

# Jurisdiction in an Immigrant-Settler Society

*The Jewish and Democratic State\**

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In 1995, a couple by the name of Adel and Iman Qa'dan from the Arab-Israeli town of Baqa al-Garbiya made a request to purchase a plot of land to build a home in the Jewish communal settlement of Katzir, in the Wadi Ara area south of Hadera. The council clerk of Tel Eiron refused to sell them the land based on the area's official policy, which prohibits the sale of plots to non-Jews. A petition was filed on the couple's behalf by the Association for Civil Rights in Israel in October of 1995. Chief Justice Aharon Barak, the president of the Supreme Court, tried to avoid making a ruling—a response similar to those made in other “sensitive” cases—and suggested that the sides reach an out-of-court settlement. Four and a half years after the filing of the petition, on March 8, 2000, the High Court of Justice (HCJ) ruled resolutely that discrimination against Arab Israeli citizens in allocating state lands, by either state or state-affiliated agencies, such as the Jewish Agency, was illegal.<sup>1</sup>

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The ruling was regarded immediately as revolutionary, even post-Zionist, and a real turning point in High Court history. Many compared it enthusiastically with the U.S. Supreme Court ruling of *Brown v. Board of Education of Topeka*,<sup>2</sup> the decision that undermined the doctrine of separate but equal education for blacks and whites in the United States. The similarity between the cases rests on the Jewish principles of the Israeli state that include systematic, bureaucratized, and far-reaching discrimination against Arab citizens, denying them access to lands to construct homes or for any other purpose. This, together with the Law of Return, constitutes the main form of legal discrimination against Arabs in Israel, and is based on the cultural, political, and legal principles stating that, first, all the land under the sovereignty of the state is exclusively (Jewish) national land;<sup>3</sup> second, no land may be sold by the state, namely, the Israel Land Authority, or any of its agencies, but only leased for a fixed period; and third, the principal agency entitled to allocate lands for settlement, nominally a non-statist agency, is the Jewish Agency. As a presumed representative of the Jewish people around the world, the agency retains special status in Israel and is not obliged to act according to the principles universally established as the responsibility of a state towards its citizens.<sup>4</sup>

However, a closer analysis of the HCJ decision in the Qa'adan family's case shows that, on a personal level, the court did not furnish the petitioners with any actual remedy to their dilemma, but offered only a general statement against discrimination. The court refrained from ordering the relevant authorities to allocate the requested plot of land to the Qa'adans. More meaningfully, it seems that the court stayed within a well-worn paradigm, recognizing formal equality but only because the circumstances did not involve any competing security concerns (see below). The verdict itself leaves a loophole for the court to avoid supporting equal rights for Arab citizens if the mere specter of national security is raised. Moreover, the court refrained from ordering the authorities to rectify built-in legal and institutional discrimination. As Alexander Kedar commented,<sup>5</sup> the "Qa'adan [verdict] draws a line. The past is to be left unchallenged, untouched and unspoken. Moreover, the story of the Qa'adans is isolated from the collective identity and the needs as Palestinian citizens of Israel."<sup>6</sup> Thus, in spite of its liberal rhetoric, the HCJ's verdict in the Katzir case did not improve the status of Palestinian civil liberties. Ronen Shamir suggested that it was not even a landmark case:<sup>7</sup>

The analysis of [by Shamir of a handful of] cases decided by the Israeli Supreme Court suggested that the effect of landmark cases was primarily symbolic. On the one hand, the cases reinforced the court's legitimacy as a solid defender of human rights. On the other hand, all these cases were isolated victories of Palestinian petitioners, which were not followed by similar results in subsequent cases. None of the decisions had any significant effects on later policy. . . . Yet, the significance of the cases was exaggerated allowing them to appear as symbols of justice.<sup>8</sup>

The present essay makes two further additions to Shamir's assertion. First, it demonstrates that the practices of the HCJ function not only to grant legitimacy to the court, but also to generate a façade of legitimacy to the Israeli state's internal and external colonization and territorial expansion efforts. Second, the demonstration is done within a suggested conceptual framework.

### Changing Boundaries of the Israeli Polity

Israel was formed as a frontier society<sup>9</sup> and a immigrant-settler state. To this day, it remains an active immigrant society, engaged in an ongoing process of settlement and territorial expansion. Even though its external frontiers are in a continual process of closure, following its peace treaties with Egypt and Jordan and having abandoned its posts in southern Lebanon, Israel presently lacks a finalized border both geopolitically and socially. Despite the Israeli state's tremendously fast and constant transformation, its fundamental attribute, that of being a settler society that must expand and consolidate itself within a given territory, has remained institutionally and culturally constant.

Zionism, the national movement that motivated and was formed by Jewish immigration and settlement, was sophisticated enough to distance itself from traditional global colonialism, the historical matrix from which it developed. Zionism emphasized the uniqueness of the so-called Jewish problem—anti-Semitism, persecution and, later, the Holocaust—and offered itself as the sole realistic and moral solution. Thus, the Jewish immigration movement was able to successfully present itself as a return to Zion, the correction of a cosmic injustice that had gone on for thousands

of years and totally disconnected from other European immigration movements to other continents.

However, that Jewish immigration and settlement were construed in Zionist terms could not change the basic social and cultural reality. Early Jewish society, established in Palestine mainly by immigrants with ethnic religious and cultural backgrounds, was vastly different from the broad local population, which perceived itself as a Western society. Within the political context of the postcolonial world order, Israeli society is plagued by the problem of existential legitimacy. It has had to repeatedly defend its existence to the international community and explain why it chose Palestine, renamed the Land of Israel, as its target territory for settlement. Palestine was not chosen for its fertile and abundant soil, its natural resources, its cheap labor force, or its potential markets; it was chosen for ideological and religious reasons. The essential reasoning behind the Israeli state and society's right to exist is embedded in symbols, ideas, and religious scriptures, even if there have been attempts to give them a secular reinterpretation and context.<sup>10</sup>

One especially fascinating phenomenon helps to illuminate Israel's current sociopolitical and political cultural arena: the state's multiple yet simultaneously invoked social and political boundaries.<sup>11</sup> The multiplicity of boundaries includes the pre-1967 borders of the state (the so-called Green Line), the area that the Israeli state actually controls, including the territory captured in 1967, and the social boundaries encompassing Jews, among others. This multiplicity, which facilitates the delineation of various boundaries in various contexts, allows the state to oscillate between them and create a democratic façade that is supported by a rational and legal judicial system and that grants legitimacy to the regime and the state. I want to look closely at four main, partially overlapping boundaries.

First, the boundary of Jewish citizenship includes the Jewish citizens of the state. It is customary within this boundary to consider Israel to be a complete and enlightened democracy. However, given the constitutional mixture of religion and nationality, the nonreligious members of the collectivity, who are supposed to be the majority within this boundary, are subject to a legislative and judicial system that is not based on fundamental democratic assumptions. Thus, even the privileged strata of Israelis—middle-class Ashkenazis, for example—do not receive the benefit of full civil rights. This is due to the existence of a dual judicial system that allows the rabbinical courts to monopolize personal status laws and has grafted a prin-

ciple of basic inequality between men and women, as well between religious and secular Jews, onto the system. The *halakha* essentially constitute an archaic patriarchal legal doctrine that has consistently preserved the superior status of males over females.<sup>12</sup>

The nature of the dual judicial system powerfully and systematically violates the right to freedom from religion and legally builds in oppression of women, which radiates from the sphere of personal status to many other social and political spheres. The irony is that the vast majority of the Jewish citizens of the state, including most secular citizens, do not perceive the situation as limiting their freedom, but rather expressing Israel's Jewishness.<sup>13</sup> The civil courts, including the HCJ, have never explicitly recognized the distinctiveness of the boundary, arguing that every citizen is equal before the law. This is part of the legitimacy-generating role of the court, demonstrated below and above by the Katzir affair, and is a very meaningful boundary for the judicial system.<sup>14</sup>

Second, the boundary of Israeli citizenship includes Jews, non-Jews,<sup>15</sup> and Arabs (or Palestinians) in Israel. Israel tends to grant Arabs and other minorities citizen's rights equal to those enjoyed by Jews, except for the previously enumerated rights and on an individual rather than a collective basis. It is considered legitimate to allow educational autonomy to ultra-Orthodox, national-religious, other religious, and conceivably even secular Jews, but not Arabs. Despite the tenet that every vote should carry equal weight, votes for parties defined in Israel as Arab parties are worthless in the sense that no meaningful parliamentary decision based on Arab votes is considered politically or morally illegitimate. The judicial system refers to all people within the boundaries as holding completely equal individual rights, but implicitly not collective rights. This is due to the assumption that, as a Jewish state, Jews are entitled to collective rights and non-Jews only individual rights. However, as we may conclude from the Katzir case and innumerable additional cases, the lack of collective rights diminishes and violates the sphere of individual rights. Many times, when cases involving the limitation of individual rights, despite the existence of collective rights, are brought to court, the court tends to protect what is perceived as Jewish national interests, as expressed by liberal rhetoric, that reinforce both the state's legitimacy and its ethno-national boundaries and identity.

Third, the ethnic-religious boundary includes everyone who is defined as belonging to the Jewish people, both in Israel and in the Diaspora. Potentially and with only a few reservations, the state belongs to anyone defined

as a Jew, wherever he or she may be, even if that individual has never considered immigrating to Israel or requesting citizenship. The first and third categories may be further subdivided into classifications of Jews according to the *halachic* Orthodox definition and alternatively, Jews accepted as Jews according to a political or other social definition. Agencies not officially part of the state bureaucracy, such as the Jewish Agency, operate within this boundary, as do the Jewish National Fund and the Himanutah Company, a non-Israeli organization with the purpose of acquiring land from Arabs, especially in the occupied territories.

Fourth is the boundary of the Israeli system of control. Even today, after establishment of an autonomous national authority following the partial implementation of the Oslo accords, the Palestinian population in the occupied territories is still within the control and part of the economic system of the Israeli state. As long as no final settlement is reached, and as long as no sovereign Palestinian state has been established, there will be no essential change in this situation. If and when a Palestinian state is established, it is difficult to foresee how the Palestinian and Israeli entities will be separated. The two entities are highly interwoven in a geopolitical sense, and there is much asymmetry in their economic and military power and cultural capital. After twenty-nine years of direct, coercive Israeli rule over the Palestinian population, the form of government, for the time being, has become a sort of shared rule, divided between the Palestinian National Authority and Israel. Authority continues to be reinforced by the military and police, economic means, and settlement. The network of settlements and the military protection they are afforded constitute a direct expansion of the Israeli state; the territories of the West Bank and Gaza Strip occupied in 1967 cannot be considered outside the perimeters of Israel's military and economic control, even if the level of direct control has declined or has been passed to a subcontractor. It is a kind of internal colonialism, as, among other reasons, according to the basic perception of each side, neither people have an alternative homeland.

At first glance it may seem that we are addressing three different, separate subjects. The first is the deprivation of the universalistic state of certain of its legislative and judicial powers and the transfer of those powers to the particularistic field of religion and *halakha*, according to the approach and interpretation of only one of the denominations within Judaism, Orthodoxy. The state thus facilitates the delineation of its collective identity and the criteria for membership within it using non-civic criteria. From this

perspective, the state is not simply Jewish, but Jewish Orthodox.<sup>16</sup> The ceding of powers to the religious legal-judicial framework makes Israel a partial theocracy, which cannot be reconciled with any definition of liberal democracy. The regime places severe limitations on women, secular citizens, and citizens who identify themselves as Jews but are not classified as Jews according to the Orthodox interpretation of the laws of *halakha*. The second subject is the state's legalized discrimination against non-Jewish, mainly Arab minorities. The third subject is the retention of over two million human beings under occupation for more than a generation, and the creation of a system to control them. The state is expanding its boundaries beyond the limits of its legitimate authority as it includes the occupied territories and their population into Israel's field of power and economic system, as a subsidiary economy and simultaneously reinforcing its underdevelopment. Thus, within the control and economic boundaries of the state, there is a population that is wholly deprived of the rights enjoyed even by its compatriot community, which dwells within the boundaries of Israeli citizenship.

The scope of this essay is limited to two intermingled questions of how the Israeli state, which officially and constitutionally defines itself as Jewish and democratic, relates judicially to two categories of Arabs and their rights on disputed land issues: first, the Arab citizens of Israel, and second, the Palestinians who have resided in the occupied territories since the 1967 war. In other words, it addresses how the immigrant-settler state tries to maintain a democratic identity and image—an important source of legitimacy—and at the same time strives to satisfy its hunger for land and the cultural code of creation of living space, all the while violating most universally accepted human rights and international conventions.<sup>17</sup>

### The Futile Periodization

The popular periodization of Israel emphasizes the rupture that allegedly occurred following the outcome of the 1967 war, especially by the so-called Israeli left. Before 1967, in the absence of the fourth boundary, Israel functioned as a moral and heroic society and state, a small nation struggling for its right to exist against the entire world.<sup>18</sup> Since 1967, Israel has become an empire of conquerors, oppressors, and dispossessors. Often, the traumatic change in government in 1977 and the rise of religious-political fundamentalism and Orthodox neo-nationalism have also been explained as dialectical consequences of that same war. Such claims are not completely

baseless, but they blot out the innumerable evils committed before 1967 and create the illusion of a mythological past, a lost Garden of Eden that existed in a historical vacuum. Future goals, too, are presented as aspirations to restore a past primarily uncontaminated by Arabs, who were absentees, hidden from sight by mechanisms of the military government that existed until 1966. In short, the legal historiography reveals no direct connection between the distant past, the more recent past, and the present. According to this vision, as Emanuel Sivan has also claimed,<sup>19</sup> it is as if the history of Zionist colonization was initiated, and mobilization of all of the necessary institutional mechanisms—including legal mechanisms—undertaken no earlier than 1967.

An in-depth examination of the past that compares it to the present is likely to point to clues about the future, without being too speculative. The most fascinating legal periodization is that of Chief Justice Aharon Barak. He divides the constitutional history of Israel into two eras. The first includes everything that came before 1992, that is, before the legislation of the two additional basic laws<sup>20</sup> of human dignity and freedom and freedom of occupation. The second includes everything that has occurred following the acceptance of these laws.

All who are involved in the legal institutional arena—judges, legal scholars, commentators, the media, and the general public—are clearly inclined to regard the legal system, especially the HCJ, as an impartial and autonomous body that acts according to universal criteria and some internal logic, disconnected from the interests of the state's ruling factions.<sup>21</sup> This approach is anchored, of course, in the idealist doctrine of separation of powers and independence among the branches of government. It is also assumed automatically to imply a system of checks and balances, with each branch of government critiquing the others on behalf citizens' rights, human dignity and freedom, and weak and minority groups. This impression has been strengthened by the HCJ's increasing role as an activist in different fields, investigating the judiciousness of the actions of the other branches of government and the level of recognition of the standing of public petitioners. Moreover, the HCJ has become a sort of constitutional court, not only interpreting laws but intervening in parliamentary legislation and nullifying laws that appear to contradict the spirit of the Basic Laws or are not "enlightened."<sup>22</sup> The general content and quality of the HCJ's services have never been defined or clarified, but their specific content may be discerned by anyone who examines various court rulings.



### The Judiciary and the Management of the Conflict

Closely examining the Israeli judiciary system clarifies that the judiciary protects neither Arab subjects from the arbitrariness of the government nor civil and human rights. It also constitutes one of the most sophisticated tools of repression employed since the state of Israel was brought into being. In this particular field, the judiciary is a central tool in reproducing a hegemonic regime, particularly regarding the inter-ethnic conflict being waged in the land and region, a trend that is likely to continue into the future. The above statement refers to all levels of the judiciary system, but especially the HCJ, the stance of which is not necessarily the result of hard-heartedness or prejudice, but due to the fact that the judiciary is an integral part of settler-immigrant society, which maintains its own logic and interests and must retain for itself a territorial living space.

The judicial system and administration in Israel thus make for a fascinating case study. They illustrate how a judicial system with a smug self-image of independence, disconnected from the governing ideology of the local population and the ethnocentric practices customary within it, has refrained from self-critique, and subsequently has had difficulty in maintaining autonomy and universality. Yet, before these topics are dealt with in detail, it is necessary to establish a value-oriented axiom upon which most of the arguments in this essay are built. The framework should be overt rather than covert, as should be the norm. The fundamental assumption is that one of the central functions of a court in general, and of the HCJ in particular, is to extend assistance and protection to minorities and to those who are politically, socially, economically, or otherwise deprived within the structure of the law and its interpretation. The court should do at least this much, and if possible more, without distinguishing which minority groups are entitled to more or less assistance. This is part of a more general approach maintaining that the moral caliber of any government or regime is measured by the quality of its relations with the underprivileged and minorities. Such relations should guarantee at least formal equality before the law and the judiciary and protection against the bias of the majority, the state, and its agents. Rhetoric arguing as much appears in innumerable HCJ verdicts and in the biographies of two prominent chief justices, Simon Agrant<sup>23</sup> and, especially, Aharon Barak.<sup>24</sup> We have no more sensitive a litmus test to exhibit the character of the Israeli government than areas in which the HCJ has intervened, or not, and the ensuing consequences. In

this regard, no minority in Israel is less privileged than the Arab minority in Israel, and no population is more oppressed by the Israeli state than the residents of the territories occupied following the 1967 war.

The courts' apparent lack of interest in the fate of ethnic and national minorities is even more obvious in a number of rulings handed down in the past few years in favor of Jewish minorities. These rulings were considered courageous and controversial, and aroused the ire of important sectors of Israeli society, such as the Orthodox Jewish community, bringing them into conflict with the courts. In a case regarding women's rights, army authorities were obligated to invite women candidates to combat pilot courses; excluding women and Reform Jews from religious councils was prohibited; and affirmative action in the form of quotas for female appointments to management and directorate positions in government and public companies was mandated.<sup>25</sup> Similarly liberal rulings were made upon issues of equal rights for homosexuals and lesbians,<sup>26</sup> de facto recognition of the Reform and Conservative movements, and de facto recognition of the rights of single-sex married couples. Each of these decisions was made within Jewish ethnic boundaries.

### Judicial Restraint Outside the Ethnic Boundary

In contrast to the judicial activism, the radical restraint, to put it mildly, that the HCJ imposes on itself regarding the rights of Arab citizens of Israel and Palestinians in the occupied territories is even more conspicuous. Even Saban,<sup>27</sup> who is very sympathetic toward the HCJ's general impact on advancing citizens' rights within the Arab population of Israel, admitted that these improvements are a result of "perimetrical radiation." Saban's sophisticated expression cloaks the notion that the court's continuous work to secure civil, human, and citizen rights for the entire population of the state also strengthens and empowers the Arab population's rights, even unintentionally. The argument wrongly presumes that the Arab citizens of Israel are subject to civil rights violations similar to violations against Jewish citizens. Recently the District Court in Beersheba affirmed a ruling of the magistrates' court that called to expel thousands of Bedouin from their homes and land in the Negev Desert (Ramat Hovav)—this after they had been exiled from their original home site and resettled there by the military government fifty years earlier.<sup>28</sup> The Bedouin involved failed to obtain and present evidence of the previous expulsion, which involved documentation

that could have only been found in the archives of the military government or the state itself, if such population transfers were even documented during those stormy times. Such cases give the impression that the courts acquire the freedom to criticize the authorities and hand down enlightened and courageous rulings on behalf of Jewish citizens in exchange for accepting the ethnocentric rules of the game and ignoring the human rights of non-Jewish communities.

### The HCJ and the Occupied Territories

Strikingly, no international convention or accepted norm requires an occupying power to grant the population under its occupation the right to submit a petition to its courts against its agencies, even regarding actions of the military government or occupational security forces. Israel set a precedent in international practice when it did not prevent inhabitants of the occupied territories from filing a suit in its high court. Presumably, this decision was made based on the first petition submitted to the Israeli HCJ<sup>29</sup> and assuming that the state would object to the court's jurisdiction over the occupied territories, but it did not. In the absence of any objection to the HCJ, the court accepted the petition and set the abovementioned precedent.<sup>30</sup>

By failing to object to the possibility of litigation by the inhabitants of the occupied territories within the HCJ, the Israeli state took a highly sophisticated political step. It not only bestowed upon the occupation an enlightened face and a legitimacy anchored in the modern concept of law and order, but from a judicial standpoint, effectively annexed the territories, producing an image of legality for the occupation itself.<sup>31</sup>

Thus, the HCJ, through its actions and omissions, was one of the central mechanisms for managing the Arab or Palestinian–Israeli conflict. The HCJ defended the Jewish ethno-national interest as constructed and presented by the government, the regime, and Zionist ideology, performing a function no less central and decisive than those performed by the settlers, the military, the bureaucracy, and the rest of the governmental agencies considered to be security and intelligence agencies. The HCJ played its role by commission and by omission, but primarily by the use of a very simple, even simplistic, technique that was astonishingly effective: by not questioning the manner in which the term “security” was used and interpreted. First, any time that the state justified its actions or inactions under the aegis of security, in nearly all cases, the court accepted the explanation without

investigating the matter further.<sup>32</sup> Second, the term “security” was almost never examined within the context of the presentation of the petition, and the court gave the state and the executive branch exclusive *carte blanche* to determine security needs without appeal or restriction. The situation is outrageous, particularly given that the court sees itself as an authority certified to rule on every area of the life of an individual or of the collectivity, including economics and banking, government affairs, medicine and biology, religion, education, and the media. State claims connected to national security are the sole exceptions to court scrutiny. The court can use independent expert witnesses in any field, but in the area of security, the experts recognized almost exclusively are the bodies that the court should consider the most questionable: other state authorities, in particular the army and security agencies. Third, in many cases the court acquiesces to the state’s demand to present the testimony of government experts off camera. Such secrecy creates a situation in which testimony and evidence is withheld from the legal representative of the side opposing the state. One has to assume that even when judges are acting in good faith, surely a principle that grants the state exclusivity over security information creates an enormous opening for injustice, highlighting the gaping chasm between the judgments made and true assertions of justice.

### The Landmark Case of Eilon Moreh

The Eilon Moreh settlement affair was one of the most famous and exceptional cases that strengthened the status quo. In this case, expropriation writs were presented to the *mukhtar*<sup>33</sup> of the Palestinian village of Rujaib to establish a Jewish settlement near Nablus, the necessity of which was explained, as usual, as being for “reasons of security.” However, the landowner appealed to the HCJ; the court accepted the petition and ruled that it was not convinced that “reasons of security” were behind the decision to expropriate private land from its owner.<sup>34</sup> In reality, however, the court was left with no choice but to reject the claim of security needs for two reasons. Among those who testified in the case were the intended Jewish settlers themselves, who declared that they meant to settle the area primarily because of their belief in the nation of Israel’s right to return to its land. The state’s security officials then gave conflicting evaluations of the situation. Major General Rafael Eitan, the chief of staff, testified that the expropriation was for security needs, but Ezer Weizmann, the defense minister, and

Major General Haim Bar-Lev, the previous chief of staff, rejected the need to establish the settlement for purposes of security. After the ruling, the settlement of Eilon Moreh was established on nearby lands that were not registered as private—or, more accurately, their status was never officially determined. After thirty years of accepting claims of on the basis of security reasons without inquiry or examination, for the first time, and almost for the last, the HCJ deviated from its standard routine. Yet even in the case of Eilon Moreh, no definition was offered as to what sort of situation would constitute a need for settlement for security reasons. On the contrary, given the conflicting testimony, doubts were raised only as to the validity of the specific claim.

Following the Eilon Moreh incident, the state took care not to place the court or itself in similarly embarrassing situations. Following Ordinance 172 of the military government, the state created appeals committees for land expropriation orders in the territories. Menachem Hofnung states that “the establishment of a quasi-judicial tribunal was designed so as to prevent the intervention of the High Court of Justice. The High Court’s power to grant relief against state authorities is conditional upon the absence of alternative relief being available to the petitioner.”<sup>35</sup> When an additional petition was presented to the High Court, it was rejected on precisely these grounds.<sup>36</sup> It should be noted that the court did not consider in any way international treaties’ absolute prohibition against making irreversible, permanent changes on the ground, and against the settlement of citizens of an occupying power within territories that are under occupation.

The situation perhaps opens a portal into the foreseeable future regarding interpretations of the legal status of settlements in the territories occupied by Israel in the 1967 war. From a legal perspective, they were considered to be temporary settlements that might be disbanded according to changes in the so-called security situation,<sup>37</sup> and consequently, Israeli law did not apply to them. However, court-protected appropriation in the name of security began much earlier and within the boundary of Israeli citizenship.

### The Nationalization of the Land

After the 1948 war and during the 1950s, the largest expropriation and nationalization of land was carried out under the aegis and with the aid of the military government. At the end of this period, 93 percent of the land in the country had been transferred to the Israel Lands Authority and

leased to the Jewish National Fund. Hundreds of Jewish settlements were established on these lands.<sup>38</sup> The lands were not expropriated, as is commonly believed, only from Palestinians who were uprooted from territories conquered by the state's military forces and who became refugees. Lands were also expropriated from Arab residents within the state's boundaries, individuals who became citizens after all of the battles had ended. These included both "present absentees," Arabs who were not on their lands at the time of the census,<sup>39</sup> and those who remained in their villages and their homes throughout. The High Court rejected dozens of petitions from Arab citizens, one after the other, simply because government representatives argued that their cases presented a threat to security.<sup>40</sup> One well-known case, though not the only one of its kind, was that of the Marionette villages of Iqrit and Bir'm. During the battles of 1948, the military requested that residents of these villages temporarily evacuate. When the fighting ceased, the authorities refused to allow them to return. Upon their appeal to the High Court, it was ruled that the residents be allowed to return to their homes subject to security considerations—which, as is well known, have prevented their return to this day.<sup>41</sup>

A lesser-known case that aptly demonstrates the collaboration of the executive, legislative, and judicial authorities is the case of the residents of Al-Jalme, who were expelled from their village on March 2, 1950 by order of the military governor and transferred to the village of Jatt. Their lands were then immediately turned over to the members of Kibbutz Lehavot Haviva. In the first stage of the case, the residents of Al-Jalme lodged a complaint with the defense minister. When they received no reply, they petitioned the High Court. The state did not bother to respond with a claim of security reasons, as might usually have occurred; instead, the state retaliated by passing the Law of Land Acquisition (Validation of Acts and Compensation) which gave *ex post facto* legality to all prior land expropriations, even those without justification. The state's representative before the High Court, Miriam Ben-Porat, did not try to defend the expulsion, but rather announced that the kibbutz had possessed the land and was unwilling to withdraw of its own accord, and that the new law made removal impossible. Judge Jacob Olshen was only able to remark that "the feeling of elemental justice rises up at hearing the claim . . . but now when there is a need to rectify the wrong for the petitioners, the law stands as an obstacle in their way."<sup>42</sup> The right to property has always been considered sacred in Israeli legislation and jurisprudence. Yet the traditional Arab holdings of land<sup>43</sup>

were not recognized as ownership, but as a situation that needed to be put into order, in most cases by expropriation.

Had the legislature and the courts wanted to make order concerning only land matters, as Alexander Kedar mentions,

there was no need to change the statute of limitations in clause 78 of the Lands Law, nor to reduce the evidentiary tools available to the (the Arab) holders of the lands. In the framework of ordering the lands it was possible to order the rights to the land, to formally register the land in the name of the state, but at the same time to settle the situation of the holders: to grant them leasing rights for generations on the lands that they held and thereby to carry out the Law of Land Leasing (Emergency Order)—1959. This arrangement which was even required by law was never carried out in any meaningful way. The desire to redeem the lands (according to the Zionist ethos) was preferred over the legal logic of searching for order.<sup>44</sup>

In practice, as long as the military government existed, about two-thirds of matters concerning Arab citizens of the state were excluded from the jurisdiction of the civil courts and turned over to military courts, in which not even the appearance of equal justice was maintained. The High Court declared itself restricted from intervening in Arab affairs, which were construed as issues of state security. In this way, administrative detentions, confinements, expulsions, and land confiscation for the military's needs ("live-fire areas") were carried out within the legal bubble of emergency decrees, which remained in effect from the British colonial era. It was thus possible to make the law an additional arm of the state, the intent of which was the justification of all areas of the state as a supplement to sovereign control. Thus Alina Korn<sup>45</sup> found that about 95 percent of the crimes committed against emergency decrees were administrative crimes by Arab citizens, such as going out and working the fields, or going to markets or workplaces outside of the areas authorized by the military government or without its approval.

### Expropriation of the Occupied Territories

The military government was abolished in 1966. By that time there was almost nothing left to expropriate of the lands belonging to Arabs in Israel. A year later, the territorial conflict between the Israeli state and the

Palestinians began afresh with the occupation of the territories in the 1967 war. Once again, legislation and adjudication were used to expropriate land and expand territory for the settler-immigrant society, which viewed territories not yet occupied more and more as a frontier available for occupation, or as they saw it, redemption.<sup>46</sup>

According to clause 55 of the 1907 Hague Convention, occupying powers can act only as temporary managers and beneficiaries of land and other properties in occupied territories; creation of permanent “facts on the ground” that remain in the area after the occupation is not permitted. In the case of the confiscation of the lands for the Beit El settlement, the High Court ruled that it was legal to confiscate private land if the owners were compensated (paid leasing fees) to establish “civilian settlements necessary for security purposes.”<sup>47</sup> Thus, establishing a civilian settlement became a security measure without the court ever having to interpret the complex meaning of such a ruling. The issue of how a civilian settlement might serve as a security measure was never discussed or weighed, even though many security experts, whom the High Court has never consulted to clarify the issue, agree that at least some of the Jewish settlements in the occupied territories are actually a military burden and danger, both tactically and strategically. These territories, except for the metropolitan area of East Jerusalem and the Syrian (Golan) Heights, were not annexed by Israel and thereby have remained so-called administered territories, differing only semantically from occupied territories. Israel has always rejected the definition of the territories as occupied, claiming that they were never under the sovereignty of another state, as the annexation of the West Bank by Jordan was never recognized by the international community, with the exception of Britain and Pakistan, and because, Israel maintains, the lands came under its control during a just and defensive war. At the same time, Israel took upon itself to abide by the rules of international law in the territories, including those of the Fourth Geneva Convention of 1949.

Most experts in the field of international law do not accept Israel’s approach. They are divided between seeing Israel as an occupying power and seeing Israel as a so-called trustee-occupant, controlling the territory until the dormant sovereignty of the local residents, a distinct and conscious sociopolitical entity, develops into a self-ruling body, which is happening before our eyes.<sup>48</sup>

One of the reasons that every Israeli government evaded annexing the territories—part of the area of historical or colonial Palestine—was to avoid



granting citizenship and its accompanying rights to the Arab residents, thereby transforming Israel into a de facto binational state. Political convenience dictated subordinating Arabs to military government laws, army decrees, and military justice. Jewish residents and their settlements, as well as the local Jewish authorities, were subject to Israeli law and justice. This arrangement is an extremely original Israeli invention, providing a personal sovereignty that accompanies each settler wherever he or she goes. Few have expressed an opinion on this issue, but it functions as a kind of selective annexation of the territories without granting the Palestinian residents citizenship. Though some of the processes involved in settling the occupied territories came as initiatives of social and political movements, such as Gush Emunim, if the state and its various agents had not desired that the settlements exist, not a single Jewish settler would live in the occupied territories today. The state granted and continues to grant them protection by means of military and police forces, land allocations, and direct and indirect subsidies, including massive allocations to infrastructure.

However, to avoid foreseeable judicial embarrassments, the Israeli occupying rule began to systematically declare unsettled lands, the lion's share of which was under traditional Arab ownership, as state lands. Legally speaking, between 60 and 70 percent of the territory in the West Bank at the time of occupation was not registered in the land registry. Despite this, all previous regimes—the Ottoman, British, and Jordanian—considered the lands as belonging to individuals, families, or villages who took responsibility for maintenance, according to traditional custom.<sup>49</sup> Israel confiscated the territories according to the military government's standard procedure: seizure for military needs, declaration of natural reserves, restriction from public use, establishment of military camps, and closure of live-fire areas. According to measurements taken by Meron Benvenisti,<sup>50</sup> by 1986, 2.8 million out of 5.5 million dunums of land, that is, 52 percent of the entire area of the West Bank, had been transferred to Israeli state ownership.<sup>51</sup> It is undeniable that Jewish settlement upon these lands occurred without fear of the High Court.

### Constitutional Revolution and the Judification of the State's Identity

The codification and ideological apex of exclusion of the Arab citizens from the boundaries of the Jewish polity was reached in the early 1990s. In March 1992, two well-known basic laws were legislated: Basic Law: Human Dignity

and Freedom and Basic Law: Freedom of Occupation. Aharon Barak, the president of the Supreme Court, has frequently claimed that, beginning in 1992, Israel embarked upon a constitutional revolution. His unspoken reference is to the democratization of the Israeli regime. In one of his latest and least ambiguous expressions, after splitting the history of Israeli law into four eras, Barak writes:

At the foundation of this revolution stand the human rights that were given constitutional standing above the regular laws. Israel changed from a parliamentary democracy to a constitutional democracy. At the head of the structure stands the constitution. A law of the Knesset cannot contradict or abolish it.<sup>52</sup> The Court is authorized to declare the law unconstitutional. With the legislation of two Basic Laws regarding human rights, constitutionalization of Israeli law occurred.<sup>53</sup>

The process of constitutionalization certainly sounds like a positive trend, particularly because the two basic laws contain some most welcome clauses. However, Ruth Gavison<sup>54</sup> opposes the continued legislation of additional basic laws. Her reasoning is that, given the internal political power relations of the Israeli state, additional basic laws will only strengthen the status quo. This means not only perpetuating the Orthodox monopoly over personal status policy issues, but also the continuous granting of emergency authority to the military and the various security agencies, as well as the protracted absence of civil equality in the state.

Anyone who followed the process of the legislation of the two basic laws knows that not only were they accepted as a compromise between contradictory ideological approaches and legislative doctrines, but also, as Ruth Gavison argued, they reproduce the existing power structure and social order. The legislative and judicial systems usually perceive democracy as a set of procedures, such as free elections, while Jewishness is regarded as an identity, an overall cultural operational code and organizational principle.<sup>55</sup>

Each of the basic laws' proclaimed purpose is to "anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state."<sup>56</sup> However, despite enormous scholastic and heroic efforts to reach a compromise among the two concepts, according to any definition of Judaism or of democracy, the two terms do not correspond with one another; if anything, they are mutually exclusive.<sup>57</sup> The term "Jewish state," the definition of which the law does not elaborate, may be interpreted several ways, including the

desire to approach theocracy<sup>58</sup> as per Justice Menachem Elon<sup>59</sup> and according to the minimalist-demographic interpretation of Gavison.<sup>60</sup> Basic Law: Human Dignity and Freedom contributes the declarative and ideological dimension to the laws of return and citizenship that were instrumental in their foundation. This is one of the most instructive examples in which constitutionalization, in the guise of progressive liberalism, perpetuates basic discrimination on the basis of ideology.

Such a phenomenon occurs because of two polar interpretations of the term “Jewish” that are selective interpretations, such as those of Justices Aharon Barak or Haim Cohen. They view the law as endorsing the selective adoption of values and norms that are a part of Jewish heritage, and which conform with Western culture’s idea of what is universal, egalitarian, liberal, and democratic. The less significant consequence of this interpretation is that it empties Israel’s definition as a Jewish state of all practical content and certainly contrasts with the legislature’s intent as revealed by the process of legislation, during which certain parliament members suggested adding the phrases “Jewish state” and “the state of its citizens,”<sup>61</sup> which were rejected outright by most parliament members. From this we see that the intent of the legislature was to interpret the “Jewishness of the state” as similar to the spirit of the term “Jewish” in the Laws of Return and Citizenship, that is, closer to the polar interpretations of Gavison on one hand and Menachem Elon on the other. Needless to say, the two laws are among the most problematic, ethnocentric, and discriminatory in the Israeli codex. Recently, interpretation of the term “Judaism,” which had been relatively liberal in accepting the Orthodox interpretation of Judaism, has become more radicalized and narrower. The Knesset passed a law requiring members of religious councils to accept the authority of the chief rabbis. It is improbable that even Menachem Elon would wish to see the primacy of the Jewish state over the democratic state, though that is indeed the design of legislators working within the framework of the constitutional revolution that Chief Justice Barak declared.

### Conclusions

Research of the law, the constitution, and the interpretation of both hold great importance. However, the legal field’s analysis and research must not be limited to these three areas. To investigate judicial rulings without an understanding of the ideological background and power dynamic within

society is to work within a judicial bubble that idealizes the state and ignores, deliberately or not, its darker corners. None of the articles or research I found on the constitutional revolution contained any admission that, after the revolution, rulings related to security issues or to the ethnocentric character of the state continue to be handed down, a fact that blatantly contradicts principles of human dignity and freedom. Even after the constitutional revolution, detentions without trial, torture, expulsions, and collective punishments continue, just as the process of creeping annexation and settlement of the occupied territories continues. Apparently the constitutional revolution will never extend to these areas.

Evidently, such rulings are made because, as David Kretzmer<sup>62</sup> has pointed out, legislators, judges, and the judicial system are all products of the national ethos and the political and social regime. The system's façade of independence has simply strengthened the degree of freedom it has in functioning as a mechanism of ethnic repression. Addressing such issues within the legal sphere and with legal rhetoric has had the added effect of granting legitimacy to the basic codes of this still-expanding immigrant-settler society.

The confines of the law are not defined within the walls of the courtroom; they are completely vulnerable and accessible to the influence of political, national, and other interest group ideologies. This is perhaps justifiable. If knowledge is power, then legislation and interpretation through adjudication is the ultimate power. If we examine the meaning of Basic Law: Human Dignity and Freedom within its wider context, we conclude with no difficulty that the law is applicable only within Jewish ethnic boundaries, making Israel a constitutionally more exclusive state now than it was before 1992.<sup>63</sup> Missing from this law and from all of the basic and other laws is the right of each individual, as a citizen, to an equal voice in designating common symbolic goods—the flag, state symbol, anthem, common holidays, days of mourning—in short, the right to a common civil religion or, alternatively, to full cultural autonomy. In this way, the new basic laws and the constitutional revolution will surely perpetuate ethnic discrimination for generations to come.