 See infra notes 113-118

The first decision in this series that was handed down by the Supreme Court in 1948 was in the matter *Herzl Kook v. Minister of Defence*[115] and shall be discussed now in more detail.

5.2.2.1. Herzl Kook v. Minister of Defence (1948)

This case deals with a request for the repeal of an administrative detention order which was based on the said Defence (Emergency) Regulations, 1945.

Justice Shalom Kassan of the Tel Aviv District Court, who was sitting as Supreme Court of Justice, refused to apply the Defence (Emergency) Regulations, 1945 because in his judgment they were illegal.

Justice Shalom Kassan who reviewed the first appeal after the establishment of the state of Israel and explicitly held that:

> "...the High Court of Justice is not obligated to abide by illegal regulations which exist in Israel only because the legislature has not found opportunity to annul them, as long as other defence regulations for a state of emergency have not been stipulated in their place. A judge cannot act and rule according to a law while he is convinced that the law is essentially invalid, and one cannot require him to do so against his conscience, only because the present government has not yet invalidated the formal law."

However, despite these reasonable comments, the opinion of this judge remained the minority and the petition was rejected by the Court.

The Presiding Justice of the Court, Dr. Berdecki, speaking for the majority, adopted a positivistic and formalistic approach towards the Defence (Emergency) Regulations, 1945 which enabled him to ignore completely the reality.

In a formalistic and legalistic style of judicial reasoning he ruled that

> "...the trouble is that whatever our opinion on these regulations may be, I must state that we are not free on this matter. We must accept the regulations as they are, that is as valid, legal regulations, subject to the interpretation given them in the highest court in the country at the time."[116]

There exist two other important cases relating to civil and political rights in which the validity of the Defence (Emergency) Regulations, 1945 was - although unsuccessfully - challenged, namely the judgment handed down by the Supreme

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115 *Herzl Kook and Ziborah Wienerski v. Minister of Defence*, quoted in English in B'Tselem, Detained Without Trial, supra note 101, at 22-23. See also Jiryis, supra note 62, at 13-14

116 *Herzl Kook and Ziborah Wienerski v. Minister of Defence*, supra note 115

Court in the matter of *El-Karbutli v. Minister of Defence,*[117] and the judgment in the matter of *El-Ard v. Commissioner of the Northern District*.[118]

In two other cases the validity of the Defence Regulations, 1939 was - also unsuccessfully - challenged, namely the decision handed down by the Supreme Court in the matter of *Leon v. Acting District Commissioner of Tel Aviv,*[119] and the decision in the matter *Zeev v. The Acting District Commissioner of Tel Aviv.*[120]

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[117] H.C. 7/48, *El-Karbutli v. Minister of Defence*, 2 P.D. 5, at 13
This case is dealing with the petition against an order to detain a Palestinian Arab inhabitant of Yaffo.
For a detailed discussion of this case and the *formalistic reasoning* see Chapter C.3.2.1. (The Declaration of the Establishment of the State of Israel - Considered as a Political Instrument.)

[118] *El-Ard v. Commissioner of the Northern District*, supra note 43
This case is dealing with the petition against the refusion by the military government - i.e. the Commissioner of the Northern District - to issue a publication permit to a weekly magazine in Arabic.
For more details regarding the *formalistic and legalistic* jurisprudence of this case see Chapter F.3.3. (Supreme Court cases concerning Regulation 94 of the Defence (Emergency) Regulations, 1945)

[119] *Leon v. Acting District Commissioner of Tel Aviv*, supra note 61
In this case the petitioners based their arguments for challenging the validity of the Defence Regulations, 1939, *inter alia,* on the second restriction of Section 11 of the Law and Administration Ordinance, 1948, supra note 48, which makes the reception of British Mandatory law "subject to such modifications as may result from the establishment of the State and its authorities." The petitioners claimed that

> "...the English statute i.e. the Emergency Powers (Defence) Act, 1939 - which empowered the High Commissioner to make Defence and Emergency Regulations - possess a dictatorial - even anti-Jewish character..."

and that, since

> "...the State of Israel is a democratic and a Jewish State",

there have come about

> "...modifications which make it impossible for the mentioned English statute to be given validity in Israel."

The petitioners furthermore argued that, since the validity of the above mentioned English Emergency Powers (Defence) Act, 1939 has ceased to exist, there is also no longer any legal basis for the Emergency Regulations, 1939. *Ibid., at 48.*
The Supreme Court rejected the petition and ruled that the Defence Regulations, 1939 are not dictatorial, and they can be recognized in the democratic state of Israel. Id., at 51. With regard to the word "modifications" as referred to in Section 11 of the Law and Administration Ordinance, 1948, supra note 48, the Court stated that restrictive interpretation is to be given to the word "modifications" which means "technical" modifications without which the law in question could not be applied after the establishment of the state. The Court also stated that it was not intended by the legislature, in using the word "modifications", to delegate part of its duties to the courts, and that it was also not intended to refer to modifications which demand special considerations. *Id., at 52,* 53.

[120] *Zeev v. The Acting District Commissioner of Tel Aviv,* supra note 70
In this case the petitioner based the arguments for challenging the validity of the Defence Regulations, 1939 on Section 9 of the Law and Administration Ordinance, 1948 and the

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Additionally to the attempts to challenge the use of the Defence (Emergency) Regulations, 1945 in the Supreme Court, suggestions to cancel them were also made in the Knesset.

Already in 1949[121] and then on a regular basis during the 1950's[122] and the first half of the 1960's[123] proposals for the annulment of the Defence (Emergency) Regulations, 1945 came from within the Knesset.

Declaration of the Establishment of the State of Israel, 1948.
For a detailed discussion of this case and the *formalistic reasoning* see Chapter C. 3.2.1. (The Declaration of the Establishment of the State of Israel - Considered as a "Political Instrument")

121 See the Speeches in the Knesset regarding the Proposed Defence (Emergency) Law, 1949; 2 D.K. 975-978 (12 July 1949). For a discussion of this Knesset speech see Jiryis, supra note 62, at 32

122 In May 1951, the leader of the opposition Heruth party, *Menahem Begin* - who in 1977 became Prime Minister of the state of Israel - spoke in the Knesset and called for an end to the use of the tyrannical and unethical laws of the British mandatory regime. In response to the Moshe Sharet, the then acting Prime Minister, who stated

> "...not to differentiate between law and law; [because] all law is law."

Menahem Begin replied:

> "...Not so! There are tyrannical laws, there are unethical laws, there are Nazi laws...The law which you have employed is Nazi, tyrannical and unethical. And an unethical law is also an illegal law..."

See the speech in the Knesset, 9 D.K 1807 (21 May 1951). An English translation of this passage is provided in B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada, supra note 101, at 24

At the end of the debate the Knesset made a resolution where it decided that the Defence (Emergency) Regulations, 1945, which have existed during the British rule, were opposed to the foundations of a democratic state, and the Knesset also called for the annulment of these Regulations.

See the speech in the Knesset, 9 D.K. 1828, 1833 (22 May 1951). This Knesset speech is discussed in B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada, supra note 101, at 24-25 and also in Jiryis, supra note 62, at 33-35

123 See the speeches in the Knesset on 20 February 1962, 33 D.K. 1315-1365 and on 20 February 1963, 36 D.K. 1207-1224. These Knesset speeches are discussed in Jiryis, supra note 62, at 44-53. See also Jiryis, Democratic Freedom in Israel (originally published in Arabic; translated by Meric Dobson) (The Institute for Palestine Studies, 1972) at 31. In June 1966, the then Minister of Justice, Ya'akov Shapira stated that "the 1945 Emergency Regulations have no place in our law books." See 46 D.K. 1708 (13 June 1966). See B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada, supra note 101, at 25. The Ministry of Justice also formed a commission of experts in order to examine the regulations and to prepare a bill detailing which regulations should be canceled. This work was interrupted by the war in June 1967, and was after the war "due to the acute emergency situation" not continued any more. See 52 D.K. 3087 (6 August 1968). See B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada, supra note 101, at

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However, in spite of the fact that so many members of all different political parties represented in the Knesset - Heruth, Mapam, United Religious Front, General Zionist Party, Israeli Communist Party - expressed opposition to the Defence (Emergency) Regulations, 1945 and even called for their cancellation, all these attempts were as unsuccessful as the above mentioned Supreme Court petitions.

The result is that until today the Defence (Emergency) Regulations, 1945 were never revoked and still form - with the exception of a few sections[124] - an organic, still valid part of Israel's legal system.[125]

And due to the above mentioned fact that the state of Israel finds itself - since its inception up until today - in a constant state of emergency, the Defence (Emergency) Regulations, 1945 can (and always could) be used at any time like any other statute in Israel.[125A]

5.2.3. The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966

5.2.3.1. General Overview

In order to give a comprehensive picture about the basic ideology and structure of Israel's legal system and its commitment towards civil and political rights of individuals and minorities, it is important to mention that as early as October 1948 a military government was established in those areas within the state of Israel which were predominantly inhabited by native Palestinian Arabs.

From 1948 until 1950, the military government had functioned without any defined legal basis.[125B]

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124 Regulation 85(1)(i) (Unlawful Associations), Regulation 111 (Detention) and Regulation 112 (Expulsion) of the Defence (Emergency) Regulations, 1945 were canceled by Section 12 of the Emergency Powers (Detention) Law, 1979, supra note 3, which established a new form of administrative detention that is subject to judicial review.

125 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 46, para. 108

125A The Defence (Emergency) Regulations, 1945 are still used against Palestinian Arab citizens of Israel; see the example given in Adalah News, http://www.adalah.org/news.htm, page 4 (In this case the Supreme Court of Israel dismisses Adalah's petition against the IDF for prohibiting a Palestinian Arab citizen of Israel from entering the West Bank - 4/26/00)

125B Hofnung, supra note 2, at 89

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Only in January 1950 - almost two years after the creation of the state of Israel in Palestine - the Israeli government established formally and legally a system of military government in order "to handle its relations with the native Palestinian Arab people residing within the area of the state of Israel as it emerged after the signement of the Armistice Agreement of 1949."[126]

The system of military government was officially imposed on three principal regions during the period from 1950 and 1966.[127] These regions were inhabited by over 75% of indigenous Palestinian Arab citizens of the state of Israel [128] and included most of the Palestinian Arab villages located within the Green Line.

The British Defence (Emergency) Regulations, 1945 provided in general the legal basis for the system of military government. It gave to the Minister of Defence the powers to appoint military commanders (governors) for the three principal regions.[129]

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126 Jiryis, supra note 62, at 15-16

127 Jiryis, supra note 123, at 30. Jiryis, supra note 62, Chapter 1 (For Security Reasons), at 15-16, 19-20; Kretzmer, supra note 1, at 4

128 Sabri Geris, Les Arabes en Israël, précédé de "Les juifs et la Palestine" par éli lobel (Librairie François Maspero, 1969) at 108 [This book written in French is an earlier version of the book "The Arabs in Israel" published by the same author in 1976, see supra note 62]

129 The precise frontiers of the military government areas were known to no one but the staff of the military government, which alone had the relevant maps. The military government never published the extent of the areas under its control and very rarely disclosed anything about its activities. With the passage of time however, most citizens have come to know the boundaries, either through daily contact with the press, or from various government documents. The most reliable description of the administrative composition of the military government was published in the State Controller's Report on Security for Financial Year 1957/58, No. 9 (15 February 1959) at 52, quoted in Jiryis, supra note 62, at 245 FN 36
According to the said Report, military governors were appointed to the following three principal areas:
1. The Northern Region, including the whole of Galilee, Acre, the plain of Beisan, and Marj ibn Amer, including the town of Afula, but not the Carmel area and the Zebulun Plain [i.e. the coastal plain between Haifa and Acre].
2. The Central Region, including the Triangle and Wadi Ara.
3. The Negev in the Southern Region, including the whole of the Negev and Wadi Arava.
These three principal areas were subdivided into a number of smaller areas, in each of which a branch of the military government acted as liaison with the local inhabitants.
In the North there were five branches: Two in Nazareth, one in Shafa Amr, one in Tarshiha-Ma'una and one in Majd al-Kurum.
In the Centre there were three branches: One in Kafr Ara, covering the area around this village and Umm al Fahm; a second branch in Baqa al Gharbiya covering Baqa, Jatt and the surrounding villages; and the third branch in Tayba covering Tayba, Tira and **Jaljulya**.
In the South there were two branches: One branch in Shuval and a second in Um Batin.
Jiryis, supra note 62, at 24
All in all there existed 54 areas where the military government was operative. See Hofnung, supra note 2, at 90

5.2.3.2. The Military Government's Systematic Violation of the Civil and Political Rights of the Palestinian Arab People (1948-1966)

One of the most harmful provision regarding the rights and freedoms of the Palestinian Arab people - but at the same time the most powerful legal tool for the military government - is Regulation 125 of the Defence (Emergency) Regulations, 1945 authorizing a military commander to declare certain areas as "closed".

Without a permit issued by a military commander no one was allowed to enter or leave a "closed area".[129A]

In addition to Regulation 125 of the Defence (Emergency) Regulations, 1945 the military government used the Emergency Regulations (Security Zones), 1949[129B] authorizing the Minister of Defence to declare any area within the territory of Israel as "security zone". Entry to such a "security zone" was only permitted to permanent residents of the area. The purpose of the Emergency Regulations (Security Zones), 1949 was to prevent the Arab residents from moving to areas adjacent to Israel's border (according to the General Armistice Agreements) and to transfer residents of a number of Arab villages from their residences to other areas.[129C]

Although the map outlining the "security zones" was not the same as that which outlined the areas under the military government, there is no doubt that there was a functional connection between the Regulation 125 of the Defence (Emergency) Regulations, 1945 and the Emergency Regulations (Security Zones), 1949.[129D]

The military government was in charge to enforce both pieces of legislation which complemented each other and which both of them were primarily designed to

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[129A] For more details regarding the use of Regulation 125 of the Defence (Emergency) Regulations, 1945, see Chapter G.2.4. (Declaration of Land as "Closed Areas" and the Creation of the so called "Uprooted Villages")

[129B] For more details regarding the use of the Emergency Regulations (Security Zones), 1949, supra note 3, see Chapter G.2.5. (Declaration of Land as "Security Zone" and Confiscating this Land)

[129C] By means of the Emergency Regulations (Security Zones), 1949, ibid., the residents of the following Arab villages were evacuated: Ikrit and Baram were evacuated on 11 November 1948, see H.C. 64/51, *Daoud & Others v. Minister of Defence*, translated into English in 2 Palestine Yearbook of International Law (1985) 119, at 120. The villages Qasas, Qatia and Ju'una were evacuated on 5 June 1949, see Hofnung, supra note 2, at 90 FN 55

[129D] H.C. 220/51, *Asslan & 30 Others v. Military Governor of Galilee*, 5 P.D. 1480; H.C. 33/52, 288/51, *Asslan & 42 Others v. Commander and Military Governor of Galilee,* 9 P.D. 689. [These cases are discussed in Chapter G.2.4.2. (Supreme Court Cases concerning Regulation 125 of the Defence (Emergency) Regulations, 1945)]
H.C. 141/81, *Committee of Displaced Persons of Ikrit, Rama & Others v. The Government of Israel & Others*, translated into English in 2 Palestine Yearbook of International Law (1985) 129. [This case is discussed in Chapter G.2.5.2. {Supreme Court Cases concerning the Emergency Regulations (Security Zones), 1949}]

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restrict the rights to land and to freedom of movement of the Palestinian Arab people living within Israel of the Green Line.

The permanent use and systematical application of the Defence (Emergency) Regulations, 1945 (and other legislative instruments) on the areas which were inhabited by the native Palestinian Arab people severely violated their fundamental rights and freedoms.

One can say that the treatment of the indigenous Palestinian Arab inhabitants by the Israeli army was typical for an occupation force in an occupied territory and was characterized by an imperialist attitude in dealing with the native Arab inhabitants.

The military government executed on a regular basis various harsh and restrictive measures enlisted in the British Defence (Emergency) Regulations, 1945, such as expulsions and deportations[130] of civilians from their villages, restrictions on travel and movement,[131] police supervision,[132] curfews,[133] closures of areas,[134] administrative detention,[135] control of speech rights,[136] and declaration of associations as unlawful.[136A]

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[130] See the following cases concerning expulsions and deportations:
H.C. 25/52, *Al-Jalil v. Minister of Interior,* 6(i) P.D. 110; H.C. 18/54, *Al-Rachman v. Minister of Interior,* 8 P.D. 473; H.C. 64/54, *Bader v. Minister of Interior,* 8 P.D. 970

[131] See the following cases concerning restrictions on travel and movement:
H.C. 13/51, *Isma'il & 7 Others v. Director of Tel Mond Prison*, 5(i) P.D. 780; H.C. 227/51, *Mahmud & 12 Others v. Director of Prison*, 5(ii) P.D. 1275; H.C. 269/60, *Watad v. Military Court (accelerated judicial procedure), Central Region*, 14 P.D. 2418 [In these cases Palestinian Arabs were tried before the military court because of having infringed restrictions on movement]

[132] See the following cases concerning police supervision:
H.C. 46/50, *Al-Ayubi v. Minister of Defence,* 4 P.D. 222; H.C. 56/65, *Sabri Jiryis v. Military Commander of District A*, 19(i) P.D. 260; H.C. 554/81, *Baransa v. Chief of Staff,* for a summary in English see 17 I.Y.H.R. (1987) 300

[133] See the following case concerning curfew:
Appeal 279-283, *Ofer, Malinki, Dahan, Mahluf, Eliahu, Gabriel, Albert, Edmund, v. Chief Military Prosecutor*, 44 Psakim (Judgments of the District Court of Israel) 362; translated into English in 2 Palestine Yearbook of International Law (1985) 71, at 94, 104 [The *Kafr Qassem case*]

[134] See the following cases concerning closures of areas:
Asslan & 30 Others v. Military Governor of Galilee, supra note 129D; *Asslan & 42 Others v. Commander and Military Governor of Galilee,* supra note 129D

[135] See the following case concerning administrative detention:
El-Karbutli v. Minister of Defence, supra note 117

[136] See the following case concerning control of speech rights:
El-Ard v. Commissioner of the Northern District, supra note 43

[136A] See the following cases concerning the declaration of associations as unlawful:
H.C. 241/60, *Kardosh v. Registrar of Companies*, translated into English in 4 S.J. (1961-1962) 7; F.H. 16/61, *Registrar of Companies v. Kardosh,* translated into English in 4 S.J. (1961-1962) 7; H.C. 253/64, *Sabri Jiryis v. District Commissioner of Northern District,* 18(iv) P.D. 673

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These and many other measures covered and restricted every aspect of life of the indigenous Palestinian Arab citizens of the state of Israel, and as the many cases and incidents show, the military government soon became an absolute power in the areas it controlled, with the freedom to act as it chose and unhampered by any administrative restraints.

In order to ensure compliance with the Defence (Emergency) Regulations, 1945 military courts were established.[137]

According to Regulation 30 of the Defence (Emergency) Regulations, 1945, it is not possible to launch an appeal against any judgment, order or direction of the military courts or to challenge the legality of such an act.[138]

5.2.3.3. The Role of the Israeli Supreme Court in the Context of the Military Government

Judicial control was limited to the possibility to launch appeals to the Supreme Court who - sitting as a High Court of Justice - had the task to review the legality of the actions of the military government.

However, this possibility was not very effective due to the fact that the Supreme Court established the doctrine of injusticiability of security considerations and made it a rule not to interfere with the decisions of the military government when its actions were based on so called "security reasons".

This doctrine of injusticiability of security considerations was established by the Israeli Supreme Court in 1950 with the decision in the matter *Al-Ayubi v. Minister of Defence,*[139] and practiced over thirty years in a long series of judgments.[140]

The doctrine of injusticiability of security considerations was based on the subjective nature of the authority, on the thought that judges should not interfere, since they are not security experts, and on English precedents, primarily on the case of *Liversidge v. Anderson*[141] handed down by the House of Lords in 1941.

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[137] In accordance with Regulation 12 of the Defence (Emergency) Regulations, 1945, supra note 64

[138] *Isma'il & 7 Others v. Director of Tel Mond Prison*, supra note 131; *Mahmud & 12 Others v. Director of Prison*, supra note 131; *Watad v. Military Court (accelerated judicial procedure), Central Region*, supra note 131

[139] *Al-Ayubi v. Minister of Defence*, supra note 132

[140] See for example the following decisions:
Isma'il & 7 Others v. Director of Tel Mond Prison, supra note 131; *Mahmud & 12 Others v. Director of Prison*, supra note 131; H.C. 111/53, *Kaufman v. Minister of Interior,* 7(i) P.D. 534; *Watad v. Military Court (accelerated judicial procedure), Central Region*, supra note 131; *Sabri Jiryis v. Military Commander of District A,* supra note 132

[141] *Liversidge v. Anderson* [1941] 3 All E.R. 338 (H.L.)
In this case the majority of the British House of Lords was not ready to examine the

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With the decision of *Baransa v. Commander of Central Front*[142] handed down in 1981 the Supreme Court marked a change in the policy of judicial review insofar as the Court deviated from the doctrine of injusticiability of security considerations.

In this case the Supreme Court explicitly held that the powers vested in the authority by the Defence (Emergency) Regulations, 1945 will be examined scrupulously and not within the limitations and self-restraint characterizing the parallel English case law as reflected in the *Liversidge v. Anderson case.*[142A]

5.2.3.4. Summary and Conclusions

The system of a military government operated according to the law in a defined geographical area and formally it did not apply to a specific population. In reality, however, from 1949 on until its abolition in 1966, the system of military government was only applied to those areas which were predominantly inhabited by an Arab population.

The imposition of the military government on most of the Arab villages within Israel of the Green Line constituted a permanent and systematic discrimination and violation of the civil and political rights of the Palestinian Arab people living in these areas.

Additionally, the almost two decades lasting military governmental regime in most of the Arab villages and towns had strong and negative implications for the socio-economic development and the well-being of the Palestinian Arab people and forms the very background for the weak political and economical position of the Palestinian Arab citizens within the Israeli society of today.

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considerations weighed by the Secretary of State when he ordered the detention of a person under Regulation 18B of the Defence (General) Regulations, 1939. The said regulation authorized the Secretary of State to detain a person if he "has reasonable cause to believe that the latter is of hostile origin or associations." In spite of the element of reasonableness, the justices actually determined that the discretion of the Secretary was absolute and that the courts would not intervene in his consideration unless he had not acted in good faith. See the majority opinions of Viscount Maugham, at 345-349; Lord Macmillan, at 366; Lord Wright, at 370-381; Lord Romer, at 386

Lord Atkin issued a dissenting opinion and argued that the court should examine the discretion exercised y the Secretary due to the element of reasonableness in regulation 18B. However, even under the dissenting opinion the court should not intervene, if the discretion were subjective, i.e. without the element of reasonableness. Id., at 35

142 *Baransa v. Commander of Central Front,* supra note 132

In this case concerning the right to freedom of movement the Supreme Court held explicitly that the powers vested in the authority by the Defence (Emergency) Regulations, 1945 will be examined scrupulously and not within the limitations and self-restraint characterizing the parallel English case law, as reflected in *Liversidge v. Anderson,* supra note 141

142A Ibid.

5.3. The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within the Occupied Territories since 1967

With regard to the applicability of the British Defence (Emergency) Regulations, 1945 in the Occupied Territories the following situation exists:

After Israeli military forces have occupied the West Bank, East Jerusalem, the Gaza Strip and the Golan Hights, in the course of the war in June 1967, the Chief of Staff of the Israeli military government in these areas issued the Military Proclamation No. 2 concerning the regulation of the authority and judiciary in the West Bank, which declared that the laws that have been in force up to 7 June 1967 in the territories shall remain valid in the territories.[143]

For the Gaza Strip an equivalent Proclamation was issued on 8 June 1967 in reference to the law in force there on 6 June 1967.[144]

However, doubts regarding the validity of the Defence (Emergency) Regulations, 1945 in the Occupied Territories at the time of the entry of Israel's army into them soon came up.[145]

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143 Military Proclamation No. 2 Concerning the Regulation of Authority and the Judiciary, issued on 7 June 1967 and applicable to the West Bank states as follows:

> "The law which existed in the Area on 7 June 1967 shall remain in force to the extent that it does not contain anything incompatible with this Proclamation or any Proclamation or Order which shall be issued by me, and subject to such modifications as may result from the establishment of the IDF Government in the Area."

See Collection of Proclamations, Orders and Appointments (Judea and Samaria), 1967, at 3, quoted in Yahav, supra note 113, at 50 FN 17
An unofficial English version of this order is also published in Jamil Rabak and Natasha Fairweather, Israeli Military Orders in the Occupied Palestinian West Bank 1967-1992 (Jerusalem Media and Communication Center, 1993) at 1

144 Collection of Proclamations, Orders and Appointments (Gaza Strip and North Sinai), 1967, at 4, quoted in Yahav, ibid., at 50 FN 18

145 It has been argued that the Constitution of the Hashemite Kingdom of Jordan of 1952 effectively annulled the Defence (Emergency) Regulations, 1945, since certain of the provisions of the Jordanian Constitution contradict certain of the powers granted under the Defence (Emergency) Regulations, 1945. One of these provisions is Article 9(1) of the Jordanian Constitution which explicitly states that "No Jordanian shall be exiled form the Kingdom", and which is certainly not compatible with the powers granted under Regulation 112 of the Defence (Emergency) Regulations, 1945. See in this regard B'Tselem, Deportation of Palestinians from the Occupied Territories and the Mass Deportation of December 1992 (Jerusalem, June 1993) at 30

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In order to remove all these doubts another Military Proclamation (No. 3)[146] was issued. This Proclamation instituted and re-enacted a number of regulations similar to the mentioned Defence (Emergency) Regulations, 1945.

Israel's governmental position is that the Defence (Emergency) Regulations, 1945 were part of the local law in the territories prior to the war in June 1967.[147]

This position has been approved by the Supreme Court.

The Israeli government has - especially the following measures enlisted in the Defence (Emergency) Regulations, 1945 - applied on a regular basis in the Occupied Territories:

Demolition of houses,[148] sealing off[149] and forfeitures[150] of houses, curfews,[151] closures,[151A] closures of institutions,[152] restrictions on travel abroad,[152A]

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146 Military Proclamation No. 3 Concerning Security Provisions, published in Jamil Rabak and Natasha Fairweather, Israeli Military Orders in the Occupied Palestinian West Bank 1967-1992, supra note 123, at 1. In 1970, Military Proclamation No. 3 was repealed and replaced by Military Order No. 378 Concerning Security Provisions, translated into English and published in Rabak and Fairweather, Israeli Military Orders in the Occupied Palestinian West Bank 1967-1992, supra note 123, at 182

147 H.C. 97/79, *Abu Awad v. Commander of the West Bank Region*, for a summary in English see 9 I.Y.H.R. (1979) 343; H.C. 513, 514/85, *Nazal v. Commander of I.D.F. in West Bank Region,* for a summary in English see 16 I.Y.H.R. (1986) 329 [Both cases concern the deportation of Palestinian Arab civilians living in the Occupied Territories]

148 See the following cases concerning demolitions of houses belonging to Palestinian Arab civilians living in the Occupied Territories: H.C. 361/82, *Khamri v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 314; H.C. 698/85, *Dagalis v. Military Commander of IDF in the West Bank,* for a summary in English see 17 I.Y.H.R. (1987) 315; H.C. 897/86, *Jab'r v. Military Commander of IDF Central Command*, for a summary in English see 18 I.Y.H.R. (1988) 252; H.C. 779/88, *Alfasfus v. Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 316; H.C. 796/88, *Ahlil v. Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 320; H.C. 45/89, *Abu Daka v. Minister* of Defence, for a summary in English see 23 I.Y.H.R. (1993) 322; H.C. 610/89, *Bakhari v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 325; H.C. 658/89, *Sanuar v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 329; H.C. 1005/89, *Aga v. Military Commander of IDF in the Gaza Strip,* for a summary in English see 23 I.Y.H.R. (1993) 330; H.C. 2209/90, *Shuahin v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 325; H.C. 4112/90, *Association for Civil Rights in Israel v. Military Commander of IDF in the Southern District,* for a summary in English see 23 I.Y.H.R. (1993) 333; H.C. 5740/90, *Hagba et al. v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 336; H.C. 42/91, *Timraz v. Military Commander of IDF in the Gaza Strip,* for a summary in English see 23 I.Y.H.R. (1993) 337; H.C. 2977/91, *Tag v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 330; H.C. 4772/91, *Khizran v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 349; H.C. 5139/91, *Zakik v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 334; H.C. 2722/92, *Al-Amrin v. Military Commander of IDF*

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in the Gaza Strip, for a summary in English see 25 I.Y.H.R. (1995) 337
See also on this issue: B'Tselem, Annual Report 1989: Violations of Human Rights in the Occupied Territories (Jerusalem, December 1989) at 41-52; B'Tselem, Collective Punishment in the West Bank and the Gaza Strip (Jerusalem, November 1990) at 35-37, 48-53; B'Tselem, House Demolition and Sealing as a Form of Punishment in the West Bank and Gaza Strip, Follow-Up Report (Jerusalem, November 1990); B'Tselem, Human Rights Violations in the Occupied Territories 1992/93 (Jerusalem, 1994) at 77; B'Tselem, Without Limits: Human Rights Violations under Closure (Jerusalem, April 1996) at 5-11
I want to stress at this point that the *demolition and sealing off of house* as forms of punishment are unique to Israel and are not used by any other country in the world. I would consider these methods of punishment as barbarian and certainly totally unfit for any country that wants to present itself as democratic and enlightened country.

[149] See the following cases concerning sealing of houses belonging to Palestinian Arab civilians living in the Occupied Territories: H.C. 434/79, *Sakhawil v. Military Commander of IDF in the West Bank*, for a summary in English see 10 I.Y.H.R. (1980) 345; H.C. 22/81, *Khamed v. Military Commander of IDF in the West Bank*, for a summary in English see 11 I.Y.H.R. (1981) 365; *Jab'r v. Military Commander of IDF Central Command*, ibid.; H.C. 387/89, *Ragabi v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 324; *Kahavagi v. Military Commander of IDF in the West Bank,* ibid.; *Aga v. Military Commander of IDF in the Gaza Strip,* ibid.; H.C. 948/91, *Hodli v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 327; H.C. 5667/91, *Gabrin v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 335; H.C. 5510/92, *Turkeman v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 347
See also on this issue: B'Tselem, Annual Report 1989, ibid.; B'Tselem, Collective Punishment in the West Bank and the Gaza Strip, 1990, ibid.

[150] See the following case concerning forfeitures of houses in the Occupied Territories: H.C. 5139/91, *Zakik v. Military Commander of IDF in the West Bank,* for a summary in English see 25 I.Y.H.R. (1995) 334

[151] See the following cases concerning curfews in the Occupied Territories: H.C. 1358/91, *Arshid v. Minister of Police*, for a summary in English see 23 I.Y.H.R. (1993) 342 [This case concerns a curfew imposed on East Jerusalem]
See also on this issue: B'Tselem, Annual Report 1989, supra note 148, at 77-83; B'Tselem, Collective Punishment in the West Bank and the Gaza Strip, 1990, supra note 148, at 18-27, 41; B'Tselem, Human Rights Violations in the Occupied Territories During the War in the Persian Gulf (Jerusalem, January - February 1991) at 3-4, 15-16; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93, supra note 148, at 93-97; B'Tselem, Without Limits: Human Rights Violations under Closure, 1996, supra note 148, at 33

[151A] See the following reports concerning closure in the Occupied Territories: B'Tselem, Collective Punishment in the West Bank and the Gaza Strip, 1990, ibid., at 18; B'Tselem, Human Rights Violations in the Occupied Territories During the War in the Persian Gulf, 1991, ibid., at 5; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93, ibid., at 99-104; B'Tselem, Without Limits: Human Rights Violations under Closure, ibid., 1996; Human Rights Watch/Middle East, Israel's Closure of the West Bank and Gaza Strip, July 1996, Vol.8, No.3 (E)

[152] See the following reports concerning closure of institutions in the Occupied Territories: B'Tselem, Closure of Schools and Other Setbacks to the Education System in the Occupied Territories (Jerusalem, September-October 1990); B'Tselem, Collective Punishment in the West Bank and the Gaza Strip, 1990, id., at 27-30; B'Tselem, Human Rights Violations in the

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disconnection of telephone lines, electricity and water supply,[152B] control of speech rights,[153] administrative detention of civilians without fair trial[154] - sometimes even over years,[155] - deportation of civilians[156] - even mass deportations[157] as it happened

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Occupied Territories 1992/93, id., at 99-103; B'Tselem, Without Limits: Human Rights Violations under Closure, 1996, id., at 17

152A See the following reports concerning restrictions on travel abroad: B'Tselem, Collective Punishment in the West Bank and the Gaza Strip, 1990, id., at 30-31, 42-43; Human Rights Watch, Israel's Closure of the West Bank and Gaza Strip, 1996, supra note 151A, at 38

152B See the following report concerning disconnection of telephone lines, electricity and water supply in the Occupied Territories: B'Tselem, Collective Punishment in the West Bank and the Gaza Strip, 1990, id., at 31-34, 44-47

153 See the following cases concerning control of speech rights: H.C. 415/81, *Ayoub v. District Commissioner,* 38(i) P.D. 750; H.C. 322/81, *Makhoul v. District Commissioner*, 37(i) P.D. 789; H.C. 541/83, *Asli v. District Commissioner,* 37(iv) P.D. 837; H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477; H.C. 562/86, *Al-Khatib v. Minister of Interior*, for a summary in English see 17 I.Y.H.R. (1987) 317; H.C. 648/87, *Kassem v. Minister of Interior*, for a summary in English see 18 I.Y.H.R. (1988) 254

154 See the following cases concerning administrative detention: H.C. 253/88, *Sagdia et al v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 288; H.C. 576/88, *Husseini, Faisal Abdul Kasser v. 1) Deputy President of the District Court of Jerusalem, Judge Eliyahu Noam and 2) Minister of Defence,* for a summary in English see 23 I.Y.H.R. (1993) 299; H.C. 769/88, *Oubeid v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 315; H.C. 670/89, *Ouda v. Military Commanders of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 326
See also on this issue: B'Tselem, Annual Report 1989, supra note 148, at 59-76; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93, supra note 148, at 109-129; B'Tselem, Detained Without Trial, Administrative Detention in the Occupied Territories Since the Beginning of the Intifada, supra note 101; B'Tselem, Detention and Interrogation of Salem and Hannan 'Ali, Husband and Wife, Residents of Bani Na'im Village (Jerusalem, June 1995); B'Tselem, Without Limits: Human Rights Violations under Closure, 1996, supra note 148, at 12; B'Tselem, Prisoners of Peace, Administrative Detention During the Oslo Process (Jerusalem, July 1997)

155 See the following cases concerning administrative detention over years without fair trial of Palestinian Arab civilians living in the Occupied Territories: H.C. 6843/93, *Qattamseh v. Military Commander of IDF in the West Bank,* Takdin Elyon 94(2) 2084; AAD 10/94, *Plonim (i.e. Unnamed) v. Minister of Defence*, translated into English by Amnesty International: http://www.btselem.org/Files/site/english/data/lebanon/detainees.htm
For a summary in English see B'Tselem, The B'Tselem Human Rights Report, Volume 6, Summer 1998, at 9, 14. See also on this issue the detailed report of B'Tselem, Israeli Violations of Human Rights of Lebanese Civilians (Jerusalem, January 2000) at 41-46

156 See the following cases concerning deportation of Palestinian Arab civilians living in the Occupied Territories: *Abu Awad v. Military Commander of IDF in the West Bank*, supra note 147; H.C. 320/80, *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 344; H.C. 698/80, *Kawasme v. Minister of Defence,* for a summary in English see 11 I.Y.H.R. (1981) 349; H.C. 629/82, *Mustafa v. Military Commander of IDF in the West Bank,* for a summary in English see 14 I.Y.H.R. (1984) 313; *Nazal v. Military Commander of IDF in the West Bank,* supra note 147; H.C. 672/88, *Lavdi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 309; H.C. 765/88, *Shakhshir v. Military Commander of IDF in the West Bank (First and Second Phase)*, for a summary in

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in December 1992 when the Israeli government carried out the deportation of 415 Palestinian Arabs on the basis of these Defence (Emergency) Regulations, 1945. Moreover, the Supreme Court - when called upon to review the legality of this mass deportation - has opted to justify the illegality of the said mass deportation and accepted in a deplorable decision and in total contradiction to international law the government's position that "security needs" take precedence over everything else.[158]

6. Conclusions

In light of the criterias and principles which characterize a liberal democratic system of government - such as the respect for the rule of law, the principle of separation of powers, rights and freedoms of minorities and individuals - I arrive at the following conclusions:

1. The state of Israel complies with the formal - institutional aspects of a liberal parliamentary democracy, since open periodic elections are held since the establishment of the state, and since representatives to the Knesset - i.e. the Israeli Parliament which makes the laws - are elected from a number of competing political parties.

2. Yet, on the substantial level the state of Israel does not meet the standards of a liberal democracy. This is the situation due to the following facts:

English see 23 I.Y.H.R. (1993) 311; H.C. 792/88, *Matur v. Military Commander of IDF in the West Bank (First and Second Phase),* for a summary in English see 23 I.Y.H.R. (1993) 316; H.C. 814/88, *Nassaralla et al. v. Military Commander of IDF in the West Bank,* for a summary in English see 23 I.Y.H.R. (1993) 321
See also on this issue: B'Tselem, Annual Report 1989, supra note 148, at 53-58; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93, supra note 148, at 67-70; B'Tselem, Without Limits: Human Rights Violations under Closure, 1996, supra note 148, at 18

157 See the following cases concerning mass deportation of Palestinian Arab civilians living in the Occupied Territories: H.C. 785/87, *1. Abd al Nasser al Aziz Abd al Aziz al Affo. 2. The Association for Civil Rights in Israel v. Military Commander of IDF in the West Bank;* H.C. 845/87, *1. Abd al Aziz Abd Alrachman Ude Rafia. 2.The Association for Civil Rights in Israel v. 1. Military Commander of IDF in the Gaza Strip. 2. Minister of Defence;* H.C. 27/88, *1. J'Mal Shaati Hindi v. Military Commander of IDF in the West Bank;* translated into English in 29 International Legal Materials (1990) 139 [The Afu case]; H.C. 5973/92, *Association for Civil Rights in Israel v. Minister of Defence*, translated into English in 10 S.J. (1988-1993) 168, for a summary in English see 23 I.Y.H.R. (1993) 353
See also on this issue: B'Tselem, Deportation of Palestinians from the Occupied Territories and the Mass Deportation of December 1992, supra note 145

158 H.C. 5973/92, *Association for Civil Rights in Israel v. Minister of Defence*, ibid.

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2.1. Since the establishment of the state of Israel in Palestine in 1948, a permanent state of emergency is in force, which formally entitles the Israeli government to apply - on the pretext of "state security" reasons - emergency powers in every day life.

This permanent state of emergency has enormous harmful effect regarding the fundamental human rights and freedoms of individuals and minorities, as well as regarding the society as a whole.

Moreover, such a permanent state of emergency also stands in contradiction to the established principles of international law - as reflected in Article 4(1) of the ICCPR, 1966. Although Article 4(1) of the ICCPR, 1966 basically allows for the derogation from certain fundamental human rights, this norm clearly established that the application of emergency laws may only occur "in time of public emergency which threatens the life of the nation [and only] to the extent strictly required by the exigencies of the situation."[159] That means the application of emergency law must be limited in time - a condition which is not fulfilled by the state of Israel.

2.2. With regard to Article 4(1) of the ICCPR, 1966 the Israeli government has declared "...that a public emergency within the meaning of article 4(1) of the Covenant exists, since the state of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens."[160] However, even where a state of emergency is legitimate, the situation in Israel does not meet the conditions set by Article 4(1) of the ICCPR, since in any case, any derogation from rights on an emergency basis must still need to qualify as "strictly required by the exigencies of the situation." And this condition has - due to the following facts - not been met by the state of Israel. An analysis of the use of emergency regulations clearly shows, that this legislation has been enacted in many areas of civil life which had no connection to a state of emergency or national security, and that in these situations the permanent state of emergency solely served as a justification for the purpose to implement a specific policy which, in the most cases, favors the Jewish population. From the huge number of Supreme Court judgments which I reviewed during the last years, it became more and more evident for me that the permanent state of emergency only served as a justification for the denial of the most basic civil and political rights of the Palestinian Arab population and as reason for doing away with all democratic procedures in order to implement a specific policy which clearly favors the Jewish population.

2.3. Based upon the permanent state of emergency an enormous quantity of security and emergency legislation has been adopted and enacted, and could also be kept in force in Israel. This emergency legislation governs many civil areas, such as

159 Article 27(1) of the American Convention on Human Rights, 1969 explicitly notes that emergency derogations must be limited in time.

160 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 46, para. 106

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foreign travel, movement of citizens within the country, property rights, labour disputes and economic policy matters. The said emergency legislation is composed of adopted British mandatory regulations as well as of a huge number of such legislation enacted after the establishment of the State in 1948. Most of this emergency legislation is, by its very nature, secondary legislation, that means it has been enacted only by an executive office holder. But, despite the above mentioned and important fact regarding its nature, the said emergency legislation empowers the executive branch (civil and military arm) of the government to alter, suspend or repeal any primary law (i.e. legislation that is enacted by the Knesset or by a mandatory authority) which is not entrenched.[161]

The said emergency legislation also empowers the executive branch (civil and military arm) of the government to impose severe restrictions upon basic rights and freedoms.

This state of affairs has changed the whole constitutional system of power relation between the different branches of government, and definitely constitutes a serious threat to the principles of the rule of law.

Especially the British mandatory Defence (Emergency) Regualtions, 1945, which were adopted by the Israeli legal system, entail numerous drastic and severe measures and sanctions - even forms of collective punishment - and allow for the imposition of martial law in Israel and the Occupied Territories.

These Defence (Emergency) Regualtions, 1945 are extremely harmful to basic human rights and freedoms, they stand in harsh contradiction to the accepted legal principles of any modern democratic legal system, and definitely contravene international humanitarian norms and universally recognized principles of law.

In spite of the severe defects and the harsh criticism by the Jewish community living in Palestine during the British mandatory period, the Israeli legislator never repealed them.

On the contrary, since the establishment of the state of Israel in Palestine in May 1948 up until today, the Israeli government has - with the Supreme Court's justification in most of the cases - applied and executed on a regular basis - in Israel as well as the Occupied Territories - nearly all measures enlisted in the Defence

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[161] Only a few statutes contain provisions which are protected against interference by emergency (secondary) legislation: Section 11 of the Second Knesset (Transition) Law, 1951, 5 L.S.I. (1950/51) 94; Section 44 of the Basic Law : The Knesset, 12 L.S.I. (1957/58) 85; Section 25 of the Basic Law: The President of the State, 18 L.S.I. (1964/65) 118; Section 42 of the Basic Law: The Government (1968), 22 L.S.I. (1968) 257; Section 56 of the new Basic Law: The Government (1992), supra note 51; Section 22 of the Basic Law: Judicature, 38 L.S.I. (1984) 101; Section 12 of the Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994); Section 6 of the Basic Law: Freedom of Occupation, S.H. No. 1387 (12 December 1992) repealed by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994)

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(Emergency) Regulations, 1945, such as house demolitions, sealing off and forfeitures of houses, restrictions on travel and movement, police supervision, curfews, closures of areas, administrative detention and deportation of civilians.

In December 1992, the Israeli government - justified by the Supreme Court - even carried out a mass deportation on the basis of these Emergency Regualtions.

2.4. Israel's security and emergency legislation has not been used only in times of war and conflict, but rather as an additional administrative means of government.

The enactment of "emergency regulations" became a routine instrument of the Israeli government for carrying out specific policies which - at the expense of the most basic human rights and freedoms of the existing Palestinian Arab minority in Israel, and the Palestinian Arab inhabitants of the Occupied Territories - promote first of all "Jewish national interests".

2.5. Israel's concept of "state/national security" is strongly connected with the underlying ideology of the state and is based on the definition of the state as a "Jewish state", whose aims are to promote Zionist goals and Jewish national values, and to exclude the non-Jewish population specifically from resource allocation, citizenship as well as from social and economic benefits.

Hundreds of Supreme Court cases and governmental activities show that the concept of "state/national security" of Israel means first of all security of the "Jewish population" but not security of "all" citizens of the state irrespective of ethnic or religious affiliations'.

In most of the cases the Israeli authorities including the Supreme Court perceive only those acts and activities as contribution to "state security" which promote Zionist, i.e. Jewish national goals.

In contrast to such acts and activities, complete non-violent acts and activities that might strengthen the "national interests and aspirations" of the native Palestinian Arab people living in Israel and the Occupied Territories - such as political expressions of Palestinian identity, non-violent form of identification with or advocacy of Palestinian national aspirations, non-violent activity in political movements or parties - are almost always deemed as threat to the "security of the state", which means the Jewish society living in Israel and the Occupied Territories.

2.6. As long as "state security" is based upon a rigid definition of the state to be a "Jewish state", whose political aims are to advance and to protect first of all Zionist goals, i.e. the values, rights and interests of the Jewish population - rather than the rights of all citizens of Israel and inhabitants within Israel's jurisdiction - peace and security will - according to my point of view - never come: Neither for the Jewish nor for the Palestinian Arab people.

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I think that it is wrong to believe that peace can be reached without social and political justice for all inhabitants living on the same territory.

I also think that it is totally wrong and totally unacceptable from a moral point of view to believe that "state/national security" of Israel is possible at the expense of the Palestinian Arab citizens and inhabitants of the state of Israel and the Occupied Territories, as well as at the expense of Israel's neighboring Arab countries.

2.7. After having reviewed Israel's laws as well as many Supreme Court decisions dealing with the issue of "state security", I could notice a recurring pattern of argumentation:

The responsible and acting persons and authorities, as well as the Supreme Court judges always try to justify human rights violations on the pretext of "state or public security" considerations and the state's responsibility to fight "terrorism" but they never really focus on the root causes which in reality lead to the so called "security problems".

These root-causes lay in the discriminatory treatment of Palestinian Arabs in general, and particularly in the illegal, more than 33 years lasting occupation of the West Bank, the Gaza Strip, the Golan Heights and East Jerusalem, and the severe violations of human rights and freedoms which - in the context of this situation - mainly occur towards the native Palestinian Arab inhabitants.

The Israeli government - in the most cases backed by the Supreme Court - violates on a daily basis the rights and freedoms of an entire other people, namely the Palestinian Arab people which belong to an other religion and nation, and which is - due to the underlying political ideology of Zionism - not included in the "national security" concept of the state of Israel.

2.8. Israel perceives "national security" as the sole or paramount concern - or to say it in other words - "state security" is considered as an end in itself.

But - and I want to stress this point specifically - where national security is considered as the only vital interest, there is always the very danger that, although the self-established criterias of the "security concept of the state" are fulfilled, at the same time the moral value of that concept becomes highly questionable.

And as the reality of Israel's legal and social order in the past and at the present time shows, many policies and practices employed by the Israeli government in the name of "national/state security" - and mostly backed by the Supreme Court - constitute a flagrant violation of the most fundamental human rights and freedoms of a great number of persons and as such violate many international commitments signed by Israel in the field of human rights and freedoms.

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2.9. Israel's concept of "national security" is based on a "military concept" and defined in terms of "military strength" and "weapons" in order to accomplish political aims and to secure certain interests of one national/religious population group - i.e. the Jewish population in Israel and the Occupied Territories.

However, according to my point of view, human security is never just about weapons and military strength but is rather heavily dependent on the development of the society as a whole, on the economic and social well-being of *all* individuals, and on the respect for human rights and human dignity of *all* citizens and inhabitants living in a state or a territory.

As long as the Israeli government defines "national/state security" in terms of "military strength" in order to secure certain interests but does not respect the fundamental human rights and humanitarian affairs of other people - and I mean here specifically the rights of the native Palestinian Arab people living in Israel and the Occupied Territories, since it is the most affected and wounded group - sustainable peace and security will never be achieved in that part of the world.

7. Recommendations

- The concept of "national security" should not be based on a political ideology which excludes a specific part or group of the population but rather should be based on a neutral definition of the state, thus including all citizens and inhabitants without distinction on the basis of nationality, ethnic origin, religion or sex.
- The state of emergency should be lifted in times of tranquillity.
- An article should be added to the Basic Laws: Human Dignity and Freedom to the effect that international human rights treaties are part of the Israeli legal system and can be applied directly by all Israeli courts.
- The courts should have the power to declare laws, legislative provisions or government acts, which offend against these international obligations, to be without force or effect.
- Existing emergency laws as well as governmental emergency measures and practices which are not in conformity with the guarantees contained in the ICCPR and other international treaties should be repealed or stopped.
- Specifically the undemocratic Defence (Emergency) Regulations, 1945 should be repealed, and the rules of evidence, i.e. the Evidence Ordinance (New Version), 1971, which establish the possibility of submission of a Certificate of Privileged Evidence (CPE) signed by the Minister of Defence, should be amended.

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- The issue of human rights should be integrated into political and economic discussions concerning the Palestinian - Israeli conflict.

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Foundations of Civil and Political Rights in Israel and the Occupied Territories

E. THE ADMINISTRATIVE, LEGAL AND JUDICIAL SYSTEM IN THE OCCUPIED TERRITORIES

1. Introduction

During the war in June 1967 between Israel and the Arab neighbors, Israel invaded and occupied a large part of territories, namely the Sinai Peninsula, the Golan Heights, the Gaza Strip, the West Bank of the Jordan River, including the area of East Jerusalem [hereinafter: The Occupied Territories].[1]

All together the Occupied Territories were inhabited by more than a million native Palestinian Arabs[2] and amounted to 26.158 square miles, including 23.166 square miles in the Sinai Desert.[3] The mentioned territories strongly differed from one another in their geographic and demographic conditions, as well as in their legal status.

The occupation of the above mentioned territories changed the territorial and demographical map and the status quo which had existed since Israel's withdrawal from the Sinai Peninsula and the Gaza Strip in 1957.[4] Additionally, the occupation had substantial effects on the administrative, legal and judicial systems operating in the said territories until June 1967:

The Sinai Peninsula, the largest territory conquered by Israel during the war in 1967, was before its occupation under the sovereignty of Egypt.[5] After the occupation it became subjected to a regime of belligerent occupation, until Israel withdrew from this area in 1979 following an Egyptian-Israeli peace treaty.

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1 Eyal Benvenisti, The International Law of Occupation (Princeton University Press, 1993) at 108-114

2 The war in June 1967 resulted in the expulsion of perhaps 250.000 Palestinian Arabs residents from the West Bank - a high proportion of whom were refugees from the 1948 war and/or residents of the Jordan Valley. Anthony Coon, Town Planning Under Military Occupation, An examination of the law and practice of town planning in the occupied West Bank, A Report Prepared For Al-Haq, The West Bank Affiliate of the International Commission of Jurists, Ramallah 1992 (Dartmouth Publishing Company Limited., 1992) at 14-15
In 1968 there lived about 356.261 native Palestinian Arabs in the Gaza Strip and Northern Sinai; 600.000 in the West Bank of the Jordan River; 66.857 in East Jerusalem and 6.400 in the Golan Heights. Yifat Holzman-Gazit, Private Property, Culture, and Ideology: Israel's Supreme Court and the Jurisprudence of Land Expropriation (unpublished dissertation submitted to the school of law and the committee on graduate studies of Stanford University in partial fulfillment of the requirements for the degree of doctor of the science of law, May 1997) at 281

3 Ibid., at 279

4 Menachem Hofnung, Democracy, Law and National Security in Israel (Dartmouth Publishing Company Ltd., 1996) at 213

5 Benvenisti, supra note 1, at 108

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The Golan Heights, a high plateau overlooking the Israeli Upper Jordan Valley and the Sea of Galilee, were before their occupation under the sovereignty of Syria.[6] In 1970 the Golan Heights were de facto annexed after the Israeli administrative and legal systems had effectively been introduced in that area through military enactments. In 1980 the Israeli parliament (i.e. the Knesset) adopted the Golan Heights Law[7] according to which "the Israeli law, jurisdiction and administration" is officially applied to the Golan Heights. This measure was internationally received as a formal annexation of the Golan Heights, and thus was condemned by the United Nations as being "null and void"[8] and as an "act of aggression".[9] Thus, the Golan Height continue to be subject to the rules of belligerent occupation, i.e. occupation resulting from war with all its consequences regarding the applicability of international humanitarian law. The occupation of the Golan Heights removed Syria's vantage point over the northern region of Israel, and the high eastern hills of the Golan Heights give Israel a good position for launching attacks into Syrian territory. Thus, the continuing control of the Golan Heights by Israel was justified originally on the grounds of "security" and military advantage. However, the sovereignty over the Golan Heights has not only this much publicized military significance but also determines the physical control over a considerable part of Israel's major water resources.[10]

The Gaza Strip which contained - and contains today more than ever before - a dense Palestinian Arab population was under Egyptian rule from 1948 until 1967. Important to mention is the fact that Egypt never claimed any title over the Gaza Strip nor did it express any intention to annex it.[11] Since the occupation during the June 1967 war, the Gaza Strip is ruled under a regime of belligerent occupation where all governmental powers are concentrated in the hands of the Israeli military, i.e. the Israel Defense Forces (IDF).[12]

The West Bank is - like the Gaza Strip - also an area densely populated by Palestinian Arabs. It had been under Jordanian administration since 1948. In 1950 the West Bank was annexed by Jordan, an act that was widely regarded as illegal

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6 Ibid.

7 Golan Hights Law, 1980, 36 L.S.I. (1981/82) 7

8 United Nations Security Council Resolution 497 (1981)

9 United Nations General Assembly Resolution 36/226A (1981); 39/146A (1984)

10 The Golan Heights form the basis for a significant part of the sources of the Jordan River. This includes the Baniyas, Wazani and Hazbani Rivers as well as smaller tributaries, both perennial as well as seasonal ones, which flow directly into the Jordan River and into the Lake Tiberias. Jitzchak P. Alster, Water in the Peace Process: Israel-Syria-Palestinians, 10 Justice (1996) 4, at 5

11 Raja Shehadeh, From Occupation to Interim Accords: Israel and the Palestinian Territories (published by CIMEL and Kluwer Law International) 1997, at 77

12 David Kretzmer, Constitutional Law, published in Introduction to the Law of Israel (edited by Amos Shapira and Keren C. DeWitt-Arar, Kluwer Law International, Boston, 1995) 39, at 56

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and void, and only recognized by Great Britain, Iraq and Pakistan.[13] Since the occupation in 1967 the West Bank is ruled under a regime of belligerent occupation where all governmental powers are concentrated in the hands of the Israeli military, i.e., the Israel Defense Forces (IDF).[14] The West Bank is the only territory whose status has been disputed prior to the Israeli occupation in 1967.

East Jerusalem (including the Old City) was - like the West Bank - from 1948 to June 1967 under Jordanian rule, and has been de facto annexed by Israel on 28 June 1967, after the Israeli government decided to apply the Israeli "law, jurisdiction and administration" over this area[15] and put it under the existing Israeli municipality of West Jerusalem. To the international community, this act of de facto annexation was explained by Israel not as an annexation, but rather as "an administrative measure aimed at equalizing the municipal services to all the residents[16] of the single municipal area and at the protection of the Holy Places."[17] In 1980 the Israeli parliament (i.e. the Knesset) adopted the Basic Law: Jerusalem, Capital of Israel,[18] which stated that "unified Jerusalem is the capital of Israel" and thus officially expressed Israel's intention to exercise sovereignty over this area. The United Nations General Assembly and the Security Council considered the 1967 act as "invalid".[19] The Security Council condemned the adoption of the 1980 Basic Law as a "violation of international law" and as being "null and void", and decided not to recognize it, and to continue to deem Israel the occupant of the territory.[20] Thus, East Jerusalem continues to be subject to the rules of belligerent occupation, i.e. occupation resulting from war with all its consequences regarding the applicability of international humanitarian law. Important to mention is the fact that the customary term "East Jerusalem" or "the eastern part of the city" for the area annexed in 1967 is misleading since the area of East Jerusalem inside the Jordanian municipal borders was only 6,4 km sq. In addition to these areas, Israel annexed an additional amount of 64 km sq or 70.000 dunams of land - most of which were in 28

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13 Benvenisti, supra note 1, at 108

14 Kretzmer, supra note 12, at 56

15 Section 1 of the Law and Administration Ordinance (Amendment No. 11) Law, 1967, 21 L.S.I. (1966/67) 75, states as follows: "In the Law and Administration Ordinance, 1948, the following section shall be inserted after section 11A:

11B. The law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the Government by order."

16 The cynical meaning of this statement becomes evident if one considers the policy that was - and still is - exercised since the last 33 years of Israel's occupation during which the most basic human rights, needs and interests of the Palestinian Arab people were not at all taken into consideration.

17 United Nations Document S/8052 (1967)

18 Basic Law: Jerusalem, Capital of Israel, 1980, 34 L.S.I. (1980) 209

19 United Nations Security Council Resolution 252 (1967); 267 (1969); 298 (1971); 446 (1979); 445 (1980); United Nations General Assembly Resolution 2253 (ES-V) (1967); 2254 (ES-V) (1967); 31/106A (1976); 33/113 (1978)

20 United Nations Security Council Resolution 478 (1980); 672 and 681 (1990)

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villages in the West Bank, and the remaining annexed lands were within the municipal boundaries of Bethlehem and Bet Jalla - to the city and placed the total amount of 70 km sq under the authority of the West Jerusalem municipality. The area of West Jerusalem tripled, making Jerusalem Israel's largest city. Thus, prior to 1967, more than 90% of the area which is today called by Israelis as "unified Jerusalem" was not at all a part of Jerusalem, but rather a part of the West Bank. The use of the term "East Jerusalem" for the Palestinian villages that originally were outside the city's boundaries has clear political implications. The new borders were set by a committee headed by General Rehavam Ze'evi, and approved by Israel's government. The guiding consideration when setting these borders was that they would ultimately become the state's borders. The determination was based on so called "security goals" (i.e. to have defensible borders) and demographic goals (i.e. to ensure a Jewish majority in the city by excluding heavily populated Palestinian areas from Jerusalem).[21] The municipal planning policy of Jerusalem was and still is - in contradiction to the obligations according to international law and fundamental principles of a democratic society - based on political-national considerations.

Important to mention is the fact that the term "Occupied Territories" is not officially used by the Israeli government, which applies for these territories the terms "Areas Administered by Israel" or "Administered Territories." The West Bank is officially also called "Judea and Samaria" corresponding with the biblical terms of this area.[22] In accordance with international law, I will primarily use the term "Occupied Territories" when referring to the above mentioned territories, namely the Sinai Peninsula, the Gaza Strip, the Golan Heights, the West Bank of the Jordan River and East Jerusalem. Additionally, I will also use other terms, such as "Military Government", "Occupying Power" and "Occupant", as these expressions are normally used in international law. However, due to the fact that the above mentioned official terms "Areas Administered by Israel", "Administered Territories" and "Judea and Samaria" appear in formal titles, in legal texts and in the jurisprudence of the Israeli Supreme Court, these expressions will occasionally also be cited in this work.

According to international law the legal status of the Occupied Territories is completely different from that of Israel within the border set by the 1949 Armistice Agreements [hereinafter: Israel or Israel within the Green Line].

However, in spite of the mentioned difference between Israel and the Occupied Territories with regard to their legal status according to international law, the laws and Supreme Court jurisprudence concerning human rights in the Occupied

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21 B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem (Jerusalem, January 1997) at 14, 17

22 David Yahav (Editor in Chief.), Israel, The "Intifada" And The Rule of Law (Israel Ministry Of Defence Publications, Israel 1993) at 25

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Territories should not be seen as separated from the laws and the jurisdiction of the state of Israel itself. The reasons which support this approach are as follows:

1. The Knesset and government ministries enact laws and regulations which are directly applicable to the Occupied Territories. Thus the legal borders separating Israel from the Occupied Territories have gradually been blurred as a consequence of the policy carried out.[23] This policy always was and - in spite of the so called "peace process" which started in October 1991 in Madrid and which more precisely should be termed as political process - still is[24] directed at creating more "facts" on the ground and at changing the demographic realities in the region through the establishment of Jewish settlements and the transfer of Jews from Israel's own territory into the Occupied Territories. This is revealed by the fact that - although the late Prime Minister Yitzhak Rabin had promised to the U.S. administration that there would be no new settlement in the Occupied Territories - in fact, during the Rabin-Peres administration from 1992-1996, the number of Jewish settlers increased by 48% in the West Bank alone.[25]

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[23] Amnon Rubinstein, The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel, 8 T.A.Univ.Stud.i.L. (1988) 59

[24] B'Tselem, A Policy of Discrimination, 1997, supra note 21; B'Tselem, Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects (Jerusalem, March 1997); B'Tselem, Demolishing Peace, Israel's Policy of Mass Demolition of Palestinian Houses in the West Bank, (Jerusalem, September 1997); B'Tselem, On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement (Jerusalem, July 1999); JMCC, Jerusalem Media and Communication Centre, Signed, Sealed, Delivered: Israeli Settlement and the Peace Process, January 1997; LAW - The Palestinian Society for the Protection of Human Rights and the Environment, Annual Report of Law, Human Rights Violations in Palestine, 1996, at 16-21; LAW, Human Rights Report 1997, at 16-27; LAW, Apartheid, Bantustans, Cantons, The ABC of the Oslo Accords, at 21-23, 39-45; LAW, Campaign to Save the Homes of Palestine, published in Coordination with the Website http://www.net-a.org/hdemol; Compiled for the LAW Conference Fifty Years of Human Rights Violations, 7 June 1998; LAW, Bulldozed into Cantons: Israel's House Demolition Policy in the West Bank Since the Signing of the Oslo Agreements. September 1993 to February 1999. First Edition: Parastou Hassouri, February 1999 (Revision: Richard Clark); LAW, Netanyahu's Legacy, June 1999; LAW, Land & Settlement Policy in Jerusalem (First Printed June 1999, Reprinted January 2000); LAWE - Land and Water Establishment, A Review of the Recent Human Rights Record of the Israeli Government and the Palestine Liberation Organization in the West Bank and the Gaza Strip, Jerusalem, September 1994; LAWE, Fraud, Intimidation, Oppression: The Continued Theft of Palestinian Land. Case Study of Jeensafut Village: One Man's Struggle to Defend His Land, Jerusalem, October 1995; LAWE, House Demolition and the Control of Jerusalem. Case Study of al Issawiya Village, Jerusalem, June 1995; LAWE, By-Pass Road Construction in the West Bank. The End of the Dream of Palestinian Sovereignty, Jerusalem, February 1996; Palestinian Centre For Human Rights, A Comprehensive Survey of Israeli Settlements in the Gaza Strip, Series Study (10), January 1996

[25] Settlement Watch Report No. 8, Peace Now, 31 July 1996, quoted in LAW, Bulldozed into Cantons, 1999, ibid., at 27, note 68.
On 22 January 1995, Shlomo Gazit, former head of the Israeli Military Intelligence issued the

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2. The various Israeli governments established the vast majority of the Jewish settlements directly, and all Jewish settlements receive governmental support for infrastructure, construction, establishment of public institutions and the like. The most Israeli government ministries and agencies were and are actively involved in planning and implementation of policies which did - and do - concern every aspect of life of the Palestinian Arab people living in the Occupied Territories.

3. The jurisdictions of Israel and the Occupied Territories are interconnected, since the operative government policies created a unified infrastructure applicable to the Occupied Territories and to Israel. Moreover, the individuals sitting in the diverse positions of the military government operating in the Occupied Territories carry with them the legal and moral concepts of the society and legal culture of the state of Israel, as well as the traditional values of the political concept that is underlying Israel's legal system as a whole and that they represent.

4. The legal norms of the military government are applied and interpreted in light of the whole existing Israeli political and legal culture.

5. It is not a foreign army that is fighting a distant battle in the Occupied Territories, but rather the Israel Defense Forces (IDF) that is ruling over the Occupied Territories since 1967 and exercising the state's, i.e., Israel's policy, in a region that has been virtually incorporated into the state.

6. The Supreme Court of the occupying power Israel - in its function as a High Court of Justice - reviews acts of the Israeli military government operating in the Occupied Territories.

In dealing with the acts of the Israeli military government in the Occupied Territories one must therefore - according to my point of view - always bear in mind

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following statement revealing the intentions by the then Labor government to continue with the ongoing colonization of Palestine through the enlargement of existing Jewish settlements and the creation of new ones: "According to the numbers made available, in the four years of this Labor government, Israel will complete 30.000 dwelling units in the territories, enabling the addition of 120.000 people. In the [5 year] interim period therefore, the Jewish population of Judea and Samaria will double." Quoted in Shehadeh, supra note 11, at 4-5

On 24 September 1996 - three years after the so called "peace process" was officially declared in the DOP - a tunnel was opened by the Israeli government near Al Haram Al-Sharif in the Old City in occupied Jerusalem which completely circumvents all Palestinian areas and cuts down the trip from the Jewish settlements of Efrat and Gilo to Jerusalem to 10 minutes. Palestinians demonstrated against this tunnel which is another proof of Israel's continuing illegal activities in the Occupied Territories. In the ensuing days of demonstrations clashes took place between the Palestinian police and the Israeli soldiers, resulting in casualties on both sides. The Israeli army used tanks and gun helicopters against the Palestinian police and the demonstrating civilians, resulting in the killing of 69 Palestinians, 15 Israeli soldiers and 1 Egyptian. In response to the opening of the tunnel the Security Council adopted on 28 September 1996 Resolution 1073 calling for the immediate cessation and reversal of all acts which result in an aggravation of the situation, and for ensuring the safety and protection of the Palestinian people. See http://www.palestine-un.org/info/imp/html (Important Events of the Last 100 Years)

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the fact that it is Israeli morality, jurisprudence, administrative and constitutional law which is strongly involved, and that the reality of Israel's more than 33 years lasting occupation of these territories cannot and should not be excluded from any analysis of and debate about the foundations of civil and political rights in Israel's legal system. A quite similar opinion has also been expressed by Supreme Court Justice Mishael Cheshin in the decision handed down in the matter of *Al-Amrin v. Military Commander of IDF in the Gaza Strip.*[26] The view that the jurisprudence applied by the Supreme Court towards the military government cannot be isolated from the jurisprudence that emerged from reviews of other branches of the government is also expressed by Professor Baruch Bracha in a comprehensive article concerning the "security powers in Israel."[27] In this article, published in 1991, Professor Bracha expressly states that the cases dealing with the "security authorities" in the Occupied Territories reflect the contemporary approach of the Supreme Court concerning judicial intervention in Israeli "security matters".[28]

The territories that became the main focus of concern as to the Jewish presence and the establishment of Jewish settlements always was and is the West Bank and East Jerusalem (to a lesser degree the Gaza Strip). Due to their significance I will concentrate my analysis on the first two mentioned areas.

I will briefly outline the conceptual, ideological and political aspects of the administrative, legal and judicial systems that emerged in these areas since the Israeli occupation in June 1967, as well as the changes that took place pursuant to the signment of the agreements between Israel and the Palestine Liberation Organization (PLO) - i.e. the Declaration of Principles on Interim Self-Governing Arrangements of 13 September 1993[29] and the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 25 September 1995.[30] In the context of these agreements the Israeli military regime was modified in some aspects after those small areas of the West Bank and the Gaza Strip, which are densely populated by Palestinian Arab people, were transferred to Palestinian "autonomous rule."

The sole criteria for my analysis of the status of the Occupied Territories will be those set by the international community, i.e. the standards of international law,

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26 This opinion has also been expressed by Supreme Court Justice Mishael Cheshin in his opinion handed down in the matter of H.C. 2722/92, *Al-Amrin v. Military Commander of IDF in the Gaza Strip*, 46(iii) P.D. 693, at 696-697; for a summary in English see 25 I.Y.H.R. (1995) 337

27 Baruch Bracha, Judicial Review of Security Powers in Israel: A New Policy of the Courts, Stanford Journal of International Law 28:39 (1991) 39

28 Ibid., at 45

29 Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, reprinted in Shehadeh, supra note 11, Appendix 6 [also referred to as Oslo I Agreement or the DOP]

30 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 25 September 1995, reprinted in Shehadeh, ibid., Appendix 7 [also referred to as Oslo II Agreement or Interim Agreement]

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according to which all Occupied Territories, including the annexed Golan Heights and East Jerusalem, are subject to belligerent occupation (occupation resulting from war).

Against this background I will briefly review Israel's governmental and jurisprudential position regarding the fundamental instruments of international humanitarian law governing belligerent occupations.

The legal, judicial and administrative changes that took place in the Occupied Territories since 1967, including the changes subsequent to the Oslo Agreements in 1993 and 1995, can be characterized by the following facts:

1. The occupation is prolonged and lasts already more than 33 years.
2. Two separate administrative, legal and judicial systems have been developed and applied on two different ethnic/religious population groups - Arabs and Jews - which are all living on the same territory: One system was developed for and applied on Jewish settlers and another on the native Palestinian Arab residents.
3. When the process of separation was completed, two different bodies of administration and judiciary exercised territorial, functional and personal jurisdictions over the native Palestinian Arab people and Israeli Jewish settlers living in the same occupied territories.

2. The Administrative System in the Occupied Territories since 1967

2.1. The Period from 1967 until 1981

After the Israel Defense Forces (IDF) entered the Occupied Territories in the course of the war in June 1967, the military commanders of the IDF assumed all powers vested in the previous Jordanian and Egyptian governments in the West Bank and the Gaza Strip.[31]

In accordance with Article 43 of the Hague Regulations of 1907[32] - which is customary international law - the Supreme Commander of the IDF in the West Bank and the Gaza Strip became both the legislative and executive branch of the government.[33]

Article 43 of the Hague Regulations, 1907 states as follows:

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31 Military Proclamation No. 2, Concerning Assumption of Authority by the Israeli Military Forces, 7 June 1967, published in Jamil Rabak and Natasha Fairweather, Israeli Military Orders in the Occupied Palestinian West Bank 1967-1992 (Jerusalem Media and Communication Center, 1993) at 1. A nearly identical proclamation was issued in the Gaza Strip on 8 June 1967, see C.P.O.A. (Gaza Strip and North Sinai), 1967, at 4

32 Article 43 of the Hague Regulations, Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Signed at The Hague, 18 October 1907

33 Yahav, supra note 22, at 23

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter should take all the measures in his power to restore, and insure, as far as possible, public order and safety (civil life[34]), while respecting, unless absolutely prevented, the laws in force in the country."

Article 43 of the Hague Regulations limits the legislative power of the Military Commander in the way that there is the principal obligation to respect the law in force in the country, "unless he is absolutely prevented" from doing so. Thus, the Military Commander may issue own legislation but only "to restore and maintain public order and safety (civil life)" and not in order to further its own interests.

That means in other words, from a legal point of view, the Military Commander of the area transferred the powers of the previous sovereign (i.e. the Jordanian and the Egyptian governments) upon himself and stands at the head of the legal system in that he serves as chief legislator.

However, as opposed to a sovereign legislator in an independent state, the powers of the Military Commander of the occupied territories are limited by general principles of international humanitarian law governing belligerent occupation. These principles, which define also Israel's obligations as an occupier, are as follows:

1. An occupying state does not acquire the right of sovereignty over the territory it occupies; it merely exercises *de facto* authority.
2. Occupation is by definition a provisional situation: the rights of the occupant over the territory are merely transitory.
3. In exercising its powers, the occupant must comply with two basic requirements, namely fulfillment of its military needs, and respect for the interests of the inhabitants.
4. The occupying power must not exercise its authority in order to further its own interests, or to meet the needs of its own population.
5. The necessity to leave the occupied area as it was until the original sovereign's return at the end of the occupation.[35] (Prohibition of transferring own population and establishing permanent civilian settlements.)

As I will show in this Chapter E., these principles were violated by all Israeli governments on a large scale, as early as Israel's occupation started in 1967.

The Supreme Commanders in the West Bank and the Gaza Strip hold each the rank of Major General, and are the Commander of IDF Forces in each area. They are also called the "O.C. Central Command" and the "O.C. Southern Command" or simply "Area Commander".

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34 This is the more accurate translation from the French text.

35 Antonio Cassese, Powers and Duties of An Occupant in relation to Land and Natural Resources, Paper presented at the Conference on the Administration of Occupied Territories, American Colony Hotel, 22-25 January 1988, quoted in LAWE, Legal Status of West Bank Groundwater Resources, Jerusalem, September 1994, at 8

Although according to the law, the Military Commander of the area has independent discretion and is granted all administrative powers over the area under his command, in practice, however, the political important decisions were always made by the top decision-makers in the Israeli government. Initially, such decisions were taken by the Minister of Defence and the Israeli government in plenary sessions. Later on, however, government offices began to be involved in policy areas for which they are responsible.[36]

Until 1981 the West Bank and the Gaza Strip were governed by "Area Commanders" who dealt with so called "security matters" and "civil matters" together. In November 1981, these two affairs were officially put under the administration of quasi-separated bodies. Nevertheless, it should be mentioned that a functional separation between the section of the military administration which dealt with "civil matters" and the section which dealt with so called "security matters"[37] was already made as early as 1967.[38]

2.2. The Establishment of a "Civil Administration" in 1981

On 8 November 1981 the IDF Area Commander of the West Bank issued Military Order No. 947,[39] which officially established a "Civil Administration" under a "Head of Civil Administration". According to the said military order the Civil Administration should be responsible for all "civil matters" of the military government, i.e. the administration of the relations with residents, provision of public services and the collection of taxes.[40] So called "security matters" continued to be under the direct responsibility of the military area commanders and their designated military commanders.[41]

Important to mention is the fact that the establishment of the said Civil Administration gives at first sight the impression of the existence of two different administrative authorities. In reality, however, its formation only constituted an internal reconstruction of the division of labor and powers within the military government[42] and was solely made for political reasons - as one can learn from the declared purposes of the Civil Administration.

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36 Hofnung, supra note 4, at 224

37 For more details on the issue of Israel's "security matters" see sub-chapter 2.4.

38 Hofnung, supra note 4, at 224

39 Military Order No. 947 Concerning the Establishment of a Civilian Administration, 8 November 1981, published in Rabak and Fairweather, supra note 31, at 210. For the Gaza Strip a similar military order was issued, see Military Order No. 725, 1 December 1981, published in C.P.O.A. (Gaza Strip and North Sinai), 1967, at 4

40 Military Order No. 947, ibid.

41 Yahav, supra note 22, at 23-24

42 Joel Singer, The Establishment of a Civil Administration in the Areas Administered by Israel, 12 I.Y.H.R. (1982) 259

The establishment of the Civil Administration was intended to form the basis for the Israeli version of the concept of "autonomy to and self-government by the inhabitants of the West Bank and Gaza"[43] - a concept which had been consistently developed by Israel as early as the occupation began in 1967 and which had been officially introduced in the Camp David Accords signed on 17 September 1978 between Egypt and Israel, but not by the PLO[44] which - and this is important to mention - refused to approve any Palestinian participation in these accords.

Due to the fact that the Area Commander appointed the Head of the Civil Administration, who was only empowered to make secondary legislation while the power to make primary legislation continued to rest with the Military Commander, the Israeli government ensured to prevent the quasi-autonomous Civil Administration from becoming one day an independent body.

In summary one can say that the establishment of the Civil Administration by Military Order No. 947, 1981 carried with it the political message of Israel's objectives to unilaterally apply its version of the concept of "autonomy for the inhabitants in the West Bank and Gaza."

This concept of "autonomy" offered by Israel is - as I see it - morally and legally unacceptable, because it is unjust, unfair and contrary to the internationally recognized right of equality among all nations.

Israel's view of how the right to self-determination of the Palestinian Arab people should look like, and what the content of their legitimate rights to national and political sovereignty and freedom from Israeli/Jewish/Zionist control should consist of, can best be understood from a survey of the consistent transformation of the administrative, legal and judicial systems in the Occupied Territories.

This transformation 1. has been pursued by Israel as early as the occupation in 1967 began; 2. has been based on the concept of political Zionism which in all its forms intends to achieve a territorial, functional and personal *separation* between the Israeli Jewish settlers (which were transferred to these territories) and the native Palestinian Arab people; 3. has been introduced officially for the first time by Israel in the Camp David Accords of 1978; and 4. was finally sought by Israel to be confirmed in the Oslo I and II Agreements signed between Israel and the PLO in 1993 and 1995.[45]

This last step of transformation that took place in the Occupied Territories in the context of the signment of the Oslo I and II Agreements in 1993 and 1995 will be delineated in more detail in sub-chapter 4.

In the following sub-chapter I will deal with the issue of Israel's understanding of so called "security matters", one of the most important term which must be analyzed in order to understand the human rights situation in Israel.

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43 Hofnung, supra note 4, at 224

44 Camp David Accords, Chapter A.1.a. (West Bank and Gaza), Washington, D.C., 17 September 1978, reprinted in Shehadeh, supra note 11, Appendix 4

45 Oslo I Agreement, supra note 29; Oslo II Agreement, supra note 30

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2.3. Israel's Understanding of "Security Matters"

Important to mention is the fact that with the phrase "security issues" Israel does not only means ensuring the security of Israel's occupation army and the maintenance of law and order. There is rather another explicit agenda which all Israeli governments pursued from the very beginnings, namely: The policy of settling Israeli Jews in the Occupied Territories.[46]

A survey of the history of Israel's occupation clearly reveals that many of the actions of the military government are "necessitated" by Israel's settlement policy itself and have nothing to do with mere security imperatives as an occupier.

As early as Israel's occupation began, the so called "security" activities carried out by the Israeli army rather entailed specific political objectives that were intended to further only the interests of the Jewish population and which were summarized by Raja Shehadeh, a Palestinian lawyer, as follows:[47]

1. Control of the Palestinian local residents by the Israeli army.
2. Prevention of hostile activities against Israel.
3. Prevention of a rise of a local Arab political leadership hostile to Israel.
4. Prevention of contacts with the PLO and control of its activities.
5. Implementation of Israel's governmental settlement policy, suppression of any resistance by the Palestinian Arab local population against it, and the protection of Jewish settlers.

In order to accomplish these political and military objectives, the Israeli authorities executed - and still execute - on the ground of "security" reasons harsh measures against the Palestinian Arab people which actually constitute unjustified and severe infringements of human rights, a breach of international law and universally recognized principles of law. And, as the huge number of negatively decided cases show the Supreme Court - when called upon to review the legality of these measures - has almost always opted to justify the illegality of the said measures and accepted in total contradiction to international law the government's position that "security needs" take precedence over everything else.

Severe infringements of human rights and universally recognized principles of law were and still are caused especially by the following measures:

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46 Raja Shehadeh, Occupier's Law, Israel and the West Bank (Institute for Palestine Studies, Washington D.C., Revised Edition 1988) at 41-47. See also B'Tselem, A Policy of Discrimination, 1997, supra note 21; B'Tselem, Israeli Settlement in the Occupied Territories as a Violation of Human Rights, 1997, supra note 24

47 Shehadeh, supra note 11, at 80

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Extrajudicial killings and executions by undercover units,[48] the use of "methods of psychological and physical pressure" during the interrogations of detained and imprisoned "security" persons,[49] declaration of associations as unlawful,[50] demolition of houses of security offenders,[51] sealing off[52] and forfeitures[53] of houses, curfews[54] closures,[55] closures of institutions,[56] restrictions on travel abroad,[57] disconnection of telephone lines, electricity and water supply,[58] control of speech rights,[59] administrative detention of civilians without fair trial,[60] - sometimes

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48 From 9 December 1987 (begin of the first Intifada) until 31 August 2000, a total of **166** Palestinian Arabs, **1** Israeli civilian, **4** Israeli security force personnel was killed by Israeli Undercover Units. http://www.btselem.org/Files/site/english/data/Undercover_Units.asp
See also the cases enumerated in the general Introduction to this work, note 55

49 An al-Haq report based on interviews from 1988 to May 1992 with more than 700 Palestinians indicates that at least **94%** of all Palestinians interrogated by the GSS were tortured or ill-treated. See Al-Haq, Torture for Security, quoted in B'Tselem, Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Services (Jerusalem, January 2000) at 44.
In an interview with the Voice of Israel in July 1995, the late Prime Minister Yitzhak Rabin, said that the torture method of "shaking" had been used against **8.000** Palestinian Arabs which were administratively detained. State officials also admitted on several occasions that many torture methods are used routinely against Palestinian Arabs. B'Tselem, ibid.
In a number of cases, even the wives of detained Palestinians were arrested during their husbands' detention, and the interrogators also ill-treated them to further pressure their husbands. See B'Tselem, Detention and Interrogation of Salem and Hannan 'Ali, Husband and Wife, Residents of Bani Na'im Village (Jerusalem, June 1995)
Moreover, the GSS agents also use torture in order to recruit collaborators. For more details on this issue see B'Tselem, Collaborators in the Occupied Territories: Human Rights Abuses and Violations (Jerusalem, January 1994)
See also the cases enumerated in the general Introduction to this work, note 74

50 See also the cases enumerated in the general Introduction to this work, note 72

51 From 9 December 1987 (first Intifada) until 31 December 1997, at least
451 houses of Palestinian Arabs were completely demolished; and
62 houses of Palestinian Arabs were partially demolished,
as forms of punishment carried out only against Arabs.
http://www.btselem.org/files/site/english/edomolitions/Statistics.asp.
See also the cases enumerated in Chapter D.5.3. of this work, note 148

52 From 1988 until 1995, at least:
294 houses of Palestinian Arabs were completely sealed; and
118 houses of Palestinian Arabs were partially sealed,
as forms of punishment carried out only against Arabs.
http://www.btselem.org/Files/site/english/edomolitions/Statistics.asp
See also the cases enumerated in Chapter D.5.3., note 149

53 See also the cases enumerated in Chapter D.5.3., note 150

54 See also the cases enumerated in Chapter D.5.3., note 151

55 See also the cases enumerated in Chapter D.5.3., note 151A

56 See also the cases enumerated in Chapter D.5.3., note 152

57 See also the cases enumerated in Chapter D.5.3., note 152A

58 See also the cases enumerated in Chapter D.5.3., note 152B

59 See also the cases enumerated in Chapter D.5.3., note 153

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even over years,[61] - deportation of civilians[62] - even mass deportations as it happened in December 1992 when the Israeli government carried out the deportation of 415 Palestinian Arabs,[63] - expropriations of Arab owned land which ended up being used for Jewish settlements, settlement and by-pass roads.[64]

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60 From 9 December 1987 (first Intifada) until 31 December 1998, a total number of more than **20.000** administrative detention orders were issued- pursuant to which:
5.000 Palestinians were held in administrative detention for up to **5 years**.
9 Jewish settlers of the West Bank were detained for up to **6 months**.
The disparity in numbers results from several orders being issued against the same individual. In the vast majority of the cases administrative detention means that the person is detained without trial and without knowing (also his lawyer does not know) the reasons and the details of the evidence against him, since the court is - according to the rules of procedure and evidence - "authorized" to choose freely how much information will be disclosed based on "security reasons".
On 26 December 1998, Israel held **82** Palestinians in administrative detention.
On 23 December 1999, Israel held **18** Palestinians in administrative detention.
On 14 February 2000, Israel held **15** Palestinians in administrative detention. (**One** of these detainees has been held for more than three years. **Two** have been held between two and three years. **One** has been held between one and two years. **Nine** have been held less than one year. In **two** cases the period that the detainee has been held is unknown.)
On 9 February 2000, Israel released Ayman Daraghmeh, a 25 year old Palestinian Arab resident of Tubas, from administrative detention. He had been held in administrative detention without trial since September 1995 (!), and was released pursuant to a Military Court judge's revocation of the ninth (!) administrative detention order issued against Daraghmeh by the OC Central Command.
http://www.btselem.org/communikit/html/articels/18/english/Administrative/index
On 12 September 2000, Israel held **5** Palestinians in administrative detentions. (**One** was detained for more than three years. **Four** were detained less than one year.)
In addition, Israel is currently (September 2000) holding **two** Lebanese civilians in administrative detention. They were **kidnapped by Israel** and are held as bargaining chips to obtain the return of Israeli MIAs. **One** of these Lebanese hostages has been held in administrative detention for more than **10 years (!)**.
http://www.btselem.org/Files/site/english/Administrative/Statistics.asp
See also the story of the Palestinian writer Ahmad Qatamesh, who was held by Israel in administrative detention without charge or trial for **5 years and 8 months.** http://www.freeqatamesh.org/index2.htm (ahmad qatamesh is free!) This website aims to tell stories of all Palestinian political prisoners.
See also the cases enumerated in Chapter D.5.3., note 154

61 See also the cases enumerated in Chapter D.5.3., note 155

62 From the time that Israel began its occupation, on 6 June 1967 to 1992, Israel deported **1.522** Palestinian Arabs from the Occupied Territories as punitive measure. Since December 1992, Israel has not deported any residents of the Occupied Territories.
http://www.btselem.org/Files/site/english/edeportation/Statistics.asp
See also the cases enumerated in Chapter D.5.3., note 156

63 See also the cases enumerated in Chapter D.5.3., note 157

64 Requisition of Palestinian private land for the establishment of military bases and Jewish civilian settlements: H.C. 606/78, *Ayub v. Minister of Defence*, for a summary in English see 9 I.Y.H.R. (1979) 337 [Beth El case]. Expropriation of Palestinian private land for the

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Thus, by employing the above mentioned measures all Israeli governments violated in a systematic way the following fundamental rights of the Palestinian Arab people: The right to life, human dignity and personal integrity; the right to freedom of associations, the right to property, the right to freedom of movement, the right to freedom from arbitrary detention, the right to a fair trial, the right to freedom of expression, the right to freedom of assembly and associations,

To sum up the above mentioned points, one can say that in reality the term "security" matters as conceived by all Israeli governments, means political and military objectives. It can also been said that if Israel's army would not occupy up until today the West Bank, the Gaza Strip, Jerusalem and the Golan Heights, and would not continue to establish Jewish settlements on expropriated Palestinian owned land, then there would be no security problem at all.

The policy of the establishment of Jewish settlements in the Occupied Territories means a systematic gross violation of the basic rights of the Palestinian Arab people and has specific harmful impact on the whole human rights situation of the Palestinian Arab people living in these areas.

A comprehensive analysis of the settlement activities and the human rights violations that were committed by Israel in their context is outside the scope of this work. However, in the following sub-chapters I will nevertheless give a short overview about the different stages, strategies and features of Israel's settlement policy in the Occupied Territories.

construction of highways: H.C. 393/82, *Askan (Cooperative Society Lawfully Registered in the West Bank Region) v. Military Commander of IDF in the West Bank,* translated into English in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press Oxford, 1996) 396, at 407. See also the literature enumerated in supra note 24

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2.4. The Establishment of Jewish Settlements in the Occupied Territories

2.4.1. General Remarks

From the very beginning of Israel's occupation in 1967 up until today, the establishment of Jewish settlements in the Occupied Territories was and is the most important political objective of all Israeli governments.

Jerusalem and the West Bank, especially the places that are strongly associated with the history of the Jewish people and located close to the more densely populated areas in Israel, have been the main focus of Israel's settlement activities.

The Jewish settlements are the cornerstone of Israel's colonizing policy and have the most lasting consequences on Palestinian land, since they are not just a few houses scattered on top of hills but rather are "organized Jewish only entities" which have preferential and quasi unlimited access to water resources. Some of them are real cities with all the necessary infrastructure, roads, industrial areas, schools, transportation and all facilities necessary to accommodate a population that lives according to western standards.

In order to establish the Jewish settlements in the Occupied Territories massive confiscations of agricultural and grazing land owned by native Palestinians, restrictions on the use of lands remaining in the hands of Palestinians as well as a huge number of demolitions of privately owned buildings took and take place.[65]

To fill these settlements Israel transferred part of its population as well as scores of new immigrants to the Occupied Territories, in direct contradiction to Article 49 of the Fourth Geneva Convention, which states as follows:

> "The Occupying Power shall not deport or transfer of its own population into the territory it occupies."[66]

Despite constant international pressure on successive Israeli governments, the establishment of new Jewish settlements and the expansion of existing ones has never been stopped or been reversed.[67]

The Jewish settlements, the military camps and the network of settlement streets and by-pass roads[68] which connect the Jewish settlements with each other and with

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[65] See below sub-chapter 2.5. (Israel's Methods and Justifications for the Expropriation and Restriction on the Use of Occupied Palestinian Lands)

[66] Article 49(6) of the Fourth Geneva Convention, 1949

[67] See the following United Nations Security Council Resolutions: Resolution 446 (22 March 1979) determines that Israeli settlements are a serious obstruction to peace. Resolution 452 (20 July 1979) calls on Israel to cease building settlements in the Occupied Territories. Resolution 465 (1 March 1980) deplores Israel's settlements and asks all member states not to assist Israel's settlement program. Recent resolutions on settlements have been vetoed by the United States, which has a negative impact on the enforcement of previous resolutions.

[68] See below sub-chapter 2.5.6. (Settlement and By-Pass Roads in the Occupied Territories)

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Israel, have resulted in a complete fragmentation of the Palestinian Arab population centers in the West Bank.

Moreover, the ring of suburbs built around the eastern part of the city of Jerusalem was definitely designed to strangle the rest of the Palestinian towns and villages located in this area.

The settlements constitute a severe violation of the right to property and other fundamental human rights of the Palestinian Arab people. They deprive the Palestinian Arab people of their land and most of their natural resources (land, water and quarry stones), determine the development of Palestinian towns and villages, and have a very harmful affect on the political future of the Palestinian Arab people. To the extent that they involve the alienation of natural resources (land, water and quarry stones), the imposition of demographic changes, or predatory action, they also represent serious violations of international law.

As already said, all Israeli governments - Labor and Likud led governments alike - have been pursuing a policy of settling the Occupied Territories. However, they pursued different strategies as to how this policy has to be translated into actions and which parts of the Palestinian areas they wanted to annex to Israel.

Meron Benvenisti, a former deputy mayor of Jerusalem under Teddy Kollek, who has written extensively on the Jewish settlements in the Occupied Territories[69] identified the below[70] described Jewish settlement phases and plans.

2.4.2. The Allon Plan and Labor Settlement Plan

The Allon Plan, named after the then Defence Minister, Yigal Allon, was submitted to several Israeli cabinets for approval in its initial version in July 1967, and amended versions were submitted from 1968 to 1970.[71] Although it was never officially approved, it served until 1977 as a guideline for the establishment of Jewish settlements in the West Bank.

The guiding assumptions of the Allon Plan were that Israel must have defensible borders which must be based on the Jordan River and the Rift Valley, and the Judean Desert. The defensive borders must also be political borders and only if Jewish settlements existed along its length would the border be political. Defensible borders required - as Meron Benvenisti argued - a chain of Jewish settlements which

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[69] See the studies carried out in the context of the West Bank Data Base Project. In 1986, when the first studies of this research project appeared, the Israeli Knesset tried to have Meron Benvenisti (and Sara Roy, an American Jewish researcher) charged with aiding an "enemy organization", namely the PLO. But the action was discontinued, probably for fear of giving the reports too much publicity. See Edward W. Said, Peace & Its Discontents: Gaza-Jericho 1993-1995 (Vintage, 1995) at 45

[70] Sub-chapter 2.4.2 to 2.4.4.

[71] Meron Benvenisti, The West Bank Data Handbook, Jerusalem, 1988, at 63

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themselves must be under Israeli sovereignty, but without the annexation of a large Palestinian Arab population.[72]

The Allon Plan tried to avoid settling the higher-density Palestinian population areas of the West Bank and the Gaza Strip, reserving these areas - roughly 60% of the Occupied Territories - as a potential bargaining chip in a future land-for-peace agreement with Jordan and Egypt.[73] The Allon Plan served as a basis for the Alignment (labor coalition) platforms of 1974, 1977, 1981, 1984 and 1988.[74]

The Jewish settlements that were built in the late 1960's were mainly established by secular Israelis and were based on the manpower and organizational resources of the settling organizations tied to the Labor movement.

Groups of Jewish Israelis settled on the land after it was allocated to them, and they were also supplied with the means of production by the government and state institutions. In many instances, the land was first settled by the Nahal (i.e. army units tied to youth organizations) who would prepare the place for habitation by a civilian population. These settlements were supported and institutionalized by the political establishment of the then Labor-led government.[75]

2.4.3. The Gush Emunim Settlement Plan

In 1978, the Gush Emunim[76] Settlement Plan was adopted by the first Likud-led government. Former deputy mayor, Meron Benvenisti, writes as follows:

> "In 1977, when the Likud came into office, the military government policy regarding physical planning was revised. The whole of the planning process for Jewish settlement was decentralized, giving more power to Israeli planning authorities, including representatives of regional and local councils. At the same time, severe restrictions were placed on physical planning for the Palestinian population. The physical planning process reflects Israeli interests exclusively, while the needs and interests of the Palestinian population are viewed as a constraint to be overcome."

The adoption of the Gush Emunim settlement strategy by the Likud party marked a departure from the Labor policy of territorial compromise.[77]

The Gush Emunim Plan - which also served partially as a strategy for the Likud, the right-wing alliance that opposed Labor - inspired Matityahu Drobless, head of

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72 According to the 1970 version of the Allon Plan, half of the total area of the West Bank and three quarters of the Gaza Strip are to be annexed to Israel. For more details see ibid.

73 JMCC, Signed, Sealed, Delivered, supra note 24, at 30

74 Id.

75 Hofnung, supra note 4, at 239

76 The Gush Emunim (the Block of the Faithful) is a right-wing Israeli movement which used religious ideology, was founded in February 1974 with the objective of settling in all parts of the Land of Israel.

77 JMCC, Signed, Sealed, Delivered, supra note 24, at 30

the settlement division of the World Zionist Organization (WZO), in what is known as the Drobless Plan,[78] which states:

> "There is to be not a shadow of doubt regarding our intention to remain in Judea and Samaria. A dense chain of settlements on the mountain ridge running southward from Nablus to Hebron will serve as a reliable barrier on the eastern front against Arab states. This buffer zone of settlements will also create security for settlers in the Jordan Valley. The areas between concentrations of the Arab population and the areas around them must be settled, to minimize the danger of the establishment of another Arab state."[79]

In the early 1980s the WZO made several plans for the building settlements and increasing the Jewish population in the Occupied Territories.

A detailed program prepared in 1983 under the guidance of Drobless constitutes a so called "development (more correctly: a Jewish settlement) plan" for 1983-86 and a " WZO master plan for the year 2010."

The "1983-86 plan" proposed between 1983 and 1986 an increase of the Jewish population to 100.000 and of Jewish settlements to 164 within five years.

Although these targets have not been achieved within the planned period, there was nevertheless an increase of Jewish settlers by 118% and an increase of housing units available only for Jews by 45% during four years (1983-1986).[80]

The ultimate objective of the "WZO master plan for the year 2010" is that 800.000 (!) Jewish settlers should live in the West Bank in the year 2010.[81]

It should be stressed at this point, that while on the one hand the state of Israel in collaboration with the World Zionist Organization (WZO) and its offshots, undertakes "ambitious" activities to encourage Jewish immigration, and to transfer and settle a large quantity of Jews in the Occupied Territories, at the same time Israel denies to millions of Palestinian Arabs refugees(i.e. the refugees of 1948, of 1967, 1982), which still live in refugee camps in the Occupied Territories, Lebanon, Jordan, Syria, Egypt and elsewhere in the world, the right to return to their homes. Moreover, Israel establishes many new Jewish settlements - mostly on land privately owned by Palestinian Arab residents of the Occupied Territories - and employs since 1967 a policy of systematic and deliberate discrimination against the Palestinian Arab people in all matters relating to land, planning and building. Thus, Israel violates the internationally recognized right of every refugee to return to his country, the fundamental right to property, the right to equality, and the rule which prohibits the occupying power to transfer own population to the territories it occupies and to establish permanent settlements.

To return to the issue of the Drobless Plan, it can be said that the essence of this plan is a shift in emphasis, increasing WZO investment in the West Bank and giving

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[78] M. Benvenisti, supra note 71, at 64
[79] Ibid.
[80] Id., at 59
[81] Id.

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development priority to the mountain ridge area rather than the Jordan Valley. The fundamental principles of the Drobless Plan are:

> "1. Jewish settlements should not be isolated. Near each existing other settlements should be built, so that blocs would be formed.
> 2. A barrier of Jewish settlements should be built to give a sense of security to the rift valley settlers in the east and prevent a situation, whereby they could find themselves pressed from east and west by Arab populations.
> 3. Jewish settlements should fragment the territorial continuity of the Palestinians. Thus, settlements must be built between and around Palestinian population centers, reducing the possibility of another Arab state, since it would be difficult for the minority [Arab] population to form a territorial continuity and political unity when it is fragmented by Jewish settlements."[82]

Due to the fact that in 1982 it turned out that the policy of settling Jews in central mountain regions of the West Bank and between the concentrations of the Arab population and around them was not a success, since there was an apparent shortage of ideologically motivated settlers prepared to leave the metropolitan areas and live in small, remote and isolated Jewish settlements, a new strategy was developed which emphasized demographic objectives, rather than security and ideological objectives. This strategy shall be discussed below.

2.4.4. The Suburbia Settlement Plans

During the phase from 1977 to 1984, the Likud government - rather than concentrate on ideologically motivated settlers - sought to attract average Israelis interested in improving their quality of life.

According to this strategy, the Jewish settlements in the West Bank were being turned into suburbs with easy and quick access to main metropolitan areas in Israel, and it was hoped that these suburban settlers - in order to protect their economic investment in the higher quality of life - would create a strong lobby that would prevent any political solution based on territorial compromise.

The Likud strategists aimed at creating internal political facts rather than geostrategic facts, since it was estimated that the decision about the future of the territories will result from domestic political struggles within the Israeli body politic rather than from direct external military or political pressure.

The following Table will demonstrate, that with the adoption of the Likud strategy the number of Jewish settlers (living in settlements built on land that was in the most cases expropriated from Arabs) substantially increased:

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82 Shehadeh, supra note 11, at 4

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Size of Population and Number of Jewish Settlements built since 1967 in the Occupied Territories (West Bank, East Jerusalem, Gaza Strip):

Year	Jewish Settlers	Palestinians	Occupied Territory	Jewish Settlements
1968		600.000 66.857 356.261[83]	West Bank East Jerusalem Gaza Strip	
1973	1.514		West Bank	17[84]
1983	27.000[85]		West Bank	103[86]
1984	44.146[87]		West Bank	137[88]
1993	120.000 160.000 4.500	1, 000.000[89] 180.000[91] 830.000[93]	West Bank East Jerusalem Gaza Strip	120[90] 9[92] 16[94]
1996	140.000 5.000[96]		West Bank and East Jerusalem Gaza Strip	 246[95] 33[97]
1997		1, 873.476[98] 1, 022.207[99]	West Bank (including East Jerusalem) Gaza Strip	
1998	162.900 180.000 6.100[100]		West Bank East Jerusalem Gaza Strip	

83 Holzman-Gazit, supra note 2
84 Shehadeh, supra note 11, at 3
85 Boudreault/Naughton/Salaam (eds.), US Official Statements, Israeli Settlements, the Fourth Geneva Convention, Institute of Palestine Studies, Washington D.C., at 172, quoted in id., at 5
86 Efraim Ben-Zadok, Incompatible Planning Goals. American Planning Association Journal, Summer 1987, quoted in Coon, at 168
87 This is a 60% growth rate in 1 year. Coon, ibid.
88 Ben-Zadok, quoted in, id.
89 Foundation for Middle East Peace, at 5, quoted in id.
90 Ibid., at 8, quoted in id.
91 Id., at 5, quoted in id.
92 Id., at 8, quoted in id.
93 Id., at 5, quoted in id.
94 Id., at 8, quoted in id.
95 Map submitted to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, Map No. 3070 Rev. 17 United Nations October 1996
96 Foundation for Middle East Peace, at 5, quoted in Coon, supra note 2, at 168
97 Map No. 3070 Rev. 17 United Nations October 1996, supra note 95
98 http://www.palestine-un.org/info/dem.html (Demography of the Occupied Palestinian Territories) A direct count in East Jerusalem was forcefully prevented by Israel, but through a variety of means a number of 328.601 Palestinians could be determined. Ibid.
99 Id.
100 PASSIA, Diary 1999, at 232, quoted in LAW, An Overview of the Consequences of Israeli Occupation on the Environment in the West Bank and Gaza, January 2000, at 17, note 28

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2.5. Israel's Methods and Justifications for the Expropriation and Restriction on the Use of Occupied Palestinian Lands

2.5.1. General Remarks

When Israel occupied in June 1967 the Sinai Peninsula, the Golan Heights, the Gaza Strip, the West Bank of the Jordan River, including the area of East Jerusalem and "set about colonizing the territory,"[101] it had already a wide experience, since all the procedures for doing this were - as I will show in more detail in Chapter G of this work - already tried and tested within Israel.

In summary these procedures include the co-ordination of ministries and Jewish agencies; mechanisms of site designation; administration and financing; the strategies of interconnection between existing Jewish areas to create continuity; fragmentation of existing Arab population centers; concentration on the establishment of powerful Jewish settlement blocs; seizure of Arab owned land and its transfer to exclusive Jewish ownership; the physical and social organization of the individual Jewish settlements.

All these principles have been followed by the Zionist movement in Palestine since the early years of the century and were soon after the establishment of the state of Israel in 1948 implemented into the legal system.

The most important legal norms in the context of land are the Basic Law: Israels Land[102] and the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952.[103] The WZO and its offshots, such as the Jewish Agency (JA) and the Jewish National Fund (JNF), provide an arena for deciding a settlement strategy which is well away from any democratic debate and international notice, and in which the religious-ethnic approach and the discriminatory objectives of settling the "land of Israel" are well accepted by their members.

In order to bring most of the lands of the occupied Palestinian territories under Israeli control the Military Area Commanders of the West Bank and the Gaza Strip issued a huge number of military orders amending the existing laws in force.

The relevant military orders provided the legal basis for the expropriations of and restrictions on the use of Palestinian owned land on which later on Jewish settlements were built, and it is also on the basis of the relevant military orders on which the "legality" of acts of the military government was judicially reviewed.

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[101] Coon, supra note 2, at 175

[102] Basic Law: Israels Land, 14 L.S.I. (1959/60) 48. For more details see Chapter G.2.9.1.

[103] World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952/53) 3. For more details see Chapter G.2.9.4.

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The below discussed military orders were, inter alia, the most important ones which were issued and heavily employed by Israel's military government in the West Bank and the Gaza Strip in order to expropriate Palestinian owned land.

Important to mention is the fact that these military orders were not employed in occupied East Jerusalem (including the areas annexed from the West Bank to East Jerusalem) and the Golan Heights, since these territories were de facto annexed by Israel, after the Israeli government decided, shortly after the occupation, to apply the Israeli law, jurisdiction and administration over them.

2.5.2. Military Orders and other Normative Sources concerning Expropriations of Land in the West Bank

2.5.2.1. Declaration of Occupied Land as "Absentees' Property" - Military Order No. 58, 1967

Similar to the way property of Palestinian Arab inhabitants of Israel within the Green Line (which fled or were expelled in the course of the 1948 war) was taken as "absentee property", the Israeli Military Commander took over so called "absentees' property" of Palestinians who fled or were expelled in the course of the 1967 war in the Occupied Territories. Military Order No. 58, Concerning Absentees' Property, 1967[104] provided the "legal" basis for taking possession of this "absentees' property", which is defined as "property whose legal owner, or whoever is granted the power to control it by law, left the area prior to 7 June 1967 or subsequently" (i.e. the property of people who left the West Bank before or as a result of the 1967 war).[105] According to this order any right that was previously granted to the owner of the "absentees' property" is to be automatically transferred to the Custodian of Absentees' Property who was appointed by the Area Commander and has the "jurisdiction to negotiate contracts, manage, maintain or develop the property." Article 5 of this military order also states that "any transaction carried out in 'good faith'[106] between the Custodian of Absentees' Property and any other person, concerning property which the Custodian believed when he entered into the

[104] Military Order No. 58, Concerning Absentee Property, 23 July 1967, published in Rabak and Fairweather, supra note 31, at 9

[105] Usama Halabi, Advocate, LL.M, Land and Planning Laws As a Political Tool: Israeli Land, Planning and Settlement Policy since 1948 (in Israel Proper), and since 1967 (in 1967 Occupied Territories). A paper presented at the conference: 50 Years of Human Rights Violations - Palestinian Dispossessed, 7-10 June 1998, Jerusalem, at 4. See also Coon, supra note 2, at 163

[106] It is really hard to believe that any Israeli/Jewish/Zionist settler/organization which made transactions regarding "absentees' property" in the Occupied Territories acted any time in "good faith", since it is exactly the issue of "land" that lays at the very foundations of the decades old and internationally discussed illegal and still ongoing occupation by Israel.

transaction to be 'absentee property', will not be void and will continue to be valid even if it is subsequently proved that the property was not at that time absentees' property." On the basis of this military order around 430.000 dunams of land have been expropriated as "absentees' property".[107]

2.5.2.2. "Requisition" of Occupied Land for "Military Purposes" - Article 52 of the Hague Regulations, 1907

The Hague Regulations, 1907 give to an occupying power the principle permission to requisition property of the occupied territory, but only after certain conditions are met. Important to mention is the fact that although the requisition restricts the rights to possession and use, it does not cancel the rights of ownership to the property. Article 52 of the Hague Regulations, 1907 states:

> "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment for the amount due shall be made as soon as possible."[108]

The requisition of large parts of land for the establishment of civilian Jewish settlements based on the claim to satisfy "immediate military purposes" was the principal method used by the Israeli army between 1968 and 1979. In this period several dozen requisition orders for land, encompassing around 50.000 dunams were issued by the regional military commanders.[109]

During the 1970's, the Supreme Court when called upon - by native Palestinian inhabitants of the Occupied Territories whose land had been taken - to review the legitimacy of the establishment of civilian settlements, regularly approved the position of the military government and ruled that "expropriations of private land in the Occupied Territories for the purpose of the establishment of civilian Jewish settlements are legal acts, since the settlements are part of the territorial defense system and are a temporary measures necessary for military/security needs."[110]

The first case was decided by the Supreme Court in this context in 1972 in the

[107] LAW, An Overview of the Consequences of Israeli Occupation on the Environment in the West Bank and Gaza, 2000, supra note 100, at 13

[108] Article 52 of the Hague Regulations, 1907, supra note 32

[109] M. Benvenisti, supra note 71, at 62

[110] H.C. 302, 306/72, *Abu Hilu, Sheikh Suleiman Hussein 'Odeh & Others v. Government of Israel*, 27(ii) P.D. 169; for a summary in English see 5 I.Y.H.R. (1975) 384 [*Abu Hilu case*]; *Beth El case*, supra note 64; H.C. 258/79, *Amira v. Minister of Defence*, 34(i) P.D. 90; for a summary in English see 10 I.Y.H.R. (1980) 331

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matter of *Abu Hilu v. Government of Israel*[111] - which served as precedent for the "legality" to establish Jewish settlements on privately owned land that was requisitioned on the pretext of military/security needs. Aware of the fact that the expropriations of privately owned land in the Occupied Territories is heavily resisted by the dispossessed native Palestinian inhabitants of this land, the Supreme Court accepted and justified the morally and legally unacceptable concept of the military government that the establishment of permanent civilian(!) settlements become an integral part of Israel's military operations, are only of temporary nature and do not "create permanent facts."

This approach was once again approved by the Supreme Court in 1978 in the matter of *Ayub v. Minister of Defence*[112] - which is better known as *Beth El* case.

In complete disregard of the most known and simple facts of human life that the establishment of civilian settlements - namely the building of houses for thousands of families, which are raising children there, sending them to schools erected for them, and which establish cemeteries - means nothing else than the creation of permanent facts, the Supreme Court ruled that "building permanent civilian settlements does not create permanent facts." In ruling so the Supreme Court definitely emasculated the relevant provisions of international law and became nothing more than an effective agent of the military government.

However, the method of issuing requisition orders on the basis of the Hague Regulations, 1907 - which implied the temporary nature of Israeli presence in the Occupied Territories - was not employed any more after the Likud party came to power in 1977, since it was incompatible with the then adopted political conception regarding the issue of land. The new method adopted by the Likud-led Israeli government for the seizure of land on which Jewish settlements were established was the declaration of land in the Occupied Territories as "state land."

The Israeli military government used the below described procedure in order to transmute Jordanian governmental and Palestinian owned private land in the West Bank into "state land."

2.5.2.3. Declaration of Occupied Land as Israeli "State Lands" - Military Order No. 59, 1967 and Military Order No. 291, 1968

In June 1967, when the Israeli occupation of the West Bank began, the land owned by Jews before 1948 - which was administered by the Jordanian Custodian of Enemy Property in the West Bank - is estimated at 30.000 dunams.[113] According to data collected by Meron Benvenisti and Shlomo Khayat, by 1973, the amount of

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111 *Abu Hilu case*, ibid.

112 *Beth El case,* supra note 110

113 This land was mostly located in the Jerusalem metropolitan area and the Etzion Bloc. Shehadeh, supra note 11, at 80

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"state lands" had increased to some 700.000 dunams. The method of declaring Palestinian/Arab-owned land as Israeli "state land" was primarily employed in the 1980's.[114] In order to understand the whole process of "declaring land to be state lands", one must first of all take a short glance at the way of *land registration* in the West Bank when Palestine was still ruled by the British mandatory power and later by the Jordanian government and finally by the Israeli military government:

* The process of land registration began in Palestine under the British Mandate in 1928 and was continued by the Jordanian government in the West Bank from 1950 to 1967. At these times there existed one system of land registration and one land register namely the Jordanian Land Register. The land registered in its name could be viewed as Jordanian "governmental or state land."[115] Prior to the Israeli occupation, the amount of Jordanian governmental land registered in the Jordanian Land Register was around 527.000 dunams[116] (i.e. around 5%) out of a total area of 5.50 million[117] dunams of West Bank land.

* In July 1967, i.e. immediately after the Israeli occupation began, the above mentioned Jordanian "governmental land" was placed into the hands of the Custodian of the Public Property - an institution which was created by virtue of Military Order No. 59, Concerning State Property, 1967.[118] This Military Order defines "state property" as any movable or immovable property which prior to 7 June 1967 belonged to a hostile state or to any arbitration body connected with a hostile state.[119] The same military order states that "any land not individually registered or registered as the property of the Islamic Waqf, is subject to the designation as state land."[120]

* An additional step for the transformation of West Bank land into "Israeli state land" was taken in December 1968 with Military Order No. 291, Concerning Settlement of Disputes over Land and Water, 1968.[121] This Military Order provided the basis for the suspension (freezing) of the land registration process in the West Bank (a process which as explained above had began under the British regime and was continued under the Jordanian rule). The justification given by the Israeli military government for this step was "to avoid prejudicing the rights

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114 M. Benvenisti, supra note 71, at 60

115 Shehadeh, supra note 11, at 81

116 M. Benvenisti, supra note 71, at 60

117 Shehadeh, supra note 11, at 80

118 Military Order No. 59, Concerning State Property, 31 July 1967, published in Rabak and Fairweather, supra note 31, at 9

119 Halabi, supra note 105, at 4; M. Benvenisti, supra note 71, at 60-61

120 The following classes of land existed according to the Ottoman Land Code, 1855: *Wakf (*land of Islamic endowments), *mulk (*private property in towns), *miri* (private land claimed by cultivation), *matruk* (land held in common by the village, or for public use - e.g. roads), *mawat* (all other land, which could be used by anyone with need. See paragraph 103 of the Ottoman Land Code). Coon, supra note 2, at 165

121 Military Order No. 291, Concerning Settlement of Disputes over Land and Water, 19 December 1968, published in Rabak and Fairweather, supra note 31, at 38

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of the many absentees and the ownership rights of Jordanian nationals who have lands in the West Bank but reside outside this area.[122] But - and this is important to mention - the Israeli military government restricted any access of Palestinian Arabs to the Jordanian Land Register.[123]

* While on the one hand any further registration of land in Palestinian ownership was suspended (frozen), at the same time massive areas of land were started to be registered in the name of Israeli governmental and quasi-governmental Jewish agencies. The land register used for this purpose was not the previous West Bank Land Register but an Israeli one which was created for that purpose by virtue of Military Order 569, Concerning the Registration of Special Transactions in Land, 1974.[124] This Israeli Land Register (Tabu) was finally merged with the Israel Lands Administration (ILA), where Israeli "state lands" are registered.[125] Due to the facts that in June 1967 only one third of the whole West Bank land have been properly registered in the Jordanian Land Register (because registration only began during the British mandatory period and was not completed during the Jordanian rule) and that in 1968 the Israeli occupier suspended (froze) all further registration in the Jordanian Land Register and also prevented any access of Palestinians to the files, it happened that large parts of unregistered land were registered in the Israeli Land Register (Tabu). This land was intended to serve the benefits and interests of the Jewish settlers only.[126]

* In 1980, the Custodian of Government Property - based on the power vested in him by virtue of Military Order No. 59, 1967 and on a twisted interpretation of paragraph 103 of the Ottoman Land Law, 1855[127] - started to declare all unregistered and uncultivated land as "state land", unless someone can prove ownership in a matter satisfactory to the Special Adviser to the Ministry of Justice and the Review Board composed of administration officials.[128] In complete disregard of the Ottoman, British and Jordanian interpretations of the Ottoman Land

[122] Shehadeh, supra note 11, at 81

[123] Ibid. According to a study carried out by Anthony Coon and published in 1992, there are 15.000 land registration files, and 926 bound volumes. Coon, supra note 2, at 165, note 29

[124] Military Order No. 569, Concerning the Registration of Special Transactions in Land, 17 December 1974, published in Rabak and Fairweather, supra note 31

[125] Shehadeh, supra note 11, at 81

[126] Ibid.

[127] Paragraph 103 of the Ottoman Land Law, 1855 only states that so called *mawat* land is "state land" (previously the Ottoman sultan's land): "...vacant land which is not in the possession of anyone by title deed or assigned *ab antiquo* to the use of inhabitants of a town or village and lies at such a distance from towns and villages that a human voice from there cannot be heard at the nearest inhabited place - for example rocky mountains, wild fields, and bushland - is called *mawat* (dead). Anyone who is in need, may cultivate it as sown land gratuitously, with the leave of the official, on the condition that the ultimate ownership (*raqabah*) shall belong to the sultan and that all the laws concerning cultivated lands shall apply to this land." M. Benvenisti, supra note 71, at 61

[128] M. Benvenisti, ibid.

Law, 1855 - according to which only unregistered *mawat* land may theoretically become "state land" - the Israeli military government adopted an extremely broad and totally absurd interpretation of this law, which was intended to enable also the declaration of all so considered "uncultivated" land as "state land". According to the Israeli interpretation, land is considered as "uncultivated" if it has not been cultivated continuously (!) during the previous 10 years.[129] The criterias for preventing the declaration of land as Israeli "state land" are the proof of the registration and cultivation of land (during the last 10 years).

* The procedure of "declaring land to be state land" works as follows:

The Civil Administration's supervisor of government property declares a specific area to be "state land" following an examination - based on the above mentioned extremely broad interpretation of the Ottoman Lands Law, 1855 - conducted by the Civil Division of the State Attorney's Office. The supervisor's representative informs the local village mukhtars about the intention to proclaim the land as "state land", and the residents of the area in question have the right to appeal to the Military Appeals Committee within 45 days. The appeal must include a detailed topographic survey of the area which the owner believes to be affected by the order and the owner must prove (in face of a battery of air photographs which will be produced) that the land has been cultivated continuously for the last 10 years.[130] If no appeal is filed, possession of the land passes to the Israeli military government. If an appeal is filed, the matter is heard by an appeals committee appointed for that purpose, the person claiming ownership having the burden of proof.[131]

* A United Nations survey conducted in 1950 concluded that 88% of the West Bank land was privately owned by Arabs.[132] By mid-1984, the amount of lands that had been proclaimed and taken as "sate lands" had reached, according to a study carried out by Benvenisti and Khayat, 1.8 million dunams of land located in the West Bank.[133] In 1988 around 1.85 million dunams (34%) out of the total West Bank were claimed by Israel to be "state land."[134] In November 1992, land held by Israel for the potential use of Jewish settlements constituted more than 60% of the total area of the West Bank and 35% of the total area of the Gaza Strip. This land is considered by Israel as "state land"; a characterization which provides the basis for the common justification given by supporters of the Jewish settlement program for

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[129] Id.

[130] Coon, supra note 2, at 166

[131] B'Tselem, Israeli Settlement in the Occupied Territories as a Violation of Human Rights, 1997, supra note 24, at 32; B'Tselem, On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement, 1999, supra note 24, at 9

[132] Coon, supra note 2, at 165

[133] M. Benvenisti, supra note 71, at 61

[134] Halabi, supra note 105, at 5; M. Benvenisti, supra note 71, at 61

the extensive expropriations of Palestinian owned land in the Occupied Territories, that no privately owned land was taken but rather so called "state land."[135]

* The procedure of declaring land as state land has the following defects:

1. It is not based on Jordanian law, which Israel as an occupier should apply according to international law.
2. It circumvents the procedure for registering the West Bank land as provided for in Jordanian law, a procedure which has been suspended (frozen) by the West Bank Military Commander in 1968,[136] and which has not been renewed since, more than 32 years later. The Israeli government did not only not take measures to register traditional land ownership in the modern land registry, but rather cynically took advantage of an undeveloped and pre-modern system of land ownership in order to steal the property from the owners.[137]
3. It manipulates paragraph 103 of the Ottoman Lands Law, 1855 by applying an extremely broad and totally absurd interpretation to the state's right to land.

The "Ottoman Sultan's theoretical ownership of all land within his control" - as a result of conquest in the year 1517 - was interpreted by Israel as a license to control an enormous amount of land, expropriate it from its users, and transfer it to the use of foreigners (i.e. the Jewish settlers), an interpretation which was never made by the Ottomans, the British, or the Jordanians.[138]

4. It imposes the burden of proof regarding land registration and cultivation of the land on the person (i.e. mostly a Palestinian) claiming ownership. Palestinians whose land has been declared "state land" have to collect their meager financial resources in order to fight against the Israeli system which is foreign to the Palestinian Arab people; is undemocratic in that it is military; fails to represent the public to which the claimant belongs; is motivated by irrelevant considerations; is supported by a highly sophisticated technology (aerial photography, computerization, and the like) used to refute Palestinian proof of ownership.[139]
5. It disregards landowners who are outside the Occupied Territories.

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[135] Shehadeh, supra note 11, at 80

[136] Military Order No. 291, 1968, supra note 121

[137] B'Tselem, On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement, 1999, supra note 24, at 9-10

[138] Ibid., at 10

[139] The reasons for the "effectiveness" of the procedure of declaring land as "state land" were expressed by Ian Lustick as follows: "The effectiveness of this technique arises in part from the brevity of the time allowed for the presentation of an appeal, the expense involved in the preparation of the detailed maps and other documents required by the tribunal and in the hiring a lawyer, and the bewilderment of semi-literate peasants faced with legal proceedings over issues and in a language (Hebrew) that they do not comprehend." Ian Lustick, Israel and the West Bank after Elon Moreh: The Mechanics of de facto Annexation, at 571, Middle East Journal, vol. 35 no. 4, Autumn 1981, quoted in Coon, supra note 2, at 166

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6. The Israeli Supreme Court was once again a "useful and loyal" agent for the military government by approving every argument put forward by it.[140]

7. The appearance of a bulldozer on his land if often the first and only indication for a Palestinian owner that his land has been "declared as state land", since the official notification procedure is simply for a military officer to point out the affected land *verbally* to the village mukhtar.[141]

2.5.2.4. Expropriation of Occupied Land for "Public Purposes" - Military Order No. 321, 1969

Land expropriations have been carried out by the Israeli military government by invoking the Jordanian Law on the Expropriation of Land for Public Purposes, No. 2, 1953, but by deleting from that law by Military Order No. 321, 1969[142] and subsequent orders[143] the civil safeguards, such as the need to publish the proposed seizure in the official gazette, the need to notify the owners of the property through the registry clerk, the need of governmental approval, and the right to appeal to a court of law.[144]

Local Jordanian law - which Israel as an occupying power has to respect according to international law - explicitly states that the expropriation must be for the "public" benefit. The "public" in the West Bank consists of the Palestinian Arab people, and not the Israeli Jewish settlers which were - in contradiction to international law - transferred by Israel to the Occupied Territories.

However, most of the lands that was expropriated on the basis of this military orders was used for Jewish settlements, access roads and for a network of highways to facilitate the expansion of Jewish settlements. Arab villages have been intentionally by-passed (e.g. Highway 60).[145]

All the 13 by-pass roads that were constructed after the Oslo I (1993) and the Oslo II Agreement (1995) were constructed on Palestinian owned lands taken by

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140 H.C. 285/81, *Fadil Muhammad a-Nazar & Others v. Commander of IDF in the West Bank*, 36(i) P.D. 701; H.C. 277/84, *Sabri Mahmud Eghrayyeb v. Appeals Committee,* 40(ii) P.D. 61; H.C. 4481/91, *Gabriel Bargil v. Government of Israel*, 47(iv) P.D. 213; all cases are discussed in more detail in B'Tselem, Israeli Settlement in the Occupied Territories as a Violation of Human Rights, 1997, supra note 24, at 34-35

141 Coon, supra note 2, at 166

142 Military Order No. 321, Concerning Land Expropriation for Public Purposes, 28 March 1969, published in Rabak and Fairweather, supra note 31, at 41

143 Military Order No. 949, published in ibid.

144 Coon, supra note 2, at 162; M. Benvenisti, supra note 71, at 61-62

145 M. Benvenisti, ibid., at 62. For more details on the Highway 60 see LAWE, By-Pass Road Construction in the West Bank, 1996, supra note 24, at 7-8

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Israel either as "state land" or expropriated for "public purposes" (e.g. Bethlehem by-pass road and Halhul by-pass road).[146]

2.5.3. Military Orders and other Normative Sources concerning the Restriction on the Use of Land in the West Bank

In addition to the method of direct confiscation of land - where the ownership is no longer in the hands of the residents - the Israeli military government also used and uses certain methods of restrictions on the use of Palestinian owned land for the purpose of establishing later on Jewish settlements on this land.

The below described military orders were the most important ones enacted by the military administration for that purpose:

2.5.3.1. Declaration of Occupied Land as "Combat or Fighting Zones" - Military Order No. 271, 1968

"Combat or fighting zones" are areas which are declared by the District Commander and where the Israeli military government does not consider itself as being responsible for damage incurred by military action. Military Order No. 372, 1970,[147] which is an amendment to Military Order No. 271, 1968,[148] regarding liability of the IDF states that "no compensation will be paid by the IDF for any damage which was caused in any area which the Area Commander has defined as a 'fighting zone'." That means in other words, no compensation is paid for any damage that occurred as a result of actions of IDF soldiers, of a force acting in coordination with the IDF or a resident working for the IDF in a declared fighting zone. The combat zones were declared in Military Order 270/1 and an attached map; they are largely coextensive with the below discussed "closed areas" and encompassed in the mid-1980's more than 1 million dunams (!) of land in the eastern part of the West Bank and in other areas.[149]

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146 Halabi, supra note 105, at 5

147 Military Order No. 372, Concerning Claims, 1 February 1970, published in Rabak and Fairweather, supra note 31, at 47

148 Military Order No. 271, Concerning Claims, 12 August 1968, published in ibid., at 36

149 M. Benvenisti, supra note 71, at 60

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2.5.3.2. Declaration of Occupied Land as "Closed Areas" - Military Order No. 378, 1970

According to Article 90 of Military Order No. 378, 1970[150] any "military commander" (i.e. any officer) is empowered to declare by a written order any area or place as a "closed area" for the purpose of the above order. The ownership of closed areas remains in the hands of the residents, but they are deprived from their right of use of the land without any compensation. In early 1985, 23 closure order were in effect and where encompassing about 1 million (!) dunams of land. Most of the closed areas are also so called "state lands" and/or declared as "combat zones". About 80.000 dunams of land were closed within populated areas as a first step towards their expropriation and the establishment of Jewish settlements - as it happened for example in the case of the Latrun Zone and with Ma'aleh Adumim.[151] In October/November 1999, 700 residents of the South Mount Hebron area were expelled from their homes, after the area had been declared a closed military zone.[152]

2.5.3.3. Declaration of Occupied Land as "Nature Reserves" - Military Order No. 363, 1969

A common strategy to confiscate land is to declare it first as so called "nature reserves" Military Order No. 363, 1969[153] Concerning the Protection of Nature Reserves imposes severe restrictions on construction and land use in areas declared nature reserves. The process of transformation of private owned land into nature reserves works as follows: The registrar of lands attaches a "warning notice" to the lands in the registry, thus diminishing the value of land.

No compensation for damages is specified. Although the declaration of a nature reserve is aimed at protecting the environment, in reality it is considered by the authorities an integral part of the land-seizure program. During the 1980s, the authorities had declared at least 340.000 dunams of land as "nature reserves".[154]

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150 Military Order No. 378, Concerning Security Regulations, 20 April 1970, published in Rabak and Fairweather, supra note 31, at 48. According to this military order any person entering or leaving a closed area without written permission of the military commander is committing a crime.

151 M. Benvenisti, supra note 71, at 62

152 B'Tselem, Expulsion of Residents from the South Mt. Hebron Area, October-November 1999 (Jerusalem, February 2000)

153 Military Order No. 363, Concerning Protection of Nature Reserves, 14 February 1969, published in Rabak and Fairweather, supra note 31, at 46

154 M. Benvenisti, supra note 71, at 60

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2.5.3.4. Prohibition of Construction on Occupied Land - Military Order No. 393, 1970

By virtue of Military Order No. 393, 1970[155] any military commander may prohibit construction or order a halt in construction or impose conditions on construction if he believes it necessary for the "security" of the Israeli army in the area or to ensure public order.[156] By 1987 the total area affected by prohibition orders was 580.000 dunams of land in the West Bank.[157]

2.5.4. Israel's Settlement Policy in Jerusalem

As already stated in the Introduction to this chapter, East Jerusalem (including 70.000 dunams of land - most of which were in 28 villages in the West Bank, and the remaining lands were within the municipal boundaries of Bethlehem and Bet Jalla) has been de facto annexed by Israel on 28 June 1967. The military orders discussed in the previous sub-chapters are not applied by Israel, but it is rather Israeli law that is applied on the whole above mentioned area of East Jerusalem.

Thus, the legal sources elaborated in Chapter G of this work, dealing with the right to property and especially the right to land, are also valid with regard to East Jerusalem. However, the British mandatory Land (Acquisition for Public Purposes) Ordinance, 1943[158] was the principal legal source for the large expropriations of land owned by Palestinian Arab residents in East Jerusalem.[159]

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155 Military Order No. 393, Concerning the Supervision of Building in the West Bank, 1970, published in Rabak and Fairweather, supra note 31

156 Orders prohibiting building have been issued regarding areas around military camps and installations, around Jewish settlements and whole settlement areas (e.g. Gush Etzion, Givat Ze'ev). Construction is also prohibited in 200-meter strip along both sides of main roads. M. Benvenisti, supra note 71, at 60

157 Ibid.

158 Land (Acquisition For Public Purposes) Ordinance, 1943, P. G. No. 1268, at 463. For more details on this legal source see Chapter G.2.8.1. of this work.

159 On the basis of this legal source, over 23.000 dunams of land have been confiscated from Jerusalem's Palestinian Arab residents from January 1968 until May 1991 in five stages:
In January 1968 an amount of 4.000 dunams was expropriated from the Palestinian villages Sheikh Jarrah, Shu'fat and Issawiya. On this land the following Jewish settlements were built: French Hill & Mount Scopus, Ramot Eshkol & Giv'at ha-Mivtar, Ma'alot Dafna. LAW, Land & Settlement Policy in Jerusalem, 1997, supra note 24, at 8-9, 19, 35-39
In April 1968 an amount of 116 dunams was expropriated in the Old City of Jerusalem for the enlargement of the Jewish Quarter. Ibid., at 9, 19, 25
In August 1970 an amount of 14.000 dunams was expropriated from the Palestinian villages of Malha, Sur Baher and Beit Jalla. On this land the following Jewish settlements were built: Neve Ya'aqov, Ramot Allon, Shu'afat Ridge, East Talpiyyot, Gilo, Atarot, Gai Ben Hinom, Jaffa Gate, Ramat Rahel Area. Id., at 9, 19, 35-39
In March 1980 an amount of 5.089 dunams was expropriated from the Palestinian villages

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Another legal source heavily used for expropriations of Arab owned land in East Jerusalem is the Absentees Property Law, 1950.[160] This law has been used particularly by the extreme right wing settler groups operating in the Old City in coordination with the Custodian of Absentees' Property and the Housing Ministry, in order to buy leases and occupy sealed property.[161]

The purpose of this sub-chapter is to give an overview about Israel's settlement policy in Jerusalem and the human rights violations resulting from the establishment of settlements in the Occupied Territories and their consequences for the Palestinian residents of the area.

After the occupation in 1967, the Israeli authorities have pursued a twofold policy towards Jerusalem. The first policy line was formulated in the "1968 Jerusalem Master Plan" which was prepared between 1967 and 1968 under the initiative of the Jerusalem municipality in cooperation with various government ministries, with the purpose to direct the city's development and building.[162] In accordance with this plan the prime objective for the Israeli authorities during the first years after the occupation in 1967 was to unite the western and eastern part of the once divided city of Jerusalem through the establishment of settlements, which should also safeguard the "reunification" of the city by creating political, physical and demographical facts on the ground.[163]

The second policy line pursued by the Israeli government towards the city of Jerusalem was developed in 1973 by the Inter-Ministerial Committee to Examine the Rate of Development in Jerusalem. This Committee determined that the preservation of a so called "demographic balance" among the ethnic groups in the city was a matter decided by the government of Israel and must be the central principle in the planning policy of Jerusalem.[164]

It should be stressed here that the term "demographic balance" is misleading, since it gives the impression of a policy that seeks to maintain a situation of symmetry, equality and generosity between the two ethnic-religious populations in the city, whereas in reality it means preserving the demographic advantage of the Jewish population of Jerusalem.

The "demographic balance" policy pursued by all Israeli governments has its roots in the years following the June war in 1967 and the extension of Jerusalem's

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Beit Hanina and Hizma. On this land the Jewish settlement Pisgat Ze'ev was built. Id., at 9 In April 1991 an amount of 2.000 dunams of land belonging to the villages of Umm Taba, Sur Baher and Beit Sahur was expropriated. On this land, which is known locally as Jabal Abu Ghneim, the Jewish settlement of Har Homa has been built. Id., at 9, 23

160 Absentees Property Law, 1950, 4 L.S.I. (1949/50) 68

161 These Jewish settler groups have their ideological roots in the Gush Emunim Movement and include the following groups: Ateret Cohanim, Elad, Torat Cohanim and the Young Israel Movement. LAW, Land & Settlement Policy in Jerusalem, 1997, supra note 24, at 25-27

162 B'Tselem, A Policy of Discrimination, 1997, supra note 21, at 19

163 LAW, Land & Settlement Policy in Jerusalem, 1997, supra note 24, at 5

164 B'Tselem, A Policy of Discrimination, 1997, supra note 21, at 45-47

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municipal boundaries over (i.e. the annexation of) East Jerusalem, causing an addition of 69.000 Palestinian Arabs to the city's whole population. In the first years after the annexation of East Jerusalem, the Israeli authorities decided to increase the proportion of Jews in Jerusalem to 80-90% by providing motives to Jews to live in the city. But after it had turned out that the Jewish population in Jerusalem grew less than planned and that the city's Palestinian Arab population grew more than predicted (the growth rate of the Palestinian Arab population was considered as a "demographic problem" in the dictionary of those who determined the planning policy for Jerusalem), the Israeli government adopted in 1973 the following recommendation:

> "A demographic balance of Jews and Arabs must be maintained as it was at the end of 1972, i.e. 73.5% Jews and 26.5% Palestinian Arabs."[165]

This "demographic balance" formula has been affirmed by all Israeli governments as a guiding principle of municipal planning policy, and it has been the foundation of all demographic and urban plans.

Thus, instead of basing the planning and housing policy on the area's potentials, on the forecasted population growth, on present and future population's needs, on location, land, costs, ownership and other criteria that apply in proper planning, the planning policy for Jerusalem is solely based on ethnic-political considerations. As a matter of fact the Israeli authorities operate since more than 22 years an ethnic quota system for Palestinian housing construction in Jerusalem.

The underlying objective of this policy was and is to ignore the growth of the Palestinian Arab people, to prevent the natural development of their neighborhoods, and later to expel as many Palestinians from the city.

In order to accomplish the above mentioned aims the Israeli government employed the following measures:

* Expropriations of Palestinian land and building Jewish settlements on it.[166]
* Restrictions on the use of Palestinian owned land.[167]

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165 Ibid., at 45

166 See supra note 159

167 According to a study carried out in 1994 by Sarah Kaminker (a former member of the Local Planning and Building Committee in the Jerusalem municipality) the majority of the land that remained in Palestinian hands after the expropriations is not designated for the development of the Palestinian neighborhoods. Only 10 km^2 have been allocated for development and building. The rest of the unexpropriated land is marked as "green areas" and "open spaces" on which building is prohibited, or it has been removed at all from the town planning schemes of Palestinian neighborhoods. Therefore, only 14% (!) of the whole area of East Jerusalem annexed to Israel in 1967 is designated for development and building in Palestinian residential neighborhoods. See B'Tselem, A Policy of Discrimination, 1997, supra note 21, at 73. Zoning large tracts of land as "green areas" has two purposes: Firstly to restrict the expansion of Palestinian neighborhoods. Hence most of the land in Palestinian neighborhoods is zoned as "green area" (e.g. 42% of Sur Bahir, 60% of Arab Es Sawareh, 69% of Jabal Mukabir). Expansion is curbed as building is strictly prohibited in green areas.

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* Use of discriminatory planning measures in order to reduce the building possibilities in Palestinian neighborhoods.[168]
* Denial of building permits to Palestinians and thus forcing them to built without permit in order to provide shelter for their families.[169]
* Demolitions of houses built by Palestinians without permit.[170]
* Restrictive residency policy for native Palestinians of East Jerusalem: Confiscation of identity cards and Denial of residency to the Palestinians.[171]

Any structures erected in parts of a neighborhood with the green zoning classification are eligible for demolition. The second purpose of zoning areas as green is to use the land as a reserve for the future construction of Jewish settlements. The long serving former Mayor of Jerusalem, Teddy Kollek, admitted in October 1991 in a meeting of the municipality's Finance Committee at which resources were diverted to build a new Jewish neighborhood called Shu'afat Ridge that the classification of the area as "green area" was in reality a method used to prevent Palestinian construction. The following Jewish settlements were for example built on land that was previously zoned as "green area": Ramot, Shu'fat, Reches Shu'fat, Har Homa (built on land of Jabal Abu Ghneim). LAW, Land & Settlement Policy in Jerusalem, 1999/2000, supra note 24, at 14-15; B'Tselem, ibid., at 80

168 The measures employed by the Israeli government are as follows: Non-preparation of town planning schemes (TPS); delays in preparing TPS; preparation of unrealizable TPS; reduction in the TPS' area; setting housing capacities according to the "demographic balance" formula of "73.5% Jews and 26.5% Palestinians". Important to mention is the fact that on most of the land that remains in Palestinian hands in East Jerusalem, building has been barred by the Israeli authorities on the ground that no TPS exists or that the TPS has not been approved for the specific area. Until 1983, the planning authorities followed the directives of the political line, and did not prepare at all (!) TPS for Palestinian neighborhoods. But - and this is important to bear in mind - without the existence of an approved TPS, it is impossible to obtain a building permit. As a result, tens of thousands of Palestinians have no "legal" possibility to build on their land, and many have built or still build without a permit in order to provide shelter for their families. For more details on this issue see B'Tselem, id., at 74.

169 From 1968 to 1974, only 58 (!) building permits were issued for the native Palestinian Arab people of East Jerusalem, notwithstanding the fact that during those years there was an increase of 24.000 Palestinians. B'Tselem, id., at 75

170 Between 1992 and 1999, the municipality and the Interior Ministry have demolished 198 Palestinian houses in East Jerusalem on the ground that they were built without a building permit. In 1999 alone, 131 people, including 68 children, lost their homes. B'Tselem, Injustice in the Holy City Jerusalem (Jerusalem, Spring 2000) at 6-7

According to a survey conducted in 1994 by the Palestinian Human Rights Information Centre, 10% of the families who have had their homes demolished live in tents while 25% of the families complained of psychological problems since the demolitions and 10% of the families indicated that the demolition adversely affected the schooling of their children.

In October 1999, an amount of 12.000 (!) Palestinian homes were subject to a demolition order. LAW, Land & Settlement Policy in Jerusalem, 1999/2000, supra note 24, at 16

In contrast to Palestinian houses, Israel refrains from demolishing thousands of houses built by Jewish settlers without building permit, and instead issues retroactive building permits. B'Tselem, Demolishing Peace, Israel's Policy of Mass Demolition of Palestinian Houses in the West Bank, 1997, supra note 24, at 15-17

171 B'Tselem, The Quiet Deportation, Revocation of Residency of East Jerusalem Palestinians (Jerusalem, April 1997); B'Tselem, The Quiet Deportation Continues, Revocation of

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*		Denial of family unification to the Palestinians.[172]

The above mentioned measures were and are pursued by Israel's municipal and Zionist authorities in order to intentionally prevent the natural growth and development of the Palestinian Arab people and are absolutely undemocratic, immoral and illegal according to international law and they definitely constitute a systematically applied policy of discrimination.[173]

Between November 1967 and February 1995, in the city of Jerusalem (western and eastern part) a total number of 76,151 housing units was built, constituting an increase of 108,6% in the number of housing units.

The following Table will show, that although since 1967 rapid development and massive housing construction in the whole city of Jerusalem (including the areas of the West Bank which were annexed to Jerusalem) took place, this was almost exclusively for the benefit of the Jewish population:[174]

Residency and Denial of Social Rights of East Jerusalem Palestinians (Jerusalem, September 1998)

172 B'Tselem, Families Torn Apart, Separation of Palestinian Families in the Occupied Territories (Jerusalem, July 1999)

173 These measures particularly constitute a violation of the international humanitarian law regarding belligerent occupation and the inalienable rights of the Palestinian people as established in UN-GA Resolution 3236 (1974). The measures also violate the ICCPR, 1966, published in Basic Documents on Human Rights, 3rd Edition, Edited by Ian Brownlie, Q.C. (Clarendon Press, Oxford, 1992) 125; ICESCR, 1966, published in ibid., 114; ICERD, 1966, published in id., 148; UDHR, 1948, published in id., 21

174 B'Tselem, A Policy of Discrimination, 1997, supra note 21, at 33

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Housing Units Built in Jerusalem between 1967 and 1995, by Ethnic/Religious Affiliation

Housing Units in Jerusalem existing in/for	**Jews**	**Palestinians**	**Unknown**	**Total**
1967	57.500	12.600	-	**70.100**
1995	122.367	21.490	2.394	**146.251**
Housing Units in Jerusalem built between				
1967 - 1995	**64.867 (88%)**	**8.890 (12%)**	**2.394**	**76.151**

Thus - between 1967 and 1995 - 88% of all housing units were built for the Jewish population (one-half of them by public construction). Although the rate of growth among the Palestinian people was and is much higher than among the Jewish population, the percentage of housing units built for Palestinians did not only not increase, but rather decreased and constituted only 12% of all housing units built between 1967 and 1995 (the large majority by private construction).[175]

In February 1995, the Jewish neighborhoods located in East Jerusalem contained 38.500 housing units (twice of the number of housing units in Palestinian neighborhoods[176]). The Palestinian neighborhoods in East Jerusalem contained only 20.900 housing units.[177] The Jewish housing units were in most of the cases built on land that was expropriated from private Palestinian owners.[178]

But, not one (!) housing unit was built on the expropriated land for the Palestinian Arab people.[179]

According to a research conducted in June 1994 by Sarah Kaminker (who was in charge of Palestinian neighborhood planning in the Jerusalem municipality from 1976-1981, and later was a member of the Local Planning and Building Committee), the housing shortage among Jerusalem Palestinians was by that year about 21.000 housing units.[180] According to a research conducted by Ze'ev Baran, architect and town planner who prepared a number of plans for the municipality of Jerusalem, the shortage of housing units among Palestinians exceeds 25.000.[181]

An increase of 100% (!) of housing units available to Palestinians would be needed in order to reduce effectively the Palestinian housing shortage.[182]

175 Ibid., at 9, 33-34
176 Id., at 36
177 Id.
178 Id., at 57-58
179 Id., at 58
180 Id., at 42, note 50
181 Id.
182 Id. at 42

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2.5.5. Settlement and By-Pass Roads in the Occupied Territories

In the context of implementing the Oslo Agreements signed between the Israeli government and the Palestine Liberation Organization in 1993 and 1994, Israel has been developing a road network in the West Bank which intends to serve only the Jewish settlers and the IDF.[183]

These "Jewish-only roads" are built around Palestinian Arab towns/villages in order to by-pass them and to enable the Jewish settlers and the Israeli military forces which protect them to move safely throughout the occupied West Bank.

The intentions behind this by-pass road system were 1.) to allow the Israeli army for an indirect method of control of all the strategic sites and roads in the West Bank; 2.) to create an infrastructure for continued settlement expansion; 3.) to allow for a reduced military presence patrolling roads which would span the entire West Bank; and 4.) to leave the semi-autonomous Palestinian enclaves to be controlled from the inside by the Palestinian Authority.[184]

By the end of 1994, the Israeli army officially announced the construction of 20 new, mostly "Jewish-only", by-pass roads, adding 400 kilometers to the road network in the West Bank, for which 330 million dollars investment was necessary and more than 16.000 dunams of land were - as a consequence of the "peace process" - confiscated, much of them fertile land under cultivation.[185]

The building of these "Jewish only"/by-pass roads are - like many other of road plans in the Occupied Territories - an expression of Israel's chilly and systematic policy of confiscation Palestinian owned land, fragmentation of Palestinian villages/towns, and expansion of Jewish settlements at the expense of the legitimate rights and needs of the Palestinian Arab people.

The "Jewish-only"/by-pass roads signify an imposition of de facto borders beyond which Palestinian Arab villages and towns will not be able to expand, and they are also a dramatic proof that the Jewish settlements and Israeli military control over the West Bank will remain in the future.[186]

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183 The construction of such a road system was a condition imposed in the context of the Oslo "peace process" for Israeli military redeployment from the West Bank. For more details on this issue see LAWE, By-Pass Road Construction in the West Bank, 1996, supra note 24, at 17-18

184 Ibid., at 5

185 Id., at 1, 5-7

186 Id.

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3. The Legal and Judicial System in the Occupied Territories since 1967

3.1. Israel's Approach towards the Application of International Law in the Occupied Territories

As already mentioned above, since June 1967 the Occupied Territories are controlled by the Israeli army and thus subject to the law of belligerent occupation. This field of law includes a system of rules which establishes limitations on the actions of a combatant or an occupying state. These rules are embodied primarily in the Hague Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, 1907[187] and in the Fourth Geneva Convention Relative to the Protection to Civilian Persons in Time of War, 1949.[188] The remainder is found in military manuals, opinion iuris, and the writings of international legal scholars.[189]

The government and the Supreme Court of Israel do not fully apply the law of belligerent occupation in the Occupied Territories, although each of them base their approach on different grounds.

Israel's governmental position on this issue is that its control over the West Bank and the Gaza Strip is not one of belligerent occupation. This position was officially declared shortly after the war in June 1967 by Meir Shamgar, who was at this time the Attorney General and became later justice and president of the Supreme Court. Shamgar held that "the Hague Regulations, 1907 and the Fourth Geneva Convention, 1949 apply only to a territory that was occupied from a legitimate sovereign government, but since Egypt and Jordan's sovereignty over the West Bank and Gaza Strip was never recognized by the international community, they cannot be considered 'occupied' territories. Thus, Israel is not obliged, by international law, to fulfill the convention's provisions, but took upon itself to fulfill de facto the 'humanitarian provisions' of these two instruments."[190]

Israel's view is completely wrong since humanitarian law is by definition and nature, entirely humanitarian. The governmental position was built on the fear that

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187 Hague Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Signed at The Hague, 18 October 1907

188 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949

189 Prominent texts are written by the following international legal scholars: Morris Greenspan, The Modern Law of Land Warfare (California, University of California Press, 1959); Lassa Oppenheim, International Law: A Treatise, Vol. II, Disputes, War and Neutrality (H. Lauterpacht ed., 7th edition 1952); Gerhard Von Glahn, The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation (Minneapolis, The University of Minnesota Press, 1957)

190 Meir Shamgar, The Observance of International Law in the Administrated Territories, 1 I.Y.H.R. (1971) at 262-266

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any acknowledgment of a state of belligerent occupation could implicit lead to the recognition of the administrator titles of Egypt and Jordan.

The Supreme Court on the other hand has developed two different views with regard to the legal status of the Occupied Territories, each dependent on the purpose the view should serve: On the one side it treated the area as separated from the state of Israel within the Green Line in order to create two different systems for two different people based on an envisioned geographical division between the Occupied Territories and Israel proper. On the other hand the Supreme Court tried to neutralize the "self-established wall" between the Green Line and the Occupied Territories in form of rejection of the petitions in the matter of "settlement of civilian residents of the state in the Occupied Territories since these petitions relate to political matters."[191]

Since the decision in the matter of *Ayub v. Minister of Defence*[192] - which is better known as *Beth El* case - Israel views the Hague Regualtions, 1907 as part of customary law, i.e. those principles which are binding on all states, regardless of their participation in specific conventions. As opposed to the Hague Regualtions, 1907, the Supreme Court views the Fourth Geneva Convention, 1949 as treaty law, which - according to the approach of the Israeli legal system - is only binding after the parliament incorporates it into domestic law through legislation. And this has never happened. Moreover, the Supreme Court has ruled that the Fourth Geneva Convention, 1949, does not restrict the authorities in exercising their authority according to the local law. This is the so called "local law doctrine"[193] which clearly contradicts the view accepted by the most prominent scholars of international law, and of course the underlying intention of the Fourth Geneva Convention, 1949 that the restrictions on the occupying power override the authority given in local law. Due to the Supreme Court's ruling that the Fourth Geneva Convention is not justiciable, it has generally refrained from discussing its provisions.

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191 *Bargil v. Government of Israel*, quoted in B'Tselem, Israeli Settlement in the Occupied Territories, 1997, supra note 24, at 34-35

192 *Beth El case,* supra note 110

193 H.C. 785, 845/87, 27/88, *1. Abd al Nasser al Aziz Abd al Aziz al Affo. 2. The Association for Civil Rights in Israel v. Commander of I.D.F. Forces in the West Bank, 1. Abd al Aziz Abd Alrachman Ude Rafia. 2.The Association for Civil Rights in Israel v. 1. Commander of I.D.F. Forces in the Gaza Strip. 2. Minister of Defence, 1. J'Mal Shaati Hindi v. Commander of I.D.F. Forces in The West Bank Region,* 42(ii) P.D. 4, translated into English in: 29 International Legal Materials (1990) 139 [The Afu Case] [In this decision the Supreme Court held that the "factual basis justify the deportation of civilians from the West Bank and the Gaza Strip by virtue of Regulation 112 of the Defence (Emergency) Regulations, 1945 if the deported persons pose a danger to public order and security."]; H.C. 698/80, *Kawasme v. Minister of Defence,* 35(i) P.D. 617; for a summary in English see 11 I.Y.H.R. (1981) 349 [Deportation of mayors from the West Bank to Lebanon by virtue of Regulation 112 of the Defence (Emergency) Regulations, 1945]; H.C. 13+58/86, *Shaine v. Commander of the IDF Forces in the West Bank Region, Head of the Gaza Strip Civil Administration,* 41(i) P.D. 197; for a summary in English see 18 I.Y.H.R. (1988) 241

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To sum up the situation, one may say that Israel constantly ignores the views of the international community and relates to international law not as binding rules, but as an obstacle and nuisance to be overcome or by-passed in order to achieve the paramount Zionist political goals.

Since the occupation in June 1967 began, the Israeli military government - backed in the most cases by the Supreme Court - committed and commits in a systematic and unchanged manner exceptionally serious war crimes against helpless and innocent Palestinian Arab civilians:

a. by acts of inhumanity, cruelty and barbarity directed against the life, dignity, as well as physical and mental integrity of the Palestinian Arab people - in particular by willful and extrajudicial killings, torture, mutilation, taking of hostages, deportation or transfer of the civilian population and collective punishment;

b. by the establishment of Jewish settlements in the occupied West Bank, the Gaza Strip, the Golan Heights and East Jerusalem in order to change the demographic composition of these territories;

c. by the use of unlawful weapons (e.g. dumdum bullets);

d. by employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment (e.g. mass destruction of olive groves owned by Palestinian Arabs);

e. by large-scale and willful destructions of the property of Palestinian civilian (e.g. demolition of houses).

Despite the fact that after the signment of the Oslo I and Oslo II agreements certain matters were transferred to the Palestinian Authorities, Israel's army still has overwhelming control over external security matters, Israelis, settlements in the West Bank, the Gaza Strip and East Jerusalem, since these issues are so called "final status issues" to be discussed in the final stage of negotiations.

Therefore, until such a final agreement is signed, it is international humanitarian law - i.e. the Hague Regulations, 1907 and the Fourth Geneva Convention, 1949 - that has to be applied by Israel on these areas.

3.2. Legal Dualismus and Apartheid in Israel and the Occupied Territories

There exist two legal and judicial systems which operate side by side within Israel's jurisdiction. In Israel itself Israeli law applies, while the Occupied Territories (West Bank and Gaza Strip) are subject to the law of belligerent occupation. Moreover, there are two types of normative sources for two types of population residing on the same territory.

The legal system in the Occupied Territories consists - beside pre-1967 local Jordanian and Egyptian laws - of so called security legislation (consisting of the

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Defence (Emergency) Regulations, 1945[194] and a huge number of military orders, regulations and other "security" legislation) promulgated by the military government and enforced by especially established military courts. This legal system was gradually developed during the last 33 years since the occupation in 1967 took place, is only applied to the native Palestinian Arab people, and does not ensure the same judicial rights and guarantees as the Israeli legal system.[195]

Although Israeli citizens living in the Occupied Territories and non-citizen Jews staying in these areas are technically seen also subject to the said military legal orders, they are in practice governed by the much more liberal Israeli law and are tried in courts inside Israel. The Palestinian Arab people of the Occupied Territories on the other hand is subject to the local or military law and is tried by military courts.[196] In applying two different legal systems to two populations - living in the same territory - according to their ethnic and religious identity, the state of Israel clearly violates the principle of equality before the law and the duty to enforce the law equally.

It must be stressed that the Knesset (the Israeli parliament) is legally and morally fully responsible for this systematically applied discrimination, since it extends periodically the validity of the Emergency Regulations (Offenses Committed in Israel-Held Areas - Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1967[197] and numerous other regulations according to which an extra-territorial personal status for Israeli settlers and Israeli citizens residing in the Occupied Territories is created. In 1984 in the framework of the renewal of the mentioned Emergency Regulations of 1967 concerning Offenses, the Knesset made more laws applicable to the Israeli settlers, every Jew, whether or not an Israeli citizen.[198]

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194 Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 Sept. 1945) Suppl. II, at 1055

195 B'Tselem, Law Enforcement vis-à-vis Israeli Civilians in the Occupied Territories (Jerusalem, March 1994) at 15-16

196 Ibid., at 16, 18

197 Emergency Regulations (Offenses Committed in Israel-Held Areas - Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1967, 22 L.S.I. (1967/68) 20; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1970, 25 L.S.I. (1970/71) 19; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Extension of Validity) Law, 1971, 26 L.S.I. (1971/72) 28; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Continuance in Force) Law, 1974, 28 L.S.I. (1973/74) 41; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Amendment) Law, 1975, 29 L.S.I. (1974/75) 306; Emergency Regulations (Areas Held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance) (Continuance in Force) Law, 1976, 30 L.S.I. (1975/76) 180

198 These laws included, in part, laws related to security services, the income tax ordinance, population registry, and national insurance. For more details see B'Tselem, On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement, 1999, supra note 24, at 18

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An important aspect of these and other military orders and regulations is that they hardly use terms like "Jews" or "Palestinians" or "Arabs" and the like in order to specify to which population group they shall apply or not.

The military orders rather use - as many other laws within Israel's legal system - certain neutral "code words" which totally mask the reality of the inherent discrimination and racism.[199] Such "code words" that are used quite often are for example: The word "people" - which means only "Jews"; or the word "settlement" - which means "Jewish settlements"; or "immigrant" - which means "Jewish immigrants"; or the term "national land" - which means "Jewish" (and not Israeli) land; or the word "public purposes" - which means "Jewish public purposes"; or the word "security matters" - which means "security for the Jewish population" and not for all citizens; or the word "special" - which means "exclusive benefit of Jews".[200] There are numerous other such terms which cannot be enumerated here exhaustively.

The legal system in the Occupied Territories is based on the concept of political Zionism - i.e. on national-religious and ethnic considerations - directed at the aim of demographic control, oppression and finally expulsion of the native Palestinian Arab people. The result of Israel's occupation and the establishment of "Jewish settlements" is a system of legal and territorial *segregation and exclusiveness based on national and ethnic-religious* considerations with large-scale discrimination by law against the native Palestinian Arab people. Since the end of the *apartheid* in *South Africa*, I could not discern any comparable legal and judicial system in the world.[201] Only the "white" areas of South Africa reached a similar level of *exclusiveness and racial segregation* as the Jewish settlements do.

The oppressive measures employed by the state of Israel on a collective level against the Palestinian Arab residents of the Occupied Territories - such as deportation, house demolition and sealing off of houses, administrative detentions, curfew, closure, restricting exit from and entry into the territories, closing of schools and universities etc... - in order to accomplish the Zionist goals are based on the already above mentioned Defence (Emergency) Regulations of 1945 and/or on so called "security legislation."

The term "security legislation" embodies military orders issued by military commanders since 1967 and throughout the still existing Israeli military rule in the West Bank and the Gaza Strip. The Israeli military commanders issued more than 1.300 military orders in the West Bank from 1967 to 1992 and over 1.000 similar

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199 Walter Lehn, The Jewish National Fund - An Instrument of Discrimination, note 18, International Organization for the Elimination of all Forms of Racial Discrimination (1982), quoted in Coon, supra note 2, at 172

200 Coon, ibid., at 172-174, 183-190, 200-204

201 See for instance the South African Natives Land Act (1913) and Native Trust and Land Act (1936) quoted in Coon, supra note 2, at 173, which stopped further "alienation" of land to Africans. This South African law is similar to Section 1 of the Israeli Basic Law: Israels Land, 14 L.S.I. (1959/60) 48. For more details on this Basic Law see Chapter G.2.9.1.

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orders in the Gaza Strip which cover every aspect of Palestinian life in the Occupied Territories. A large number of these military orders stands in clear contradiction of Israel's obligation under Article 47 of the Fourth Geneva Convention, 1949 and Article 43 of the Hague Regulations, 1907 due to the fact that they are designed to protect and further only the interests of the Israeli state and the Jewish Israeli settlers which were transferred to the Occupied Territories. These military orders and regulations sanction or make "legal" virtually every illegal act that occurs in the Occupied Territories, namely: The occupation itself, violations of civil and political rights as well as economic, social and cultural rights of the native Palestinian Arab people. They give a "legal" facade to the manipulation of natural resource for the interests and benefit of the belligerent occupier rather than for the indigenous Palestinian population. Under the pretext of "legality" illegal military orders and regulations violating international law were issued, in order to establish facts on the ground.

In summary one may say that Israel's occupation was and is a legalistic occupation that is characterized by the fact that there exists for even the most illegal act performed by Israel's military authorities a "legal" basis.[202] This is very much in line with the general nature and approach of the Israeli legal system.

Israeli military orders permit the Israeli occupying forces to pursue Israel's colonialist policies of economic subjugation, political, cultural and social oppression of an entire people - i.e. the Palestinian Arabs. Under international law these systematically applied policies and practices are totally illegal. Article 43 of the Hague Regulations, 1907 requires a belligerent occupier to respect the laws in force of the country occupied. This is repeated in Article 64 of the Fourth Geneva Convention, 1949.

With regard to the legal nature and the validity of the military orders one must say that the procedures of issuance and publication are carried out within the military, without prior public discussion or external parliamentary supervision.[203]

During the period of 1967 to 1992 more than 2000 military orders were issued non-sequentially, sometimes without number and many were unpublished. They were not widely distributed and notification of these orders occurred randomly and obtaining copies from the Israeli military governor's legal adviser was difficult. Thus these military orders were not enacted in regular legislative procedures, including parliamentary debates. Moreover, there is no publication in an Official Gazette as requested for laws in order to become formally valid.

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[202] See the vast number of Israeli military orders that were issued for the Occupied Palestinian West Bank and the Gaza Strip. See Rabak and Fairweather, Israeli Military Orders in the Occupied Palestinian West Bank 1967-1992, supra note 31

[203] Hofnung, supra note 4, at 233-234; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93 (Jerusalem, 1994) at 19

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The legislative acts of the Supreme Commander are termed "Orders" and constitute for all intents and purposes primary legislation,[204] which covered - and despite the so called "peace process" - still covers all areas of life.

Until the enactment of the two basic laws on human rights in 1992, the acceptance of the legislation of the Military Commander as "primary legislation" raised - from the point of view of the Israeli legal system - some problems, due to the fact that the Supreme Court did not have the power (jurisdiction) to review that primary legislation (made by the Military Commander) in the same way that it did not have the jurisdiction to review legislation passed by the Knesset.[205]

In order to overcome this problem of jurisdiction, the Supreme Court held in the decision of *Dwaikat v. State of Israel*[206] that it has the power of judicial review over legislation made by the Military Commander because of, inter alia, the fact that the Military Commander is an administrative organ operating under Israeli law and, therefore, part of the executive branch in Israel. In addition to the orders of primary legislation issued by the commander of the area, subordinate officials of the military government (i.e. military commanders in the sub-regions and staff officers who worked in cooperation with civil government offices in Israel) may issue - under existing primary legislation - secondary legislation, which is termed "Regulations", "Notices", "Provisions", "Rules", "General Permits" and "Orders". This kind of legislation does not have the same nature as "Military Orders" issued by the Supreme Commanders.[207]

Under Military Order No. 130 concerning Interpretation[208] every legislative act carried out by the military government or on behalf of it (including orders which pertain to individuals, such as granting a license or appointing a person to a post) is called "secondary legislation". Section 8 of the same order set out the legislative hierarchy for the region: "Security legislation" takes precedence over any other law, even if it does not explicitly repeal the latter. Within security legislation, legislation made by the Area Commander takes precedence over legislation made by any other military commander or authority which acts on behalf of an Area Commander. Under Section 17 of the same order, the Area Commander may exercise any power granted to a subordinate military commander or any other authority. Under Section 18, the Area Commander may delegate all powers vested in him, except for that to issue proclamations and order applicable to the entire region.

To mention in this context are also the IDF's Rules of Engagement/Pocketbook for Soldiers Serving in Judea, Samaria, and the Gaza Strip, which provide rules for

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[204] Hofnung, ibid., at 222

[205] See Chapter B.5. (The Attitude of the Israeli Supreme Court towards Judicial Review of Primary Legislation of the Knesset in Human Rights Cases)

[206] H.C. 390/79, *Dwaikat v. State of Israel,* 34(i) P.D. 1; translated into English in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press Oxford, 1996) 379, at 407; for a summary in English see 9 I.Y.H.R. (1979) 345

[207] Hofnung, supra note 4, at 223

[208] Military Order No. 130, Interpretation (The West Bank Region), 1967, quoted in ibid.

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the behavior of Israeli soldiers serving in the Occupied Territories and for "treatment" of the Palestinian Arab population in the Occupied Territories. They define what a soldier may and may not do in terms of opening fire - therefore also called the "Open-Fire Regulations". An examination of these rules shows that they are formulated in an unclear and very open-textured way giving much discretion to the soldiers, without explaining as to how to exercise that discretion properly. These rules leave many "gray" areas by expressions such as "in accordance with the circumstances," "to the degree possible," "as much as possible," and the like. Additionally to these written orders, Israeli soldiers in the field are given oral briefings, and IDF Senior Officers give on certain events statements to the media, which taken all together have the effect of making the IDF Rules of Engagement even more vague, rather than make them clearer.[209]

Important to mention is the fact that during the whole period of occupation since 1967 and until the mid-1990's, the Israeli authorities have completely deprived the Palestinian Arab people in the Occupied Territories of the possibility of choosing their own representatives, of enacting own legislation through them, and of appointing officials, judges, and policemen to administer their affairs according to their will. Nevertheless, there has been - since the early hours as the occupation in June 1967 began - strong political resistance, violent and nonviolent, by Palestinian groups and individuals towards Israel and Israelis.

Due to the incredible injustice that was and still is done to the Palestinian Arab people in the Occupied Territories on a daily basis, the preservation of "Israeli law and order" was and is - logically - perceived as the interest of an illegitimate and inhuman government with its judicial system as a tool to impose its will.

Given the severe injustice inflicted on a whole innocent people - i.e. the Palestinian Arab people - by the Israeli occupation power on a daily basis, one may not wonder that violations of Israeli "law" and the disrespect for the Israeli governmental and military authorities have acquired a touch of patriotism among the Palestinians, finally creating, however, a situation in which social order and conventions within the Palestinian society have been undermined as well.

The military orders continue to be issued and continue to be applied across the Occupied Territories, even though a transfer of power to the Palestinian Authority has taken place in accordance with the Oslo Agreements. Under the Oslo Accords, the Israeli military orders were to remain in force during the five years transitional period. A mechanism was put in place between the Palestinian Authority and Israel to review these military orders and to, possibly, revise these orders. However, no progress has been made in this sphere.

Palestinians in the Occupied Territories - excluding Jerusalem - are subject to Israeli military law, issued in form of military orders and regulations by the Israeli military governors of the West Bank and Gaza Strip.

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[209] B'Tselem, Activity of the Undercover Units in the Occupied Territories (Jerusalem, May 1992) at 15, 120-124

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Palestinians with Jerusalem residency (i.e. with blue ID cards) are, on the whole, subject to Israeli law. This is on the basis, that Israel assumes "Jerusalem to be part of the Israeli state" and therefore, subject to its laws.

3.3. The Questionable Role of Israel's Supreme Court

In cases linked to the Occupied Territories the Supreme Court has played the role of an "agent" of the military government, defending harsh restrictions and violations of fundamental rights. The majority of the hundreds of cases related to the Occupied Territories were decided by the Supreme Court in favor of the considerations of the military government.[210]

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[210] See for example the below described cases - involving the Palestinian people in the Occupied Territories - concerning the following issues:
Requisition of Palestinian private land for the establishment of military bases and Jewish civilian settlements: *Beth El case*, supra note 64
Expropriation of Palestinian private land for the construction of highways: H.C. 393/82, *Askan (Cooperative Society Lawfully Registered in the West Bank Region) v. Military Commander of IDF in the West Bank,* translated into English in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press Oxford, 1996) at 407
Imposition of censorship on the press and all published materials: H.C. 619/78, *Al-Talia Weekly Magazine v. Minister of Defence*, for a summary in English see 10 I.Y.H.R. (1980) 333; H.C. 322/81, *Makhoul v. District Commissioner*, 37(i) P.D. 789; H.C. 415/81, *Ayoub v. District Commissioner,* 38(i) P.D. 750; H.C. 541/83, *Asli v. District Commissioner,* 37(iv) P.D. 837; H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477
Deportation of Palestinian civilians because of 'hostile activity and propaganda: H.C. 97/79, *Abu Awad v. Military Commander of IDF in the West Bank,* for a summary in English see 9 I.Y.H.R. (1979) 343; H.C. 320/80; *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 344; H.C. 698/80; *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 349; H.C. 629/82, *Mustafa v. Military Commander of IDF in the West Bank,* for a summary in English see 14 I.Y.H.R. (1984) 313; H.C. 513/85, 514/85, *Nazal v. Military Commander of IDF in the West Bank,* for a summary in English see 16 I.Y.H.R. (1986) 329
Mass Deportations of Palestinian Arab civilians: *Afu Case,* supra note 193; H.C. 5973/92, *Association for Civil Rights in Israel v. Minister of Defence*, translated into English in 10 S.J. (1988-1993) 168
Administrative Detention: H.C. 6843/93, *Qattamseh, Ahmad Suleiman Musa v. Military Commander of IDF in the West Bank,* Takdin Elyon 94(2) 2084; AAD 10/94; *Plonim (i.e. Unnamed) v. Minister of Defence*, (unpublished); translated into English by Amnesty International; for a summary in English see B'Tselem, The B'Tselem Human Rights Report, Volume 6, Summer 1998, at 9, 14
Demolition of Houses: H.C. 434/79, *Sakhawil v. Military Commander of IDF in the West Bank*, for a summary in English see 10 I.Y.H.R. (1980) 345; H.C. 361/82, *Khamri v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 314.
Sealing of Houses: H.C. 22/81, *Khamed v. Military Commander of IDF in the West Bank*, for a summary in English see 11 I.Y.H.R. (1981) 365; H.C. 5510/92, *Turkeman v. Minister of Defence,* for a summary in English see 25 I.Y.H.R. (1995) 347. Torture: H.C. 336/96, *Abd al-*

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After the War in 1967 the Supreme Court of Israel, in its capacity as the High Court of Justice, started to give the Palestinian residents of the Occupied Territories the opportunity to challenge the military government's actions. Initially, i.e. during the 1970s the Supreme Court was not sure if it should extend the jurisdiction over acts of the military government in the Occupied Territories,[211] but in later cases, starting in 1981 with the case *Abu Aita v. Commander of West Bank*,[212] the Supreme Court clearly ruled that

> "...there exists the authority to examine on a personal basis the office holders in the Military Government who are members of the State executive arm as 'persons who occupy public office under law' and are therefore subject to supervision of this Court,... which reviews the legality and validity of the actions in accordance with the basic concepts of Israeli administrative law."[213]

The extension of the Supreme Court's jurisdiction over the Occupied Territories and the fact of giving the civilian population access to the own national judicial system is without doubt exceptional.[214] Lon Fuller called this effect the "judicalization" of the conduct of the military government.[215]

I think that giving the Palestinian civilian population access to the Israeli national judicial system, did neither enhance the legitimacy of the governmental actions nor the legitimacy of the Supreme Court itself. I rather think that the Israeli Supreme Court - in order to keep a minimum rate of legitimacy - should have refuse to undertake the task of reviewing cases from the Occupied Territories. The Court

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Halim Belbayasi v. General Security Service; H.C. 8O49/96, *Mohammed Abdel Aziz Hamdan v. General Security Service*; H.C. 3124/96, *Mubarak v. General Security Service*, for a translation of these three cases into English see Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases, An Annotated Sourcebook (Jerusalem, January 1997) at 20-21; H.C. 532/91, *X v. The State of Israel,* cited in Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases, An Annotated Sourcebook (Jerusalem, January 1997) at 12

211 *Abu Hilu,* supra note 110

212 H.C. 493/81, *Abu Aita v. Military Commander of IDF in the West Bank,* translated into English in 7 S.J. (1983-1987) 1

213 *Abu Aita,* ibid. See also the cases *Askan* supra note 210, at 407; H.C. 358/88, *Association for Civil Rights in Israel v. Central District Commander,* translated into English in 9 S.J. (1977-1990) 1, at 12-13

214 Eyal Benvenisti, Judicial Review of Administrative Action in the Territories Occupied in 1967 in: Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press, Oxford, 1996) 371, at 372; Dan Simon, The Demolition of Homes in the Israeli Occupied Territories, 19 Yale Journal of International Law (1994) 1, at 22. Compare in contrast to the Israeli Supreme Courts attitude that of the U.S. Supreme Court, which refused to adjudicate claims of Panamanian citizens and firms against the actions of the U.S. Military Forces, following the occupation of Panama in 1989. See Industria Panificadora, S.A., et al. v. United States, 763 Fsupp. 1154 (D, DC, 1991); Goldstar (Panama) v. United States, 967 F 2d 965, 968 (4th Cir., 1992)

215 Lon Fuller, Anatomy of the Law (1968) at 111, 112

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could have done so easily by employing the argument of the "lack of jurisdiction" over the Occupied Territories or by using the doctrine of "non-justiciability of political questions" - as it did in other cases.

Ronen Shamir - in contrast to my opinion - has argued in an article entitled "Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice" that - although the overwhelming majority of the petitions that were submitted to the Supreme Court were removed, compromised, or decided in favor of the military government in the Occupied Territories - the few decisions which were decided in favor of the petitioner not only enhanced the court's own legitimacy but also legitimized Israel's governmental policies and actions in the Occupied Territories.[216] He argued that with the few decisions decided in favor of the petitioner the Supreme Court created an effective "myth of rights", a belief that "litigation can evoke a declaration of rights from the court."[217] According to his approach these few "landmark cases" led to the legitimization of Israel's policy of occupation through judicial approval, and strengthened to a certain degree the pride and image of the military government in the Occupied Territories among the majority of Israel's society.[218]

I do not share the opinion that the "landmark cases" led to the legitimization of Israel's policy of occupation through judicial approval, since it would totally emasculate international law and mean that the most illegal and immoral deeds - such as (extrajudicial) killings, torture, hostage taking, house demolitions as form of punishments - can become "legitimate" acts after being declared so by a court.

4. The Impact of the Oslo Agreements signed in 1993 and 1995 on the Occupied Territories

Between 13 September 1993 and 27 September 1995 five agreements, comprising 598 pages of text were signed between the state of Israel and the PLO.

The main agreements signed between Israel and the PLO are the Declaration of Principles on Interim Self-Government Arrangements signed on 13 September 1993 (Oslo I Agreement or the DOP)[219] and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip signed on 25 September 1995 (Oslo II Agreement or Interim Agreement).[220]

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216 Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, 24 L. & Soc'y Rev. (1990) 781, at 783, 786, 795-799

217 Ibid., at 797

218 Id.

219 Oslo I Agreement, supra note 29

220 Oslo II Agreement, supra note 30

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Both agreements follow a similar structure, entail fundamental conceptual similarities, are a manifestation of Israel's view towards the legitimate rights of the Palestinian Arab people to equality, freedom, human dignity, political self-determination and national sovereignty, and are a continuation of Israel's political objectives as they were laid down for the first time in the Camp David Accords.

Three fundamental political objectives pursued by Israel at all times appear in the Camp David Accords as well as in the subsequent Oslo I and II Agreements and may be summarized as follows:

1. The first objective is to ensure that the ultimate political fate of the Occupied Territories is - in the words of the Israeli analyst Aryeh Shalev - "put off".[221]

2. The second objective is to formulate an agreement on "the interim phase" in such a manner as to win time and make it possible for Israel during this interim phase to continue to create facts on the ground (i.e. to build Jewish settlements) so that the option to annex these areas in the future is not in danger.[222]

3. The third objective is to establish an "autonomous authority" enjoying functional, but not territorial powers. This objective has its basis in the concept of Zionism - laying at the very foundation of the state of Israel - according to which Israel was and is only interested in the "land" in the Occupied Territories but not in the administration of the affairs of the native Palestinian Arab people.

In order to accomplish this aim a "Palestinian Authority" should be established to which only functional - and very limited territorial - jurisdiction should be "transferred", thus ensuring that Israel remains the "source of all authority."

The said Palestinian Authority should also be responsible for "law and order" within the areas under its functional jurisdiction. Moreover, in order to give it "legitimacy" it should have an elected council.[223]

With the Oslo I and II Agreements signed in 1993 and 1995, the above mentioned political objectives pursued by Israel since 1967 were realized.[224]

Regarding the Palestinian side one must say that it is not possible to identify so called "interim objectives" that were formulated already at the time of the signment of the Camp David Accords in 1978 and that continued to be consistently pursued from that time on. The PLO - which was disallowed in the Camp David Accords of 1978 - only started with the negotiations in Madrid in 1991 to pursue a consistent diplomatic objective, namely the attainment of recognition of the PLO as full negotiating partner with Israel.

Following the signment of the Oslo Agreements between Israel and the Palestinians in 1993 and 1995 the West Bank and the Gaza Strip were divided into three areas, namely A, B, C, with different legal provisions and jurisdictions

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221 Aryeh Shalev, The Autonomy-Problems and Possible Solutions, Paper No. 8, Center for Strategic Studies, T.A.Univ., T.A., 1980, at 55, quoted in Shehadeh, supra note 11, at 15

222 Ibid.

223 Id.

224 Shehadeh, supra note 11, at 15

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applicable to each. In each area the responsibility of the Palestinian Authority and the Israeli military government is different.

Only in Area A the Palestinian Authority has full control over civil and internal security (i.e. internal police) matters. These areas comprise the main and heavily populated Palestinian West Bank towns.[225]

In Area B the Palestinian Authority has only control over civil matters, but no authority over security issues (neither internal nor external).[226]

At the time of writing this work Area A and Area B together consist of only 33,8% of the West Bank and 60% of the Gaza Strip.[227]

In Area C - which still consists of 66% of the West Bank and 40% of the Gaza Strip - Israel has full control over all matters. In these areas lay the Jewish settlements and large areas around.[228]

The division in different areas with a different level of responsibility has important implications on the status of human rights for Palestinian residents of the West Bank and the Gaza Strip. In that context it must be stressed that the Israeli military government has not been abolished in the mentioned areas, since there was only a "withdraw" of the Israeli army from the most populated areas and a "transfer" of authority to the Palestinian Authority, with the intention that the "source of authority" remains the Israeli military government. The Israeli army did also not miss the chance to issue further military orders still severely violating the most fundamental rights - e.g. the right to freedom of movement by imposing long lasting closures and curfews - of the native Palestinian Arab people. Thus one may easily discern that the Oslo I and II Agreements did not put an end to occupation. They only allowed the occupying power Israel to avoid direct confrontation in populated areas while keeping a strategic oversight in surrounding areas.[229]

The Palestinian Authority has only effective control over small and fragmented areas (comparable to Bantustans or small enclaves), and initiatives to develop an integrated policy in any field are doomed to failure, due to the severe restrictions imposed by the Israeli military government affecting all areas of life.

All this happens due to the fact that the relationship between the Palestinians Authority and the Israeli government is a power relationship in which the weaker side - i.e. the Palestinian side - is not able to assert its rights and in which the stronger side - i.e. the Israeli side which always was and is heavily supported by the United States - constantly pressures the weaker side. Moreover, Israel does not give up about the ideology of political Zionism which should be discussed publicly in a

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[225] Ibid., at 33

[226] Id.

[227] LAW, An Overview of the Consequences of Israeli Occupation on the Environment in the West Bank and Gaza, January 2000, supra note 100, at 7

[228] Shehadeh, supra note 11, at 33

[229] LAW, Apartheid, Bantustans, Cantons, The ABC of the Oslo Accords, supra note 24

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serious manner, since it lays at the very foundations of the dispossession of the Palestinian Arab people and all the human rights violations.

Thus the Israeli authorities bear an overwhelming responsibility, since they failed to comply with their obligations as an occupying power but also as a member of the international community, which committed itself to the enforcement of declarations and conventions protecting human rights.

5. Conclusions

1. The administrative, legal and judicial system that developed in the Occupied Territories since the 1967 June war is based on the concept of political Zionism as expressed on the Zionist Congress in 1919, and is directed at the legal and territorial *segregation and exclusiveness based on Jewish national and religious* considerations with large-scale discrimination by law against the native Palestinian Arab people, demographic control, oppression and finally expulsion of the native Palestinian Arab people. The system that was developed by Israel's military government resembles the former system of *apartheid* in *South Africa*. Only the "white" areas of South Africa have reached a similar level of *exclusiveness and racial segregation* as the Jewish settlements do.

Under international law such systematic policies of discrimination against an entire people are totally illegal and a gross violation of human rights.

In terms of legal philosophy the legal system in the Occupied Territories may be described as highly legalistic characterized by two facts, namely 1. the most legal changes and administrative actions, that took place during more than 33 years of occupation, were introduced by a vast number of military orders; and 2. for even the most illegal act performed by Israel's military authorities a "legal" basis exists. These military orders enable the Israeli occupier to pursue the colonialist policies of economic subjugation, political, cultural and social oppression of the Palestinian Arab people.

2. The Israeli Supreme Court adopted a strong positivistic, formalistic, dogmatic and authoritarian jurisprudential conception, which is characterized by the literal application of law within self-imposed limits of a rigid scheme of deductions and by a complete indifference towards individual human affairs and justice. The Supreme Court also took much effort and "pain" to present the most illegal and immoral actions performed by the military/executive branches of the government as "consistent with international human rights and humanitarian law."

3. The Oslo I and II Agreements of 1993 and 1995 in combination with the continuously established facts on the ground - i.e. the Jewish settlements which were established throughout all times since 1967 and in even accelerated form since 1993 (i.e. the start of the so called "peace process") - reveal Israel's attitude towards

individual civil and political rights as well as collective rights to territorial self-determination and national independence of the Palestinian people.

This attitude is characterized by a principal non-intention on the part of Israel to respect the fundamental rights of the Palestinian people, is materialized in the developments that took place during the last seven years and is revealed by the fact that the human rights situation of the Palestinian Arab people living in the Occupied Territories not only not improved but on the contrary even deteriorated:

All Israeli governments after the signment of the Oslo I and II Agreements accelerated the illegal process of establishing Jewish settlements - including the building of Jewish only by-pass roads for the settlers - and thus have increased the accompanied human rights violations towards the Palestinian Arab people.

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F. THE RIGHT TO FREEDOM OF EXPRESSION, SPEECH AND THE PRESS

1. Introduction

The right to freedom of expression is one of the most important conditions for the existence of a democratic society. It is not only an essential means for assuring individual self-fulfillment but also central for discovering the truth[1] and for achieving a more stable society.[2]

Moreover the possibility of exercising the right to freedom of expression enables to draw attention to the violation of other fundamental rights, freedoms and interests.

Freedom of speech is therefore an essential defence of the individual against the government and the abuse of power. If once that freedom is lost, all other freedoms may be lost with it.

The right to freedom of expression is embodied in a series of international declarations and conventions. Article 19 of the Universal Declaration of Human Rights, 1948 [hereinafter: UDHR] provides:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[3]

In a similar way Article 19 of the International Covenant of Civil and Political Rights, 1966 [hereinafter: ICCPR], which has been ratified by Israel in 1991, guarantees the right to freedom of opinion and expression:

> "(1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[4]

However, the right to freedom of expression is not an absolute right and limitations on it are basically also allowed according to international law. Two articles of the ICCPR itself explicitly relate to the possibility to impose restrictions on the right to freedom of expression:

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1 John Stuart Mill, On Liberty, 1859 (McCallum ed. 1946) at 15, 24-25, 30-31, 40-41, 47-48

2 Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1969) at 3

3 Article 19 of the Universal Declaration of Human Rights, 1948, published in Basic Documents on Human Rights, Third Edition, Edited by Ian Brownlie, Q.C. (Clarendon Press, Oxford, 1992) at 21, 25

4 Article 19 of the International Covenant on Civil and Political Rights, 1966, published in ibid, at 125, 132

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Article 19(3) of the ICCPR states that

> "[T]he exercise of the rights provided for in paragraph 2 of this article ...may be subject to certain restrictions...necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals."[5]

Both the language of Article 19(3) of the ICCPR as well as the international jurisprudence to it make it clear that any restrictions must meet a strict tree-part test. This test has been confirmed by the Human Rights Committee[6] and requires that any restriction must:

1.) be provided by law;
2.) have the goal to safeguard one of the legitimate interests in Article 19(3);
3.) be necessary to achieve this goal.

It is clear that the proper approach to review a particular restriction is not to balance the various interests involved but to ascertain whether the restriction meets the above mentioned strict test.[7]

Article 4(1) of the ICCPR entails a derogation clause according to which

> "[I]n time of public emergency which threatens the life of the nation..., the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant..."

including the right to freedom of expression.[8]

As already mentioned in a previous chapter,[9] the Israeli government introduced with regard to Article 4 of the ICCPR the following derogation clause:

> "[S]ince its establishment the State of Israel has been the victim of constant threats and attacks on its very existence ...a public emergency within the meaning of article 4(1) of the Covenant exists [which makes it necessary for the Government] to take measures to the extent strictly required by the exigencies of the situation, for the Defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention, [and] insofar these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."[10]

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5 Ibid.

6 UN Doc. A/49/40, para. 9., 7.

7 The European Court has held that in evaluating restrictions it is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted. See Sunday Times v. United Kingdom, Judgment of 26 April 1979, Series A, No. 30, 2 EHRR 245, para. 65

8 According to Article 4(2) of the ICCPR no derogation may be made from Article 6 (right to life), Article 7 (prohibition of torture), Article 8(1) and (2) (prohibition of slavery and servitude), Article 11 (prohibition of imprisonment for contractual obligation), Article 15 (nulla poena sine lege), Article 16 (right to recognition as a person) and Article 18 (freedom of thought, conscience and religion)

9 See Chapter D.3.4. (Israel's Permanent State of Emergency: Legal Sources and Justifications), FN 57

10 Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights [ICCPR]. The Report was submitted in

It follows that in Israel the right to freedom of expression as established in Article 19(2) of the ICCPR must be read in connection with the above mentioned derogation clause and is subject to restrictions.

Nonetheless are such restrictions of the right to freedom of expression - in accordance with Article 4(1) of the ICCPR - subject to the principles of proportionality and necessity, and must comply with other obligations under international law, and may not be discriminatory solely on the ground of race, color, sex, language, religion or social origin.

Another standard-setting international legal source relevant for the right to freedom of expression is the Barcelona Declaration[11] which was adopted at the Euro-Mediterranean Conference in November 1995, and - at the same time - established the Euro-Mediterranean Partnership between 15 countries of the European Union and 12 southern Mediterranean participants, including Israel and the Palestinian Authority.[12] The primary purposes of this partnership is to strengthen political dialogue, economic and financial cooperation, social development, and to promote greater understanding between cultures. However, the Barcelona Declaration also calls for the commitment from participants to respect fundamental human rights and freedoms, including the right to freedom of expression.[13]

Regarding the constitutional status of the right to freedom of expression it must be said that in Israel this right has never enjoyed formal protection through a superior normative source. Although the 1992 enacted Basic Law: Human Dignity and Freedom,[14] defines a number of fundamental rights, it does not explicitly refer to the right to freedom of expression, therefore leaving the normative quality of this right - in light of the existing Basic Law: Human Dignity and Freedom - still very much in question.

However, as it is discussed in other chapters[15] of this work, the current Supreme Court President Aharon Barak and several other justices of this Court as well as members of the academic community,[16] take the position that the right to freedom of expression can be considered as indirectly protected by the concept of human

June 1998 to the UN Human Rights Committee and circulated as UN document CCPR/C/81/Add.13 [hereinafter: Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998], para. 106

11 Euro-Mediterranean Partnership: Barcelona Declaration and Working Program (Brussels: European Commission, DG1B External Relations, November 1995)

12 The other southern Mediterranean participants are Tunisia, Morocco, Algeria, Mauritania, Egypt, Jordan, Lebanon, Syria, Turkey, Cyprus and Malta

13 Barcelona Declaration, supra note 11

14 Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994)

15 See Chapter B.7. (The Enactment of two Basic Laws on Human Rights in 1992 and Their Impact on the Israeli Legal System)

16 E.g., Professor David Kretzmer, see Chapter B.7., ibid.

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dignity, contained in Section 1 of the Basic Law: Human Dignity and Freedom.

According to this approach the purpose of the Basic Law: Human Dignity and Freedom is to protect and to entrench the right to human dignity as required in a democracy and in the light of the principles contained in the Declaration of the Establishment of the State of Israel. President Barak argues that, due to the fact that with the enactment of the Basic Law: Human Dignity and Freedom a conceptual - constitutional - revolution had occurred in Israel, the right to human dignity has now the position of a supra-legal constitutional right.[17] Human dignity is the freedom of a person to shape his personality, the freedom of choice and moulding of one's word-view. According to Barak it is possible to argue, that freedom of expression is part of human dignity since the concept of human dignity regards the human being as an end and not as a means to an end.[18]

If the mentioned view - that freedom of expression forms a part of human dignity - is really accepted in Israel's legal community, then the principle of freedom of expression draws its normative strength not from ordinary laws or statutes, judicially interpreted, and from case law, but to a certain degree from the constitution itself.[19]

Recently a new Draft Basic Law: Freedom of Expression and Association[20] has been prepared by the Ministry of Justice, but it still waits for being approved by the Knesset.[21] This draft basic law articulates a fundamental right to freedom of expression and opinion, including the right to publish information and opinions. It also deals with related rights such as freedom of assembly, procession, demonstration, association, and creative expression, but does not contain any guarantee of access to information. The preparation of this specific basic law on speech rights may be seen as a sign that the principle of freedom of speech shall not be enclosed in the concept of human dignity.

Despite the fact that there exists no constitutional piece of legislation which contains an explicit provision protecting freedom of expression, the Supreme Court has recognized this principle - in a series of decisions, starting with the judgment in the case *Kol Ha'am Company Limited v. Minister of Interior,*[22] handed down by Justice Agranat in 1953.

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17 Aharon Barak, The Tradition of Freedom of Expression in Israel and its Problems, 9 Justice (1996) 3, at 5

18 Ibid.

19 But this matter has not yet been settled within Israel's constitutional framework.

20 Draft Basic Law: Freedom of Expression and Association, H.H. No. 2256 (7 March 1994), at 336; Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 43

21 http://www.knesset.gov.il/knesset/knes/eng_mimshal_yesod25.htm (Basic Laws in the Process of Enactment)

22 H.C. 73/53, 87/53, *Kol Ha'am Company Limited & Al-Ittihad Newspaper v. Minister of Interior, v. Minister of Interior,* translated into English in 1 S.J. (1948-1953) 90

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The Supreme Court articulated and developed the right to freedom of expression through the method of interpretation of statutes and legislations, which to a large extent date back to the British mandatory period and which all have limiting effect.

Important to mention is the fact that freedom of expression is even in a democratic society, not an absolute principle. Other basic rights and social interests, such as property rights, human dignity and public feelings, integrity of the judiciary, national security and public peace must also be taken into consideration, and limitations may be imposed in a situation where the right to freedom of expression clashes with these other values.[23]

The crucial problem in such conflicting situations between free expression of opinions and other rights worth being protected, is to find the proper limits of the different interests involved.

Among these other values "national security" is without doubt one of the most important one which has to be protected, for without securing the mere existence of the state itself, other values cannot be realized as well.

However, national security may never be an end in itself,[24] for where national security is considered as the only vital interest, there is the danger that this interest is fulfilled, while at the same time its moral value is highly questionable.

The clear meaning and content of national security depends therefore on the nature of the governmental, social and political system and on the values the society is willing to upheld.

A society that is for example committed to democracy, the end is the rule of the people which respects individual human rights and freedoms.

As already mentioned several times in this work, the protection of Israel's "national security" - which according to the Supreme Court jurisprudence comprises the aims to protect "the territorial independence of the state of Israel, a specific governmental system and the nature of the state to be a Jewish state" - is considered as the most important objective of Israel's political system.

The view that the existence of the state of Israel as the state of the Jewish people - rather than the state of all its citizens - has to be protected at almost any price, is unanimously shared by most of the Jewish population living in Israel, as well as by many Jews living throughout the world.

The term "state security" is - although used quite often - not clearly defined by the Israeli legislator.[25]

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23 Emerson, The System of Freedom of Expression, supra note 2, at 9-11

24 This idea has been well expressed by the current Supreme Court President Aharon Barak in the decision of H.C. 680/88, *Schnitzer v. Chief Military Censor,* translated into English in 9 S.J. (1977-1990) 77, at 115

25 The Israeli legislator has often employed the terms "considerations of state security" or "reasons of security" but only very few pieces of legislation clearly define "security needs".

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However, the most influential aspect on Israel's concept of "state security" is the permanent existing Palestinian-Israeli conflict, involving not only territorial and ideological questions, but also religious and national issues.[26]

Israel's concept of "state security" is strongly connected with the ideological basis of the state to be a "Jewish state", whose political aims always were and still are to advance and protect Zionist values.

The implementation of these Zionist values into Israel's social and legal order is carried out through the use of a specific formula for allocating political powers, social and economical benefits, as well as resources (especially land, water and budget) with the result that the said order favors the Jewish population.

The Palestinian Arab people simply does not share the "public good" as perceived by the Jewish majority in power, therefore also the concept of "state security", cannot be shared by most of the Palestinian Arab people living in Israel and the Occupied Territories as well.

As various examples in this Chapter F will show, severe restrictions of the right to freedom of expression occur in the name of "state or public security" in order to protect the specific content of Israel's state concept.

In practice, the main problems with regard to the exact meaning of "security considerations" concern the scope of discretion accorded to decision-making bodies and exercised in the name of state security. In Israel wide powers are granted to the executive branch of the government which is, based on security considerations, allowed to restrict freedom of expression in all its forms.

The security related limitations on freedom of expression are founded on a large number of British mandatory legislation, formal and semi-formal agreements and administrative procedures.[27]

The methods for imposing limitations consist of license requirements of newspapers, military censorship, criminal prohibitions, voluntary censorship imposed by editors of the written and electronic press, denying journalists the access to information and preventing journalists from entering areas which are declared by order to be "closed military areas."

The first purpose of this Chapter F is to provide an overview about the different

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See for example the Civil Defence Law, 1951, 5 L.S.I. (1952) 72, which clearly defines "time of war" and "time of attack" when the members of the civil defense are given special powers. But even in academical literature and international law the term "security needs" is often used without much effort to define its meaning.

26 Menachem Hofnung, Democracy, Law and National Security in Israel (Dartmouth Publishing Company Limited, 1996) at 75

27 About legal restrictions on the press see, Gabriel Strassman, Media Laws and Professional Ethics: Theory and Practice (Tel Aviv: University of Tel Aviv and the Israel Press Council 1986) (Hebrew)

statutory sources relating to speech rights, their historical and socio-political background as well as the characteristic aspects and problems connected with these sources.

There shall also be an analysis of the status of the right to freedom of expression, speech and the press within Israel's legal framework.

The normative sources regulating speech rights in Israel consist of a number of British mandatory statutes incorporated into Israeli law in 1948[28] as well as of Israeli legislations enacted by the Knesset after the establishment of the state.

As it will be demonstrated in the following chapter, these statutory regulations are on the one hand restrictive towards the principle of freedom of expression and on the other hand generous with regard to the interests of the state.[29]

The second purpose of Chapter F is to provide an analysis of the different philosophical and political sources which helped to create Israel's fundamental jurisprudential concepts and general guidelines of free speech.

There shall also be an examination of the policies and methods of interpretation employed by the Supreme Court in order to justify its reasoning and to legitimize dominant ideologies and political interests in regard to speech rights.

The final purpose of this Chapter F is directed at an evaluation of the application of various normative sources and jurisprudence on speech rights of the Jewish and Palestinian Arab people living in Israel and the Occupied Territories.

The above mentioned methods for imposing limitations on the freedom of expression will be examined in view of general principles of international law, as well as in light of Israel's domestic laws and constitutional changes that took place with the enactment of the Basic Law: Human Dignity and Liberty.

2. Jurisprudence

Israel's jurisprudence of freedom of expression was increasingly developed during the 1970's and 1980's and is characterized by the influence of different legal-philosophical doctrines and political systems.

The jurisprudence is nourished by restrictive, utilitarian and dogmatic concepts, such as, legal positivism, legal formalism, British colonialism[30] and Zionism on the

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[28] By virtue of Section 11 of the Law and Administration Ordinance, 1948, 1 L.S.I. (1948) 7

[29] Pnina Lahav, Governmental Regulation of the Press: A Study of Israel's Press Ordinance, 13 Isr.L.R. (1978) 230, at 234

[30] Daniel Friedmann, The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period, 10 Isr.L.Rev. (1975) 192; Infusion of the Common Law into the Legal System of Israel, 10 Isr.L.Rev. (1975) 324; Independent Development of Israeli Law, 10 Isr.L.Rev. (1975) 515

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one hand, and by liberal/libertarian, legal realist and sociological conceptions,[31] such as British constitutional liberalism,[32] British constitutionalism and American realism on the other hand.

The liberal/libertarian and sociological jurisprudential conception of free speech is characterized by the recognition of the principle of free speech as an important condition for the existence and the proper functioning of a democratic regime, as well as the recognition that law reflects historical, political, economical, social and other events, theories and trends. This approach was the first time employed in 1953 in the already mentioned and often cited *Kol Ha'am case.*[33]

In this case Justice Agranat, handing down the judgment for the Supreme Court, explicitly expressed Israel's commitment to freedom of speech and of the press,[34] and declared that freedom of expression is a "superior right" of "decisive importance,"[35] which may be restricted only in "moments of supreme urgency."[36] The *Kol Ha'am* case is considered as having set the cornerstone of constitutional law in Israel.[37]

Other decisions representing this approach of free speech jurisprudence are the judgment of the case *Schnitzer v. Chief Military Censor*,[38] handed down in 1988, and the judgment in the matter *Avineri v. Shapira*.[39]

The positivistic, formalistic, dogmatic and authoritarian legal conception is characterized by the belief that the only source of the individual's subjective right is the positive law, by the distinction between "law as it is" and "law as it ought to be", by literal application of law within self-imposed limits of a rigid scheme of deductions and by complete indifference towards individual human affairs and justice.[40]

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31 Pnina Lahav, Israel's Press Law in: Press Law in Modern Democracies, A Comparative Study (edited by Pnina Lahav, Longman, 1985) 265, at 266

32 Friedmann, supra note 30

33 *Kol Ha'am,* supra note 22*,* at 105

34 Ibid.

35 Id., at 97

36 Id., at 100

37 With this decision Israel did achieve something what in the U.S. and other countries was reached only by the adoption of a formal constitution or parliamentary legislation. See David Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, Israeli Reports to the XIII International Congress of Comparative Law (ed. Celia Wasserstein Fassberg) (The Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem 1990) 183, at 192

38 *Schnitzer,* supra note 24

39 C.A. 214/89, *Avineri v. Shapira*, for a summary in English in The Jerusalem Post, Law Reports (reported and edited by A.F. Landau) at 111

40 Mieczyslaw Maneli, Juridical Positivism and Human Rights (Hippocrene Books, New York, 1981) at 284- 286

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This approach may be found in cases such as *Cohen v. Minister of Defence*,[41] *El Ard v. District Commissioner*,[42] *Ayoub v. Minister of Interior,*[43] *Makhoul v. Jerusalem District Commissioner,*[44] *Asli v. Minister of Interior,*[45] *Hadashot v. Minister of Defence*[46] and *Ha'aretz v. Israel Electric Corporation Ltd*., *Israel Electric Corporation Ltd. v. Ha'aretz*.[47]

This approach can also be found in the cases *Kenan v. Film and Theater Censorship Board*[48] and *Azulai v. State of Israel*.[49]

As already mentioned above, this Chapter F also evaluates the speech rights of the Jewish and the Palestinian Arab people living in Israel and the Occupied Territories, and examines the question if these two distinct groups of the population are treated differently by the executive and judicial authorities.

The major findings of this examination will be that in most of the cases the administrative authorities have applied different normative sources, standards and methods of interpretation on the speech rights of these two distinct people groups.

Although, Jews and Palestinian Arabs are formally equal before the law, the basic approach of using different normative and interpretative standards on both groups underlies Israel's legal, judicial and socio-political system as a whole and may be described as systematic.

With the exception of a few decisions[50] this approach was upheld by the Supreme Court also in the area of speech rights.[51]

In reviewing numerous cases on speech rights one may observe that the

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41 H.C. 29/62, *Cohen v. Minister of Defence*, translated into English in 4 S.J.(1961-1962) 160

42 H.C. 39/64*, El Ard v. District Commissioner,* 18(ii) P.D. 340

43 H.C. 415/81, *Ayoub v. District Commissioner,* 38(i) P.D. 750

44 H.C. 322/81, *Makhoul v. District Commissioner*, 37(i) P.D. 789

45 H.C. 541/83, *Asli v. District Commissioner,* 37(iv) P.D. 837

46 H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477

47 C.A. 723/74, *Ha'aretz Daily Newspaper Ltd v. Israel Electric Corporation Ltd*, translated into English in 9 S.J. (1977-1990) 226; for a summary in English see 12 I.Y.H.R. (1982) 290; F.H. 9/77, *Israel Electric Corporation Ltd v. Ha'aretz Daily Newspaper Ltd*., translated into English in 9 S.J. (1977-1990) 295; for a summary in English see 12 I.Y.H.R. (1982) 294

48 H.C. 351/72, *Kenan v. The Films and Plays Censorship Council*, for a summary in English see 5 I.Y.H.R. (1975) 373

49 Cr.A. 696/81, *Azulai v. State of Israel*, for a summary in English see 19 Isr.L.Rev. (1984) 586

50 *Cohen*, supra note 41; H.C. 2/79, *Al Assad v. Minister of Interior*, 34(i) P.D. 505, 513; for a summary in English see 10 I.Y.H.R. (1980) 335; *Hadashot,* supra note 46

51 *El Ard*, supra note 42; *Ayoub,* supra note 43; *Makhoul,* supra note 44; H.C. 644/81, *Omar International Inc. New York v. The Minister of Interior* , 36(i) P.D. 227; *Asli*, supra note 45; H.C. 562/86, *Al-Khatib v. Minister of Interior*, for a summary in English see 17 I.Y.H.R. (1987) 317; H.C. 648/87, *Kassem v. Minister of Interior*, for a summary in English see 18 I.Y.H.R. (1988) 254. [All these cases concern Palestinian Arab newspapers and magazines. The Supreme Court rejected all the petitions.]

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established Hebrew press,[52] radio and television broadcasts, and Jewish speakers,[53] even if they employ racist speech,[54] enjoy a much wider degree of freedom of expression, than the Palestinian Arab speakers, newspapers, radio and television broadcasts publications within Israel's borders of 1948, and in East Jerusalem or the Occupied Territories, whose readership is in the Occupied Territories.[55]

Also to mention is the crucial fact that in numerous cases the Supreme Court on the one hand stressed the importance of freedom of speech and the need to protect this right from the arbitrary forces of the administrative authorities. - But that - on the other hand - the Court refrained from interfering in decisions if they are based on so called "security considerations" and finally upheld restrictive measures.

This style of reasoning may be found also in many decisions dealing with other severe measures, such as closure of newspapers, theaters and institutions, administrative detention, prosecution and deportation of opinion-makers, journalists and writers.

In such cases the Supreme Court in fact allows that the subjective discretion of the administrative authorities prevails over judicial reasoning.

After this general introduction to the jurisprudential concepts on speech rights, I will turn now to the specific analysis of the principle of freedom of expression in the mass media, the written and electronic press.

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52 I.e. the Hebrew papers which are partners to the censorship agreement between the Editors' Committee and the Military Censor. For details see below the Chapter 8.4. (Military Censorship)

53 *Schnitzer,* supra note 24; *Avineri*, supra note 39

54 H.C. 399/85, *Kahane v. Broadcasting Authority,* for a summary in English see 23 Isr.L.Rev. (1989) 515

55 See also Article 19 World Report 1988 (ed. Kevin Boyle) (Times Books, United States) at 261-270

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3. Licensing of Newspapers and Printing Press

3.1. Statutory Provisions

In contrast to the majority of Western Countries, in Israel one must obtain a permit, i.e. a license from the Ministry of Interior in order to be officially allowed to publish a newspaper.

Although it is recognized by international law that states may regulate the access to information to the broadcast medium, licensing procedures for newspapers, magazines and journals are suspect means.

However, in Israel there exist two main legal sources, namely the British mandatory Press Ordinance, 1933[56] and the British mandatory Defence (Emergency) Regulations, 1945[57], which regulate these licensing requirements and various other administrative limitations and aspects concerning freedom of the press.

Both sources reflect the British-colonial approach nourished by an authoritarian understanding regarding the value system of the state in general and of civil liberties in specific. This approach was characteristic for the policy of the British mandatory authorities in Palestine, which imposed firm control over the whole field of printed media of communications in order to maintain a certain degree of public order in midst the growing political violence between the Palestinian Arab and Jewish population.

Theoretically the Press Ordinance, 1933 and the Defence (Emergency) Regulations, 1945 still form the most important legal sources of Israel's press law. However, in practice, these legal arrangements are rarely implemented in matters of supervision, regulation of contents and sanctions of the Hebrew press.

In everyday practice the Hebrew press and mass media is governed by an informal system of agreements, arrangements and procedures which are not regulated by law, but upon which the editors of the most Hebrew newspapers and the military authorities have agreed. These arrangements will be discussed below within the context of military censorship.

The Palestinian Arab press on the other hand is not party of these arrangements and is therefore subjected to the formal legal sources, i.e. first of all to the Defence (Emergency) Regulations, 1945.[58]

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56 Press Ordinance, 1933, reprinted in M. Doukhan, Laws of Palestine, 1932, 243-266

57 Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945) Suppl. II, at 1055

58 Hofnung, supra note 26, at 127, 131, 133. As already mentioned in a previous chapter the Defence (Emergency) Regulations are - beside the numerous Military Orders - the most important legal source in the Occupied Territories. See Chapter D.5.3. (The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within the

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3.1.1. The Press Ordinance, 1933

The Press Ordinance, 1933[59] deals with three basic topics, namely: the requirement of licensing of newspapers and the printing press; the governmental supervision and regulation of the contents of newspapers, and the administrative or penal sanctions to be imposed on the media in the case of a violation of the first two elements.

The enactment of the Press Ordinance, 1933 was motivated to a significant degree by the findings of a Commission of Inquiry,[60] which was appointed to investigate the causes of the waves of violence in Palestine that occurred in August 1929, and in which 133 Jews and 116 Arabs were killed, and some hundred people on both sides had been wounded.[61]

The Report of the said Commission, which became later known as the Shaw Report, named after its Chairman, Sir Walter Shaw, made "frequent reference to articles which appeared in newspapers in Palestine between October 1928 and August 1929," and stated that the Palestinian Arab Press as well as the Hebrew newspapers published articles which were "intemperate, provocative or of a character likely to excite susceptible readers."

The Report also stated that "too great a liberty of expression had been allowed to the press in Palestine and that the use which was made of that liberty played a part in the events which led u to the disturbances."[62] The Shaw Report also issued recommendations to tighten the control over the press by the Palestine Government,[63] which resulted in the enactment of the Press Ordinance, 1933.[64]

Occupied Territories since 1967)

[59] Press Ordinance, 1933, supra note 56. The Press Ordinance, 1933 was published as a Bill in Palestine Gazette Extraordinary of 16 August, 1932, page 662, and came into force on the 13 January, 1933. It is based on the Cyprus Press Law enacted by the British in 1930 and had replaced the Ottoman Press Law, consisting of a body of Ottoman Laws which were inherited by the British from the Turks and incorporated into the mandatory legal system (by virtue of Article 46 of the Palestine Order-in-Council).

[60] I.e. the Commission On the Palestine Disturbances of August 1929, named after its Chairman Sir Walter Shaw also "Shaw Commission"

[61] See in this regard also Chapter A.5.2. (The Disturbances in Palestine in 1920, 1921, 1925 and 1929)

[62] Shaw Commission Report, Report of the Commission On the Palestine Disturbances of August 1929, Cmd. 3530, London, 1930, Chapter III, at 26-69, Chapter V, at 90, and Chapter XIII, at 156)

[63] Shaw Report, supra note, Chapter V, at, 91, Chapter XIV, at 167

[64] For more details regarding the historical background and the socio-political climate which lead to the enactment of the Press Ordinance, 1933 see Lahav, Governmental Regulation of the Press, supra note 29, at 235-247

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The most important aspect of the Press Ordinance, 1933 is its purpose to force all printed media[65] to obtain a permit, i.e. a license prior to the publication. From the requirement of obtaining a license, one may clearly understand the theoretical conception of liberty underlying the thinking of the British Colonial Regime.[66]

The obligation to require a permit prior to the publication clearly violates basic principles of British constitutional law,[67] but it suited to the British colonial approach practiced in that time.[68]

According to the doctrine against prior restraint, introduced in the 18th century by the British lawyer and lecturer William Blackstone, censorship as a means of curtailing expression is rejected.

In his treatise Blackstone distinguished between prior restraint and subsequent punishment, and, instead of exercising prior restraint, clearly prefers regulation through the criminal law.[69]

The doctrine against prior restraint is an important tool in protecting free expression and the market place of ideas. Censorship, in contrast, only serves for official supervision of numerous public issues and narrows the range of opportunity for public criticism of governmental policies.

Moreover, the dynamics of censorship often lead to an extension beyond its defined limits and cover areas which were not originally meant to be censored.[70]

However the doctrine against prior restraint does not absolutely forbid the introduction of censorship into a democratic legal system. [71] It allows censorship pursuant an explicit statutory authorization and in situations where the disclosure of the information could harm the most vital national security interests alone, but censorship should not extend to the discussion of political issues.

Another characteristic of the Press Ordinance is the fact that it deals only with the effects of the printed press on public life, i.e. it relates only to the public sphere, but does not protect the right to privacy and reputation.

The main articles of the said Ordinance, relevant in connection with the discussion of specific Supreme Court cases, shall be discussed now in more detail:

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65 With the exception of books and one-time pamphlets.

66 Lahav, Governmental Regulation of the Press, supra note 29, at 243

67 Blackstone, Commentaries on the Laws of England, Volume IV, Of Public Wrongs (Adapted by R. Malcolm Kerr) (Beacon Press, Boston, 1962), at 161

68 For a discussion of the British Colonial practice see E. Lloyd Sommerlad, The Press in Developing Countries (Sydney University Press, 1966), at 144

69 Blackstone, Commentaries IV, supra note 67, at 161

70 For an extensive discussion of this doctrine see T.I. Emerson, The Doctrine of Prior Restraint (1955), 20 Law and Contemporary Problems, 648

71 Pnina Lahav, Political Censorship: Some Reflections on its Validity in Israel's Constitutional Law, 11 Isr.L.R. (1976) 339, at 343

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Section 2 of the Press Ordinance, 1933 defines the term newspaper in broad terms as

> "...any publication containing news, intelligence, reports of occurrences...published in Palestine for sale or free distribution at regular or irregular intervals..."[72].

Section 4 of the Press Ordinance, 1933 states the publication of any newspaper requires a permit, i.e. a license.

Section 30 of the Press Ordinance, 1933 states that a permit must also obtained for the possession of a printing press.

A permit is only granted if the proprietor and editor have fulfilled a series of conditions, such as reaching the age of 25 years of age, passing matriculation exams and showing the ability to speak, read and write in the language in which the newspaper is printed. The Minister of Interior has discretion to waive these personal requirements.[73]

A permit for a newspaper may not be refused if the conditions set up in the Press Ordinance are met by the applying person.[74]

Section 6 of the Press Ordinance, 1933, however, states that the permit may be suspended or canceled due to a number of reasons, some of them are purely technical, such as if the person who has obtained such a permit fails to publish the newspaper within three months.[75]

Newspapers are also obligated to publish any denial issued by the government pertaining to information previously published in the paper, as well as any official announcements free of charge.[76]

According to the Press Ordinance a newspaper has to refrain from publishing any material "likely to endanger the public peace" or containing seditious libel. If the newspaper does not comply with these obligations, it may be subject to severe sanctions, such as suspension, seizure, penalties.

The sanctions can be divided into administrative and penal sanctions.

The most important section, establishing an administrative sanction is Section 19(2)

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72 Section 2 of the Press Ordinance, supra note 56

73 Section 5(1)(a), 5(1)(b) and 5(5) of the Press Ordinance, ibid.

74 Pnina Lahav, Israel's Press Law, supra note 31, at 271

75 Section 6 of the Press Ordinance, supra note 56
On the basis of this completely illiberal ground the Supreme Court decided in the matter H.C. 213/52, *Stein*, *Publisher of the "Democratic Newspaper" v. Minister of Interior*, 6(ii) P.D. 867, to cancel the permit of the Yiddish language "*Democratic Newspaper"*.
In a highly formalistic and mechanical method of interpretation and application of the law the Supreme Court dismissed the petition and upheld the decision of the Minister of Interior. The Court relied on the doctrine of the separation of powers and held that, since the said section grants broad discretionary power to the Minister of Interior there is no authority for the Court to exercise substantial judicial review and to interfere. Ibid., at 872

76 Section 17 of the Press Ordinance, supra note 56

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of the Press Ordinance, 1933 dealing with the suspension of publications by the High Commissioner, who is now the Minister of Interior.[77]

Section 19(2) of the Press Ordinance, 1933 states:

> "The High Commissioner either with or without having caused the proprietor or editor of a newspaper to be warned under sub-section (1) thereof may, if any matter appearing in a newspaper is, in the opinion of the High Commissioner-in Council, likely to endanger the public peace, by Order suspend the publication of a newspaper for such a period as he may think fit and shall state in the said order the period of such suspension."

According to this Section the Minister of Interior may, without any legal proceedings, suspend a newspaper "if any matter appearing in it [the newspaper] is, in his opinion, likely to endanger the public peace." That means that the executive branch is bestowed with wide discretionary powers, a fact that has very serious implications for the whole field of freedom of the press.

An important sanction is established in Section 23 of the Press Ordinance, 1933. It empowers the courts to close down or suspend a newspaper and printing presses as well as to disqualify a person from acting as a proprietor or an editor, if any of the above were involved in a conviction for seditious or other libel.

In the first years after Israel's inception in 1948, Section 19 of the Press Ordinance was occasionally utilized by the government in order to suspend a number of newspapers.[78] This trend ended in late 1953 with the decision in the matter *Kol Ha'am Company Limited v. Minister of Interior.*[79] In this case - which will be discussed in more detail below - the Court held that the suspension of a newspaper may only occur if there is a probable danger that the publication will endanger the public peace.[80]

Between 1953 and 1981 - until the decision in the matter *Omar International Inc., New York v. Minister of Interio*r[81] no other suspension of a newspaper was carried

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[77] *Kol Ha'am,* supra note 22, at 90. Before the suspension the Minister of Interior may warn the newspaper in advance of his intention, but he is not required to do so. See Section 19(1) of the Press Ordinance, supra note 56

[78] E.g., *Kol Ha'am*, supra note 22. In January 1953, the publication of the Communist Party Organ and newspaper *Kol Ha'am* was suspended for the period of ten days, based on the ground that a published article "was likely to endanger the public peace". The Court adopted in its opinion a highly formalistic and dogmatic style of interpretation and application of the law and dismissed the petition. The Court held that according to the law it is not within the Court's authority to decide upon the substantial question itself, i.e. if a certain publication really endangers the public peace. The Court may only investigate if the decision of the Minister of Interior is arbitrary or discriminatory, based on untenable considerations or not within the limits of the law, but since all these defects do not exist, there is no reason for the Court to interfere.

[79] *Kol Ha'am,* supra note 22, at 90

[80] Ibid.

[81] *Omar*, supra note 51

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out under Section 19 of the Press Ordinance, 1933. Also the other powers granted to the executive branch according to the Press Ordinance have not been exercised by the government in that period, neither against Hebrew nor Palestinian Arabic newspapers.

Instead of the Press Ordinance the authorities preferred and still prefer- even in times of peace - to implement the second source dealing with license requirements and suspension orders, namely Regulation 94 of the Defence (Emergency) Regulations, 1945.[82] These Regulations shall be discussed now in more detail.

3.1.2. The Defence (Emergency) Regulations, 1945

The second source regulating the requirement of a license for newspapers and setting other limits to speech rights is Part VIII of the Defence (Emergency) Regulations, 1945.[83] This source serves as an instrument of prior restraint, imposing in advance of an actual publication official restrictions in order to suppress speech or other forms of expression.

According to the Defence (Emergency) Regulations, 1945 - in contrast to the above mentioned Press Ordinance - the license for a newspaper may be refused by the District Commissioner, without giving any reasons.[84]

Regulation 94 deals with newspaper permits and states:

> "(1) No newspaper shall be printed or published unless the proprietor thereof shall have obtained a permit under the hand of the District Commissioner of the district in which the newspaper is being, or is to be printed.
>
> (2) The District Commissioner, in his discretion and without assigning any reason therefor, may grant or refuse any such permit and may attach conditions thereto and may at any time suspend or revoke any such permit or attach new conditions thereto and may at any time suspend or revoke any such permit or attach new conditions thereto."

The language of Regulation 94 clearly shows that this norm allows for an unrestricted suppression of publications regardless of the content and the ideas which are actually communicated by them and without giving any reason. Regulation 94 grants absolute discretion to the executive authorities.

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82 Defence (Emergency) Regulations, 1945, supra note 57

83 Ibid.

84 The general practice, adopted by the Supreme Court in some decisions in the 1980's, is that if the decision of the authority is challenged in the Supreme Court, the District Commissioner submits a *Certificate of Privileged Evidence,* signed by the Minister of Defence, stating that all or parts of the evidences on which the Commissioner founded his decision are privileged for reasons of "state security". See for more details on this issue Chapter D.3.3. (Israel's Rules of Evidence in "Security Matters") and below the discussion of the following cases: *Makhoul*, supra note 44; *Asli*, supra note 45; *Ayoub,* supra note 32

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The Defence (Emergency) Regulations, 1945 were extensively used by the Israeli authorities after the War in June 1967 in order to control the Arab newspapers which were published in East Jerusalem[85] and whose readership were the Palestinian people in the Occupied Territories.[86]

Based upon the said Defence (Emergency) Regulations, 1945 before[87] and during the Intifada the most daily Palestinian newspapers - except for the still existing Arab daily *Al-Quds* - were closed down.

Today there is only one Arab daily newspaper *Al-Quds* and some Arab weekly magazines which are published in East Jerusalem.

As already explained in detail in a previous chapter of this work,[88] the legal situation in East Jerusalem is different of that in the other Occupied Territories, i.e. the West Bank and the Gaza Strip.

East Jerusalem has been de facto annexed to Israel after the War in June 1967 and is since then governed by Israeli law which grants more rights and freedoms to the citizens, and which does not enable the government to implement the same methods as used in the West Bank and the Gaza Strip.

This situation created a certain "dilemma" in so far as on the part of the Israeli government there was no intention to let the residents of East Jerusalem and the rest of the Occupied Territories - to which the newspapers printed in East Jerusalem were delivered - enjoy the right to freedom of expression and information. The government "feared" that such freedoms would only encourage hostile activities against the state of Israel.[89]

However, the mentioned "dilemma" was resolved by using extensively the Defence (Emergency) Regulations, 1945 in East Jerusalem, and closing down newspapers or prohibiting the publication of specific articles on the basis of security considerations.[90]

And despite the fact that the Palestinian newspapers in East Jerusalem always

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[85] East Jerusalem was the historical center of the Palestinian press

[86] Hofnung, supra note 26, at 131. For more details on this issue see Chapter D.5.3. (The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within the Occupied Territories). The Defence Emergency Regulations, 1945 are applicable also in Israel within the Green Line. For more details on this issue see Chapter D.5.2. (The Validity and Scope of Application of the British Defence (Emergency) Regulations, 1945 within Israel since 1948)

[87] In the late 1970's and the beginnings of the 1980's the Palestinian dailies *"A(l)-Sha'b"* and *"Al-Fajr"* were closed down. Both newspapers were considered by the Israeli government as instrument of the PLO and extremely "anti-Israel" oriented. For details see Moshe Negbi, Justice under Occupation: The Israeli Supreme Court versus the Military Administration in the Occupied Territories(Cana, Publishing House Ltd., Jerusalem, 1981) at 149-153

[88] See Chapter E. (The Administrative, Legal and Judicial System in the Occupied Territories)

[89] Hofnung, supra note 26, at 131

[90] See *Ayoub;* supra note 32; *Makhoul,* supra note 44; *Asli,* supra note 45

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formed part of the Israeli press, they were not subjected to the same laws as the Israeli Hebrew press.

It emerged that two different legal sources are applied on two different peoples, living on the same territory and within the same jurisdiction. In doing so, the Israeli government, supported by the Supreme Court, clearly violates the internationally recognized principle of equality before the law.

3.2. Supreme Court Cases concerning Section 19(2) of the Press Ordinance, 1933

3.2.1. Kol Ha'am Company Limited v. Minister of Interior (1953)

The Facts of the Case

In this case the Minister of Interior issued an order suspending the publication of the Hebrew and Arabic Communist Party newspapers *Kol Ha'am* and *Al-Ittihad.*

The reason for the suspension was the publication of leading articles in these newspapers, which severely criticized the Israeli government and the then Foreign Minister Abba Eban.

The ground for the criticism that was voiced in both of the articles was a news item published in the Hebrew newspaper Ha'aretz.

According to this item Israel's ambassador in the United States has expressed Israel's readiness to place 200.000 soldiers at the side of the United States, in the event of war between the United States and the Soviet Union.[91]

Pursuant to his power under Section 19(2)(a) of the Press Ordinance, 1933 the Minister of Interior suspended the publication of both papers for the period of ten and fifteen days after he was convinced that the articles are likely to endanger the public peace.[92]

The papers challenged the decision in the Supreme Court. The Court upheld the petition and ruled that the orders of suspension had been wrongly issued and should be set aside.[93]

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91 Two months after the publication of the said item in the newspaper *Ha'aretz* the then Prime Minister Ben-Gurion denied this report and declared that it was only a "piece of journalistic imagination." See *Kol Ha'am,* supra note 22, at 92-94

92 Ibid., at 92

93 Id., at 90

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The Decision of the Supreme Court

(1) Establishment of Freedom of Expression as "Superior Right"

In this case Justice Agranat, handing down the opinion for the Court, declared that freedom of expression[94] is a "superior right" of "decisive importance"[95] which may be restricted only in "moments of supreme urgency, such as war or national crisis,"[96] and after a balancing process between the interest of state security and freedom of expression was carried out.[97]

Concerning the question of the definite normative status of the right to freedom of expression within Israel's legal system, Professor Kretzmer argued that with this decision the Supreme Court established freedom of expression as soft legal principle.[98]

Therefore, the Supreme Court may and actually does apply laws which are - according to the Court's own opinion - "inimical to basis notions of free speech in a democratic society."[99]

In order to found his opinion that freedom of speech is a "superior right" Justice Agranat relied on three justifications, namely 1. democracy; 2. the quest for truth; and 3. self-fulfillment.

With regard to the first justification of democracy, he emphasized the close connection between the right to freedom of expression and the democratic process, and - for a deeper understanding - he outlined first of all the mechanism in an autocratic régime, where it is strictly forbidden to criticize the political acts of the ruler in public.[100]

Justice Agranat asserted that the nature of the democratic régime - being a government by will of the people where the "rulers" are looked upon as agents and representatives of the people who elected them, which are entitled to criticize at any

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94 He regards the right to freedom of the press as one specific form of freedom of expression. Id., at 94

95 Id., at 97

96 Id., at 100

97 Id., at 101

98 It is - according to Professor Kretzmer - a *legal principle* in the sense that all public authorities must recognize it and that statutory provisions restrictive to freedom of speech should be interpreted in a way to minimize the restriction. But it is - according to Professor Kretzmer - only a soft principle due to the fact that it has no superior normative status, which means that there is no possibility to review the constitutionality of primary legislation on the strength of the argument that it is inconsistent with the principle of freedom of speech. See Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, supra note 37, at 192, 197

99 *Al Assad,* supra note 50, at 513, for a summary in English see 10 I.Y.H.R. (1980) 335

100 *Kol Ha'am,* supra note 22, at 94

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time - would inevitably lead to the enforcement of the principle of freedom of expression, which can only be limited when it comes in conflict with other interests, such as life, limb or property of another.

He stated that the democratic process is one of selection of the common aims of the people by the means of public negotiation and discussion and free exchange of ideas on matters of public interest, since public opinion plays a vital part in that discussion.[101]

The second justification used by Justice Agranat was the importance of freedom of expression as a process of investigating the truth

> "...since only by considering 'all' points of view and a free exchange of 'all' opinions truth is likely to be arrived at".[102]

The third justification discussed by Justice Agranat was the social interest that is involved and that considers the principle of freedom of expression as an instrument for self-fulfillment and the pre-requisite to the realization of freedom of the individual.

To found his opinion Justice Agranat relied 1. on Justice Brandeis observations in the American case of *Whitney v California*; **2.** on a pamphlet by the poet Milton written in 1644; 3. on John Stuart Mill's book "On Liberty"; 4. on L.J. Scrutton's statements about freedom of speech made in "Ex parte O'Brien."[103]

(2) Adoption of the "Probable Danger" or "Near Certainty" Test

Justice Agranat adopted the "probable danger" test as general balancing test for resolving the conflict of freedom of expression and public order or security,[104] and in that context he outlined those judicial guidelines that the decision making administrative authorities were expected to follow in imposing such restrictions.

Stressing on the one hand the utmost importance of the right to freedom of expression in a democratic régime, Justice Agranat stated on the other hand that the right to freedom of expression is also subject to the restrictions of the law.

According to Justice Agranat's discussion the right to freedom of expression is

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[101] Ibid., at 95

[102] To found his opinion he relied on two famous American judgments, namely that of Justice Holmes in the case of *Abrams v. U.S.* [(1919) 40 S.Ct. Rep. 17] as well as on Justice Learned Hand's observations in the case *U.S. v. Associated Press,* 52 Federal Supplement 362 (S.D.N.Y. 1943). See *Kol Ha'am,* supra note 22, at 96

[103] *Kol Ha'am,* supra note 22, at 97, 98

[104] The probable danger test appeared for the first time in the American jurisprudence - two years before the Kol Ha'am case - in the majority opinion of the decision *Dennis v. U.S.*. However, the still accepted test in America was, at the time of the decision in the Kol Ha'am matter, the clear and present danger test. According to the probable danger test it is not necessary that the danger is present. See *Dennis v. United States* (1951), 71 S.Ct. Rep. 857

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never an absolute and unlimited right, but rather a relative one, due to the fact that there exist also other interests of the state and society, which under certain conditions take precedence over the principle of freedom of expression.

Justice Agranat held, that in situations of a conflict of certain societal interests a process of weighing up, a balancing of the competing interests must take place in order to come to a solution.[105]

He discussed the broad concept of "state security" as the most important of these "other" interests, which must be protected in order to insure other liberties, including freedom of expression.

State security - so Justice Agranat - includes everything to avoid the danger of invasion by an enemy, the suppression of any attempt at the forcible overthrow of the existing regime by hostile factors from within, and which consists of the maintenance of public order and public peace.[106]

Referring on the one hand to the fact that in times of emergency greater weights will generally be given to state security, he also warned of situations, where the authorities "overlook the great social value which the principle of freedom of expression adds to the efficacy of the democratic process and which will prohibit the publication even at a time when this does not constitute a danger of the peace of the state."[107]

To point to this specific problem he cited Lord Sumner in the British case of *De Keyser*, Justice Brandeis in the cases *Shaefer v. United States*, Justice Frankfurter's judgment in the case *Dennis v. United States,*[108] as well as Professor Chafee's famous book "Freedom of Speech in the U.S.A" and the director of the British Broadcasting Corporation, Sir William Haley.[109]

Reasserting the basic position that free speech could justifiable be restrained Justice Agranat outlined the test of "balancing the interests" by establishing general judicial guidelines, which the administrative authorities were expected to follow:

In doing so, Justice Agranat examined the words of Article 19(2)(a) of the Press Ordinance, 1933 and considered the phrase "likely to endanger the public peace" as the one to be interpreted - based on the following question:

> "What is the test which the Minister of the Interior should apply when he comes to decide whether the material that has been published is "likely to endanger the public peace" to the degree that justifies the suspension of the publication?"[110]

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105 *Kol Ha'am,* supra note 22, at 99
106 Ibid., at 98, 99
107 Id., at 100, 101
108 *Attorney-General v. De Keyser's Royal Hotel, Limited* (1920) A.C. 508; *Shaefer v. U.S.* (1919) 40 S.Ct. Rep. 259; *Dennis v. United States,* supra note 104
109 *Kol Ha'am,* supra note 22, at 101
110 Ibid., at 102

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With regard to the expression of "endangering the public peace" Justice Agranat stressed the broadness of this concept, but came finally to the conclusion that "any publication leading to the use of violence by others, to the overthrow by force of the government in power or of the existing regime, to the breach of the law, to the causing of riots or fighting in public or to the disturbance or order, endangers the public peace."[111]

Relating then to the term "likely" Justice Agranat stated that there are two possible interpretations, namely the "bad tendency" interpretation and the "probable danger" interpretation.[112]

According to the first option, a slight and remote "bad tendency" in the direction of the undesired consequences justifies already the suspension of the newspaper.[113]
Justice Agranat dismissed this interpretation and stated that

> "...the 'bad tendency' approach is suitable to an autocratic or totalitarian regime, but renders inefficient the process of investigating the truth which is the very essence of any democratic regime."[114]

Justice Agranat considered the "probable danger" interpretation as the only acceptable approach that represents the intention of the legislator in Section 19(2)(a) of the Press Ordinance, 1933.[115]

In order to found his opinion, he relied on considerations of the nature of the "system of laws under which the political institutions in Israel have been established," as well as on "the matters set forth in the Declaration of the Establishment of the State of Israel, 1948".

Justice Agranat concluded that according to the Declaration of the Establishment of the State of Israel, 1948, Israel is a based on the "foundations of freedom" and the "securing of freedom of conscience."

He stated that the Declaration of the Establishment of the State of Israel, 1948 "does not consist of any constitutional law", but insofar it "expresses the vision of the people and its faith," the laws of the state, including the provisions of a law made in the time of the Mandate and adopted by the state after its establishment, must be "studied in the light of its national way of life."[115A]

These considerations lead him to the conclusion that the standard by which the Minister of Interior must exercise his discretion regarding the term "likely", is the standard of "probability."[116]

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111 Id.
112 Id.
113 Id.
114 Id., at 104
115 Id., at 105
115A Id., see also Chapter B.3.2.2. (The Declaration of the Establishment of the State of Israel - Considered as "Instrument of Interpretation")
116 *Kol Ha'am,* supra note 22, at 105

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Justice Agranat also stated that the test of "probability" does not constitute a precise formula that can easily or certainly adapted to every single case.

Therefore - so Justice Agranat - the Minister of Interior, when using his power under Section 19(2) of the Press Ordinance, 1933 must make an estimation, according to what seems reasonable in the circumstances of the case, as to whether the publication of the material probable affects the public peace.[117]

According to Section 19(2) of the Press Ordinance, 1933 there are - so Justice Agranat - two possible measures in order to suppress or restrict the freedom of the press, namely punishment after the publication and prevention of the publication, i.e. censorship.[118]

Justice Agranat analyzed the preventive measure, namely the measure of censorship. After citing famous thinkers, such as the British philosopher William Blackstone, the American Professor Chaffee, William Jefferson, as well as the American Supreme Court judgment *Near v. Minnesota,*[119] - he concluded that it is the severest and most powerful means. He furthermore stated that

> "...one should not attribute to the Israel legislator an intention to authorize the executive power to order the suspension of a newspaper only because the matters published seem to it to disclose a mere tendency to endanger the public peace."[120] The applicable standard is "probability."[121]

Justice Agranat held that the guiding principle ought always to be if there exists the probability that as a consequence of the publication, the public peace will be affected.[122]

Summary and Conclusions

In the *Kol Ha'am* case the Supreme Court adopted the following jurisprudential approaches and concepts:

1. Relying on the Declaration of the Establishment of the State of Israel, 1948 as an instrument for interpretation in order to incorporate freedom of speech into Israel's legal order.

2. Introduction of the concept of extra-statutory rights into Israel's legal order - in contrast to the jurisprudence that preceded the *Kol Ha'am case* in which the Court based its reasoning only on sources that were explicitly recognized in form of legislative acts.

3. Narrow interpretation of Section 19(2) of the Press Ordinance, 1933.

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117 Ibid., at 110
118 Id., at 105
119 *Near v. State of Minnesota ex. rel. Olson Co. Atty*. (1930) 51 S.Ct. Rep. 625
120 *Kol Ha'am,* supra note 22, at 107
121 Ibid., at 108
122 Id., at 115

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4. Refusal to defer to the administrative discretion and thus restriction of the powers of the Minister of Interior according to Section 19(2) of the Press Ordinance, 1933.

5. Adoption of the jurisprudential approaches of liberalism, American legal realism and sociological jurisprudence towards freedom of speech.

6. Adoption of the principle of judicial review of the "probability" that freedom of expression might threaten "national security".

7. Establishment of the principle that the "doctrine against prior restraint" is part of Israeli law.

3.2.2. Omar International Inc. NY v. Minister of Interior (1981)

Between the years 1953 and 1981 the Minister of Interior has never used his power according to Section 19(2) of the Press Ordinance in order to close down newspapers.[123]

The first time when he did so after the judgment in the *Kol Ha'am* case has been handed down, was in 1981 in the matter of *Omar International Inc., New York v. Minister of Interior.*[124]

The Facts of the Case

In this case the Minister of Interior ordered the suspension of the publication of the *Al-Fajar* newspaper, a daily in Arabic, with an weekly supplement in English published in Jerusalem.

The reason for this order was the publication of articles - which applauded violent actions against the Israeli army in the West Bank - convincing the Minister of Interior

> "...that these articles bear glorification of acts of murder and terror praising and encouraging their continuation and words which are likely to endanger the public peace."

The Supreme Court dismissed the petition and upheld the suspension order.

The Decision of the Supreme Court

The *Kol Ha'am* decision established the rule that the use of power according to

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123 With regard to the rare use of Section 19(2) of the Press Ordinance, 1933 Menachem Hofnung stated that a "dormant" piece of legislation which is not implemented by the governmental bodies, holds no constitutional guaranty for individual freedoms." See Hofnung, supra note 7, at 133

124 *Omar,* supra note 51

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Section 19(2) of the Press Ordinance calls, on the part of the Minister of Interior, for the weighing of the interests of public peace on the one hand against the freedom of the press on the other.

The guiding question must be:

> "Is it probable that as a consequence of the publication, a danger to the public peace has been disclosed?"

In order to resolve this question the Minister of Interior has to estimate, according to what seems reasonable in the circumstances of the case, whether the published material effects the public peace.

The then Supreme Court President, Y. Kahan, giving the judgment for the Supreme Court, recalled and discussed at great length numerous sections of the *Kol Ha'am* decision, and came to the conclusion that the *test of "probability"* had been met.

The Court stated that the petitioners by publishing in their newspaper articles from which the danger to public peace is probable, abused the right of freedom of expression and the exceeded permissible bounds tolerable to a democratic regime desiring to protect its existence.[125]

Summary and Conclusions

Although the court cited the probable danger test and mentioned that the circumstances would justify the suspension, the court did not explain according to the established doctrinal guidelines in the *Kol Ha'am case*, how the publication will cause the disorder in the Occupied Territories.

3.3. Supreme Court Cases concerning Regulation 94(2) of the Defence (Emergency) Regulations, 1945

3.3.1. Adoption of a Strong Legal Formalistic and Positivistic Approach

The Press Ordinance, 1933 was not used very much, due to the existence of the Regulation 94(2) Defence (Emergency) Regulations, 1945, enabling the authorities to by-pass the application of the judicial guidelines which were established by the *Kol Ha'am* case and which have to be applied in connection with the Press Ordinance.

Regulation 94(2) was extensively used during the 1980's in order to prevent the

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125 Ibid.

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publication of new Arab newspapers and magazines and to cancel the permits of existing ones, published in East Jerusalem.

The reason for the preferred use of these Defence (Emergency) Regulations during this time is the fact that the scope of judicial review according to them is much narrower than according to the Press Ordinance, 1933.

According to Regulation 94(2) the District Commissioner has absolute, i.e. subjective discretion and may decide without giving any reason for his decisions. But if the authority decides to reveal the grounds, e.g., state security reasons, the Court will also review the reasons and will require the authority to reveal the evidence.[126]

However, important to mention is the fact that the challenged act in the mentioned cases was decided by a civilian public officer[127] who based his decisions on "security considerations".

This enabled the Supreme Court to treat these cases not as free speech cases, but as "security matters" which belong to a different conceptual framework, in the sense that judicial review depends on the extent to which the authorities are prepared to disclose the reasons for the exercise of their powers - in order to justify their decisions.

The scope of judicial review of governmental decisions in security matters depends therefore on the extent to which the authorities are ready to reveal the reasons for their decisions.[128]

Until the 1980's the District Commissioner did principally not reveal the grounds for the decision, but since then[129] the practice concerning the issue of disclosing the reasons and the evidence has changed in the following way:

In cases where the District Commissioner revoked a license or refused to grant one to a certain applicant, who subsequently challenged this decision in the Supreme Court, the Commissioner submitted to the Court - pursuant to Section 44(a) of the Evidence Ordinance (New Version), 1971[130] - a Certificate of Privileged Evidence (CPE), also called Certificate of Immunity, signed by the Minister of Defence. This certificate states that the evidence, on which the commissioner based his decision, is privileged for security reasons and may not be disclosed to the petitioner.

However, Section 46(a) of the Evidence Ordinance, 1971, gives the petitioner the

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126 Shimon Shetreet, The Scope of Judicial Review of National Security Considerations in Free Speech and Other Areas - Israeli Perspective, 18 I.Y.H.R. (1988) 35, at 44

127 The decision making authorities in such cases are the District Commissioners which are appointed by and responsible to the Minister of Interior

128 Shetreet, supra note 126, at 44

129 See the cases: *Makhoul*, supra note 44; *Ayoub*, supra note 32; *Asli,* supra note 45

130 Sections 44(a) of the Evidence Ordinance (New Version), 1971, 2 L.S.I. [N.V.] (1972) 198

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possibility to file a petition for disclosure of the evidence. For the purpose of deciding upon the petition, the evidence is then examined by the Supreme Court in camera,[131] and may only be disclosed

> "...if the Court finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure."[132]

In an article published in the Israel Yearbook on Human Rights, Professor Shimon Shetreet is of the opinion that in cases involving a Certificate of Privileged Evidence, the Court "in fact reviews whether the evidence indeed supports the decision based on security reasons."[133]

According to my opinion this argument is not correct, since 1. the Court only examines if the evidence may be disclosed to the petitioner, and 2. in cases where not all evidence is disclosed by the Court it is impossible for the petitioner to analyze substantive aspects of the case and to prepare his legal defence by submission of additional evidence/ explanations to prove the opposite.

Hence in a procedure involving privileged evidence not completely revealed to the petitioner, the Court does not really know if all evidence is provided, and therefore the Court cannot review whether the evidence supports the decision. Such a procedure comes in serious conflict with the principle of due process of law which includes, inter alia, that all of the evidence is brought before the Court.

With the exception of the first two judgments discussed below, the District Commissioner routinely submitted to the Court a Certificate of Privileged Evidence, signed by the Minister of Defence, and the Supreme Court without exceptions refused to disclose the evidences.

The following judgments will demonstrate, that the Supreme Court principally applied a strong formalistic approach of judicial restraint in cases where revocations or refusals of permits of Arabic newspapers or magazines were based on Regulation 94 of the Defence (Emergency) Regulations, 1945. The Court did not intervene and thus allowed that the subjective discretion of the executive branch prevailed over substantive judicial reasoning.[134]

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131 Sections 46(a) of the Evidence Ordinance (New Version), 1971, ibid.
According to the Evidence Ordinance, such a petition is dealt with by one justice, but in practice the petitioner has the choice between two possibilities:

> 1.) The petition for revealing the evidence is heard by a judge who will not sit on the bench that hears the main petition; or
>
> 2.) The judges who hear the main petition also see all the evidence and rule on the issue of the privileged evidence and the main issue.

See Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, supra note 37, at 202

132 Sections 44(a) of the Evidence Ordinance (New Version), 1971, id.

133 Shetreet, supra note 126, at 44, 45

134 The Supreme Court has dismissed several petitions where the authorities based their

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The first case in this series was handed down by the Supreme Court in 1964 in the matter of *El-Ard v. District Commissioner*.[135]

3.3.2. El-Ard v. District Commissioner (1964)

In this case the El-Ard Company, composed of Arab citizens of Israel, wanted to publish a weekly magazine in Arabic in the Northern District and applied to the District Commissioner, in order to get a publication permit. The Commissioner of the Northern District - basing his decision on Regulation 94 of the Defence (Emergency) Regulations, 1945 - refused to grant a permission out of security considerations but he did not give any reasons for his decisions.

The El-Ard Company petitioned to the Supreme Court and claimed that the competent authority had acted malicious, discriminatory, without good faith and contradictory to the Declaration of the Establishment of the State of Israel.
Moreover, he claimed, were the reasons for the decision of the authority not disclosed to them.

The Supreme Court - using a very legalistic and formalistic style of reasoning - refused to interfere and dismissed the petition, arguing that according to the evidences the competent authority acted out of security considerations.
The Court also held that the evidences upon which these considerations are based cannot be disclosed to the public, but they were shown to this court.

Finally the Supreme Court held that - since Regulation 94 of the Defence (Emergency) Regualtions does not give the Court the authority to investigate the factual evidence of the reasoning, which led to the decision of the competent authority - the authority to judicial review is also limited.[136]

The strong formalistic approach of the Supreme Court was well expressed in Justice Olshan's opinion. His words deserve to be quoted:

> "Whatever its [the courts] opinion may be, it must act and tell others to act according to the law. Whether the law is good, or bad, whether the law is valid or not - all these considerations rest with the legislator and not with the court."[137]

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decisions on so called "security reasons". See for example *El Ard,* supra note 42; *Makhoul;* supra note 44, *Ayoub*, supra note 32; *Asli,* supra note 45.

It should be mentioned at this point that the Supreme Court has adopted this attitude also towards other Regulations of the Defence Emergency Regulations, 1945, such as Regulation 111 (Administrative Detentions), Regulation 112 (Deportations) and Regulation 119 (House Demolitions).

135 *El Ard,* supra note 42

136 Ibid., at 343

137 Id., at 343

The legal explanation for dismissing the petition was the doctrine of the separation of powers.

The second case in connection with Regulation 94 of the Defence (Emergency) Regulations reached the Supreme Court in 1979 in the matter *Al Assad v. Minister of Interior.*[138]

3.3.3. Al Assad v. Minister of Interior (1979)

In this case the competent authority, using its power under Regulation 94(2), denied to grant a permit for the publication and circulation of an Arab monthly magazine published in East Jerusalem.

The authority based its decision on the grounds that the Communist Party - which is outlawed in the West Bank and affiliated with the "National Palestinian Front" - stood financially and morally behind this magazine, and that the magazine intends to incite the population of Jerusalem and the West Bank to political violence and resistance.

By a decision of two to one, the Court overruled the administrative decision and ordered the Ministry of Interior to issue the requested permit.

The minority opinion was given by Justice Kahn, who basically relied on the judgment in the above discussed *El Ard case.*[139]

Additionally he applied the ruling of the 1977 British case *R. v. Secretary of State for the Home Department*[140] and held that

> "...state security considerations would prevail over rules of natural justice."[141]

The majority opinion was delivered by Justice Landau and was joined by Justice Miriam Ben-Porat and Justice Moshe Landau.

Justice Landau described Regulation 94(2) of the Defence (Emergency) Regulations, 1945 as

> "...a draconian one, promulgated by a colonial administration, and inconsistent with fundamental concepts of a democratic state concerning freedom of speech and freedom of expression, as explained in ...H.C. 73/53 [the Kol Ha'am case] and other decisions."

Additionally, Justice Landau expressed the court's preference for the doctrine against prior restraint, stating that

> "...it is better, at present at least, not to violate the principle of freedom of expression and to submit the petitioner and the magazine to the test of reality. If

138 *Al Assad,* supra note 50, for a summary in English see 10 I.Y.H.R. (1980) 335
139 *El Ard,* supra note 42
140 *R. v. Secretary of State for the Home Department,* [1977] 3 All E.R. 452
141 *Al Assad*, supra note 50, for a summary in English see 10 I.Y.H.R. (1980) 335, at 337

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> it becomes clear that there was ground for the respondent' reason.....he [the respondent] may immediately use his authority to void the permit, as provided in Regulation 94(2)."[142]

Summary and Conclusions

1. Reading Justice Landau's majority opinion one may discern objection by the court towards the existence of the Defence (Emergency) Regulations, 1945 and their application in connection with freedom of expression. At first sight Justice Landau's opinion seems to criticize a conceptional element within Israel's legal system, namely the existence and application of the undemocratic and draconian Defence (Emergency) Regulations, 1945.

2. However, looking behind the court's reasoning, it becomes clear that the non-application of the El-Ard rule was in reality mainly motivated by the fact that, on the one hand, the competent authority did chose to disclose the reasons for his refusal,[143] but that, on the other hand, it failed to submit to the court any concrete evidence, in order to justify the reasons.

3. In other words this means that only due to the fact that procedural obligations were not fulfilled, the Supreme Court was allowed to review both the reasons and the factual evidence.

4. But - and this is important to stress - the decision itself does not mark a substantive change in the judicial concept itself.

3.3.4. Makhoul v. Jerusalem District Commissioner (1981)

Another case involving Regulation 94(2) of the Defence (Emergency) Regulations, 1945 reached the Supreme Court in 1981 in the matter *Makhoul v. Jerusalem District Commissioner*.[144]

In this case, Dr. Najwa Makhoul, a Palestinian Arab citizen of the state of Israel and lecturer at the Hebrew University, tried several times to get a permit to publish a weekly magazine in Arabic concerning public health, sociology of science, and gender. The District Commissioner - using his power under Regulation 94(2) of the Defence (Emergency) Regulations, 1945 - denied to grant the requested permit for the weekly magazine published in East Jerusalem.

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142 Ibid.

143 According to Regulation 94 of the Defence Emergency Regulations, 1945 no duty is imposed on the competent authority to disclose the reasons and evidences upon which the decision is based.
Defence (Emergency) Regulations, 1945, supra note 57

144 *Makhoul,* supra note 44

At first the District Commissioner did not give any reason for the refusal to grant the permission, and relied on the language of Regulation 94(2) of the Defence (Emergency) Regulations, 1945, which allows him to do so.

Only after several further requests by the petitioner, the District Commissioner finally argued that state "security reasons" would prevent him from granting a permission.

As in the *Al Assad case*[145] the Commissioner based his decision on "security considerations", but this time he avoided to commit a procedural defect, as described above and attached a Certificate of Privileged Evidence, signed by the Minister of Defence.

And again in a highly formalistic opinion and mechanical method of interpretation and application of the law, the Supreme Court upheld the decision of the executive authority.

The Court stated that the broad language of Regulation 94(2) basically allows the authority not to give any reasons for its decision, and precludes the Court to exercise substantive judicial review, i.e. to investigate the factual evidence and requiring the authority to base the decision upon the content of the publication.[146]

But due to the fact that the authority stated the ground for the refusal, the Supreme Court had to examine the factual evidence and had to decide if the evidence may be disclosed. However, the Court came to the conclusion that "state security" considerations justify that the evidence be not disclosed.

In contradiction to the doctrine established in the *Kol Ha'am* case to balance freedom of expression against state security and to probe the sociopolitical meaning of the statutory language, the court established in this case a new doctrine of balancing, namely between so called "state security" and proper procedure.

Justice Menachem Elon, giving the judgment for the court, stated in this regard as follows:

> "The severeness of Regulation 94, that deals with the freedom of speech and the freedom of expression, is not very popular in this Court. The State Attorney notified us therefore that...the Commissioner does not wish to pull an opaque screen, but he is willing to remove it for our consideration...he is acting on grounds of *security reasons* and he has submitted us with a Certificate of Immunity...whenever the commissioner adopts this procedure, the harshness of the Commissioner's absolute authority...is neutralized...thus we can find *the balance which is absolute necessary between the security of the state and the protection of basic rights and proper procedure*." [Emphasis added] [147]

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145 *Al Assad*, supra note 50, for a summary in English see 10 I.Y.H.R. (1980) 335

146 *Makhoul*, supra note 44, at 792

147 Ibid., at 793-794

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Other Cases and Final Conclusions

In a number of other decisions involving the publication of Arabic newspapers and magazines - by virtue of Regulation 94(2) of the Defence (Emergency) Regulations, 1945 - the District Commissioner refused to grant a publication permit - this happened in the case of *Ayoub*[148] - or revoked such a permit - as it happened in the cases of *Asli,*[149] *Al-Khatib*[150] *and Kassem*.[151]

All these cases have in common:
1. That the refusal or the revocation were not based on the ground of the actual content of the papers - even if the papers passed the examination of the Military Censor - but on so called "security considerations", namely the alleged affiliation of the publishers with one of those Palestinian organizations which were banned under the Prevention of Terrorism Ordinance, 1948.[152]
2. That the evidences for the allegations have never been disclosed;
3. That the procedures and final decisions given by the Supreme Court were - from the conceptional point of view - the same as in the above mentioned *Makhoul* case, namely that
a. the District Commissioner appealed to security reasons, but submitted a

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148 *Ayoub,* supra note 32. Even after the purpose of the intended magazine was changed the permission was not granted.

149 *Asli,* supra note 45. The ground given by the District Commissioner in order to justify his decision was that "the newspaper serves as an organ and as a means of expression of the Popular Front for the Liberation of Palestine (PFLP) headed by Dr. George Habash."

150 *Al-Khatib*, supra note 51. The ground given by the District Commissioner in order to justify his decision was the "direct linkage (supervision, management and financiation) with the Popular Front for the Liberation of Palestine (PFLP) headed by Dr. George Habash."

151 *Kassem*, supra note 51. The ground given by the District Commissioner in order to justify his decision was that "the magazine was financed by the Popular Front for the Liberation of Palestine (PFLP) headed by Dr. George Habash."

152 See the Prevention of Terrorism Ordinance, 1948, 1 L.S.I. (1948) 76.

Section 1 of the Prevention of Terrorism Ordinance, 1948 defines the term "terrorist organization" as a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence. The Israeli government has the power to declare an organization to be a terrorist organization. It should be stressed at this point that in such cases, the burden to prove that the organization is not a terrorist organization according to the above mentioned definition falls upon the defendant.

Section 8 of the Prevention of Terrorism Ordinance, 1948 provides the legal basis for this rule, stating that if the Government, by notice in the *Official Gazette,* declares that a particular body of persons is a "terrorist organization", this notice shall serve, in any legal proceeding, as a proof that the said body is a terrorist organization, unless the contrary is proved. On the basis of the Prevention of Terrorism Ordinance the Israeli government has declared the PLO and numerous Palestinian organizations, such as the Popular Front for the Liberation of Palestine (PFLP), the Democratic Front for Peace and Equality (DFPE) as "terrorist organizations." Today the PLO is not any more considered as "terrorist organization."

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Certificate of Privileged Evidence (CPE) to the Supreme Court; and
b. the Supreme Court investigated the evidences in camera, but did not disclose the evidences to the petitioners due to "state security" considerations, and
c. the Supreme Court finally upheld the decision of the executive authority.

4. Censorship

4.1. Philosophical and Historical Dimensions of Censorship

After the establishment of the state of Israel in May 1948, the British mandatory Censorship Regulations were adopted into Israel's legal system and in later years Israeli legislation was even added to it. Generally spoken censorship is an undemocratic method, since it violates the fundamental right to receive information through different channels, and to transmit this information including the possibility to express an opinion on it.

The British writer Francis Williams has stated that "censorship of any kind is a dangerous and deplorable instrument to be used only in the most extreme circumstances and then with the most rigorous safeguards."[153]

However, the use of censorship as specific measure to limit the freedom of the press is not unique to Israel, but was, far more also applied in other Western countries in times of war.[154] Nevertheless, one must say that with regard to the state of Israel the situation is in various aspects different than in other countries. The first major difference lies in the fact that censorship is carried out not only temporarily during a specific time of war, but rather permanently since the establishment of the state in May 1948.

Despite Israel's often stated commitment to upheld the values of a democratic society, where the individual has the basic right to receive accurate and up-dated information and to publish it, Israel adheres until today to the method of censorship.

The second specific aspect of Israel's censorship is the fact that in Israel the Censor is always part of the military establishment.

4.2. Statutory Provisions for Military Censorship

4.2.1. The Defence (Emergency) Regulations, 1945

[153] Francis Williams, Press, Parliament and People (London, 1946) 17

[154] W.J. Small, Political Power and the Press (New York: W.W. Norton & Company, Inc., 1972) at 72-89. See also Dina Goren, Secrecy and the Right to Know (Turtledove Publishing, 1979) Chapter 8 (The Press in Wartime) at 71-84

The legal basis for censorship in Israel is Part VIII (Regulations 86-101) of the Defence (Emergency) Regulations, 1945,[155] which defines the powers of the Military Censor. Originally the Censor was "any person appointed as such in writing by the High Commissioner,"[156] but later the power of the High Commissioner was transferred by the Israeli government to the Minister of Defence.

According to the Defence (Emergency) Regulations, 1945 the Military Censor has absolute discretion.
Regulation 87(1) of the Defence (Emergency) Regulations, 1945 provides:

> "The Censor may by order prohibit generally or specially the publishing of matters the publishing of which, in his opinion, would be, or be likely to be or become, prejudicial to the defence of Palestine or to the public safety or to public order."[157]

Additionally the Military Censor has the authority:

> "...to prohibit the importation or exportation or publishing of any publication which could harm the defence of Israel." (Regulation 88)[158]

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155 Defence (Emergency) Regulations, 1945, supra note 57

156 Regulation 86 of the Defence (Emergency) Regulations, 1945, ibid.

157 Regulation 87(2) of the Defence (Emergency) Regulations, 1945 states as follows:

> "Any person who publishes any matter in contravention of an order under this regulation and the proprietor and editor of the publication in which it is published and the person who wrote, printed, drew or designed, the matter shall be guilty of an offense against these Regulations."

See the Defence (Emergency) Regulations, 1945, id.

In 1988 the Censor issued an order, according to which the publication of matters in the above mentioned categories is prohibited unless there is an approval obtained prior to the publication. See Emergency Order (Submission of Printed Matter for Prior Approval and Prohibition of Printing and Publishing), 1988, K.T. No. 5135 (18 September 1989) 31

158 Regulation 88 of the Defence (Emergency) Regulations, 1945 deals with prohibited publications and states:

> "(1) The Censor may by order prohibit the importation or exportation, or the printing or publishing of any publication (which prohibition shall be deemed to extend to any copy or portion of such publication or of any issue or number thereof), the importation, exportation, or printing or publishing or which, in his opinion, would be, or be likely to be or become, prejudicial to the defence of Palestine or to the public safety or to public order.
> (2) Any person who contravenes any order under this regulation and the editor of the publication in relation to which the contravention occurs, and any person (unless in the opinion of the Court he ought fairly to be excused) who has in his possession or control, or in premises of which he is the occupier, any publication prohibited under this regulation or who posts, delivers or receives any such publication, shall be guilty of an offense against these Regualtions."

See the Defence (Emergency) Regulations, 1945, supra note 57

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> "...to open all mail." (Regulation 89)
>
> "...to order restrictions over outgoing mail or other material containing information." (Regulation 91)[159]
>
> "...to examine/search any traveler and his packages." (Regulation 92)
>
> "...to confiscate or forbid any printing press used for printing any unlawful publication." (Regulation 100a)
>
> "...to prohibit the operation of a printing press." (Regulation 100 b)
>
> "...to enter and search premises if he suspects that they are used for the purpose of printing/publishing any unlawful material." (Regulation 101)

An extensive authority is contained in Regulation 97 dealing with

> "...the power of the Censor to require submission of matter for censorship before publication."[160]

The Defence (Emergency) Regulations, 1945 theoretically outline the legal framework upon which the relationship between the entire Israeli press and the Military Censor is built.

However, since the establishment of the State of Israel, these Defence (Emergency) Regulations, 1945 were in practice - with the exception of the closure of the Hebrew newspaper "*Hadashot*"[161] in 1984 - not enforced against the Hebrew-language press, the English-language daily Jerusalem Post, and the electronic media.

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[159] Regulation 91(2) of the Defence (Emergency) Regulations, 1945 states:

> "...no document, pictorial representation, photograph or other article whatsoever regarding information shall be sent or conveyed from Palestine to any destination outside Palestine otherwise that by post..."

See the Defence (Emergency) Regulations, 1945, ibid.

Regulation 91 is also the legal basis for the obligation of foreign correspondents to submit all their material to the censor, since they can only send it in the approved manner, and the official channel, i.e. the post, will not send any material unless the censor has passed it. See Meron Medzini, Censorship Problems in Israel - The Legal Aspect, 6 Isr.L.R. (1971) 309, at 313. See also the Report of B'Tselem, Censorship of the Palestinian Press in East Jerusalem, Information Sheet (Jerusalem, February-March 1990) at 8

[160] Regulation 97 of the Defence (Emergency) Regulations, 1945 states:

> "(1) The Censor may by order require the proprietor, editor, printer or publisher of any publication, or the proprietor or manager of any printing press or printing business, or the author of, or any person about to print or publish, any matter, to submit to the Censor before printing or publishing any matter intended for printing or publishing.
> (2) Any such order may be given either generally or in respect of any particular subject or class of subject, and, in the case of a publication published at regular or irregular intervals, may be given in respect of any particular issue or class of issues or of all issues for a specified period."

See the Defence (Emergency) Regulations, 1945, supra note 57

[161] *Hadashot,* supra note 46. See also on this affair Cr.A. 1127/93, *State of Israel v. Klein*, 48(iii) P.D. 485

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This state of affairs is the result of a voluntary agreement, signed in the beginning of 1950, between the Editors' Committee and the Minister of Defence,[162] according to which the Military Censor does not exercise his powers granted under the Defence (Emergency) Regulations, 1945, against those newspapers[163] whose editors are members of the so called "Editors' Committee."[164]

4.3. The Censorship Agreement between the Editors' Committee and the Israel Defence Forces (IDF)

The Editors' Committee has its roots in the so called "Reaction Committee", which was established by the editors of the Jewish newspapers in Palestine in the early 1940's.[165]

Eventhough the Hebrew newspapers at that time showed a wide range of different opinions and political views it was ideologically united by the aim to serve the Zionist cause and to establish a Jewish homeland, rather than to provide information.

In order to present a coordinated response to the politics of the British authorities and to prevent a crack in the unity of the Jewish community, which was considered as vital element in the struggle against the British regime, the Jewish community began to impose self-censorship.[166]

This internal, voluntary system of censorship functioned separately from that of the British mandatory government.[167]

After the state of Israel was established the "Reactions Committee" was reorganized, renamed as "Editors' Committee" and officially registered as an

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[162] Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 510. The authority of the Minister of Defence was later transferred to the Israel Defence Forces and came there under the supervision of the Director of Military Intelligence. See Meron Medzini, Censorship Problems in Israel - The Legal Aspect, supra note 159, at 315

[163] The Editors' Committee include the major Hebrew-language dailies Ha'aretz, Ma'ariv and Yediot Aharonot, as well as the English-language daily Jerusalem Post.

[164] Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 510. However, the Military Censor has used his power under the Defence Emergency Regulations and stopped the publication of the newspaper Hadashot for four days in May, 1984 because the newspaper committed a censorship offense. See *Hadashot,* supra note 46. See also on this affair *State of Israel v. Klein*, supra note 161

[165] Dina Goren, Secrecy and the Right to Know, supra note 154, at 89; Negbi, Paper Tiger, The Struggle For a Press Freedom in Israel (Sifriat Poalim, Publishing House Ltd, Tel Aviv 1985) at 83

[166] Ibid., at 89, 117

[167] Id., at 88-89, 116-117

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independent association in 1953, whose aims were to defend its members common interests in everything relating daily papers in Israel and to develop mutual cooperation to this end.[168]

Although the Editors' Committee called for a change of the repressive anti-democratic British Defence (Emergency) Regulations, 1945 which remained in force after the establishment of the state of Israel in Palestine,[169] the Israeli government did not accept the idea of abolishing these Regulations, but rather suggested to the editors to reach an agreement with the Minister of Defence based on a system of self-censorship.[170]

Such an agreement was preliminarily signed in May 1949 and finalized at the beginning of 1950.[171]

It is important to mention that the result of the said agreement is that - instead of being an instrument for controlling the government - the entire Hebrew press became an arm of the government and the army, that was ready to hide information which is considered as harmful to the so called "national security" of the state of Israel.

In 1966 a new Censorship Agreement, not greatly different from the previous one was signed between the Editors' Committee and the General Staff, and thus replaced its predecessor.[172]

This 1966 Censorship Agreement provides that the

> "...censorship shall not apply to political matters, opinions, commentaries and criticisms - unless it is possible to conclude information about state security from the written forms."[173]
> "The purpose of censorship is to prevent the publication of security information that may aid the enemy or harm the defence of the state."

Under this Censorship Agreement the editors voluntarily submit to the censor all news relating to security matters. Only articles which deal with issues set forth in a confidential list - given to the newspapers - must be submitted for approval by the censor.

According to the agreement a joint committee of editors and army representatives, also known as "Censorship Committee", was established, whose

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168 Id., at 90, 91
169 Medzini, Censorship Problems in Israel, supra note 159, at 315
170 Professor Kretzmer calls it "extra-statutory" censorship. See Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, supra note 37, at 204
171 Goren, Secrecy and the Right to Know, supra note 154, at 119
172 Ibid., at 120. Extracts from the Censorship Agreement are also published in Y. Gal-Nor and M. Hofnung, Government of the State of Israel (Jerusalem: Nevo Publishing House, 1993) at 1070
173 Clause 4 of the Censorship Agreement, in Y. Gal-Nor and M. Hofnung, Government of the State of Israel, ibid.

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task was to deal with complaints of the newspapers and the Censor.[174]

The decisions of the Censorship Committee were final and there was no possibility to challenge the decisions of the Censor in the court. That means the parties had agreed to abandon the possibility to turn to the ordinary courts.[175]

In the 1950s and early 1960s - when communication technologies were not yet as advanced as today - the Military Censor could prevent in effective way the publication of information, without any interference of the courts.

The Censor has indeed used his powers in numerous instances in order to promote political interests of the ruling parties in the Knesset, and to serve private aspirations of certain influential persons.[176]

The Editors' Committee is not open to all newspapers and magazines,[177] specifically not to the Arab newspapers and magazines of East Jerusalem and the Occupied Territories, and some Hebrew papers.[178]

This has the consequence that the Military Censor continues to operate according to the Defence (Emergency) Regulations, 1945 against those newspapers who are not members of it, and issues orders requiring the said newspapers to submit all articles on the matters classified in the order.[179]

According to an Order issued by the Military Censor in 1988 censorship does not only apply to newspapers, but to

> "...every publications of material relating to state security, public peace and public order in Israel, the West Bank[180] and the Gaza Strip, or to Arab-Israeli

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[174] The Censorship Committee is a three members committee consisting of a representative of the Editors' Committee, a representative of the General Staff and an independent chairperson. It is a quasi-judicial body with punitive powers and the authority for the speedy adjudication of breaches of the agreement. For more details see the Censorship Agreement, id.

[175] Id.

[176] The Military Censor prohibited for example the distribution of the Communist Party newspaper, *Al-Ittihad*, published in Arabic inside the Green Line. According to then Minister of Defence David Ben Gurion, the decision was based on "security grounds". See 5 D.K. 1492 (24 May 1950)

[177] Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, supra note 37, at 205; Negbi, Justice under Occupation: The Israeli Supreme Court versus the Military Administration in the Occupied Territories, supra note 87, at 153; Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 511

[178] To this group of newspapers also belong the Communist party organ *Al-Ittihad*, the meanwhile not any more existing Hebrew daily "*Hadashot*" and the weekly magazine *Ha'Olam Hazeh*. See B'Tselem, Censorship of the Palestinian Press in East Jerusalem, Information Sheet (Jerusalem, February-March 1990) at 8

[179] Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, supra note 37, at 205; Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 511

[180] The original text in Hebrew uses the biblical terms "Judea and Samaria" in order to describe the area of the West Bank.

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> relations, even if the information in the said publication has already been published."[181]

A substantial amendment of the editors agreement occurred in 1996.[182] According to this amendment *all* media has the right to file petitions against the Censor in the High Court of Justice.

It also clarifies the limitation of Military Censorship to matters clearly related to state security; it allows all media to quote freely from items previously published in Israel or abroad; and it established a Censorship Appeals Committee, headed by a retired Supreme Court Justice.

While newspapers have the right to appeal to the Supreme Court, the Censor cannot appeal decisions by the Committee.

This new agreement applies now to all newspapers and media in Israel without regard if they are members of the Editors' Committee or not.[183]

However, until 1996 there was a different treatment between those newspapers which are members of the Editors' Committee and those which are not.

This has been explicitly criticized by Israeli jurist Moshe Negbi, who wrote with regard to those newspapers which are members of the Editors' Committee:

> "...in return for the censor's formal undertaking not to apply political censorship to them, the members of the Editors' Committee have paid a high ethical and moral price, becoming in effect passive accomplices in suppressing the freedom of many other papers and journalists."[184]

Important to mention is the fact that - since the very beginning of using of censorship - no clear criteria were established, according to which this method should be practiced.

There exists an uncertainty and openness with regard to the exact definition of specific terms and expressions, such as "harm to state security", "national security", "public security" and the like. The vagueness upon the term "harm to state security" is best described by the former Chief Censor Avner Bar-On in his Book: "The Untold Stories, The Diary of the Chief Censor".[185]

In this book, Avner Bar-On admits that when he took over the position of a Chief Censor, he asked the Chief of Staff of the IDF, General Yigal Yadin, what the term "harm to state security" should exactly mean and how this term could be defined.

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181 Emergency Order (Submission of Printed Matter for Prior Approval and Prohibition of Printing and Publishing), 1988, K.T. No. 5135 (18 September 1989) 31

182 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 512

183 Ibid., para. 512

184 Negbi, Paper Tiger, supra note 165, at 16-27-43

185 Avner (Walter) Bar-On, The Untold Stories, The Diary of the Chief Censor (Edanim Publishers, Jerusalem, 1981) Avner Bar-On was Chief Censor for 26 years.

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But instead of giving a clear answer, General Yadin only recommended "to speak about these things with the outgoing Censor, Gershon Dror, or even better, to sit with him one month."[186]

The outgoing Censor was subsequently questioned by Bar-On on this matter, and meant that it was impossible to define this term, but that after practicing some time as a Chief Censor, he [Bar-On] would surely know what it [state security] is and what not.[187]

I want to stress at this point that the reality in Israel showed - and still shows - that censorship is not limited to so called "security matters" - whatever it might be - but rather that it extents to matters relating to foreign affairs, Israel's position in the international community and to political dissent which is considered to be outside the boundaries of the so called "national consensus."

Important criterions in censorship-considerations are the national and/or religious identity of the publishers and the readership:

There were articles, reports and opinions that were allowed to be published in the Hebrew press, but were censored for the Palestinian Arab press in East Jerusalem, even when the articles were precisely translated.[188]

Other examples for arbitrary censorship are articles which pertained purely political matters and opinions, and nothing relating to state or public security.[189]

In 1990 for example, when many Jewish immigrants from the USSR started to come to Israel, an order was issued prohibiting the publication of information on the number of immigrants without permission of the Censor. However, this order came under criticism and it became very soon clear that it was not possible to stop reporting about the immigration.

A similar case - dealing with the immigration of Jews from the Yemen - occurred in mid 1993.[190]

An important aspect of the 1966 censorship agreement is the fact that it has only contractual nature, and due to the fact that for the restrictions set up in the agreement no legal basis exists,[191] it was very easy for the Military Censor to circumvent or

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186 Ibid., at 15

187 Id., at 16, 21

188 B'Tselem, Censorship of the Palestinian Press in East Jerusalem, Information Sheet, supra note 159, at 20-26

189 Ibid., at 31-35

190 Hofnung, supra note 26, at 135, 136

191 Until 1989, the censorship agreement did only apply to the established Hebrew newspapers, but not to those newspapers which challenged the existing social norms and order. Affected were especially the Palestinian Arab newspapers, but also some Hebrew newspapers, such as *Kol Ha'am*, *Ha'Olam Hazeh*, *Hadashot*. Hofnung, supra note 26, at 136, 137. See Kretzmer, The Constitutional and Legal Status of Freedom of Speech in Israel, supra note 37, at 205; Medzini, Censorship Problems in Israel, supra note 159, at 316

disregard them.

There was no possibility to enforce them in the courts in the case that the censor exceeded the powers granted to him.[192]

As a result of the rules established in the editors agreement, matters concerning the use of the censor's power were for a long time not brought to the courts. Only after a number of newspapers appeared which were not members of the Editors' Committee several petitions against the decisions and the use of powers of the Military Censor under the Defence (Emergency) Regulations, 1945 were brought before the Supreme Court.

The first case in this context occurred in 1984 in the matter *Hadashot v. Minister of Defence*[193] - also known as the "Bus No. 300 Affair".[194]

Another important Supreme Court case dealing with the powers of the Military Censor under the Defence (Emergency) Regulations, 1945 is the decision in the matter of *Schnitzer v. Chief Military Censor*,[195] handed down in 1988.

4.4. Supreme Court Cases concerning Military Censorship

4.4.1. Hadashot v. Minister of Defence (1984) - "The Bus No. 300 Affair"

Application of a Strong Legal Formalistic and Dogmatic Concept

In this case the popular daily Hebrew newspaper Hadashot was closed down for four days after having ignored the instructions of the Military Censor not to publish anything concerning the mentioned affair.

The Supreme Court used a very formalistic and dogmatic approach, and thus succeeded to escape from dealing with the substantive issue as to whether the prohibition on content was lawful.

The Bus No. 300 Affair had certain after-effects which were dealt with in the judgments *Barzilai v. State of Israel*[196] and *State of Israel v. Klein*.[197]

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192 Dina Goren, Secrecy and the Right to Know (Turtledove Publishing, 1979) Chapter 8 (The Press in Wartime); Negbi, Paper Tiger, supra note 165, at 36

193 *Hadashot,* supra note 46

194 Pnina Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, 10 Cardozo Law Review (1988) 529, at 530

195 *Schnitzer,* supra note 24

196 H.C. 428/86, *Barzilai v. Government of the State of Israel*, translated into English in 6 S.J. (1986) 1; Lahav, A Barrel Without Hoops, supra note 194, at 529-559

197 *State of Israel v. Klein,* supra note 161

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Only the latter judgment, however, is relevant in the context of the present Chapter F dealing with the use of powers of the Military Censor under the Defence (Emergency) Regulations, 1945.

The Bus No. 300 Affair has its importance until today,[198] since it reflects to a great degree Israel's understanding and respect for specific values, such as human life and dignity, universal justice, democracy, rule of law and due process.[199]

The Facts of the Case

On April 12, 1984 four Palestinian residents of the Gaza Strip hijacked the civilian Bus No. 300 and took its passengers as hostages.

At sunrise of the following day the bus was stormed and liberated by a special military (paratroopers) unit of the Israel Defence Forces. In the course of the liberation operation two of the hijackers were shot to death instantly, while the two others were struck unconscious and handed over to the General Security Service,[200] i.e. the Secret Service operating within Israel.

After an interrogation had taken place during which the two terrorists were seriously beaten by soldiers and officers, they were - following an order by the head of General Security Service - killed by one of the General Security Service's personnel.[201]

The head of the General Security Service later claimed that the Prime Minister at this time - who vehemently denied this - had authorized the execution.

The official version was that two of the terrorists had been killed when the bus

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[198] See the article by Ronen Bergman, The Darkest Night HA'ARETZ, English Edition, 12 February 1999, at 8-11

[199] As already mentioned the Bus No. 300 Affair had certain after-effects which were, inter alia, dealt with in the judgment *Barzilai v. Government of the State of Israel*, supra note 196, handed down in 1986 - two years after the *Hadashot* case.

The *Barzilai* case proved the readiness of Israel's legal and political system to accept illegal deeds, such as the slain of terrorists and potential murders without trial, when it comes to protect the integrity of the Jewish State, where obviously non-Jewish life, and specifically the life of Palestinian Arabs has less value than Jewish life. This fact is evidenced in the *Barzilai* case and best expressed in the pardon message issued by the President of the state of Israel, Dr. Weizman, where he stated as follows:

> "In the special conditions of the State of Israel we cannot allow ourselves any relaxation of effort, nor permit any damage to be caused to the defence establishment and to those loyal men who guard our people."

See *Barzilai,* supra note 196, at 7

[200] The Hebrew term for the General Security Service is "Shin Bet".

[201] In order to create the impression that the two hijackers had been killed during the storming of the bus the killer took a stone and beat them to death. See Bergman, The Darkest Night, supra note 198, at 9

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was seized and the other two died on their way to the hospital as a result of wounds they had sustained.[202]

But due to the fact that a staff photographer of the meanwhile defunct Hebrew daily Hadashot was present at the time of the storming the bus and pictured the terrorists, there exists clear evidence, that the terrorists have been captured alive and were unharmed.[203]

Two weeks after the affair had taken place the Minister of Defence informed all newspaper editors in Israel, that an internal Commission of Inquiry was established in order to investigate the circumstances of the terrorists deaths.[204] The Minister also asked the editors not to publish any information concerning the said commission.

The spokesman of the Military Censor additionally instructed the newspapers' editors that the whole material on the Bus No. 300 Affair, including citation of foreign sources - in which the photograph with the two terrorists being alive already appeared - required submission to the censor prior to the publication.[205]

However, the Hebrew daily newspaper Hadashot, whose editor was not member of the Editors' Committee and therefore not bound by its decisions to respect the censor's order,[206] ignored the instruction.

Instead of the required submission of the information to the Military Censor prior to the publication, Hadashot published the picture of the two terrorists as they were led away from the bus, together with an attached article under the headline:

"The affair of the Hijacked Bus: Inquiry Commission Appointed to Investigate How the Terrorists Were Killed."

The newspaper did also describe in detail the commission, its composition and its tasks.[207]

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202 Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, supra note 194, at 534

203 Bergman, The Darkest Night, supra note 198, at 9

204 The conclusions of the Commission were as follows:

> "No evidence was found that the Prime Minister had authorized such an (execution) order, but any such authorization - if given - would have been illegal, since "the law of the State of Israel, while taking into consideration its specific security needs, prohibits categorically the killing of prisoners. An order issued by a commander to kill prisoners is patently illegal and one should refuse to obey it."

See Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, supra note 194, at 534. *Hadashot*, supra note 46, at 481-82

205 Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, ibid., at 534. *Hadashot*, ibid., at 481-82

206 The editor of Hadashot represented the so called "new generation" of Israeli journalists which has criticized the agreement between the Editors' Committee and the censor as a "sell out" to the political establishment.

207 *Hadashot*, supra note 46, at 482

The Closure of the Paper and the Petition to the Supreme Court

After the publication of the mentioned article, the Military Censor immediately reacted, used his power granted under Article 100(i) of the Defence (Emergency) Regulations, 1945 and ordered the closure of the newspaper for four days.

It should be mentioned at this point that - in contrast to various Palestinian Arab newspapers published in East Jerusalem, which have been closed down after 1967 under the Defence (Emergency) Regulations, 1945 - these measures were - until this Bus No. 300 Affair - not used against any Hebrew newspaper in Israel.[208] However, this time it happened.

Against the decision of the Military Censor a petition was brought to the Supreme Court the newspaper. The newspaper argued that since the paper was not member of the Editors' Committee, there was no obligation to comply with the decisions of this body not to publish a specific story.

A further argument was that the whole information concerning the affair did only concern the government of Israel, and that it did not contain anything regarding "state security". He argued that there was nothing in the information, that was likely to harm the "defence of the state of Israel", the "public peace" or the "public order".

The closure of the newspaper was a clear, although unsuccessful, attempt by the Israeli government - acting through the Military Censor - to hide the act of the killing of the two unarmed prisoners from the public.

The Decision of the Supreme Court

The Supreme Court - although mentioning the vital importance of freedom of expression and information for a democracy - unanimously upheld the decision of the Military Censor.[209]

The Opinion of Justice Menahem Elon

Justice Menahem Elon, speaking for the court, adopted a highly formalistic and dogmatic approach for his reasoning in order to justify the court's ruling. He held that since the petitioner did receive a definite order to submit all information to the censor prior to the publication, and since he has not done so, he clearly violated the

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208 In 1953, when the Hebrew Communist Party newspaper *Kol Ha'am* - based on Section 19(2) of the Press Ordinance, 1933 - was closed down, the Supreme Court overruled the administrative decision by the Minister of Interior. Justice Agranat held that absent a probable danger to national security, this method of censorship, i.e. the closure, may not be employed. He interpreted the Press Ordinance narrowly and restricted the discretion of the Minister of Interior. See the discussion of the *Kol Ha'am* case, supra sub-chapter 3.2.

209 *Hadashot,* supra note 46, at 482

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law. Therefore it was no need for the court to treat the issue of balancing the secrecy - which is required in order to safeguard the national security and public order - and the "unwritten right" to know and to inform.[210]

The Court only needed to ascertain that a reasonable man would find sufficient evidence in the record that the paper had violated its duty to obey the censor.[211]

The Supreme Court concentrated on the formal duty to submit the material to the censor, making it possible to avoid to treat the substantive question of whether the prohibition on content was lawful.

Justice Menachem Elon emphasized the procedural violation of the law and stressed the principle that

> "...just as we are advised to obey and nurture the fundamental right to free expression and information, we are advised to obey the law and its existence, for both together are the soul of the democracy."[212]

The result of this ruling was that Hadashot remained closed for four days.

Summary and Conclusions

1. The Bus No. 300 Affair[213] as a whole deals with a number of important questions concerning the effects of Palestinian terrorism and Israeli counterterrorism on the political and legal system, and concerning the interpretation and respect for values, such as human life and dignity, universal justice, democracy, rule of law and due process.

2. The specific moral issue in this affair concerns the question "whether an activity of the state - such as the cold-blooded killing of an unarmed prisoner (terrorist) by an organ of the state - can ever be justified by "reasons of states" allowing the state to ignore the most basic principles of law and order?"

3. The second moral issue involved in this context concerns the question "which kind and how much of a terrorist method, i.e. the cold-blooded killing of a taken prisoner, may a state adopt and still maintain its commitment to the rule of law, and at which stage does the state itself turn into an organ of terrorism?"

4. The *Hadashot* case shows how the Supreme Court succeeded to avoid dealing with the reality when it comes to certain issues, such as the so called "integrity of the state of Israel". The case specifically shows the readiness of the Supreme Court to cooperate with the Israel's defence and security establishment in order to protect the "integrity of the Jewish state."

5. Concentrating on the fact that the law was violated, because the newspaper did

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210 Ibid., at 484
211 Id., at 485
212 Id., at 484
213 Id.

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not submit the information to the censor, enabled the Court to escape from dealing with the issue that two prisoners (terrorists) were killed.

4.4.2. Schnitzer v. Chief Military Censor (1988)

Application of the "Near Certainty" or "Probable Danger" Test

Another important case dealing with the powers of the Military Censor is the decision in the matter of *Schnitzer v. Chief Military Censor*, handed down by the Supreme Court in 1988.[214]

The significance of this decision lies in the establishment of the following guidelines:

1. The Court re-emphasized a new policy towards the scope of judicial review in security matters. The Court held that actions exercised by the security authorities which have subjective discretion - such as the Military Censor - are subject to judicial review.

2. The Court determined that the censor has to be guided by the "near certainty" or "probable danger" test adopted in the *Kol Ha'am case*.

3. The Court applied this policy to an until then almost unchallenged sector of the national security establishment, namely the military censorship apparatus. In considering substantive issues of the case the Court adopted a liberal/libertarian approach towards free speech jurisprudence and set aside a decision of the Military Censor.

As a result of this decision the agreement between the Editors' Committee and the Minister of Defence was amended:

According to Section 1 of the agreement the Censor may prohibit the publication only in instances in which there is

> "...a near certainty that the publication will result in serious harm to the security of the state."

Section 2 of the agreement states that military censorship would not be applied

> "...to political matters, opinions, interpretation, evaluations or any other matter unless they contain or allow one to derive security-related information".[215]

The Facts of the Case

In the *Schnitzer* case the Military Censor, pursuant to Regulation 87 of the

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214 *Schnitzer,* supra note 24

215 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, paras. 509, 511

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Defence (Emergency) Regulations, 1945, prohibited that the daily Hebrew newspaper *"Ha-Ir",* which was not member of the Editors' Committee, publishes parts of an article, that was submitted for approval several times.

The Censor forbade the publication of two matters:

1. Criticism of the effectiveness of the leadership of the "Institute for Intelligence and Special Functions", i.e. the Mossad.[216]

2. Disclosure of the forthcoming changes in the leadership of the Mossad.

The Censor argued with regard to the first matter that any criticism of the Mossad could harm its ability to function at all levels and this could harm state security.

With regard to the second point the Censor argued that the publication would endanger the life of the head of the Mossad.[217]

Against the Censor's decision a petition was launched to the Supreme Court.

The Decision of the Supreme Court

The Supreme Court dismissed the mentioned claims, overturned the decision of the Military Censor to prohibit the publication of the said article and established the following guidelines.

The Opinion of Justice Aharon Barak

With regard to Regulation 87 of the Defence (Emergency) Regulations, 1945 which - like Regulation 94 - grants absolute or subjective discretion to the decision making body, Justice Barak, handing down the judgment for the Court, held that

> "...despite the fact that the Defence (Emergency) Regulations, 1945 were enacted during the British Mandatory Regime they now form part of Israeli democratic legislation and should be interpreted in harmony with the new legal environment which has been developed since the establishment of the state of Israel."[218]

According to Justice Barak, the legal environment or normative umbrella over all legislation consists not only of the immediate legal context, but also of "accepted principles, basic aims and fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."[219]

Therefore, so Justice Barak, the Defence (Emergency) Regulations, 1945 should

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216 The Mossad is the Israeli Secret Service responsible for espionage, intelligence gathering and political covert operations in foreign countries. The General Security Service (Hebrew: Shin Bet) is responsible for operations inside the State of Israel.

217 *Schnitzer*, supra note 24, at 81, 82

218 Ibid., at 81, 87-88

219 Id., at 88

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be interpreted against the background of the basic values of Israeli law, which derive from the Declaration of the Establishment of the State of Israel of 1948 as well as from the foundations of Israel's justice system.[220]

Regarding the values which shape the interpretation of the Defence (Emergency) Regulations, 1945, Justice Barak held, that these are first and foremost "security considerations", such as the "defence of the state" and "public safety and order".

However, Justice Barak also held that:

> "Security is not an end in itself, but a means to an end. The end is the democratic regime, which is the rule of the people and which respects the rights of the individual, among which freedom of expression occupies an honored place. Everything must be done, therefore, to minimize the possibility that security considerations will restrict freedom of expression, which is one of the principal values which security is supposed to protect."[221]

According to Justice Barak's conception, in the case of a clash between security of the state and freedom of expression, these two conflicting values must be balanced against each other: Free expression may only be restricted when there is a near certainty of substantial harm to the security of the state and there is no other way to prevent the danger while preventing the injury to freedom of expression.[222]

With regard to the scope of judicial review of subjective discretion, i.e. the Military Censor's subjective discretion, Justice Barak held that subjective discretion does not differ from all other administrative discretion.

Subjective discretion must be exercised lawfully, i.e. within the law, for the purpose envisioned, reasonably, in good faith, on the basis of evidence reasonably evaluated, after giving due consideration of and balancing the other values involved.[223]

Justice Barak also held that the approach of a limited scope of judicial review of powers of authorities under the Defence (Emergency) Regulations, 1945, i.e. the doctrine of injusticiability of security considerations, will not be applied any more by the Supreme Court.[224]

The doctrine of injusticiability of security considerations was based on the subjective nature of the authority, on the thought that judges should not interfere, since they are not security experts, and on English precedents, primarily *Liversidge v. Anderson.*[225]

This doctrine of injusticiability of security considerations was established by the

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220 Id., at 89
221 Id., at 115, 116
222 Id., at 116
223 Id., at 77
224 Id., at 104-109
225 *Liversidge v. Anderson* [1941] 3 All E.R. 338 (H.L.)

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Israeli Supreme Court in 1950 in the decision *Al-Ayubi v. Minister of Defence,*[226] and practiced until the decision in the matter *Baransa v. Commander of Central Front* handed down by the Supreme Court in 1981.[227]

Finally, Justice Barak concluded that, since the Military Censor did not meet the burden of the proof cast upon him to establish that there exists "a near certainty of harm to security if the article will be published he [the Military Censor] did not act reasonably, since a reasonable Military Censor would have arrive at a different conclusion."[228]

Therefore the Supreme Court overturned the decision of the Military Censor to prohibit the publication of the said article.

4.5. Self-Censorship Imposed by Newspapers Editors

Beside the above described censorship agreement between the Editors' Committee and the IDF, there exists another very important informal arrangement according to which important or sensitive information may be kept secret from the public. This arrangement is a system of self-censorship imposed by the newspaper editors on themselves.

According to this semi-formal arrangement the members of the Editors' Committee agreed not to publish "secret" information, which is presented to them in closed meetings by governmental figures, i.e. the Prime Minister, a senior minister or sometimes the Chief of Staff of the IDF. The members promised not to publish this information, even if they obtained it also from a different source.

This information is not limited to issues of state security, but rather includes matters of internal and external politics, which according to the rules of military censorship do not require that this information is not published.[229]

As various examples of Israel's history showed, this system of self-censorship - based on a wrongly understood duty by many editors to limit themselves in order to fulfill "national responsibilities" or "interests of the state", and to protect the

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226 H.C. 46/50, *Al-Ayubi v. Minister of Defence*, 4 P.D. 222 (This case deals with the right to freedom of movement)

227 H.C. 554/81, *Baransa v. Commander of Central Front,* for a summary in English see 17 I.Y.H.R. (1987) 300. In this case - which deals with the right to freedom of movement - the Supreme Court held explicitly that the powers vested in the authority by the Defence Regulations will be examined scrupulously and not within the limitations and self-restraint characterizing the parallel English case law, as reflected in the *Liversidge v. Anderson Case*, supra note 226.
For more details on this issue see Chapter D.5.2.3. (The Defence (Emergency) Regulations, 1945 as Legal Basis for the System of Military Government within Israel from 1948-1966)

228 *Schnitzer*, supra note 24, at 115

229 See Hofnung, supra note 26, at 139

"security of the state" and the like - contributed to human rights violations and to the existence of serious crisis.[230]

It must be stressed here, that - instead of fulfilling their duties of criticizing and warning, and of defending the principles of a free press and the public's right to know - the members of the Editors' Committee often cooperated - in fact until today - closely with the government.

Only during a short period, namely after the Likud government came to power in 1977 and the beginning of the year 1984, the cooperation between the Editors Committee and the government broke down.

During the first year of the Lebanon war in 1982, self-censorship was not imposed, and military reporters enjoyed relative freedom in covering the events, exposing the decisions of the Israeli government to enter into the war and the way the war itself was conducted.[231]

4.6. The Prior Clearance Arrangement

In addition to the Editors' Committee agreement, which was discussed above, there exists another informal censorship arrangement, namely the prior clearance and accreditation arrangement.[232]

It has been established by the Israel Defence Forces (IDF) spokesman and is not mentioned in any law or legal rule, but is rather the "outcome of the desire of the army authorities to cultivate ordered public relations."[233]

According to the accreditation arrangement, military correspondents of the written press as well as from the Israeli Broadcasting Authority must be accredited by the Israel Defence Army in order to have access to information and to be invited by the defence authorities to participate in information tours, visits to military establishments, lectures and meetings with high military officers.[234]

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[230] Before the outbreak of the War in October 1973 the editors of various Hebrew newspapers received many reports from foreign news agencies about the concentration of Egyptian and Syrian military forces along the borders to Israel. A few days before the war broke out, the Editors' Committee met the Chief of Staff of the IDF who confirmed the reports. The editors have been asked to keep the information secret, and indeed did so. By imposing self-censorship the editors failed to criticize the system and its weakness. See Negbi, Paper Tiger, supra note 165, at 87

[231] Several Israeli reporters published in books shortly after the Lebanon war their data and observations: See Ze'ev Shiff and Ehud Ya'ari, Israel's Lebanon War (New York: Simon & Schuster 1984). S. Schiffer, Snowball (Tel Aviv: Edanim/Yediot Aharonot, 1984)

[232] Hofnung, supra note 26, at 142-144

[233] *Cohen*, supra note 41, at 162

[234] Ibid., at 161

The received information shall support journalists in carrying out their functions.[235] In general it does not consist of secret information, which could harm the security of the state - such information would have been already banned by the Military Censor. The main purpose of the accreditation arrangement is to advance the objectives of the army, i.e. to present to the public information which makes the task of the army easier,[236] to strengthen the fighting spirit and the faith of the soldiers in the justice of the cause and the competence of their officers.[237]

The censorship method of prior clearance is used with regard to information which is likely to embarrass the Israeli army, which criticizes the military establishment and places the government policy of Israel in a negative light, which shows the weakness of the Israeli system, the deficiencies of army operations and the declining confidence of soldiers in the army.[238]

It is easy to understand that this censorship method is not compatible with the tasks and functions of an independent press, which should check and criticize the Israeli military apparatus and the defence establishment, instead of playing the "arm of the government". Prior clearance was and is often used in order to suppress political dissent and criticism.

During the first decades of Israel's statehood military reporters of the Israeli Broadcasting Authority (IBA) had to submit all information concerning the Israeli army, including that obtained from foreign sources, to the IDF Spokesman, who reviewed it before publication.

Since 1980 prior clearance applies only in times of war. In that year the Israeli Broadcasting Authority and the IDF Spokesman agreed in a "letter of understanding" that only material which in the opinion of the IDF Spokesman "harms the morale of the troops in the front-line or in the rear" should be prohibited.

However, especially during the Lebanon war in 1982, the IDF Spokesman banned news items, which had even passed the Military Censor, because of the political view or line expressed in the article or report.[239]

Military reporters which fail to comply with the guidelines established by the IDF Spokesman are imposed severe sanctions, such as revocation of accreditation and denial of access to informational activities provided by the Defence Ministry and the Israeli army.

An important judgment concerning the issue under review was handed down by the Supreme Court in 1962 in the matter *Cohen v. Minister of Defence.*[240] This

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235 Id.
236 Id., at 165
237 Id., at 162
238 Hofnung, supra note 26, at 143-144
239 Ibid., at 144
240 *Cohen*, supra note 41, at 160

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judgment clearly reflects the Supreme Court's highly legal positivistic and formalistic approach.

4.6.1. Cohen v. Minister of Defence (1962)

The Facts of the Case

In this case the Israel Defence Force (IDF) revoked the accreditation of the military correspondent of the weekly magazine *"HaOlam HaZeh"* , since according to the arguments of the army it

> "...acted consistently on a line contrary to the educational spirit of the Israel Defence Army and accordingly the Israel Defence Army is not prepared to continue granting a special right to the representative of this weekly."[241]

The army also argued that since no law regulates the arrangement for accrediting correspondents, it had full discretion to act "all as appears beneficial to the army.

The army also stated that it will give assistance and information only to those editors, whose activity promotes their purposes.[242]

The weekly magazine petitioned to the High Court and claimed that the decision is arbitrary, discriminatory and based on irrelevant reasons.

The Decision of the Supreme Court

Application of a Strong Legal Formalistic and Dogmatic Concept

All three judges of the Supreme Court upheld the decision and argued that, since the petitioner failed to show that he has been deprived of a right recognized by law, the Court has no jurisdiction to interfere.[243]

Despite that fact that the petitioner claimed that he was violated in his right to receive nondiscriminatory treatment from the authorities, this was not recognized by the Court as ground for intervention.

The Court obliged the petitioner to show the existence of a specific statutory or judicially developed right, i.e. legal right of access to information, and held that

> "...only if the applicant possesses a legally recognized right wrongful discrimination can serve as a ground for the court's interference to protect that right but discrimination by itself does not create a right."[244]

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241 Ibid., at 161
242 Id., at 162
243 Id.
244 Id., at 169

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The Court held that since no law exists that establishes the right to be an accredited correspondent and to enjoy contact with the army authorities,[245] or which imposes upon the army the duty sending out invitations, arranging interviews with army correspondents, or receiving a journalist, the court cannot compel the army to do something which the legislature has not obliged to do.[246]

Summary and Conclusions

With this line of interpretation the Supreme Court clearly showed a highly positivistic approach according to which a legal right only exists if it is derived from a positive law enacted by a sovereign and backed by sanction, but where it is not the judiciary's task to create this right. - In the sense of "What is not created or granted does not exist."

4.7. Foreign Press and Journalists

Articles and reports of foreign correspondents stationed in Israel must also be submitted for the approval of the Military Censor, if they contain security related matters. Additionally, foreign correspondents have to carry letters of accreditation issued by the Government Press Office in order to get the permission to attend confidential briefings and to be present at security related events. Before the letters are handed out the journalists must sign a document by which they promise to submit any report on security matters to the Military Censor.[247]

Foreign broadcast media are not subject to Military Censorship.[248]

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[245] Id., at 163

[246] Id., at 167

[247] Until the outbreak of the Intifada in 1987, in only two cases the letters of accreditation were taken from foreign reporters. This situation changed during the Intifada. In April 1988, the letters of accreditation of the NBC and the Washington Post Reporters were revoked, after reporting that Israeli soldiers were involved in the killing of the PLO leader, Abu Jihad, in Tunisia. See *Ha'aretz,* 27 April 1988. In October 1988, the letter of accreditation of the Reuters Reporter was revoked after reporting on secret military units operating in Gaza and the West Bank against Intifada activists. See the article in *Ha'aretz,* 25 October 1988. See also Hofnung, supra note 26, at 145, 146

[248] Ibid.

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5. The Israeli Broadcasting Media - Radio and Television

5.1. Statutory Provisions

5.1.1. The Broadcasting Authority Law, 1965

Until the enactment of the Broadcast Authority Law, 1965[249] Israel's radio was directly controlled and directed by the Prime Minister's Office.

In 1965 under the above mentioned law the Israel Broadcast Authority, a semi-independent statutory body, which is subject to governmental control was established.[250] While the managing committee of this authority is appointed by the government,[251] the authority itself is not subject to direct governmental control and exercises its tasks and duties in an independent fashion.[252]

The policies of the authority are determined by the managing committee and a plenary appointed by the government from various political parties according to their representation in the Knesset.[253]

Until 1990 the reporters of the Broadcast Authority were subject to guidelines and procedures created to ensure "objective" reporting according to the "national consensus".[254]

The Broadcast Authority is bound to ensure that the broadcasts of the Broadcasting Service enable appropriate expression of different outlooks and opinions prevailing among the public and supply reliable information.[255]

In the case *Brand v. Minister of Communications*[256] for example the Court ruled that because of its statutory role as a forum for different views and ideas, the Broadcast Authority bears not only a duty to broadcast, but also to enable reasonable reception of its broadcasts, so that it may effectively promote the principle of free expression.

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249 Broadcast Authority Law, 1965, 19 L.S.I. (1965/66) 103
250 Hofnung, supra note 26, at 149
251 Section 14 of the Broadcast Authority Law, 1965, supra note 249
252 Broadcast Authority Law, 1965, ibid.
253 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 514
254 Hofnung, supra note 26, at 149
255 Section 4 of the Broadcast Authority Law, 1965, supra note 249
256 H.C. 3472/92, *Brand v. Minister of Communications*, 47(iii) P.D. 143

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5.1.2. The Second Television and Radio Broadcast Authority Law, 1990

Until 1990 there was only one television station. With the introduction of cable networks and the establishment of the Second Channel television network under the Second Television and Radio Broadcast Authority Law, 1990[257] the monopoly over public media channels started to brake down.[258]

All Israeli broadcast media are subject to Military Censorship in security-related matters in the same manner as the press.

5.2. Supreme Court Cases concerning Israel's Broadcasting Authority (IBA)

The decisions of the Israeli Broadcast Authority (IBA) are subject to judicial review for administrative legality by the Supreme Court of Justice.[259]
However, the willingness of the Supreme Court to intervene in decisions of the Broadcast Authority strongly depends on the type of expression, on other conflicting values (i.e. the so called security reasons, the public order), on the identity of the persons and political groups involved.[260]

With regard to the public's right to receive information, the Supreme Court has in two major cases for example overturned the decisions of the Broadcast Authority, which were intended to prevent the airing of a particular person or political group.

The first decision in this context was handed down by the Supreme Court in 1982 in the matter *Zichroni v. Broadcasting Authority.*[261]

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257 Second Television and Radio Broadcast Authority Law, 1990, S.H. No. 1304 (13 February 1990) 59

258 Hofnung, supra note 26, at 149

259 Combined Initial and First Periodic Report on the Implementation of the ICCPR, 1998, supra note 10, para. 514

260 See for example the following cases:
H.C. 606/93, *Promotion of Initiatives and Publishers (1981) Ltd. v. Broadcast Authority,* for a summary in English see 3 Justice (1993) 41 (This case concerns the right to freedom of commercial speech and the required restrictions on commercial speech); H.C. 2437/92, *Lev v. Minister of Education and Culture*, 46(iii) P.D. 756. H.C. 1/81, *Shiran v. Broadcast Authority,* 35(iii) P.D. 365

261 H.C. 243/82, *Zichroni v. Broadcasting Authority,* for summaries in English see: 19 Isr.L.Rev. (1984) 526 and The Jerusalem Post Law Reports (edited by A.F. Landau, Jerusalem, 1993) at 5

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5.2.1. Zichroni v. Broadcasting Authority (1982)

The Facts of the Case

In this case the petitioner, a prominent Israeli Jewish lawyer, complained against a resolution of the Broadcast Authority which decided not to broadcast or to television initiated interviews with "public persons" identified as persons who regard the PLO[262] as the sole or legitimate agent of Palestinian Arabs in the Occupied Territories.[263]

The Decision of the Supreme Court

All three judges of the court agreed with the above mentioned statement of the Broadcast Authority and discussed at great length questions regarding the principle of freedom of expression.

The majority of the judges came to the conclusion that the decision of the Broadcasting Authority was basically balanced, both from the point of view of the petitioner's freedom to receive information and from the point of view of safeguarding the vital interests of the state.

Nevertheless the Supreme Court overruled the decision of the Broadcast Authority due to the fact that the decision did not clearly specify the meaning of the phrases "public persons" and "identifying (themselves) with the PLO", making it impossible to implement the decision of the Managing Committee.[264]

However, despite the fact that the decision of the Broadcast Authority was overturned, the majority opinion clearly reflects an authoritarian spirit and speaker-oriented approach applied by the Supreme Court.

The Opinion of Justice Levin

Justice Levin held that, due to the established principles of free speech and in the light of the clear and known fact that the PLO endangers the security of the State of Israel, and even rejects its very existence the Authority has the right to preclude its reporters from initiating interviews with public figures identified with the PLO.

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262 This is the "Palestine Liberation Organization".

263 It should be mentioned that at this time - in contrast of the situation of today - the state of Israel did not yet regard the Palestine Liberation Organization (PLO) as the legitimate representative of the Palestinian people, but rather as an *"organization which endangers the security and the well-being of Israel, and even rejects its right to exist."* See *Zichroni*; supra note 261, for a summary in English see The Jerusalem Post Law Reports, at 5, 6

264 Ibid., for a summary in English see 19 Isr.L.Rev. (1984) 526, at 527

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After having applied the test of reasonableness, Justice Levin held that the decision of the Authority keeps the standards of the "fairness doctrine" as fixed in the United States, and which had been recognized by the Supreme Court of Israel on the basis of American precedent.[265]

He cited from American jurisprudence,[266] and held that the Broadcasts decision enabled a full, fair and balanced presentation of information, despite the fact such presentation by certain persons was precluded.

However, Justice Levin's decision to uphold the petition rested on the fact that the particular decision under review could not be implemented.

The Opinion of Justice Bach

Justice Gavriel Bach stated that speech rights could not be restricted without reference to the content, and that the decision of the Authority was unacceptable, since it unjustifiable infringed the principle of free speech.

He held that the "fairness doctrine" was intended to ensure the right of the community to receive reliable, full and balanced information, as distinct form news that was presented in a prejudiced, arbitrary and partisan manner.

According to Justice Bach's opinion this "fairness doctrine" has been violated by the decision in question.

Interesting is also that he referred to the test adopted in the Kol Ha'am case as the "clear and present danger" test, and not as "probable danger test".[267]

Justice Bach's opinion clearly reflects a libertarian thinking.

The Opinion of Justice Yehuda Cohen

The third judge, Yehuda Cohen, wrote a dissenting opinion and held that it was not the content of what is said, but the personality of the speaker, that should guide the restrictions of speech rights.

He agreed with Justice Levin that the ban on personal interviews with members of and sympathizers with the PLO was not unreasonable, and did not violate the right of the public to receive full and fair information of what was going on in the Occupied Territories.

He offered the following example: "A person expresses opposition to Jewish settlements in [the Occupied Territories] - this is a legitimate opinion when it is expressed by someone who seeks the well-being of the state.

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265 Id., for a summary in English see The Jerusalem Post Law Reports, at 7
266 Id., 37(i) P.D. 757, at 775 (Hebrew)
267 Id., for a summary in English see The Jerusalem Post Law Reports, at 9,10

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But the same statement, expressed by someone who is considered by the population of [the Occupied Territories] to voice the views of the Palestine Liberation Organization, carries a subversive and inciting impact and increases the population's hostility."[268]

His opinion clearly expresses the exercised practice by the Supreme Court of a different treatment of speakers dependent on his identity.

5.2.2. Kahane v. Broadcasting Authority (1985)

Another important decision involving the right to receive information in the context of a decision of the Broadcasting Authority is the case *Kahane v. Broadcasting Authority*[269]

The Facts of the Case

This case deals with the decision of the Broadcast Authority not to broadcast the political opinions of Rabbi Meir Kahane, who was elected to the Knesset on the extremely anti-Arab and racist "Kach" platform, calling for exclusion and expulsion of all Palestinian Arab citizens from the state of Israel and the Occupied Territories, for discrimination between Jews and non-Jews, and for outlawing sexual relations between Jews and non-Jews.[270]

The decision of the Broadcast Authority was intended to ensure that the public media would not serve as a forum for incitement against citizens, and for statements which are harmful to the state and contradictory to its principles of the Declaration of the Establishment of the State of Israel, 1948 which will ensure the complete equality of political and social rights, regardless of race, religion or sex.

Rabbi Meir Kahane petitioned the legality of the Broadcasting Authority's decision and argued that the said decision was inconsistent with its duty according to the Broadcast Authority Law, 1965.

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268 Id., 37(i) P.D. 757, at 787 (Hebrew)

269 *Kahane,* supra note 54

270 Because of his racist position, the Central Elections Committee had declared the "Kach" platform ineligible for election, but the Supreme Court applying a highly formalistic and dogmatic approach and concentrating on the lack of a statutory regulation and on procedural defects, reversed the decision of the Elections Committee. The Kach List has won one seat in the 11th Knesset. See E.A. 2/84,3/84, *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset* (Neiman I), translated into English in 8 S.J. (1969-1988) 83; for a summary in English see 20 Isr.L.Rev. (1985) 397. For more details on this case see Chapter C.6. (The Concept of Israel as a "Jewish State" and its Impact on Legislation and Jurisprudence concerning the Right to be Voted)

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The Decision of the Supreme Court

The Supreme Court overturned the decision of the Broadcast Authority and ordered the Broadcasting Authority to broadcast all of Kahane's views and opinions "just as those of other political parties on a basis of equality."

Despite the fact that the decision of the Supreme Court was unanimously, the opinions of the three judges show significant differences concerning the question about the

> "...authority and the scope of the Broadcasting Authority regarding the broadcast of views and opinions which are in conflict with the democratic nature of the state, since they spread hatred and hostility among people because of their race or national origins."[271]

The Opinion of Justice Aharon Barak

Justice Aharon Barak analyzed in detail the nature and the scope of freedom of expression and raised the question whether freedom of speech includes racist speech.

He came to the conclusion that freedom of speech includes "internally" the freedom of racist speech and may not be restrained, particularly when it comes to the freedom of speech of a political party in parliamentary life.

He also held that the Broadcast Authority has no power to place a prospective ban on publications of a racist speech. In order to found his opinion he invoke the justifications of the search for truth, the wish to self fulfillment, and relied first of all on the democratic argument.

He stated that freedom of speech is what gives the regime its democratic character, that without democracy there is no freedom of speech and without freedom of speech there is no democracy.

He held that the need to maintain the democratic regime, which is based on tolerance and social stability, support freedom of speech as a central basic right of Israel's constitutional law.

Then he went on and stated that freedom of speech is not just the freedom to express or hear widely accepted views, but also the freedom to express dangerous, annoying and racist views, which the public abhors and hates.[272]

Only if educational and penal means cannot prevent the danger to public order, and only if democracy is not strong enough, and "a match of hatred may light a social fire, freedom of speech may be limited."

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271 *Kahane,* supra note 54, 41(iii) P.D. 255, at 262 (Hebrew)

272 Ibid., for a summary in English see 23 Isr.L.Rev. (1989) 515

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Summary and Conclusions regarding the Opinion of Justice Aharon Barak

The most important aspect in Justice Barak's decision is the fact that - although discussing at great length the established and by the Israeli authorities adopted jurisprudence regarding situations of a clash between free speech and public order - he did not apply these principles on the case before him.

On the one hand Justice Barak emphasized:

1. That in a democratic society freedom of speech is not absolute but relative, and other basic principles, such as human dignity, the right to property, the integrity of the judicial process and the public peace, must also be taken into account.

2. That previous decisions determined that if the principle of freedom of speech and public order clash, public order prevails,[273] but only where the injury to public order is harsh, serious and severe,[274] and only if there exists a near certainty that the speech will cause real damage to the public order.[275]

3. That the "term of public order includes the protection of human dignity and the public's feelings, whether majority or minority ones," and that a near certainty that the feelings of a religious or ethnic minority be really and harshly hurt, by publication of a racist speech, would justify limiting that speech."[276]

4. That the Israeli Penal Code, 1977[277] as well as various international agreements, e.g. the U.N. Convention on the Elimination of All Forms of Racial Discrimination, 1965 to which Israel is a party, explicitly call for combating the phenomenon of racism.

On the other hand Justice Barak completely disregarded the mentioned principles and the fact that there exist specific statutory regulations in Israel against racial incitement:

1. He did not accept that racist speech - due to its dangerous and unique nature - must be treated differently than other forms of political speech.

2. He rather believes that "freedom of speech includes "internally" the freedom of racist speech as well," because from "freedom to express racist views and opinions democracy will only emerge strengthened and more robust."

3. He did not recognize that any political doctrine of superiority based on racial differentiation is outlawed by international law, because it is scientifically false, morally condemnable, socially unjust and dangerous and because there is no

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[273] H.C. 153/83, *Levi v. Southern District Police Commander,* translated into English in 7 S.J. (1983-1987) 109

[274] H.C. 14/86, *Laor v. Film and Play Supervisory Board*, 41(i) P.D. 421

[275] *Kahane,* supra note 54

[276] Ibid., at 295

[277] Justice Barak mentions for instance sections of the Penal Code, such as incitements to racism 144(a); injury to religious feelings (173); publication of obscene materials (214)

justification for racial discrimination, neither in theory nor in practice, anywhere.

4. He did not recognize that racism is an obstacle to friendly and peaceful relations among nations as well as among peoples living within one and the same territory, and that racism is contradictory to the ideals of any human society.

5. He did not honor the U.N. Convention on the Elimination of All Forms of Racial Discrimination, 1965,[278] which explicitly states in Article 4(a) that all "States Parties shall declare as an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination."

6. He also did not consider existing Israeli laws, but rather accepted the American doctrine on the clash between freedom of speech and racism.[279]

The Opinion of Justice Bach

Justice Gavriel Bach agreed with Justice Barak only on the issue that prior restraint, i.e. an absolute denial of access to the electronic media, by the Broadcast Authority is not legitimate, and does not fit the near certainty test, which requires a case by case examination of every speech.

The decision whether or not to broadcast must be ad hoc, following an examination of whether there is a near certainty of a real danger to the public order if a particular opinion is broadcast at a particular time.

However with regard to the issue if freedom of expression also includes racist speech Justice Bach did explicitly not share the opinion of Justice Barak.

He stressed that free speech is not an absolute value and may be restricted when it clashes with a superior social interest.

According to his opinion racist or inciting statements concerning racial or ethnic affiliation are harmful to the feelings of those people and communities against which they are directed, and their publication constitutes a breach of public order.

Justice Bach explicitly recognized the catastrophic experience with racism. His words deserve to be quoted:

> "I don't think that in Israel, given the tragic and traumatic experience of our people, I need waste words on the destructive nature and essence of incitement to racial hatred. There is no verbal conduct which has more negative

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[278] International Convention on the Elimination of All Forms of Racial Discrimination, 1966, published in: Basic Documents on Human Rights, Third Edition, Edited by Ian Brownlie, Q.C. (Clarendon Press, Oxford, 1992) 148

[279] Justice Barak held that "American Courts have often held that a criminal prosecution of forbidden speech is possible in more instances that prior restraint." See *Near v. Minnesota,* 283 U.S. 697 (1931), supra note 119; New *York Times Co. v. United States*, 403 U.S. 713 (1971)

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> consequences, such as encouraging violence, appealing to the lowest and most debased instincts of people, and undermining the dignity of parts of the population against whom such incitement is directed. Therefore, if there are spheres in which freedom of expression may be restricted out of concern for a preferred public interest, isn't it only proper to include among them the interest in preventing the fanning of hatred and hostility on racial and ethnic grounds?"[280]

He held that because of this alone the Broadcast Authority may refrain from publishing programs of such content or meaning.

Justice Bach held that the Broadcast Authority should not permit Rabbi Meir Kahane to express racist views on television and radio, and that the Authority could stop the broadcast of a speech if it had reason to believe that the said speech would constitute a breach of the law against racial incitement.

The third judge Shoshana Netanyahu did not express an own opinion on those issues which divided her colleagues.

[280] *Kahane,* supra note 54, at 311

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6. Conclusions

1. Despite the fact that the government of Israel has a relatively liberal approach towards the right to freedom of expression, the right is not fully respected with regard to the Palestinian Arab people.

2. The right to freedom of expression, which according to Article 19(2) of the ICCPR includes

> "...the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"

is not sufficiently protected within Israel's legal system.

3. Expressing opposition to the aims and policies of a political party or the government of the day is a basic democratic right.

4. Political expression of non-violent nature is at the heart of any democratic regime.

7. Recommendations

- The prepared Draft Basic Law: Freedom of Expression and Association should be enacted by the Knesset, or alternatively the existing Basic Law: Human Dignity and Freedom must be amended so as to make it clear that the guarantees of freedom of expression in both the existing Constitution, i.e. the existing Basic Law, and under international law supersede ordinary legislation.
- Existing legislation, as well as the jurisprudence and governmental practices concerning the right to freedom of expression should be reviewed in order to ensure full compliance with international law and constitutional guarantees to freedom of expression.
- The sections of the British mandatory Press Ordinance, 1933, which force all printed media to obtain a permit, i.e. a license prior to the publication, should be abolished and the doctrine against prior restraint should be implemented.
- The British mandatory Defence (Emergency) Regulations, 1945, providing for military censorship and other authoritarian measures, should be abolished.
- The rules of evidence, i.e. the Evidence Ordinance (New Version), 1971 providing for the possibility of submission of a Certificate of Privileged Evidence (CPE) signed by the Minister of Defence, must be amended.
- The Military Censorship Agreement between the Editors' Committee and the

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Israel Defence Force (IDF), the practice of self-censorship, as well as the prior clearance and accreditation arrangement established by the IDF, should be abolished.

- A comprehensive system for access to information based on public interest and principles of openness and transparency should be established.
- International law and constitutional guarantees must be taken into account when drafting new legislation.
- Discriminatory law enforcement must be ended.
- Instead of the formula of balancing values and interests the jurisprudence of the Supreme Court should establish absolute limits.
- The permanent state of emergency must be ended and emergency derogations from the right to freedom of expression must be limited in time.
- Security considerations shall not be used as justification in order to suppress speech rights of Palestinian Arab citizens, if these activities do not have any potential to involve violent acts, but rather express opposition to the policies adopted by the government of the day.

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G. THE RIGHT TO PROPERTY

1. Introduction

The right to property is a fundamental human right which is recognized by all democratic countries and embodied in a series of international declarations and conventions. Article 17(1) of the Universal Declaration of Human Rights, 1948 [hereinafter: UDHR] explicitly relates to this right and states:

> "Everyone has the right to own property alone as well as in association with others."[1]

Article 17(2) of the UDHR states:

> "No one shall be arbitrarily deprived of his property."[2]

Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 [hereinafter: CERD] - which was ratified by the Israeli government on 3 January 1971 - states:

> "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...the right to own property alone as well as in association with others."[3]

Regarding the constitutional status of the right to property in Israel it must be said that until 1992 this right has never enjoyed any formal protection through a superior normative source. Nonetheless, when the state of Israel was established in Palestine on 14 May 1948, the right to property was at least indirectly recognized by the Declaration of the Establishment of the State of Israel, 1948 which states that the state of Israel

> "...will foster the development of the country for the benefit of all its inhabitants";
> "...will be based on freedom, justice and peace as envisaged by the prophets of Israel";
> "...will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex and will guarantee freedom of religion, conscience, language, education and culture";
> "...will be faithful to the principles of the Charter of the United Nations."[4]

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1 Article 17 of the Universal Declaration of Human Rights, 1948, published in Basic Documents on Human Rights, Third Edition, Edited by Ian Brownlie, Q.C. (Clarendon Press, Oxford, 1992) 21, at 24

2 Ibid.

3 Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966, published in Basic Documents on Human Rights, id., 148, at 151-152

4 Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I.(1948) 3, at 4

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But until 1992, the Declaration of the Establishment of the State of Israel, 1948 was neither considered as part of the constitutional system, which determines the validity of various ordinances and laws or their repeal, nor as having the force of a law.[5] The Declaration's only object was to affirm the foundations and the establishment of the state of Israel for the purpose of its recognition by international law, and to express the vision of the people and its faith but not to confer any individual rights to the citizen of the state of Israel nor to impose any legal duty on the Israeli government.[6]

Only in 1992, with the enactment of the Basic Law: Human Dignity and Freedom, the right to property has been formally protected on a constitutional level. Section 3 of the Basic Law: Human Dignity and Freedom states:

> "No injury shall be caused to the property of a person."[7]

Important to mention is the fact that although the Basic Law: Human Dignity and Freedom has granted explicit constitutional protection to the right to property, the mentioned right may be limited in accordance with Sections 8 and 12 of the said Basic Law.

As already discussed in Chapter B.7.2. of this work, Section 8 entails a so called "balancing clause" and prohibits any infringement of the rights conferred by the Basic Law: Human Dignity and Freedom except by a law which accords with the values of the State of Israel and is intended for a fitting purpose, and only to the extent necessary.

Section 8 of the Basic Law: Human Dignity and Freedom states as follows:

> "The rights conferred by this Basic Law shall not be infringed save where provided by a law which accords with the values of the State of Israel, which was intended for a fitting purpose, and only to the extent necessary, or by a law as aforesaid by virtue of express authorization therein."[8]

Important to mention is the fact that Section 8 has to be read together with Section 1A of the Basic Law: Human Dignity and Freedom - an amendment which was introduced in 1994 - referring to the values of the state of Israel as a "Jewish and a democratic state" and stating that the purpose of this Basic Law is to protect human dignity and freedom in order to entrench these values.

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5 See Chapter B.3.3. (The Nature and Legal Status of the Declaration of the Establishment of the State of Israel, 1948)

6 H.C. 10/48, *Zvi Zeev v. The Acting District Commissioner of the Urban Area of Tel Aviv*, translated into English in 1 S.J. (1948-1953) 68, at 71-72; H.C. 73/53, *Kol Ha'am Company Ltd. v. Minister of Interior,* translated into English in 1 S.J. (1948-1953) 90, at 105

7 Section 3 of the Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation, S.H. No. 1454 (10 March 1994)

8 Section 8 of the Basic Law: Human Dignity and Freedom, ibid.

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Section 1A of the Basic Law: Human Dignity and Freedom states:

> "The object of this Basic Law is to protect human dignity and freedom, in order to entrench the values of the State of Israel as a Jewish and democratic State in a Basic Law."[9]

The first principle, defining Israel as a Jewish state, emphasizes the national character of the state and is not only a sociological description but - as I have demonstrated already in previous chapters of this work - is rather an ideological description that finds its expression in the whole constitutional and normative framework of the state. The second principle on the other hand stresses universal democratic values and should have implied that the state of Israel serves the needs of *all* its citizens.

However, the most Israeli legal scholars and Supreme Court judges - ranging from the liberal, secular to the conservative, religious spectrum - do not acknowledge the tension and inherent antagonism between the two notions of Israel's nationhood.

The current President of the Supreme Court Aharon Barak, who for instance is considered to represent the liberal, secular approach within Israel's legal community, views the Jewish state as one that not only includes Jewish heritage and Jewish law but also Zionist values.[10]

But - as I have already elaborated in Chapter A[11] of this work - the nationalistic concept of political Zionism in all its appearing - seemingly different - doctrines always focuses on a complete exclusion of the indigenous Palestinian Arab people especially from the allocation of land but also from other resources (water, budget).

In this chapter, I will show in detail in the specific context of the rights to movable and immovable property that - as long as such a concept as it is formulated by political Zionism - lays at the very foundations of the whole legal, institutional and governmental system itself, the concept of "democracy" is not taken seriously by the Israeli state.

For it is not enough just to formally "proclaim a democratic state" and to write down such a proclamation in a law that is called "Basic", without however doing anything in order to incorporate this concept on a substantial level into the whole legal and institutional system itself.

The interpretation of the term "Jewish state" - given by the present Supreme Court President Aharon Barak - is characterized by a strong emphasis on the

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9 Section 1A of the Basic Law: Human Dignity and Freedom, id.

10 Aharon Barak, Interpretation in Law, Vol. III, Constitutional Interpretation (Jerusalem, 1994) at 330

11 See especially Chapter A.2. (Ideology and Doctrines of the Concept of Political Zionism), Chapter A.3. (Sources of the Concept of Political Zionism) and Chapter A.4. (Establishment of "Jewish National Institutions" by the Zionist Movement)

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religious-ethnic aspects of the state of Israel which - according to his interpretation - has to be first of all the state of the Jewish people but not the state of *all* its citizens,[12] as it would be appropriate for a state based on a democratic concept.

His interpretation of the term "Jewish state" is also similar to the religious perception of the Torah and the Jewish tradition as the sovereign authority on the life of the Jews. This is revealed by the fact if one compares President Barak's interpretation with that of Supreme Court Justice Menachem Elon, who in the majority of his cases applies Jewish law, the same basic tenets may be discerned.[13]

As already mentioned above, the right to property may also be limited in accordance with Section 12 of the Basic Law: Human Dignity and Freedom, which provides that emergency regulations that are properly in force may deny or restrict the rights under the said Basic Law.[14]

Section 12 of the Basic Law: Human Dignity and Freedom states as follows:

> "Nothing in any emergency regulations shall be effective to alter this Basic Law, to suspend its validity temporarily or to stipulate conditions to it; however,

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12 Supreme Court President Barak has interpreted the term "Jewish state" also in the following way:

> "*...The Jewish state is, therefore, the state of the Jewish people*...it is a state in which every Jew has the right to return... it is a state where its language is Hebrew and most of its holidays represent its national rebirth... a Jewish state is a state which developed a Jewish culture, Jewish education and *a loving Jewish people*...a Jewish state derives its values from its religious heritage, the Bible is the basic of his books and Israel's prophets are the basis of its morality. A Jewish state is also a state where the Jewish Law fulfills a significant role... *a Jewish state is a state in which the values of Israel, Torah, Jewish heritage and the values of the Jewish Halacha are the bases of its values.*" [Emphasis added]

Barak, Interpretation in Law, supra note 10, at 332. For more details on this issue see Chapter B.7.2. (The Basic Law: Human Dignity and Freedom, 1992 - Amended in 1994)

13 With regard to the values of the state of Israel as a "Jewish and democratic state" Justice Menachem Elon expressed the following view:

> "...a significant element of the term "Jewish" includes Jewish law. Every judge who is faced with a constitutional problem, is now bound to anchor his decision in the values of a Jewish and democratic state, and the term "Jewish" precedes "democratic". Of course, the term "Jewish" also includes Zionist values but one cannot say that it does not include the Talmud. That would be nonsense. Regrettably, an opinion was expressed that it only included Jewish values which were accepted by the world. *Today it is agreed that Jewish values are not necessarily universal values...*" [Emphasis added].

Menachem Elon, We are Bound to Anchor Decisions in the Values of a Jewish and Democratic State, Justice, 17 (1998) 10. For more details on this issue see Chapter B.7.2. (The Basic Law: Human Dignity and Freedom, 1992 - Amended in 1994)

14 The state of Israel is since its establishment in May 1948 until the very day of writing this work in a permanent state of emergency. For more details on this issue see Chapter D. (Israel's Permanent State of Emergency and the Question of its Compatibility with the Concept of a Liberal Democracy Based on Human Rights)

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> where the State is in a state of emergency by virtue of a declaration under Section 9 of the Law and Administration Ordinance 1948, emergency regulations may be promulgated under the said Section which will have the effect of revoking or restricting rights under this Basic Law, provided however that the revocation or restriction shall be for a fitting purpose and for a period and to an extent which shall not exceed what is required."[15]

Important to mention is also Section 10 of the Basic Law: Human Dignity and Freedom which states as follows:

> "This Basic Law shall not derogate from the validity of any law existing on the eve of this Basic Law coming into force."[16]

This section clearly reveals that the Basic Law: Human Dignity and Freedom directly effects only laws enacted after March 1992 with the result that all the property laws that were enacted until then - and which were and are especially harmful and discriminatory towards the Palestinian Arab people - stay in force.

At this point it seems important to me to mention two rules of interpretation of law declared by the present Supreme Court President Aharon Barak:

The one rule states that "previous legislation has to be interpreted in accordance with the spirit of the new Basic Law: Human Dignity and Freedom."[17]

The other rule states that "Israel's inherited and enacted legislation must be "interpreted in harmony with the new legal environment and normative umbrella which has been developed since the establishment of the state of Israel, and which consists not only of the immediate legal context, but also of accepted principles, basic aims and fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."[18] That means in other words: All the laws and emergency regulations which were enacted over the decades and are still valid, as well as the jurisprudence that was never declared invalid but reflects the "principles, basic aims and fundamental criteria which are accepted by the Israeli society and derive from the sources of Israel's social consciousness" form "the new legal environment or normative umbrella over all legislation" - in spite of the fact that such legal instruments and such jurisprudence are often illegal, immoral, a gross violation of international law and universally recognized principles of law and therefore unacceptable.

As I will show in the course of this chapter - in accordance with the above mentioned line of interpretation - many totally illegal, undemocratic, immoral and

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15 Section 12 of the Basic Law: Human Dignity and Freedom, supra note 7

16 Section 10 of the Basic Law: Human Dignity and Freedom, ibid.

17 Aharon Barak, The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law, 31 Isr.L.Rev. (1997) 3, at 11

18 H.C. 680/88, *Schnitzer v. Chief Military Censor,* translated into English in 9 S.J. (1977-1990) 77, at 81, 87-88. (This case was discussed in detail in Chapter F.4.4. of this work)

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therefore unacceptable laws and regulations are still in force and - as the reality shows - also regularly applied by the executive apparatus.

In this chapter I will show that despite Israel's commitments according to international law, its initial assertions in the Declaration of the Establishment of the State, 1948 as well as the present constitutional obligation under Section 3 of the Basic Law: Human Dignity and Freedom to honor the right to property, Israel committed and still commits severe infringements of this right.

It should be stressed here that the issue of violations of property rights of the Palestinian Arab people - especially the violation of their rights to immovable property (i.e. land rights) - constitutes the very essence of the still unresolved conflict between the Palestinian Arab people (living within Israel as well as in the Occupied Territories or as refugees outside of Palestine) and the state of Israel.

The purpose of this Chapter G is to provide an overview about the different normative sources relating to property rights (especially land rights) and to examine the policies and methods which were - and still are - applied by the Israeli authorities and quasi-governmental institutions in order to come into possession and ownership of land that belonged to the Palestinian Arab people living in Israel and the annexed areas of the Occupied Territories - i.e. East Jerusalem and the Golan Heights. There will also be a discussion of the institutions involved in the process of land seizure.

Additionally, this Chapter G will provide an insight into the fundamental jurisprudential concepts and methods of legal interpretation which were employed by the judges of the Israeli Supreme Court in order to found and justify their opinions and to approve the dominant ideologies and political interests involved.

As already elaborated in Chapter E of this work the nature of the legal regimes, which are applied in the area within Israel's borders set by the 1949 Armistice Agreements [hereinafter: Israel within the Green Line] and in the territories occupied during the war in June 1967, are different. This Chapter G will mainly deal with the situation of the right to property in Israel within the Green Line since 1948, while an overview discussion of the situation in the Occupied Territories since 1967 and the big amount of legislation and jurisprudence that developed in the context of these territories was already provided in Chapter E.

Nevertheless it can be said that the underlying philosophy, the policy line and methods used by the Israeli authorities in order to come into possession and ownership of Palestinian Arab land were in Israel within the Green Line as well as in the Occupied Territories the same.

Although, over the years, the processes of taking possession and transferring the ownership of land, took different forms and strategies - by introducing a variety of legal instruments, methods and myths, and by establishing and using many administrative institutions - the ultimate objectives by the Zionist movement

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remained in Israel within the Green Line as well as in the Occupied Territories, from the very beginnings and throughout all times unchanged and the same.

These objectives were and are the "de-Arabization" and "Israelification" of Arab owned land - to use the terms of Baruch Kimmerling[19] - or, "ethnic-cleansing" and "colonization" - to use two other terms of international law.

As I will demonstrate in the course of this Chapter G, this ultimate Zionist objective can and could be learned from a huge number of sources, namely:

1. Official Zionist documents proposing the transfer of Palestinian Arabs to other countries.
2. Articles, books and reports written by leading Zionist figures.
3. Town planning schemes issued by the different Israeli government ministries (Interior Ministry - Planning Department, Building and Housing Ministry).
4. Official Notes, speeches, statements and decisions in the Knesset and Municipal Council meetings.
5. Internal working papers.
6. Jurisprudence of the Israeli Supreme Court.

Prominent Zionist figures throughout all decades - from the beginnings of movement at the turn of the 19th century and continuously since the establishment of the state of Israel in Palestine in 1948 and also after the occupation of the territories[20] in 1967 up until today - have clearly declared their objectives and policy with regard to the land in Palestine.

Already in 1904, Menachem Ussishkin, a Zionist leader and the then head of the Jewish National Fund (JNF), described the main objectives and the methods to be employed by the Zionist movement as follows:

> "In order to establish Jewish autonomy, or to be more exact -- a Jewish state in Palestine, it is first of all essential that all the land of Palestine, or at least most of it, be the property of the Jewish people. Without the right of land ownership, Palestine will never be Jewish regardless of the number of Jews in it, both in the city and country... But how is land ownership customarily achieved? Only in one of the following three ways: by force -- that is, through conquest in war (or, in other words, by stealing land from its owners); by compulsion -- that is, through government expropriation of land; and by voluntary sale on the part of the owners.
>
> Which of these three ways is appropriate in our case?
> The first way is out of the question, for we are too weak for this method. Thus,

[19] The terms "de-Arabization" and "Israelification" of land are often used in sociological and anthropological studies. See for example the work of Baruch Kimmerling, Land, Conflict and Nation Building: A Sociological Study of the Territorial Factors in the Jewish-Arab Conflict (Department of Sociology and Social Anthropology, Hebrew University of Jerusalem, 1976) at 223-224

[20] I.e. the Sinai Peninsula, the Gaza Strip, the Golan Heights, the West Bank including the area of East Jerusalem

> we can only speak of the second and third ways." [Emphasis added][21]

In 1936, Avraham Granovsky, another Zionist leader who in 1960 became the president of the JNF, wrote as follows:

> "The land question is quite literally one of life or death for Zionism and the Jewish National Home. Zionism proposes to re-establish the Jewish people in the land of its ancestors...If, therefore, the necessary land be kept out of reach, the Zionist goal can never be attained."[22]

In 1987, Teddy Kollek, the then mayor of Jerusalem spoke in a Jerusalem Municipal Council meeting as follows:

> "Whoever thinks that the Arabs have it so good here is simply wrong... Take *Bet Safafa* as an example. Some of their land was taken for Katamon, some of their land taken for *'Itri'*, some for *Gilo*, some for the road that traverses that neighborhood, and for *Patt*... I could tell you the same story about every village."[23]

In 1994, Amir Cheshin, former advisor on Arab affairs to the mayor of Jerusalem, expressed the Israeli planning and building policy towards the Palestinian Arab people living in Jerusalem in this way:

> "...The planning and building laws in East Jerusalem rest on a policy that calls for placing obstacles in the way of planning in the Arab sector - this is done in order to preserve the demographic balance[24] between Jews and Arabs in the city, which is presently in a ratio of 72 % Jews and 28 % non-Jews."[25]

This means that in complete disregard of the realities on the ground (namely that Palestine is populated by a large number of native Palestinian Arabs which once even formed the majority of the total population) and in complete violation of international law and fundamental principles of a democratic and fair society that treats its population equally and without distinction based on religious or ethnic considerations, the various Israeli governments adopted from the very beginnings a land, planning and housing policy based on political-national and religious-ethnic considerations.

This policy lead in the past and still leads to a permanently favored treatment of the whole Jewish population (i.e. the present and the potential future) at the expense of the indigenous Palestinian Arab people and their fundamental rights and freedoms

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[21] Menachem Ussishkin, quoted in Kimmerling, supra note 19, at 59

[22] Avraham Granovsky, The Land Issue in Palestine, (KEREN KAYEMET LEISRAEL (Jewish National Fund) Jerusalem, 1936) at 12

[23] Minutes of Jerusalem Municipal Council meeting, 27 December 1987, quoted in B'Tselem, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem (Jerusalem, January 1997) at 55

[24] For more details on the term of "demographic balance" see Chapter E.2.5.4. (Israel's Settlement Policy in Jerusalem)

[25] Quoted in B'Tselem, A Policy of Discrimination, 1997, at 71

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in general, and their rights to property (especially land), housing and residence in particular.

In accordance with existing British mandatory legislation and a series of newly enacted laws, emergency regulations and military orders,[26] the Israeli government employed the following practices and methods in Israel within the Green Line as well as in the Occupied Territories in order to come into possession and ownership of land:

- Declaration of Palestinian Arabs as "absentees" and confiscating their land.
- Expropriation of Palestinian Arab private owned land for "security purposes".
- Expropriation of Palestinian Arab private owned land for "public purposes".
- Declaration of Arab owned land as "closed areas" and confiscating this land.
- Declaration of Arab owned land as "security zone " and confiscating this land.
- Declaration of land as "waste land" and confiscating this land.
- Transfer of ownership from Arab Palestinians to Jewish national institutions.
- House demolitions.

The applied policies and methods will be examined in view of international law and universally recognized principles of law, which are binding on all states in accordance with Article 38(1)(c) of the Statute of the International Court of Justice, as well as in view of Israel's domestic laws and constitutional changes that took place with the enactment of the Basic Law: Human Dignity and Liberty in 1992. In order to understand the whole system of property laws in Israel, their development, their way to function and their effects for the Palestinian Arab people living in the area, it is necessary to start with the early days after Israel's declaration in May 1948 and to look at the new situation that emerged during and after the fightings that took place as a consequence of the establishment of the state of Israel. This shall be done in the following sub-chapter 2.

[26] The legal regime in the Occupied Territories was - and still is - mainly based on military orders which exist in a huge number. For more details see Chapter E. (The Administrative, Legal and Judicial System in the Occupied Territories)

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2. Israel Since 1948

2.1. General Remarks

The aim and policy of the Zionist movement before the establishment of the state of Israel in Palestine in 1948 was to purchase and acquire land that was owned by Palestinian Arabs and - in conformity with the principle of "inalienability of land"[27] - to "freeze"[28] it from an economic and national standpoint. As already elaborated in Chapter A of this work,[29] the Zionist movement established in 1901 at the 5th Zionist Congress the Jewish National Fund (JNF)[30] in order to fulfill the above mentioned Zionist goal.

The JNF was the main official arm and organ of the Zionist Organization [which was later on called the World Zionist Organization (WZO)] in the era before the establishment of the state of Israel in Palestine in 1948, whose tasks were to purchase and acquire land in Palestine (but not to sell it) and to finance Jewish communal settlements.

In 1907 the JNF was separately registered in London as Limited Liability Company[31] and all the lands purchased by the JNF were registered in the name of this private company, which - according to Article 3 of its Memorandum of Association of the JNF, 1907 - was not permitted

> "(11) ...to divest itself of the paramount ownership of any of the soil of the prescribed region which it may from time to time acquire..."[32]

Considering the already in Chapter A.4.3. elaborated fact that the Constitution of the Jewish Agency of 1929 provides in its Article 3[33] that

> "(d) Land is to be acquired as Jewish property, and...to be taken in the name of the Jewish National Fund, to the end that the same [land] shall be held as the inalienable property of the Jewish people..."

and that

> "(e) ...in all works or undertakings carried out by the Agency, it shall be deemed to be a matter of principle that Jewish labour shall be employed..."

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27 See Chapter A.4.1.1. (The Fundamental Principle of "Inalienability of Land")

28 Kimmerling, supra note 19, at 59

29 For details see Chapter A.4.4. (The Jewish National Fund (JNF) - Established in 1901)

30 The Hebrew name for Jewish National Fund is "Keren Kayemet Le-Israel" which literally means "Perpetual Fund for Israel".

31 CERTIFICATE OF INCORPORATION No. 92825, Keren Kayemeth Leisrael Limited, reprinted in Vol. II The Palestine Yearbook on International Law (1985) 194

32 Article 3(11) of Memorandum and Articles of Association of the Jewish National Fund, 1907, reprinted in The Palestine Yearbook, ibid., at 196

33 Article 3 of the Constitution of the Jewish Agency, 14 August 1929, quoted in Sami Hadawi, Palestinian Rights and Losses in 1948, A Comprehensive Study (Saqi Books, 1988) at 61

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one may easily understand that these two principles make the political and economic position of any native Palestinian Arabs living on such land (that was transferred to the control of the mentioned Jewish National Institutions, i.e. the JNF and the JA) most difficult and almost impossible. For, as a result of the application of the above mentioned two principles these native Palestinian Arabs are often driven out by Jewish economic pressure in almost as distrastrous a way as if they were removed by force.

Thus, all purchases of land and property rights in the name of the JNF lead to the complete "extra-territorialisation"[34] of such lands for all non-Jews, i.e. mainly the indigenous Palestinian Arab people.

In order to come into possession of land in Palestine before the establishment of the state of Israel, the Zionist movement demanded the complete "de-freezing" of land and its neutralization of any political or national implications, which meant that the land of Palestine should be placed in the economic market with its price being determined exclusively by laws of supply and demand.[35]

So it happened that as long as the land was owned by indigenous Palestinian Arabs the Zionist movement heavily fought against all the legal restrictions that existed with regard to the sale of land to Jews. At the same time the Zionist movement developed a land policy that forbade any sale of land that had been purchased by and transferred to the control of the Jewish National Institutions - such as the JNF, the JA and the WZO - to non-Jews.[36]

However, in spite of the enormous efforts that had been made by the Zionist movement to purchase land in Palestine only a small portion of land, namely 1,734.000 dunams (= 6,59% of the total land area in formerly British mandatory Palestine), was owned by Jewish institutions or individuals shortly before the establishment of the state of Israel:[37]

- The JNF owned 933.000 dunams of land.
- The PICA[38] owned 435.000 dunams of land.
- Different private purchasers owned together 366.000 dunams of land.

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34 This term was used by Sir John Hope Simpson in his critical Report of 20 October 1930, Cmd. 3686, London, at 54, quoted in Avraham Granovsky, Land and the Jewish Reconstruction in Palestine ("Palestine and Near East" Publications, Jerusalem, 1930) at 105-107

35 Kimmerling, supra note 19, at 59

36 For details see Chapter A.4. (Establishment of "Jewish National Institutions" by the Zionist Movement)

37 Avraham Granott, Agrarian Reform and the Record of Israel (London: Eyre and Spottiswoode, 1956) at 28, quoted in David Kretzmer, The Legal Status of the Arabs in Israel (Boulder Westview Press, 1990) at 69 FN 5

38 This is the Palestine Jewish Colonization Association which held the land purchased by Baron Edmond Rothschild. See Kretzmer, ibid.

Additionally 195.000 dunams of state land were held by Jews on various tenancies.[39]

In 1949 after the signing of four Armistice Agreements[40] between Israel and the neighboring countries, the state of Israel [hereinafter: Israel within the Green Line] controlled over 72% of the whole formerly British mandatory Palestine, and included parts of Palestine which were previously inhabited by a majority of native Palestinian Arabs which were expelled or took flight in the course of the 1947/48 war and became refugees, leaving behind almost everything they owned.[41]

It should be mentioned at this point that all four Armistice Agreements explicitly state that they were based solely on military considerations and that they do not prejudice the rights, claims and positions of the parties with regard to the settlement of the Palestine question.

Thus, it is clear that - although the newly established state of Israel occupied the above mentioned 72% of former mandatory Palestine - it did not have the ownership[42] of most of the land, which consisted of especially cultivable land.

According to calculations and estimations of the UN Conciliation Commission for Palestine, more than 80% of the land in Israel within the Green Line was owned by Palestinian Arabs. More than 4,574.000 dunams of this land were cultivable.[43]

But it was not only land that was left behind by the fleeing or expelled Arab population, far more also enormous amounts of other property, such as houses, apartments, factories, shops, machinery, goods and commodities of all kinds,

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39 Id.

40 Between February and July 1949 four General Armistice Agreements were signed between Israel, on the one hand, and the neighboring Arab countries (Egypt, Lebanon, Jordan and Syria) on the other hand:
The General Armistice Agreement with Egypt was signed on 24 February 1949, see United Nations Treaty Series No. 654, at 251 (UN document S/1264/Rev.1)
The General Armistice Agreement with Lebanon was signed on 23 March 1949, see United Nations Treaty Series No. 655, at 287 (UN document S/1296/Rev.1)
The General Armistice Agreement with Jordan was signed on 3 April 1949, see United Nations Treaty Series No. 656, at 303 (UN document S/1302/Rev.1)
The General Armistice Agreement with Syria was signed on 20 July 1949, see United Nations Treaty Series No. 657, at 327 (UN document S/1353/Rev.1)

41 The events around the establishment of the state of Israel in Palestine live on in the Palestinian narrative as *al-Nakba (the Catastrophe)* and mean the tragic moments when the majority of the native Palestinian Arabs took flight or were expelled in the course of the war that broke out after the adoption and implementation of the UN-GA Resolution 181 (II) and after the declaration of the state of Israel in Palestine on 14 May 1948. For more details on this issue see Chapter A.5. (Palestinian Arab Opposition to Political Zionism in the 1920's and 1930's: Major Events Leading to the Rejection by the Palestinian Arab People of the UN GA Resolution 181 (II) of 29 November 1947)

42 Baruch Kimmerling developed the distinction between sovereignty and ownership over the land. See Kimmerling, supra note 19, at 35-44

43 Kretzmer, supra note 37, at 70 FN 7

animals, crops, fruits, vegetables, olive trees and citrus plantages, bank accounts, money, and rights to movable and immovable property.

Although the newly established state of Israel took also control over these kinds of property left behind by the Arab population, of course it did not have the ownership of or the permission to use it.

However, in 1948 the political leadership of the Jewish community of formerly Palestine had become the political leadership of the newly established state of Israel. This was then also the moment when the aims and policies of the Zionist movement turned into the policies of an independent state, which could use all its law-making power and its power to control the executive in order to come into possession and ownership of land and other movable and immovable property.

Over the years, the state of Israel has used existing British mandatory laws and regulations, and has also enacted a series of own emergency regulations and Knesset laws in order to requisition private land and other private property that was owned by Palestinians, and to transfer it to the "ownership" of the state of Israel. These laws and regulations may be divided into a number of categories:

The first category consists of emergency regulations and laws, that were enacted by the Israeli government and parliament for the specific purposes of expropriation or facilitation expropriations of private land and other property that was owned by Palestinians, of establishing the relevant institutions, and of "legalizing" the arbitrary takeover of Arab owned land:

1. The Abandoned Areas Ordinance, 1948[44]
2. The Emergency Regulations (Cultivation of Waste Lands), 1948[45]
3. The Emergency Regulations (Absentees' Property), 1948[46]
4. The Absentees' Property Law, 1950[47]
5. The Absentees' Property (Compensation) Law, 1973[48]
6. The Emergency Regulations (Requisition of Property), 1948[49]
7. The Emergency Land Requisition (Regulation) Law, 1949[50]

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44 Abandoned Areas Ordinance, 1948, 1 L.S.I. (1948) 25; published on 30 June 1948 and retroactively effective as from 16 May 1948

45 Emergency Regulations (Cultivation of Waste Lands), 1948, I.R. No. 27 (15 October 1948) at 3 [They were formally repealed in 1984. See infra sub-chapter 2.6.1. (The Emergency Regulations (Cultivation of Waste Lands), 1949)]

46 Emergency Regulations (Absentees' Property), 1948, I.R. No. 37 (12 December 1948) Suppl. II, at 59

47 Absentees' Property Law, 1950, 4 L.S.I. (1949/50) 68

48 Absentees' Property (Compensation) Law, 1973, 27 L.S.I. (1972/73) 176

49 Emergency Regulations (Requisition of Property), 1948, I.R. No. 39 (24 December 1948) Suppl. II, at 87

50 Emergency Land Requisition (Regulation) Law, 1949, 4 L.S.I. (1950/51) 3

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8. Land Acquisition (Validation of Acts and Compensation) Law, 1953[51]
9. The Development Authority Law, 1950[52]
10. The World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952[53]
11. The Keren Kayemet Le-Israel Law, 1953[54]
12. The Israel Lands Administration Law, 1960[55]
13. The Basic Law: Israels Land (1960)[56]
14. The Israel Lands Law, 1960[57]
15. The Planning and Building Law, 1965[58]
16. The Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967[59]
17. The Negev Land Acquisition (Peace Treaty with Egypt) Law, 1980[60]

The second category consists of general land expropriation laws which have been used to expropriate land from Palestinian Arabs:

18. The British Land (Acquisition For Public Purposes) Ordinance, 1943[61]

The third category consists of laws that have expropriatory effects:

19. The Land (Settlement of Title) Ordinance, 1928[62]
20. The State Property Law, 1951[63]
21. The Nationality Law, 1952[64]
22. The Prescription Law, 1958[65]
23. The Land Law, 1969[66]

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[51] Land Acquisition (Validation of Acts and Compensation) Law, 1953, 7 L.S.I. (1952/53) 43
[52] Development Authority (Transfer of Property) Law, 1950, 4 L.S.I. (1949/50) 151
[53] World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952/53) 3
[54] Keren Kayemet Le-Israel Law, 1953, 8 L.S.I. (1953) 35
[55] Israel Lands Administration Law, 1960, 14 L.S.I. (1960/61) 50
[56] Basic Law: Israels Land, 14 L.S.I. (1959/60) 48
[57] Israel Lands Law, 1960, 14 L.S.I. (1960/61) 49
[58] Planning and Building Law, 1965, 19 L.S.I. (1965/66) 330
[59] Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, 21 L.S.I. (1966/67) 105
[60] Negev Land Acquisition (Peace Treaty with Egypt) Law, 1980, 34 L.S.I. (1979/80) 190
[61] Land (Acquisition For Public Purposes) Ordinance, 1943, P. G. No. 1268, at 463
[62] Land (Settlement of Title) Ordinance, 1928, L.P. Vol. II, cap. 80, p. 853 (English Edition)
[63] State Property Law, 1951, 5 L.S.I. (1950/51) 45
[64] Nationality Law, 1952, 6 L.S.I. (1951/52) 50
[65] Prescription Law, 1958, 12 L.S.I. (1957/58) 129
[66] Land Law, 1969, 23 L.S.I. (1968/69) 283

The fourth category consists of security and emergency legislation which do not necessarily deal directly with expropriation of land, but which authorize restrictions on the use of land or access to it:

24. The British Defence (Emergency) Regulations, 1945[67]
25. The Emergency Regulations (Security Zones), 1949[68]

The fifth category consists of nature protection laws which have been used in order to place obstacles and restrictions on the use of land:

26. The Forests Ordinance, 1926[69]
27. The National Parks, Nature Reserves and National Sites Law, 1963[70]

These laws and emergency regulations together with an interpretation "hostile" towards the native Palestinian Arab inhabitants were employed by the various decision-making governmental bodies and mostly backed by the Israeli Supreme Court. The enactment and use of this legislation give evidence to the fact that the declared policy of the Zionist movement was not to allow the Arab refugees back to their villages and towns, and not to make land available to the native Palestinian Arab citizens of the state.

This policy had tremendous effects on the land resources of many Arab villages, and is the most sensitive issue between Palestinian Arabs and Zionist Israelis/Jews until today. Israel's land policy and the employed methods of land acquisition through the enactment of Knesset laws and emergency regulations has been based on the political concept of the Zionist movement as well as on the old religious principle of the Torah according to which the "Land of Israel" is divine and therefore "...the land shall not be sold for ever for the land is Mine" (Leviticus 25:23).

It should be stressed at this point that initially most of the legislation took the form of "emergency" regulations which were issued by ministers under Section 9 of the Law and Administration Ordinance, 1948 [71] and extended after three months for fixed periods. When these fixed periods of extension expired, most of the "emergency" regulations formed the direct basis for permanent Knesset legislation.

Most of the described laws are still valid until today, although many of them are in fact not applied. Nevertheless it seems very important to me to discuss not only the actually applied laws in the field of property rights, but rather also the valid but

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67 Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945) Suppl. II, at 1055

68 Emergency Regulations (Security Zones), 1949, K.T. No. 11 (27 April 1949) 169. [The validity of these regulations was extended annually until 1972, when they were allowed to lapse. See infra sub-chapter 2.5.1. (The Emergency Regulations (Security Zones), 1949)]

69 The Forests Ordinance, 1926, quoted in Kretzmer, supra note 37, at 55

70 The National Parks, Nature Reserves and National Sites Law, 1963, quoted in Kretzmer, supra note 37, at 55

71 Law and Administration Ordinance, No. 1 of 1948, 1 L.S.I.(1948) 7

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not applied laws as well as the invalid laws, since these two latter groups of laws and the jurisprudence that developed in the context of these laws still form parts of the legal environment and normative umbrella of the whole legal system in Israel.

A discussion of these laws reveals how the political objectives of the Zionist movement - after its coming to sovereign power with the establishment of the state of Israel - have been translated into "seemingly neutral" legal terms and into highly discriminatory actions, and how Arab Palestine has been transformed into Jewish Israel. A discussion of these laws is also of utmost importance for any deeper understanding of the still existing highly conflict-loaded relationship between Palestinian Arabs and Israelis/Jews/Zionists. Moreover, this discussion will reveal the very background for the weak political, legal and economical status of the Palestinian Arab citizens within the Israeli society today.

In the course of this chapter I will show that the enactment, use and implementation of these laws has lead to the situation that the native Palestinian Arab people - which once, i.e. until the outbreak of the war in December 1947, formed the majority in Palestine - turned into a mostly landless and largely impoverished, by the Israeli government not recognized highly discriminated minority of "second and third class" citizens of the state of Israel.

As already elaborated in a previous chapter[72] of this work, Israel's "security and emergency" legislation has not been used only in "times of war and conflict", but rather as an additional administrative means of government and thus became a routine instrument of the Israeli government for carrying out specific policies which - at the expense of the most basic human rights and freedoms of the native Palestinian Arab people - promote first of all Jewish national interests.

The following important pieces of mainly emergency legislation concerning expropriation of private property were already passed during the first months (June - December 1948) after the establishment of the state of Israel in Palestine:

1. The Abandoned Areas Ordinance, 1948[73]
   (published in the Official Gazette on 30 June 1948)
2. The Emergency Regulations (Cultivation of Waste Lands), 1948[74] (published in the Official Gazette on 15 October 1948)
3. The Emergency Regulations (Absentees' Property), 1948[75]
   (published in the Official Gazette on 12 December 1948)
4. The Emergency Regulations (Requisition of Property), 1948[76]

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72 See Chapter D.1. (Introduction), Chapter D.4. (Israel's Formal "Security" and "Emergency" Legislation: Legal Sources and Justifications)

73 Abandoned Areas Ordinance, 1948, supra note 44

74 Emergency Regulations (Cultivation of Waste Lands), 1948, supra note 45

75 Emergency Regulations (Absentees' Property), 1948, supra note 46

76 Emergency Regulations (Requisition of Property), 1948, supra note 49

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(published in the Official Gazette on 24 December 1948)

These pieces of legislation are characterized by the following principles:

* The executive authorities were empowered to take possession of private property without having to comply with legal or administrative procedures usually followed during times of peace.[77]
* The authorities had the power to issue documents which served as evidence which could not be refuted in legal proceedings.[78]

Looking through this legislation one may discern that only the Emergency Regulations (Requisition of Property), 1948 contained a regulation stating that so called "security considerations" are a major factor in the exercise of the powers by an administrative authority.[79] In the first three pieces of legislation the "security considerations" were of secondary[80] or no importance at all.[81] After the above mentioned "emergency" regulations had become permanent Knesset legislation, the main instruments for transferring the land from private (mostly Arab) ownership to the "ownership under Jewish control" were enacted - with the further aim to create the conditions for the mass settlement of Jews in every part of the country.[82]

In the following sub-chapters 2.2. - 2.7., I will discuss the above mentioned British and Israeli emergency regulations and Knesset laws that were used by the Israeli executive authorities in order to come into possession and ownership of private land previously owned by Palestinian Arabs that took flight or were expelled in the course of the war that took place in the context of the establishment of the state of Israel in Palestine. I will also give an insight into the fundamental jurisprudential concepts and methods of legal interpretation which were employed by the judges of the Israeli Supreme Court in order to found and justify their opinions and to approve the dominant ideologies, as well as the political and military interests involved. I will demonstrate that, since the very early days after the state of Israel came into being in May 1948 until the early 1950's, Israel's political objectives were to create a legal mechanism and adequate legal instruments that would enable expropriations and allocations of private Arab owned property - first of all land and houses - on the pretext of "legality", and to block any possibilities of the return of Arab refugees.

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77 Menachem Hofnung, Democracy, Law and National Security in Israel (Dartmouth Publishing Company Limited, 1996) at 103

78 Regulation 22 of the Emergency Regulations (Cultivation of Waste Lands), 1948, supra note 45; Regulation 27, 28, 32 of the Emergency Regulations (Absentees' Property), 1948, supra note 46; Regulations 4 and 5 of the Emergency Regulations (Requisition of Property), 1948, supra note 49

79 Regulation 3 of the Emergency Regulations (Requisition of Property), 1948, ibid.

80 Abandoned Areas Ordinance, 1948, supra note 44

81 Emergency Regulations (Absentees' Property), 1948, supra note 46

82 Hofnung, supra note 77, at 103

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All this happened in blatant violation of the obligations imposed on Israel by early United Nations resolutions and in complete disregard of the commitments and promises made by Israel in the General Assembly Resolution 273 (III) of 11 May 1949, admitting Israel as a State Member to the United Nations.[83] The preamble of UN Resolution 273 (III) refers explicitly to Israel's undertakings to implement Resolution 181 (II) of 29 November 1947 and Resolution 194 (III) of 11 December 1948. The last resolves that

> "...the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss or damage to property which, under principles of international law or in equity, should be made good by the Government or authorities..." [84]

In the following sub-chapters I will show that, while Israel's willingness to comply with international law and internationally recognized principles of justice and fairness was not present in the process of "Israelification" of Palestine, Israel's resort to legal measures - shaped by the underlying ideology of Zionism - as a strategy of land expropriation was a prime concern. That means - in accordance with a monistic conception of law, and a very formalistic, legalistic, and positivistic approach regarding the nature and function of a legal system - very quickly a large quantity of legal norms (first in the form of emergency regulations which were later transformed into permanent Knesset legislation) was created with the clear objective to "legalize" and "justify" expropriations of private (mostly Arab owned) property. This set of norms included:

* Special legal proceedings aimed at depriving those who possessed land of their ownership of it.
* Special rules of evidence which transferred the burden of proof onto the person who claimed ownership or possession of land.
* Special provisions that would limit the power of the courts to review the implementation of this legislation, and that replaced the review of the courts by a review of quasi-judicial tribunals.

One may observe that from the very beginnings of Israel's existence, the political, economic and military activities in the field of property rights were guided by a clear policy of "de-Arabization" and ethnic-cleansing accompanied by a policy of "Israelification" and colonization. This policy was quickly implemented by measures such as taking control of Palestinian land and houses owned by uprooted Arabs, by unauthorized expropriations of private Arab property and its allocation to

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83 United Nations General Assembly Resolution 273 (III). Admission of Israel to membership in the United Nations, 11 May 1949. UN document A/Res/273 (III)

84 United Nations General Assembly Resolution 194 (III): Establishing a UN Conciliation Commission for Palestine (UNCCP) and Resolving that the Refugees should be permitted to return to their Homes, 11 December 1948, UN document A/Res/194 (III)

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Jewish immigrants, by arbitrary destructions of Arab houses, fields and even whole villages, and by creating facts (i.e. the establishment of new settlements) on the ground, so that taken together the physical map and demographic face of Palestine quickly changed.[85]

The theory that the said policy of "de-Arabization" and ethnic-cleansing of Palestine from hundred thousands of native Palestinian Arabs has taken place in a planned and well coordinated way - pointing to an expulsion out of design rather than out of accidental circumstances created by the situation of war - is strongly supported by the following facts, legal evidences and documents:

1. The kind of activities and acts that were committed by the Israeli army - such as the complete and barbarous destruction of hundreds of Palestinian Arab villages and houses during the period of 1948 and mid-1949.

2. The discriminatory use and operation of the existing British mandatory legislation and the creation of specific legislation in the very early months of Israel's statehood in order to come into possession and ownership of land and other property that belonged to Palestinian Arabs.

3. The Supreme Court jurisprudence which upheld almost all decisions of the executive authorities that lead to the expropriation and seizure of Arab land.

4. The large number of important official Zionist documents, which proposed the establishment of a Jewish "national home" in Palestine, based on an ideological concept from which the non-Jewish inhabitants, i.e. mainly the native Palestinian Arab people, should be excluded in eternity.

5. The establishment of the WZO, the JNF, the JA and other Zionist Institutions which clearly rested - and still rest - on the principles of "inalienabiltiy of land" and "Jewish labor".

6. The large number of proposals regarding transfer of the Arab population from Palestine issued by a number of Zionist leaders[86] throughout all times, and especially the establishment of Transfer Committees during the 1948 war, by or in coordination with the Jewish, and later Israeli, authorities.[87]

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[85] Benny Morris, The Birth of the Palestinian Refugee Problem, 1947-1949 (Cambridge University Press, 1987) at 155

[86] The following Zionist leaders proposed the transfer of Arabs: Theodor Herzl, David Ben-Gurion, Chaim Weizman, Nachman Syrkin, Arthur Ruppin, Leo Motzkin, Israel Zangwill, Vladimir Jabotinsky, Menachem Ussishkin, Moshe Shertok (Sharett), Abraham Sharon (Schwadron), Edward Norman, Joseph Weitz, Ernest Frankenstein, Victor Gollancz. For more details see Chaim Simons, International Proposals to Transfer Arabs from Palestine, 1895-1947. A Historical Survey (Ktav Publishing House, Inc., New Jersey, 1988)

[87] Nur Mashalha, Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882-1948, Washington, D.C., IPS, 1992, quoted in Lex Takkenberg, The Status of Palestinian Refugees in International Law (Clarendon Press - Oxford, 1998), at 15

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After these general remarks I will turn now to the detailed discussion of the various legal instruments and jurisprudential concepts that were created and used regarding the issue under review.

2.2. Declaration of Palestinians as "Absentees" and Confiscating their Land and Movable Property

2.2.1. The Emergency Regulations (Absentees' Property), 1948 and The Absentees' Property Law, 1950

The Emergency Regulations (Absentees' Property), 1948 [88] - enacted on 12 December 1948 - is one of the most important legal instrument that has been specifically enacted in order to come into possession of land owned by native Palestinian Arabs who fled or were expelled in the course of the war after the implementation of the UN Resolution 181 (II) and the establishment of the state of Israel in Palestine.

After having been extended several times,[89] the Emergency Regulations (Absentees' Property), 1948 formed the direct basis for the enactment of the Absentees' Property Law, 1950.[90]

With the enactment of the Absentees' Property Law, 1950 a powerful legal instrument was created upon which all major expropriations of land and property belonging to native Palestinian Arabs that fled or were expelled have been based.

Despite the fact that some of these native Palestinians managed to find a way to return to and to stay legally in Israel, they were - due to the existence and the extensive application of the Absentees' Property Law, 1950 - not automatically entitled to receive their property back.

Although this law was passed by the Knesset with the specific purpose to acquire Arab owned *land*,[91] it applies also to movable property.
Section 1(a) of the Absentees' Property Law, 1950 states that "property"

> "(a) ...includes immovable and movable property, moneys, a vested or contingent right in property, goodwill and any right in a body of persons or in its management."[92]

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88 Emergency Regulations (Absentees' Property), 1948, supra note 46

89 Emergency Regulations (Absentees' Property) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 38; Emergency Regulations (Absentees' Property) (Extension of Validity) (No. 2) Law, 1949, 3 L.S.I. (1949) 111; Emergency Regulations (Absentees' Property) (Extension of Validity) Law, 1949, 4 L.S.I (1949) 13

90 Absentees' Property Law, 1950, supra note 47

91 Hofnung, supra note 77, at 106

92 Section 1(a) of the Absentees' Property Law, 1950, supra note 47

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According to the Absentees' Property Law, 1950 any person who, after the 29 November 1947, was a citizen of one of the Arab countries which fought against Israel, or was living in one of those countries, or fled or was expelled from his usual place of residence and became a refugee, was declared to be an "absentee".

Section 1(b) of the Absentees' Property Law, 1950 - which became the most dangerous and harmful provision for the property rights of the Palestinian Arab people - defines an "absentee" as:

> "(1) a person who, at the time during the period between the 29th November 1947 and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 1948, that the state of emergency declared by the Provisional Council of State on the 19th May 1948 has ceased to exist[93], was the legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who at any time during the said period -
>
> (i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan, Iraq or the Yemen, or
>
> (ii) was in one of these countries or in any part of Palestine outside the area of Israel, or
>
> (iii) was a Palestinian citizen and left his ordinary place of residence in Palestine
>
> (a) for a place outside Palestine before the 1st September 1948; or
>
> (b) for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment;
>
> (2) a body of persons which, at any time during the period specified in paragraph (1), was a legal owner of any property situated in the area of Israel or enjoyed or held such property, whether by itself or through another, and all the members, partners, shareholders, directors or managers of which are absentees within the meaning of paragraph (1), or the management of the business of which is otherwise decisively controlled by such absentees, or all the capital or which is in the hands of such absentees."[94]

Section 1(e) of the Absentees' Property Law, 1950 entails a definition of the term "absentees' property" which means:

> "(e) property the legal owner of which, at any time during the period between the 29th November 1947 and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 1948, that the state of emergency declared by the Provisional Council of State on the 19th

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[93] It shall be recalled here that until the very day of writing this work the state of emergency, declared by the Provisional Council of State on 19 May 1948, has not yet ceased to exist. For more details on this issue see Chapter D. (Israel's Permanent State of Emergency and the Question of its Compatibility with the Concept of a Liberal Democracy Based on Human Rights and Freedoms)

[94] Section 1(b) of the Absentees' Property Law, 1950, supra note 47

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> May 1948, has ceased to exist, was an absentee, or which, at any time as aforesaid, an absentee held or enjoyed, whether by himself or through another; but it does not include movable property held by an absentee and exempt from attachment or seizure under section 3 of the Civil Procedure Ordinance, 1938."[95]

Important to mention is that the Absentees' Property Law, 1950 also applied to the property of the Moslem Waqf whose administrators had become "absentees".[96] In 1965, the Israeli Government began, however, to release some of the property owned by the Waqf and to transfer it to communities of Moslem trustees who were entrusted with the management of the property.[97]

An examination of Section 1(b) and (e) of the Absentees' Property Law, 1950 clearly reveals that a person could be considered as an "absentee" under the law, even though he was legally present in Israel when his property was considered to have become "absentees' property".

That means the legal owner of any property situated in the "area of Israel"[98] who at any time after the 29 November 1947 was - for what reason ever - outside Palestine is - according to the Absentees' Property Law, 1950 - an "absentee".
That means in other words: Once an "absentee" - always an "absentee".

The only exception to the mentioned rule is entailed in Section 27 of the Absentees' Property Law, 1950, which recognizes the right of a person - who may be defined as an "absentee" - to apply to the Custodian for a written confirmation which certifies that he is not an "absentee" and releases his property

> "...if the Custodian is of the opinion that he left his place of residence -
> (1) for fear that the enemies of Israel might cause him harm, or
> (2) otherwise than by reason or for fear of military operations..."[99]

The wide definition of "absentee" and the intensive use of the Absentees' Property Law, 1950 transformed into "absentees" not only refugees and exiles - which ended up across the borders of that territory of Palestine on which the state of Israel was established - but rather also a huge number of internal refugees ("present absentees" and "displaced persons") which have moved from one part of Israeli territory to another during the war and which fell into this definition.

The Absentees' Property Law, 1950 created approximately 75.000 of "present absentees"[100] and "displaced Palestinians" who - in combination with the application of other laws and emergency regulations - until today cannot return to their villages,

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95 Section 1(e) of the Absentees' Property Law, 1950, ibid.
96 Section 1(d) of the Absentees' Property Law, 1950, id.
97 Kretzmer, supra note 37, at 58
98 The term "area of Israel" means the area in which the law of the state of Israel is applied, see Section 1(i) of the Absentees' Property Law, 1950, supra note 47
99 Section 27 of the Absentees' Property Law, 1950, ibid.
100 Kretzmer, supra note 37, at 57

despite the fact that they are Israeli citizens.[101]

Looking through the Absentees' Property Law, 1950 one may discern that the term "absentee" is framed in a neutral way, that means without any reference to the religious or ethnic affiliation of a person.

Nonetheless, it is important to know that the law was specifically enacted in order to be applied against the native Arab inhabitants of Palestine, who fled or were expelled from their villages and towns.

The real intentions behind the Absentees' Property Law, 1950 may best be understood by reading the Knesset debates on the said law, where several Knesset members suggested that the definition of "absentee" shall be changed, but whose proposals were rejected.

With regard to the Palestinian refugees and the enactment of the Absentees' Property Law, 1950 the Chairman of the Knesset Finance Committee, David-Zvi Pinkas, declared in a very cynical Knesset speech as follows:

> "...the land of people who had left the country may have been taken over by others, who could not automatically be expelled from such land,...the security situation is still to serious...and war could brake out...
> This [Absentees' Property] Law is also for the good of the absentees. It is a constructive law, which protects the people's right....
> The law does not cause injustice to anybody. Whatever is due to people, they will receive. Peace will come and matters will be satisfactorily resolved."[102]

The fact is that the Absentees' Property Law, 1950 did precisely the opposite than to protect the people's right.

The Absentees' Property Law, 1950 rather served as an effective means by the Israeli government to deprive the Palestinian Arab refugees from their lands and other immovable and movable property.

The Absentees' Property Law, 1950 caused an immense injustice to the Palestinian Arab people in general, since it produced many refugees, who in most of the cases are - until today - not allowed to return to their villages and towns.

As I see it the existence and application of the Absentees' Property Law, 1950 contributed to a large extent to the existing situation of a permanent and unresolved conflict between the Israeli/Jewish/Zionist and the Palestinian/Arab people living in Israel and throughout the world.

In complete rejection of the above quoted cynical speech of that Knesset member I can only observe that precisely because of the existence of such a legal instrument as the Absentees' Property Law, 1950 matters remained unresolved until the very day

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[101] See also sub-chapters 2.2.4. (The Creation of so called "Present Absentees") and 2.2.4.2. (Jurisprudence regarding "Present Absentees" Cases) and sub-chapter 2.4. (Declaration of Land as "Closed Area" and the Creation of the so called "Uprooted Villages")

[102] 4. D.K. 867-872 (20 February 1950), 911-919 (1 March 1950)

of writing this work and peace has not come at all over the country and even the whole region.

Despite the fact that the Absentees' Property Law, 1950 provides for monetary compensation[103] it discriminates against all native Palestinian Arabs that fled or were expelled in the course of the war around the establishment of the state of Israel, due to the fact that it completely deprives the Arabs refugees of the right to return to their homes.

The jurisprudence of the Israeli Supreme Court in the context of the issue of "absentees' property" is characterized

1. by an unwillingness to go into the merits of land expropriation decisions;
2. by a judicial tolerance of illegal actions of the administrative organs;
3. by a complete deference to the subjective discretion of the executive branch.

Major judgments of the Israeli Supreme Court relating to the application of the Absentees' Property Law, 1950 will be discussed in sub-chapters 2.2.3. and 2.2.4.

2.2.2. Main Features and Institutions Involved in the Context of the Application of the Absentees' Property Law, 1950

2.2.2.1. The Custodianship Council for Absentees' Property

The Absentees' Property Law, 1950 directs the Minister of Finance to appoint a Custodianship Council for Absentees' Property, whose chairman shall be called the Custodian.[104]

The Custodian has far-reaching powers, such as to bring an action and institute any other legal proceeding against any person and be a plaintiff, defendant or otherwise a party in any legal proceeding;[105] to take care of held property;[106] to manage the business on behalf of an absentee;[107] to expel an occupier of immovable property who, in his opinion, has no right to occupy it;[108] to demolish buildings built on immovable property[109] and several other powers.

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[103] Section 19 of the Absentees' Property Law, 1950, supra note 47, provides that the "absentees' property" must be sold for its "official value", which is defined as a function of net value for property tax purposes. In 1973 a specific law for compensation was enacted, namely the Absentees' Property (Compensation) Law, supra note 48. Under this law "absentees" had no longer the right to apply for release of their property and had - since then - only the right to compensation.

[104] Section 2(a) of the Absentees' Property Law, 1950, supra note 47

[105] Section 2(b) of the Absentees' Property Law, 1950, ibid.

[106] Section 7 of the Absentees' Property Law, 1950, id.

[107] Section 8 of the Absentees' Property Law, 1950, id.

[108] Section 10 of the Absentees' Property Law, 1950, id.

[109] Section 11 of the Absentees' Property Law, 1950, id.

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An excessive provision is also Section 4(a) of the Absentees' Property Law, 1950 according to which:

> "(1) all absentees' property is hereby vested in the Custodian as from the day of publication of his appointment or the day on which it became absentees' property, whichever is the later date;
> (2) every right an absentee had in any property shall pass automatically to the Custodian at the time of vesting of the property; and the status of the Custodian shall be the same as was that of the owner of the property."[110]

A very important and highly discriminatory provision concerning the ownership rights of the Palestinian refugees and exiles is Section 19(a)(1) of the Absentees' Property Law, 1950 which provides that the Custodian has no right to sell or transfer the ownership rights to land to anybody else than the so called "Development Authority" - a body of persons appointed by the government.[111]

Section 19(a)(1) of the Absentees' Property Law, 1950 states as follows:

> "(a) Where the vested property is of the category of immovable property, the Custodian shall not -
> (1) sell or otherwise transfer the right of ownership thereof; provided that if a Development Authority is established under a Law of the Knesset, it shall be lawful for the Custodian to sell the property to that Development Authority at a price not less than the official value of the property."[112]

Important to mention is the fact that - in blatant violation of the obligations imposed on Israel by early UN resolutions and in complete disregard of the commitments and promises made by Israel in the United Nations General Assembly Resolution 273 (III) of 11 May 1949 admitting Israel as a State Member to the United Nations[113] - the Absentees' Property Law, 1950 does not give to the real owners of so called "absentees' property" the right to return to their land and to get back their movable and immovable property.

The Absentees' Property Law, 1950 gives only to the Custodian the power, in his sole discretion and on the recommendation of a special committee which is appointed by the Israeli government (Section 29),[114] to sell and release vested property in exchange of a consideration (Section 28).

Section 28(c) of the Absentees' Property Law, 1950 states in this regard:

> "Where the Custodian has sold vested property, "*the property which has been sold becomes released property and passes into the ownership of the purchaser*, and *the consideration which the Custodian has received becomes held*

110 Section 4(a) of the Absentees' Property Law, 1950, id.
111 For more details regarding the Development Authority see sub-chapter 2.2.2.2.
112 Section 19(a)(1) of the Absentees' Property Law, 1950, supra note 47
113 See UN Resolution 273 (III), supra note 83
114 Section 29 of the Absentees' Property Law, 1950, supra note 47

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property..." [Emphasis added][115]

In 1973 a specific law for compensation was enacted, namely the Absentees' Property (Compensation) Law,[116] according to which absentees' had no longer the right to apply for release of their property. Since then they and have only the right to compensation.

Another excessive and highly unfair provision of the Absentees' Property Law, 1950 is embodied in Section 30, establishing specific rules of evidence which

1. transfer the burden of proof onto the person who claimed ownership or possession of his property;
2. empower the Custodian to issue - in his sole (i.e. subjective) discretion - written confirmations and certifications (that a particular person is an "absentee" or not);[117] and
3. entitle these written confirmations and certifications to serve as conclusive evidence of the facts stated in them and which could not be refuted in any legal proceeding.

Section 30 of the Absentees' Property Law, 1950 states as follows:

> "(a) Where the Custodian has certified in writing that a person or body of persons is an absentee, that person or body of persons shall so long as the contrary has not been proved, be regarded as an absentee."
>
> (b) Where the Custodian has certified in writing that some property is absentees' property, that property shall, so long as the contrary has not been proved, be regarded as an absentees' property.
>
> (d) A copy certified by the Custodian of an entry in his books or official files or of another document in his possession shall, in any action or other legal proceeding, be accepted as prima facie evidence of the correctness of its contents.
>
> (e) A written confirmation by the Custodian as to matters within the scope of his functions shall, unless the Court has otherwise directed, be accepted in any action or other legal proceeding as prima facie evidence of the facts stated in the confirmation."[118]

By virtue of the Absentees' Property Law, 1950, the Custodian became the holder of rights to thousands of privately owned pieces of land in almost every Arab village or town.

Since the Absentees' Property Law, 1950 placed the burden on the person seeking liberation of his/her property to prove that the reason for leaving his residence was one of the reasons which entitle him to a confirmation according to Section 30, one may easily understand that liberation of property from the control of the Custodian

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115 Section 28 of the Absentees' Property Law, 1950, id.
116 Absentees' Property (Compensation) Law, 1973, supra note 48
117 Section 27 and Section 28 of the Absentees' Property Law, 1950, id.
118 Section 30 of the Absentees' Property Law, 1950, id.

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became one of the most complicated things in Israel.[119]

At the moment the Custodian had acquired rights to land or other immovable property, it became very difficult for the owner(s) of this land or immovable property to exploit its full economic potential, since without written permission of the Custodian, the owner was not permitted to take possession of such land or property, to built on it, or to sell it.[120]

As already mentioned above Section 19(a)(1) of the Absentees' Property Law, 1950 established the rule that the ownership of immovable property vested in the Custodian should not be sold or transferred except to a Development Authority and in exchange for a price not less than the official value of the property.

In some cases the Custodian became the holder of rights to land that was situated exactly between two pieces of privately owned land and that could have been joined by purchase and used for economic purpose, but became often totally useless - due to the Custodian's existence - forcing the owners to sell it to the Development Authority which worked in close connection with the Custodian.[121]

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119 Until 1958, of tens of thousands Israeli Arabs classified as "absentees", the Custodian had issued only 209 certificates releasing property to its original owners. Yifat Holzman-Gazit, Private Property, Culture, and Ideology: Israel's Supreme Court and the Jurisprudence of Land Expropriation (unpublished dissertation submitted to the school of law and the committee on graduate studies of Stanford University in partial fulfillment of the requirements for the degree of doctor of the science of law, May 1997) at 269 FN 25

120 Sections 10 and Section 11 of the Absentees' Property Law, 1950, id.

121 Hofnung, supra note 77, at 107. It should be mentioned at this point that it was impossible to receive a reasonable price in the private market for a peace of land on which the Custodian had rights to.

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2.2.2.2. The Development Authority

Four and a half months after the passing of the Absentees' Property Law, 1950 the Knesset enacted the Development Authority (Transfer of Property) Law, 1950[122] under which the Development Authority was set up.

The Development Authority was established as a corporate body of persons appointed by the Israeli government and is authorized to enter into contracts, to possess and acquire property and to be a party in any legal or other proceeding.[123]

Section 3 of the Development Authority (Transfer of Property) Law, 1950 enumerates the competences of the Development Authority which are the power

> "(1) to buy, rent, take on lease, take in exchange property;
>
> (2) to build, erect, pave, alter..., develop,..., manage...buildings, roads, railways, bridges, factories, electric power plants, transport enterprises, settlement and housing schemes and other undertakings;
>
> (3) to develop, complete, meliorate, merge, cultivate and reclaim property;
>
> (4) to sell or otherwise dispose of, let, grant leases of, and mortgage property..."[124]

After the Development Authority had been installed, the Custodian started successively to transfer the right of ownership to the lands and other immovable "absentees' property" - most of it belonging to Palestinian Arabs - to this body.

According to Section 3(4)(a) of the Development Authority (Transfer of Property) Law, 1950 the Development Authority is permitted to sell or otherwise transfer the rights to ownership to property solely to the state, the JNF, local authorities and an institution for settling landles Arabs - an institution which has never been established.[125]

The Development Authority (Transfer of Property) Law, 1950 also established that any immovable property not being land must first be offered to the JNF, and only if it refused to purchase it the Development Authority can seek other purchasers.

On 29 September 1953 an agreement[126] between the Custodian and the

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122 Development Authority (Transfer of Property) Law, 1950, supra note 52

123 Section 2(a) and (b) of the Development Authority (Transfer of Property) Law, 1950, ibid.

124 Section 3 of the Development Authority (Transfer of Property) Law, 1950, id.

125 Section 3(4)(a) of the Development Authority (Transfer of Property) Law, 1950, id., Avraham Granott, head of the JNF, comments on this with the following words:

> "Thus a great rule was laid down, which has a decisive and basic significance - that the property of absentees cannot be transferred in ownership to any one but national public institutions alone, namely, either the State itself, or the original Land Institutions of the Zionist Movement."

See Avraham Granott, Agrarian Reform and the Record of Israel at 104, quoted in Kretzmer, supra note 37, at 74

126 1954 Government of Israel Yearbook 113, quoted in Sabri Jiryis, Settlers' Law: Seizure of

Development Authority was signed, according to which the Custodian transferred the "ownership" of all confiscated private "absentees' property" in his possession to the Development Authority, i.e. into "public ownership".[127]

It should be mentioned at this point that from that moment on the "absentees' property" held by the Custodian was only the consideration received for the property, and an "absentee" who applied for release of his property would be entitled only to the consideration.[128]

The Development Authority handed then the property declared as absentees' property over to the Amidar Company, a governmental company controlled by the Ministry of Housing with the objective of housing and settling of Jews.[129]
From the Amidar Company the land was transferred to "new Jewish immigrants - i.e. the new settlements."[130]

It should be mentioned at this point that, even before the Development Authority was actually established, two agreements - the first in January 1949,[131] and the second in October 1950[132] - were signed between the government of the state of Israel and the Jewish National Fund (JNF), according to which a total of 2,373.676 dunams of land that was previously expropriated from native Palestinian Arab citizens[133] of Israel were sold to the JNF, a privatized land fund.

On 26 June 1953 these two agreements were incorporated in a final and comprehensive third agreement signed between the Development Authority[134] and the JNF. According to this third agreement the transferred lands were demarcated and the ownership was established in the Land Registry.[135]

The process of transferring the ownership of lands from one Israeli body to another had the purpose that the JNF acquires the lands of Arabs refugees in a very "legal" manner that should protect this body from any lawsuit.

Palestinian Lands, Vol. II The Palestine Yearbook on International Law (1985), at 20

127 Under this agreement 69.000 apartments or houses and businesses were transferred to the Development Authority, see 1955 Government of Israel Yearbook 47, quoted in Kretzmer, supra note 37, at 58, 72, FN 41

128 See supra note 103

129 Jiryis, supra note 126, at 20

130 Usama Halabi, Land and Planning Laws As a Political Tool: Israeli Land, Planning and Settlement Policy since 1948 (in Israel Proper), and since 1967 (in 1967 Occupied Territories). A paper presented at the conference 50 years of Human Rights Violations - Palestinian Dispossessed, 7-10 June 1998, Jerusalem, at 2

131 According to the January 1949 agreement 1,101.942 dunams were sold to the JNF. See Kretzmer, supra note 37, at 62

132 According to the October 1950 agreement 1,271.734 dunams were sold to the JNF. See Kretzmer, ibid.

133 Some of these native Palestinian Arab citizens were the so called "present absentees".

134 The Development Authority came in the meantime into existence.

135 Granott, Agrarian Reform and the Record of Israel, at 107-111, quoted in Jiryis, supra note 126, at 20-21

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For the state of Israel the said arrangement of transferring the ownership of absentees' property was - and still is - used as a shield against accusation of discrimination and racism against native Palestinian Arab citizens of Israel which eventually try to purchase land. Whenever the state of Israel was - and is - accused of land policies that discriminate against the Palestinian Arab people, it was - and is - argued that the discrimination is not done by the Israeli government, but by a private institution (i.e. the JNF) set up to settle Jews.[136]

Nevertheless, it is clear that this process of transferring the ownership of mostly Arab owned land to the JNF - a privatized land fund - was used in order to prevent the sail of land to Arabs.

The Report of the Committee on Economic, Social and Cultural Rights from 4 December 1998 strongly criticizes the turning over of vast resources (including confiscated Arab land) to the WZO/JA and the JNF, and stated that this practice constitutes "an institutionalized form of discrimination" against the Palestinian Arab citizens of Israel and a breach of Israel's obligations under the International Covenant of Economic, Social and Cultural Rights, since "these institutions are chartered to benefit the Jews exclusively" despite the fact that these institutions are linked to the state by law and operate as public bodies.[137]

2.2.2.3. The Jewish National Fund (Keren Kayemet Le-Israel)

As already elaborated in detail in a previous chapter of this work,[138] the Jewish National Fund (JNF) is another body that played and plays an important role in the context of the right to property (especially the rights to land) and the violation of this right towards the native Palestinian Arab people.

The JNF was established in 1901 as land fund - based on contributions from Zionists/Jews all over the world - with the clear objective "to purchase, lease or otherwise acquire any lands, forests, rights and other immovable property in Palestine, Syria, parts of Turkey in Asia and the Peninsula of Sinai for the purpose to settle Jews on such land."[139]

Although established as a main official organ of the WZO, in 1907 the JNF was separately registered in England as private Limited Liability Company.

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136 Jiryis, ibid., at 21

137 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 04/12/98. E/C.12/1/Add.27 (Concluding Observations) para. 11

138 See Chapter A.4.4. (The Jewish National Fund (JNF) - Established in 1901)

139 Article 3(1) of Memorandum and Articles of Association of the Jewish National Fund, 1907, The Palestine Yearbook, supra note 32, at 196

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After the establishment of the state of Israel the status of the JNF was determined by the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952[140] which applies to all institutions of the WZO.

However, since the lands purchased by the JNF in Palestine in the era before the establishment of the state of Israel, were registered in the name of a limited English company, the Keren Kayemet Le-Israel Law, 1953[141] was passed in order to facilitate the transfer of the title in all these lands to an Israeli company.

Under the Keren Kayemet Le-Israel Law, 1953 the existing (English) JNF became an Israeli company[142] and all the lands belonging to the existing JNF were transferred to and registered in the name of the newly formed JNF - i.e. the company which is now called "Keren Kayemet Leisrael (KKL)".[143]

Section 3(a) of the Memorandum of Association of the Jewish National Fund, 1954 defines the main objective of the new Israeli JNF as to purchase and acquire rights in lands, forests and immovable property for the purpose of settling Jews.[144]

However, due to the fact that at the end of the 1950s, 90% of the whole land in Israel was already "Israeli land" the main function of the JNF was not any more the purchase of land but land reclamation, development and afforestation.[145]

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[140] World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 53

[141] Keren Kayemet Le-Israel Law, 1953, supra note 54 [This law is also known as "Jewish National Fund Law"]

[142] Section 2 of the Keren Kayemet Le-Israel Law, 1953, ibid., states as follows:

> "The Minister of Justice may approve a memorandum and articles of associations of a company limited by gaurantee, ..., for the purpose of establishing a body incorporated in Israel to continue the activities of the existing company, which was founded and incorporated in the Diaspora."

The Memorandum and Articles of Association of the Jewish National Fund, 1954, were duly approved and published under the terms of the Keren Kayemet Le-Israel Law, 1953, see 1954 Yalkut HaPirsumim 354, at 1197; reprinted in Vol. II The Palestine Yearbook on International Law (1985) 206

[143] Section 4 of the Keren Kayemet Le-Israel Law, 1953, supra note 54

> "Every right or power vested by law in the existing company shall also be vested in the new company."

[144] Section 3(a) of the Memorandum and Articles of Association of the Jewish National Fund, 1954, The Palestine Yearbook, supra note 142, at 206

[145] That means the land was owned by three bodies: the State, the Development Authority and the Jewish National Fund. See Kretzmer, supra note 37, at 60, 63

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2.2.3. Jurisprudence regarding "Absentees' Property" Cases

The jurisprudence concerning "absentees' property" cases is characterized by the Supreme Court's deference to the executive discretion and the confinement to intervention solely in infringements of legal rules, thus enabling the Custodian to succeed almost always to claim his share.

1. This happened for example in the decision handed down by the Supreme Court in 1954 in the matter of:

- *Habab v. Custodian of Absentees' Property*

This case concerns the power of the Custodian under Sections 28 and 29 of the Absentees' Property Law, 1950, to release - subject to the recommendations of a special committee - absentees' property to its owners. The said special committee, however, refused to recommend the release of land needed for agricultural settlement. Against the special committee's decision a petition was launched to the Supreme Court. The petitioner argued that he was wrongly considered as an absentee, and his land was improperly put under control of the Custodian for Absentees' Property. Justice Witkon, handing down the decision for the Supreme Court, rejected the petitioner's argument and refused to interfere in the policy of the said special committee. He stated that "the Custodian is not a trustee of the absentees" and that he had "no duty of care toward absentees, as they are regarded as foreign enemies who may be deprived of their property by the state."[146]

2. The Israeli Supreme Court also deferred to the executive discretion and confined its intervention to the infringements of legal rules in cases where the ownership was held jointly by a number of people and one or some of them was or were classified as "absentees" under the Absentees' Property Law, 1950. This happened in the following cases:

* *Natzara v. Custodian of Absentees' Property*[147]
* *Diab v. Custodian of Absentees' Property*[148]
* *Custodian of Absentees' Property v. Mussa*[149]

3. The Supreme Court also refused to intervene when the owner of the land died without leaving a will and some of the heirs were classified as "absentees" under the Absentees' Property Law, 1950. This happened in the following cases:

- *Custodian of Absentees' Property v. Shariah Court*[150]
- *Beria v. Custodian of Absentees' Property*[151]

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[146] C.A. 58/54, *Habab v. Custodian of Absentees' Property,* 10 P.D. 912, at 918-919
[147] C.A. 440/60, *Natzara v. Custodian of Absentees Property,* 17(ii) P.D. 1345
[148] C.A. 1397/90, *Diab v. Custodian of Absentees' Property,* 46(v) P.D. 789
[149] C.A. 3747/90, *Custodian of Absentees' Property v. Mussa*, 46(iv) P.D. 361, at 364
[150] H.C. 32/62, *Custodian of Absentees' Property v. Shariah Court*, 16(iii) P.D. 1942, at 1945

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2.2.4. The Creation of so called "Present Absentees"

2.2.4.1.Statutory Provisions

Due to the very broad definition of the term "absentee" in Section 1 of the Absentees' Property Law, 1950, this law could be applied to any native Palestinian Arab or any resident in Palestine who had left his usual place of residence in Palestine after 29 November 1947 - the day of the adoption of the UN GA Resolution 181 (II) - even if it was only for a short family visit.

The definition of "absentee" in the Absentees' Property Law, 1950 determined who would, or better, who would not be entitled to full civil rights in the state of Israel, and it is no accident that the definition of "absentee" is similar to the requirements that must be met in order to receive "nationality by virtue of residence" according to the Nationality Law, 1952.[152]

It should be mentioned at this point that the Absentees' Property Law, 1950 as well as the two years later enacted Nationality Law, 1952 were formulated for the same purpose, namely to exclude as many Palestinian Arabs as possible from any classification of those entitled to full civil rights, without having to resort to define legal categories which would appear to be discriminating on a religious or ethnic basis.[153]

Section 3 of the Nationality Law, 1952 defines the requirements that must be fulfilled in order to receive nationality (i.e. citizenship) by residence:

> "(a) A person who, immediately before the establishment of the State, was a Palestinian citizen and who does not become an Israel national under section 2, shall become an Israel national with effect from the day of the establishment of the State if -
>
> (1) he was registered on the 1st March 1952 as an inhabitant under the Registration of Inhabitants Ordinance, 1949; and
>
> (2) he is an inhabitant of Israel on the day of the coming into force of this Law; and
>
> (3) he was in Israel, or in an area which became Israel territory after the establishment of the State, from the day of the establishment of the State to the day of the coming into force of this Law, or entered Israel legally during that period.
>
> (b) A person born after the establishment of the State who is an inhabitant of Israel on the day of coming into force of this Law, and whose father or mother becomes an Israel national under subsection (a), shall become an

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151 C.A. 434/62, *Beria v. Custodian of Absentees' Property,* 17(iii) P.D. 1538, at 1539-1540

152 Compare Section 3(a) of the Nationality Law, 1952, supra note 64, and Section 1(b)(1)(iii) of the Absentees' Property Law, 1950, supra note 47

153 Hofnung, supra note 77, at 105

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Israel national with effect from the day of his birth."[154]

If one compares Section 1 of the Absentees' Property Law, 1950 with that Section 3 of the Nationality Law, 1952, one may discern that the scope of application of the Absentees' Property Law, 1950 is wider than that of the Nationality Law, 1952.

The Nationality Law, 1952 created some legal categories of people, which 1. had not been counted in the census taken in 1948, or 2. fled or were forced to leave Palestine in 1948 and returned to their ordinary places of residence with the permission to be reunited with their families, and could acquire citizenship by virtue of their residence according to the Nationality Law, 1952.
Important to mention is the fact that although these people managed to acquire citizenship according to the Nationality Law, 1952, they could - due to the existence of the Absentees' Property Law, 1950 - in most of the cases not free themselves from their "legal" status as "absentees"[155] despite the fact that they were/are present in Israel.[156] This was the way how the "legal" status of "present absentees" was created.

2.2.4.2. Jurisprudence regarding "Present Absentees"

The most excessive cases to mention in this context are those of the residents living in the Arab villages and towns of the so called "Little Triangle" (situated north-east of Tel Aviv), which was annexed by Israel following the signment of the General Armistice Agreement between Israel and Jordan on 3 April 1949.[157]
These people acquired Israeli citizenship/nationality by virtue of their residence - according to the Nationality Law, 1952 - and their property rights in the villages of this "Little Triangle" were left undisturbed. But at the same time these inhabitants of the "Little Triangle" were declared "absentees" with regard to their property situated within the state of Israel prior to 1949, despite the fact that Article VI.6. of the Armistice Agreement between Israel and Jordan[158] explicitly states that the inhabitants of the villages affected by the establishment of the Armistice Demarcation Lines shall be entitled to maintain, and shall be protected in, their full

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154 Section 3 of the Nationality Law, 1952, supra note 64

155 Section 1(b)(1) of the Absentees' Property Law, 1950, supra note 47

156 However, Section 27 of the Absentees' Property Law, 1950 gives one exemption to the above rule. According to this section the Custodian may, in his sole discretion, and on the recommendation of a special committee, give to a Palestinian citizen, who left his ordinary place of residence, and who is defined as an absentee, a written confirmation that he is not an absentee. With the confirmation the property ceases to be absentees' property. But this person must in his application prove to the Custodian that he left his place of residence either for (1) for fear that the enemies of Israel might cause him harm, or (2) otherwise than by reason or for fear of military operations.

157 General Armistice Agreement signed between Israel and Jordan, supra note 40

158 Article VI.6. of the General Armistice Agreement between Israel and Jordan, ibid., at 310

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rights of residence, property and freedom.
The reason given for this decision was that these inhabitants were outside the state of Israel when the Emergency Regulations (Absentees' Property), 1948[159] were published on 12 December 1948.

This interpretation of the Absentees' Property Law, 1950 was for the first time developed by the Israeli Supreme Court in the matter of
* *Al-Yousef v. Custodian of Absentees' Property*[160]
and then regularly approved in a number of decisions, such as

- *Custodian of Absentees' Property v. Samara, Al-Rabi, Joussi*[161]
- *Hassan v. Municipality of Jerusalem, Custodian of Absentees' Property.*[162]

In all these cases the Supreme Court adopted a highly positivistic, formalistic, dogmatic and authoritarian judicial conception and thus succeeded to escape to deal with the substantial facts on the ground, namely whether the decision on content was lawful, considering the fact that these inhabitants were not at all "absentees" but on the contrary living at all times on the same territory which had been transformed from Arab Palestine into the state of Israel.

As already mentioned this judicial conception is characterized by the belief that the only source of the individual's subjective right is the positive law; by the distinction of "law as it is" and "law as it ought to be"; by the literal application of law within self-imposed limits of a rigid scheme of deductions, and by the complete indifference towards individual human affairs and justice.[163]

2.2.5. The Klugman Report - Published in 1992

Today it is officially recognized by the Israeli government that the institution of the Custodian of Absentees' Property only served as a means to dispossess Palestinians of their lands and other property. In September 1992, an Inter-Ministerial Committee, headed by the then Director General of the Ministry of Justice, attorney Haim Klugman, published a Report [hereinafter: Klugman Report] which clearly states that the Custodian of Absentees' Property was not created to protect the land of real or present absent Palestinian Arabs but rather was established to come into possession of their land. The Committee also found that moneys from the state

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159 Emergency Regulations (Absentees' Property), 1948, supra note 46
160 H.C. 225/53, *Al-Yousef v. Custodian of Absentees' Property*, 8(i) P.D. 341, at 343
161 C.A. 25/55, 145/55, 148/55, *Custodian of Absentees' Property v. Samara, Al-Rabi, Joussi,* 10(iii) P.D. 1825, at 1832
162 C.A. 42/60, *Hassan v. Municipality of Jerusalem, Custodian of Absentees' Property*, 15(ii) P.D. 966, at 969
163 Mieczyslaw Maneli, Juridical Positivism and Human Rights (Hippocrene Books, New York, 1981), at 284-286

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budget was used for acquisitions, payments for renovations, and payment for evictions, lawyers and guarding fees.[164] Thus the Klugman Report clearly established that funds of the state of Israel were used in order to dispossess the Palestinians of their homes. After the publication of the Klugman Report, the organization IrShalem - whose goal is to promote coexistence, understanding and peace between the Jewish and Arab residents of Jerusalem - petitioned the Israeli Supreme Court to direct the government to implement the report's recommendations. But to this day the report is not implemented and no charges were ever brought against the key individuals who played a central role in helping and championing the settler groups.[165]

2.3. Requisition of Private Land and Houses during an Officially Proclaimed "State of Emergency" for the Purposes of "State Security" and "Essential Services"

2.3.1. The Emergency Regulations (Requisition of Property), 1948 and The Emergency Land Requisition (Regulation) Law, 1949

During the 1948 war in Palestine various "agencies" - mostly so called "security agencies" - confiscated land and a large number of houses, apartments and other buildings in order to provide accommodation for newly arriving Jewish immigrants, and to enable the establishment of administrative facilities, business premises and offices for various Israeli official organizations.[166]

During the time of the 1948 war the orders requisitioning land and houses were issued by military commanders according to Regulations 48 and 72 of the Defence Regulations, 1939[167] and Regulations 114 and 115 of the Defence (Emergency) Regulations, 1945.[168]

A vast number of case law dealing with these Regulations reveals that the

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164 Klugman Report 1992, Report by an interministerial governmental committee, headed by the director general of the Ministry of Justice, attorney Haim Klugman. See also LAW, Land & Settlement Policy in Jerusalem (First Printed June 1999, Reprinted January 2000) at 27-28

165 H.C. 2179/95, *IrShalem Jerusalem v. Prime Minister & Others*

166 Hofnung, supra note 77, at 109

167 Defence Regulations, 1939, P.G. No. 914 (26 August 1939) Suppl. III, at 659. See for example the following cases: H.C. 10/49, *A.S. Corporation v. Gubernik*, 2 P.D. 226; H.C. 29/49, *Sheinin v. Competent Authority (Gubernik),* 2 P.D. 654; H.C. 132/51, *Dolan v. Chairman of the Execution Officer,* 5(ii) P.D. 1497; H.C. 68/49, *Schwartz v. Officer Empowered to Requisition Property*, 2 P.D. 943

168 Regulations 114-115 of the Defence (Emergency) Regulations, 1945, supra note 67. See for example the following case: H.C. 11/48, *Mizel v. Competent Authority (Gubernik),* 1 P.D. 133

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property seizure during the 1948 war was marked by highly questionable acts.

In order to "legalize" retrospectively illegal acts of property seizure and to provide a legal basis for future confiscations, the Emergency Regulations (Requisition of Property), 1948[169] were enacted and came into force on 24 December 1948.

After having been extended several times[170] the Emergency Regulations (Requisition of Property), 1948 formed the direct basis for the enactment of the Emergency Land Requisition (Regulation) Law, 1949[171] - which came into force on 30 November 1949.

With the Emergency Land Requisition (Regulation) Law, 1949 a powerful legal instrument was created which entitled the acting competent authority to issue documents by virtue of which illegal actions and confiscations, carried out during the 1948 war, were given legal validity.

Section 2 of the Emergency Land Requisition (Regulation) Law, 1949 empowered the Israeli government to appoint a "competent authority" which were - pursuant to Section 3(b) - entitled to issue a "land requisition orders" or "housing orders" in any case where

> "...he is satisfied that the making of the order is necessary for the defence of the state, public security, the maintenance of essential supplies or essential public services, the absorption of immigrants or the rehabilitation of ex-soldiers or war invalids."

Section 3(a) of the Emergency Land Requisition (Regulation) Law, 1949 also states that the above mentioned powers of the "competent authority" shall only exist during officially declared states of emergency. However, as already elaborated in Chapter D of this work, such an officially declared state of emergency is in Israel in force - up until today and without interruption - since 19 May 1948.

Important to mention is the fact that most of the property seizures were carried out before the enactment of the Emergency Land Requisition (Regulation) Law, 1949.[172] However, with the creation of this law the original seizures were extended for another three years (i.e. until November 1952),[173] and by a later date, they were extended for a further two periods of three years each (i.e. until 1955 and again until

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[169] Emergency Regulations (Requisition of Property), 1948, supra note 49

[170] Emergency Regulations (Requisition of Property) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 37; Emergency Regulations (Requisition of Property) (Extension of Validity) (No. 2) Law, 1949, 3 L.S.I. (1949) 46; Emergency Regulations (Requisition of Property) (Extension of Validity) (No. 3) Law, 1949, 3 L.S.I. (1949) 111

[171] Emergency Land Requisition (Regulation) Law, 1949, supra note 50

[172] See the cases mentioned in supra notes 167, 168

[173] See Section 6 of the Emergency Land Requisition (Regulation) Law, 1949, supra note 50, which states that the period of requisition of land shall be for the period of three years.

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1 August 1958).[174] The implementation of the above mentioned laws and amendments made it possible that property confiscated in 1948 could "legally" be held for a period of ten years consecutively.

Shortly before the date of 1 August 1958 arrived, some of the land was restored to its owners, and the rest was purchased in accordance with the laws regulating the expropriation of land for public purposes.[175]

2.3.2. Jurisprudence regarding Land Requisition in a "State of Emergency" for the Purposes of "State Security"

Until the mid-1950's, additional seizures and confiscations were carried out according to the Emergency Land Requisition (Regulation) Law, 1949 - as the Supreme Court decision in the matter of *Koppelman v. Competent Authority for Regulating the Requisitioning of Land*.[176]

The jurisprudence of the Israeli Supreme Court in the context of the Defence Regulations, 1939;[177] the Defence (Emergency) Regulations, 1945;[178] the Emergency Regulations (Requisition of Property), 1948 and the subsequently enacted Emergency Land Requisition (Regulation) Law, 1949 is characterized

1. by a judicial tolerance of illegal actions of the administrative organs;
2. by an unwillingness to go into the merits of land confiscation decisions;
3. by a willingness to defer to the subjective discretion of the executive branch.

Looking through the case law, it can be said that by means of the Emergency Land Requisition (Regulation) Law, 1949, the state of Israel and its agencies held private land, apartments and buildings over many years, without paying a market price for its use.

These seizures of land and other immovable property for so many years after the 1948 war had ended, had in reality nothing to do with a situation of emergency, but was aimed at lowering the expenses to Israel's state budget.[179]

This policy - which in a large number of cases was supported by the Supreme Court of Israel - constituted a clear violation of the individual's property rights and

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[174] S.H. 1952, p. 293; Emergency Requisition of Land (Temporary Order) Law, 1956, S.H. 1956, p. 149, quoted in Hofnung, supra note 77, at 110 FN 126

[175] Hofnung, ibid., at 111

[176] C.A. 364/58, *Koppelman v. Competent Authority for Regulating the Requisitioning of Land*, 13(iii) P.D. 1762. This case is dealing with the compensation to be paid for the requisition of a building in Tel Aviv on 23 July 1956.

[177] Defence Regulations, 1939, supra note 167

[178] Regulations 114-115 of the Defence (Emergency) Regulations, 1945, supra note 67. See for example the case: H.C. 11/48, *Mizel v. Competent Authority (Gubernik),* 1 P.D. 133

[179] Hofnung, supra note 77, at 112

definitely stood in contradiction to the promises made in the Declaration of the Establishment of the State of Israel, 1948.

2.4. Declaration of Land as "Closed Areas" and the Creation of the so called "Uprooted Villages"

2.4.1. Regulation 125 of the British Mandatory Defence (Emergency) Regulations, 1945

Regulation 125 of the Defence (Emergency) Regulations, 1945[180] forms the legal basis for the declaration of land as "closed area" in order to facilitate the expropriation of Arab owned land. This norm was also the legal basis for the creation of the so called "uprooted villages" in Israel.

The said norm was specifically used in the 1950's in order to prevent many native Palestinian Arab inhabitants from returning to their villages and lands from which they were expelled or fled in the course of the war that broke out in the context of the establishment of the state of Israel in Palestine in May 1948.

The inhabitants of these villages are called "the uprooted" or "internal refugees" and most of them have - until today - never been permitted to return.[181]

Regulation 125 of the Defence (Emergency) Regulations, 1945 states:

> "A Military Commander[182] may by order declare any area or place to be a closed area for the purposes of these Regulations. Any person who, during any period in which any such order is in force in relation to any area or place, enters or leaves that area or place without a permit in writing issued by or on behalf of the Military Commander shall be guilty of an offense against these Regulations."[183]

In order to prevent the native Arab inhabitants from returning, the military government declared these villages as a "closed area", and unless the chief of staff of the Israeli army had agreed, it was - and still is - impossible to enter the village - due to so called "security reasons".[184]

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180 Defence (Emergency) Regulations, 1945, supra note 67

181 Legal Violations of Arab Minority Rights in Israel, A Report on Israel's Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination, published by Adalah, The Legal Center for Arab Minority Rights in Israel, March 1998 [hereinafter: Adalah, Legal Violations of Arab Minority Rights in Israel] at 55

182 This is the Military Commander for the area or place in question appointed by the General Officer Commander. See Regulation 2 in connection with Regulation 6 of the Defence (Emergency) Regulations, 1945, supra note 67

183 Regulation 125 of the Defence (Emergency) Regulations, 1945, ibid.

184 Jiryis, supra note 126, at 23

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As a rule the Israeli government offered to the inhabitants of the "uprooted villages" compensation in order to make them renounce their property, but in most of the cases the inhabitants refused these proposals, and still continue their attempts to return to their homes.[185]

In order to facilitate the expropriation of Arab owned land[186] Regulation 125 of the Defence (Emergency) Regulations, 1945 was often used in combination with several other laws and emergency regulations, such as the Land (Acquisition for Public Purposes) Ordinance, 1943;[187] the Emergency Regulations (Cultivation of Waste Lands), 1948;[188] the Emergency Regulations (Security Zones), 1949;[189] the Land Acquisition (Validation of Acts and Compensation) Law, 1953.[190]

Important to mention is the fact that Regulation 125 of the Defence (Emergency) Regulations, 1945 has never been used in order to close Jewish neighborhoods or towns in the state.[191]

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185 Ibid.

186 Among the villages whose land has been confiscated after closing orders according to Regulation 125 of the Defence (Emergency) Regulations, 1945 have been issued were: Amqa, Faradiya, Kafr Inan, Saffuriya, al-Majdal, Kafr Bir'im, al-Mansura, Mi'ar, Kuwaikat, al-Birwa, al-Damun, al-Ruwais and al-Ghabisiya. See Jiryis, supra note 126, at 23 FN 14

187 Land (Acquisition For Public Purposes) Ordinance, 1943, supra note 61. For more details see infra sub-chapter 2.8. (Expropriation of Land for "Public Purposes")

188 Emergency Regulations (Cultivation of Waste Lands), 1948, supra note 45. For more details see infra sub-chapter 2.6. (Declaration of Land as "Waste Land" and Confiscating this Land)

189 Emergency Regulations (Security Zones), 1949, supra note 68. For more details see infra sub-chapter 2.5. (Declaration of Land as "Security Zone" and Confiscating this Land)

190 Land Acquisition (Validation of Acts and Compensation) Law, 1953, supra note 51. For more details see infra sub-chapter 2.7. (Legalization of Unlawful Actions by Means of "Transfer of Ownership" of Land)

191 Adalah, Legal Violations of Arab Minority Rights in Israel, 1998, supra note 181, at 55

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2.4.2. Supreme Court Cases concerning Regulation 125 of the Defence (Emergency) Regulations, 1945

2.4.2.1. Asslan & Others v. Military Governor of Galilee (1951)

A serious and until today not yet settled case dealing with Regulation 125 of the Defence (Emergency) Regulations, 1945 concerns the village Rabesieh located in the western part of the Galilee area.

Concerning this village the Israeli Supreme Court issued two decisions, namely

- *Asslan & 30 Others v. Military Governor of Galilee*[192] and
- *Asslan & 42 Others v. Commander and Military Governor of Galilee*[193]

Both cases deal with the systematic violation of the rights to property, to movement and residency of the native Arab inhabitants of the village, caused by the application of Regulation 125 of the Defence (Emergency) Regulations, 1945.

Both Supreme Court judgments are characterized by a positivistic conception of the law and a strong formalistic and dogmatic style of judicial reasoning.

The rulings of the Supreme Court in both cases, which will be discussed below, is important not only for the legal rules laid down there, but principally because of the way the other branches of the government responded to the judgements.

Asslan & 30 Others v. Military Governor of Galilee - First Case

The Facts of the Case

In May 1948, the residents of the village Rabesieh were expelled from their homes by soldiers of the Israeli army in the course of the fightings which took place in this area. However, in spring 1949 they returned to their village.[194]

On 26 January 1950, they were expelled for the second time by soldiers of the Israeli army and were also not allowed to re-enter their village.[195]

On 2 August 1951 - together with 12 other villages in the Western Galilee - the village Rabesieh was declared as "closed area" under Regulation 125 of the Defence (Emergency) Regulations, 1945.[196]

This closing order was not published in the Official Gazette as required.[197]

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192 H.C. 220/51, *Asslan & 30 Others v. Military Governor of Galilee*, 5 P.D. 1480

193 H.C. 288/51, 33/52, *Asslan & 42 Others v. Commander and Military Governor of Galilee,* 9 P.D. 689

194 *Asslan & 30 Others v. Military Governor of Galilee*, supra note 192, at 1482

195 Ibid.

196 Id., at 1483

197 Id.

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On 24 September 1951, a number of inhabitants returned to their village Rabesieh in order to live in their homes but were immediately expelled (for the third time) by the military commander, who did not allow them to return.[198]

On 25 September 1951, the inhabitants (Jamal Mahmoud Asslan and 30 other native Arab inhabitants) of the village launched a petition to the Supreme Court challenging the validity of the military order on the ground that the military commander had no authority to expel them or to prevent them from entering and living in their village, and that the expulsion and the denial of their right to movement were illegal and totalitarian acts.[199]

The Decision of the Supreme Court

The Supreme Court of Israel accepted the petition and declared the "closing order" of the area issued by the military commander according to Regulation 125 to be void, since the said closing order - which has legislative nature - had not been published in the Official Gazette as required.[200]

Furthermore, the Supreme Court held that the respondent had neither the right to expel the petitioners, nor to prevent them from entering, leaving or living in the village of Rabesieh.

On 30 November 1951 - as a result of its conclusions - the Supreme Court issued a decree absolute against the respondents (i.e. the Israeli military authority) according to which they were ordered to allow the residents of Rabesieh to return to their village.[201]

Summary and Conclusions

1. At first sight this decision seemed to be a positive step towards the recognition of basic human rights and freedoms in general, and the rights of the native Arab inhabitants of Rabesieh in particular, since they were allowed to return and to live in their village.
2. However, looking in more detail to the court's reasoning, it becomes clear that the annulment of the closing order did take place only due to the lack and non-fulfilled of formal and procedural obligations by the military commander.
3. The Supreme Court applied a formalistic and dogmatic approach and solely concentrated on the lack of the formal requirement of publication but did not deal with the substantive matters at stake.

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[198] Id., at 1482
[199] Id.
[200] Id., at 1483, 1487
[201] Id.

Asslan & 42 Others v. Military Governor of Galilee - Second Case

The Facts of the Case

Immediately after the first decision was handed down by the Supreme Court (30 November 1951) some native Arab residents returned to the village.[202]

Others delayed and before they could return two things happened:

On 6 December 1951 - only a few days after the first Supreme Court decision was published - the military authorities issued according to Regulation 125 of the Defence (Emergency) Regulations, 1945 a "closing order" for the village Rabesieh.[203]

This time the military authorities did not make the above described mistake and the closing order was - as required - published in the Official Gazette.[204]

On 8 December 1951, a number of residents (Jamal Mahmoud Asslan and 42 other native Arab inhabitants) of the village once again launched a petition against the above mentioned closing order to the Supreme Court requesting an order prohibiting their expulsion form the village or alternatively, ordering that they be granted permits to enter the village.[205]

On 10 December 1951 - as a reaction to the Supreme Court's first decision - the Minister of Defence enacted emergency regulations which accorded retroactive validity to orders issued with proper authority but which were not published.[206]
The statute was given retroactive effect as from 15 May 1948.

The Decision of the Supreme Court

That time the Supreme Court dismissed the petition.

At first the Court distinguished between the villagers who had returned before publication of the closure order - i.e. those who returned between 30 November 1951 and 6 December 1951 - and those who did not.[207]

The Supreme Court held that the former could not be expelled, but that the latter had no right to enter.[208]

During the court hearing the respondents furthermore argued that the closure of the village was based solely on so called "security grounds", and they submitted a

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202 *Asslan & 42 Others v. Commander and Military Governor of Galilee*, supra note 193, at 691
203 Ibid.
204 Id.
205 Id.
206 Id.
207 Id.
208 Id.

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certificate signed by the acting Minister of Defence that these "security grounds" for the decision were privileged.[209]

As a consequence the Court refused to interfere, did, however, express some skepticism as to whether "security grounds" were really behind the decision and also expressed the wish that some solution be found.

Justice Landau, handing down the judgment for the Court, applied a positivistic, formalistic and legalistic style of judicial reasoning and thus escaped from dealing with the substantial matters at stake. He held as follows:

> "It is not surprising that in view of all these developments, the suspicion may arise that the concealed security grounds are no grounds at all; However the court cannot pronounce on the basis of pure suspicion and surmise. It requires a firmer basis for its decisions...the delivery of a certificate of the acting Minister of Defence frustrates...any possibility of investigating the substance of the matter." [210]

Despite the mentioned doubts concerning the geniuses of the respondents declaration, the Supreme Court dismissed the petitions of most of the village residents and made the order nisi absolute only in favor of those very few petitioners who had managed to return and settle in the village between 30 November 1951 (i.e. the day of the Supreme Court's first order) and 6 December 1951 (i.e. the day of the issuance of the closing order).[211]

Summary and Conclusions

1. The decision in the matter of *Asslan & 42 Others v. Commander and Military Governor of Galilee* is, on the one hand, characterized by an unwillingness of the Supreme Court to go into the merits of decisions of the executive branch if violations of fundamental rights to property, movement and residency of the native Palestinian Arab inhabitants are involved. On the other hand the decision is characterized by a strong willingness of the Supreme Court to defer to the subjective discretion of the executive branch.

2. The decision also shows how the other branches of the government dishonor the judgments of the Supreme Court, and how it is possible within Israel's executive and legislative apparatus to distort laws and to change them from one day to the other.

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209 Id., at 694, para. 11
210 Id., at 695, para. 12
211 Id., at 696, para. 14

The Aftereffects of the Second Decision of the Court

The military authorities did never allow the residents of Rabesieh to return to their homes but rather bombarded and destroyed the whole village - including all the houses - of Rabesieh. The only building that remained is the ruin of the village church. Until today Rabesieh remains a "closed area" and its residents are still trying to return to it.[212]

Important to mention is the fact that with the ongoing prevention of the Arab inhabitants to return to Rabesieh and the complete and arbitrary destruction of all the houses and the property of the villagers, the Israeli authorities commits and committed a serious breach of the internationally recognized rights to property, residency and movement.

2.4.2.2. The Establishment of Military Firing Ranges in the al-Roha Area of Wadi Ara and in Umm al-Fahem (1976, 1985 and 1998)

Another highly critical and not settled case relating to the use of Regulation 125 of the Defence (Emergency) Regulations, 1945 as a means to expropriate Arab owned land concerns the establishment of Military Firing Ranges in the al-Roha area of Wadi Ara, in the region of central Israel known as the "Triangle".[213]

In this case - starting in the mid-1970's - in the recent years new and even dramatic - because specifically violent - developments occurred involving not only the violation of the Palestinian Arab's right to property, but also of a number of other rights and freedoms, such as the right to freedom of movement, the right to assembly and demonstration, the right to life, bodily integrity and human dignity, the right to liberty and freedom from arbitrary detention, and the rights to equality before the law and in law enforcement.

Due to its symbolical character for the discriminatory way the Israeli government treats the Palestinian Arab minority in Israel, and due to the utmost importance with regard to the violation of the Palestinian fundamental rights to land and housing, this case shall be discussed in detail in the next sub-chapter.

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[212] Hofnung, supra note 77, at 66-67

[213] Adalah, The Legal Center for Arab Minority Rights in Israel, Brief: Umm al-Fahem, Focusing on events of 27-29 September 1998, at 1 [hereinafter: Adalah, Brief: Umm al-Fahem]. Adalah, Annual Report 1999, at 22 [hereinafter: Adalah, Annual Report 1999]. http://www.adalah.org/news.htm (Attorney General Endorses Police Review of Violence at Umm El Fahem; Forced to Re-Open Investigation after Public Outcry - 2/25/00) [hereinafter: http://www.adalah.org/news.htm]

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The Facts of the Case

In 1976, Military Firing Range 109 was established on 12.000 dunams (3.000 acres) of land in the al-Roha area of Wadi Ara, in the region of central Israel known as the Triangle, where the Arab town Umm al-Fahem is located.[214]

In 1985, an additional 20.000 dunams (5.000 acres) of land in the same area was set aside as Military Firing Range 105.[215]

In May 1998, the Israeli army incorporated the above mentioned Military Firing Ranges 105 and 109 into a new area, which is designated as Military Firing Range 107 and occupies a total of 42.000 dunams (10.500 acres) of al-Roha land.[216]

In the same month Arab citizens of Israel who own farm-land within the said Military Firing Range 107 were informed by mail of a change in their land's status, namely that approximately 18.000 dunams (4.500 acres) of their land, located near the town of Umm al-Fahem and used mainly for agriculture, had been declared a "closed area" under Military Order 107, issued in accordance with Regulation 125 of the Defence (Emergency) Regulations, 1945.[217]

The Palestinian farm-owners were told that they could continue to cultivate their farms only on weekends, and only after obtaining special entry permits and expensive insurance policies releasing the IDF from all responsibility for personal and property damages. Under the said Military Order 107, the farmers' freedom to cultivate their lands was so severely curtailed as to be nonexistent. And even if they could satisfy the strict requirements for entry, the terms set by the IDF indicated that by farming their lands they are at severe risk of being injured or killed by unexploded shells or other weapons remaining in the area.[218]

Over the next few months, the residents of Umm al-Fahem sent letters to the Prime Minister and his cabinet expressing opposition to the change in the land's status and requesting negotiations on the matter, as well as demonstrations in protest of the land confiscation were virtually ignored by the Israeli authorities.[219]

In early September 1998, as frustration grew and the government remained unresponsive, a protest tent was erected on the disputed al-Roha land. As a gesture

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[214] Adalah, Annual Report 1999, ibid.

[215] Id.

[216] Nine Arab towns border on the Firing Range 107. In some cases the boundaries run along the walls of residents' homes. See Adalah, Brief: Umm al-Fahem, supra note 213, at 1

[217] Ibid., at 1, 4 FN 16

[218] Id., at 1

[219] Id. See also the comment and article on this issue published in the Hebrew daily HA'ARETZ, English Edition, 29 September 1998, at A6 (An unnecessary flare-up); HA'ARETZ, English Edition, 2 October 1998, at B1 (Uzi Benziman, Corridors of Power - A festering sore)

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of ongoing opposition by the Palestinian residents, a few demonstrators remained in the tent at all times.[220]

On 27 September 1998, Israeli security forces arrived at the al-Roha protest site, dismantled the protest tent, attacked and beat the residents who were present. Then they surrounded the public high school of Umm al-Fahem - where 1.500 pupils were inside the school - and attacked the students and teachers with tear gas (CS), rubber-coated metal bullets and - according to the evidences found at the spot - even with live ammunition (after the clashes empty 562mm IDF cartridges were found).[221] Several Palestinian Arab students and teachers were injured in the attack, some seriously enough to be hospitalized. Two Palestinian youths each lost an eye after being struck by rubber -coated metal bullets.[222]

As news spread of the attacks on the demonstrators in the tent and students in the high school, residents of Umm al-Fahem hurried toward those sites and confronted the security forces. Some Palestinian residents threw stones and became involved in physical combat with officers, who responded with tear gas (CS), water cannons and rubber-coated metal bullets. At the height of the clashes, about 800(!) security officers became involved.[223]

The situation quieted somewhat down in the late evening of the same day when military officers announced an agreement with community leaders suspending the closure of al-Roha land until the end of December 1998 in order to work out an "acceptable" compromise for each side.[224]

Nevertheless, the demonstrations and violence continued for three more days following the attacks on the demonstrators in the protest tent and on the Umm al-Fahem high school, and spread to Nazareth, Kafr Kana, Tira and other Arab towns. Altogether, the demonstrations left over 400 Palestinian residents injured, 70 of whom were hospitalized, including the Umm al-Fahem Mayor Sheik Raed Salah.[225] At least 14 Israeli security officers were also hurt during the clashes.[226]

The Aftereffects of the Violent Clashes of 27 September 1998

Although dozens of Umm al-Fahem residents were detained during the protests, and many were beaten while in police custody and/or were prevented from speaking with lawyers, the Knesset voted in December 1998 against the establishment of an

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[220] Adalah, Brief: Umm al-Fahem, supra note 213, at 2
[221] Ibid., at 3
[222] Id., at 2
[223] Id.
[224] Id.
[225] Id., at 3
[226] Id., at 2

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independent commission of inquiry to investigate the events leading to the violence, misconduct and brutality of the police/security forces.[227]

On 24 January 2000, the Attorney General of Israel, Elakyim Rubinstein, approved the results of an internal police review dealing with the violence at Umm al-Fahem. This internal review cleared the police of all responsibility for the clashes, and recommended that all complaints filed against individual officers be dropped, due to the excessive difficulty of identifying particular individuals.[228]

Rubinstein's decision was met with widespread condemnation and outrage from individuals and groups throughout the country, including the Deputy Speaker of the Knesset, who called on the Attorney General to resign.

The chair of the Israeli Bar Association, Shlomo Cohen, publicly wrote to the Attorney General as follows:

> "...I am shocked to read the results of the police investigation, and even more shocked by your [the Attorney General Rubinstein's] acceptance of the events and investigation. It is difficult that you, as chief law enforcement officer of the state, have gone along with such an investigation. The results of this 'investigation', and even more your acceptance of them, are a harsh blow to the rule of law, equality in the eyes of law, and law enforcement in Israel."[229]

MK Hashem Mahameed characterized Rubinstein's decision as a "whitewash" which "adds insult to injury, legitimizing violence and retroactively permitting the police to use violence against Palestinian Arab citizens of Israel."[230]

As a result of this overwhelming outcry, the Attorney General decided to refer the accusations of police brutality back to the Internal Investigation Department, whose head announced in February 2000 that the investigation would be re-opened in light of "new evidence".[231]

While these new evidences were not disclosed to the public, in any case there exist some important old evidences which deserve to be mentioned at this point.

These evidences consist of the fact that the Israeli security forces in fact anticipated and even planned on high levels of violence in Umm al-Fahem.

This is revealed by the fact that the police administration reserved space at Givat Haviva center for a large number of officers on the evening preceding the attack on the protest tent, ensuring that substantial forces would be in the area.

Thus, when on the next day of the attack, 800 policemen appeared at the spot this was no coincidence, but a planned action by the Israeli police administration.

Moreover, the Arab newspaper Al-Sunara reported that days before the clashes, the Afula hospital was warned by the Israeli police to prepare themselves for the

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227 Adalah, Annual Report 1999, supra note 213, at 22

228 http://www.adalah.org/news.htm, supra note 213

229 Adalah, Annual Report 1999, supra note 213, at 22

230 Ibid.

231 Id.

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arrival of large numbers of injured persons.[232] The principal of the Umm al-Fahem high school also stated that some time before the demonstrations took place, police officers visited the school building without giving any explanation for what seems, in retrospect, to resemble a reconnaissance mission.[233]

Background and Conclusions regarding the Protests in Umm al-Fahem

The villagers' strong protest and reactions towards Military Order 107 - altering the status of 18.000 dunams of agricultural land in the al-Roha area of Wadi Ara including Umm al-Fahem, and declaring this land as "closed military zone" - are grounded on the following facts:

The town of Umm al-Fahm - which covered a registered area of 86.000 dunams of land prior to 1948 and is now limited to only 25.000 dunams of land[234] - reflects and symbolizes the ongoing discrimination exercised by all Israeli governments towards the Palestinian Arab people especially when it comes to the allocation of land and other resources (such as water and budget).[235]

Although the Palestinian Arab citizens of Israel comprise nearly 20% of the total population, the jurisdiction of all Arab local authorities covers less than 2% of the municipal areas in the country.[236]

While 93% of the state lands are in Jewish hands (if not also private), the Palestinian Arab citizens of Israel only own 4,2% of the lands they owned 100 years ago.[237]

Despite a generally high rate of population growth and despite the fact that Umm al-Fahem and all other Arab towns located in Israel within the Green Line are already severely overcrowded, Arab towns are allowed little or no room for expansion, while at the same time Jewish towns are allotted new land.[238]

At this point it is very important to mention that since the 1970's Israeli governmental plans have called for a new Jewish town to be called "Iron" and to be established in the Wadi Ara region - a fact which is well known to even the youngest Arab citizen of Israel.[239]

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232 Al-Sunara, 2 October 1998, quoted in Adalah, Brief: Umm al-Fahem, supra note 213, at 4

233 Adalah, Brief: Umm al-Fahem, ibid.

234 Id.

235 HA'ARETZ, 29 September 1998, supra note 219, at A6; HA'ARETZ, 2 October 1998, supra note 219, at B1

236 Adalah, Brief: Umm al-Fahem, supra note 213, at 4

237 HA'ARETZ, 2 October 1998, supra note 219, at B1

238 Adalah, Brief: Umm al-Fahem, supra note 213, at 4

239 Ibid.

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Moreover, the master plans formulated by government ministries for the year 2020 - as well as the Trans-Israel Highway plan[240] - show little consideration for the development needs and life styles of the Palestinian Arab population.[241]

Within the Arab society in Israel it is also a very well known fact that Regulation 125 of the Defence (Emergency) Regulation, 1945 - according to which land is declared a "closed area" - is often the first of a series of "legal" and "quasi-legal" steps used by the Israeli government in order to expropriate their lands on which finally Jewish settlements are built.[242] The mechanism always works in a familiar way: First the area is declared a "closed area", later on Nahal outposts are set up there, then the land becomes "state land" and is afterwards transferred to one of the quasi-governmental Zionist institutions, such as the JA and the JNF. Finally on the land a Jewish settlement is built from which Palestinian Arab citizens of Israel are totally excluded.

Having in mind this expropriation mechanism and considering the above mentioned governmental plans to build the Jewish city of "Iron", the fears of the Arab farm owners that the al-Roha land will be expropriated and used to build the city of "Iron" become very logic.

Shuli Dichter, who in 1998 was one of the directors of the organization called "Sikkuy," whose goal is to advance Israeli Arab citizens and give them equal status in Israeli society, confirmed in an interview to the newspaper Ha'aretz that:

> "The riots in Umm al-Fahem came in light of plans to build the city of Iron and the Arab's concern regarding this matter is not unfounded."

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240 http://www2.haaretz.co.il/special/highway [HA'ARETZ special for the on-line edition, 6 September 2000 (The Trans-Israel Highway)] The Trans-Israel Highway is also called "Route No. 6" and is part of the national master plan No. 31. For the first building stage of the Trans-Israel Highway 17.000 dunams of land were confiscated. 12% of this land was confiscated from private owners, most of them Arabs. (Half of the confiscated land is intended for interchanges and half for the highway itself.)

241 HA'ARETZ, 2 October 1998, supra note 219, at B1

242 As already mentioned, Regulation 125 of the Defence (Emergency) Regulation, 1945 is often used in combination with other legal instruments, such as the Land (Acquisition For Public Purposes) Ordinance, 1943, supra note 61, see sub-chapter 2.8. (Expropriation of Land for "Public Purposes"); Emergency Regulations (Cultivation of Waste Lands), 1948, supra note 45, see sub-chapter 2.6. (Declaration of Land as "Waste Land" and Confiscating this Land); Emergency Regulations (Security Zones), 1949, supra note 68, see sub-chapter 2.5. (Declaration of Land as "Security Zone" and Confiscating this Land); Land Acquisition (Validation of Acts and Compensation) Law, 1953, supra note 51, see sub-chapter 2.7. (Legalization of Unlawful Actions by Means of "Transfer of Ownership" of Land)

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2.5. Declaration of Land as "Security Zone " and Confiscating this Land

2.5.1. The Emergency Regulations (Security Zones), 1949

As already mentioned in a previous chapter of this work,[243] the military government used - as a complementary means to Regulation 125 of the Defence (Emergency) Regulations, 1945 - the Emergency Regulations (Security Zones), 1949[244] which were published for the first time on 27 April 1949.

The validity of the Emergency Regulations (Security Zones), 1949 was extended, first by the Emergency Regulations (Security Zones) (Extension of Validity) Law, 1949 until 1 August 1949,[245] and then again in an amended form by the Emergency Regulations (Security Zones) (Extension of Validity) (No. 2) Law, 1949 until 31 July 1950.[246] The most important provisions of this latter amended form shall now be discussed in more detail.

Nevertheless, it should be mentioned that after the 31 July 1950 the validity of the security zone regulations was extended annually until 1972, when they were allowed to lapse.[247]

According to Regulation 1 of the amended Emergency Regulations (Security Zones), 1949 certain strips of land (10 kilometers north and 25 kilometers south of the 31st parallel) along the borders of the "territory of Israel" were defined as "protected area", and the "territory of Israel" is defined as "the area in which the law of the state of Israel is applied."[248]

The wide definition of the term "the territory of Israel" is an important aspect in the Emergency Regulations (Security Zones), 1949 and indicates that not any specific boundaries of the state of Israel - and certainly not those as established in the UN Resolution 181 (II) of 29 November 1947 - are meant.

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243 See Chapter D.5.2.3.2. [The Military Government's Systematic Violation of the Civil and Political Rights of the Palestinian Arab People (1948-1966)]

244 Emergency Regulations (Security Zones), 1949, supra note 68

245 Emergency Regulations (Security Zones) (Extension of Validity) Law, 1949, 3 L.S.I. (1949) 47

246 Emergency Regulations (Security Zones) (Extension of Validity) (No. 2) Law, 1949, 3 L.S.I. (1949) 56

247 See the following laws: Emergency Regulations (Security Zones) (Extension of Validity) Law, 1953, 8 L.S.I. (1953/54) 47; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1960, 14 L.S.I. (1960) 11; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1962, 17 L.S.I. (1963/64) 26; Emergency Regulations (Security Zones) (Extension of Validity) Law, 1971, 26 L.S.I. (1971/72) 29

248 Regulation 1(a)(b) of the Emergency Regulations (Security Zones), 1949, supra note 246

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Regulation 2 of the Emergency Regulations (Security Zones), 1949 empowers the Minister of Defence to declare any area within the "territory of Israel" to be a "security zone".

Regulation 2 of the Emergency Regulations (Security Zones), 1949 states:

> "The Minister of Defence may from time to time, by order under his hand published in *Reshumot,* declare that the whole or any part of the protected area shall be a security zone for the purpose of these Regulations."[249]

According to Regulation 6(a) of the Emergency Regulations (Security Zones), 1949 a person who is not a permanent resident of the "security zone" is not allowed to enter or to be in that area, unless he had received a written permit from a competent authority.

Regulation 6(a) of the Emergency Regulations (Security Zones), 1949 states:

> "A person other than a permanent resident or a soldier or police officer on duty shall not be in or enter a security zone save under and in accordance with the terms of a written permit from a competent authority; provided that the Minister of Defence may, in an order under regulation 2 or by separate order under his hand published in *Reshumot,* exempt a particular class of persons from such prohibition in respect of the whole or a part of the security zone, unconditionally or subject to conditions."[250]

Regulation 3 of the Emergency Regulations (Security Zones), 1949 entails a definition of the term "permanent resident" and states as follows:

> "For the purpose of these Regulations, a permanent resident of a security zone is a person who on the day on which a particular area, by virtue of a declaration under regulation 2, becomes a security zone is a permanent resident of such area."[251]

Additionally to the declaration of an area as security zone, these regulations give special powers to the Minister of Defence and the Israeli authorities over the inhabitants of the specified area.

Regulation 8(a)(b)(c) of the Emergency Regulations (Security Zones), 1949 empowers the "competent authority" to issue so called "orders to leave" - i.e. expulsion orders - requiring that a permanent resident of a declared security zone has to leave the area within fourteen days. When these fourteen days elapsed, the permanent resident shall be deemed to be a non-permanent resident to whom Regulations 6 and 7 of the Emergency Regulations (Security Zones), 1949 shall apply.[252] Regulations 6(a)(b) and 7 state, inter alia, that a person that is without permission according to Regulation 6(a) in a "security zone" may be removed from

[249] Regulation 2 of the Emergency Regulations (Security Zones), 1949, ibid.

[250] Regulation 6(a) of the Emergency Regulations (Security Zones), 1949, id.

[251] Regulation 3 of the Emergency Regulations (Security Zones), 1949, id.

[252] Regulation 8(a)(b)(c) of the Emergency Regulations (Security Zones), 1949, id.

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the "competent authority" - even by the necessary force - and is additionally liable to imprisonment and other punishment.

Reflecting now just for a few moments on the said provisions of the Emergency Regulations (Security Zones), 1949 one may easily discern that residents of a village - who perhaps never left their village in their whole life - become suddenly persons who are not permanent residents any more.

Even if there was the possibility to launch, within four days, appeals to so called "appeal committees"[253] which were specifically established[254] for the purpose to hear the complaints of residents against the orders to leave their villages, no such order was ever canceled.[255]

In 1965 - almost two decades after the enactment of the said Emergency Regulations (Security Zones), 1949 - one could learn from a publication (namely "My Diary and Letters to the Children") written by the influential Zionist figure Joseph Weitz that the specific intention behind these Regulations was to create an instrument making it possible for the Israeli authorities to confiscate - on the pretext of legality - lands on frontiers and the adjacent areas, and to sell these lands to the Jewish National Fund [i.e. the Keren Kayemet Leisrael (KKL)].[256]

The Minister of Defence heavily exploited the powers given to him in the Emergency Regulations (Security Zones), 1949 and declared nearly half of the area of the Galilee - namely the area between the Lebanese and Syrian frontiers in the north and the main Nahariya/Tarshiha/Hurfaish/Sa'sa/Safed road, to Lake Tiberias in the south, bounded by the sea in the west and the Syrian and Jordanian frontiers in the east, in which many Arab villages were located - to be a "security zone".[257] He also declared the whole of the Triangle area - including the village of Jaljulya - which is located in central Israel and inhabited by native Palestinian Arabs, a "security zone".[258] In addition, another area near the Gaza Strip, and four areas on the Jaffa-Jerusalem railway line, near the village of Battir, were declared to be a "security zone".[259]

The importance of the Emergency Regulations (Security Zones), 1949 became apparent in the case of the village of Ikrit, a Palestinian Christian village which is situated in Western Galilee near Israel's border with Lebanon.

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253 Regulation 10(a) of the Emergency Regulations (Security Zones), 1949, id.

254 Regulation 9 of the Emergency Regulations (Security Zones), 1949, id., states that appeals committees are to be appointed by the Minister of Defence.

255 Jiryis, supra note 126, at 24

256 Joseph Weitz, Yumanei Weagrutai Lebanim (My Diary and Letters to the Children) (Tel-Aviv: Massada 1965) (Hebrew), Vol. 3, at 373-374

257 Jiryis, supra note 126, at 23

258 Ibid.

259 Id.

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This case is one of the longest legal battles ever known in the context of expropriations of Arab owned land - it lasted for over thirty years - and Israel's Supreme Court has so far issued three judgments: The first two judgments were issued by the Supreme Court in 1951 in the matters of *Daoud & Others v. Minister of Defence & Others,*[260] and *Daoud v. Security Zones Appeal Committee, Office of the Military Governor of the Galilee*.[261] In 1981 the Supreme Court has issued the third judgment in the matter of *Committee of Displaced Persons from Ikrit v. Government of Israel & Others*.[262]

The Ikrit case can be considered as a landmark case in the Palestinian struggle against the Israeli Zionist colonization process and the methods of the Israeli government to acquire Arab owned lands.

It should be mentioned at this point that until today the people of Ikrit have not given up their claim to return to their village.

Due to the importance and symbolic nature for the way of utilizing the law in order to serve the interests of an exclusive settler community, these judgments shall be discussed in more detail in the following sub-chapter 2.5.2.

2.5.2. Supreme Court Cases concerning the Emergency Regulations (Security Zones), 1949

2.5.2.1. Daoud & Others v. Minister of Defence & Others - First Case (1951)

The Facts of the Case

On 31 October 1948, the village of Ikrit was captured by the Israel Defence Force (IDF) after its native Arab inhabitants had surrendered without any resistance and without fleeing.

On 8 November 1948, the native Arab residents were evacuated from their village by the military authority and were ordered to move to the village of Rami for a period of 15 days only, until the end of the military activity in the area.[263]

On 24 April 1949, the Emergency Regulations (Security Zones), 1949 were promulgated. In these Regulations, the area described in Regulation 1 was declared

[260] H.C. 64/51, *Daoud & Others v. Minister of Defence*, translated into English in 2 Palestine Yearbook of International Law (1985) at 119

[261] H.C. 239/51, *Daoud & Others v. Security Zones Appeal Committee, Office of the Military Governor of the Galilee*, translated into English in 2 Palestine Yearbook of International Law (1985) at 124

[262] H.C. 141/81, *Committee of Displaced Persons from Ikrit v. Government of Israel & Others*, translated into English in 2 Palestine Yearbook of International Law (1985) 129

[263] *Daoud v. Minister of Defence*, supra note 260, at 119, 120

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to be a "protected area". In accordance with Regulation 2 of the said Regulations, the Minister of Defence on 26 September 1949 declared the said protected area to be a "security zone". The village of Ikrit fell within the bounds of that security zone.[264]

At the end of the 15 day period, the village residents were not permitted to return to their village Ikrit and petitioned the Supreme Court.[265]

The Decision of the Supreme Court

To justify their actions, the respondents (i.e. the Israeli government) relied on the Emergency Regulations (Security Zones), 1949 and claimed that the village Ikrit had been declared a "security zone" and that as the village residents had ceased to be "permanent residents" of the village they had no right to return.[266]

The argument of the respondents was that a "permanent resident" within the meaning of the aforementioned Regulations is only a person who at the time when the Regulations came into force were physically present in the security zone.[267]

The Supreme Court rejected the argument of the respondents.

Justice Sussman, handing down the judgment for the Court, adopted a positivistic, formalistic and technical style of judicial reasoning. He held that after 27 April 1949 (i.e. the day on which the original regulations came into force) and until 26 September 1949 (i.e. the day on which the area was declared to be a security zone) there was simply no legal basis for depriving the petitioners of their right to return.[268] Justice Sussman decided that, since the villagers of Ikrit have been illegally prevented from returning to their villages before the declaration of the village as "security zone", they must be considered as permanent residents within the meaning of the said Regulation 3 of the Emergency Regulations (Security Zones), 1949.[269] However, Justice Sussman also added that

> "...so long as no competent authority has issued an expulsion order against the petitioners, in accordance with Regulation 8, they may return to reside in the village of Ikrit." [270]

On 31 July 1951 - as a result of these conclusions - the Supreme Court issued a decree absolute against the respondents (the Israeli authorities) according to which they were ordered to allow the residents of Ikrit to return to their village.[271]

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[264] Ibid., at 121
[265] Id., at 120
[266] Id., at 122
[267] Id.
[268] Id., at 123
[269] Id.
[270] Id.
[271] Id.

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Summary and Conclusions

1. At first sight this decision seems to be a step towards the recognition of the rights and freedoms of the native Arab villagers of Ikrit, since the Supreme Court explicitly ordered the Israeli authorities to allow them to return.
2. However, looking in more detail to the court's reasoning, it becomes clear that the Supreme Court - applying a formalistic and dogmatic approach that is characterized by the strict and literal application of the "law as it is" - upheld the villagers right to return only due to the technical defect of the military order.

2.5.2.2. Daoud & Others v. Security Zones Appeal Committee, Office of the Military Governor of the Galilee - Second Case (1951)

The Facts of the Case

Despite the positive result in the first judgment the authorities did not carry out what they were required to do and did not let return the village residents.[272]

On 10 September 1951, the competent authority issued in accordance with Regulation 8 of the Emergency Regulations (Security Zones), 1949 expulsion orders against the residents of the village.[273]

On 13 September 1951, the residents of Ikrit launched - in accordance with Regulation 10 - an appeal against the expulsion orders to the appeal committee.[274]

For so called "security reasons" the appeal committee had allowed that the competent authority may give his testimony in the absent of the petitioners (the residents of Ikrit) and finally handed down a decision dismissing the appeal.[275]

The residents of Ikrit once again petitioned the Supreme Court on the ground that the decision of the appeal committee is invalid.

It should be mentioned at this point that even before the Court convened, the Israeli army was mobilized and blew up all the houses in the village of Ikrit. The only recognizable building that remained is the ruins of the village church.[276]

However, the inhabitants of the village of Ikrit relied in their petition on the following three arguments:

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272 *Daoud v. Security Zones Appeal Committee*, supra note 261, at 125

273 Ibid.

274 Id.

275 Id.

276 See Editor's Note in 2 Palestine Yearbook of International Law (1985), at 119. The complete destruction of the village of Ikrit - leaving only ruins of the church - resembles very much to the destiny of the village of Rabesieh. See sub-chapter 2.4.2.1. (The Aftereffects of the Second Decision of the Court)

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The petitioners' first argument was that the competent authority (i.e. the military authority which issued the expulsion orders) was questioned by the appeal committee in the absence of the petitioners' council, and that the petitioners were not permitted to question the witness.[277] In order to justify this argumentation the petitioners relied on Regulation 12(b) of the Emergency Regulations (Security Zones) (Extension of Validity) (No. 2) Law, 1949.[278]

The petitioners' second argument was that the court has to hear the testimony without the parties being present in order to ascertain whether the expulsion orders were actually based on reasonable grounds of "state security".[279]

And finally the petitioners argued that the expulsion orders were invalid due to the fact that they were issued without the government having provided the petitioners with alternative housing outside the security zone.[280]

The Decision of the Supreme Court

The Supreme Court rejected all arguments put forward by the petitioners and finally confirmed the expulsion orders.

Justice Olshan, handing down the judgment for the court, employed a very dogmatic and technical style of interpretation and judicial reasoning and thus succeeded to escape from dealing with the substantive issue at stake as to whether the expulsion on content was lawful or not. With regard to the first argument the Supreme Court held that according to Regulation 12 of the said Emergency Regulations (Security Zones) (Extension of Validity) (No. 2) Law, 1949, an appeal committee determines its own wording and procedural arrangements insofar as these have not been specified in the Regulations.[281] Due to the fact that these Regulations contain no provision as to whether an appeal committee may hear testimony in the absence of the parties, should this be necessary for reasons of state security, the committee was authorized to act as it did. In rejecting the petitioners' first argument, the Supreme Court held that a commission may hear witnesses in the absence of the party concerned.[282]

With regard to the second argument and the request to re-hear the testimony, the Supreme Court was not ready to examine the merits and the reasonableness of the case, since "this court does not act as an appeal court in relation to the decisions of the appeal committee."[283]

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[277] *Daoud v. Security Zones Appeal Committee*, supra note 261, at 125-126

[278] Emergency Regulations (Security Zones) (Extension of Validity) (No. 2) Law, 1949, supra note 246

[279] *Daoud v. Security Zones Appeal Committee*, supra note 261, at 125-126

[280] Ibid., at 127

[281] Id., at 126

[282] Id., at 127

[283] Id.

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With regard to the third argument the Supreme Court declared that the legal point of view of the fact that the petitioners have not been provided with alternative housing arrangements cannot invalidate the expulsion orders. The court held that only if an expulsion order is issued and the government does not fulfill its duty to provide housing, the affected resident may demand that it do so.

The petition - so the court - only refers to the illegality of the expulsion order and the invalidity of the decision of the appeal committee but did not request to issue an order obliging the government to fulfill its duty to supply housing.[284]

After having rejected all arguments, the Supreme Court finally confirmed the expulsion orders.[285]

Summary and Conclusions

1. In this case the Supreme Court did only examine the formal and technical requirements of the decision of the appeal committee.
2. The Supreme Court's decision in the matter of *Daoud & Others v. Security Zones Appeal Committee, Office of the Military Governor of the Galilee* is characterized by a judicial tolerance of illegal actions of the administrative organs; by an unwillingness to go into the merits of decisions involving the violation of the fundamental rights to property, movement and residency of the native Palestinian Arab inhabitants of Ikrit; and by a willingness to defer to the subjective discretion of the executive branch.
3. The decision shows how the other branches of the government dishonored the first judgment of the Supreme Court, and how it is possible within Israel's executive and legislative apparatus to distort laws, to change them from one day to the other and to accord them retroactive effect for a number of years.

2.5.2.3. Committee of Displaced Persons from Ikrit & Others v. Minister of Defence - Third Case (1981)

The Facts of the Case

Two years after the second decision was handed down, a new law, namely the Land Acquisition (Validation of Acts and Compensations) Law, 1953[286] was enacted by the Knesset. In accordance with Section 2 of the said law, the Minister of Finance signed on 25 August 1953 a certificate by which the entire land of the

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284 Id.
285 Id., at 124, 128
286 Land Acquisition (Validation of Acts and Compensation) Law, 1953, supra note 51. For more details regarding this law see infra sub-chapter 2.7. (Legalization of Actions by Means of "Transfer of Ownership" of Land)

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village Ikrit - totaling about 15.650 dunams - would pass into the possession of the Development Authority. Most of these lands were registered at the Land Registry Office in the name of the State and the Development Authority and various settlements have been established on them.[287] In addition, the military commander issued two orders according to which the village of Ikrit was declared to be a "closed area" under Regulation 125 of the Defence (Emergency) Regulations, 1945. One closing order was issued in 1963 and the other in 1972, which should supplement the first order of 1963. In March 1981, the residents of Ikrit petitioned the Supreme Court and questioned two aspects, namely first the legality of the Minister of Finance's certificate and second the legality of the closure orders issued by the military commander.[288]

The Decision of the Supreme Court

The Supreme Court rejected the petition in all its arguments. Deputy President Yehuda Cohen, handing down the decision for the Court, held that the certificate and the closing orders were issued many years ago and that due to this delay the land of Ikrit passed - in accordance with Section 2 of the Land Acquisition (Validation of Acts and Compensations) Law, 1953 - lawfully into the possession of the Development Authority.[289]

The petitioners argued that this delay would not cause damage to their petition, since they had always shown they would never accept their expulsion from the village of Ikrit and the ban on their return, through their constant applications to the various Israeli authorities,[290] and through their bringing the case to the attention of many public figures, including the Prime Minister, which all promised many times to reconsider and help in their case.

However, the Court rejected this argument, and held that - although the court assumes that the residents did not in fact accept their expulsion from the village - the long delay works to the petitioner's disadvantage.[291] Furthermore, the Court held that - although it is well known that the Ikrit case has been discussed many times by public figures (including the Prime Minister) who all made many promises to reconsider the case[292] - in reality so called "security reasons" would not make it possible to allow the petitioners to return.[293]

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[287] *Committee of Displaced Persons of Ikrit & others v. Government of Israel*, supra note 262, at 129, 131

[288] Ibid., at 131

[289] Id., at 132

[290] Id., at 131

[291] Id.

[292] Id., at 132

[293] Id., at 132-133

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2.6. Declaration of Land as "Waste Land" and Confiscating this Land

2.6.1. The Emergency Regulations (Cultivation of Waste Lands), 1949

The Emergency Regulations (Cultivation of Waste Lands), 1948[294] were published for the first time on 15 October 1948, and a few months later - in January 1949 - the validity was in an amended form extended.[295]

The validity of these regulations was originally extended until the officially proclaimed state of emergency had ceased to exist.[296] After a time they were, however, no longer applied and were formally repealed in 1984.[297]

Under the original regulations possession of absentees' property was taken but after the enactment of the Emergency Regulations (Absentee's Property), 1948,[298] the Emergency Regulations (Cultivation of Waste Lands), 1948 were only applied to those Israeli residents who were not absentees.[299]

Although the Emergency Regulations (Cultivation of Waste Lands) seem at first sight an ordinary enactment passed merely to cope with the issue of cultivation of waste lands, in practice the amended regulations are another legislative instrument that has been used by the Israeli government in order to come into possession of land owned by Palestinian Arabs.

The amended Emergency Regulations (Cultivation of Waste Lands), 1948[300] empower the Minister of Agriculture during a state of emergency and for the period of five years[301] to take possession - but not ownership - of:

1. Waste land[302] if the Minister of Agriculture is not satisfied that the owner of the land has begun or is about to begin or will continue to cultivate the land.[303]

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294 Emergency Regulations (Cultivation of Waste Lands), 1948, supra note 45

295 Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, 2 L.S.I. (1948/49) 70

296 Section 1 of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, ibid.

297 Kretzmer, supra note 37, at 55

298 Emergency Regulations (Absentees' Property), 1948, supra note 46

299 Hofnung, supra note 77, at 112-113

300 Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, supra note 295

301 Regulation 5 of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, ibid.

302 Regulation 1 of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, id. ["Waste land" meant "land capable of yielding crops and which in the opinion of the Minister of Agriculture is uncultivated"

303 Regulation 4 of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, id.

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2. Animals, machines, tools or implements capable of being used for agricultural purposes; buildings in a rural area, which is not used for the requirements of the defence of the state or public security;[304]

3. Water resources and water installations which in the opinion of the Minister of Agriculture are not sufficiently utilized.[305]

An important aspect of the amended Emergency Regulations (Cultivation of Waste Lands), 1948 is - with regard to the individual's fundamental right to property - that the decisions made by the Minister of Agriculture could not be challenged directly in any court.

Although Regulation 21 of the Emergency Regulations (Cultivation of Waste Lands), 1948 did provide for the establishment of Committees consisting of three appointed members,[306] their decisions were final and the owner of the taken land and other property, had no right to appeal against those decisions.[307]

Important to mention is the fact that the issue of cultivation of agricultural land is by its very nature no matter which would justify the continued use of an emergency legislation. However, as already elaborated in a previous chapter,[308] Israel's emergency legislation - which exists in a large quantity - was and is not only used in times of war and conflict, but rather as an additional administrative instrument of dealing with all spheres of daily life and routine problems.

The Emergency Regulations (Cultivation of Waste Lands), 1948 were often exploited in combination with Regulation 125 of the Defence (Emergency) Regulations, 1945 and the Emergency Regulations (Security Zones), 1949, through which a mechanism was created which enabled the Israeli government to widen its sphere of control over land which was privately owned by Arabs.

The said mechanism functioned in the following way:

Under the mentioned regulations the Military Governor or the Minister of Defence issued orders to close off areas - encompassing Arab owned agricultural lands - which were either declared as "closed area" or as "security zones".

The owners of the lands were then not allowed to enter such areas - for any purpose whatsoever, including cultivation - without a written permit which was generally not issued. After three years passed, the Ministry of Agriculture issued

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304 Regulation 16 of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, id.

305 Regulation 17 of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, id.

306 Regulation 21(a) of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, id.

307 Regulation 21(b) of the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance, 1949, id.

308 See Chapter D.1. (Israel's Permanent State of Emergency and the Question of its Compatibility with the Concept of a Liberal Democracy Based on Human Rights and Freedoms - Introduction)

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certificates which classified the lands as uncultivated. The owners were notified that unless cultivation is renewed immediately the lands will be subject to expropriation.

The owners - which were still barred by the security authorities - from entering the closed areas within which their land are located - could not resume cultivation. The lands are then expropriated and become part of the general land reserve for Jewish settlements and cultivation.[309]

2.6.2. Supreme Court Cases concerning the Emergency Regulations (Cultivation of Waste Lands), 1948

Due to the mentioned lack of the right to appeal to any court, there exist hardly any petitions to the Supreme Court of Israel.

Only in 1966 the right to appeal against the decisions of the Committees established according to Regulation 21 was granted,[310] and only after some years before a civil appeal for damages had been instituted against the Minister of Agriculture.[311] In this case, decided by the Supreme Court in 1960 in the matter of *Shiff v. Minister of Agriculture*, compensation was claimed after an orchard was requisitioned under the amended Emergency Regulations (Cultivation of Waste Lands), 1948.

Against a negative decision issued by a Committee which was established for these matters according to Regulation 21, the petitioner launched a civil claim to the District Court who rejected this claim. Against this decision of the District Court an appeal was made to the Supreme Court.

In its decision the Supreme Court expressed surprise over the fact that the chairman of the Committee established in accordance with Regulation 21 of the amended Emergency Regulations (Cultivation of Waste Lands), 1948 was also the administrative director of the department which was in charge of waste lands. This means in other words: The same person sat as a judge (i.e. as a Committee member) in a suit which he himself was the party being sued.[312]

However, despite these defects, the Supreme Court - using a very formalistic style of reasoning and by literally applying the law - rejected the petition.

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[309] Ian Lustick, Arabs in the Jewish State, Israel's Control of a National Minority (University of Texas Press, Austin, 1982) at 177-178

[310] Hofnung, supra note 77, at 113

[311] C.A. 23/60, *Shiff v. Minister of Agriculture,* 14 P.D. 1190

[312] Ibid., at 1195

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2.7. Legalization of Actions by Means of "Transfer of Ownership" of Land

2.7.1. The Land Acquisition (Validation of Acts And Compensation) Law, 1953

The Land Acquisition (Validation of Acts and Compensation) Law, 1953[313] was enacted in order to give retrospectively legal "validity" to the expropriations of Arab owned land that - in the period from 14 May 1948 and 1 April 1952 - was taken by the Israeli authorities for military purposes, for development objectives, and for the use by existing or newly established Jewish settlements. It should be stressed at this point that large parts of Arab owned land was - by means of all the laws which were discussed until now[314] - in practice already transferred to the state of Israel, since the real Arab owners of the land were not allowed to possess and/or to return to their land.
Technically, nevertheless, the ownership of this land was still by their original owners, a situation which should be eliminated with the help of the Land Acquisition (Validation of Acts and Compensation) Law, 1953 - which intended to transfer the legal ownership of the original owners to the "ownership" of the newly established state of Israel.

The enactment of this law marks insofar a final step that should formally complete the process of de-Arabization and ethnic cleansing (which had taken place during the first years after Israel's existence) as until the enactment of this law, Arab owners could - at least - hope for the return of their houses, factories, shops and lands seized by the Israeli government.[315]

The Land Acquisition (Validation of Acts and Compensation) Law, 1953 was passed with the support of all the Zionist parties.[316]

The said law conferred extensive powers on the Israeli authorities (i.e. the minister whom the government authorizes for the purpose of this law[317]) to issue certificates, whereby the ownership of any land that had been confiscated in whatever illegal manner during the period from 14 May 1948 until 1 April 1952, could be transferred

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313 Land Acquisition (Validation of Acts and Compensation) Law, 1953, supra note 51

314 Abandoned Areas Ordinance, 1948, supra note 44; Emergency Regulations (Cultivation of Waste Lands), 1948, supra note 45; Emergency Regulations (Absentees' Property), 1948, supra note 46; Emergency Regulations (Requisition of Property), 1948, supra note 49; Emergency Regulations (Security Zones), 1949, supra note 68

315 Jiryis, supra note 126, at 25

316 Hofnung, supra note 77, at 115

317 Section 1(a) of the Land Acquisition (Validation of Acts and Compensation) Law, 1953, supra note 51. The Government delegated the Minister of Finance to administer the Law. See Kretzmer, supra note 37, at 58

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to the Development Authority- a company under full control of the government, which was allowed in return to sell property to the state, the JNF, and local authorities. Such a certificate, by the mere fact of its being signed by the Minister of Finance, even if its content is not true, was enough to ratify any act of illegal expropriation of any property and to alienate the ownership of any land and transfer it to the Development Authority.

Section 2(a) of the Land Acquisition (Validation of Acts and Compensation) Law, 1953 established the conditions for the transfer of the ownership as follows:

> "2(a) Property in respect of which the Minister certifies by certificate under his hand -
>
> (1) that on the 1st April 1952 it was not in the possession of its owners; and
>
> (2) that within the period between the 14th May 1948 and the 1st April 1952 it was used or assigned for purposes of essential development, settlement or security; and
>
> (3) that it is still required for any of these purposes -
>
> shall vest in the *Development Authority* and *be regarded as free from any charge*, and the Development Authority may forth with take possession thereof."[Emphasis added][318]

During the period of one year provided for under Section 2(c) of the Land Acquisition (Validation of Acts and Compensation) Law, 1953 the Minister of Finance could issue certificates, which in fact were produced in large quantities.[319]

As already mentioned in a previous chapter of this work, Benny Morris, a British historian, found out that "about 350 Arab villages and towns were depopulated in the course of the 1948-49 and during its immediate aftermath.

By mid-1949, the majority of these sites were either completely or partly in ruins and uninhabitable."[320]

Furthermore, in the years from 1948 to 1949, a total number of 186 new Jewish settlements were established on sites or near sites where there were previously Arab villages and towns.[321]

About a half year after the enactment of the Land Acquisition (Validation of Acts And Compensation) Law, 1953, regulations were published which expropriated the lands of about 250 "abandoned" Arab villages and individual absentees, amounting to about 1,250.000 dunams.[321A]

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318 Section 2(a) of the Land Acquisition (Validation of Acts and Compensation) Law, 1953, supra note 51

319 Jiryis, supra note 126, at 26

320 Morris, supra note 85, at 155. For more details see Chapter A.5.5. (The Period after the Adoption of the United Nations General Assembly Resolution 181 (II) of 29 November 1947 until the Signment of Armistice Agreements in 1949)

321 Hofnung, supra note 77, at 114

321A Holzman-Gazit, supra note 119, at 273

In 1955 Moshe Keren, the Arab-affairs editor for the Hebrew daily newspaper *Ha'aretz,* characterized the sweeping land seizures of the late 1940's and early 1950's correctly as

> "...wholesale robbery in legal guise. Hundreds of thousands of dunams were taken away from the Arab minority... The future student of history will never cease to be astonished at how it happened..."[321B]

The Land Acquisition (Validation of Acts And Compensation) Law, 1953 provides for two methods of compensation: Cash payments and the granting of alternative lands. It should also be mentioned that severe restrictions on compensation through grants of alternate land were imposed by the law itself.
Compensation in land was only offered in the case that the property was used for agriculture, and was the main source of livelihood of its owner who has no other land sufficient for his livelihood. Then the Development Authority shall, on the owner's demand, offer him alternative land, either for ownership or for lease, as full or partial compensation.[322] However, there is no obligation to compensate the owner with land of the same kind as the expropriated was.[323]
Few of the Israeli Arabs affected by the policy of land acquisition claimed rights under the compensation scheme, since accepting compensation was on the one hand perceived as legitimation the expropriation, on the other hand were the terms for the compensation not favorable.[322A] Moreover, in cases in which alternate land was offered by the Israeli government, it often belonged to other Palestinian Arab "absentees" - sometimes even members of the same family - which was of course unacceptable for the Palestinian Arabs.[322B]

2.7.2. Supreme Court Cases concerning the Land Acquisition (Validation of Acts And Compensation) Law, 1953

Several cases show that the Supreme Court interpreted the above mentioned conditions in harsh and hostile way towards Palestinian Arab citizens of Israel which launched petitions against the decisions of the Minister of Finance who administered the law.[324] In the judgment handed down for example in the matter of

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[321B] Moshe Keren, Have We an Arab Policy?, Ha'aretz, 1 January 1955, quoted in Lustick, supra note 309, at 175

[322] Section 3(b) of the Land Acquisition (Validation of Acts And Compensation) Law, 1953, supra note 51

[323] H.C. 158/58, (*Tsch-*) *Uda v. Competent Authority*, 12 P.D. 1513

[322A] Holzman-Gazit, supra note 119, at 274; Lustick, supra note 309, at 180

[322B] Holzman-Gazit, ibid.

[324] H.C. 5/54, *Yonas v. Minister of Finance*, 8 P.D. 314; H.C. 14/55, *Al-Nadaf v. Minister of Finance*, 11 P.D. 785

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Yonas v. Minister of Finance[325] the Land Acquisition (Validation of Acts And Compensation) Law, 1953 was used together with Regulation 125 of the Defence (Emergency) Regulations, 1945.[326]
In complete disregard of the principles of due process, the Supreme Court decided in this case that the Minister of Finance had no obligation to grant a hearing to a land-owner before issuing a certificate in respect to his land and the certificate was regarded as decisive evidence that the conditions of the law had been fulfilled. The Supreme Court also held that the possession of the land by the owner had to be "actual possession."[327] The owner of his land was - by an order issued pursuant to Regulation 125 - restricted to use and to enter his land - and therefore not in actual possession of it, and his lawful behavior was used against the land owner in order to expropriate his land.

2.8. Expropriation of Land for "Public Purposes"

2.8.1. The Land (Acquisition for Public Purposes) Ordinance, 1943

The Land (Acquisition for Public Purposes) Ordinance, 1943[328] is a legacy of the British mandatory regime, which - as a colonial government - established in Palestine a centralized and draconian expropriation regime that the British would never dare to enact at home.
The said Ordinance authorizes the Minister of Finance (who had succeeded the powers of the High Commissioner under the British Mandate) "where he is satisfied that it is necessary or expedient for any public purpose to acquire the possession or use of any land." "Public purpose" is defined in the ordinance as "any purpose certified by the Minister to be such a public purpose."[329] Moreover, the publication in the government gazette of a notice of an intention to acquire land is "deemed to be conclusive evidence that the Minister has certified the purpose for which the land is to be acquired to be a public purpose"[330] Thus, according to the said ordinance the Minister of Finance has full discretion in defining the "public purpose". In that context it should be mentioned that although the term "public purpose" is a neutral term, the Israeli understanding of this term is however strongly connected with the aims of political Zionism and the religious-ethnic rationale of the state of Israel which aims to benefit only the Jewish population, and consequently considers as

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325 Ibid.
326 See sub-chapter 2.4. (Declaration of Land as "Closed Area" and the Creation of the so called "Uprooted Villages")
327 *Yonas*, supra note 324
328 Land (Acquisition For Public Purposes) Ordinance, 1943, supra note 61
329 Section 2 of the Land (Acquisition For Public Purposes) Ordinance, 1943, ibid.
330 Section 5 of the Land (Acquisition For Public Purposes) Ordinance, 1943, id.

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"public" only the Jewish population of state of Israel, but not *all* lawfully residing citizens or residents irrespective of any ethnic or religious considerations. That means in other words: The native Palestinian Arab inhabitants (and all other non-Jews) were, are and will never be considered as the "public", and the claim that expropriations are intended to serve a "public purpose" is accurate only if the "public" for whom it is justifiable to harm Palestinian property rights consists entirely of Jews.

As a result of the underlying rationale of the "public purpose" definition, the seemingly neutral law becomes a powerful instrument for discrimination against the Palestinian Arab people.

Although according to the Land (Acquisition for Public Purposes) Ordinance, 1943, the person whose land has been expropriated for "public purposes" is entitled to compensation, in reality, however, no compensation was paid. The justification offered by the Supreme Court to this "rule of no-compensation" was either the "betterment rationale" or the "tax rationale".[331]

On the basis of this Acquisition Ordinance which is the general legal source for land expropriations in Israel, thousands of dunams of land owned by the Palestinian Arab people were confiscated. This legal source was used specifically in the first two decades of the existence of Israel in order to expropriate Arab owned land in the Galilee for the purpose to build Jewish settlements there and to "Judaize the Galilee":[332]

In 1956 for example 1200 dunams of Arab land was expropriated under the pretext of using the land to build governmental offices. Later it turned out that only 80 dunams were actually used to build the said offices, while the rest of the land was used to build the Jewish town of Upper Nazareth.[333]

In 1962 the Israeli authorities expropriated 5100 dunams of land of the villages of Deir el-Assad, el-Bi'ne and Nahef in order to build the Jewish town Carmiel. The inhabitants of this fertile and cultivated land made their living from it, and therefore appealed to the authorities in order to exchange these specific confiscated lands with others, owned by them and not be forced to search for livelihood in Jewish towns. But their attempts to challenge the expropriation in the High Court of Justice were without any success.[334]

In 1965 the Israeli government expropriated 3000 dunams of land of El-Battof - a fertile agricultural plain belonging to the Palestinian villages of Arrabe and Sakhnin located in the Galilee - in order to build the passage of the "National Water Carrier",

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[331] Holzman-Gazit, supra note 119, at 120-124

[332] Kretzmer, supra note 37, at 51, 52. Important to mention is the fact that according to the UN-GA Resolution 181 (II) of 1947, the Galilee should not been included in the territory of the Jewish state

[333] H.C 30/55, *Nazareth Lands Defence Committee v. Minister of Finance*, 9 P.D. 1261; Halabi, supra note 130, at 2; Lustick, supra note 309, at 177

[334] H.C. 181/57, *Ahmad Kassam v. Minister of Finance*, 12 P.D. 1986; Lustick, ibid., at 177

carrying water from the Tiberias Lake to the Negev.[335]
In 1976 the Israeli government decided to expropriate another 6000 dunams of land belonging to the Palestinian Arab citizens of Israel in order to develop the Galilee.[336] Shortly after the Minister of Finance issued the expropriation orders in accordance with the Acquisition Ordinance, a regional Arab protest began to organize. The meetings, rallies and mass demonstrations climaxed in a general strike on 30 March 1976, termed "Land Day" during which six Palestinian Arabs were killed in clashes with Israeli authorities. Since then the Palestinian citizens of Israel hold on 30 May of every year a "Land Day", which can be seen as a symbol of the Palestinian's alienation in the country. However, even after this major expropriation the Israeli policy of confiscating Arab owned lands continued and tens of new Jewish settlements were built on highlands in the Galilee.[337]

Important to mention is the fact that the Israeli Supreme Court - when called upon to review the legality of expropriation orders based on the Land (Acquisition For Public Purposes) Ordinance, 1943 - has adopted a very formalistic judicial approach and refused to examine the merits of the Minister's definition of "public use or purpose". In Israeli law the definition of public purpose is considered as a purely administrative judgment even if its character may resemble a legislative (as opposed to executive) act. Moreover, the highly centralized power conferred upon the Minister of Finance by the Land (Acquisition for Public Purposes) Ordinance, 1943 makes close examination by the Supreme Court more important as a matter of policy, and in fact the absence of meaningful judicial review over the Minister's "public purpose" definition led and leads to the abuse of powers and to unjust outcomes. With the exception of one decision handed down in 1993 - which was reversed in a further hearing[338] - the court has always refused to intervene and to examine the merits of the land expropriation decisions issued according to the said ordinance.

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[335] Usama Halabi, The Impact of the Jewishness of the State of Israel on the Status and Rights of the Arab Citizens in Israel in Masalha Nur, (ed.) The Palestinians in Israel: Is Israel the State of all its Citizens and "Absentees"? (Galilee Center for Social Research, 1993) at 20; Lustick, supra note 309, at 177

[336] Kretzmer, supra note 37, at 52

[337] Halabi, supra note 130

[338] *Nusseibeh & Others v. Minister of Finance*, 39(iv) P.D. 68, quoted in Holzman-Gazit, supra note 119, at 114, 128-130

2.9. Israel's System of Ownership and Administration of Land

2.9.1. The Basic Law: Israels Land (1960)

As already mentioned the original intention and policy of the Zionist leadership in the era before the establishment of the state of Israel in Palestine was directed at the acquisition and freezing of land ownership.
After the state of Israel was established the said policy was continued and the Basic Law: Israel's Land[339] enacted in 1960 was a further "important" legislative step in order to freeze the ownership of "Israel's lands".
With this basic law the ownership of "Israel's lands"[340] was frozen by adoption of the principle of inalienability of Israels land.
Section 1 of the said basic law states that the ownership of Israel lands, which is the lands in Israel of the State, the Development Authority and the JNF, shall not be transferred by sale or in any other manner.

Certain limited exceptions as to various types of land and particular transactions are, however, allowed. This general rule and the exceptions are deeply rooted in Jewish law and reflect Jewish values.

The Basic Law: Israels Land is an important example for the incorporation of Jewish law principles into Israel's legal system. When the chairman of the Legislative Committee, MK Warhaftig, presented the bill to the said Basic Law: Israel's Land, in the Knesset, he explicitly explained the background and the purpose of this law as follows:[341]

> "The law covers land, the national heritage; its purpose is to articulate a basic principle of our national life, namely, that ownership of the land cannot be transferred in perpetuity.
>
> The purposes of this bill, as I present it, are as follows: [First,] to give legal form to the essentially religious principle that "the land must not be sold beyond reclaim, for the land is Mine" (Leviticus 25:23). Whether or not this verse from Scripture is mentioned in the law, as was proposed, this law gives legal form to that principle of the Torah...
>
> The second purpose is a practical one. The land was acquired and settled by the whole nation. God first promised it to our ancestors Abraham, Isaac, and Jacob. It was settled for the first time by the entire nation under Joshua, and then under King David. It was settled a second time by the exiles who returned from Babylonia, and a third time, in our generation, by all the Jews who dwell in Zion with assistance from the entire Jewish people throughout the world.
>
> The lands belonging to the Jewish National Fund were acquired with the pennies contributed by all Jews everywhere, and the lands of the Development Authority were consecrated by the blood of our young soldiers. We have no

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339 Basic Law: Israels Land, supra note 56

340 "Israel's Lands" were at that time already 90% of the whole land in the country.

341 Remarks of MK Warhaftig, 29 D.K. 1916-1917 (1960), quoted in Elon, Jewish Law: History, Sources, Principles, supra note 20, at 1651-1652

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right to transform this property, acquired and conquered by the entire people, into the private property of individuals.

The purpose of the second section of the bill is to express a principle that we have previously accepted in several other laws. I refer to the distinction between agricultural and urban land....We have provided here that the prohibition of transfer in perpetuity does not apply to urban of industrial land. Such land may be transferred.

In other words, we have adopted in our statutes the distinction made by our Torah, the Torah of Moses, between agricultural and residential buildings in walled cities: 'If a man sells a dwelling house in a walled city, it may be redeemed until a year has elapsed since its sale....If it is not redeemed before a full year has elapsed, the house in the walled city shall pass to the purchaser beyond reclaim throughout the ages; it shall not be released in the jubilee' (Leviticus 25:29-30). This distinction...is clear and understandable, since the land itself is of primary importance only when it is used for agriculture. In the case of urban and industrial land, on the other hand, it is the activity on the land or what is extracted from the land that is of primary importance. The same distinction has been accepted in two other laws: The Development Authority (Transfer of Property) Law, 1950[342] and the State Property Law, 1951."[343]

Conclusions

1. According to the said Basic Law: Israel's Land all the lands taken from the Palestinians by the different methods of expropriations[344] have become part of "Israel's Land" and may - according to the existing legal situation - not be sold, exempt for the cases specified in the law.
2. With this basic law the ownership of "Israel's lands"[345] has in fact been frozen by the adoption of the above described so called "principle of inalienability of land"[346] which means that land which has been acquired by Jews as Jewish property, and which has passed into Jewish ownership, is to remain in perpetuity within the Jewish community.
3. The said Basic Law: Israel's Land stands in direct contradiction to international law and universally recognized principles of law, since it discriminates in a systematic and unchanging way against the non-Jewish population, i.e. the Palestinian Arab people which fled or was expelled in the course of the war that broke out after the implementation of the UN Resolution 181 (II) of 29 November 1947 and the establishment of the state of Israel in Palestine in May 1948.

[342] Development Authority (Transfer of Property) Law, 1950, supra note 52
[343] State Property Law, 1951, supra note 63
[344] See supra sub-chapters 2.2.-2.8.
[345] Israel's lands are estimated to be at least 92% of the total lands in Israel.
[346] See Chapter B. 4.1.1. (The Fundamental Principle of "Inalienability of Land")

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2.9.2. The Israel Land Administration Law, 1960

Under the Israel Land Administration Law, 1960[347] the Government established the "Israel Lands Administration" which has the task to administer all Israel's lands, i.e. land of the JNF, state lands and Development Authority lands.[348] The Israel Lands Administration administers the possession and use of these lands through a system of land leases.[349]

2.9.3. The Agricultural Settlement (Restrictions on Use of Agricultural Land and of Water) Law, 1967

The Agricultural Settlement (Restrictions on Use of Agricultural Land and of Water) Law, 1967[350] was enacted after the Israel Lands Administration and the JNF became aware of the fact that Jewish agricultural settlements - moshavim and kibbutzim - had started to sublease agricultural land, which was leased to them by the Israel Land Administration, to Arab farmers.[351] The phenomenon of leasing land to Arab farmers had worried the authorities to the extent that in a play on words they started to speak about the "Ishmael Lands Administration" instead of the "Israels Land Administration."[352] In order to ensure that Jewish agricultural settlements could not circumvented in any way their lease agreement with the Israel Land Administration, the officials of the Israel Lands Administration and the JNF came to the conclusion that only a clear Knesset law could stop this custom of handing land over to Arab farmers.
With the Agricultural Settlement (Restrictions on Use of Agricultural Land and of Water) Law, 1967 the demanded law was enacted by the Knesset.

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347 Israel Lands Administration Law, 1960, supra note 55

348 Section 1 and 2 of the Israel Land Administration Law, 1960, ibid.

349 Kretzmer, supra note 37, at 61

350 Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, supra note 59

351 In many cases it was agricultural land that the Arab farmers had lost by one of the mentioned expropriation methods. See the interviews with senior Israel Lands Administration and Jewish National Fund officials published in an article in the Israeli (Hebrew) newspaper Ha'aretz, on 14 October 1966.

352 The above mentioned Ha'aretz article was entitled with the words "Keren Kayemet LeYishmael" - "Ishmael's National Fund".

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2.9.4. The World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952

2.9.4.1. General Remarks

The World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952[353] is one of the most important and fundamental law that expresses the idea and commitment of Israel to be a "Jewish state", since this law connects the rights and benefits, granted by the WZO and the JA, with the religious affiliation and the national origin of an inhabitant of the state of Israel.

According to this law "the state of Israel regards itself as the creation of the entire Jewish people, whose gates are open to every Jew wishing to immigrate to it."[354] Furthermore, the said law states that the mission of gathering in the exiles, is the central task of the state of Israel and the Zionist movement.[355] The said law recognizes the original mandate and role played by the WZO and the JA,[356] and declares that these organizations will continue to encourage immigration and to supervise immigrant absorption and settlement projects in Israel.[357]

Section 4 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952 explicitly recognizes the WZO - which according to Section 3 of the said law - is also the JA, as

> "...the authorized agency which will continue to operate in the State of Israel for the development and settlement of the country, the absorption of immigrants from the diaspora and the coordination of the activities in Israel of Jewish institutions and organizations active in those fields."[358]

Important to mention in the context of the discussion of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952 is the Covenant between the government of the state of Israel and the WZO and the Covenant between the government of the state of Israel and the JA.[359] These two covenants

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353 The World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 53

354 Section 1 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, ibid.

355 Section 5 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, id.

356 For more details on the original role of these bodies see Chapter B.4. (Establishment of "Jewish National Institutions" by the Zionist Movement)

357 Section 2 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 53

358 Section 4 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, ibid.

359 Section 7 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, id.

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entail details regarding the status of the WZO and the JA, and regarding the form of cooperation between the Israeli government and these bodies.

2.9.4.2. The Covenant between the Israeli Government and the WZO

This Covenant was signed in June 1979, with retroactive force from June 1971, and defines the functions of the WZO. According to this Covenant, many of the functions of the WZO are connected with immigration of Jews from the diaspora.

In addition, the WZO fulfills also many other governmental activities, such as:

1. Maintenance and support of cultural, educational, scientific, religious, recreational and social welfare institutions;
2. Agricultural settlement, purchase and development of land by the institutions and funds of the WZO;
3. Participation in founding and extension of development projects in Israel;
4. Encouragement of capital investment in Israel;
5. Support for the elderly, handicapped and other deprived persons in need of assistance and social services.[360]

According to this Covenant a joint Government-WZO committee is set up which has the duty to coordinate activities, and which grants the WZO, its institutions and funds exemption from a wide range of taxes.[361] It should be mentioned that the WZO carries out only such duties as defined above, which the JA does not in fact carry out.

2.9.4.3. The Covenant between the Israeli Government and the JA

This Covenant is in most of its provisions identical to the provisions in the WZO Covenant. The main difference however lies in one general clause in the Covenant which establishes the duty of the JA as

> "...to perform by itself, or in cooperation with other institutions, every activity, whose purpose is to assist **immigrants** and needy persons to be absorbed into the social life of Israel."[362]

It should be stressed at this point that these services are provided by the JA only in Jewish settlements and towns, and only for Jewish inhabitants, but not in Palestinian Arab communities or for Palestinian Arab inhabitants.[363]

Important to mention in this context is the fact that the formal legal status of the WZO and the JA does not rest only on the above mentioned law and the covenants

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[360] Kretzmer, supra note 37, at 93
[361] Ibid., at 93
[362] Id., at 94
[363] Legal Violations of Arab Minority Rights in Israel, 1998, supra note 181, at 51, 52

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but also on numerous other laws of the Knesset which acknowledge the right of these two bodies to representation in various governmental agencies.[364]

The said representation enables these institutions to exercise decisive influence on the governmental agencies, which nevertheless remain responsible for their discriminatory activities. Far more, the real implications of the WZO and the JA operations - as far as the situation of human rights (especially the Palestinian's right to be treated equally) - do not emerge from an examination of statutory instruments alone but rather from the way and the process how these bodies actually operate in performing their tasks.

The entire activities of these bodies are directed at the establishment of Jewish settlements and the grant of privileges and services to the Jewish population of the state of Israel and the Occupied Territories (but not to all citizens and inhabitants). This process is a continuation of the Zionist program, which especially regards the establishment of such nationally defined settlements as justified both on ideological and security grounds.[365]

It is important to mention that many new agricultural settlements have been established for the Jewish population in Israel and the Occupied Territories on previously Arab-owned land with the financial help of the JA, which enjoys the privilege of the exemption of taxes and other compulsory Governmental charges.[366] At the same time the needs and interests of the native Palestinian Arab people in Israel and the Occupied Territories were and still are completely neglected. Since the establishment of the state of Israel in 1948, for the Palestinian Arab population not even one agricultural settlement has been established, and many Palestinian Arab villages and towns, which exclusively depend on governmental funding, still lack basic services and infrastructure.

The legal status of the WZO and the JA is strongly criticized by the international community - such as the United Nations - as well as by Israeli academic writers - such as Professor David Kretzmer of the Hebrew University, for example, who described the consequences of the relationship between the JA and the state of Israel for the Palestinian Arab citizens of Israel in 1990 in the following way:

> "...The Arab citizens of Israel are entirely excluded from the process, whether as decision-makers or as beneficiaries. This means not only that nor new Arab agricultural settlements have been established in Israel since the Establishment of the State of Israel but that basic services in Arab villages lag far behind those in all new rural settlements. The Jewish Agency, as we have seen, is responsible

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364 See for example Section 4(c) of the Fruit Production and Marketing Board Law, 1973, 27 L.S.I. (1972/73) 370; Section 5 of the Vegetable Production and Marketing Board Law, 1959, 13 L.S.I. (1958/59) 245. [These statutes deal with marketing boards to deal with various agricultural products and stipulate that representatives of the Jewish Agency or the WZO will be members of the board.]

365 See in this regard Kretzmer, supra note 37, at 95

366 Section 12 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 53

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> for developing the infrastructure in new rural settlements. It finances a whole range of development works, including public buildings and such basic services as sewage and water systems and connection to the national water supply and electricity grid. Most Arab villages still have no proper sewage disposal facilities. There are over forty 'non-recognized' Arab villages that are not connected to the water supply, the electricity grid or the telephone system. The reason given for lack of the most basic facilities in established Arab villages is that the buildings are widely scattered and that installation of modern facilities would therefore be prohibitively expensive. The fact remains, however, that there is not one Jewish rural settlement without basic facilities. "[367]

In its Concluding Observations of 4 December 1998, the UN Committee on Economic, Social and Cultural Rights explicitly noted

> "...with grave concern that the Status Law of 1952 [i.e. the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952] authorizes the World Zionist Organization/Jewish Agency and its subsidiaries, including the Jewish Nation Fund to control most of the land in Israel, since these institutions are chartered to benefit Jews exclusively. Despite the fact that the institutions are chartered under private law, the State of Israel nevertheless has a decisive influence on their policies and thus remains responsible for their activities."[368]

The UN Committee on Economic, Social and Cultural Rights also stated that:

> "A State party cannot divest itself of its obligations under the Covenant [i.e. the International Covenant on Economic, Social and Cultural Rights] by privatizing governmental functions."[369]

Finally, the UN Committee on Economic, Social and Cultural Rights held that

> "...a large-scale and systematic confiscation on Palestinian land and property by the State [of Israel] and the transfer of that property to these agencies [i.e. the World Zionist Organization (WZO) and Jewish Agency] constitute an institutionalized form of discrimination because these agencies by definition would deny the use of these properties to non-Jews. Thus, these practices constitute a breach of Israel's obligations under the Covenant [i.e. the International Covenant on Economic, Social and Cultural Rights]."[370]

Summary and Conclusions

1. The WZO and the JA are bodies of the Zionist movement which are aimed to benefit only Zionist interests, i.e. the interests of the Jewish population.[371]

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[367] Kretzmer, supra note 37, at 95-96

[368] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel. 04/12/98. E/C.12/1/Add.27. (Concluding Observations) para. 11

[369] Ibid.

[370] Id.

[371] Section 7 and 9 of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, supra note 53

2. The World Zionist Organization (WZO) and JA (Status) Law, 1952 ensures exclusive Jewish sovereignty over land ownership and budgetary allocations for building and development.

3. Due to the fact that the government of Israel cooperates and coordinates many of its functions - such as ownership of land, building, developing, housing, and budgetary allocations - with the WZO and the JA, these bodies function in fact as quasi-governmental entities.

Despite this state of affairs, however, they solely advance the goals of the Zionist movement, since they only grant privileges and services to the Jewish population living in Israel and the Occupied Territories but not to all inhabitants irrespective of their religious or ethnic affiliation.

In doing so these bodies evidently discriminate against the non-Jewish population, i.e. mainly the native Palestinian Arab people.

2.9.4.4.Ka'adan v. Israel's Land Administration (1995)

The case *Ka'adan v. Israel's Land Administration*[372] - which will be discussed below in more detail - clearly shows the discriminatory effect of the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952 for the native Palestinian Arab citizens. In the context of this case the discriminatory land and housing policy performed by the WZO and the JA in cooperation and coordination with the government of the state of Israel becomes evident.

The decision of the Supreme Court in the matter *Ka'adan v. Israel's Land Administration* demonstrates how the Israeli government violates in a systematic and institutionalized manner the fundamental right to equal treatment when the Palestinian Arab people in the state of Israel is involved. However, this is the first case in which the legality of the Covenant between the government and the JA has been challenged before the Supreme Court.

The Facts of the Case

In 1995 the petitioner Adel Ka'adan - a Palestinian Arab citizen of Israel who has worked for years as a nurse at Hillel Yaffe Hospital in Hadera - after having seen an advertisement offering plots of land for $ 17, 000 in the community of Katzir tried to purchase the said land.[373]

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372 H.C. 6698/95, *Ka'adan v. Israel's Land Administration,* 54 P.D. 258, http://www3.haaretz.co.il/eng/htmls/kat2_3 (High Court rules for equality); http://www.jerusalempost.com/Editions/2000/03/09/News/News.3741.html (High Court: Arab family was unjustly barred from state land)

373 H.C. 6698/95, *Ka'adan v. Israel's Land Administration*, for a summary in English see http://www3.haaretz.co.il/eng/htmls/kat9_7 (I want my kids to have normal education)

The Katzir settlement was set up in 1982 together with several other southern "lookout settlements" in a project to establish a series of communities in areas of the Galilee with dense Arab populations. In 1992 Katzir was integrated in a program, originally launched by Ariel Sharon, which was intended to strengthen and build up the area on the Israeli side of the 1967 Green Line by establishing more Jewish settlements. [374] Katzir is one of many communities established jointly by the state and the JA. Such settlements are built on so called "state land" (i.e. land that has been acquired by the state), and their infrastructure and development projects are financed by the JA[375] - a quasi-governmental body. These settlements, however, are explicitly for Jews, and there is no parallel body responsible for creating new settlements for Palestinian Arab citizens of Israel.

Although the petitioner Adel Ka'adan complied with all the procedural requirements for purchase a plot of land, his application was refused by the "Katzir Cooperative Association", which administers the process, on the ground that the internal regulations of the JA would not allow to sell houses in the settlement Katzir to non-Jews.[376]

Following this decision, Adel Ka'adan filed a petition against the state and the JA to the Supreme Court challenging the refusal of his application to purchase the land and a house in Katzir. The petitioner argued that since the Israeli Land Authority (ILA) - a state institution owing 93% of the land in Israel - is responsible for allocating land to the JA, the ILA could not legally allocate land to a third party that explicitly discriminates against a whole group of citizens on the basis of the national origin of these citizens, in this case the Palestinian Arab minority of Israel. Moreover, he argued that since all ILA land is public, i.e. defined as "state land", any discrimination on these lands is illegal, and violates the principle of equality. The government should not permit the JA to discriminate but should rather command the JA to treat all citizens of Israel - thus also the petitioner who is a Palestinian Arab citizen of Israel - equally.[377]

In its response the government rejected the petitioner's argument and - using a highly legalistic and technical argument - declared that the act of the state is legal, since it relied on the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952 as well as on the Covenant between the JA and the state of Israel.[378] The government claimed that the state can not act differently, for it will then violate the said covenant with the JA, which is completely based on law.[379] With this argumentation, the Israeli government clearly justified its discriminatory

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374 http://www3.haaretz.co.il/eng/htmls/kat11_6 (No Arabs nor Haredim need apply here)

375 Legal Violations of Arab Minority Rights in Israel, 1998, supra note 181, at 52

376 Ibid., at 53

377 Id.

378 For more details see sub-chapter 2.9.4.3. (The Covenant between the Israeli Government and the Jewish Agency)

379 Ibid.

attitude towards the Palestinian Arab citizens of Israel, legitimized its racist policy of not selling homes to Arab citizens on "state land", and completely ignored its obligation to maintain equality between Israel's citizens.

The Decision of the Supreme Court

A five-judge panel, headed by Supreme Court President Aharon Barak, finally ruled on the case and reached in March 2000 the decision - which took four years to reach - after Barak's recommendation - that some practical solution to the Ka'adans appeal of the settlement's decision be found outside of the courts - yielded no result.[380] In this decision the Supreme Court held that the government broke the law when it allocated state-owned land to the JA to build a community settlement that barred Arabs from building homes there.

Supreme Court President Aharon Barak, handing down the opinion for the court,[381] declared that the state must abide by the norms of equality in all its activities but that this obligation has been violated by relaying lands to some other party (in this case, the JA, which then delivered the land to the Katzir community) that in turn allocates the land according to religious or national criteria.[382] President Barak clearly stated that the decision to provide land to the JA to establish a "Jews only" rural community at Katzir broke the law. Due to the fact that the state, its agencies and its workers are public trustees, public land must be allocated on a fair and egalitarian basis, in accord with the norms of good government.[383]

In order to found the opinion the Supreme Court relied partly on the language used in the Declaration of the Establishment of the State of Israel of 1948, which commits Israel to uphold total equality of social and political rights for all its citizens without distinctions of religion, race and sex. In this context President Aharon Barak wrote as follows:

> "...Equality is among the fundamental principles of the state of Israel...Every authority in Israel, beginning with the state of Israel, its institutions and employees, must treat the various individuals in the state equally...This is requisite from the Jewish and democratic character of the state and it is a function of the principle of the rule of law which is in force here. Thus, the state must honor and protect the fundamental right of every individual in the state to equal treatment"

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380 http://www3.haaretz.co.il/eng/htmls/kat2_3 (High Court rules for equality)

381 From the day on when the petition was launched to the Supreme Court, President Barak described the petition as one of the most difficult of his judicial career and that he did not want to rule on the case. In escape from the obligation to reach any decision, he appointed the Jerusalem lawyer Yoram Bar-Sela to mediate between the sides in the unfulfilled hope to reach an out-of-court settlement.
http://www.jerusalempost.com/Editions/2000/03/09/News/News.3741.html (High Court: Arab family was unjustly barred from state land)

382 http://www3.haaretz.co.il/eng/htmls/kat2_3 (High Court rules for equality)

383 Ibid.

However, despite these seemingly clear words, President Barak also added that the right to equality is not an absolute right, and that there are situations or factors - such as so called "security" needs or the special needs of a homogenous community - that would justify an infringement of the principle of equality.

He also stressed that in ruling in favor of the petitioner Adel Ka'adan, this decision should not be regarded as the total disqualification of a land-settlement policy that has been implemented for many decades by the Zionist movement and the state of Israel.[384]

Three other judges - namely Theodore Or, Mishael Cheshin and Yitzchak Zamir - joined President Barak's decision in accepting the petition.

Justice Ya'acov Kedmi's opinion was the only dissenting voice.[385]

The Significance of the Ka'adan Case

After the *Ka'adan* decision was handed down by the Supreme Court, Israeli Jewish lawyers and journalists expressed their belief that the said decision marked a historic milestone in the legal battle for Palestinian Arab equal rights in Israel. The commentators compared the *Ka'adan* case with the decision in the matter of *Brown v. Board of Education*,[386] handed down by the United States Supreme Court in 1954, which ruled that racial segregation in schools is unconstitutional.

Although the *Brown* case was very important for African-Americans at that time, the *Ka'adan* case has not the same significance for Palestinian Arab citizens of Israel, in spite of the fact that both cases deal with the issue of integration. The reasons for this state of affairs lay in the following facts:[387]

1. Unlike African-Americans, who in the 1950's fought for integration, the Palestinian Arab minority in Israel has never expressed a desire to integrate into Jewish communities or schools, and has historically never placed this issue on its political agenda. On the contrary, the Palestinian Arab minority has repeatedly pushed for collective rights and autonomy.[388]

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384 http://www.jerusalempost.com/Editions/2000/03/09/News/News.3741.html (High Court: Arab family was unjustly barred from state land)

385 Ibid.

386 *Brown v. Board of Education,*

387 http://www.adalah.org/news.htm (Adalah's Comments on the Supreme Court's Decision in the Ka'adan Case - 4/2/00)

388 For instance, Palestinian Arabs living in so called "mixed cities" have demanded solutions for the social and economic conditions confronting their own, segregated neighborhoods. They have not pushed for integration into Jewish neighborhoods. In addition, Palestinian Arabs living in Arab villages in the Triangle and the Galilee have never sought to move to the nearby Jewish cities of Tel Aviv, Netanya, Hadera, Karmiel and Ma'alot. The reason is far more that the enumerated examples of cities as well as the settlement of Katzir are ideological, established by the Jewish Agency on confiscated Palestinian Arab lands, and offer schools which, according to Katzir's representatives to the Court, will continue to be comprised only of Jews and to instruct students based on Zionist values. See ibid.

2. Today, the Brown case is not considered by most African-Americans as significant achievement for their community. The critique against the Brown case focuses on the negative influence on integration of a minority group into the majority culture. This is also the position of most Palestinian Arabs in Israel, which would of course not consider it as a contribution if their children would not learn in their own language and would only learn Zionist history.

3. Historically, rulings of the court that deal with minority rights fall into one of two categories. In the first category of decisions, the court accepts a minority's claims regarding a matter of importance to its historical, political struggle, and issues a decision which the minority could not achieve without the court's interference. The Supreme Court's ruling in the *Ka'adan* case, however, does not fall into this category, since it falls far short of reaching the Palestinian Arab agenda demands.[389]

The second category of decisions results in an immediate social, political and conceptual change regarding the status of the minority group, as it was in the case of *Brown v. Board of Education*.[390] In the *Ka'adan* case, on the other hand, the court did not decide to change the concept itself, since the court's ruling was narrowly focused and referred only to the terms of the specific case and circumstances of the Ka'adan family. Thus this decision will not result in an upsurge of Palestinian Arab families submitting applications to live in Jewish settlements.

4. In the future the *Ka'adan* decision might negatively affect the ability of Palestinian Arabs to demand their collective rights, such as the establishment of an exclusive Arab, and not mixed town, since the state can now claim that it cannot tolerate the establishment of towns on a racial, ethnic or religious basis, and that it is a fully democratic state, open to all its citizens without discrimination. But the Palestinian Arabs as a group did not bring the *Ka'adan* case as a collective rights case to the Supreme Court, their representatives and political leadership were not part of the case and did not ask the Ka'adan family to serve as a test case. While the country waited for the decision, the Palestinian Arab media was not interested in the outcome. Moreover, while the liberal Jewish Israeli public reported on the case and framed the public discussion of its importance to equal rights, the Palestinian Arab minority was not consulted.[391]

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389 The following unfulfilled demands are on the Palestinian Arab agenda: The right to return to the uprooted villages, official status for unrecognized Arab villages, recognition of the Palestinian Arab minority as a national minority, increased development space for Palestinian Arab municipalities, the granting of national priority status to these areas, equal budget allocations to the Palestinian Arab municipalities, an end to the confiscation of Palestinian Arab land in the Negev, and a halt to the issuance of demolition order against Palestinian Arab homes. See id.

390 In the *Brown* case, the day after the court's ruling, African-Americans felt a significant, tangible change in their everyday lives. Most white schools, at least in the cities, were compelled to open their doors to African-American children, and white and African-American children studied for the first time together.

391 http://www.adalah.org/news.htm, supra note 387

Conclusions

1. The decision only applies to the *specific* case of the settlement Katzir, but is *not* one of *principal* quality which would prohibit all future discriminations against Arab citizens of Israel. Hence, in other similar cases and situations, special circumstances might still be put forward in order to justify land allocations in favor of the Jewish population and in clear contradiction to the state's obligation to treat every citizen equally.

2. The Supreme Court explicitly upgraded with this decision the Declaration of the Establishment of the State of Israel of 1948, as a national legal standard. Thus, not only the democratic values, but also the Jewish and Zionist values incorporated in the Declaration, i.e. the discriminatory approach were upgraded.

3. The *Ka'adan* decision is only an individual victory for one Arab family in Israel, but might be an obstacle for the Arab minority to claim collective rights.

4. Due to the above mentioned defects, it is doubtful if this decision can indeed prevent future discriminations of the same kind.

3. Summary and Conclusions

The purpose of this Chapter G was to provide an overview about the different normative sources relating to property rights and to examine the policies and methods which were and still are applied by the Israeli authorities in order to come into possession and ownership of private land - mostly owned by Palestinian Arabs of Israel and the annexed areas of the Occupied Territories - i.e. East Jerusalem and the Golan Heights. This chapter also provided an insight into the fundamental jurisprudential concepts and methods of legal interpretation which were employed by the judges of the Israeli Supreme Court in order to found and justify their opinions and to approve the dominant ideologies and political interests involved. Finally this chapter dealed with the institutions involved in the process of land seizure.

It was demonstrated that since the very early days after the establishment of the state of Israel in Palestine in May 1948 until the early 1950's Israel's political objectives were to create a legal mechanism and adequate legal instruments that would enable expropriations and allocations of private Arab owned property - first of all land and houses - on the pretext of "legality" and to block any possibilities of the return of Arab refugees. All this happened in blatant violation of the obligations imposed on Israel by early United Nations resolutions and in complete disregard of the commitments and promises made by Israel in the General Assembly Resolution 273 (III) of 11 May 1949 admitting Israel as a state member to the United Nations. The preamble of UN Resolution 273 (III) explicitly refers to Israel's undertakings to

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implement Resolution 181 (II) of 29 November 1947 and Resolution 194 (III) of 11 December 1948. Resolution 194 (III) explicitly determines that the Palestinian Arab refugees wishing to return to their homes should be permitted to do so at the earliest practicable date.

While Israel's willingness to comply with international law and internationally recognized principles of justice and fairness was not present in the process of "Israelification" of Palestine, resort to legal measures shaped by the underlying ideology of political Zionism as a strategy of land expropriation was a prime concern by Israel. In accordance with a highly formalistic, legalistic, and positivistic approach regarding the nature and function of a legal system, very quickly a large quantity of legal norms (first in the form of emergency regulations which were later transformed into permanent Knesset legislation) was created with the clear objective to "legalize" and "justify" expropriations of private (mostly Arab owned) property. This set of norms included: (1) Special legal proceedings aimed at depriving those who possessed land of their ownership of it. (2) Special rules of evidence which transferred the burden of proof onto the person who claimed ownership or possession of land. (3) Special provisions that would limit the power of the courts to review the implementation of this legislation, and that replaced the review of the courts by a review of quasi-judicial tribunals.

It was shown in this chapter that - although over the years, the processes of taking possession and transferring the ownership of Arab owned land took different forms and strategies by introducing a variety of legal instruments, methods and myths, and by establishing and using many administrative institutions - the ultimate objectives by the Zionist movement remained from the very beginnings up until today unchanged.

The legal history of Israel shows that from the very beginnings of Israel's existence, the political, economic and military activities in the field of property rights were guided by a clear policy of "de-Arabization" and ethnic-cleansing accompanied by a policy of "Israelification" and colonization of Palestine.

That the said policy of "de-Arabization" or ethnic-cleansing of Palestine from hundred thousands of native Palestinian Arabs had taken place in a planned and well coordinated way - pointing to an expulsion out of design rather than out of accidental circumstances created by the situation of war - is strongly supported by the following facts, legal evidences and documents:

1. The kind of aggressive activities and acts that were committed by the Israeli army - such as the complete and barbarous destruction of hundreds of Palestinian Arab villages and houses during the period of 1948 and mid-1949.

2. The discriminatory use and operation of the existing British mandatory legislation and the creation of specific legislation in the very early months of Israel's statehood in order to come into possession and ownership of land and other property that belonged to Palestinian Arabs.

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3. The Supreme Court jurisprudence which upheld almost all decisions of the executive authorities that lead to the expropriation and seizure of Arab land.

4. The large number of important official Zionist documents, which proposed the establishment of a Jewish "national home" in Palestine, based on an ideological concept of Zionism from which the non-Jewish inhabitants, i.e. the native Palestinian Arab people, should be excluded in eternity.

5. The establishment of the WZO, the JNF, the JA and other Zionist institutions which clearly rested - and still rest - on the principles of "inalienabiltiy of land" and "Jewish labor".

6. The large number of proposals regarding transfer of the Arab population from Palestine issued by a number of Zionist leaders throughout all times, and especially the establishment of Transfer Committees during the 1948 war, by or in coordination with the Jewish, and later Israeli, authorities.

In accordance with existing British mandatory legislation and a series of newly enacted laws, emergency regulations and military orders, the Israeli government employed the following practices and methods in order to come into possession and ownership of land: Declaration of Palestinian Arabs as "absentees" and confiscating their land. Expropriation of Arab owned land under the pretext of "security purposes" or "public purposes" in order to allocate this land to the exclusive use of Jewish immigrants. Declaration of Arab owned land as "closed areas", "security zone" or "waste land" and confiscating this land. Transfer of ownership from Arab Palestinians to Jewish national institutions. Arbitrary destruction of Arab houses and even whole villages in order to establish new Jewish-only settlements - so that taken together the physical map and demographic face of Palestine quickly changed.

In the course of this chapter it was shown that the enactment, use and implementation of the discussed legislation has lead to the situation that the native Palestinian Arab people, which until the outbreak of the war in December 1947 formed the majority population in Palestine, turned into a mostly landless and largely impoverished by the Israeli government until today not recognized highly discriminated minority of "second and third class" citizens of the state of Israel.

In this chapter it was demonstrated how the political objectives of the Zionist movement, after its coming to sovereign power with the establishment of the state of Israel, have been translated into seemingly "neutral" legal terms accompanied by highly discriminatory actions, and how formerly Arab Palestine has been transformed into Jewish Israel. A thorough discussion of these laws was important in order to provide a deeper understanding of the still existing highly conflict-loaded relationship between Palestinian Arabs and Israelis/Jews/Zionists. This discussion also revealed the very reason for the weak political, legal and economical status of the Palestinian Arab citizens within the Israeli society today.

It was demonstrated that the laws and emergency regulations - most of them are still valid - hardly use terms like "Jews" or "Palestinians" or "Arabs" in order to specify to which population group they shall be applied or not. Israel's legal system

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far more uses neutral "code words" which totally mask the reality of the inherent discrimination. Such "code words" are for example "people" - which in reality means only "Jews"; "settlement" - which means "Jewish settlements"; "immigrant" - which means "Jewish immigrants"; "national land" - which means "Jewish land"; "public purposes" - which means "Jewish public purposes"; "security purpose" - which means "security for the Jewish population"; "special" - which means "for the exclusive benefit of Jews."

It was demonstrated that the legal system in Israel is undemocratic and highly discriminatory, since it is directed at the legal and territorial segregation of the state's inhabitants, based on national-religious considerations and performed by measures such as demographic control, oppression and expulsion of the native Palestinian Arab people. The nature and approach of Israel's legal system is highly legalistic characterized by the fact that even for the most illegal act performed by Israel's authorities there exists a "legal" basis. Under the pretext of "legality" the Israeli authorities pursue a systematically applied colonialist policy of discrimination against the whole Palestinian Arab people constituting a gross violation of human rights and a severe infringement of international law - especially Article 5 of the ICERD, 1966 - and universally recognized principles.

Despite Israel's commitments according to international law, its initial assertions in the Declaration of the Establishment of the State, 1948 and the obligations under Section 3 of the Basic Law: Human Dignity and Freedom, 1992 to honor the right to property, Israel committed - and still commits - severe infringements of this right.

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H. SUMMARY AND FINAL CONCLUSIONS

In this work I have outlined how civil and political rights in Israel and the Occupied Territories are regulated, which ideological and political concepts, normative standards and spiritual sources nourish them, and how written and unwritten principles are applied and interpreted by the Supreme Court of Israel in pursuance of its self-imposed duty to safeguard the individual's rights and freedoms. The background and starting point for my examination were Israel's domestic laws and constitutional framework, Israel's Supreme Court jurisprudence as well as international human rights and humanitarian law. The main results of my analysis have already been detailed in concluding sections at the end of each chapter. This final chapter summarizes these earlier findings and contains overall conclusions and recommendations in respect of the study as a whole.

The establishment of the state of Israel in Palestine on 14 May 1948 - as envisaged by the Zionist movement which emerged at the end of the 19th century - has produced one of the biggest tragedy of the post Second World War era, since it was accomplished at the expense of hundreds of thousands native Palestinian Arabs which after having been dispossessed from their homes were never allowed by Israel to return and subsequently became refugees and stateless. Within the borders of the established state of Israel according to the 1949 Armistice Agreements there only remained 158.000 native Palestinian Arabs.

Chapter A of this work provided some essential information regarding the history, ideology and philosophy of political Zionism forming the background for the idea and decision towards a "national home for the Jewish people" in Palestine and culminating in the establishment of the state of Israel in Palestine in May 1948. This background information intended to provide a deeper understanding of the foundations of Israel's legal system and jurisprudence regarding civil and political rights and freedoms in general and the implications for the native Palestinian Arab people in particular. At the same time this background information gave an insight into the very beginnings of the conflict between the Israeli/Jewish/Zionist and the Palestinian/Arab people.

I have demonstrated that the traditional aims of the concept of political Zionism - a special form of the idea of nationalism which manifests itself in several forms - were and are to promote Jewish immigration and to ensure exclusive Jewish ownership of and sovereignty over the land in Palestine. I have outlined that the activities of the Zionist movement during the Ottoman and British Mandate period were directed at the creation of an autonomous Jewish social, political and economic infrastructure built with Jewish capital and Jewish labor for a Jewish market, with the aim to be "secure from Arab boycotts."

Furthermore, I have elaborated that the Balfour Declaration, 1917 which was later also incorporated into the text of the Mandate for Palestine in 1922 conferred upon

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Great Britain the responsibility to exercise a dual policy towards two different peoples which both claimed the same territory as their "homeland".

I have demonstrated that although the Balfour Declaration, the British Mandate and other documents provided for a concept of political equality by asserting that "nothing shall be done to prejudice the civil and religious rights of the existing non-Jewish communities" - this statement was actually not equivalent to the promise of "the establishment of a national home for the Jewish people" made to the leaders of the Zionist movement which in reality meant the promise of the right to self-determination of the Jewish people at the expense of the Palestinian Arab people and their right to self-determination.

I came to the conclusion that the responsibilities conferred upon Great Britain could never be truly reconciled due to the fact that the "national home" policy's underlying ideological and political concept was Zionism, which was and is characterized by an almost total disregard for the native Arab and/or non-Jewish population in most of the conceptual terms. The native Palestinian Arabs never could and never can fit equally into the concept of the Zionist movement and its "vision" of a Jewish nation-state, leading to the conclusion that whatever was and is looking positively from the Zionist point of view was and is looking absolutely negatively from the native Palestinian Arab point of view.

In Chapter A, I have also demonstrated that a vast number of historical documents prove that the Palestinian Arab people clearly understood from the very beginnings the essential points of the Balfour Declaration, 1917 and the Mandate for Palestine, 1922, which acknowledged the idea of political Zionism and the right to self-determination of the Jewish people while at the same time reduced the political status and the chances to self-determination of the native Arab inhabitants in relating to them as "the existing non-Jewish communities."

The historical documents show that the Palestinian Arab inhabitants feared that - as a result of the developments - they would be reduced to the status of a minority or even be transferred to the neighboring Arab countries, as it was suggested by several Zionist leaders from the very beginnings. As demonstrated, these fears were not simply drawn from increased Jewish immigration and acquisition of land by the Zionist movement, but rather from various writings and speeches of Zionist leaders, as well as the establishment of specific Zionist Institutions - such as the World Zionist Organization (WZO), the Jewish Agency (JA) and the Jewish National Fund (JNF), which are based upon the principles of "inalienability of land" and the employment of solely "Jewish labour", and which prove, that the concept of political Zionism aimed to create a national home in Palestine for the Jewish people alone from which the indigenous Palestinian Arabs should be excluded, at best be discriminated, but certainly not be treated equally. The native Arabs rejected the activities of the Zionist movement and the Balfour Declaration because they anticipated that there was no place for them in the political, territorial and economic concept of Zionism.

Contrary to the claim that is often made, the Zionist movement was throughout all times of its activities in Palestine fully aware of the existence of the native Arab population as well as of their growing opposition towards the project of political Zionism. The Zionist movement also clearly understood that the native Palestinians would never accept any transformation of Arab Palestine into a Jewish national home and that - from the point of view of the Palestinian Arab people - such an entity would never have legitimacy.

Both sides knew that the implementation of Zionism could be accomplished only at the expense of the Palestinian Arabs.

In the course of this work I have demonstrated that throughout all times Zionist intellectuals and leaders ignored these facts because they knew that there was no solution within the Zionist way of thinking, and thus they chose to rely on so called historical rights, religious determination and economic means to acquire the land of Palestine whether the native Arabs agreed or not.

The Israeli government commonly claims that the events of 1948 (i.e. the expulsion and/or flight of the majority of the Palestinians) occurred *because* the Palestinian Arab people rejected the UN Partition Resolution 181 (II), *thus* causing their dispersion and hardship. But considering the concept of Zionism it becomes clear that these claims are a falsification of facts, since the UN Partition Resolution 181 (II) was a blatant violation of the right to self-determination of the Palestinian Arab people, which only exercised its right to protest.

In this study I have demonstrated that the undemocratic concept of political Zionism has been translated and implemented into the whole fabric of Israel's legal and social order, leading to the situation of a permanently favored treatment of the whole present and future Jewish population at the expense of the indigenous Palestinian Arab people and their fundamental rights and freedoms.

Throughout this work - and especially in Chapters E and G - I have demonstrated that the concept of political Zionism is until today an unchanged and uniform concept, since the basic aim to occupy as much land as possible and whenever there is an opportunity to it without taking into consideration the fundamental rights and freedoms of the Palestinian Arab inhabitants, still prevails.

In Chapters C, F and G, it was shown that the concept of political Zionism is specifically reflected in laws, regulations and court decisions dealing with the right to citizenship and nationality, the right to equality, the right to freedom of movement and residence, the right to freedom of speech and the right to property.

It was demonstrated that the violations of the rights of the native Palestinian Arab inhabitants, specifically the issue of ownership and sovereignty of land as well as the connected issue of the demographic composition of the whole population, lay at the very foundations of the whole conflict between the Israeli/Zionist and the Palestinian/Arab people.

In Chapter B of this work I have dealed with the issue of Israel's obligations to enact a constitution, including a bill of human rights, and with the issue of Israel's

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approach towards judicial review. First of all I have shown that although the Declaration of the Establishment of the State of Israel, 1948 is one of the most important documents of Israel's constitutional framework, until 1992 it was neither considered as a legally binding document nor as a higher basic norm or constitution. That means it did not confer any individual rights to the citizen of the state of Israel nor did it impose any legal duty on the Israeli government.

I have shown that when the political parties drafted the Declaration of the Establishment of the State of Israel, 1948 they produced a political document which reflects a certain compromise among the groups that were politically active at that time: On the one hand the Declaration established Israel as a "Jewish state". On the other hand the Declaration provided for social and political equality for *all* inhabitants of the country - including the Arab inhabitants of Israel.

In Chapter B - and especially in Chapter C - I have shown that the strong pronunciation of the Jewish character of the state of Israel has in many fields discriminatory effect for the non-Jewish population, i.e. mainly the Palestinian Arab people which is not recognized as a national minority by the government.

The Palestinian Arab citizens of the state of Israel are not full citizens, since the state defines itself as the state of the Jewish people - rather than the state of *all* its citizens, and since the Palestinian Arab citizens are not authorized to decide in matters relating to the security concept of the state and its ideological direction.

Especially in Chapters C, D, E, F and G, it was shown that although the Jewish and Palestinian Arab population is formally equal before the law, in reality different normative and interpretative standards are applied on both groups, and it was shown that this basic approach underlies Israel's legal, judicial and socio-political system as a whole and must therefore be considered as systematically applied illegal policy of discrimination and segregation.

In Chapter B I have furthermore shown that despite the enactment of two basic laws on human rights in 1992 the discriminatory situation and its underlying conditions did not really change. I have shown that these two basic laws resulted in an almost empty attempt towards a real democratization of Israel's legal order as a whole, due to the fact that these basic laws suffer from serious defects.

The first deficiency concerns the Basic Law: Human Dignity and Freedom, 1992 and relates to the fact that this law lacks any clauses guaranteeing the right to equality of all citizens, the right to freedom of religion and conscience, the right to freedom of expression and the press, the right to freedom of demonstration, assembly and association. Although these rights lay at the very foundations of a liberal democracy, they were explicitly not incorporated into the Basic Law: Human Dignity and Freedom, 1992, and thus do certainly not have the same legal and constitutional status as the other enumerated rights.

The second deficiency concerns the Basic Law: Human Dignity and Freedom, 1992 and relates to the fact that this law may be amended by a simple majority (i.e. 61 members) of the Knesset.

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Another deficiency concerns both basic laws and relates to the fact that these laws explicitly declare that their purpose is to protect the rights set out in the basic laws "in order to entrench the values of the state of Israel as a Jewish and democratic state in a Basic Law." While the second value mentioned in this clause points to the universal democratic character of the state, aiming to serve the needs of all its citizens, emphasizes the first value the Jewish character of the state and completely disregards the existing bi-national character of the state.

As demonstrated throughout the work, the "Jewish character" of the state of Israel means not only a sociological description, but rather relates to the ideological and political objectives of the state and finds expression in the constitutional regime and the whole legal order. In Chapters C and G, I have shown that the "Jewish character" of the state is reflected in Israel's jurisprudence and legislation relating to the demographic composition of the state of Israel; Zionist institutions; national holidays; the state's flag, emblem and anthem; issues of education; and issues of land-ownership.

The clause relating to the state of Israel as "a Jewish state" discriminates against the second nation - i.e. the Palestinian Arab people - due to the fact, that according to all common interpretations ranging from the religious to the secular spectrum, the Jewish values always consist of Zionist values and objectives, and in employing these values, the democratic values may always be suspended.

In Chapter B, I have outlined that the Basic Law: Human Dignity and Freedom, 1992 contains another main deficiency which relates to the fact that it does not apply to legislation that was passed before the enactment of this basic law. Thus all the legal instruments that were enacted before this basic law and that were never declared invalid remain automatically and totally unchanged in force, despite the fact that they often constitute unjustified and severe infringements of human rights, a breach of international law and universally recognized principles of law. Moreover, according to Israel's rules of interpretation, the inherited and enacted legislation must be "interpreted in harmony with the new legal environment and normative umbrella, which has been developed since the establishment of the state of Israel and which consists not only of the immediate legal context, but also of accepted principles, basic aims and fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live." That has the consequence that all the laws and regulations, that have been enacted over the decades and that were never declared invalid, but express the above mentioned "principles, basic aims and fundamental criteria" which are accepted by the Israeli society and derive from the sources of Israel's social consciousness form "the new legal environment or normative umbrella over all legislation" - in spite of the fact that such legal instruments are often illegal, immoral, even a gross violation of international law and universally recognized principles of law and therefore unacceptable.

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The same principles apply to the jurisprudence, that was developed by Israel's Supreme Court over the decades, and that has never been overruled or declared as illegal. Although it is true that in recent times the Israeli Supreme Court has overruled some of its earlier illegal decisions - such as the decisions relating to the legitimation of torture - most of the illegal, immoral and unacceptable jurisprudence still lays at the very foundations of the Israeli legal system and forms "its legal environment" reflecting "the principles, basic aims and fundamental criteria which are accepted by the Israeli society and derive from the sources of Israel's social consciousness".

In order to enhance the democratic level, I would recommend that the 1992 enacted basic laws on human rights should be amended so as to make clear that the constitutional guarantees contained in these laws and under international law supersede ordinary legislation and previously issued illegal jurisprudence. After such an amendment, all legislation enacted before these basic laws and all jurisprudence should be reviewed and in the case of not meeting the established requirements it should be amended or abolished. Especially the following pieces of legislation do not meet the requirements of a democratic society: The Absentees Property Law, 1950, the Basic Law: Israels Land, the Defence (Emergency) Regulations, 1945, the Law of Return, 1950, and the World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952.

In Chapter C, I have shown that the "Jewish values" were directly translated into case law and legally binding norms, which explicitly benefit the rights and interests of the Jewish population at the expense of the Palestinian Arab population. Although the legal description of the country as "Jewish state" affects all aspects of rights and freedoms, it has certainly specific negative impact on the Palestinian Arab's right to equality, citizenship, property (especially land and housing rights), freedom of speech, cultural and political associations, and participation of political groups in Knesset elections, if such groups challenge Israel's nature as a "Jewish state" and propose "a state of *all* its citizens". I have also shown that the notion of Israel as the state of the "Jewish people" became insofar a "constitutional fact" as a party list that rejects this fact is not allowed to participate in the elections to the Knesset. I have outlined that the strong emphasis on and the legal description of the "Jewish nature" of Israel encourages discrimination and racism against the Palestinian Arab people and makes them in every aspect of life to "second and third class citizens."

In Chapter D, I analyzed the existence of a permanent state of emergency which is in force since Israel's inception in 1948. I have shown that such a permanent state of emergency stands in contradiction to the established principles of international law as reflected in Article 4(1) of the ICCPR, 1966. I arrived at the conclusion that the state of Israel only complies with the formal-institutional aspects of a parliamentary democracy, but that on a substantial level the state of Israel does not meet at all the standards of a liberal democratic country.

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In the context of an analysis of Israel's use of emergency laws I have shown, that this legislation has been enacted in many areas of civil life which had no connection to a state of emergency or national security, and that in these situations the permanent state of emergency solely served as a justification for the purpose to implement a specific policy.

Moreover, from the huge number of Supreme Court judgments which I reviewed during the last years, it became more and more evident for me that the permanent state of emergency only served as a justification for the denial of the most basic civil and political rights of the Palestinian Arab population and as reason for doing away with all democratic procedures in order to implement a specific policy which clearly favors the Jewish population.

In Chapter D, I have furthermore outlined that Israel's concept of "state/national security" is strongly connected with the underlying Zionist ideology of the state and is based on the definition of the state as a "Jewish state", whose aims are to promote Zionist goals and Jewish national values, and to exclude the non-Jewish population specifically from resource allocation, citizenship as well as from social and economic benefits.

I have demonstrated that Israel perceives "national security" as the sole or paramount concern and an end in itself, but that at the same time the moral value of that concept becomes highly questionable, and that - as the reality of Israel's legal and social order in the past and at the present time shows - many policies and practices employed by the Israeli government in the name of "national/state security" - and mostly backed by the Supreme Court - constitute a flagrant violation of the most fundamental human rights and freedoms.

In the course of this work it became evident that Israel's concept of "national security" is based on a "military concept" and is defined in terms of "military strength" and "weapons" in order to accomplish political aims and to secure certain interests of one population group - i.e. the Jewish population in Israel and the Occupied Territories. However, human security is never just about weapons and military strength but is rather heavily dependent on the development of the society as a whole, on the economic and social well-being of all individuals, and on the respect for human rights and human dignity of *all* citizens and inhabitants living in a state or a territory.

As long as "state security" is based upon a rigid definition of the state to be a "Jewish state", whose political aims are to advance and to protect first of all Zionist goals, and the values, rights and interests of the Jewish population alone - rather than the rights of *all* citizens of Israel and inhabitants within Israel's jurisdiction - peace and security will according to my point of view never come: Neither for the Jewish nor for the Palestinian Arab people.

After having reviewed Israel's laws and Supreme Court decisions dealing with the issue of "state security" I could notice a recurring pattern of argumentation: The responsible and acting authorities including the Supreme Court always try to justify

human rights violations on the pretext of "state or public security" considerations and the state's responsibility to fight "terrorism" but they never really focus on the root causes which lead to the so called "security problems" and which lay in the discriminatory treatment of Palestinian Arabs in general, and particularly in the illegal, more than 33 years lasting occupation and the severe violations of the human rights and freedoms of the native Arab inhabitants.

In Chapter E, I have described the legal, judicial and administrative system that emerged in the territories occupied by Israel in the June 1967 war. I have shown that the system in these territories is based on the concept of political Zionism as expressed on the Zionist Congress in 1919, and is directed at the legal and territorial *segregation and exclusiveness based on Jewish national and religious* considerations with large-scale discrimination by law against the Palestinian Arab people, demographic control, oppression and expulsion of the native Arab people.

I have shown that the system that developed by Israel's military government resembles the former system of *apartheid* in *South Africa*. In terms of legal philosophy the legal system in the Occupied Territories may be described as highly legalistic characterized, inter alia, by the fact that for even the most illegal act performed by Israel's military authorities a "legal" basis exists. I have demonstrated that the Israeli Supreme Court adopted a strong positivistic, formalistic, dogmatic and authoritarian jurisprudential conception characterized by the literal application of law within self-imposed limits of a rigid scheme of deductions and by a complete indifference towards human rights and justice.

I have also demonstrated that the Oslo I and II Agreements of 1993 and 1995 in combination with the continuously established facts on the ground - i.e. the Jewish settlements which were established on Palestinian owned land throughout all times since 1967 and in even accelerated form since 1993 - reveal Israel's attitude towards individual civil and political rights as well as collective rights to territorial self-determination and national independence of the Palestinian people.

This attitude is characterized by a principal non-intention on the part of Israel to respect the most fundamental rights of the Palestinian people, is materialized in the developments that took place during the last seven years and is revealed by the fact that the human rights situation of the Palestinian Arab people living in the Occupied Territories not only not improved but on the contrary even deteriorated.

I have shown that all Israeli governments after the signment of the Oslo I and II Agreements accelerated the illegal process of establishing Jewish settlements - including the building of Jewish only by-pass roads for the settlers and the army - and thus have increased the accompanied human rights violations.

Chapter F was entirely devoted to the right to freedom of expression, speech and the press, since a vast number of important and still relevant Supreme Court jurisprudence has been developed in the context of this right. I have shown that despite the fact that the government of Israel has a relatively liberal approach towards the right to freedom of expression, the right is not fully respected with

regard to the Palestinian Arab people. The right to freedom of expression, which according to Article 19(2) of the ICCPR includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, is not sufficiently protected within Israel's legal system.

The purpose of Chapter G was to provide an overview about the different normative sources relating to property rights and to examine fundamental jurisprudential concepts and methods of legal interpretation which were and still are applied by the Israeli authorities in order to come into possession and ownership of private land - mostly owned by Palestinians of Israel and the annexed areas of the Occupied Territories. It was shown that since the very early days after the establishment of the state of Israel in Palestine in May 1948 until the early 1950's Israel's political objectives were to create a legal mechanism and adequate legal instruments that would enable expropriations and allocations of private Arab owned property - first of all land and houses - on the pretext of "legality" and to block any possibilities of the return of Arab refugees.

All this happened in blatant violation of the obligations imposed on Israel by early United Nations resolutions and in complete disregard of the commitments and promises made by Israel in the General Assembly Resolution 273 (III) of 11 May 1949 admitting Israel as a state member to the United Nations.

The preamble of UN Resolution 273 (III) explicitly refers to Israel's undertakings to implement Resolution 181 (II) of 29 November 1947 and Resolution 194 (III) of 11 December 1948.

Resolution 194 (III) explicitly determines that the Palestinian Arab refugees wishing to return to their homes should be permitted to do so at the earliest practicable date.

While Israel's willingness to comply with international law and internationally recognized principles of justice and fairness was not present in the process of "Israelification" of Palestine, resort to legal measures shaped by the underlying ideology of political Zionism as a strategy of land expropriation was a prime concern by Israel.

In accordance with a highly formalistic, legalistic, and positivistic approach regarding the nature and function of a legal system, very quickly a large quantity of legal norms (first in the form of emergency regulations which were later transformed into permanent Knesset legislation) was created with the clear objective to "legalize" and "justify" expropriations of private (mostly Arab owned) property.

It was shown in this chapter that - although over the years, the processes of taking possession and transferring the ownership of Arab owned land took different forms and strategies by introducing a variety of legal instruments, methods and myths, and by establishing and using many administrative institutions - the ultimate objectives by the Zionist movement remained from the beginnings up until today unchanged.

Thus, I come to the conclusion that any chances towards an improvement of the human rights situation within Israel's legal system in general and with regard to the

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rights to equality of the Palestinian Arab people in particular would require a serious debate of Zionism - its ideology and political concept, its history and narratives, its policies and methods, and its incompatibility with equal rights of the non-Jewish population - since only then the difficult questions and fundamental flaws of this concept, suppressed since the establishment of the state of Israel would become visible.

That means the root causes of the Israeli-Palestinian conflict should publicly be discussed, namely the whole issue of the 1948 dispossession that lays at the root of Israel's existence and its subsequent behavior, the system of the military government which was imposed upon the Israeli Arabs from 1948 to 1966, that the Israeli Arabs are the same people as the Palestinian Arabs in the Occupied Territories, Jewish fundamentalism, Israel's occupation since 1967 which is the longest military occupation in modern times, Israel's contraventions of especially the Fourth Geneva Convention, the legal system that developed in the Occupied Territories, the Jewish settlements which are totally closed for Palestinians and which in reality are heavily armed military encampments, the system of by-pass roads and road-blocks which crisscross Palestinian land in the Gaza Strip and the West Bank, the role of the army within the Israeli society - that for instance the most influential and powerful Supreme Court judges (e.g. the current Supreme Court president Aharon Barak or the former president Meir Shamgar) were high ranking military personnel.

There should be an open discussion about the Covenant between the Israeli government and the World Zionist Organization, the sophisticated system of apartheid that developed in almost all aspects of Israel's social and legal order, the ethnic cleansing policy pursued by Israel since the early days of the state's existence, the massacres in and devastations of Qibya, Kafr Qassem, Sabra and Shatila, the systematic continuity of Israel's dehumanization and enslavement of a whole people - i.e. the native Palestinian Arabs, the house demolitions, land expropriations, the curfews and closures, the illegal arrests, hostage taking and torture, the continued oppression and persecution of the 20% Palestinian Arab minority within Israel.

It should also be stressed that it is the state of Israel with its executive and judicial apparatus - i.e. its army, its government, its parliament, its judiciary - which is fully and directly responsible for the applied systematic policy of discrimination, oppression and persecution.

There should also be a public discussion about the regulated traffic between Israeli lobbying and the US Middle East policy. To few people for instance know that Martin Indyk, US ambassador (for the second time during the Clinton administration) to Israel, before he came to the very heart of the US government in a top and secretly run position, was the head of the Washington Institute for Near East Policy, a quasi-intellectual thinktank that always engaged in active advocacy on the part of Israel, and coordinated its work with that of AIPAC (the American Israel Public Affairs Committee), the most powerful and feared lobby in Washington. Moreover, before he came to the Bush administration Dennis Ross, the State

Department consultant who has been leading the "peace process", was also the head of the Washington Institute for Near East Policy.

It should be known that there is a healthy fear and respect for AIPAC all over America, but especially in Washington, where in a matter of hours almost the entire Senate can be marshaled into signing a letter to the president on Israel's behalf.

Only a few members of the Congress have ever resisted AIPAC openly but soon after their re-election was blocked by the many political action committees controlled by AIPAC, and that was it then.

All these facts must be known since it is the US which dominates the Middle East policy, which allocates huge amounts of money to the state of Israel and the Israeli high-tech military apparatus - equipped with missiles, tanks and helicopter gunships used against Palestinian demonstrators, stone-throwing children and civilian houses.

In light of the above mentioned facts I come to my final conclusions, namely that although the Israeli-Palestinian peace process provides the best framework and guarantee for the eradication of human rights violations, human rights concerns go beyond the peace process and must be considered on their own merits and in a comprehensive way.

That means in other words the Israeli-Palestinian peace process is by its very nature a political process, and should - despite the fact that it is a necessary precondition for the promotion and the respect of human rights - never prejudge the exercise of human rights.

The promotion of human rights and democracy are not an obstacle to an Israeli-Palestinian peace but rather the very condition to achieve this goal. Human rights cannot be set aside to await the success of negotiations, since they are not the raison d'être for the agreements or negotiations within the peace process.

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APPENDICES

APPENDIX 1
Basic Law: Human Dignity and Freedom (1992)

1. The fundamental rights of a person in Israel are grounded on the recognition of the value of human beings, on the sanctity of life and of their freedom, and they will be honoured in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel.
   [Amendment inserted by Basic Law: Freedom of Occupation - 1994]

1A. The object of this Basic Law is to protect human dignity and freedom, in order to entrench the values of the State of Israel as a Jewish and democratic State in a Basic Law.

2. No injury may be caused to the life, person or dignity of a human being as a human being.

3. No injury shall be caused to the property of a person.

4. Every person has the right to protection of his life, his person and his dignity.

5. The freedom of a person shall not be removed or restricted by detainment, imprisonment, confinement or in any other way.

6. (a) Every person is free to leave Israel.
   (b) Every Israeli citizen located abroad has the right to enter Israel."

7. (a) Every person has the right to privacy.
   (b) The private domain of a person shall not be infringed without permission.
   (c) No searches shall be conducted in the private domain of a person, on his person, in his person or in his belongings.
   (d) The privacy of a person's conversation, writings or works shall not be infringed.

8. The rights conferred by this Basic Law shall not be infringed save where provided by a law which accords with the values of the State of Israel, which was intended for a fitting purpose, and only to the extent necessary, or by a law as aforesaid by virtue of an express authorization therein.
   [Amendment inserted by Basic Law: Freedom of Occupation - 1994]

9. The rights conferred by this Basic Law on persons serving in the Israel Defence Forces, the Israel Police, the Prison Service or other state security forces, shall not be restricted, nor shall the rights be made subject to conditions, save as provided by law and to an extent which does not exceed what is required by the substance and nature of the service.

10. This Basic Law shall not derogate from the validity of any law existing on the eve of this Basic Law coming into force.

11. Every authority of the government authorities is under a duty to respect the rights conferred by this Basic Law.

12. Nothing in any emergency regulations shall be effective to alter this Basic Law, to suspend its validity temporarily or to stipulate conditions to it; however, where the State is in a state of emergency by virtue of a declaration under Section 9 of the Law and Administration Ordinance 1948, emergency regulations may be promulgated under the said Section which will have the effect of revoking or restricting rights under this Basic Law, provided however that the revocation or restriction shall be for a fitting purpose and for a period and to an extent which shall not exceed what is required.

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APPENDIX 2A

Basic Law: Freedom of Occupation (1994)

[Repealed the Basic Law: Freedom of Occupation - 1992]

1. The fundamental rights of a person in Israel are grounded on the recognition of the value of human beings, on the sanctity of life and of their freedom, and they will be honoured in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel.
2. The object of this Basic Law is to protect freedom of occupation, in order to entrench the values of the State of Israel as a Jewish and democratic State in a Basic Law.
3. Every citizen or resident of the State may engage in any occupation, profession or business.
4. Freedom of occupation shall not be violated save where provided by a law which accords with the values of the State of Israel, which was intended for a fitting purpose, and only to the extent necessary, or by a law as aforesaid by virtue of an express authorization therein.
5. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.
6. Nothing in any emergency regulations shall be effective to alter this Basic Law, to suspend its validity temporarily or to stipulate conditions to it.
7. This Basic Law shall not be amended save by a Basic Law enacted by a majority of Knesset members.
8. A provision of law which violates freedom of occupation shall be valid notwithstanding that it does not accord with Section 4, if it is incorporated in a Law enacted by a majority of Knesset members and it expressly declares that it is valid notwithstanding the provisions of this Basic Law; a Law as aforesaid will cease to be valid at the end of four years from the date it comes into force, save where an earlier termination date is provided therein.
9. Legislative provisions which but for the provisions of this Basic Law or the Basic Law repealed as aforesaid in Section 9, would have been in force prior to the coming into force of this Basic Law, shall remain in force for two years from the date on which this Basic Law comes into force, if not repealed earlier; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.
11. In the Basic Law: Human Dignity and Freedom:
    (1) Section 1 shall be marked 1A and prior thereto shall come:
    '1. The fundamental rights of a person in Israel are grounded on the recognition of the value of human beings, on the sanctity of life and of their freedom, and they will be honoured in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel.'
    (2) At the end of Section 8 shall come: 'or by a law as aforesaid by virtue of an express authorization therein.'

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APPENDIX 2B

Basic Law: Freedom of Occupation (1992)

[Repealed by the Basic Law: Freedom of Occupation - 1994]

1. Every citizen or resident of the State may engage in any occupation, profession or business; this right shall not be restricted save by statute, for a worthy purpose and for reasons of the public good.
2. If the engagement in an occupation is conditional upon receiving a license, the right to a license shall not be denied except according to statute and for reasons of state security, public policy, public order and health, safety, the environment, or safeguarding of public morals.
3. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.
4. Emergency regulations shall not have the power to amend, temporarily suspend or place conditions on this Basic Law.
5. This Basic Law shall not be amended save by a Basic Law enacted by a majority of Knesset members.

6. Legislative provisions that were in force prior to the coming into force of this Basic Law, and which contradict its provisions, shall remain in force for two years from the date on which this Basic Law comes into force; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.

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- 1998
- 1999

Periodical Reports

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- Israel's Forgotten Hostages: Lebanese Detainees in Israel and Khiam Detention Centre (MDE 15/18/97, July 1997)

News Releases

- Amnesty International calls on Israel's High Court to Respect International Law by Rejecting Torture (MDE 15/2/98, 7 January 1998)
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- High Court Postponement of Torture Case Leaves Victims Unprotected (MDE 15/06/99, 13 January 1999)
- High Court Should End the Shame of Torture (MDE 15/05/99, 12 January 1999)
- Israel and the Occupied Territories: Committee Against Torture Must Take Strong Action (MDE 15/22/97, 6 May 1997)
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- Israel's Report to UN Committee Fails to Address Abuses in Occupied Territories (MDE 15/68/98, 14 July 1998)
- Israel Should Observe UN Committee Against Torture Call for Immediate Halt to Torture (MDE 15/32/98, 19 May 1998)
- Israeli Supreme Court endorses Hostage-Taking (MDE 15/21/98, 6 March 1998)
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- New Draft Law Jeopardizes Victim's Rights (MDE 15/102/97, 15 December 1997)
- Supreme Court Must Free Lebanese Hostages (MDE 15/08/99, 26 January 1999)
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- News, http://www.adalah.org/news.htm
- Annual Report 1999
- Brief: Umm al-Fahem, Focusing on events of 27-29 September 1998
- Equal Rights and Minority Rights for the Palestinian Arab Minority in Israel, A Report to the UN Human Rights Committee on Israel's Implementation of Articles 26 & 27 of the ICCPR, submitted by: Arab Human Rights Organizations (Adalah: The Legal Center for Arab Minority Rights in Israel and The Arab Association for Human Rights (HRA)), Nazareth, July 1998
- Legal Violations of Arab Minority Rights in Israel, A Report on Israel's Implementation of the International Convention on the Elimination of all Forms of Racial Discrimination, March 1998

6.2. Association for Civil Rights in Israel (ACRI)

- Annual Report 1996-1997

6.3. B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories

Data

- http://www.btselem.org/Files/site/english/Administrative/Statistics.asp

(Administrative Detention- Statistics)

- http://www.btselem.org/communikit/html/articels/18/english/Administrative/index

(Administrative Detention)

- http://www.btselem.org/Files/site/english/edeportation/Statistics.asp

(Deportation - Statistics)

- http://www.btselem.org/Files/site/english/edomolitions/Statistics.asp

(House Demolitions - Statistics)

- http://www.btselem.org/Files/site/english/Planning&Building/Statistics.asp
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Case Studies

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- Lethal Training, The Killing of Muhammad Al-Hilu by Undercover Soldiers in Hizmeh Village (Jerusalem, March 1997)
- The Death of Mustafa Barakat in the Interrogation Wing of the Tulkarm Prison (Jerusalem, September 1992)

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Information Sheets

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- Bureaucratic Harassment, Abuse and Maltreatment During Operational Activities in the West Bank in the 1st Year of the Declaration of Principles (Jerusalem, Sept. 1994)
- Censorship of the Palestinian Press in East Jerusalem (Jerusalem, Febr.-March 1990)
- Closure of Schools and Other Setbacks to the Education System in the Occupied Territories (Jerusalem, September-October 1990)
- Complaints of Human Rights Violations in the Israeli-Occupied Territories (Jerusalem, August 1991)
- Demolishing Peace, Israel's Policy of Mass Demolition of Palestinian Houses in the West Bank, (Jerusalem, September 1997)
- House Demolition and Sealing as a Form of Punishment in the West Bank and Gaza Strip, Follow-Up Report (Jerusalem, November 1990)
- House Demolition During Operations Against Wanted Persons (Jerusalem, May 1993)
- Human Rights Violations in the Occupied Territories During the War in the Persian Gulf (Jerusalem, January - February 1991)
- Information Sheet (Jerusalem, August 1989)
- Information Sheet (Jerusalem, September 1989)
- Information Sheet (Jerusalem, November 1989)
- Information Sheet (Jerusalem, April 1990)
- Information Sheet (Jerusalem, June 1991)
- Injustice in the Holy City Jerusalem (Jerusalem, Spring 2000)
- Limitations on Building of Residences on the West Bank (Jerusalem, August 1990)
- Limitations on the Right to Demonstrate and Protest in the Territories (Jerusalem, January 1992)
- Renewal of Deportation of Women and Children from the Occupied Territories on Account of "Illegal Residency" (Jerusalem, September-October 1991)
- Sexual Harassment in the Name of the Law, Violence and Degradation during Searches of Palestinian Homes in Hebron (Jerusalem, December 1996)
- Sheer Brutality: The Beatings Continue, Beatings and Maltreatment of Palestinians by Border Police and Police Officers during May-August 1997 (Jerusalem, August 1997)
- The Killing of Palestinian Children and the Open-Fire Regulations (Jerusalem, April 1996)
- The Military Judicial System in the West Bank, Follow-Up Report (Jerusalem, November 1990)
- Torture During Interrogations: Testimony of Palestinian Detainees - Testimony of Interrogations (Jerusalem, November 1994)
- Violence against Minors in Police Detention, (Jerusalem, June-July 1990)
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Press Releases

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- HCJ Permission to Use 'Moderate Physical Pressure" (28 January 1996)
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