Living in Denial: The Arab Minority and Israeli Law

Shimon Peres

President Shimon Peres and Russian President Vladimir Putin at the inauguration ceremony in Netanya for the memorial that commemorates the Soviet Union Army's role in defeating Nazi Germany in the Second World War, 24 June 2012.

Umm al-Fahem, unknown date

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״אני לא יודעת כמה אנשים עובדים בשב״כ, אז בוא לא נעשה עכשיו חשבונות. אתה עוד תגלה יום אחד ואנחנו נגלה אבל לא זו הנקודה...החיים הם יותר מורכבים.״

ראיון של ח״כ תמר גוז׳נסקי עם יאיר לפיד, 17 אוקטובר 1999.[1]

״גם בזמן החתימה על הכרזת העצמאות, על מגילת העצמאות, אז היתה התרגשות כשקראו לי לחתום. אחרי שקראו לי לחתום, חתמתי, והתיישבתי על המקום. עד היום אתה יכול לראות את המקומות איפה כל אחד יושב.״

מאיר וילנר, טקס לכבוד החתימה על הכרזת העצמאות, 5 בנובמבר 1997.[2]

״המדינה היחידה אשר עמדה לנו בשעה המכרעת הגדולה, וכמעט בלי עזרתה אינני יודע אם היינו משיגים מה שהשגנו, זו היתה רוסיה. הרוסים היו הראשונים שהציעו באו״ם שיש צורך במדינה יהודית.״

דוד בן גוריון, תוכנית מוקד (שלום רוזנפלד, דוד פדהצור, ואביגדור לבונטין מראיינים), הטלוויזיה הישראלית, 1970.[3]

“In truth, a degree of disconnect has marked Russia’s relations with Israel ever since its foundation in 1948. Stalin supported and armed Israel, hoping to use it as an ally against Britain and America, yet he still murdered Jewish anti-fascist leaders at home and made anti-Semitism into a state policy.”

“Vladimir Putin and the holy land”, *The Economist*, 16 March, 2013.

“What is still more perplexing is how the same blindness is repeated painstakingly by modern Zionist historians who retell the story not so much with the luxury of hindsight but with the same narrowness of vision that spurred on the early Zionists…Surely Zionism’s genuine successes on behalf of Jews are reflected inversely in the absence of a major history of Arab Palestine and its people.”

Edward Said, “The Acre and the Goat”, *The New Statesman*, 11 May 1979 in Edward Said, The Politics of Dispossession – The Struggle for Palestinian Self-Determination 1969 – 1994, (Pantheon Books, 1994), 35.

“Edward Said: So in your opinion there is evidence, enough evidence, to show that there was a concerted effort to rip Palestine of its indigenous population?

Ilan Pappe: Oh yes, definitely.”

In Search of Palestine Documentary, BBC, 1998.

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[1] “I don’t know how many people work for the Israel Security Agency, so let us not engage in settling accounts. One day you will find out as well as we but this is not the point…life is more complicated.” MK Tamar Gozansky, Interview with Yair Lapid, Yair Lapid Live at 10 - Chanel 3 Cable TV, 17 October 1999.

[2] “Also at the time of signing the Declaration of Independence, the Charter of Independence, there was excitement when I was called to sign. After I had been called to sign, I signed, and sat in my place. To this day you can see the places where each signing person sat.” Meir Vilner, ceremony of signing the Declaration of Independence, 5 November 1997. Vilner was an MK for the Israeli Communist party from 1949 to 1990 and its leader for decades. The Hebrew translation of sit is ‘Shev’, composed of the letters Shin and Bet.

[3] “The only state that assisted us in the most crucial period, and without its assistance I don’t know if we could have realized our achievements, was Russia” David Ben-Gurion, Interview with Moked program, Israeli TV, 1970.

“His major claim is that Israel and the US – especially the latter, seen by Chomsky as the arch-villain of the piece – are rejectionists opposed to peace, whereas the Arabs, including the PLO, have for years been trying to accommodate themselves to the reality of Israel.”

Edward Said, “Permission to narrate”, *6(3) London Review of Books*, 16 February 1984.

“Edward Said: He was there to listen to me… Haaretz is the New York Times of Israel.

Interviewer: Were you close to Arafat?

Edward Said: Yeah, I knew him very well you could say, until the period of the gulf war.

Interviewer: How does he always maintain his power?

Edward Said: Well, he is probably the most brilliant politician of survival I think that the modern period has seen. In his own way, he is extremely effective with his people. But I think he has become unfortunately, he has a tendency to identify Palestine with himself. He thinks he is Palestine and Palestine is he.”

Edward Said, C-Span interview, 24 April 2001.

"ترى ايحق لنا أن نقول ان ثمت وطنا عربيا؟ اذا عنينا بالوطن الجبال والأنهار، والسهول والشواطئ، فهو موجود بلا شك، منذ أن نزل العرب ديارهم الحاضرة. أما اذا عنينا به – كما هو الواجب والصحيح – تغلغل معنى الوطن في الذهن العربي، وتولد الارادة لحمايته واعلاء شأنه واطراد تقدمه، فلا!"

قسطنطين زريق، معنى النكبة، 5 اب 1948.[4]

'''אצל אלתרמן,'' אמר לתמר, ''יש בית כזה בשירי מכות מצרים': 'ונקבץ אספסוף הפלך/ וקולר האשמה עמו/ לתלות בשרים ומלך/ ולפרקו מצוארי עצמו.' זאת, בעיני, כמעט שורת-הסיכום של כל דברי הימים. זה הסיפור של כולנו, מרוכז בתריסר מילים.'''

עמוס עוז, המצב השלישי, 1991, עמ' 169.[5]

''אני לא כל כך זוכר איך זה התחיל, הסיפור הזה.''

[4] “I wonder if we are entitled to say that there is an Arab homeland? If we mean by homeland mountains and rivers, plains and beaches, it definitely exists, ever since the Arabs inhabited their current lands. But if we mean by it – as it should be – a deep understanding of this concept in the Arab mind, generating the will to protect it and appreciating its significance as well as seeking its progress, then there is no such homeland!” Constantin Zurayk, The Meaning of Nakba, 5 August 1948 in The Nakba of 1948: Causes and Solutions, 1-50 (Walid Khalidi ed.)(Institute for Palestine Studies, 2009).

[5] “In Alterman’s poetry, he said to Tamar, there is a verse in the Plague Poems: ‘The spindle mob gathered/and with it the collar of guilt/to hang king and meat/and to dismantle him from the neck of itself.’ This, to my mind, is almost the summary line of the entire two Books of Chronicles. This is the story of all of us in dozen words.” Amos Oz, The Third Condition - Ha-Matsav Hashlishi (Keter, 1991), p.169.

אנטון שמאס, "דברים שכתב מארצות הברית לרגל צאת המהדורה החדשה של הספר 'השקרן הכי גדול בעולם'", *הארץ*, 26 במאי 2011.[6]

"הסטאטיסטיקה היבשה (והחלקית), שהובאה בשורות הקודמות, מוכיחה כי מאז הקמת המדינה לא עבר כמעט פרק זמן בלי שיבוצעו פעולות – טירור על ידי קבוצות אנשים, שבחרו להכריע בכוח הזרוע בויכוחים פוליטיים, מצפוניים ודתיים."

יואל מרקוס, "טירור בישראל", *דבר*, 22 במרץ 1957.[7]

"אנחנו כמפלגת העבודה וכמערך שוללים הפיכת דיון מדיני רציני, לתיאטרון מתמשך והולך, מאז הקמת המדינה, ההצגות החוזרות ונשנות על עצמן, כאשר הדבר המרכזי בהן הוא האפקט, עשיית הרושם... יש לנו 58 ימים של מערכה נגד הליכוד, והיום זה שעת האפס. ואין בפי מילים להזהיר את חומרת המצב...בוא יצחק, שב."

שמעון פרס, מתוך סדרת הנבחרים של חיים יבין, הטלויזיה הישראלית, 1981.[8]

"בני עמי, לא לסתום הגולל באנו. באנו להצדיע לך יצחק. הצדעה מפורשת למה שהיית: לוחם עז שהנחיל נצחונות לעמו...לא ידענו מי יחבל. לא שיערנו שהחבלה תהיה כה גדולה...יום קודם לכן ישבנו כמנהגנו בארבע עיניים."

שמעון פרס, הלווית ראש הממשלה לשעבר יצחק רבין, 6 בנובמר 1995.[9]

"באסיפת האבל של ח. ארלוזורוב, שנתקיימה בוארשה ביום א', 18 ביוני אמרתי: 'זה לא היה רצח מטעמים פרטיים. אלה שמצפונם לא-נקי מפריחים שמועות שהרצח התרחש על רקע פרטי. כאחד מידידיו הקרובים והאינטימיים ביותר הינני מודיע, כי בחייו הפרטיים לא היה שום יסוד, שמישהו יפגע בו. הרצח - מעשה של טירור פוליטי. אינני חושד, איננני מאשים שום מפלגה יהודית ברצח. איני מאמין כי בעם היהודי יש מפלגה הנוקטת בטירור פוליטי.' (מתוך הדו"ח על האסיפה שהופיע באותו יום בוארשא ב"ידיעות", עיתון מרכז "החלוץ" בפולין).

אין לי מה להוסיף לדברים אלה ואין לי מה לגרוע מהם. אולם, כמו אז כן גם עכשיו יש לי חשד, כי יד דמים מורעלת יהודית עשתה את הרצח, וההודעות הפאטריטויות הצבועות של 'המנהיג' הרביזיוניסטי ב'מאמענט' מ-23 ביוני שיהודי אינו מסוגל לעשות רצח כזה – לא הקטינו את חשדי אף כחוט השערה. אדרבא, המאמר הנזכר, שבו שולח מר ז'בוטינסקי 'קללה מרה' ברוצח ואגב כך גם בתנועת הפועלים בא"י שהוא מכנה אותה בשם 'שגעון אדום' – הגביר את החשד הנורא שלי, שכן מאמרי שיסוי בולטים כאלה כלפי ציבור הפועלים יוצרים את האווירה שבה מתחנכים רוצחים פוליטיים."

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[6] "I don't exactly remember how it began, this story." Anton Shamas quoted in Maya Sela, "A liar brought back to life", *Haaretz*, 3 June 2011, http://www.haaretz.com/weekend/week-s-end/a-liar-brought-back-to-life-1.365722

[7] "The plain (and partial) statistics mentioned in the previous lines, show that since the establishment of the state, terrorist activity has been frequent, executed by various groups, who selected to impose their opinion in political, moral, and religious debates." Yoel Marcus, "Terror in Israel", *Davar*, 22 March 1957.

[8] "We as the Labor and Labor Alignment party reject transforming a serious political debate, to an ongoing and recurrent theatre, the repetitive charades since the founding of the state, while the most importing thing is the effect, making an impression…we have a 58 days battle against the Likud, and today is the decisive moment. And I have no words to warn regarding the severity of the situation…come Yitzhak, sit." Shimon Peres, from Haim Yavin's TV series 'The Elected', Israeli TV, 1981.

[9] "My people, we did not come here to put an end. We came here to salute you Yitzhak. An explicit tribute for what you were: a fierce warrior that realized victories for his people…We did not know who would sabotage. We did not expect that the sabotage would be so great...a day before we sat together in private as usual." Shimon Peres, words delivered at the funeral of former Israeli Prime Minister Yitzhak Rabin, 6 November 1995.

דוד בן גוריון, "אני מאשים", דבר, 7 ביולי 1933.[10]

"אנ רוצה לפתוח בכמה מילות רקע ותסלחו לי שאני טיפה אסקור אולי את הקריירה שלי...הזדעזעתי כמו כולכם מרצח ראש הממשלה יצחק רבין על ידי מחבל יהודי מתועב בנובמבר 1995"

יובל דיסקין, ראש השב"כ לשעבר, כנס עשור ליוזמת ז'נבה, 4 דצמבר 2013.[11]

"רונאל פישר איש מעריב שלום לך. לפני פחות מארבעה חודשים פרסמת בסוף שבוע של מעריב כתבה המבוססת על שיחה שניהלת עם אדם שממלא תפקיד בכיר באגף האבטחה של השב"כ. הכותרת של הכתבה 'השגרירויות והמאבטחים הם בשר תותחים וראשי השב"כ אדישים.' כותרת המשנה 'מחדלים של ראשי השב"כ וסיכון חייהם של המאבטחים, תפיסת ביטחון לקויה שאפשרה פיגועים רצחניים, ופברוק דו"חות חקירה והסתרת מחדלים'."

מיכה פרידמן, תוכנית מיוחדת של תיק תקשורת בעקבות רצח רבין, הטלויזיה החינוכית, נובמבר 1995.[12]

"אילנה דיין: אתה עדיין נהנה מהמשחק הפוליטי?

בנימין בן אליעזר: כן.

אילנה דיין: אפשר להיות פוליטיקאי בלי להיות ציניקן?

בנימין בן אליעזר: לא."

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[10] "In H. Arlosoroff's mourning gathering, which took place in Warsaw on Sunday June 18 I said: 'this murder was not perpetrated for personal reasons. Those who have no clean conscience are spreading rumors that the reason for the murder was personal. As one of his closest and intimate friends I hereby declare that his personal life could not have been the basis for his murder. The murder – an act of political terrorism. I do not suspect, I do not accuse any Jewish political party for this murder. I do not believe that in the Jewish people there is a political party that applies political terrorism. (From the report that appeared in 'Yedioth' in Warsaw, the newspaper of the 'Halutz' center in Poland). I have nothing to add to these words nor to derogate from them. Yet, as then also now I suspect, that a poisoned bloody hand committed the murder, and the hypocritical patriotic announcements of the revisionist 'leader' in the 23 June edition of 'Mament' did not decrease my suspicion at all. Moreover, the aforementioned article, in which Mr. Jabotinsky directed a 'bitter curse' at the murderer and incidentally at the workers movement in the land of Israel as well which he called 'red lunacy' – increased my grave suspicion, since such blatant inciting articles against the workers community generate the environment in which political murderers are educated." David Ben-Gurion, "I Accuse", *Davar*, 7 July 1933. On 14 March 1982 a Begin led government established a commission of inquiry to investigate the circumstances of Arlosoroff's death 49 years earlier. After three years of deliberations the commission submitted its report to Prime Minister Shimon Peres concluding that it was not possible to determine the identity of the assassins. See Yitzhak Ben Hurin, "Sima Arlosoroff's testimony is not reliable – Stavsky and Rosenblatt did not murder", *Maariv*, 5 June 1985. The Supreme Court rejected a petition challenging the legality of the commission's establishment which alleged that its mandate was not a contemporary governmental conduct that caused the loss of public trust as the law required. See HCJ 152/82 *Daniel Alon v. The Government of Israel*, 36(4) PD 449 (1982).

[11] "I want to open with few background words and excuse me if I review a bit my career…like all of you I was shocked from the murder of Prime Minister Yitzhak Rabin by a despicable Jewish terrorist in November 1995." Yuval Diskin, former head of the Israel Security Agency (Shin Bet), 10th Anniversary Convention for the Geneva Initiative, 4 December 2013. See also Mabat Sheni, 18 Years for the Assassination of Yitzhak Rabin, Chanel 1, 23 October 2013.

[12] "Maariv reporter Ronel Fisher greetings. Less than four months ago you published a report in Maariv's weekend magazine based on a conversation you conducted with a person who occupied a senior position in the Security Section of the Israel Security Agency (Shin Bet). The title of the report 'the embassies and the security guards are cannon fodders.' The subtitle is 'Failures by the heads of the Shin Bet and a risk to the security guards' life, inadequate security conception that permitted murderous suicide attacks, and fabrication of investigation reports as well as concealing failure to act.'" Micah Friedman, special program of Media File pursuant to the Rabin assassination, Israeli Educational TV, November 1995.

ראיון של בנימין בן אליעזר עם אילנה דיין, תוכנית עובדה בערוץ 2, 14 באפריל 2011.[13]

"جيتك ليوم واحد ترفع عنا القوانين لجوز ابني...يش لي הצעה אם זה יעבוד אנחנו עמוק עמוק בנשמה שלהם."

عرس الجليل، فيلم فلسطيني \ بلجيكي \ فرنسي، 1987.[14]

"سوا"

كلمة تردد من قبل معظم مغني الأعراس لدى العرب في اسرائيل.[15]

"أن مواطنتنا مشتقة من حقنا على هذه البلاد وليس في هذه البلاد...انو العالم العربي بسالنا عن رأينا في القضايا السياسية، هذا عاطل؟...اخوان شخصو الموضوع مزبوط."

المفكر العربي والنائب السابق د. عزمي بشاره، خطاب سياسي. [16]

"يُخَادِعُونَ اللَّهَ وَالَّذِينَ آمَنُوا وَمَا يَخْدَعُونَ إِلاَّ أَنفُسَهُم وَمَا يَشْعُرُونَ... وَإِذَا قِيلَ لَهُمْ لاَ تُفْسِدُواْ فِي الأَرْضِ قَالُواْ إِنَّمَا نَحْنُ مُصْلِحُونَ؛ أَلا إِنَّهُمْ هُمُ الْمُفْسِدُونَ وَلَكِن لاَّ يَشْعُرُونَ."

القرآن الكريم، سورة البقرة، الآيات 9، 11-12.[17]

"ده بيهددنا"

جمال عبد الناصر، فيلم مصري، 1999.[18]

"دول بياخدو أوامر"

المصير، فيلم مصري، 1997.[19]

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[13] "Ilana Dayan: Do you still enjoy the political game?
Binyamin Ben Eliezer: Yes.
Ilana Dayan: Is it possible to be a politician without being cynical?
Binyamin Ben Eliezer: No."
Binyamin Ben Eliezer's interview with Ilana Dayan, Uvda program Chanel 2, 14 April 2011.

[14] "Elder Arab man to military commander: I ask that you lift the laws for one day so I would be able to conduct my son's wedding…military officer to military commander: I have a suggestion if it will work we are deep in their soul." Wedding in Galilee, Palestinian/Belgian/French film, 1987.

[15] "Together", a word reiterated by most Arab wedding singers in Israel.

[16] "Our citizenship is derived from our right over this country, not in this country…that the Arab world is asking us about our opinion in political matters, is this wrong?...brothers characterize the issue correctly." Thinker and former MK Azmi Bishara, political speech. – الصحيح إن وليس أن إذ ابتدأت الكلمة الجملة. للمراجعة ينظر الياس عطاالله، المناهج والهوية – وثيقة أخطاء كتب التدريس المعتمدة في وزارة المعارف من الصف الثاني حتى الثامن (الناصرة: جمعية الثقلفة العربية، 2011). للباحث د. الياس عطاالله اصدارات اضافية في مجال علوم اللغة أثرت هي أيضا المكتبة العربية محليا واقليميا. يسكن د. الياس عطاالله في حيفا.

[17] Qur'anic verses about deception and corrupting.

[18] "He threatens us" Gamal Abdel Nasser, Egyptian film, 1999.

[19] "They take orders" Destiny, Egyptian film, 1997.

"التاريخ لما بيتغير الجغرافيا كمان بتتغير وبتتأسم، زي ما كل حاجه حوالينا دلوأت بتتغير وبتتأسم"

هي فوضى، فيلم مصري \ فرنسي، 2007.[20]

״חברותיי חברות וחברי הכנסת, בבוקר יום שני, 3 ביולי 1944, עמד יהודי ציוני בחליפה במשרדו של אדולף אייכמן במשרדו בבודפשט, ׳עצביך נראים לי רופפים׳ אמר לו אייכמן, ׳אולי אשלח אותך קצת לנופש באושוויץ׳. היהודי הציוני שמולו לא התבלבל. הוא שלף מכיסו קופסה והדליק לעצמו סיגריה, שווה בין שווים. האיש הזה היה ד״ר ישראל קסטנר. הוא היה במשרד משום שהוא ניהל עם אדולף אייכמן משא ומתן, וגם עם קצינים נאצים נוספים, בכך הציל מאות אלפי יהודיות ויהודים מהשמדה. אחר כך הוא עלה לישראל והיה מועמד לכנסת מטעם מפא״י. רג׳ו קסטנר היה סבא שלי.״

ח״כ מירב מיכאלי, נאום הבכורה בכנסת, 5 בפברואר 2013.[21]

״תוקפו של המסר האצור בספרו של גדעון האוזנר איננו פג עם הזמן.״

שמעון פרס, הקדמה לספרו של גדעון האוזנר, משפט אייכמן בירושלים, הוצאת 2011.[22]

״המגעים לגבי הגירת היהודים עברו לגוף יהודי אחר, ״ועדת העזרה וההצלה״, שהיתה פעילה בחוגים ציוניים ושחבריה היו אוטו קומולי, ד״ר ישראל קסטנר, שמואל שפרינגמן ויואל ברנד. תפקידם היה לסייע לפליטים. הם ציידו אנשים בתעודות מזוייפות, הבריחו אותם מעבר לגבול ואף רכשו נשק. כעת נפתחו לפניהם אופקים חדשים.״

גדעון האוזנר, משפט אייכמן בירושלים, 1979, עמ׳ 128.[23]

״במשפטים שהתנהלו בנירנברג נגד פושעי הנאצים לאחר המלחמה התנדב קסטנר להעיד לטובת נאצי בשם קורט בכר...רבות התלבטתי מה יכול היה להניע אותו לנהוג כפי שנהג.״

[20] "When history changes geography also changes and fragmented, as everything around us is currently being changed and fragmented" It Is Chaos, Egyptian / French film, 2007.

[21] "Colleagues MKs, on Monday morning, 3 July, 1944 a Zionist Jew wearing a suit stood in the office of Adolph Eichmann in Budapest, 'you seem exhausted' said Eichmann, 'perhaps I should send you for a vacation in Auschwitz'. The Zionist Jew before him was not confused. He took a pack of cigarettes from his pocket and lit one, an equal among equals. That man was Dr. Yisrael Kastner. He was in that office because he negotiated with Eichmann, and with other Nazi officers, thus he saved hundreds of thousands of Jewish women and men from destruction. Then he immigrated to Israel and was a Mapai candidate for Knesset. Rezso Kastner was my grandfather." MK Merav Michaeli, inaugurating speech in the Knesset, 5 February 2013.

[22] "The validity of the message hoarded in Gideon Hausner's book has not dissipated through time." Shimon Peres, introduction to Gideon Hausner's book The Eichmann Trial in Jerusalem, 2011.

[23] "The contacts regarding the immigration of Jews turned to another Jewish body, 'The Committee for Assistance and Rescue', which was active in Zionist circles and composed of Otto Komoly, Dr. Israel Kastner, Shmuel Springman, and Joel Brand. Their role was to help the refugees. They supplied them with fabricated identity cards, smuggled them across the border and even purchased weapons. Now new horizons have opened before them." Gideon Hausner, The Eichmann Trial in Jerusalem, 1979, p.128.

חיים כהן, מבוא אישי – אוטוביוגרפיה, 2005, עמ' 329. [24]

"Dr. Rezso (Rudolph) KASTNER, being duly sworn deposes and says:

…
I was in Budapest until November 28**,** 1944; as one of the leaders of the Hungarian Zionist organization I not only witnessed closely the Jewish persecution, dealt with officials of the Hungarian puppet government and the Gestapo but also gained insight into the operation of the Gestapo, their organization and witnessed the various phases of Jewish persecution…

The Germans entered into discussion with leaders of the Jewish community for reasons of administrative efficiency. We conducted the discussion in the hope that we might be able to save some human lives. By holding the ax over our heads they made us responsible for financial contributions and other exactions imposed on the Jewish community. Ultimately the leaders of the "Jewish council" and other intermediaries were also scheduled for extermination. The SS and the Gestapo was particularly intent on liquidating those who had direct knowledge of their operations. I escaped the fate of the other Jewish leaders because the complete liquidation of the Hungarian Jews was a failure and also because SS Standartenfuhrer Becher took me under his wings in order to establish an eventual alibi for himself. He was anxious to demonstrate after the fall of 1944 that he disapproved the deportations and exterminations and endeavored consistently to furnish me with evidence that he tried to save the Jews. SS Hauptsturm- fuhrer Wisliczeny repeatedly assured me that according to him Germany cannot win the war. He believed that by keeping me alive and by making some concessions in the campaign against the Jews he might have a defense witness when he and his organization will have to account for their atrocities. Strangely he came to Hungarian Jews with the letter of recommendation from leading Slovak Jews. The latter were not deported in 1942 and were saved over until the end of 1944.
…
In September 1944 Slovakian partisans engineered a revolt in Banska-Bystricza. The Jewish youth joined the revolution enthusiastically. Aichmann thereupon sent SS Hauptsturmfiihrer Brunner to Bratislava with instructions to deport all the 17,000 odd Jews still left behind after the deportations of 1942. They were to go to Oswiecim. SS and Hlinka-Guards arrested the Jews. They were transported from Sered. About 13,500 Jews were caught, the rest were in hiding. Following my appeal the A.D.C. of Becher Capt. Griison journeyed to Bratislava and tried to intervene with SS Obersturmbannfiihrer Vitezka, Slovakian Gestapo Chief to stop the deportations. Vitezka's reply was: "As far as I am concerned .I will agree readily if I get telegraphic authority from Kaltenbrunner to this effect". Becker said on 2 November 1944, in the Hotel Walhalla, St. Gallen, Switzerland, in the presence of the representative of the Joint D.C.: "We have militarily annihilated the Slovakian Jews."

In the first half of November 1944 about 20,000 Jews were taken from Theresienstadt to Oswiecim and were gassed, on instructions from Aichmann. As far as I could ascertain this was the last gassing process. According to Becher, Himmler issued instructions -on his advice -on the 25 November 1944 to dynamite all the gas chambers and crematoria of Oswiecim. He also issued a

[24] "In the trials against Nazi criminals held at Nuremberg after the war Kastner volunteered to testify in favor of a Nazi called Kurt Becher…I often reflected what drove him to act the way he did." Haim H. Cohn, A Personal Introduction – Autobiography, 2005, p. 329.

ban on further murdering of Jews. Wisliczeny confirmed the existence of such an order. But he maintained that Aichmann sabotaged this order and was supported in this by Miiller and Kaltenbrunner. Following the advance of the Russian Army it was necessary to evacuate the Polish and Silesian camps. Some of the Jewish prisoners were sent to Bergen-Belsen or other camps. Most of the Jews found in these camps by the Allies arrived there either at the end of 1944 or at the beginning of 1945. Other Jews in the extermination camps were shot, or were frozen dead on the way.

…

After the fall of 1944 Himmler granted several concessions. Thus he permitted the departure for Switzerland of 1,700 Hungarian Jews deported to Bergen-Belsen and also agreed to suspend the annihilation of the Jews of the Budapest Ghetto. Himmler permitted the handing over to the Allies the Jews of Bergen-Belsen and Theresienstadt without a shot being fired, which in his eyes and eyes of his colleagues was such a generous and colossal concession that he certainly hoped some political concession in return. In the hope of establishing contact with the Allies Himmler made some concessions even without expecting economic returns. To this desire of Himmler may be ascribed the general prohibition dated 25 November 1944, concerning the further killing of Jews. On 27 November 1944 Becher showed me a copy of Himmler's order on this subject. Aichmann at first did not obey this order."

Dr. Rezso Kastner's affidavit before Warren F. Farr, Major, Judge Advocate General's, Dept. Office, U.S. Chief of Council, London, 13 September 1945.[25]

"המשפט היה אמור להוכיח ששופטי ישראל ומערכת המשפט הישראלית מסוגלים להציג את הבלתי אפשרי: גם לערוך משפט ציבורי, היסטורי, אידיאולוגי, חשוף לביקורת העולם, וגם לקיימו על פי כללי המשפט הפלילי הרגיל...חוב כלפי העבר, גאולתו של עבר זה מתוך אפלתו, חשיפתו וסיפורו, היו אפוא הכוחות המניעים שפעלו במשפט אייכמן – הן מצד המארגנים, הן מצד המבקרת."

עדית זרטל, "חנה ארנדט נגד מדינת ישראל", בתוך 50 ל 48: מומנטים ביקורתיים בתולדות מדינת ישראל (עדי אופיר עורך), 1999, עמ' 161.[26]

"The difficult thing is to distinguish between genuine holocaust feelings, and manipulated holocaust arguments…no body is Salman Rushdie in Israel."

Tom Segev, Interview with Harry Kreisler - Conversation with History, University of California Berkeley, 20 September 2004.

"רצח אדם משום שהוא שופט הוא כדור בנפשה של הדמוקרטיה"

[25] International Military Tribunal Nuremberg, Trial of the Major War Criminals before the International Military Tribunal, Documents and Other Materials in Evidence (Nuremberg: 1948), Volume XXXI, Document 2605-PS, pp.2, 3, 12, 13. The discrepancies in Becher's spelling and drafting Aichmann rather than Eichmann are in the original text of the affidavit.

[26] "The aim of the trial was supposed to demonstrate that Israeli justices and the Israeli legal system are capable to present the impossible: to conduct a public, historical, ideological trial open to international criticism, and to hold it pursuant to regular criminal trial procedure…debt towards the past, salvaging this past from its darkness, exposing and narrating it, were the driving forces that operated in the Eichmann trial – among its organizers as well as its critique." Idith Zertal, "Hannah Arendt v. The State of Israel", in 50 to 48 – Critical Aspects in the History of the State of Israel (Adi Ophir ed.), 1999, p.161.

אהרן ברק על רצח השופט עדי אזר בשנת 2004, מתוך הסרט של יצחק רובין "רצח שופט", שודר בערוץ הראשון ביום 30 בדצמבר 2010.[27]

"אדם, כל אדם, האוצר בקרבו סוד על מעשה נורא שראה בעיניו – סוד שרק הוא יודע עליו, הוא ואין-בלתו – יכול שיחוש צורך נפשי לשתף את הזולת בסודו. ואולם, במקום שאותו אדם מעורב במעשה הנורא, ועם כל רצונו לשתף את הזולת בסודו, יפעלו בקרבו בה בעת כוחות-נגד בני-עצמה שיזהירו אותו מפני הסגרת הסוד לידי אחרים; שאם יעבור ויסגיר – אפשר ייפגע."[28]

השופט מישאל חשין, דנ"פ 4342/97 *מדינת ישראל נ' סולימאן אל-עובייד*, פ"ד נא(1) 736, 832-831 (1998).

"בולגריה...זה ההונגרי ההונגרי"

בית"ר פרובנס, סרט ישראלי, 2002.[29]

"אין מוצא, לא זזים מכאן"

אין מוצא, שיר בביצוע אדם.[30]

"הצליל שלך שאין לו משל, הדמעה שלנו שאין בה ניחם."

שמעון פרס בהלוויתה של הזמרת עפרה חזה, 24 בפברואר 2000.[31]

"איש מנגנוני הבטחון: קולמן אני רוצה את הדו"ח הזה מייד.

קולמן: זה לא כל כך פשוט. יש הרבה עבודה.

איש מנגנוני הבטחון: זה לא מעניין אותי. תגמרו את העבודה ותוציאו לי את הדו"ח.

קולמן: בסדר אדוני אנחנו נשתדל."

מתחת לאף, סרט ישראלי, 1982.[32]

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[27] "Murdering a person because he is a judge is a bullet in the soul of democracy" Chief Justice Aharon Barak on murdering Justice Adi Azar in 2004. From Yitzhak Rubin's film *Murdering a Judge*, Chanel 1, 30 December 2010. See also Ram Landes's film about former Chief Justice Aharon Barak *The Judge*, Chanel 2, 14 July 2009.

[28] "A person, any person, who captures a secret about a terrible conduct that he witnessed with his eyes – a secret that only he, no one else, knows about it – could feel an emotional necessity to share this secret with others. Yet, when the person is involved in the terrible act, and with all his desire to share his secret, inside him will operate powerful counter forces that will warn him from disclosing the secret to others; if he discloses he could be harmed." Justice Mishael Cheshin, AHC 4342/97 *State of Israel v. Suleiman Al-Ubaid*, 51(1) PD 736, 831-832 (1998).

[29] "Bulgaria…It's the Hungarian, the Hungarian" Beitar Province, Israeli film, 2002.

[30] "No way out, no one leaves", No Way Out, song by Adam.

[31] "Your melody that is unmatched, and our tear that provides no comfort", Shimon Peres at the funeral of singer Ofra Haza, 24 February 2000.

[32] "Security apparatus person: Coleman I want this report immediately.
Coleman: It's not that simple. It requires a lot of work.
Security apparatus person: I don't care. Finish the work and release the report.
Coleman: OK sir we will try." Under the Nose, Israeli film, 1982.

"ושם עלה למשל שברון הלב של קרמניצר. ההרגשה היותר מכל היא עצב ענק. עצב האם כולם ערים ומודעים למה שאולי קורה פה."

פרופ' עוזי ארד, ראש המכון למדיניות ואסטרטגיה, המרכז הבינתחומי הרצליה, החזון העתידי לערבים הפלסטינים בישראל, כנס במכון ון ליר בירושלים, 28 בפברואר 2007.[33]

"אין פה כלום...כאוס...הטרגדיה של הדיון הציבורי הישראלי שאנחנו לא מבינים שיש מצב, מצב מאוד מתסכל, שבו בכל קרב אנחנו מנצחים, אבל במלחמה אנחנו מפסידים."

עמי איילון, ראש השב"כ לשעבר, סרט שומרי הסף, 2012.[34]

[33] "And then I thought of Kremnitzer's heartbreak. The most significant feeling is sadness. Sadness if everyone is aware and conscious about what perhaps is taking place here." Uzi Arad, Head of the Institute for Policy and Strategy, Lauder School of Government, Diplomacy, and Strategy, Interdisciplinary Center Herzliya, The Future Vision for the Palestinian Arabs in Israel, Conference at Van Leer Institute in Jerusalem, 28 February 2007.

[34] "There is nothing here…chaos…the tragedy of the Israeli public debate is that we don't comprehend that there is a situation, a very frustrating situation, in which in each battle we win, but at war we lose", Ami Ayalon, former head of the Israel Security Agency (Shin Bet), The Gatekeepers film, 2012.

Introduction

1. Since the creation of the State of Israel in 1948 the Arab minority has been living in the virtual reality of the Israeli situation without knowing it. Contrary to dominant belief, Israel has not changed much since its founding. Its main ideology has been to maintain, compellingly, the supremacy of an Eastern European Jewish identity (Moldavian, Romanian or Bulgarian) that is most visible from Netanya to Rehovot.[35] This is executed through its various bureaucratic structures such as the government, the military, the Israel Security Agency (Shin Bet), the police and the criminal justice system, the university, popular culture, and the public sector which remains the main employer in the country.[36] The opening quotes of this report is an attempt to depict this bizarre and constant reality.

2. There has been a clear desire to reproduce the inferiority of the Mizrahi Jews (those who came to the country from Arab or Muslim states), and not to create a melting pot to realize at least a Jewish citizenship. In such a political and institutional environment, the discrimination against the Arab minority is an intended consequence. Considering Israel's exceptionally rigid situation, it is futile to discuss potential solidarity between oppressed groups or to seek the support of "enlightened" Israeli individuals who for decades failed to inform their Arab comrades about Israel's true character.[37]

3. The Arab minority became as such as a result of the 1947 – 1949 war which culminated in their internal displacement and the expulsion of the majority of their community to the neighboring Arab states. It is estimated that 160,000 Arabs remained in Palestine while 750,000 – 800,000 were driven out of the country. From 1948 to 1966 they lived under military rule that imposed substantial restrictions on basic liberties. Today, they number around 1,720,000 and form about 20% of Israel's total population. The Arabs in Israel are Moslems, Christians, and Druze. The vast majority of them live in villages or a bit larger

[35] A profile of this group that is not a parody can be found on the website of The Institute for National Security Studies or through a review of Lapid's Yesh Atid party which could amount to the aforementioned genre. To this group one can add the settlers.

[36] According to the Israeli Ministry of Economy the big employers in the Israeli economy, of which the vast majority are public sector jobs, employ 53% of the total labor force. Small and medium employers in the Israeli economy that are formed mostly from commercial businesses employ 47% of the total labor force. The commercial sector in Israel is composed as follows: 33% minor businesses (151,717; 1 to 4 employees, 250,291 employees, 13% of the total employees in the commercial sector); 4 % independents (one individual self-employed - 249,305). These two groups form 20% of the commercial product. 21% small businesses (46,165; 5 to 19 employees, about 10% of the total employees in the commercial sector, 13 % of the commercial product); 2.5% medium businesses (11,477; 20 to 99 employees, 435,773 employees, about 22% of the employees in the commercial sector, 16 % of the commercial product); 0.5% big businesses (1,632; 598,415 employees, 31% of the employees in the commercial sector, 51% of the commercial product). See Ministry of Economy, Periodic Report – The Situation of Small and Medium Businesses in Israel 2013 – 2014, September 2014, pp.7, 52. Various governmental sources contain different statistics because they define governmentally funded or controlled bodies, such as governmental corporations, as part of the commercial sector.

[37] 'Zionist' conduct during World War Two in Palestine and Hungry as well as British lack of support for the 1947 U.N. General Assembly resolution that partitioned Palestine and American (Secretary of State George C. Marshall) opposition to Israel's declaration of its founding in 1948 do not coincide with the general wisdom that Israel's legitimacy was based on Jewish suffering during that war. Ilan Pappe' who opens his book *The Ethnic Cleansing of Palestine* with Ben Gurion's quote "I am for compulsory transfer; I do not see anything immoral in it" should be ignored or at least read with suspicion. The same applies to Ella Shohat's 'radical critique' of Israeli culture and her "flashing backward and *forward* to follow a theme" while analyzing Israeli cinema.

towns inhabited exclusively by Arabs. Some reside in predominantly Jewish towns such as Haifa, Jaffa, Lod, Ramla, and Acre.

4. Despite certain increase in their level of education, it is difficult to say that they have changed their basic mode of thought about society and governance. Their municipal politics is dominated by tribal loyalties, and their internal national political rivalry is tainted by covert and forthright sectarianism. According to official Israeli data that ignores the situation and the actual financial and social condition of the country's entire population, the economic standing of this group is at the lowest levels compared to other segments in the Israeli society, as their educational performance. Crime is persistent among this minority and its spread transcends political affiliations, national as well as religious identities, and borders.

5. The Israeli communist party controlled the Arab minority's founding representative politics.[38] This fact triggered certain debate within the party between nationalist attitudes and abstract deceptive 'universalist' (omami in Arabic) approaches personified by Vilner, Gozansky, and Hanin.[39]

6. Al-Ard group veteran Mohammad Miari defined his 1980s politics as Palestinian. Initially his party also included self-declared progressives such as Uri Avneri (a Hirut activist during the mandate) and Mattityahu Peled (a former general in the Israeli military). In 1995 Azmi Bishara and others founded the National Democratic Assembly seeking to transform Israel to a state of all its citizens and connect Arab citizens to the issues of the larger Arab world. This political party sought to reimagine the era of the Egyptian leader Jamal Abdel Nasser neglecting the tradition of coups and divisions that Egypt had led in many countries in the region also under the leadership of the alleged unifier of the Arabs.[40]

7. The Islamic movement in Israel was established in 1971 advocating social norms based on strict interpretation of Islam without directly entering politics. In 1989 the movement participated in the municipal elections obtaining significant success in Umm al-Fahm municipality. In 1996 the movement was divided to two camps over the issue of participating in Israeli parliamentary elections and politics. Both camps of the Islamic movement share the general politics of the Arab minority that oppose Israeli discrimination and the 1967 occupation of Palestinian territories.

8. The culture of the Arab minority has been centered mostly on poetry and theatre. Mahmoud Darweesh and Samih Al-Qasem are probably the best known poets that this community has produced. Darweesh left Israel for good in 1970, joined the Palestine Liberation Organization and became its national poet. Towards the end of his career he departed from the romantic naivety about Palestinian politics which signified most of his writing. The

[38] Arab politicians who operated as part of the governing Mapai party during the period of military rule or as allies of it have been considered non-representative.
[39] 'Conflicts' took place within this camp as well that included additional figures among them Moshe Sneh and Shmuel Mikunis. Israeli Arab communists Tawfik Toubi and Tawfik Ziad operated under the dominant leadership of their fellow Israeli Jewish communists, without being notified regarding the true nature of the Israeli regime, nor noticing it by themselves.
[40] See, for example, The Prince, Egyptian film, 1984.

stage has consistently attracted young people who have possessed more passion to create than talent, with little awareness about Israeli, regional, and international actualities and cultures.

9. Writings about the Arab minority in English have underscored the institutional discrimination they have suffered from, and varied in their disciplines and motivations.[41] The Israeli legal system had been shaped by Eastern and Central European figures despite some adherence to mandate British law and jurisprudence. Since the promotion of Attorney General Aharon Barak, a survivor of a Lithuanian ghetto and an expert on agency law, to Supreme Court Judge in 1978 he had attempted to introduce American liberal jurisprudence following that of American Supreme Court Justice William Brennan and the legal philosophy of Ronald Dworkin.[42] His repetitive effort which commenced in 1982,[43] demonstrated also in his books, lacked the constitutional tradition and commitment that has existed in the United States for generations.[44]

10. Hanna Nakara was probably the first Arab attorney in Israel who tried to use the law for civil rights purposes, particularly regarding citizenship and land issues.[45] Trained as a lawyer in 1933 Damascus, his legal efforts awaits thorough scrutiny.[46] Other Arab lawyers, such as Elias Khoury and Usama Halabi, advanced human rights in courts relating to matters arising from the occupied Palestinian territories in East Jerusalem, the West Bank, and Gaza. In the wake of the 1987 intifada in the occupied territories and the mass arrests that the Israeli military carried out against demonstrators, many Arab lawyers represented

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[41] See Sabri Jiryes, The Arabs in Israel (Inea Bushnaq trans.)(Monthly Review Press, 1977); Ian Lustick, Arabs in the Jewish State (University of Texas Press, 1980); David Kretzmer, The Legal Status of Arabs in Israel (Westreview Press, 1990); Nadim Rouhana, Palestinian Citizens in an Ethnic Jewish State (Yale University Press, 1997); Dan Rabinowitz, Overlooking Nazareth: The Ethnography of Exclusion in the Galilee (Cambridge University Press, 1997); As'ad Ghanem, The Palestinian-Arab Minority in Israel, 1948 – 2000 (State University of New York Press, 2001); Dan Rabinowitz & Khawla Abu Baker, Coffins On Our Shoulders – The Experience of the Palestinian Citizens of Israel (University of California Press, 2005); Displaced at Home: Ethnicity and Gender among Palestinians in Israel (Rhoda Ann Kanaaneh & Isis Nusair eds,)(State University of New York Press, 2010); Amal Jamal, Arab Minority Nationalism in Israel – The Politics of Indigeneity (Routledge, 2011); Ilan Pappe', The Forgotten Palestinians: A History of the Palestinians in Israel (Yale University Press, 2011); Shira Robinson, Citizen Strangers: Palestinians and the Birth of Israel's Liberal Settler State (Stanford University Press, 2013); Ahmad Sa'di, Thorough Surveillance: The Genesis of Israeli Policies of Population Management, Surveillance and Political Control Towards the Palestinian Minority (Manchester University Press, 2015).

[42] For a description of the shift in Israeli jurisprudence from formalist to liberal-activist see Menachem Mautner, Law and the Culture of Israel (Oxford University Press, 2011). According to the author, although the Supreme Court did not lack liberal judges in its early days, since the 1980s there had been a clear difference in the form and substance of its rulings. They became much longer and relied on moral imperatives derived from the law's interpretation rather than its text. He attributes this shift primarily to former Chief Justice Aharon Barak.

[43] See Aharon Barak, "On the Judge as an Interpreter", *12 Mishpatim – Hebrew University Law Faculty Law Review*, 248-29, 256 (1982)("Too often the judge stands at a cross road and requests direction in which road should he choose…Legal education belongs to the humanities, rather than the natural sciences…if the law is the material, and the legislative purpose is the spirit, then the judge flames soul into the body."

[44] See Richard A. Posner, How Judges Think, 362-368, (Harvard University Press, 2010).

[45] For a recent study on lawyering for social justice causes see Leila Kawar, Contesting Legal Activism in Court: Legal Activism and Its Radiating Effects in the United States and France (Cambridge University Press, 2015).

[46] See A Memoir of a Palestinian Attorney: Hanna Deeb Nakara, Lawyer of the Land and the People (Atallah Kupti ed.)(Beirut: Institute of Palestine Studies, 2011)(2nd ed.)(Arabic). The memoir does not include legal specifics, rather it is focused mainly on his political writings and evaluations by Nakara's fellows in the Israeli Communist Party.

Palestinian detainees in the Israeli military court system which applied distinctly unfair rules of procedure and evidence.[47]They also filed tort lawsuits in Israeli courts on behalf of Palestinians who incurred injuries as a result of the Israeli military's use of force.

11. The genuine and systematic use of the law for the benefit of the Arab minority in Israel should be attributed to the establishment of Adalah – The Legal Center for Arab Minority Rights in Israel in 1996.[48] Its founder the charismatic general director Hassan Jabareen has led the most complex cases before the Israeli courts in an unprecedented and innovative manner. His organization published writings that challenged the accepted Israeli academic wisdom about the relations between law and society, participated in conferences abroad and became almost an official spoke group for the Arab minority. In 2002 the Ministry of Interior initiated a failed inquiry against the human rights organization pertaining to corruption allegations and acting not in accordance with its mandate.[49]

12. The purpose of this report is to analyze the discriminatory realities that the Arab minority had incurred through attempts to contest this persistent predicament in the legal sphere. The focus will be on legal deliberations before the Supreme Court since 1948. The research does not necessarily capture the entire legal interaction between the Arab minority and Israeli law. Inquiring legal advocacy and judicial reasoning in the lower instances can shed additional light on this aspect of the strained minority state relations.

Military Rule

Establishing the Military Rule

13. The Israeli government imposed a military rule on Arab inhabited areas from 1948 to 1966. The official legal basis for this rule was established a year after its imposition through the Emergency Regulations (Security Zones) – 1949. During this period the restrictions carried out by the Israeli authorities, which included violations of the rights to liberty, property, and freedom of the press, were founded on the Defense Regulations (Emergency) – 1945. The latter's origin was British, aimed primarily to stifle Zionist terrorist activity in Palestine.[50]

14. The Israeli Supreme Court rejected a request to order abolishing military tribunals in the Galilee formed to conduct expedited criminal procedures. The petitioners argued that the

[47] See Lisa Hajjar, Courting Conflict: The Israeli Military Court System in the West Bank and Gaza (University of California Press, 2005). See also Nadera Shalhoub – Kevorkian, Militarization and Violence against Women in Conflict Zones in the Middle East - A Palestinian Case Study (Cambridge University Press, 2009); Nadera Shalhoub – Kevorkian, Security Theology, Surveillance and the Politics of Fear (Cambridge University Press, 2015); Jimmy Carter, Palestine – Peace not Apartheid (Simon & Schuster, 2006).

[48] www.adalah.org. The author of the report worked with this organization from 1999 to 2007. Since the late 1990s several non-governmental organizations have ben established to advance the right of the Arab minority not necessarily through the legal system.

[49] Yair Ettinger, "If we don't use the democratic means, what should we use?", *Haaretz*, 28 August 2002.

[50] See "The Protest Convention against the Emergency Regulations", *3 Ha-Praklit - Law Review of the Jewish Lawyers in Palestine*, 58 (1946). One of the Lehi's armed activities in Palestine was an assassination attempt in 1944 against the High Commissioner for Palestine Harold MacMichael.

Chief of Staff of the Israeli Military was not authorized to establish such tribunals under the Defense Regulations (Emergency) – 1945. The Court ruled to the contrary referring to article 14(A) of the Governance and Law Ordinance – 1948, although this provision stipulated the Israeli Government as replacing the British Mandate authorities, not the Chief of Staff of the Israeli Military.[51]

Freedom of Movement

15. In its early days twice the Supreme Court ordered the release of imprisoned Arab suspects who were apprehended according to incomplete or vague arrest warrants originating from the Defense Regulations (Emergency) – 1945.[52]Nevertheless, the Court upheld military commanders' orders restricting the freedom of movement of Arab citizens despite their controversial rational.

16. Mr. Subhi Al-Ayubi was an attorney in 1949 Jaljulia who requested and was granted a permit from the military commander to leave his village to go to Jaffa for medical treatment. He stayed there longer than permitted which prompted the military commander to issue an order against Mr. Al-Ayubi's presence in Jaffa compelling him to return to his village. The Supreme Court rejected the attorney's challenge of this order and commented on the petitioner's attempt to obtain information about the alleged security reason for issuing it:

> During the examination of respondent No. 4 the petitioner's representative posed certain questions with the purpose to obtain information about the "security reasons" which the aforementioned order was based on. Yet, the witness refused to answer these questions – and the Deputy Attorney General objected to answer these questions – arguing that the supreme interests of the state do not permit revealing the information under discussion. We decided – we did not have any other choice legally – to favor this privilege and not to allow the petitioner's questions.[53]

17. The Military Commander in the Jerusalem area issued orders to displace eight individuals from the village Abu Ghosh to other villages because of the police's allegations that some of them refused to assist the police investigation regarding an attack against a nearby youth institute (they were not investigated as suspects, remained silent except for protesting the fact that they were being investigated). The police also contended that the presumed infiltrators who allegedly threw hand grenades at the youth institute found shelter in the homes of the other Abu Ghosh residents. The Court rejected the petition against the military order underscoring the right of the military commander not to expose his security considerations for issuing the displacing order:

> And now we come to the issue – that is decisive in its importance – which we presented above: is there a basis and justification for the security reasons alleged

[51] HCJ 107/52 *Asad v. The Chief of Staff of the Israeli Military*, 6 PD 339, 340 (1952).
[52] HCJ 7/48 *Alkharbutli v. Minister of Defense*, 2 PD 5 (1949); HCJ 95/45 *Nayef Al-Khoury v. IDF's Chief of Staff*, 4 PD 34 (1950).
[53] HCJ 46/50 *Subhi Al-Ayubi v. Minister of Defense*, 4 PD 222, 229 (1950).

> by the first respondent. He does not reveal to us what is his security rational, and for this we cannot express any reservation.[54]

18. A leader in the Israeli Communist Party and a member of Taybeh village local council, Mr. Hassanen was exiled to another village by a military order for drafting a pamphlet against the Israeli police and government. The pamphlet was drafted following a disruption to a 1st May gathering that the Communist Party organized by a group of people from the village. Its authors accused the police of an intended failure to prevent the disruption and even being complicit in organizing it. The Court rejected Mr. Hassanen's petition reasoning that the sharp critique of the government amounted to incitement that justified the Military Commander's order. It quoted the following passage from the pamphlet as a reason for its decision:

> > The Ben Gurionist police which had always been present in great numbers during the rallies of the Communist Party, disappeared that day and concentrated its forces in the police station anticipating for a slaughter in our town that would be organized and carried out by the police's assistants and beneficiaries.[55]

The Al-Ard Group Legal Affairs

19. Al-Ard group was formed by Arab individuals mainly from the north of the country that sought to realize equality between Arabs and Jews. Politically, the group advocated a just political solution for the Palestine problem, based on the rights and interests of the Palestinian Arab people. They were influenced by progressive nationalist Arab ideas spreading from Nasser's Egypt as they were being broadcast through that state's radio.

20. The Supreme Court dismissed petitions challenging restrictions on freedom of movement filed by members of Al-Ard group. The Military Commander in the north of Israel issued an order against Mr. Sabri Jiryes which imposed serious restrictions on his movement and placed him under constant police supervision. The Supreme Court had previously upheld declaring Al-Ard association as an illegal one,[56] which led it to reject Mr. Jiryes's petition who argued that "the authorities used that decision of the court to strike a blow against him and his colleagues."[57] The Court accepted the allegations of the Israeli Secret Service (Shin Bet) against Mr. Adib Abu Rahmoun, an alleged member of Al-Arad group (he contended that he was only a worker in a print house that published Al-Ard's writings), that his trip to East Jerusalem for Christmas could be used by hostile elements in then Jordan to recruit him for activities against the state of Israel.[58]

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[54] HCJ 188/53 *Mahmoud Rashid Abu Ghosh v. The Military Commander in Jerusalem Area*, 7 PD 941, 946 – 947 (1953).
[55] HCJ 126/59 *Hassanen v. Military Commander in the Central Area*, 13 PD 1534, 1537 (1959).
[56] HCJ 253/64 *Sabri Jiryes v. Haifa District Commissioner*, 18(4) PD, 673 (1964).
[57] HCJ 56/65 *Sabri Jiryes v. Military Commander for Zone A'*, 19(1) PD 260, 261 (1965).
[58] HCJ 368/65 *Adib Abu Rahmoun v. Minister of Interior*, 20(1) PD, 201 (1966).

21. Members of Al-Ard group were convicted for publishing a newspaper without a license,[59] succeeded to legally contest barring their registering as a company,[60] but failed in their legal challenge to the unreasoned decision of the Northern District Commissioner to ban them from issuing a licensed newspaper,[61] and in their attempt to register an association.[62] In addition, the Supreme Court upheld the decision of the Knesset's Central Elections Committee not to permit their registration as a political party because of their alleged subversive goals.[63]

22. Justice Haim Cohn wrote minority and contradictory opinions opposing the registration of Al-Ard group as a company, and disqualifying the decision of the Central Elections Committee to bar Al-Ard from becoming a parliamentary political party. In the company registration matter he underscored that the registrar's discretion is broad and could include "state security considerations", as opposed to his opinion in the political party affair. In the former decision he emphasized that:

> Possible infringement of basic civil rights, such as freedom of expression and association, or the existence of other means to prevent the worrying concerns, do not undermine the absolute decisiveness of the discussed discretion.[64]

23. A unanimous ruling by the Supreme Court upheld a decision of the Northern District Commissioner in Nazareth that prevented the now registered Al-Ard company to obtain a license to publish a newspaper, despite its unreasoned and lacking in any detail nature. Justice Zvi Berenzon reiterated the discrimination argument advanced by the petitioner and rejected it for lack of merit:

> The alleged discrimination is that the group of individuals associated with the petitioner are all Arab that are not linked to any resembling group in the Jewish community, and the Commissioner discriminates against them from a national perspective and for their political opinions that do not suit his own. We do not know if there is any basis for this allegation, because the petitioner did not indicate any act or statement that would substantiate it…I also do not agree that the discrimination and malicious argument should require us to demand from the Commissioner a detailed response regarding his decision.[65]

24. The Supreme Court failed Al-Ard members again in their attempt to challenge Haifa District Commissioner's decision not to permit their registration as an association. Justice Witkon considered that their goals were subversive and drew an analogy to the Weimar Republic to support his decision:

> Not once we witnessed in history states that exercised an appropriate democratic regime, that were overthrown by various fascist and totalitarian movements, who

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[59] CA 228/60 *Hakim Kahwaji v. The Attorney General*, 14 PD, 1929 (1960).
[60] HCJ 241/60 *Mansour Kardosh v. Companies Registrar*, 15 PD, 1151 (1961). Upon the Company's Registrar request, the Supreme Court heard the issue again reaching the same result. See AH 16/61 *Company's Registrar v. Mansour Kardosh*, 16 PD, 1209 (1962).
[61] HCJ 39/64 *Al-Ard Company Ltd v. Northern District Commissioner, Nazareth*, 18(2) PD, 340 (1964).
[62] HCJ 253/64 *Sabri Jiryes v. Haifa District Commissioner*, 18(4) PD, 673 (1964).
[63] HCJ 1/65 *Yakov Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset*, 19(3) PD 365 (1964).
[64] HCJ 241/60 *Mansour Kardosh v. Companies Registrar*, 15 PD, 1151, 1172-1173 (1961).
[65] HCJ 39/64 *Al-Ard Company Ltd v. Northern District Commissioner, Nazareth*, 18(2) PD, 340, 344 (1964).

used rights such as freedom of expression, the press, and association which the state provides to carry out their destructive activity. He who saw this during the Weimar Republic will never forget the lesson.[66]

25. Although the Elections to the Knesset Law - 1959 did not authorize the Central Elections Committee to disqualify the registration of political parties, the Supreme Court did not void its decision to ban the newly formed 'Socialists' party, which included Al-Ard members, from participating in the elections to the Israeli parliament. The reason for banning this party was Al-Ard members' purported subversive and dangerous platform. Concurring with the majority opinion, Justice Zussman also relied on the German experience, trying to learn from a post-World Word Two court ruling:

> It is not a coincidence that the Supreme Court of the Federal German Republic founded after the Second World War is, as far as I know, the first court that established the principle that a judge must rule also according to law that is not written in the law books, which is superior to ordinary law and even the constitution.[67]

Land Rights and Emergency Regulations

26. In three different instances the Supreme Court ruled that the Israeli Military Commander's control of land inhabited by Arab communities based on regulation 125 of the Defense Regulations (Emergency) – 1945 were not legal.[68] Nevertheless, the Arab inhabitants of these villages were prevented from returning to their original location of residence. Regulation 125 stipulated that:

> A Military Commander 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 offence against these Regulations.

27. The Israeli military expelled the inhabitants of the village of Gabsiya who became citizens of the newly established state, and prevented their return to their homes through regulation 125 of the Defense Regulations (Emergency) – 1945. The Supreme Court declared the military commander's order as void because it had the effect of law and therefore should have been published in the official gazette of the State of Israel. The court described the displacement inflicted by the Israeli military in Gabsiya village:

> The petitioners were residents of the village Gabsiay in western Galilee until it was occupied by the IDF in May 1948…as a result of the aforementioned occupation operations, the petitioners were expelled from the village by soldiers, but they returned to it in spring 1949 and resided there until 26 January 1950 when they

[66] HCJ 253/64 *Sabri Jiryes v. Haifa District Commissioner*, 18(4) PD, 673, 679 (1964).
[67] HCJ 1/65 *Yakov Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset*, 19(3) PD 365, 389 (1964).
[68] HCJ 220/51 *Jamal Aslan v. The Military Commander of the Galilee*, 5 PD 1480 (1951); HCJ 64/51 *Daoud v. Minister of Defense*, 5 PD 1117 (1951); HCJ 36/52 *Naddaf v. Minister of Defense*, 6 PD 750 (1952).

were expelled again by Israeli soldiers. Since then they moved to the nearby Danun village, and were barred from returning to their village which remained deserted.[69]

28. A week after this decision the Military Commander issued a similar order that was published in accordance with the Supreme Court's ruling. He again prevented the Gabsiya residents from returning to their village and declined to provide them with entry permits. The Court rejected a petition against the Military Commander's discretion, noting the difficulty to contest his alleged security considerations:

> It is possible that the concealed considerations are not as such at all. Yet, the Court cannot rule based solely on concerns and suspicion. A Court decision requires a more solid foundation…we must admit, that given the aforementioned facts it was not easy to accept the sincerity of these determinations (security considerations – MD). Yet, in the situation of lack of knowledge that we find ourselves in we cannot totally disqualify the possibility that there is a genuine security consideration that we are unable to be aware of, which is sufficient to justify the position of the respondent.[70]

29. Israeli forces expelled Al-Galameh residents on 2 March 1950 without any apparent legal justification. A Kibbutz was established in the village's location. The Supreme Court ruled that the displacement of the village's residents was not legal, but failed to provide a concrete remedy based on the odd reasoning that the military commander was not a civil servant subject to the Court's orders. The Court proposed that the petitioners attempt to seek a civil remedy against the residents of the Kibbutz in another legal instance and bear the possible costs for it. It reiterated the villagers' allegation regarding their displacement of which the respondents did not oppose indicating its arbitrariness:

> The petitioners' allegation is that they are not absentees, and that they were displaced from their village on 2 March 1950 without any legal order, distanced from their registered lands, and settled in the village Jatt. All of this was carried out according to the orders of the military commander in Baqa. Meanwhile, a Kibbutz was established in the same location (Lehavot Haviva?) which began to cultivate their land. The petitioners approached the military commander and the police several times who promised to return them, yet all of these promises did not materialize. Finally, they addressed the Minister of Defense who failed to provide a response.[71]

30. A similar scenario took place regarding the residents of the village Iqrit. The significance of this affair is that their case had been presented before the Supreme Court six times. In 1951 the Court ruled that the Iqrits were entitled to be in their village given their permanent residence status at the time of issuing the military order that declared the village as a closed military area. It ordered that the petitioners be allowed to reside in their village, and that their property and lands returned to them.[72] The Israeli authorities failed to comply with

[69] HCJ 220/51 *Jamal Aslan v. The Military Commander of the Galilee*, 5 PD 1480, 1482 (1951).
[70] HCJ 288/51 *Jamal Aslan v. The Military Commander of the Galilee*, 9 PD 689, 695 (1955).
[71] HCJ 36/52 *Naddaf v. Minister of Defense*, 6 PD 750, 751 (1952). The questioning about the name of the Kibbutz is in the original text.
[72] HCJ 64/51 *Daoud v. Minister of Defense*, 5 PD 1117 (1951).

the Court's order. The petitioners approached the Supreme Court again which declared that it was unable to reiterate its previous order, rather only, if such a request was filed, to consider whether the Israeli authorities were in contempt of the original order.[73]

31. On 10 September 1951 the military commander in the area issued orders against residents of Iqrit that imposed their departure, although they were still outside the village waiting for the implementation of the original Court ruling allowing their return and receiving their property. The Israeli authorities had apparently provided false promises to the villagers about their intention to permit their return. The Iqrits appealed against the legality of the orders before the military authorities and were rejected. The military's alleged security reasons for issuing the orders remained undisclosed barring the Iqrits from challenging them. The Supreme Court upheld the decision and the proceedings of the Israeli military.[74]

32. On 25 August 1953 the Minister of Finance confiscated 15,600 dunams of Iqrit's land through the Development Authority Law – 1953. In 1963 the military commander issued an order barring entry into the area that formed Iqrit. Another similar order was issued in 1972 by the Commander of the Northern Command in the IDF. In 1981 the Committee of Iqrit's Displaced in Rama sought to challenge before the Supreme Court the land confiscation and the military orders. The Court held that considering the long period of time that had elapsed since the land acquisition and the issuance of the military orders it is not possible for the Court to examine whether the considerations of the Minister of Finance and the military commanders were valid.[75]

33. In 1997 citizens originally from Iqrit again filed a petition before the Supreme Court. They argued that the authorities' acknowledgment of their special circumstances and the injustice inflicted upon them show that a governmental promise had emerged to return them to their village. In addition, they requested to annul the land confiscation because the 1953 public interest advanced as a reason for it was no longer present. They further requested to consider the military orders barring entry to Iqrit as void because the alleged security reasons for issuing them had passed.

34. The Court rejected the petition stating that although it is possible that a governmental promise towards the residents of Iqrit had developed throughout the years, the authorities possessed broad discretion to retract from this promise. Regarding the state land acquisition, the Court stated that much of Iqrit's land had been occupied by Jewish settlements. It also held that the advanced public interest that prompted the land confiscation was still present, without detailing for what reason vacant land in Iqrit should be under state control. Regarding the military orders barring entry to Iqrit, the Court ruled that the security reasons which legitimated issuing them did not exist anymore.[76] A petition for rehearing was rejected as well.[77]

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[73] HCJ 238/51 *Daoud v. Minister of Defense*, 5 PD 1658 (1951).
[74] HCJ 239/51 *Daoud v. The Appellate Committee of the Galilee Security Zones*, 6 PD 229 (1952).
[75] HCJ 141/81 *Committee of Iqrit's Displaced in Rama v. The Government of Israel*, 36(1) PD, 129 (1981).
[76] HCJ 840/97 *Aouni Sbeit v. The Government of Israel*, 57 PD 803 (2003).
[77] AH 6354/03 *Aouni Sbeit v. The Government of Israel*, Decision, 18 June 2004.

Property Rights

35. Since Israel's founding its parliament adopted a series of laws setting various rules and procedures the purpose of which had been to extend state control over as much land as possible. In general, the Supreme Court upheld the state's claim for ownership or possession regarding a disputed land.

Lands (Acquisition for Public Purposes) Ordinance – 1943

36. The Lands (Acquisition for Public Purposes) Ordinance – 1943 defined broad powers for the Minister of Finance to declare a land as required for public interest purpose and confiscate it.[78] Article 2 of this Ordinance proclaims a public interest purpose as "Any purpose that the Minister of Finance authorized as a public interest." Pursuant to the deliberation of several cases before the Supreme Court in the 1990s regarding the possibility of restituting an expropriated land should the authorities fail to use it for the declared public purpose or should that purpose change throughout the years, the legislature amended this ordinance in 2010 and blocked any serious possibility for restitution.[79]

37. The Committee for the Protection of Nazareth's Confiscated Land petitioned in 1955 the Supreme Court claiming that the authorities' decision to confiscate land in Nazareth area to establish a governmental compound to be subsequently developed to a new town was arbitrary and discriminatory. The Court dismissed the petition underscoring the broad discretion to declare an area as required for public purpose pursuant to the Lands (Acquisition for Public Purposes) Ordinance – 1943. The Court articulated a high threshold to demonstrate a possible arbitrariness in selecting the land for realizing the public purpose:

> Indeed, it is not our role to examine whether the purpose for which the land had been acquired was a public interest in the meaning of the law, or not. According to article 5(2) of the Ordinance, the mere publication of an announcement is a decisive evidence that the purpose of the acquisition was for public interest.

[78] Haim Sandberg attempts to contest the premise that this ordinance was used primarily to confiscate land from Arab citizens to benefit the Israeli Jewish majority. He provides statistical estimates of the private land confiscation carried out against Arab citizens based on this ordinance and proposes to conduct a specified legal analysis about particular cases in order to conclude that there had been a policy of deliberate confiscation of land from the minority in favor of the majority. An authority on Israeli property law Zandberg has not done such research. See Haim Sandberg, "Expropriations of Private Land in Israel: an Empirical Analysis of the Regular Course of Business", *43 Israel Law Review* 590 (2010). Israeli academics critical of Israel's land policies have cynically expressed their Foucauldian analysis. See Oren Yiftachel and Alexander (Sandy) Kedar, "On Power and Land: The Israel Land Regime", *16 Teoria Ubikoret*, 67, 68 (2000)("The purposes, the institutions and practices that constituted the ethnocratic society created a legal situation and public norms, that allow and even encourage the continuation of the expansion and control of the dominant ethnos. This situation enables the dominant group to divert (Hebrew: lehasit – MD), destabilize, or ignore contesting exclamations voiced by marginal underprivileged groups.")

[79] Article 9 of the Ordinance refers the state and any claimant to the Court in case of dispute over the amount of compensation. Article 12 proclaims that in determining a compensation the fact that the confiscation was imposed on the owner should not be a relevant consideration. In addition, the compensation should be evaluated based on the amount that would have been obtained as a result of a willful sale of the land in the market. Most of the land confiscated from Arab owners were agricultural that often transformed to land for building after the confiscation. The value of the latter has always been significantly higher than the price of land for agriculture.

> The Court is permitted to examine whether the selection of the land, that had been acquired to realize the public purpose, was not arbitrary. As a rule, the Court will not hastily find arbitrariness simply because the land owner was able to point to other land that could fulfill the purpose of the acquisition. The owner should show that his land was selected based on irrelevant considerations that do not relate at all to the declared purpose.[80]

38. In 1991 Mr. Nusseibeh attempted to legally abolish the confiscation of his land in the area between East and West Jerusalem. His land was confiscated in 1968. Until filing the petition before the Supreme Court, the authorities had not used the disputed land and had initiated planning procedures to use it for a different alleged public interest than the original one which also had not materialized. Initially, the declared public interest for the acquisition was roads and residential areas, and the later public interest purpose of the acquisition became commercial stores.

39. The Court ruled in a majority opinion of two to one in favor of Mr. Nusseibeh. Because the Court's ruling had set a significant precedent, it also decided that the case be heard again by a larger panel of judges.[81] The latter ruled against the petitioner in a majority opinion of four to three judges. The most senior judge of the panel, the outgoing Chief Justice Meir Shamgar did not right an opinion, rather he only agreed with the majority, forming a decisive tip of the balance in the judges' opinions in a matter that the Court considered as exceptionally significant. The reasoning of the majority in the rehearing of the case was that the Minister of Finance did not abandon the public interest purpose and was entitled to change it throughout the years.[82]

40. The Minister of Finance decided in 1976 to confiscate the land of Mr. Saliba Suleiman Makhul near the village of Makr. The declaration about the confiscation did not include details about the alleged public interest purpose. In 1987 Mr. Makhul challenged the legality of the acquisition because the authorities failed to use it for any purpose. He withdrew his petition based on the Court's recommendation after the Israeli authorities claimed that they were initiating the relevant procedures for using the land for housing, industry, and tourism. In 1992 the latter public interest goal changed and became housing to absorb the newly arriving immigrants from the former Soviet Union. Mr. Makhul's 1995 petition before the Supreme Court seeking to annul the acquisition was rejected on the ground that the authorities are entitled to change the declared public interest purpose of the confiscation.[83]

41. In 2001 the Supreme Court delivered another principled judgment on this issue by a panel composed of nine judges reaching an opposite result than those articulated in the matters of Nusseibeh and Makhul. Yehudit Kersik and others petitioned the Court in 1996 requesting to abolish the confiscation of land near Hadera which took place in 1966 and

[80] HCJ 30/55 *The Committee for the Protection of Nazareth's Confiscated Lands v. Minister of Finance*, 9 PD, 1261, 1264 (1955).
[81] HCJ 5091/91 *Mazen Hassan Zaki Nusseibeh v. Minister of Finance*, Judgment, 9 August 1994.
[82] AH 4466/94 *Mazen Hassan Zaki Nusseibeh v. Minister of Finance*, 49(4) PD, 68 (1995).
[83] HCJ 2739/95 *Saliba Suleiman Makhul v. Minister of Finance*, 50(1) PD, 309 (1996).

was used for military bases. In 1993 the authorities initiated plans designating the land in the area for housing.

42. Justice Heshin wrote an extended opinion of which the other members of the panel agreed. According to this pioneering opinion a citizen is entitled to restitute his confiscated land if the authorities failed to use it for a certain period of time or if the declared public interest purpose of the acquisition changed to another that is not related to public interest. The Court derived this ruling from the authorities' obligation to manage the confiscated land for a public interest purpose, and the property rights of the individual that had been enhanced after the enactment of the 1992 Basic Law: Human Dignity and Liberty:

> According to the emerging before our eyes doctrine, the confiscating authority is not permitted and is not authorized to do with the confiscated land as it wishes – as if it had been a private owner – and it is subject to a regime of specific public interest uses of the land. Indeed, the linkage between a confiscated land and its public interest purpose could stem from the individual's right to property, and the individual's right ought to be upheld – as a matter of principle – and the land be restituted to his possession once the public interest use had ended. Once the public interest is over, so is the authority's legitimacy to maintain its possession and ownership. It is high time to establish this doctrine and of this we declare today. We are aware, of course, of the mini revolution that we are creating in the laws of confiscation and that we are recognizing a doctrine that changes a bit the understanding of property in land. Yet the bite that this doctrine is supposed to take from is limited, by definition – and subject to other legal doctrines – primarily to the relations between the state (or other public authorities) and the individual, and only regarding the law of confiscation. Still, we consider that we should acknowledge the linkage-doctrine. The time has come for this.[84]

43. However, this principled decision left certain crucial issues unresolved such as the timing of its applicability (to past acquisition as well or only to future ones), issues of statute of limitations, and the nature of the public interest purpose of the acquisition that could change. The Court also called upon the legislature to amend the Ordinance. Justice Or, who was against the right to restitute the land from the confiscating authorities in the matter of Nusseibeh (the original hearing and the additional one), agreed with this ruling without elaborating on or noting his earlier positions.

44. In 2010 the Ordinance was amended in a manner that rendered the Supreme Court's new understanding of property rights meaningless.[85] It introduced definitions of public interest purposes that included building new settlements or expanding existing ones, infrastructure, military bases, police stations, desalinations plants, tourism and gas stations. In addition,

[84] HCJ 2390/96 *Kersik v. The State of Israel, Israel Land Administration*, 55(2) PD, 625, 653 (2001).

[85] Before the enactment of this law the Supreme Court rejected another petition by an Arab citizen who alleged that the authorities had neglected the confiscated land for a long time and used it for forestry which was not a legitimate public interest purpose for confiscation pursuant to the Lands (Acquisition for Public Purposes) Ordinance – 1943. The Court found that the disputed land which formed part of a larger one that had been confiscated to expand the town of Nazareth Illit, was used for this public interest purpose. In addition, the forestry plans that the authorities initiated for the smaller specific disputed piece of land was considered a legitimate public interest purpose under the law. See HCJ 7579/07 *Said Dahamshe v. Israel Land Administration et al*, Judgment, 11 November 2009.

the new amendment determined that beginning to use the land for the declared public interest purpose could last for up to 17 years after the confiscation, which is a clear departure from the Supreme Court's guiding new doctrine. Further, the amendment empowered the Minister of Finance to change the original public interest purpose of the confiscation.[86] The applicability of the law's amendment is prospective excluding from its scope confiscations that took place prior to its enactment.[87]

Absentees' Property Law – 1950

45. The Absentees' Property Law – 1950 granted substantial powers for the Ministry of Finance to gain possession and ownership in property that was owned by an 'absent person'. The duration of the law's applicability is from 29 November 1947 until the emergency situation that the Israeli Tentative State Council declared on 19 May 1948 ends. This declared emergency situation is still in place therefore the law remains applicable to this day. Article 1 defines an absent person as: 1 – a person who was a citizen or subject of Lebanon, Egypt, Syria, Saudi Arabia, Iraq, or Yemen;[88] 2 – a person who is present in one of these countries or in any part of the land of Israel / Palestine which is not the State of Israel; 3- a citizen or resident in the land of Israel / Palestine who left it to another place prior to 1 September 1948 or to a place in the land of Israel / Palestine that was at the time under the control of forces that sought to prevent the establishment of the state of Israel or fought against Israel subsequent to its founding. The law also applies to the property of associations and companies that were owned or controlled by absentees. Absentee property is defined as the absentee's.

46. Article 4 of the law instantly transfers the ownership and other rights in absentees' property to the Ministry of Finance's delegate the Custodian of Absentees' Property, based on the absentees' status as such. No additional requirement is needed to gain the rights in such property:

> Considering the provisions of this law –
>
> > Any absentee property is hereby vested to the Custodian from the day of his appointment, or from the day it became an absentee property, based on the later date of the two;
> >
> > Any absentee's right in the property is instantly transferred to the Custodian once the property had been vested; the Custodian's rights are as the owner's.

47. The Supreme Court held in this regard that "being an absentee formulates through the fulfillment of certain factual conditions, and is not subject to any formal declaration. The Custodian's determination is not a constitutive act, rather a mere statement about an existing situation."[89] Once the conditions of article 1 have been fulfilled "the property is

[86] See Articles 2, 7B, 14, 14A, 14B, 14D of the Lands (Acquisition for Public Purposes) Ordinance – 1943 as amended in 2010.
[87] Article 27(a) of the Law Amending the Lands (Acquisition for Public Purposes) Ordinance – 1943 (No.3), 2010.
[88] Following the 1994 peace treaty between Israel and Jordan the Absentees' Property Law – 1950 seized to apply to a person who was a citizen or subject of Jordan after 10 November 1994. Seizer of Jordanian's property that occurred prior to this date remain valid. See article 6 of the Law to Implement the Peace Treaty between Israel and the Hashemite Kingdom of Jordan – 1995.
[89] HCJ 109/87 *Havat Mekura Ltd. v. Ali Younes Hassan et al*, PD 47(5) 1, 29 (1993).

vested with the Custodian according to article 4 of the law."[90] An absentee property is the Custodian's regardless whether he registered it as such in the Land Registration Records.[91]

48. Article 5 of the law provides the awkward determination that not knowing the identity of the absentee does not preclude his property from gaining the status of absentee and its absorption by the Custodian. It is not clear how the ambiguity of a person's identity can assist in determining his or her location in order to trigger the law's applicability. The status of absentee is premised on the presence of a person in a certain geographic area at an ongoing period of time.

49. Article 6 obligates any person to hand over the Custodian absentees' property in his possession. This provision also proclaims that a person's debt to an absentee becomes towards the Custodian. Article 7 mandates the Custodian to preserve the absentees' property, but it does not state that his obligation is towards the absentees. Article 8 empowers the Custodian to manage an absentees' business or terminate it through selling it. Article 10 authorizes the Custodian to issue a certificate that has the effect of a court ruling against a person possessing an absentee property that is land.

50. Article 16 grants the Custodian immunity from civil law suit should administer property that was mistakenly considered as absentee, if the mistake was genuine and logical. Article 17 legitimates a Custodian's transaction regarding absentees' property if conducted in good faith even if at the time of its conclusion the property was not vested with the Custodian as an absentee property. Article 20 absolves the Custodian from paying absentees' loans, except for basic governmental taxes. Article 21 prescribes an obligation for a person or an association who are possessing, using or benefiting from an absentee property to inform the Custodian about such property.

51. Articles 22 and 23 annul transferring absentees' property to a third party by the absentee or by any other person. Articles 27 and 28 authorize the Custodian to grant a person a certificate that he was not an absentee and to consider restituting the property to that person if he shows that he left the country at the relevant time out of fear from Israel's enemies or that he left the country not because of the hostilities that were taking place.[92] Article 30 sets a series of evidentiary rules regarding the determination of a person and property as absentee including provision 30(g) "the Custodian shall not be examined regarding the source of information that led him to grant a certificate according to this law, unless the Court instructed otherwise for a special reason."

52. Article 19 prohibits the Custodian from conducting transactions in absentees' property that is land, except with the Development Authority established according to the Development Authority Law – 1953. In an agreement signed between the Custodian and the Development Authority on 29 September 1953 all absentees' land rights were transferred to the Development Authority. The powers of this authority were designated to use such

[90] HCJ 415/89 *Hassan Salib Darweesh v. The Custodian of Absentees' Property et al*, 46(5) PD, 521 526 (1993).
[91] CA 1397/90 *Hussein Ali Diab v. The Custodian of Absentees' Property et al*, 46(5) PD, 789, 796 (1992)
[92] Article 28A of the law is a 1951 amendment which granted property rights to an absentee that was legally present in Israel after 1951, and became the owner or possessor of property.

land for development purposes, in addition to acting as a source for state funding through loans and employment.[93] It is not clear for whose benefit the Custodian is supposed to administer the absentees' property in his ownership and possession. The law does not impose an obligation on the Custodian to administer the property under his control for the benefit of absentees or to act as their trustee. Its purpose has been compared to confiscation of enemy's property.[94]

53. Despite its application in certain instances to property claimed by non-Arab citizens,[95] the main purpose of the Absentees' Property Law – 1950 has been to capture in the Custodian's broad powers property owned or possessed by Arabs. In 2015 the Supreme Court applied the law to property in East Jerusalem claimed by Palestinian residents of the West Bank, although it is disputed if East Jerusalem forms part of Israel as the law requires to establish jurisdiction.[96] The Court noted the possible ramifications of the extended geographic applicability of the law that could encompass property in Israel which is owned or possessed by Israeli settlers living in the West Bank. It indicated the Attorney General's awareness of this fact and the unlikelihood that the law will be applied against this group of citizens.[97]

54. Since its early consideration of the Custodian's discretion the Supreme Court underscored his immense and almost absolute powers, even when the authorities' actions were glaring in their arbitrariness.[98] The Court legitimated the Custodian's certificates about the absentee status of land claimed by Arab citizens, also when they were issued subsequent to the claimants' petition before the Supreme Court.[99] Discrepancy between the Custodian's position about issuing such a certificate and the Attorney General's had been indicated by the Court.[100] In another instance the Custodian failed to convince the Court that he awarded possession rights to a cultivating company in half of the territory of a land that was declared as absentee property. The Court instructed the Custodian to pursue the law for an appropriate transfer of those rights to the company.[101]

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[93] Government Yearbook, 1954-1955, p.47, referred to in CA 5931/06 *Daoud Hattab Hussein et al v. Shaul Cohen et al*, Judgment, 15 April 2015, para.14.
[94] CA 5931/06 *Daoud Hattab Hussein et al v. Shaul Cohen et al*, Judgment, 15 April 2015, para.16.
[95] See, for example, HCJ 99/52 *Palmoni v. The Custodian of Absentees' Property et al*, 7 PD 836 (1953)(an Israeli agent who left the country during the war in August 1948 to one of the neighboring hostile countries. The Custodian declared him as an absentee and took over his property. The Court ordered to annul his status as an absentee).
[96] U.N. Security Council resolution 478 of 20 August 1980 declared the Israeli enactment of Basic Law: Jerusalem, Capital of Israel which purported to confirm East Jerusalem as part of Israel, a violation of international law, null and void.
[97] CA 5931/06 *Daoud Hattab Hussein et al v. Shaul Cohen et al*, Judgment, 15 April 2015. Based on the law's wording, such rights are the Custodian's without any requirement for any action on his part.
[98] HCJ 3/50 *Emily Kawar et al v. The Custodian of Absentees' Property*, 4 PD, 654, 663 (1950)(noting the Custodian's powers to administer property that is partially owned by absentees). See also HCJ 43/49 *Tanous Ashkar v. The Commissioner for Absentees' Property, Northern District et al*, 2 PD, 926 (1949) (consideration of the Emergency Regulations of Absentees' Property – 1948 that are similar to the 1950 law as well as the inconsistent conduct of the authorities).
[99] HCJ 137/50 *Mohammad Abdel Kader Almasri v. The Commissioner of Absentees' Property, Jaffa*, 5 PD 645 (1951); HCJ 304/52 *Kasem Attiya Mohammad AL-Said et al v. The Custodian of Absentees' Property Haifa et al*, 8 PD 639 (1954).
[100] HCJ 168/52 *Sami Adib Salem et al v. The Custodian for Absentees' Property*, 6 PD 1000 (1952).
[101] HCJ 35/54 *Mohammad Salem v. The Commissioner of Absentees' Property*, 8 PD 1440 (1954).

55. The Supreme Court did not accept Mr. Al-Fahoum's medical documents about his ravel to Beirut for his sister's treatment during the 1948 hostilities, and acknowledged the Custodian's declaration of his absentee status as well as the confiscation of his property.[102] Similarly, the Court approved the Custodian's transactions with third parties, the Development Authority in particular, regarding absentee property which was owned by Arab citizens and erroneously considered as such since the concerned individuals never left the country.[103] It did the same also when the Custodian failed to register the absentee property in the Land Registration Records, not concluding from this failure any bad faith on his part.[104] The Court provided a very broad understanding of what is a transaction perpetrated in good faith with a third party under article 17 of the law:

> Good faith is a subjective standard and should be distinguished from the objective duty of care in which its absence amounts to negligent conduct...any action that was practically carried out sincerely, is seen as conducted in good faith…whether it was negligent or not.[105]

56. In addition, in a majority ruling the Court followed the exceptionally strict evidentiary rules of the Absentees' Property Law to invalidate a transaction between Hasna Shdeida and her brother regarding an alleged absentee property, overturning the Nazareth District Court decision. The property reached the Development Authority via the Custodian of Absentees' Property in 1953 given the alleged absentee status of the brother. In 1986 Ms. Shdeida discovered the absentee status of the property after having received a request to evacuate it.[106] Justice Netanyahu relied on the evidence of the Israel Land Administration to refute Ms. Shdeida's claim that she had cultivated and used the land for a long time and therefore gained rights in the land despite the Custodian's claims:

> The respondent's sun testified that the land had been cultivated for generations. This testimony was contradicted by an official of the Israel Land Administration, who knows the location since 1980, and he described the land as uncultivated, with few heavy rocks, some trees, bushes, natural forest, small number of olive and figs trees, and one eucalyptus tree.[107]

57. Article 4(A1) is a 1965 amendment to the law that applied retroactively to Waqf land (property dedicated to charity under Islamic/religious law). The Custodian is authorized to release Waqf property that would be administered by a group of individuals appointed in various towns as trustees and for charitable purposes (articles 29A, 29B and 29E of the law).[108] The Supreme Court rejected a request to administer Waqf property through an

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[102] HCJ 100/63 *Sharif Omar Al-Fahoum v. The Custodian for Absentees' Property*, 17 PD 2271 (1963). The Court relied on another case with similar factual circumstances not published by the Supreme Court records. See at p. 2276 *Ali Ahmad Mohammad Al-Khatib v. The Custodian of Absentees' Property, Jaffa* (not published).

[103] CA 1397/90 *Hussein Ali Diab v. The Custodian of Absentees' Property et al*, 46(5) PD, 789, 796-97 (1992); HCJ 3747/90 *The Custodian of Absentees' Property et al v. The Estate of the Late Thuraya Ahmad Abdelgani Mousa*, 46(4) PD, 361, 365-367 (1992); HCJ 109/87 *Havat Mekura Ltd. v. Ali Younes Hassan et al*, PD 47(5) 1, 29 (1993).

[104] CA 6912/98 *Khaled Rabah et al v. The Custodian of Absentees' Property et al*, 58(2) PD, 870, 876-878 (2004).

[105] HCJ 170/66 *Wasfiyeh Fayad v. The Custodian for Absentees' Property et al*, 20(4) PD 433, 436-37 (1966).

[106] HCJ 463/89 *The Custodian of Absentees' Property et al v. Shdeida et al*, 45(5) PD 857, 865 (1991).

[107] HCJ 463/89 *The Custodian of Absentees' Property et al v. Shdeida et al*, 45(5) PD 857, 864 (1991).

[108] Articles 29I, 29J, and 29L are 1967 amendments to the law that proclaim similar arrangements regarding released absentee property for the Evangelical-Episcopalian Church.

appointment by the Sharia Court because of the absentee status of the disputed property.[109] It held that the Supreme Islamic Council which administered such property during the mandate had dispersed as a result of the 1948 hostilities and therefore is considered absentee.[110] Further, the Court overturned a ruling by the Appellate Sharia Court holding that it has no jurisdiction over Waqf property that became absentee because this designation annuls its characterization as Waqf and grants the Custodian clean ownership in the property:

> According to the statute therefore the Waqf was vested in the Custodian without limitation prescribed by law, or conditions determined at the time of forming the Waqf or subsequent to that date, and the clean ownership of the property was deposited in his hands. The retroactive annulment of all the limitations, reservations, and the conditions invalidated its Waqf characteristics, and subsequently, with the appropriation of its quality as Waqf, the powers of the Sharia Court to consider its internal administration or to interfere in it have been invalidated as well.[111]

Securing State Control over Land

58. Additional series of laws enacted between 1951 and 1960 established the state's control over land in the country. Until the adoption of the Land Law - 1969 Ottoman law governed issues arising from real estate disputes.[112] The alleged purpose of the Land Rights Settlements Ordinance – 1969 has been to advance clarity regarding land rights, but it also contributed to the state gaining more land, as did the Land Acquisition Law (Peace Treaty with Egypt) – 1980.

59. Articles 1 and 2 of the State Property Law – 1951 declared that all property owned by the British Mandate on 14 May 1948, as a trustee or otherwise, is the state's property since Israel's pronouncement of its founding the subsequent day. Article 3 attributed to the state any property that lacked ownership. Article 9 annulled the Government's Lands Ordinance – 1942 which placed the Mandate authorities as owners or trustees of property in Palestine. Article 2 of the Land Acquisition (Validation of Acts and Compensation) Law – 1953 granted the Minister of Finance the broad power to acquire land that was used in the period between 1948 – 1952 for necessary development needs, security or settlement, was not in the possession of its owner in 1952, and is still required at least for one of these purposes, by issuing a certificate to this effect. Article 2(d) proclaims that issuing such a certificate

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[109] HCJ 332/52 *Yakoub Hasouna as Mitwali and on behalf the Waqf of Haje Fatmeh M. Al-Awadi v. The Custodian for Absentees' Property, Jaffa et al*, 6(2) PD, 1198 (1952).

[110] HCJ 415/89 *Hassan Salib Darweesh v. The Custodian of Absentees' Property et al*, 46(5) PD, 521, 526-527 (1993). See also HCJ 69/55 *Boulos Hanna Boulos v. The Development Authority et al*, 10 PD 673, 681 (1956)(a discussion of the Supreme Islamic Council's status as absentee compared to the status of a person appointed by the Sharia Court for the purpose of administering Waqf property).

[111] HCJ 6452/96 *The Custodian of Absentees' Property v. The Appellate Sharia Court et al*, 55(4) PD, 363, 371 (2001).

[112] The Majalla Annulment Law – 1984 abolished the entire Ottoman law applicable in Israel, except for the Sharia Court's jurisdiction over personal status matters. Article 2(a) of this law maintained the applicability of provisions in other laws that relate to the Majalla. Jurisprudence's Foundations Law – 1980 prospectively annulled the validity of article 46 of the King's Order in Council 1922 – 1947 which stated that Ottoman and equity British law form part of the law in Palestine.

does not mean that the relevant land was not state property or that the state did not possess a right regarding it prior to its acquisition by the Minister of Finance. Articles 3 and 4 set out vague standards for the possibility of compensation, failing to note the right to obtain land in the same size and quality of the acquired one or appropriate financial compensation.

60. Article 22 of the Statute of Limitations Law – 1958 extended the period of time required under Ottoman law to claim title in land through possession and cultivation: from 10 to 15 years in non-registered land, from 15 to 25 years in registered and zoned land. In addition, this provision added 5 more years for the possession count starting from the law coming into effect (1958) if the possession commenced after 1 March 1943. Article 159(b) of the Land Law – 1969 abolished the possibility to claim title in zoned land based on the Statute of Limitations Law – 1958, except if this right had materialized prior to its entry into effect on 1 January 1970.

61. Until establishing the Israel Land Administration (ILA) by law in 1960, the Development Authority and the Jewish National Fund (JNF)[113] managed governmental land confiscated through the Absentees' Property Law – 1950 or the Lands (Acquisition for Public Purposes) Ordinance – 1943. Basic Law: Israel's Land - 1960 defined it as land in Israel owned by the state, the Development Authority or the JNF. The Basic Law which has a constitutional standing in the Israeli legal system prohibited transferring the ownership in this land by sale or any other means, unless specifically permitted by law.[114] Israel's lands are 93% of the total 22 million dunams that form the country's territory.

62. Article 4A of Israel's Land Authority Law – 1960 sets the composition of Israel's Land Council which is empowered to administer Israel's lands. It is constituted from the designated minister and 13 additional members: 7 governmental appointees and 6 representatives of the JNF. The latter organization has explicitly defined its function as intended to serve and advance the interests of a specific ethnic group. In 1961 a treaty was signed between the government of Israel and the JNF acknowledging its historic role in Palestine and affirming the administration of JNF's land through Israel's Land Authority.[115]

63. A 2009 amendment to the Israel's Land Authority Law – 1960 introduced article 1A which proclaimed the purposes of this authority as including working for the public interest and securing land reserves for future generations. Seven years after its creation the Supreme Court had held that the ILA did not constitute a corporation or a separate legal entity that can be subject to orders in civil law suits, rather an administrative body that performs governmental functions.[116] The Court ignored that almost half of the ILA's managing body, the Israel's Land Council, was composed by JNF's member which was established as a corporation and not considered a governmental actor.[117]

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[113] The Jewish National Fund was established in 1901 by central and eastern European Zionists. The purpose of the organization had been to act as a trustee of the Jewish people in relation to land in Israel / Palestine.
[114] See article 2 of Israel's Land Law – 1960 which proclaims specific authorized transactions in this land.
[115] 2009 ministerial order reduced the number of JNF members in Israel's Land Council to two.
[116] CA 570/66 *Abdallah Baloum et al v. Israel Land Administration et al*, 21(1) PD 109 (1967).
[117] See Keren Kayemet Law – 1953.

64. Article 22 of the Land Rights Settlement Ordinance – 1969 enshrines state rights in land whether they were claimed or not, and granted the state title over unproven claims "State rights in land will be enquired and settled whether they were claimed officially or not, and any right claimed by another person that was not proven shall be registered as the state's". Articles 51 and 52 proclaim a right to demand land registration based on possession for extended period of time, subject to the provisions of the Land Law – 1969.[118] Article 112 provided the state with immunity from law suits if during land zoning and registration process certain titles were not noticed even if they had been registered or obtained through a court ruling. Similarly, no law suit can be filed if there has been a mistake in drawing the borders for zoning, the division of land and the determination of a territory.

65. The Land Acquisition Law (Peace Treaty with Egypt) – 1980 granted significant territory in the south of Israel to the state and declared any land settlement disputes regarding them as void. The law established an administrative quasi-judicial committee to consider possible claims against the acquisition of the land, and proclaimed vague procedures for informing citizens, mainly Bedouin communities, about the prospect of losing land that they claim as their own as well as for seeking potential compensation.[119]

Early Litigation against Confiscation

66. The Turan Local Council failed to gain ownership in lands that during the mandate were registered as that of "the High Commissioner for the time being on behalf of the village of Turan". The Supreme Court emphasized the categorical provisions of State Property Law – 1951 that acquired the mandate authorities' property to the state. The Council's allegation that the land was not registered in its name prior to the establishment of Israel was because it lacked an official legal capacity unlike its status after 1948 did not convince the Court.[120]

67. The same scenario occurred with the local council Jaffa of Nazareth whose land was registered during the mandate as "the High Commissioner for the time being on behalf the village of Yafa". The registration also noted that it "is being made in the name of government as there is no legal body to represent the village." The Supreme Court rejected the arguments of Mr. Hanna Nakara, the attorney for the local council who presented mandate era precedents demonstrating recognition of community's ownership similar to the one that existed in Jaffa of Nazareth. It held that there was no necessary identification between the Jaffa of Nazareth communities prior and subsequent to the establishment of the state of Israel.[121]The Supreme Court confirmed its conclusions in an additional hearing conducted in this matter.[122]

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[118] For claiming land rights based on possession for extended period of time see Plia Albeck, "Statute of Limitations in Land in Israel", *1 Kiryat Hamishpat – Ono Academic College Law Faculty Law Review*, 335-352 (2001) (discussing the scope of the Ottoman Law's applicability and the innovations introduced by Israeli law).

[119] Articles 1, 2, 4, 7, 8, 11, 12, 24, 26 of the Land Acquisition Law (Peace Treaty with Egypt) – 1980.

[120] CA 156/64 *Turan Local Council et al v. The Jewish National Fund et al*, 18(3) PD 596 (1964).

[121] CA 547/74 *Asad Ibrahim Khatib et al v. State of Israel et al*, 30(2) PD 440, 445-448 (1976).

[122] AH 10/76 Jaffa of Nazareth Local Council v. State of Israel et al, 31(2) PD 605 (1977). Ms. Plia Albeck from the Attorney General Office represented the state in these deliberations. According to the Supreme Court "The 1947 settlement documents were not submitted to court and it seems that they were lost."(p.607).

68. The Israeli authorities erased the registration of Mr. Younes's land ownership in Arara, banned him from entering and cultivating his land through an order of the military commander, and the Minister of Finance declared this land as required for settlement, development or security purposes pursuant to article 2 of the Land Acquisition (Validation of Acts and Compensation) Law – 1953. The Court rejected Mr. Younes's claim that he should have been heard by the Minister of Finance prior to issuing his certificate about the disputed land:

> We don't consider that issuing the certificate is a quasi-judicial act. The Minister is not ruling regarding a dispute before him, rather is stating about or confirming the materialization of certain facts. By law, issuing the certificate immediately transfers the land to the Development Authority's ownership.[123]

69. The Court confirmed the Minister of Finance's certificate based on the same law in relation to Mr. Nadaf's land, who had also been barred from using it by the Israeli Military. The Minister's certificate was issued subsequent to a case between Mr. Naddaf and the Military in which the Court had expressed reservation about the Military's conduct.[124] Nevertheless, the Court reaffirmed its previous holding about the incontestable nature of the Minister's certificate based on Land Acquisition (Validation of Acts and Compensation) Law – 1953.[125]

70. Waqf land can also be confiscated based on Land Acquisition (Validation of Acts and Compensation) Law – 1953, and its characterization as such does not grant it immunity from the Minister of Finance's reach.[126] An attempt to re-register the ownership of land confiscated based on this law and subsequently leased to the original owners, Bedouin citizens in the Negev, by the Israel Land Administration who sought to evacuate the claimants failed in the Supreme Court.[127]

71. The absolute nature of the Minister of Finance's certificate under article 2 of the law was reaffirmed by the Supreme Court which annulled the claim of actual possession of the confiscated land to contest the Minister's certificate, although this element was prescribed by article 2.[128] The same Court disappointed the Maronite Church in Israel who tried to restitute 23,000 dunams confiscated by the Minister of Finance in the village of Fassuta, north of Israel. The authorities had agreed to restitute about 600 dunams that formed the land for cemetery and church. The Court upheld the state's argument that the rest of the land remain required for security purposes given its proximity to the border with Lebanon.[129]

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[123] HCJ 5/54 *Mahmoud Ali Younes v. Minister of Finance et al*, 8 PD 314, 316 (1954).
[124] HCJ 36/52 *Naddaf v. Minister of Defense*, 6 PD 750 (1952). See also discussion under the chapter Military Rule – Land Rights and Emergency Regulations.
[125] HCJ 14/55 *Haj Mahmoud Al-Nadaf v. Minister of Finance et al*, 11 PD 785 (1957).
[126] HCJ 292/60 *Waqf Ala Al-Din Ashkuntana by the Mitwali Said Abu Al-Afia v. The Development Authority et al*, 15 PD 1278 (1961).
[127] HCJ 84/83 *Mohammad Atiye Al-Wakili et al v. State of Israel*, 36(4) PD 173 (1983).
[128] HCJ 816/81 *Fatmeh Hassan Gara v. The Development Authority*, 39(1) PD 542 (1985).
[129] HCJ 517/85 *The Appointed for the Maronite Church Waqf in Israel through the Archbishop of Tyre and the Holy Land of the Maronite Patriarchy through the appointed Monsignor Kherpo*, 42(1) PD 696, 701-703 (1988).

72. In 1953 the Minister of Finance confiscated about 34,000 dunams near Umm al-Fahem according to the Land Acquisition (Validation of Acts and Compensation) Law – 1953. A dispute about 200 dunams of this land more than 50 years later challenged the legality of the confiscation. The land has been vacant and used for forestry. The Supreme Court underscored the rigidity of the Minster of Finance's certificate about the confiscated land, and that forestry should be understood as a legitimate purpose of settlement and confiscation under article 2 of the law.[130] Plaintiffs who succeeded to demonstrate their ownership in a land confiscated in 1953 based on this law, failed to obtain as a compensation proper land or suitable monetary reparations.[131]

73. Extending the period of time required to possess land in order to claim ownership over it created serious obstacles before Arab citizens to succeed in obtaining land rights through courts. Mr. Al-Tabash failed in his law suit against the Attorney General for this reason. The District Court did not accept Mr. Tabash's allegation that he had possessed and cultivated a piece of land at least for 10 years. The Supreme Court rejected his appeal based on the time extension for the land possession to 15 years:

> The petitioner's attorney acknowledged that his claim before the District Court – and the Magistrate Court – was essentially to gain ownership and registration of land based on article 78 of the Ottoman Land Law. Given articles 22 and 29(b) of the Statute of Limitations Law – 1958, the appropriate time required for the petitioner's claim is 15 years instead of 10, and at the time of filing the law suit before the Magistrate Court the first period of the two had not passed.[132]

74. The Israeli authorities' understanding of cultivation as forming possession to acquire rights in land was adopted by the Supreme Court. The cultivation should be consistent and systematic:

> He [the petitioner] submitted evidence that in the disputed piece of land there were figs trees, but they withered and died twenty years ago. The settling officer correctly said that 'revived a person Mawat land and developed it for a while and prior to gaining rights in it abandoned it, as if he had done nothing.'"[133]

75. A strict interpretation of cultivation was applied also regarding claimed desert land in the Negev.[134] Similarly, the Court accepted the authorities' broad interpretation of land designation as Mawat rather than Miri, in which case no claim for rights based on possession and cultivation of the land is possible. It did so despite the authorities'

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[130] HCJ 4067/07 *Mahmoud Khalil Abdel Fatah et al v. The State of Israel et al*, Judgment, 3 January 2010, paras.24-37.

[131] CA 7935/09 *The Estate of the late Khaled Kassab Saabneh et al v. The Development Authority et al*, Judgment, 17 July 2011.

[132] HCJ 80/58 *Mohammad Mustafa Al-Tabash et al v. The Attorney General*, 12 PD 2006, 2007 (1958). See also CA 547/74 *Asad Ibrahim Khatib et al v. State of Israel et al*, 30(2) PD 440, 443-44 (1976)(Al-Khatib family alleged possession and cultivation of land for generations and sough to own it. The Court ruled that the years count commenced when the land was settled in 1947 and given the extension of the possession period to 25 years based on the 1965 amendment to the Statute of Limitations Law-1958 the family failed to show that they are entitled to register the land as theirs.)

[133] HCJ 472/59 *Hassan Ramli Al-Gadir et al v. State of Israel*, 15 PD 648, 651 (1961).

[134] HCJ 218/74 *Salim Ali Gdei Al-Hawashle et al v State of Israel et al*, 38(3) PD 141, 151 (1984).

identification of nearby territory as Miri.[135] In addition, the Court relied on vague evidence required to demonstrate the status of the land,[136]and undermined the actual consistent cultivation of the land which is a strong indication that the land is not Mawat.[137]

76. Umm al-Fahem local council failed to register rights in its name regarding surrounding land. The Court did not accept its allegation that the disputed land had consistently been used for grazing and should be designated for the local council as Matruka land. It underscored that the local council had constructed certain buildings in the claimed lands and therefore its allegation about land use for grazing had been refuted.[138]

No Title in Israel's Land and the Israel Land Administration

77. The Supreme Court went further in its interpretation restricting the possibility to obtain land rights through possession and cultivation. It overturned a ruling by the Nazareth District Court in favor of a claimant that had possessed and cultivated the land in accordance with the Ottoman and Israeli land laws requirements. However, it allowed the state to introduce a new argument on appeal that based on Basic Law: Israel's Land of 1960 ownership in this land shall not be transferred by sale or any other manner. 1965 amendment to the Statue of Limitations Law-1958 extended the periods for possession to claim ownership without abolishing this possibility. The amendment made it more difficult to obtain rights in land based on possession and cultivation but did not invalidate this option. The Court reasoned that if the basic law bars willful state transactions in Israel's land (93% of the total land in the country) it is not conceivable that gaining rights in land despite the will of the state should be permitted:

> When we come to interpret article 1 of the basic law we should strive to realize its purpose and prefer an interpretation that will coincide with the purpose of its enactment as opposed to disrupting this purpose. The clear aim of the basic law is to prohibit the transfer of ownership in Israel's land (barring few exceptions determined by the legislature) to private owners, as in "the country shall not be sold forever".[139]

78. The Israeli Land Administration (ILA) had consistently granted permits for single Israeli Jewish families to reside in the Negev, south of Israel and control significant area of land. This phenomenon had existed since the early days of the state. Pursuant to a petition filed before the Supreme Court contesting the legality of this kind of settlement given its illegal nature from a planning point of view, the authorities declared before the Court that they would incorporate this form of settlements in the regional planning schemes for the Negev.[140]

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[135] HCJ 342/61 *State of Israel v. Hussein Sawaed et al*, 15 PD 2469, 2472-73 (1961).
[136] HCJ 518/61 *State of Israel v. Saleh Badran et al*, 16 PD 1717, 1719-21 (1962); HCJ 274/62 *State of Israel v. Nimer Hussein Ali Sawaed et al*, 16 PD 1946 (1962).
[137] HCJ 298/66 *Masad Yousef Asad Kasis et al v. State of Israeli et al*, 21(1) PD 372, 381-383 (1967).
[138] HCJ 438/70 *Umm al-Fahem Local Council v. State of Israel*, 26(1) PD, 813, 816-817 (1972).
[139] HCJ 520/89 *State of Israel v. Abdallah Asad Shibli et al*, 46(2) PD 81, 85 (1992).
[140] HCJ 243/99 *Adam Teva V'din et al v. Minister of Agriculture et al*, Judgment, 12 July 2001.

79. In 2006 Adalah – The Legal Center for Arab Minority Rights in Israel challenged the authorities' plans in the Negev that included this form of settlement. The Supreme Court dismissed the petition noting that it is a legitimate mode of settlement aimed to advance agricultural and touristic purposes in the area. It also disapproved with the discrimination allegation highlighting the obligation and commitment of the ILA to conduct its affairs without bias.[141]

80. On the other hand, the Magistrate Court through the Supreme Court failed the residents of the unrecognized village[142] of Atir in the Negev represented also by Adalah. The Courts accepted the state's request for the evacuation of nearly 1000 citizens because of plans to establish a Jewish town in the same area. The state's request was carried out despite the villagers' presence there for more than 60 years, being displaced by the military authorities three times in 1956, and the permission to reside in that location under applicable property law considering the state's lack of any action in their regard for decades.[143]

81. A bid to lease apartments in the Jewish Quarter of East Jerusalem was limited to citizens who served in the military and new Jewish immigrants who were residents. A petition by Mr. Bourkan, a resident of East Jerusalem, challenging this condition was rejected by the Supreme Court. As to the military service condition the Court noted through Justice Haim Cohn that "it is required for simple security consideration" without further elaboration.[144]

82. Although the prospect of challenging state land confiscation and development plans in the Israeli Courts had not proved as successful, the Supreme Court did deliver several judgment on land issues and regarding the ILA that attempted to uphold equal rights and due process. The Court approved the policy to lease land to Bedouins only in a town in the Negev because it was part of a relocation policy for this community from unrecognized villages to permanent towns. It denied the request of an Israeli Jewish police officer to lease land in that particular town.[145]

83. The Supreme Court accepted the petition of an Arab Citizen against the community settlement of Katsir near Umm al-Fahem who refused to permit his residence there alleging the land is the Jewish Agency's based on the ILA's allocation and thus designated for Jews

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[141] HCJ 2817/06 *Adalah – The Legal Center for Arab Minority Rights in Israel et al v. The National Council for Building and Planning et al*, Judgment, 15 June 2010.

[142] The unrecognized villages are Bedouin communities in the Negev that don't enjoy basic governmental services such as education, electricity, and water because of their presumed status as trespassers into state lands. Their relations with some of the nearby Jewish regional councils have been tense. See, for example, HCJ 6672/00 *Gazi Abu Kaf et al v. Minister of Interior et al*, Judgment, 5 November 2002 (a petition by residents of an unrecognized village against the redrawing of a regional council borders given the hostility between the two camps. The Court granted their request and the village was not included in the specific regional council based on administrative law considerations; HCJ 2778/05 *Regional Council Ramat Negev v. Prime Minister, Ariel Sharon et al*, Judgment, 19 November 2007 (a petition against the Attorney General and the Chief of Police to compel them to apply the rule of law against residents of an unrecognized village). For a discussion of this community's rights see the chapter Social and Economic Rights.

[143] PCA 3094/11 *Ibrahim Farhoud Abu Elgian et al v. State of Israel*, Judgment, 5 May 2015.

[144] HCJ 114/78 *Mohammad Said Bourkan v. Minister of Finance et al*, 32(2) PD 800 (1978). Israeli Jewish citizens are obligated to serve in the Israeli military after high school (3 years for men and 2 years for women), whereas Arab citizens are not, except for Arab Druze. The Court approved the policy to lease land in a town in the Negev to Bedouins only because it was part of a relocation policy for this community from unrecognized villages to permanent towns.

[145] HCJ 528/88 *Eliezer Avitan v. Israel Land Administration et al*, 43(4) PD 297 (1989).

only.[146] The Court also ruled that the ILA failed to implement its decision "with all deliberate speed".[147] It determined that there is a principled obligation to appoint an Arab citizen to Israel Land Administration's Council given the right for adequate representation in government and the duty of the authorities to exercise their discretion in accordance with fairness, equality, and other relevant consideration.[148]

84. Adalah's petition before the Supreme Court regarding the policy of the ILA's administration of JNF land, led to the Attorney General's declaration before the Court that the ILA would market land, including the JNF's, without discrimination. Should a non-Jewish person win a bid for land owned by the JNF, the ILA would swap land with it in a non-developed area and that is not designated for marketing.[149]Another legal action by this organization resulted in a change in the ILA's practice and the admittance of an Arab couple to live in a community settlement inhabited by Israeli Jewish citizens and to lease land there.[150]

Police Brutality

85. The relations between the police and the Arab minority have been tense. Three major rvents have shaped this fact in the consciousness of the Arab minority: 1) the 1956 massacre carried out by border patrol police in the village of Kafr Qasim against its residents who were returning to their homes from work without knowing about the curfew that the military commander in the area had imposed; 2) The killing of six protesters and wounding of others who demonstrated against land confiscation in the Galilee in 1976. This event has been commemorated by the Arab minority as Land Day; 3) the excessive use of force that the police used against unarmed mass demonstrations in October 2000, the largest in the minority's history, which resulted in killing 13 Arab citizens and the injury of many more. The legal standard regulating the police's use of force has been affected by the regional and local Arab-Israeli conflict.

[146] HCJ 6698/95 *Adel Kadan et al v. Israel Land Administration et al*, 54(1) PD, 258 (2000).
[147] HCJ 8060/03 *Adel Kadan et al v. Israel Land Administration et al*, Judgment, 26 April 2006, paras.15-18.
[148] HCJ 6924/98 *The Association for Civil Rights in Israel v. The Government of Israel et al*, 58(5) PD 15, 33-43 (2001).
[149] HCJ 9205/04 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Israel Land Administration et al*, Decision, 24 September 2007.
[150] HCJ 8036/07 *Fatina Ebrik-Zbeidat et al v. Israel Land Administration et al*, Judgment, 13 September 2011. The Supreme Court delivered several precedent setting judgments relating to the operation of the ILA not connected to the rights of Arab citizens: HCJ 5023/91 *MK Avraham Poraz et al v. Minister of Construction and Housing, Ariel Sharon*, 46(2) PD 793, 801-805 (1992) (ILA's obligation to hold bids or lottery when allocating land for construction to benefit underprivileged groups.); HCJ 6176/93 *Elyakim 1986 – Agricultural Cooperative Association for Settlement Ltd. Et al v. Israel Land Administration et al*, 45(2) PD 158 (1994)(disqualifying the ILA's allocation of land without a bid); HCJ 244/00 *New Discourse Association, For A Democratic Discourse et al v. Minister of National Infrastructure et al*, 56(6) PD 25 (2002)(annulling decisions of the ILA's Council that benefited Israelis living in agricultural communities by transforming land that they reside on from designated for agriculture to construction.); HCJ 1027/04 *The Independent Cities Forum et al v. Israel Land Administration's Council et al, Judgment*, 9 June 2011 (discussion of ILA's decisions relating to residency and construction rights of Israeli living in agricultural communities. Annulling few elements of the decisions and maintaining most of their content).

The Gould Case 1953

86. In 1953 the Supreme Court overturned a conviction for manslaughter incurred by a representative of the Custodian of Absentees' Property. Mr. Gould claimed that he had brought an Arab infiltrator from Gaza to a police station. The police officers instructed Mr. Gould to accompany the infiltrator to another police station. On the road while walking, Mr. Gould claimed, the infiltrator who was blindfolded attempted to attack his captor. As a result he shot him in the head causing his death.

87. The District Court in Tel Aviv did not accept Mr. Gould's version and sentenced him to seven and a half years imprisonment for manslaughter. The Supreme Court ruled that Mr. Gould's conduct was justified because he was trying to prevent the escape of a person who was reasonably suspected of having committed a felony, using a legitimate measure in the specific circumstances. Although Mr. Gould was a citizen the Court in discussing the right to use of force against escaping arrestee applied the standards relevant to a police officer.[151]

The Kafr Qasim Case 1956

88. The military commander in the Kafr Qasim area imposed a curfew that entered into force at 17:00 on 29 October 1956, the first day of the Suez Crisis. Returning to their village from work and not knowing about the curfew a group of Arab citizens were shot at from close range by a squad of the border patrol police who operated that day as reserves in the military. Forty seven citizens were killed including women and children. The Military District Court convicted the commander who gave the order to execute the shooting and his subordinates for murder.[152] The Military Appellate Court upheld their convictions but reduced their sentence,[153] as did subsequently the Commander in Chief of the Israeli military.[154] The District Military Court held that a manifestly illegal order should be disobeyed.[155]

The Raa'd Case 1971

89. Both the Haifa District Court and the Supreme Court rejected the civil law suit of Mr. Raa'd's wife and estate requesting damages for his death as a result of police shooting. Mr. Raa'd participated in a demonstration in Shefa-Amer demanding to increase Egged buses in the early hours of the morning that transported Arab citizens to their work. In an attempt to disperse the protest the police shot live ammunition in the air. Mr. Raad was shot in the chest and died as a result of the police firing. The District Court ruled that the police benefited from immunity against such law suit because it was not possible to act according to an official's duty of care in the turbulent circumstances of the protest. The Supreme Court upheld the rejection of the law suit not accepting the appellants' claim about shooting

[151] HCJ 57/53 *Yitzhak Gould v. The Attorney General*, 7 PD 1126, 1139 (1953).
[152] MC (Central Command) 3/57 *Military Prosecutor v. Major Malinki*, 17 Psakim (District Court) 90 (1958).
[153] MC (Appeal) 283/58 *Ofer v. Military Prosecutor*, 44 Psakim (Supreme Court) 362 (1960).
[154] See Menachem Finkelstein, "'The Seventh Column' and the 'Purity of Arms' Natan Alterman on Security, Morality, and Law", *20 Law and Military*, 169-192 (2009).
[155] MC (Central Command) 3/57 *Military Prosecutor v. Major Malinki*, 17 Psakim (District Court) 90, 213-214 (1958). The appeal instance did not change this legal determination.

towards the chest which demonstrated clear negligence on the part of the police. It favored the police officers' testimonies over the medical expert's opinion who argued that the bullet's direction entering the chest was from top to bottom.[156]

The Ankonina Case 1990

90. In 1986 occupied Gaza a military commander shot at a car that turned away from a long line of cars waiting at a check point. The military barrier was erected pursuant to the stabbing of an Israeli citizen few days earlier. It was not the only car that did the same. The military commander shouted at the car to stop, fired live ammunition in the air, and subsequently towards the car's tires after it had completed its turn. The driver died as a result of the shooting from the back and at a distance. The District and Appellate Military Courts had convicted the military commander for causing death by negligence. The Supreme Court elaborated on the conditions required to materialize in order for a shooting by a police officer at a suspect be considered legitimate developing the law established by the 1953 Gould precedent. This includes the need for such a shooting to be proportionate in the specific circumstances and subsequent to a warning. Nevertheless, the Court acquitted the military commander finding that his distant shooting from the back fulfilled these conditions.[157]

October 2000

91. Early October 2000 (1st, 2nd, 3rd, and 8th) witnessed the largest unarmed demonstrations by Arab citizens in Israel. The police used live ammunition, snipers and rubber coated metal bullets to suppress the protests which resulted in the death of 13 Arab citizens and wounding of numerous others. The government and the police conducted war game Ruah Seara (Stormy Wind) on 6 September 2000, the first in the police's history that predicted the protests and the police's response including the use of snipers as they occurred in October 2000.

92. A Commission of Inquiry established pursuant to these events found that the police's shooting which killed 13 Arab citizens was apparently not legal and recommended to conduct additional investigation regarding those responsible for it.[158] Known also as the Or Commission pursuant to its head Supreme Court justice Theodor Or, it recommended administrative measures against the Minister of Internal Security and senior police commanders.[159] Yet it failed to attribute prima facie criminal responsibility to the Prime Minister, the Minister of Internal Security, the Israel Security Agency (Shin Bet), and the

[156] CA 751/68 *Hamameh Raad, in her name and as the natural custodian of her minor children et al v. State of Israel*, 25(1) PD 197, 207-214 (1971).
[157] CA 486/88 *Staff Sergeant David Ankonina v. The Military Prosecutor*, 44(2) PD 353 (1990).
[158] Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.2, p.766.
[159] Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.2, pp.563-757.

senior police command for these events, particularly the use of distant lethal shooting by snipers at unarmed protesters.[160]

93. Upon the recommendation of Prime Minister Ehud Barak and with the participation of Minister of Internal Security Shlomo Ben Ami and Chief of Police Yehuda Vilk, the police conducted a war game on 6 September 2000 which anticipated the protests in an accurate manner. Titled Ruah Seara (Stormy Wind) the war game also expected the use of snipers in Umm al-Fahm area about a month prior to their actual deployment. The scenario envisaged by the police was identical to developments on 2 October 2000 except for shooting by protesters. According to the representative of the police's northern district at the war game:

> As a response to the scenario, first stage in Bartaa', first stage in Bartaa' concentration of protection measures and snipers, dealing with the event on the basis of public disorder control, develops to shooting, isolating road 65 by check points.[161]

94. Prime Minister Ehud Barak described during a radio interview on the morning of deploying and using snipers his instruction to the police to use all necessary force to open blocked roads. He also praised the police's conduct a day before despite his awareness that they killed at least one person and injured many others:

> At a meeting that lasted until after midnight at my home, I directed the police force and the Minister of Internal Security – incidentally, both deserve great praise for the self-control they exhibited yesterday during the demonstrations – but I told them that they have a green light to take any action necessary to maintain law and order and ensure that citizens of the state are free to move about everywhere in the state.[162]

95. Ehud Barak supervised the police's conduct in October 2000 and testified before the Or Commission about his first-hand experience as a former senior security official in commanding and leading responses to disturbances:

> I was IDF's Deputy Chief of Staff and participated in government meetings when Popper murdered the workers near Rishon Lizion, and when the events at the (1990 –MD) Temple Mount took place resulting in 21 killed. And I was IDF's Chief of Staff during the massacre at the Cave of Machpelah, and the subsequent harsh events. All of this I know. From personal and direct experience.[163]

96. Minister of Internal Security Shlomo Ben Ami and the police's senior command praised the use of snipers against unarmed protesters as a deterrent, rather than as a response to

[160] See Marwan Dalal, War Game Ruah Seara: Criminal Responsibility of Senior Israeli Officials for Use of Snipers in October 2000 (Haifa: Grotius – Center for International Law and Human Rights, 2014).
[161] Representative of the Police Northern District at the war game, exhibit no.2438 before the Or Commission, protocol p.120 (transcript of war game Ruah Seara 'Stormy Wind').
[162] Exhibit no.4283 - transcript of radio interview with Prime Minister Ehud Barak, "This Morning Show" 06:00-08:00am, Reshet Bet, 2 October 2000. The meeting lasted from 22:00pm to 02:00am. See Or Commission Report, Vol.1, p.209.
[163] Ehud Barak's testimony before the Or Commission, 20 August 2002, protocol p.15543.

imminent threat to life, in their conclusion to an assessment meeting held on 8 November 2000:

> The calculated combination of special professional forces (snipers, undercover personnel, and more) during the serious public disorder events, was a turning point in handling the events.[164]

97. The Or Commission warned Arab elected figures MK Azmi Bishara, MK Abdel Malek Dahamshe, and Umm al-Fahem mayor Sheikh Raed Salah that their political speeches from 1998 to 2000 contributed to escalating the relations between the Arab minority and the authorities, but did not recommend any recommendations in their regard because of their elected status.[165] A petition to the Supreme Court against the issuing the warnings was not successful.[166] No Israeli Jewish figures had been warned for similar allegations or worse, most notably MK Ariel Sharon whose visit to the Haram Al-Sharif / Temple Mount few days before the events inflamed the tension both in the occupied territories and in Israel. As the author of this report had argued in response to Israel's leading constitutional law authority Professor Amnon Rubenstein's discriminatory allegation against the Or Commission:

> The Or Commission was right in not issuing recommendations against these elected figures, and it was mistaken, from the beginning, when it issued warnings against them. An official commission of inquiry is an arm of the executive branch. Its purpose is to critically examine the government's conduct, actions or omissions that caused a loss of public trust. It is not supposed to examine political positions, or lawful political actions undertaken by political currents.
>
> The discrimination committed by the Or Commission differs from that which Rubenstein characterized as between executive branch officials and elected Arab figures that were warned. Rather, the discrimination is between the latter and Jewish elected figures that were not summoned at all to testify before the Commission; at the top of this list is Ariel Sharon. Sharon's provocative visit to al-Aqsa mosque compound on 28 September 2000 received minimal attention in the Or Commission report because according to the Or Commission, this date did not fall within its mandate. On the other hand, the Commission examined political statements made by Arab public figures since 1998. The Or Commission's disregard for Sharon's conduct is also peculiar because police intelligence material in the Commission's possession warned of its danger.[167]

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[164] Exhibit no.747A before the Or Commission (the conclusion of the 8 November 2000 police commanders' assessment meeting). See also exhibit no.747 before the Or Commission (the same conclusion with minor amendments made by Chief of Police Vilk: Special Forces instead of snipers); testimony of Yehuda Vilk before the Or Commission, 25 October 2001, protocol p.7685 (regarding exhibit 747 "to write snipers is also correct").

[165] Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.2, pp.643-646.

[166] HCJ 6342/02 *MK Abdel Malek Dahamshe et al v. The Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000*, Judgment, 4 August 2002.

[167] See Marwan Dalal, "The Or Commission indeed discriminated", *Haaretz*, 13 October 2003.

98. The Or Commission decided to hold the examination of Israeli Security Agency's (Shin Bet) top two officials, its head and his deputy, in camera. This organization has played a significant role in shaping governmental policy towards the Arab minority since the state's founding. Its head and district commanders participated in the crucial meetings with the Prime Minister, the Minister of Internal Security and the senior Police Command during the investigated events. The Supreme Court rejected a petition filed on behalf the October 2000 victims' families challenging this decision.[168]

99. The Or Commission included in its report a finding about the discrimination that the Israeli authorities had consistently applied against the Arab minority:

> The events, their exceptional nature and harsh outcome stem from deep seated factors, which created an explosive situation among the Arab public in Israel. These factors, including the state and its consecutive governments, failed to provide in depth and comprehensive approach to the severe problems posed by the existence of a large minority of Arabs in the Jewish state. The governmental treatment of the Arab sector had been characterized in large part by neglect and discrimination. The establishment did not show sufficient sensitivity for the Arab sector's needs, and did not act appropriately to allocate the state's resources equally also to this sector. The state did not do enough, and did not put enough effort, to realize equality for its Arab citizens and to abolish the phenomenon of discrimination and deprivation.[169]

100. The Or Commission recommended that the Police Investigating Unit (Mahash) should further investigate the police's illegal use of force, including the deployment of snipers during October 2000, which resulted in death and serious injuries to numerous individuals. Mahash's investigation has suffered from substantial flaws,[170] as did the subsequent examining report of the Attorney General Office.[171]

101. Judge Theodor Or has condemned the conduct of Mahash regarding the police killings in October 2000 in a lecture he delivered at Tel-Aviv University on 1 September 2004, one year after the publication of the Commission's report:

> In general, Mahash did not collect evidence relating to the events surrounding the killings of the citizens, did not gather evidence at the scene, and did not attempt to locate any of the police officers who were involved in the incidents shortly after they occurred… The Commission of Inquiry recommended that Mahash conduct an investigation into a number of incidents in which 13 people died. The intention was that, following the investigation, a decision would be reached over whether indictments should be filed and if so against whom. It is becoming clear that, to

[168] HCJ 950/02 *Families of the October 2000 Victims v. The State Commission of Inquiry into the Clashes between Security forces and Israeli Civilians*, Judgment, 4 February 2002.

[169] Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.2, p.762.

[170] Mahash, Conclusions regarding the Clashes between Security Forces and Israeli Citizens in October 2000 (Jerusalem: Ministry of Justice, 2005). For a critical analysis of Mahash's investigation regarding all the October 2000 killings by the police see Marwan Dalal, The Accused (Adalah the Legal Center for Arab Minority Rights in Israel, 2006).

[171] The Attorney General, Decision regarding Mahash's Report (Jerusalem: Ministry of Justice, 2008).

> date, no conclusion has been reached over whether indictments are to be filed in relation to any of the events that Mahash was charged with investigating. The explanation given is that Mahash lacks sufficient personnel, and that only when additional manpower was provided did the pace of the investigation accelerate. In light of the grave results of the events that Mahash is charged with investigating, in light of the fact that the testimonies obtained by investigators on behalf of the Commission and by the Commission itself were always available to everyone, including Mahash investigators, as long ago as when the Commission was performing its work; and in light of the fact that over a year has passed since the Commission made its recommendations, it is regrettable that the Mahash investigation has not accomplished more.[172]

102. Justice Or's critique of Mahash's conduct in the aftermath of the October 2000 demonstrations did not appear in the report of which he was its principal author, and ignored the fact that two of the Commission's investigative team members were Mahash personnel (Alex Or and Avidan Shtal). Further, Mahash's investigators are police officers who are loaned to the Police Investigation Division and are expected to return and operate in their former capacity.

103. Since the creation of Mahash in 1992 and for the subsequent twelve years there have been repeated discussions about employing trained investigators independent from the police. The latest was the State Comptroller 2005 report which observed that the deliberations and committees that considered the status of Mahash's investigators have been futile:

> From the above description it appears that the issue of civilizing Mahash's staff has accompanied its activity for the last 12 years and remains unsettled. Decisions regarding the required steps for civilizing have not been carried out, and no other clear decisions have been taken. The above mentioned bodies seized to deal with this matter, and it has been totally neglected in recent years.[173]

104. The Or Commission failed to use its power under article 9 of the Commissions of Inquiry Law – 1968 to invite Mahash representatives for questioning regarding their investigative conduct pursuant to the October 2000 protests and the police's use of lethal force. Article 9(a)(1) provides that the "Chairman of the Commission of Inquiry, in consultation with its other members, is authorized to invite a person more than once before the Commission to testify, or to present documents, or other exhibits in his possession."

105. In addition, the Or Commission blamed Arab citizens for their hesitant cooperation with the Israeli authorities as a reason for not advancing the investigation.[174] It mentioned

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[172] See Theodor Or, One Year to the Report of the State Commission of Inquiry regarding the October 2000 Events, (Tel Aviv: Tel Aviv University Press, 2004); Yair Ettinger, "Or critiques Mahash: not one investigation has been completed in relation to October 2000", *Haaretz*, 2 September 2004.

[173] "The Institutional Handling of Complaints about Police Brutality and Inappropriate Conduct of Police Officers", (Jerusalem: State Comptroller Report 56A, 2005), p.376.

[174] Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.1, pp.14-16.

the fact that some of the victims' families had declined to conduct an autopsy for their loved ones after they had been buried.

106. The Or Commission failed to note that: a. Mahash had instructed hospitals to release victims' corpses after the killings by the police in October 2000; b. four autopsy reports of the victims were in Mahash's possession, including that of Muslih Abu Jarad, who was killed in Umm al-Fahm on 2 October 2000 as a result of police sniping; c. Investigating Reason of Death Law – 1958 empowers Mahash to request a court to conduct an autopsy after a deceased person had been buried; d. Article 9 of the Commissions of Inquiry Law – 1968 empowers it to examine Mahash's conduct and instruct it regarding its powers and responsibilities under the law.

107. The critique of Mahash had been required throughout the proceedings of the Or Commission. Its absence from the Or Commission report and Justice Or's late pronunciation of this critique are, at best, puzzling. He was authorized to examine and instruct Mahash about its obligations under the law during the Commission's proceedings, but he failed to do so and did not express any reservations about its conduct in the Commission's report. Justice Or should have explained in public this discrepancy in his judicial conduct as well as what drove him to express the late sharp observations about Mahash's failures.

108. Mahash's subsequent investigation regarding the police's responsibility for the shooting and killing of 13 Arabs suffered from serious flaws. Its failed examination of the deployment and use of snipers against protesters from a distance was staggering. Mahash found that the use of snipers was legitimate to open road 65 in Umm al-Fahm area, considering that there was imminent danger to police officers trying to disperse protesters, although they were more than 150m distant from the police. The snipers shot only at demonstrators using David Sling which had a potential of causing serious and imminent injury. Their conduct was proportionate, including the simultaneous shooting of three snipers at one target – protester. According to Mahash, The fact that the police did not use less lethal measures than snipers, and did not warn the protesters prior to the snipers' shooting is immaterial in this case.[175] Mahash concluded:

> From the investigation material it appears, that the Chief of Police instructed during a meeting the evening before to open the road and for this purpose snipers were deployed. We are of the opinion, that the police's obligation to maintain the right of Arabs and Jews to drive on main roads free of disturbances should not be judged through the criminal justice process…therefore, we have decided, that considering the severe public disorder, the extreme violence and the feeling of uncertainty that captured the police on 2 October in Umm al-Fahm, as in other places in the country, it is not possible to determine under the required conditions of a criminal procedure that Alik Ron's decision to use snipers, against stone throwers, with Sling David, was not legal. Thus we decided to shelve the file against Ron for lack of evidence.[176]

[175] Mahash, Conclusions regarding the Clashes between Security Forces and Israeli Citizens in October 2000 (Jerusalem: Ministry of Justice, 2005), pp.62-72.

[176] Mahash, Conclusions regarding the Clashes between Security Forces and Israeli Citizens in October 2000 (Jerusalem: Ministry of Justice, 2005), p.72.

109. Mahash should have examined weather there had been evidence that constituted a prima facie case against the police's northern district commander Ron, not if he would have bene convicted beyond reasonable doubt pursuant to an indictment and criminal procedure. Such evidence were ample before the Or Commission and Mahash. Its findings and conclusions contradicted those of the Or Commission. Its analysis was fictitious.

110. Mahash's investigation of Alik Ron on 10 April 2005 was short spanning a bit more than one page. During this investigation Ron's version regarding seeing the protesters whom he ordered the snipers to shoot at because of their alleged imminent danger to life was different than the one he provided to the Or Commission. Mahash investigators did not confront him with this significant contradiction, or change in his versions. Ron at Mahash investigation:

> Question: When you authorized the snipers to shoot, did you see the danger, or did you rely on reports you received?
>
> Answer: I was near them. I operated the snipers after having been there, saw the danger and instructed them to shoot.[177]

111. Ron's version before the Or Commission:

> Justice Theodor Or: We can say then that you have not identified the targets, rather instructed them what are the appropriate targets, that the shooting should be at Sling David users and below the knee.
>
> Alik Ron: Some of the targets I observed and instructed based on clothing etc, others the reporting satisfied me.[178]

112. Ron claimed before the Or Commission that he was the one who deployed and operated the snipers in Umm al-Fahm area "from A to Z".[179]This included ordering their collective shooting of three snipers at the same target.[180] At Mahash investigation, Ron alleged that the commander of the snipers decided to order the targeting of a single protester by three snipers. It was not his order. Mahash failed to document this version of Ron in writing, but it is heard through the tape which recorded Mahash's investigation of Ron.[181]

113. Mahash failed to enquire with Ron about this change of version, and did not consider Ron's contradictions as another strong indication for his criminal responsibility in deploying and operating the snipers. It also failed to ask Ron about withholding the fact of deploying and operating snipers in Umm al-Fahm area from the government, which the Or Commission found as another factor for his failed conduct.[182] Mahash overlooked the 8

[177] Alik Ron statement to Mahash, 10 April 2005.
[178] Testimony of Alik Ron before the Or Commission, 4 September 2001, protocol pp.6230-6231.
[179] Testimony of Alik Ron before the Or Commission, 4 September 2001, protocol p.6219.
[180] Testimony of Alik Ron before the Or Commission, 4 September 2001, protocol p.6226.
[181] Mahash Tape of Alik Ron's statement, 10 April 2005.
[182] Testimony of Alik Ron before the Or Commission, 4 September 2001, protocol p.6219-6220; Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.2, pp.494, 498.

November 2000 police commanders' positive assessment, including Ron's, of using snipers as deterrent against unarmed protesters,[183] and not in an imminent threat to life condition, which was another clear manifestation of the police's northern district commander intent to cause death and serious injuries.

114. Mahash's investigation of the deploying the snipers in Umm al-Fahm was malicious. It reinforced the understanding that it is not an independent entity from the police, considering that its investigators are on loan police officers who expect to return and work with their former colleagues and superiors.

115. Following the publication of Mahash report on 18 September 2005, the Attorney General announced that he will examine Mahash's report although no person or organization had requested to conduct such an examination.[184] On 27 January 2008 the Attorney General published his report confirming Mahash's conclusions, including regarding the use of snipers in Umm al-Fahm area on 2 October 2000.

116. The Attorney General Office explained at length the legal basis for Ron's purported legitimate conduct in using snipers to open Road 65 in Umm al-Fahm on 2 October 2000.[185]Yet, the Attorney General did not order additional investigation of Ron, nor did he note the change in his versions before the Or Commission on the one hand, and to Mahash on the other.

117. Similar to Mahash, the Attorney General Office omitted the Or Commission's finding about Ron having concealed the use of snipers from the government when assessing his conduct. It also failed to link the police commanders' 8 November 2000 positive assessment of using snipers against unarmed protesters for deterrence purposes to Ron's intent to inflict death and serious injuries among them. The Attorney General's final recommendation in relation to former northern district commander in the police was identical to Mahash's: no sufficient evidence to prosecute Ron.

118. Two cases were filed by Adalah before the Supreme Court against the head of the Border Police Bentzi Sau who was complicit to the use of snipers in the Umm al-Fahem area. The first was during the Or Commission deliberations requesting the Court to order the cancelation of his promotion. The Court rejected the petition conceding with the Attorney General's response that a decision in this matter before the Or Commission had concluded its work was premature.[186] A majority ruling of this Court accepted the petition against Sau's promotion in contravention to the Or Commission's recommendation to suspend it for four years.[187]

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[183] See Report of the Official Commission of Inquiry to Examine the Clashes between Security Forces and Israeli Citizens in October 2000, September 2003, Vol.2, pp.499-500.
[184] Attorney General Menachem Mazuz, Introductory Letter to the Office's Report, 27 January 2008.
[185] Attorney General Office, Decision regarding Mahash's Report (Jerusalem: Ministry of Justice, 2008), pp.345 - 379.
[186] HCJ 3286/01 *Victims' Families Committee v. Minister of Internal Security et al*, Judgment, 31 May 2001.
[187] HCJ 4585/06 *October 2000 Victims' Families et al v. Minister of Internal Security et al*, Judgment, 24 October 2006.

The Sadi Case 2005

119. 17 year old Mahmoud Sadi was killed by undercover police officers in Lod on 8 December 2003. They did so while he was in a car at a red stopping light, after surrounding him by two cars one from the side and another from the rear. The police officers claimed that they were looking for drug dealers and had received a report about a possible shooting in Lod.

120. Mahash decided to close the file against the police officers for lack of guilt. The Attorney General as well as the Supreme Court upheld its decision rejecting the family's quest for redress represented by Adalah. They were not convinced from the serious discrepancies in the statements the police officers provided to Mahash, including: a. only one officer claimed seeing a gun by Sadi, and it was not the police officer who shot the lethal bullet from the back; b. the forensic report did not show any of Sadi's fingerprints on the alleged gun found in his car after the termination of the purported clash between the parties; c. a witness to this incident stated to Mahash that he saw the entire event noting that Sadi did not point a gun at the police nor did he carry one.

121. At the hearing before the Supreme Court the petitioners were confronted with an awkward conduct by the panel led by Chief Justice Aharon Barak. The Court refused to hear oral arguments during the hearing scheduled by it that was held on 5 September 2005, and strongly recommended that the petitioners withdraw their petition. The Court could have rejected the petition without inviting the parties to present oral arguments.[188] The petitioners were compelled to abide by the Court's imposing proposal. Nevertheless, it decided also to reject the petition in one line without providing any reasoning, including not stating that it was not founded factually or legally.[189]

Miscarriage of Justice

> "The three judges of the Haifa District Court, who are hearing the file of Rachel Heller's murder, visited yesterday afternoon the crime scene near Caesarea. Their intent was to have a direct impression prior to reaching a verdict regarding Baranes…the journey to the crime scene was a regular hearing of the court. Justice Avraham Friedman barred the reporters from taking photographs or recording it, but the atmosphere was more convenient and it was possible to hear comments that we are not accustomed to notice in court hearings."
> Yoel Dar, "The Judges of Amos Baranes Examined the Murder Reconstruction Track", *Davar*, 18 November 1975, p.4.

> "Ezra Goldberg, Retired Police Officer: Markus did not let Baranes sleep for four days and four nights. And this made him collapse totally, and then he was willing to say that he murdered his father.
> …

[188] See article 5 of the High Court of Justice Procedure Regulations – 1984.
[189] See HCJ 12000/04 *Labiba Sadi v. The Attorney General*, Judgment, 5 September 2005. See also Ran Shapira, "Supreme Court Does Not Accept Petition Demanding Criminal Indictment of Police Officers Who Shot and Killed Mahmoud Sadi", 18 Adalah's Newsletter, September 2005, http://www.adalahYit.org/uploads/oldfiles/newsletter/eng/sep05/fet.pdf

> Police officer talking to Baranes during the actual interrogation: You wrote a certain statement, can you read the statement and sign it? [He reads it to Baranes] I can show you the place. And Rachel's room in the soldiers' dormitory from where I picked her up, and I am willing to show you the location where I struggled with her and the places where I disposed of her body and her belongings.
> Baranes: Yes, but you know that all of this is imaginary.
> Police officer: Thank you."
> *Murder for Life*, Yitzhak Rubin film, Chanel 1, 21 November 2005.

> Lack of alertness and understanding by all elements of the law enforcement regarding what they had encountered, the involvement in the investigation of those who were suspected of exercising inappropriate consideration to thwart it, and incomprehensible failure on the part of those who observed these suspicions with idleness, joined all together, as detailed in this report, and led to descent the curtain on a play in which there are those who had been murdered, murderers, and law enforcement elements, but no convicted accused for murder, that would receive their deserved punishment.
> Commission of Inquiry to Examine the Law Enforcement System in the Perinian and Police Officer Tzahi Ben-Or Affair, 2007.[190]

The Israeli Criminal Justice System

122. The issue of miscarriage of justice in Israeli courts does not relate exclusively to the relations between the Arab citizens and the Israeli authorities which have been affected by the discrimination as well as poor social conditions that they incur. Yet, it is important to examine this problem also through these lenses by reviewing two cases that demonstrated serious flaws in the conduct of the Israeli legal system. These cases have also been widely publicized in the Israeli press throughout the legal proceedings. In the two cases Arab citizens were accused of murdering young Israeli Jewish persons.

123. In both murder cases of the 13 year old boy from Haifa Danny Katz on 8 December 1983 and 16 year old Hanit Kikus from the southern town Ofakim on 10 June 1993 there had been attempts to request retrials. The convicted murderers of Danny Katz obtained a retrial only to be convicted again for his murder. The Supreme Court rejected the request to conduct a retrial regarding the murder of Hanit Kikus.

124. Another significant case that will be examined is that of Amos Baranes, who was convicted for murdering 19 years old soldier Rachel Heller near Netanya in October 1974. For decades Baranes claimed innocence filing several requests for retrial until he succeeded to obtain one and was acquitted in 2002. These three cases are probably the most notable in the Israeli legal discourse about miscarriage of justice. They have also been well memorialized in the press.

[190] Report of the Commission of Inquiry to Examine the Law Enforcement System in the Perinian and Police Officer Tzahi Ben-Or Affair (Jerusalem, 2007), p.182.

125. According to the Israeli Central Bureau of Statistics in the years 2000 to 2012 50% to 61% of the Attorney General Office's indictments were filed against Jewish suspects compared to 34% to 44% filed against Arab suspects, reflecting a significant disparity in relation to the proportion of each group in Israeli society: 80% to 18%. The rate of convictions in the same period for the entire group of indicted suspects was 81% to 87%.[191] The rate of criminal convictions for grievous offences has been exceptional and deteriorating for all indicted persons: 95.4% (1990); 97.4% (2000); 99.8% (2004); 99.9% (2005).[192] The same phenomenon existed in 2006.[193]

126. Since Israel's founding only 26 retrials were carried out.[194] This figure distances the Israeli legal system from others, primarily the United States and England. The academic legal research has repeatedly conducted comparisons with these two countries, the United States in particular, presuming identification with their regime of governance and expressing disappointment regarding the statistical disparity.[195]It is rare to find a comparative research with the Russian legal system or any other Eastern European country.

127. The Dean of the Hebrew University Law School Professor Mordechai Kremnitzer opened his article about this subject with a quote from the U.S. Supreme Court that emphasized the need to reach a conviction based on solid evidence rather than the accused's confession. He noted the probability of acquitting an accused who admitted perpetrating a crime by an Israeli court "the possibility is very low, approaching zero."[196] Justice Uri Shtruzman of the Tel Aviv District Court, who subsequently served as chairman of the Likud's internal elections committee indicated the reasons for providing false confessions by suspects that include investigators' violence, promises and maneuvers, financial difficulties and a quest to end the burdening investigation process.[197]

128. The proposition of a specialist commission to amend article 12 of the Evidence Ordinance – 1971 the purpose of which was to disqualify a suspect's admission that was obtained unlawfully and to require additional independent evidence for conviction other

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[191] Central Bureau of Statistics, Statistical Abstract of Israel 2014, Criminal Statistics: Persons Accused in Criminal Trials, By Selected Characteristics, http://www1.cbs.gov.il/shnaton65/st11_06x.pdf

[192] Central Bureau of Statistics, Statistical Abstract of Israel 2007, Criminal Convictions for Grievous Offences, By Selected Characteristics, http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st11_03&CYear=2007.

[193] Central Bureau of Statistics, Statistical Abstract of Israel 2008, Criminal Convictions, By Selected Characteristics, http://www.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st11_04&CYear=2008. The title of this chart differs from the 2007 one by omitting the term 'grievous offences', but the data relates to the same topic.

[194] Public Defender's Office, Activity Report for the year 2013, 54 (Ministry of Justice, 2014).

[195] See Boaz Sangero, "The Admission as a Basis for Conviction – Is it Indeed the "Queen of Evidence" or Only the Empress of False Convictions", *4 Aley Mishpat – College of Law and Business Law Review*, 245 (2005); Efrat Fink & Rotem Rosenberg – Robbins, "On The Institutional Problems that Prohibit Amending Wrongful Convictions in Israel", *5 Maa'sey Mishpat – Law Journal for Law and Social Justice*, 193 (2013); Boaz Sangero, Innocents' Conviction in Israel and the World – Factors and Solutions (Tel Aviv: Resling, 2014).

[196] Mordechai Kremnitzer, "Conviction Based on Admission – Is There a Danger in Israel to Convict Innocents?", *1 Ha-Mishapt – College of Management Law School Law Review*, 205 (1993).

[197] Uri Shtruzman, "The Suspect's Defense against False Admission", *2 Ha-Mishpat – College of Management Law School Law Review*, 27 (1992).

than the admission was not incorporated into law.[198] The commission headed by former Supreme Court Justice Eliezer Goldberg reviewed the false methods of interrogation that the police applied which included: extended periods of sleep deprivation accompanied by psychological mistreatment, severe beating, and joint interrogations with the Israel Security Agency (Shin Bet).[199]

129. Supreme Court jurisprudence introduced certain rules aimed at increasing protection for suspects held in police custody. A majority ruling annulled a regulation that limited holding a private meeting between an attorney and his in custody client should the prison's warden consider that their contact might result in committing a crime.[200] In addition, it adopted two rules that disqualify questionable evidence: a. if not warning a suspect under investigation that he has the right to remain silent and to consult with an attorney his autonomy and free will were substantially hindered resulting in providing a false admission; b. if accepting the unlawful evidence the accused's right for due process was significantly hampered in contrast to Basic Law: Human Dignity and Liberty. The Court also noted that when deliberating serious crimes the interest of securing public order could overcome the right for due process.[201]

130. A government appointed commission of inquiry which was granted certain powers of an official commission of inquiry pursuant to the Commissions of Inquiry Law – 1968 found serious flaws in the police's criminal investigation process and its supervision by the Attorney General Office. It was established in 2005 and headed by Chief Justice of the Jerusalem District Court Justice (ret.) Vardi Zeiler, who was joined by a former Prosecutor, and a former senior police commander. Its mandate was to inquire about the police's investigation process regarding the murder of a criminal in a hospital by persons disguised as police officers, the police's relations with criminals and the murder of a former police officer in Mexico who was a potential state witness against his colleagues in relation to corruption allegations. The Zeiler Commission found that the police, the Internal Investigation Unit of the Police (Mahash), and the Attorney General Office failed in their duties to uphold basic binding norms as well as the applicable law.

131. Known as the Commission investigating the police conduct in the Perinian affair it determined in 2007 that senior police officers lied before it, submitted false reports as police officers or failed to report despite their obligation to do so.[202] As to police investigation of grievous crimes it recommended, among other things, that:

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[198] Report of the Committee regarding Conviction based on Admission Alone and the Grounds for Retrial, 22 (Jerusalem, 1994).

[199] Report of the Committee regarding Conviction based on Admission Alone and the Grounds for Retrial, 23-26 (Jerusalem, 1994).

[200] HCJ 1437/*02 The Association for Civil Rights in Israel et al v. The Minister for Internal Security*, 58(2) PD 746 (2004).

[201] HCJ 5121/98 *Corporal (Res.) Rafael Yissascharof v. The Military Prosecutor et al*, 61(1) PD 461 (2006), paras.36, 67, 72-73 of Justice Beinich's opinion.

[202] Report of the Commission of Inquiry to Examine the Law Enforcement System in the Perininan and Police Officer Tzahi Ben-Or Affair (Jerusalem, 2007), p.147, para.11.20.

> Investigating grievous crimes, that their definition and substance would be determined by police regulation (hereinafter – grievous crimes), would entail a reporting obligation in each file upon the person responsible for investigating.
> The reporting should include all the following: the path of the conducted investigation; the reason for pursuing this path; the alternatives in the file for the selected path of investigation; indicating the reason for the absence of additional alternatives; the compatibility or lack thereof of the selected path for investigation with existing intelligence information.[203]

132. The Commission considered that Mahash's decision to close the investigation against a senior police officer suspected of having received a bribe and breaching his fiduciary duty as a public official on the ground of lack of evidence as opposed to insufficient evidence was not reasonable.[204]As to the Attorney General Office's obligation to supervise the police's investigation of grievous crimes, the Commission found inadequacies and recommended to establish binding rules to clarify the relationship between the two bodies:

> The authorizations of the Attorney General's regional offices are required to perform various police activities. The working relationships in these aspects have suffered from disruptions, both within the Attorney General's regional office, and in its relationship with the police (see chapter 7). To reduce these disruption to minimum, it is recommended:
> It should be accurately determined, by law or regulation, what are the matters that require a prior authorization of the Attorney General Office as a condition for the police's activity.[205]

The Murder of Danny Katz 1983

133. 13 year old boy Danny Katz from Haifa was murdered on 8 December 1983. He was kidnapped in a car, hit by a plank, strangled by a rope, and subjected to sexual abuse subsequent to the murder. The following day his body was removed from the thicket where it was placed after the murder to the location where it was found three days later near the town of Sakhnin. Trash in proximity to the location of the body contained personal items of one of the convicted for Katz's murder. Five acquainted Arab Citizens were convicted for this murder based on their admissions and sentenced to life imprisonment: three supermarket workers from Sakhnin located in Katz's neighborhood, and two from Wad El-Ein, a worker in the same supermarket and the other was a guard at a construction location.

134. During their interrogation one of these suspects, Ahmad Kuzli, volunteered to provide information about another murder in return for gaining a state witness status. The police was able to extract from him information about the rape and murder of 21 year old

[203] Report of the Commission of Inquiry to Examine the Law Enforcement System in the Perinian and Police Officer Tzahi Ben-Or Affair (Jerusalem, 2007), p.173, para.12.61.
[204] Report of the Commission of Inquiry to Examine the Law Enforcement System in the Perinian and Police Officer Tzahi Ben-Or Affair (Jerusalem, 2007), p.117, para.6.45.
[205] Report of the Commission of Inquiry to Examine the Law Enforcement System in the Perinian and Police Officer Tzahi Ben-Or Affair (Jerusalem, 2007), p.181, para.12.63.

soldier Daphna Karmon which occurred also in Haifa on 10 June 1982, more than a year before the murder of Katz. Kuzli, another implicated in the Katz murder, and two additional Arab citizens were convicted for this crime.[206]

135. The Supreme Court denied the appeal in the Katz matter indicating the District Court's detailed analysis of the evidence and the contradictions in the statements of the accused. It underscored the fact that the crime reconstruction video scene also by the Supreme Court showed that the accused performed it willingly:

> During their extended interrogation the appellants provided many statements, initially absolutely denying the allegations against them, but at the end of the interrogation, the five provided admissions confirming what was attributed to them in the indictment. In addition, they collaborated with their interrogators in reconstructing their actions and all the reconstructions were filmed and shown to the District Court (and to us)…I share the conclusion of the lower court that all accused performed the reconstructions willfully, although not out of abundant enthusiasm.[207]

136. Throughout the process that led to this conviction the Attorney General Office and the Courts did not explain the reason for this exceptionally vicious murder that shook Israeli public opinion, other than saying that the kidnapping of Katz took place in order to carry out the murder. Based on the accused's admissions the Supreme Court was content that "a conspiracy was plotted between the appellants to kidnap and murder the deceased."[208]

137. A request for additional hearing before the Supreme Court was not accepted. The Court confirmed the analysis and conclusions of the District and Appellate instances underscoring the fact that four out of the five accused preferred not to testify before the District Court which raised serious difficulties to substantiate the allegation of forced admissions.[209]

138. In 1996 the convicted five filed a motion for retrial before the Supreme Court. Three years later the Court granted their request holding that they had suffered a miscarriage of justice based on the following cumulative reasons: a. the dispute within the Attorney General's Office regarding the fairness of their trial and the possibility of their innocence; b. new evidence withheld from the defense, the courts, and the Attorney General Office in the form of the interrogation that the Israel Security Agency (Shin Bet) had carried out against the suspects and their subsequent opinion about the suspects' lack of involvement with any hostile group and their possible innocence. The Court noted the police's denial of this interrogation's existence and the unsatisfactory explanations it provided about its failure to disclose it; c. problematic legal representation by court appointed defense counsel of which one sought to revoke his appointment, and the hostile public atmosphere in which they were compelled to conduct the defense; d. the interrogation's dynamic, in particular

[206] CA 157/87 *Kamel Sbeihi et al v. State of Israel*, Judgment, 31 December 1987.
[207] CA 915/85 *Ahmad Mizyer Kuzli et al v. State of Israel*, Judgment, 9 May 1991, paras.3, 7.
[208] CA 915/85 *Ahmad Mizyer Kuzli et al v. State of Israel*, Judgment, 9 May 1991, para.16.
[209] AH 3081/91 *Ahmad Mizyer Kuzli et al v. State of Israel*, 45(4) PD 441, 477-478 (1991).

leading the suspects to make statements according to police dictates; e. polygraph examination that favored the convicted individuals; f. strong indications reinforcing the innocence of the petitioners of which even the Attorney General acknowledged that "unresolved issues remained."[210]

139. The retrial confirmed the conviction again. The Tel-Aviv District Court emphasized that the accused failed to explain their various admissions to their interrogators not accepting their claim about their subjugation to unlawful interrogation methods. In addition, it undermined the advanced new evidence of the Shin Bet regarding the possible innocence of the accused, and made a finding for the first time in the entire proceedings of this case that the accused acted pursuant to a nationalist motive to kill a Jewish boy:

> The Shin Bet interrogators who testified before us underscored time and again that they received a mandate with a single purpose, to examine the accused's membership or lack thereof in a nationalist organization or body. They did not examine the actual perpetration of the murder, and did not receive in their possession the entire evidentiary materials (except statements that referred to motive). They also did not examine, and therefore did not conclude, regarding the question whether all of the accused or some of them acted based on a nationalist motive, either as a single motive, or one among others. Their role was, as mentioned, whether there had been a local organization or a nationalist group or membership in such a group.
>
> In fact, the accused talk in their statements about a nationalist motive. Actually, it is possible to say that the accused talk about two motives:
>
> > A nationalist motive, when each of the accused say that it existed regarding any of the other accused;
> > Fear, when each of the accused say that he was afraid of the other accused, thus he was dragged to commit this crime.
> > Only Ali noted a financial motive.[211]

140. The appeal to the Supreme Court failed. Judge Ayala Prokaccia found it appropriate to express grief and restrained satisfaction in relation to this affair:

> The blood of Danny Katz is constantly calling from the ground, and the passing of years does not undermine the intensity of this crime that took the life of a young and gentle boy who had yet to experience the taste of life. The legal system exhausted all the resources at its disposal to find the guilty, put them on trial and punish them. It did not rest and repeatedly reexamined itself throughout many years, time and again until the last doubt in this affair dissipated. It did justice while respecting the basic rights of the accused and striving to investigate the truth through a significant investment of human resources in order to prevent any possible error. The end of the road brings with it little consolation and some serenity (Shalva).[212]

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[210] RR 7929/96 *Ahmad Kuzli et al v. State of Israel*, 53(1) PD 529, 567-571 (1999).
[211] CC 5052/99 (Tel-Aviv District Court) *State of Israel v. Ahmad Mizyed Kuzli et al*, Judgment, 25 February 2005, chapter 14.
[212] RCA 3268/02 *Ahmad Mizyed Kuzli et al v. State of Israel*, 59(5) PD 761, 816 (2005).

141. The convicted five then requested the Special Commission for Parole Release pursuant to the Conditional Release from Prison Law – 2001 to recommend for the President to reduce their sentence. It did so and the President Shimon Peres reduced it in 2007 to 45 years for the two convicted of murdering Danny Katz and Daphna Karmon and 30 years for the rest. The Katz family unsuccessfully petitioned the Supreme Court against the President's decision.[213]

The Murder of Hanit Kikus 1993

142. 16 year old Hanit Kikus from the southern town Ofakim was raped and murdered on 10 June 1993. 44 year old Suleiman Al-Ubaid from Rahat in the Negev was convicted for her rape and murder. Initially, Kikus's body was not found and no evidence of her rape and murder was available other than Ubaid's admission. The District Court in Beersheba convicted him for both crimes in a two to one majority ruling. During the deliberations of Ubaid's appeal before the Supreme Court Kikus's body was found. The Court decided to terminate his convictions and returned the case to the District Court. Ubaid was subsequently convicted again by the District Court for both crimes through the same majority ruling. The Supreme Court accepted his appeal regarding the murder but rejected it in relation to the crime of rape. Additional hearing before this Court culminated in a majority ruling convicting Ubaid of both crimes murder and rape. His life sentence was upheld. Ubaid's request for retrial was denied.

143. At the time of the crimes Ubaid was married with children and worked at a rubbish dump as a truck driver. His conviction was based on his admissions. The initial lead for the police was a neighbor of the Kikus family who worked at the Ofakim municipality trash department. He claimed that he had heard Ubaid talk about someone having sex at the rubbish dump. Ubaid is illiterate, left school at the age of 12, and both the defense and prosecution experts confirmed that he suffered from mental retardation. An allegedly convicted felon who worked with the Israel Security Agency (Shin Bet) shared Ubaid's prison cell and extracted from him incriminating statements (he was beaten before Ubaid in order to attribute legitimacy to him as an arrested car thief). During the crime reconstruction Ubaid led the interrogators to different locations where he allegedly had disposed of the undiscovered body.

144. One of the Beersheba District Court majority judges who convicted Ubaid commented about the psychological agony that certain felons experience which leads them to acknowledge their guilt in the context of analyzing Ubaid's reconstruction of perpetrating the crimes:

> Sigmund Freud's determination is known, that there are certain felons who are eager to receive punishment and therefore one should not accept a priori the known allegation, that a person's nature is not to incriminate himself (Jones, "The life and

[213] HCJ 9631/07 *Moshe Katz et al v. The President of the State et al*, Judgment, 14 April 2008.

work of Sigmond Froid" 233)(1957).(The mistaken spelling of Freud's name in the book title is in the original Hebrew text - MD).[214]

145. Ubaid indicated few contradictory locations where he purportedly disposed of Kikus' body, one of them the rubbish dump where he worked. Yet, despite the Israeli authorities' efforts the body was not found when the indictment was filed and the case deliberated before the District Court. According to one of the participants in the search effort from the Israel Defense Forces' Unite to Track Missing Persons "the body could not have remained complete at the rubbish dump, and in a situation where they [the search team] would have found the body's remains they its identification would have been impossible."[215] In addition, despite Ubaid's admission of committing the rape and murder he was unable to provide a description of his victim or any identifying feature of her:

> In the last reconstruction, when he was emotionally broken and weak he was unable to say whether the girl was in fact Hanit Kikus…the accused was interrogated time and again by the best interrogators of the Negev police, and they could not extract from a mentally retarded person any identifying detail. From what this stems if not from an objective situation that the accused does not know. He claims that he raped her but cannot describe whether she wore trousers or a dress. He says that the girl undressed and put on her close prior and after the rape…the accused is unable to identify and describe her although her picture was shown to him.[216]

146. While hearing Ubaid's appeal the Supreme Court decided pursuant to the parties' agreement to quash his convictions after the emergence of new evidence in the form of Kikus' body remains and return the case to the District Court.[217]Kikus' partial skeleton as well as her shirt and bra, were found accidentally two years after her murder on 11 June 1995 in a pit at a construction site near Beersheba. The location was not one of the two places in which Ubaid claimed he had disposed of the body. The District Court finding was that Ubaid had placed the body in the rubbish dump where he worked, 8 to 10 km away from where the body was found two years later.

147. The same panel of judges at the Beersheba District Court reached the same decision convicting Ubaid for the crimes of raping and murdering Kikus by a majority ruling. The police alleged that fibers it had collected from Ubaid's car that were not submitted as evidence before but were in its possession matched fibers extracted from Kikus's newly found shirt. The District Court was content from this link between Ubaid and Kikus, although no objective evidence was submitted to Court demonstrating that she was raped.[218]

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[214] CC 76/93 (Beersheba District Court) *State of Israel v. Suleiman Al-Ubaid*, Judgment, 22 November 1994, Justice Zvi Segal's opinion, para.21

[215] CC 76/93 (Beersheba District Court) *State of Israel v. Suleiman Al-Ubaid*, Judgment, 22 November 1994, Justice Neal Hendel's opinion, para.115

[216] CC 76/93 (Beersheba District Court) *State of Israel v. Suleiman Al-Ubaid*, Judgment, 22 November 1994, Justice Neal Hendel's opinion, para.117.

[217] CA 6948/95 *Al-Ubaid v. State of Israel*, Judgment, 14 September 1995.

[218] CC 76/93 (Beersheba District Court) *State of Israel v. Suleiman Al-Ubaid*, Judgment, 19 February 1996.

148. Majority rulings of the Supreme Court accepted Ubaid's appeal regarding murdering Kikus and rejected it concerning raping her. Justice Goldberg considered Ubaid's vulnerable status as a mentally retarded person. He opined that the factual circumstances in the case should be understood as one unit and Ubaid ought to be acquitted from both crimes rape and murder. Justice Kedmi decided that the charges against Ubaid could be separated deciding to acquit him from the crime of murder but not of rape given evidence that linked him to the victim. Justice Levin rejected Ubaid's appeal blaming him for not testifying before the District Court to refute the allegations and suspicions against him. He made analogy to inappropriate cases to declare that Ubaid's failure made the allegations against him conclusive:

> In my opinion, the aforementioned factual circumstances implicates the appellant in the act of murder, in a manner that he should have taken the witness stand and refute or at least raise doubt, regarding his involvement in the act…and once this has not been done the implicating evidence becomes conclusive.[219]

149. The conclusion of the additional hearing before an expanded panel of nine Supreme Court judges which the defense and the prosecution requested was a majority ruling convicting Ubaid for both crimes rape and murder. Chief Justice Aharon Barak agreed with the main ruling noting that the discrepancy between Ubaid's admission about the body's location and the eventual place where it was found did not affect the entirety of his admissions and evidence leading to his conviction:

> There is no reason why not to determine that the segments in Ubaid's admissions that coincide with the location where the body was found, should remain valid and join the other already existing evidence in this matter. This is the path walked by Justice Or, and I cannot but join his reasoning and grounds in relation to this issue. On the other hand, I was not convinced that the body's location raised reasonable doubt concerning Ubaid's guilt and "undermined" the evidence in the possession of the prosecution. Also in this matter I agree with my colleague Justice Or, that indeed it is possible to find evidentiary basis that explains the reason for Ubaid avoiding to disclose the body's exact location.[220]

150. Justice Heshin who also shared the main opinion's reasoning underscored the significance of Ubaid's reconstruction of the crime and his admissions before his Shin Bet fellow inmate:

> I watched the video film in which Ubaid reconstructs Kikus' journey towards her death. I read the transcript of his conversation with the planted fellow inmate, a conversation in which he admitted, practically, to have murdered and raped Hanit. After watching and seeing, it will be very difficult not to convict him for the two offences he was charged of: murdering Hanit and raping her.
>
> Here is the conversation with the planted inmate: Ubaid's first –but not last- admission is before this inmate. The planted inmate is not a law enforcement officer, and Ubaid's answers to his fellow inmate's questions are a regular conversation, as someone telling his friend about recent events that had taken place.

[219] CA 2109/96 *Suleiman Al-Ubaid v. State of Israel*, 51(1) PD 673, 735 (1997).
[220] AHC 4342/97 *State of Israel v. Suleiman Al-Ubaid*, 51(1) PD 736, 863 (1998).

> In the beginning of the conversation Ubaid is like a sealed book, as in the sealed book presented before the police interrogators. Yet, throughout the conversation his heart opened up bit by bit, and once opened – it never closed. Indeed: Ubaid's admission of the murder and rape does not emerge from his heart as a great outburst of water; yet his words, even if at times are somewhat reluctant, are in their essence decisive.
>
> A person, any person, who captures a secret about a terrible conduct that he witnessed with his eyes – a secret that only he, no one else, knows about it – could feel an emotional necessity to share this secret with others. Yet, when the person is involved in the terrible act, and with all his desire to share his secret, inside him will operate powerful counter forces that will warn him from disclosing the secret to others; if he discloses he could be harmed.
>
> …
>
> Pursuant to the conversation with the planted inmate, there are the reconstructions: one reconstruction the same night, and another construction few days later…I watched the reconstruction films in which Ubaid is their main hero. I saw Ubaid describing what took place and heard his voice while performing the reconstruction. The person will look into the eyes and I looked into Ubaid's eyes and listened carefully to his voice. After all this I knew – I became certain – that his admission was not a false one, that he is telling about events he was involved in, and that he was not reciting words indoctrinated by others, that he was not repeating what others ordered him to say.[221]

151. In 2005 Ubaid submitted a failed request for amnesty before the President of the state. Former Supreme Court justice Miriam Ben-Porat was asked to provide advice on the matter in which she concluded that Ubaid's convictions were correct. His motion for retrial was rejected as well.[222]

Amos Baranes and the Murder of Rachel Heller 1974

152. The murder of 19 year old soldier Rachel Heller in 1974 does not contain an 'Arab element'. The accused and the victim are Israeli Jews. Nevertheless, this case is significant not only because of its wide coverage by the Israeli media but also due to Baranes' continued efforts, even after the reduction of his sentence and release from prison, to request a retrial and to insist on his innocence until he gained a legal declaration acknowledging it in 2002. This case also contains the significant legal deliberation about alleged police failures during the reconstruction of the crime.

153. According to the legal findings of the case on 23 October 1974 Baranes met with Rachel Heller and drove her in his truck towards Tel-Aviv. They started kissing and when reaching Caesarea Baranes parked on the side road close to bushes. When she refused to take off her bra, Baranes imposed himself on the victim by hitting her on the head, had sex with her and subsequently strangled Heller to death.

[221] AHC 4342/97 *State of Israel v. Suleiman Al-Ubaid*, 51(1) PD 736, 831-832 (1998).
[222] RR 8498/13 *Suleiman Al-Ubaid v. State of Israel*, Decision, 12 February 2015.

154. Baranes was convicted for murdering Heller based on his admission. His appeal before the Supreme Court centered on the legality of the police interrogators' conduct while obtaining his admission. The Court held that illegal interrogation methods and lack of proper documentation of the interrogation do not necessarily demonstrate that the suspect's admission was false.[223] A motion for additional hearing before the Supreme Court was rejected.[224] Baranes filed three unsuccessful requests before the same court for a retrial.[225] The fourth request was granted relying on the following factors: several police officers had provided false testimonies in court, the police forensic examination unit destroyed crucial evidence, and one medical expert retracted from his original version that Baranes did not complain about physical abuse during the police interrogation.[226]

155. Notwithstanding the Supreme Court's decision in favor of Baranes, it failed to mention any reference to the Public Defender's allegation that the police did not disclose to Baranes's defense during the original proceedings the involvement of the Israel Security Agency (Shin Bet) in Baranes's interrogation and that portions of the interrogation had taken place at one of the Shin Bet's facilities which contained recording technology. The Shin Bet had interrogated two persons who testified against Baranes for their alleged membership in a radical left group together with the murdered Heller. They were initially investigated as suspects in murdering the victim.

156. The Public Defender gained this information twenty five years after Heller's murder from three former Shin Bet officials who were aware of the Baranes file and interrogation. He alleged that Shin Bet officials could have been called to testify by the defense in order to support Baranes's version that his admission was extracted through a violent and illegal interrogation. According to the Public Defender one of Baranes's interrogators was a former Shin Bet officer who applied against Baranes interrogation methods that were carried out against Palestinian suspects in the occupied Palestinian territories.[227]

157. At the Nazareth District Court an awkward scenario took place. The prosecution requested to withdraw the indictment, while the defense sought to gain a declaration of acquittal indicating that it also is not interested in conducting the trial, despite his motion before the Supreme Court that generated this procedure. Baranes incurred no financial costs for the legal proceedings given his representation by the Public Defender's Office. The District Court acquitted Baranes by a majority opinion calling it a "silent acquittal" because the case was not heard and no evidence presented.[228]Both sides could be held in contempt of court for not applying the order of the Supreme Court to conduct a retrial, whereas the technical solution provided by the District Court has also not followed the superior instance's clear order.

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[223] HCJ 127/*76 Amos Baranes v. State of Israel*, 30(3) PD 507 (1976).
[224] AH 25/76 *Baranes v. State of Israel*, Judgment, not published.
[225] RR 2/78 *Baranes v. State of Israel*, Judgment, not published; RR 8/84 *Baranes v. State of Israel*, 29(1) PD 589 (1985); RR 6731/96 *Baranes v. State of Israel*, 51(4) PD 241 (1997).
[226] RR 3032/99 *Amos Baranes v. State of Israel*, 56(3) PD 354 (2002).
[227] RR 3032/99 *Amos Baranes v. State of Israel*, Public Defender's Motion for Retrial, 1999, paras.139-177.
[228] CC (Nazareth District Court) 1212/02 *State of Israel v. Amos Baranes*, Decision, 11 December 2002.

158. Shaul Markus, the head of the investigation team assigned to the Rachel Heller murder case was indicted for perjury and convicted by a District Court in 1982 through two to one majority ruling. The prosecution alleged that Markus lied about not being at the reconstruction site of Heller's murder when Baranes said that he does not intend to continue the reconstruction. Baranes's defense had alleged at his trial that only after Markus severe beating he continued performing the reconstruction. The District Court majority ruling that convicted Markus of perjury noted that his denial of being present at the reconstruction site was not true, but incidental and insignificant. It also found that Markus did not beat Baranes and imposed a very light sentence. The Supreme Court unanimously overturned Markus's conviction. It reasoned over 79 pages that the police officer's claim which constituted the basis for the prosecution's allegations against Markus was not credible.[229]

Citizenship Rights

Identity Issues

159. Citizenship Law – 1952 defines its scope and sets conditions for obtaining it: based on the Law of Return - 1950; residency in Israel; birth; adoption; naturalization; or the Minister of Interior's decision. Article 1 of the Law of Return - 1950 proclaims the right of any Jewish person in the world to immigrate to Israel. According to article 2 this immigration is subject to obtaining a visa that could be barred from persons acting against the Jewish people or from those that could endanger public health or national security.

160. A 1970 amendment to this law broadened the scope of those entitled to benefit from such immigration to include the Jewish person's partner, his or her children and grandchildren as well as their partners.[230] From 1948 to 2010 the significant number of immigrants pursuant to the Law of Return - 1950 came from the former Soviet Union: 1,208,956, forming 39.3% of this group.[231] The two main periods for this particular immigration were the mid-1970s and after the collapse of the former Soviet Union in the 1990s.

161. Several cases were filed before the Supreme Court requesting to order the Israeli Ministry of Interior to register persons as Jewish in their identification cards arguing, among other things, that they are entitled for the registration based on the Law of Return - 1950. Their request was granted.[232] On the other hand, the Court confirmed the Ministry's rejection to register a person's nationality as Israeli rather than Jewish.[233] In 1977 the Supreme Court referred two Arab Druze brothers to the District Court to file their request to change their registration in the nationality category of the identification card from Druze

[229] HCJ 190/82 *Shaul Markus v. State of Israel*, 37(1) PD 225 (1983).
[230] On the distinction regarding gaining rights pursuant to this amendment prior to immigrating to Israel and after becoming residents in it see HCJ 3648/97 *Yisrael Stamka et al v. Minister of Interior et al*, 53(2) PD 728 (1999).
[231] Central Bureau of Statistics, Immigration/Aliya to Israel: 2007-2010 (Jerusalem, 2012), p.9.
[232] See HCJ 58/68 *Shalit v. Minister of Interior*, 23(2) PD 477 (1970); HCJ 5070/95 *Na'amat – Movement of Working Women & Volunteers*, 56(2) PD 721 (2002); HCJ 2859/99 *Tais Rodriguez-Tushbeim et al v. Minister of Interior*, 59(6) PD 721 (2005).
[233] CA 630/70 *Tamarin v. State of Israel*, 26(1) PD 197 (1972).

to Arab.[234] They argued that the Ministry of Interior misled their parents who did not speak Hebrew, and that Arab reflect their national identity. 32 years later the Ministry of Interior did not oppose the motion of an Arab Druze academic represented by Adalah to make the same change in his identification card.[235]

162. The Arab minority's citizenship issues had emerged in the early days of the state from legal attempts to secure residency and citizenship rights in order not to be deported from the country, while a military rule governed their daily lives. Persons who left the country or were deported during the Israel-Arab war petitioned the Supreme Court seeking residency and citizenship in the new state. It is difficult to say that they were faced with total rejection at the Supreme Court given certain successful cases.

163. sixty years later citizenship rights matters have arisen from attempts to obtain family unifications between couples of which one was not a citizen, rather a resident of the 1967 occupied Palestinian territories or a national of certain Arab states. The Supreme Court confirmed the constitutionality of a law that barred the possibility of family unification. Once again Adalah led the legal challenge.

Advocating Citizenship Rights in the 1950s

164. Nazareth native Salim Ibrahim Al-Badawi left the country to a neighboring Arab state before the end of hostilities in 1949 without obtaining a permit from the Israeli authorities and returned few months later without gaining an entry permit. The Israeli authorities rejected his requests to be registered and granted an identification card. The Supreme Court held that he was late in filing his petition and that he had no one to blame but himself given his non-authorized travels from and into Israel. It did not provide any legal provision or court precedent that conditioned citizenship registration and obtaining identification cards with traveling to neighboring countries through permits. Nor did the authorities allege any security risk arising from the petitioner. He was expelled:

> Although the petitioner resided and was present in Nazareth, when the city was occupied by the IDF, he left it few months later and moved to enemy states, without a permit from the Israeli authorities prior to the end of hostilities and the signing of the ceasefire agreements with Arab states, and his return to the country, after few months in enemy countries, was without an entry permit. This means, that he is to blame for his debacle; and in these circumstances we do not consider that justice could be served by the Court's intervention to order the authorities, civilian and military, how to act towards the petitioner.[236]

165. Due to lack of response by the Israeli authorities and their failed request to extend the period to file it, the Supreme Court ordered to register Mohammad Asad Esgayer and others as citizens and grant them identification cards. The Court also noted that the

[234] HCJ 436/77 *Kayuf Kamil bin Muhammed et al v. Minister of Interior*, 32(1) PD 306 (1977).
[235] OM (Haifa) 11910-07-10 *Yakub Halabi v. Haifa Ministry of the Interior*, Judgment, 14 February 2011.
[236] HCJ 177/51 *Salim Ibrahim Al-Badawi et al v. Galilee Military Governor*, Nazareth et al, 5 PD 1241, 1242 (1951).

authorities were empowered to initiate proceedings against the petitioners if their allegation about Esgayer's inaccurate representations before it were true.[237]

166. Majd al-Krum's residents' allegation that the Israeli authorities had repeatedly denied their return to their village and request to gain citizenship was not accepted by the Supreme Court. Despite certain contradictions in the military commander's version of events, and relying on undisclosed information for national security reasons, his claim that the petitioners were not expelled rather traveled outside the country and back without a permit during an emergency situation of ongoing hostilities was favored. The Court concluded that for this reason the petitioners were not entitled to be registered as citizens and obtain identification cards:

> In their motion they argued that they were initially expelled by the military, but as we have seen in the village, they left it willingly, without duress or coercion, and crossed the borders and fled – not expelled – to Lebanon. The meaning of this is that: in days of danger to the state, when it is surrounded from all sides by hostile peoples, who in the past fought against her viciously, and until today they annoy her for every step she takes and intend to destroy her, in these frenzied days people desert her and move to the enemy's camp. And after that they return, pretending to be law abiding citizens and dare to claim equal rights as other citizens. They also approach this Court and withhold from it the truth, and yet demand justice. This is how the petitioners acted, and the Court is not willing to accept their allegations. Withholding basic facts has always failed a person's motion before this Court. Further – and not less important – the Court considers that a person who willingly travels, without a permit, from the defense line of the state to the offensive lines of the enemy, is not worthy of the Court's assistance and relief while the military authorities are combating him and his likes to protect the state and its citizens. The Court will also not compel a civilian institution – such as the first respondent – to act – for example: to grant an identification card - for such a person, that would prevent the military authorities to exercise severe violence against him for jeopardizing the state's peace.[238]

167. The same scenario was repeated in the matter of Sabri Hassan Mustafa Abu Ras and his family, who the court found that they left the country and returned without a permit in the context of the hostilities with the neighboring Arab states. The Attorney General Office argued that based on the Residents Registration Ordinance - 1949 the Residents Registrar was under an obligation to register residents who had been *legally* present in the country, whereas the petitioners returned to Israel without a permit. The Court did not accept this contention indicating that the military commander had been involved in such decisions, apparently as an assistant to the Ministry of Interior. His obligation was to secure the borders and protect the country from infiltrators and smugglers. Although the authorities did not allege specific risk arising from the Abu Ras family, their petition was rejected on security grounds:

> Should the Court order respondent No. 3 and his subordinates – even if they are civilian officials only – to exercise their obligation, that is to grant felons,

[237] HCJ 108/51 *Mohammad Asad Esgayar et al v. The Minister of Interior et al*, 5 PD 1323, 1324-1325 (1951).
[238] HCJ 125/51 *Mohammad Ali Hussein et al v. Minister of Interior*, 5 PD 1386, 1392 (1951).

> "infiltrators" and various smugglers, identity cards, and to hinder by this the military authorities from applying their role, that is, to protect the state's borders from besieging and enemies? The answer is in the question's formulation. And this answer determines the fate of this case. This Court will not deliver a decision that will result in forfeiting state's security, according to the request of those who are placing this security in danger. It is only the Court's obligation to note at the end that while deliberating this case, few facts were clarified that require a sympathetic approach to the petitioners. But this is not up to us. We walked in the path of general considerations and previous judgments.[239]

168. Residents of Bee'ne village were granted the right to be registered in the citizens' registration records and obtain an identity card. The Court acknowledged their presence in the village during its occupation by the Israeli military and their subsequent expulsion from it. It is not clear from the judgment if they crossed the border or remained in Israel as internally displaced prior to their return to the village and approaching the Court.[240]

169. The Supreme Court revoked a 1950 expelling order issued by the Israeli military authorities against Tawfik Walid Khalidi. He had left to Lebanon during the hostilities few days before Israel was founded to collect a debt from the mandate authorities for his work at the train facility in Haifa. The Court found that the order was arbitrary and that the petitioner who had obtained temporary residency permits did not pose a security risk.[241]

170. Similarly, the order expelling Jamil Al-Khalil's wife was annulled because the Supreme Court found that the military authorities illegally deported her and others from the village of Faradis to Lebanon in 1952. She did not leave the country by her free will, therefore her return without a permit should not be held against her.[242] It seems that based on this reasoning Arabs who were deported from Israel/Palestine during the 1947 – 1949 war and did not pose any risk, could have returned to the country without a permit and request to be citizens.

171. Ahmad Mohammad Abdel-Jalil was not as fortunate. His petition and claim that he was expelled by the Israeli authorities were rejected because according to the short and technical reasoning of the Court his filing was not in due course.[243]The same occurred with Taha Abdel Al-Rahman whose filing to be registered was considered late by the Supreme Court although it invalidated a military order expelling him (based on article 112 of the Emergency Regulations – 1945) on the grounds that it was not signed by the Minister of Defense, who cannot delegate his power to military commanders. However, the legal effect of this result remained that Abdel Al-Rahman could be deported because he could not obtain citizenship status in Israel.[244]

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[239] HCJ 145/51 *Sabri Hassan Mustafa Abu Ras et al v. The Military Governor of the Galilee et al*, 5 PD 1476, 1479-1480 (1951).
[240] HCJ 157/51 *Qasem Abdallah Abed et al v. Minister of Interior*, 5 PD 1680 (1951).
[241] HCJ 155/51 *Mustafa Tawfik Khalidi v. Minister of Interior et al*, 6 PD 52 (1952).
[242] HCJ 227/52 *Jamil Al-Khalil v. Minister of Police*, 7 PD 49 (1953).
[243] HCJ 25/52 *Ahmad Mohammad Abdel-Jalil v. Minister of Interior*, 6 PD 110 (1952).
[244] HCJ 240/51 *Taha Abdel Al-Rahman v. Minister of the Interior*, 6 PD 364 (1952).

172. Suleiman Nijem petitioned the Supreme Court to order his registration as a citizen and prevent his deportation outside the country. He failed because the Court found that his filing was supported by his father's contradictory affidavit about his locations in and outside Israel after his village Ebilin had been occupied by the Israeli forces. The Court rejected the petition despite its assessment of the military commander's evidence about Suleiman's presence in Lebanon to visit his brothers as being "based on the military's 'intelligence' sources, which means: rumors, that should not be considered primary evidence."[245] The Court did not discuss any information about the petitioner's risk to security that should have legitimated his expulsion. It did note that Nijem could file another request before it supported by his own affidavit.

173. A person who left the country before its founding was not considered a resident for the purpose of acquiring citizenship. Only those whose permanent resident was in Israel / Palestine or were legally present in the country for three months could be granted citizenship status based on the Residents Registration Ordinance – 1949. Without providing detail, the Supreme Court ruled there was doubt whether Mr. Mahmoud Nabroui met either one of these conditions.[246]

174. Similarly, a person who left the country prior to its founding to one of the neighboring states for a legitimate reason such as education, and returned subsequent to its establishment without a permit, could not demand citizenship status. This applied to a 13 year old boy form the village of Rama who left Palestine to Lebanon in 1947 to continue his education after disturbances had taken place in Jerusalem where he studied. He returned after Israel's founding without a permit and approached the authorities to gain a status as a citizen. The Court expressed sympathy to the petitioner's family who filed the petition, despite the expanded application of the law.[247]

175. A former collaborator with Jewish forces prior to the establishment of the state of Israel defected to the Arab side during the 1947 – 1949 hostilities. He claimed before the Supreme Court that he fled his village out of fear from repercussions due to his former assistance to the Israeli side. The Court rejected his request to order his registration as a citizen and confirmed his deportation.[248] The Supreme Court voided the status of citizenship under the mandate in Palestine distinguishing it from Israeli citizenship for the purposes of confirming the deportation of a person who resided in Palestine, did not demonstrate that he was compelled to leave the country, and returned without a permit. It did so despite the exclusion of such citizens from the deportation power granted by the considered provision.[249]

176. Mazra'a village native Mustafa Saad Bader was injured as a result of a gunshot. In 1948 he was in the hospital of the Red Cross in Acre. After recovery he was imprisoned in

[245] HCJ 201/51 *Suleiman Nijem v. Minister of Interior et al*, 6 PD 337, 338 (1952).
[246] HCJ 97/52 *Mahmoud Nabroui v. Minister of Interior et al*, 6 PD 424 (1952).
[247] HCJ 112/52 *Khalaf and Issa Khalil Khalaf v. Minister of Interior et el*, 6 PD 185, 188-190 (1953).
[248] HCJ 183/52 *Farida Abu Gish v. Minister of Interior et al*, 6 PD 862 (1952).
[249] HCJ 174/52 *Fahed Ali Hussein in the name of Mohammad Ali Abu Daoud v. Acre Prison Warden et al*, 6 PD 897, 901-902 (1952).

a detention camp until March 1949. Once released from there he was asked by Israeli soldiers whether he preferred to stay in the country or leave to one of the neighboring Arab states. He selected the first option. A short while after he was deported by the Israeli authorities, only to return and be deported time and again. The Supreme Court held that the three military deportation orders issued against him in 1951 – 1952 were not legal and the petitioner was entitled to remain in the country and gain citizenship status. The Court underscored that the Israeli military posed an option for the petitioner to stay without considering him a security risk.[250]

177. The saga of Mr. Bader did not end here. He was arrested in August 1953, deported a month later for security reasons undisclosed by the Court, and in October the military authorities amended their first deporting order for technical mistakes not discussed in the judgment, when Bader was already outside the country. The Court upheld his deportation rejecting the allegation that he gained a citizen's status. It reasoned that he did not fulfil the conditions of Citizenship Law – 1952 for obtaining Israeli citizenship to mandatory Palestine residents, particularly the one that related to registration in the Residents Registry prior to 1952. Bader was registered pursuant to his initial case in 1953. His parents filed the petition on his behalf.[251]

178. A wife's petition to prevent the deportation of her husband because he had stayed for a short period in Lebanon, was rejected given the ambiguous citizenship status, according to the Court, of her and her husband. The wife is from Argentina who married her husband in 1934 Palestine. The Court found that it was not clear if either of them was an Israeli citizen and if so under what conditions either one can bestow citizenship status over the other and bar the possibility of deportation.[252]

179. Attorney Hanna Nakara who represented many petitioners requesting to obtain citizenship status to prevent their deportation form the country, was able to secure a passport after having been registered as a resident and obtained an identification card. He managed to realize all this despite his presumed illegal return to the country subsequent to his forced departure to Lebanon in 1948 in the aftermath of the occupation of Haifa where he worked. The Supreme Court ruled that it was difficult to challenge a District Court decision regarding his right to vote, which presumed his legal return to the country, although that decision was not reasoned.[253]

180. Among Nakara's few successes in this difficult legal and political issue was to convince the Supreme Court of the deportation circumstances that a family from the village Majd al-Krum had experienced and their entitlement for citizenship status despite returning to the country without a permit.[254]

[250] HCJ 8/51 *Mustafa Saad Bader v. Minister of Interior*, 7 PD 366 (1953).
[251] HCJ 64/54 *Saad and Hind Bader v. Minister of the Police et al*, 8 PD 970 (1954).
[252] HCJ 32/53 *Nabih Tawfik Badran Mustafa v. Commander of the Northern Command et al*, 7 PD 587 (1953).
[253] HCJ 112/53 *Hanna Deeb Nakara v. Minister of Interior*, 7 PD 955 (1953).
[254] HCJ 282/52 Hussein Abu Daoud et al v. Minister of Interior, 7 PD 1081 (1953).

181. The Israeli authorities wanted to deport Salem Ahmad Kiwan notwithstanding his possession of an Israeli citizenship. They alleged that he returned to the country without a permit and was expelled several times prior to gaining citizenship. The Court made a broad legal determination departing from previous rulings and held that Israeli citizenship did not grant immunity from deportation. Nevertheless, it accepted Mr. Kiwan's petition because he had possessed documents that barred the authorities from arguing about entering the country illegally prior to being a citizen.[255]

182. Mohammad Naamne left his village Arrabeh to Lebanon in 1949 before its surrender to Israeli forces. He tried to return several times only to be repeatedly deported by the Israeli authorities. The Supreme Court upheld the state's allegation that he posed a security risk and denied his brothers' petition on his behalf.[256] A collective request by groups of individuals from several villages before the Supreme Court to order the granting of citizenship failed. They alleged that they were displaced in and deported from Israel / Palestine. In some instances there was evidence that the authorities had promised to solve the citizenship problem shortly before parliamentary elections.[257]

183. Bi'ina village native Jamal Nagib Mousa obtained a passport despite his travel to Beirut and the Ministr of Interior's opposition. The authorities' claimed that he was not present in the country from 1948 to 1952 which was one of the pre-conditions to obtaining citizenship and a passport. A majority opinion of the Court ruled that this element of the Citizenship Law – 1952 did not require constant presence in the country. The petitioner was in his village when occupied by Israeli forces on 30 October 1948. His travel to Beirut, Lebanon to settle compensation matters with the former Mandate authorities should not be considered as lack of presence in the country for the purposes of the applicable law.[258] It is not clear from the judgment whether the petitioner returned from Lebanon to Israel by entering legally with a permit or not, although this element formed part of the presence condition in the Citizenship Law – 1952.[259]

184. The Israeli military deported an alleged felon who claimed that he was compelled to leave the country during the hostilities. His legal challenge before the Supreme Court advanced by his brother failed.[260]

Family Unification

185. In 2003 the Israeli parliament adopted a tentative and renewable legislation (Horaat Shaah) pertaining to gaining citizenship that affected in large part spouses of Arab citizens. It barred awarding citizenship and residency status to persons from the West Bank and Gaza. The Minister of Interior was authorized to exercise his discretion to approve either

[255] HCJ 155/53 *Salem Ahmad Kiwan v. Minister of Defense et al*, 8 PD 301 (1954).
[256] HCJ 130/54 *Hassan Ahmad Saleh Naamne v. Police Commissioner of Zvulun District et al*, 8 PD 1439 (1954).
[257] HCJ 236/51 *Abdel Gani Mohammad Keis et al v. Minister of Interior et al*, 8 PD 617 (1954).
[258] HCJ 328/60 *Jamal Nagib Mousa v. Minister of Interior*, 16 PD 69 (1962).
[259] Article 3(a)(3) of Citizenship Law – 1952 proclaimed regarding presence as a condition for Israeli citizenship "From the day of establishing the state until this law enters into effect (17 July 1952 – MD) was in Israel or in a territory that became part of Israel after its founding, or entered legally to Israel during this period."
[260] HCJ 219/51 *Ahmad Abu Ayash v. Military Governor for the Galilee*, 6 PD 221 (1952).

status for spouses of Arab citizens whose age is above 35 for men and 25 for women. In 2007 the general prohibition was expanded to include citizens or residents of Iran, Lebanon, Syria, and Iraq. It also established a committee that would consider humanitarian factors on exceptional basis to grant status in Israel regardless of the age of Arab citizens' spouses. The law did not apply to persons from the occupied territories or the other aforementioned states who would be considered by the Israeli security forces as having contributed to Israel's security. The Knesset consistently renewed the applicability of the tentative law.

186. The main rational for this law advanced by the Attorney General Office was the need to confront security risks that could arise from persons with contacts to the occupied territories or enemy states. Adalah led the legal challenge to the constitutionality of the law before the Supreme Court. The petitioners argued that the law's effect is discrimination based on national origin and constituted a violation of the right to family life, privacy, personal autonomy and liberty. In 2006 an expanded panel of eleven Supreme Court justices delivered their judgment in a six to five majority ruling that upheld the law's constitutionality in accordance with this concept's development in the Israeli legal system since the 1992 enactment of Basic Law: Human Dignity and Liberty.[261]

187. Although the demographic aspect was present during public debate about the law in the Knesset, and two of the justices noted the possibility that the law's purpose was also demographic,[262] the general approach adopted by the Supreme Court was that based on the official documents of the law's enactment its purpose was only to confront possible security risks. In writing the primary opinion of the majority, Justice Heshin underscored that the Israeli Security Agency (Shin Bet) did not advise to entirely prohibit family unification allowing it pursuant to certain conditions. He also countered the presumption that the law included a demographic purpose:

> If the state is willing to take certain risks, should we contend and tell her why have you not taken greater risks upon yourself? Furthermore, the Knesset and the Government considered, based on the Shin Bet's advice, that some risks for a person's life should be tolerated by the Israeli democracy in order to uphold basic rights of the individual, and others should not be accepted. Should the Court, given the principle of separation of powers, overturn this decision? The answer to this question, to my mind, is no.
>
> …
>
> The proposed bill, the text of the law, its amendments, and furthermore, the state's arguments before us, all indicate that the law's purpose is security. The debate heard in the Knesset while legislating the law does not change this purpose. In addition, the demographic issue was not considered by us, and we were not asked to decide regarding it. Why therefore my colleagues mention this topic in their opinions?...indeed, should the Knesset legislate one day a law that one of its purposes would be to preserve Jewish majority in Israel, the Court could discuss in

[261] HCJ 7052/03 *Adalah – Legal Center for Arab Minority Rights in Israel et al v. Minister of Interior et al*, Judgment, 14 May 2006.
[262] HCJ 7052/03 *Adalah – Legal Center for Arab Minority Rights in Israel et al v. Minister of Interior et al*, Judgment, 14 May 2006, para.14 of Justice Ayala Procaccia's opinion, para.24 of Justice Salim Joubran's opinion.

depth the demographic consideration. The Court would discuss the matter and overcome it. Yet, this is not the situation before us, since we have not been asked to consider this issue.[263]

188. Six years later the Supreme Court rejected petitions regarding the same law with the 2007 amendments also by a six to five majority ruling.[264]

Political Participation

Elections

189. Other than the 1965 Supreme Court ruling that confirmed the decision of the Central Elections Committee (CEC) to bar members of Al-Ard group from competing in the elections for Israeli parliament, all other similar cases that remerged since the 1980s resulted in upholding the right of the Arab minority's representatives for political participation. In addition, these representatives have needed to confront parliamentary disciplinary proceedings and the Attorney General's criminal charges against what they perceived as legitimate political activity. Adalah stood out as a leading advocate on behalf of these representatives.

190. Al- Ard was a group of individuals who advanced progressive Arab nationalist ideas spreading in the Arab world from Nasser's Egypt in the 1950s and 1960s. They intended to realize equality between Arabs and Jews in Israel and advocated for a just political solution for the Palestinian people's predicament. As discussed under the chapter of Military Rule, their attempt to participate in the Israeli elections was not their sole legal affair against the Israeli authorities. Supreme Court majority ruling of two to one upheld the decision of the CEC to prohibit the group's participation in the elections on security grounds drawing comparison to Germany and the danger of subversive groups that reached power through democratic means. The minority decision emphasized the strict power of the CEC that did not extend to substantive examination of the political parties' platforms.[265]

191. Al-Ard group veteran attorney Mohammed Miari led the Progressive Movement for Peace (PMP) in the 1980s and faced challenges regarding his right for political participation. His legal battles coincided with those of the extreme right wing leader of the Kach party Meir Kahane that was eventually disqualified. Towards the 1984 parliamentary elections the CEC which was composed of parties represented in the Knesset and headed by a Supreme Court justice, delivered two majority decisions that disqualified both the PMP and the Kach party. The first for its alleged dangerous subversive political agenda as well as its identification with the enemies of the state, and the second because of its racist platform. The Supreme Court overturned both decisions of the CEC.

[263] HCJ 7052/03 *Adalah – Legal Center for Arab Minority Rights in Israel et al v. Minister of Interior et al*, Judgment, 14 May 2006, paras.134-135 of Justice Mishael Cheshin's opinion.
[264] HCJ 466/07 *MK Zehava Gal-On et al v. The Attorney General et al*, Judgment, 11 January 2012.
[265] HCJ 1/65 *Yakov Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset*, 19(3) PD 365 (1964).

192. The Court's analysis centered on comparing the two parties to the disqualified one by its 1965 ruling and the standards it had established. It found that despite Kach's apparent racist agenda this party did not advocate the disintegration of the state of Israel as a political unit as was established regarding Al-Ard group.[266] Concerning the PMP, and despite Miari's past membership with Al-Ard, the Court found that the CEC did not properly consider the factual basis in his regard, including the alleged undisclosed security information advanced by the Minister of Defense and an affidavit by the former Commander of the Northern District in the military. The latter had issued restricting administrative orders against Mr. Miari in 1980 because he called for a general strike by the Arabs in Israel in response to the assassination of Palestinian mayors in the West Bank.[267] In addition, the Court cautioned from hindering the basic right to participate in elections without substantive evidence demonstrating the probability of the alleged security risk which could arise from a specific political party.[268]

193. These two cases generated a 1985 amendment to Basic Law: The Knesset by introduction article 7A the purpose of which to set criteria for barring political parties from participating in parliamentary elections. Two conditions were determined in relation to a political party's explicit or implicit platform, or its conduct: a. denying the state's existence as the state of the Jewish people; b. denying the state's democratic character. Towards the elections for the Knesset in 1988 the majority members of the CEC approved Miari's list and the Supreme Court upheld its decision by a three to two majority ruling. The Court rejected the allegation that Miari's agenda did not recognize Israel as the state of the Jewish people in violation of article 7A of Basic Law: The Knesset. Dissenting members of the CEC filed the appeal against its approving decision.[269] The Supreme Court upheld the CEC's decision to bar Kach party from participating in elections for its racist platform which undermined Israel's democratic character in breach of article 7A of Basic Law: The Knesset.[270]

194. The Court approved the registration of a right wing political party that adopted an agenda close to Kach's including advocating rabbinical law as the basis for the legal system,[271]as well as the registration of a nationalist Palestinian political party led by Ahmad Tibi who at the time identified publicly as a special advisor to Yasser Arafat.[272] A decision by the Associations' Registrar not to register an association called "Israeli Palestinian Association for Human Rights" because it might create an impression to the public that the

[266] EA 2/84 *Moshe Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, 39(2) PD 225, 247 (1985).
[267] EA 2/84 *Moshe Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, 39(2) PD 225, 247-258 (1985).
[268] EA 2/84 *Moshe Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, 39(2) PD 225, 259-279 (1985).
[269] EA 2/88 *Yoram Ben Shalom et al v. Central Elections Committee for the 12 Knesset et al*, 43(4) PD 221 (1989). In these matters that were deliberated in proximity to the election's date the Court first delivered its final decision and subsequently it issued its reasoned ruling.
[270] EA 1/88 *Moshe Neiman et al v. Chairman of the Central Elections Committee for the 12 Knesset*, 42(4) 177 (1988).
[271] PCA 7504/95 *Ganem Yassin et al v. Party's Registrar*, 50(2) PD, 45 (1996).
[272] PCA 2316/96 *Meron Eisekson v. Party's Registrar*, 50(2) PD 529 (1996).

State of Israel acknowledged, directly or indirectly, the existence of a Palestinian state was struck down by the Supreme Court.[273]

195. Attempts to limit the right for political participation of the Arab Minority's parliamentary representatives continued from the late 1990s to this day. The motions to disqualify individual members or entire political parties have been generated by competing Israeli Jewish political parties represented at the CEC. In the case of the Balad party led by MK Azmi Bishara the Attorney General submitted such a request. The latter party had engaged the Israeli public opinion and the legal authorities because of its clear political platform to transform Israel from the state of the Jewish people or the Jewish state to a state of all its citizens, and due to its persistent positions against the Israeli occupations of Palestinian territories and South Lebanon.

196. Azmi Bishara's claims about Israel's lack of historic legitimacy in Palestine, that the Jewish people is an imagined community exiled from its homeland 2000 years ago, and that Jews around the world do not possess a national status expressed in an interview with Haaretz newspaper were subjected to serious judicial critique. The Supreme Court stated that MK Bishara was close to crossing the line and violate article 7A of Basic Law: The Knesset for denying Israel as the state of Jewish people. It rejected the petition challenging the majority of the CEC's decision to approve Bishara's participation in the elections based on technical grounds relating to the lack of status for the petitioner before the Court, and the fact that Bishara and Balad were not parties to the proceedings.[274]

197. MK Bishara sought to revoke this decision arguing that he and Balad were not party to the proceedings that included determinations by the Supreme Court which could jeopardize the political party's legitimacy before the CEC and the Court itself. Bishara, Balad and the CEC reached an agreement that the Supreme Court's determination about the MK would not be held against him because he was not party to the proceedings and therefore was not given the opportunity to present arguments in relation to the disputed allegations.[275]

198. In 2001 Basic Law: The Knesset was amended again by setting three conditions to bar a political party or an individual from participating in the elections based on the party's explicit or implicit goals or conduct as well as the MK's. The amendment was contextualized as a response to MK Bishara's statements in Syria in which he expressed praise for the Lebanese organization Hizbollah in the aftermath of the Israeli withdrawal from South Lebanon. The conditions prescribed by the Basic Law are: a. denying Israel's existence as a Jewish and democratic state; b. incitement for racism; c. support for an armed struggle, of an enemy state or terrorist group, against the state of Israel.

199. Before the 2003 elections to the Knesset the Attorney General filed an exceptional motion before the CEC requesting to bar Balad party and MK Azmi Bishara from participating in the elections. Given Balad's platform, the Attorney General contended, and

[273] CA 4531/91 *Darweesh Naser et al v. The Association's Registrar*, 48(3) PD 294 (1994).
[274] EA 2600/99 *Avner Erlikh v. Chairman of the Central Elections Committee*, 53(3) PD 38 (1999).
[275] HCJ 2247/02 *MK Azmi Bishara et al v. Avner Erlikh et al*, Judgment, 16 February 2003.

Bishara's public and some private statements the source of which had not been disclosed, Bishara is not interested in realizing equality for Arabs in Israel only rather his long term program is a one state Israel/Palestine instead of Israel. He and Balad are a reincarnation of Al-Ard group. By this Bishara had denied Israel's existence as a Jewish and democratic state.

200. The Attorney General added that based on Bishara's alleged support to resisting the Israeli armed forces in South Lebanon (a conduct that was at the time indicted by the Attorney General) and the occupied territories he practically supported an enemy state or a terrorist organization against the state of Israel. The Attorney General also backed a request to bar right wing and former Kach party leader Baruch Marzel from participating in the elections. Members of the CEC requested to prohibit MK Ahmad Tibi from running in the elections because of his alleged support to resisting Israeli forces in the occupied territories.

201. The majority of the CEC's members decided against the participation of Balad party as well as MKs Bishara and Tibi in the parliamentary elections, and to approve Marzel's. Seven to four Supreme Court ruling did not confirm the decisions barring Balad and MK Azmi Bishara from the elections, whereas in relation to MK Tibi its decision was unanimous. The same majority ratio rejected the appeal against Marzel's participation in the elections. All were permitted to compete as candidates.[276]

202. Prior to the 2009, 2013 and 2015 elections Balad , Unified Arab List, and MK Haneen Zoabi of Balad successfully confronted requests by the CEC to bar them from competing in the elections based on their political positions and activities, including MK Zoabi's participation in the humanitarian Flotilla to Gaza in 2010 which was raided by the Israeli military.[277] After MK Zoabi's legal triumph in 2015 her advocate Adalah's General Director Hassan Jabareen commented about the repeated ritual of requesting to limit rights of the Arab minority's political representatives by filing disqualification requests before the CEC:

> Since 2003, Adalah has represented Arab political parties and MKs against disqualification motions approved by the CEC. This is a process that exists solely to subject the Arab minority to the authority and monitoring of the Jewish majority, which perpetuates the delegitimization of Arabs citizens of Israel. It is time to strip the CEC of this authority and transfer it to the courts.[278]

Sanctioning and Indicting Political Activity

203. Another aspect of limiting the political rights of the Arab minority's representatives is through restricting their privileges as parliamentarians and filing criminal charges for

[276] EC 11280/02 *Central Elections Committee for the 16th Knesset v. MK Ahmad Tibi et al*, 57(4) PD 1 (2003).
[277] EA 561/09 *Balad et al v. Central Elections Committee for the 18th Election*, Judgment, 7 March 2011; EC 9255/12 *Central Elections Committee v. MK Haneen Zoabi*, Judgment, 20 August 2013.

[278] Adalah, Israeli Supreme Court cancels disqualification of Arab MK Haneen Zoabi from 2015 general elections, 18 February 2015, http://www.adalah.org/en/content/view/8462.

their political activity. Their politics included vigorous critique of the Israeli military policies and conduct as well as an attempt to connect the Arab minority to the issues of the wider Arab world.

204. MK Mohammad Miari of the Progressive List for Peace participated in a 1985 memorial for former Palestinian mayor of Hebron and PLO member Fahd Al-Qawasmi conducted in Jerusalem.[279]Likud MK Michael Eitan filed a motion to strip MK Miari of his privileges under the MKs' Immunity, their Rights and Obligations Law -1951 not to be arrested, subjected to search, and freedom of movement while performing his tasks as an elected representative. The Knesset confirmed the stripping of Miari's rights.

205. The Supreme Court's three to two majority ruling upheld the MK's privileges under the law holding that his conduct did not constitute a security risk and it is questionable if stripping the privileges of an MK as a punishing mechanism should be confirmed.[280] Similarly, the Knesset decided in 2010 to limit MK Haneen Zoabi's privileges because of her participation in a humanitarian flotilla to Gaza. The Supreme Court selected not to rule regarding MK Zoabi's petition on the merits because the Knesset term had ended and with it the limitation on the MK's privileges.[281]

206. MK Bishara was indicted for two speeches delivered in June 2000 in Umm al-Fahm and the subsequent year in Syria in which he praised the conduct of Hizbollah's armed resistance against Israeli forces in South Lebanon. Bishara alleged in these speeches that Hizbollah's armed struggle led to the Israeli withdrawal from these territories in May 2000. The Attorney General's charge was that MK Bishara supported a terrorist group in violation of the Terror Prevention Ordinance – 1948.

207. MK Bishara's initial argument before the Magistrate Court in Nazareth was the applicability of his immunity as an MK: his speeches were political expressing his as well as his constituencies' views and they were well established under international law. The Magistrate Court decided that this argument should be considered after hearing the entire case and as part of the final judgment. MK Bishara represented by Adalah petitioned the Supreme Court alleging that this issue should be determined at the beginning of trial. The Court ruled in his favor by a two to one majority judgment. The result was the quashing of the indictment. Nevertheless, Chief Justice Aharon Barak of the majority noted that the presumption is that MK Bishara committed the alleged offense, but he should not be prosecuted for it because of the immunity that he enjoyed as an MK:

> At the end, I should note that there is nothing in my judgment that applauds the petitioner's statements. On the contrary: my presumption was that by making these statements he committed a criminal offense of supporting a terrorist organization. Indeed, the petitioner's statements are difficult, and they are very much unpleasant

[279] Fahd Al-Qawasmi was murdered in Jordan on 12 December 1984 by unknown gunmen.
[280] HCJ 620/85 *MK Mohammad Miari et al v. Chairman of the Knesset, MK Shlomo Helel*, 41(4) PD 169 (1987).
[281] HCJ 8148/10 *MK Haneen Zoabi et al v. The Knesset*, Judgment, 13 February 2013. The Court confirmed the Knesset's sanctions against MK Issam Makhoul of the Israeli Communist Party because of a sharp speech he delivered in the Knesset against the government's policy regarding beach lifeguards in which he used offensive language. See HCJ 12002/04 *MK Issam Makhoul v. The Knesset*, Judgment, 13 September 2005.

to hear. Yet, I found that they were said while the petitioner was performing his duty, and for this purpose, as an MK. We should guard and protect the ability of MKs to perform their duties without fear and concern. This protection, for which the substantive immunity was designated, forms a public interest of a superior priority. This protection is essential for the existence of basic political liberties. It is also essential for the existence of the Israeli democracy.[282]

208. Another indictment incurred by MK Azmi Bishara related to reaching an agreement with the Syrian authorities about 19 trips to that country for Arab citizens (800 people in total) to visit their relatives. MK Bishara and two of his assistants were charged for organizing an illegal entry into enemy state based on Emergency Regulations (Exiting the Country) – 1948. Yet these regulations excluded their applicability in relation to persons who possess a diplomatic passport or a service passport. All MKs obtain a service passport when they assume their role as such. MK Bishara's defense counsel Adalah's General Director Hassan Jabareen raised this issue as a preliminary argument. The Magistrate Court accepted it and ruled that the MK enjoyed immunity from being indicted because of the kind of passport he possessed. MK Bishara's aids, however, were convicted for assisting illegal exit from the country.[283]

209. In 2007 MK Bishara left the country for good and resigned from the Knesset pursuant to an investigation against him for allegedly assisting the Hezbollah organization during the 2006 Israel-Lebanon war and for financial mismanagement.[284]

210. Former Balad MK Said Naffa also arranged trips to Syria in 2007 and met there with the deputy director of the Popular Front for the Liberation of Palestine which was designated as a terrorist organization under Israeli law. The former MK was charged in 2011 for assisting illegal exit from the country and meeting a foreign agent. His preliminary arguments against the indictment were rejected by the District Court in Nazareth which convicted the MK and sentenced him for one year imprisonment.[285] On 31 August 2015 the Supreme Court rejected Mr. Naffa's appeal.[286]

211. MK Mohammad Barakeh of the Israeli Communist Party was charged in 2009 with four counts regarding unrelated incidents concerning his political activity. The Magistrate Court in Tel Aviv annulled two charges before trial because of the MK's immunity. It also acquitted him from the charge of assaulting an undercover police agent at a demonstration in Bilin in the West Bank and convicted him for assaulting a right wing activist at another demonstration. The District Court overturned this conviction in 2015. Adalah's General

[282] HCJ 11225/03 *MK Dr. Azmi Bishara v. The Attorney General et al*, 60(4) PD 287, 324 (2006).
[283] C 5196/01 (MCN) *State of Israel v. Bishara Azmi et al*, Decision, 31 March 2003.
[284] See Amira Howeidy, "Defining the enemy", *841 Al-Ahram Weekly*, 19-25 April 2007; Rory McCarthy, "Wanted, for crimes against the state", *The Guardian*, 24 July 2007; Marwan Bishara, "Why is Israel after my brother?", N.Y. Times, 11 May 2007.
[285] CC (DCN) 47188-12-11 *State of Israel v. Said Nafa, Judgment*, 6 April 2014. The Magistrate Court's judgment in the case of MK Bishara's similar conduct relating to the applicability of immunity given the service passport he possessed as an MK is not binding for the superior District Court. In addition, MK Naffa was accused of meeting a foreign agent, an offense that entails up to 15 years imprisonment sentence.
[286] CA 6833/14 *Said Naffa v. State of Israel*, Judgment, 31 August 2015.

Director Hassan Jabareen who acted as a defense counsel for MK Barakeh noted after his total acquittal the peculiarity of this case advanced against an elected representative of the Arab minority:

> Today's decision shows that the entire case against [former] MK Mohammad Barakeh, with its plethora of different charges, was a political case from the outset. This is the first time that an indictment has been filed against an MK because of his political activities, like participating in a demonstration. The cancellation of all charges against MK Barakeh shows that the state engaged in the selective prosecution of an Arab MK because of his political activity.[287]

212. In addition, former mayor of Umm al-Fahm Sheikh Raed Salah, one of the most prominent leaders of the Islamic movement in Israel, was convicted by the District Court in Jerusalem for inciting to violence and racism. Salah contended that he gave a sermon in Jerusalem two weeks after the Israeli authorities had destroyed holy places that formed part of the Al-Aqsa mosque in which he underscored the criminality of these authorities. He also made implicit analogy to blood libel against Jews but the prosecution dropped the charges against him in this regard.[288]

Freedom of Movement

Emergency Regulations and the Shin Bet's Credibility

213. During the military rule imposed against the Arab minority (1948 – 1966) discussed under a separate chapter, freedom of movement was one of many political rights that such a rule by definition infringed. Permits were required to leave a village on a regular basis. In one instance the Israeli military authorities declared a curfew in a village without the knowledge of some of its residents resulting in a massacre.

214. After the end of the military rule the Israeli authorities advanced three sources of law to limit freedom of movement. Article 110 of the Defense Regulations (Emergency) – 1945 which empowered a military commander to order that a person be placed under police supervision[289] and article 6 of Emergency Regulations (Exiting the Country) – 1948 which authorized the Minister of Interior to "ban a person from leaving the country, if there is a basis for concern that his departure would harm state security". Article 5 of these regulations required to obtain a permit from the Israeli authorities to visit Arab countries

[287] Adalah, Former MK Barakeh's conviction overturned, cleared of all four charges relating to political demonstrations, 11 May 2015.

[288] See Kobi Nachshoni, "Islamic Movement leader in Israel jailed for incitement", *Ynet*, 3 April 2014; Yonah Jeremy Bob, "Islamic Movement leader Salah convicted of racist incitement on appeal", *Jerusalem Post*, 11 October 2014.

[289] Article 108 of the Defense Regulations (Emergency) – 1945 defined the general conditions that permitted issuing military orders under chapter 10 of the regulation(articles 108-113): "An order shall not be made by the High Commissioner or by a Military Commander under this Part in respect of any person unless the High Commissioner or the Military Commander, as the case may be, is of opinion that it is necessary or expedient to make the order for securing the public safety, the defense of Palestine, the maintenance of public order or the suppression of mutiny, rebellion or riot.."

that do not have diplomatic relations with Israel. Obtaining such a permit has been a pre requisite to visiting Saudi Arabia for pilgrimage purposes. 1992 Basic Law: Human Dignity and Liberty which gained a constitutional status in the Israeli legal system provides in article 6(a) that "All persons are free to leave Israel."

215. The orders limiting freedom of movement were issued against authors and persons who wanted to travel to Saudi Arabia for pilgrimage based on undisclosed grounds of security risk provided by the Israel Security Agency (Shin Bet). In 2006 the Minister of Interior informed an Arab journalist that he is banned from traveling outside the country for security reasons, although he did not intend to do so. An Official Commission of Inquiry established to investigate the interrogation conduct of this organization and its performance before Israeli courts found in 1987 that it had systematically misled courts. A decade before the Supreme Court's declaration that certain interrogation methods of the Shin Bet had been illegal,[290] the Commission headed by Justice Moshe Landau of the same Court noted regarding the organization's credibility:

> The second affair, known as the "Bus 300 affair", is significantly different from the norm of committing perjury in courts. Different, and in our opinion, much more severe. In this instance, in addition to committing perjury, a Shin Bet officer member of the investigation committee knowingly and intentionally obstructed its proceedings. Suffice it for our purposes to say that most probably this unimaginable and grave conduct could not have occurred without a systematic and decades long custom of providing false testimonies in courts, which succeeded to mislead courts in so many occasions.[291]

Authors

216. Fawzi Al-Asmar was a member of Al-Ard group. In 1970 a military order instructed the police to ban Al-Asmar's departure from the town of Lod for one year on security grounds. Al-Asmar had lived and worked in Tel Aviv as an Arabic language teacher and a translator. He requested to change the restricting conditions and limit them to Tel Aviv rather than Lod so he would be able to work. Al-Asmar was placed in administrative detention in 1969 because the Israeli secret services had allegedly captured a person from Jordan member of the Popular front for the Liberation of Palestine (PFLP), who possessed a letter written with invisible ink directing him to meet with Al-Asmar of Al-Ard group. Weapons were found as a result of capturing the PFLP person and his interrogation. He was indicted and imprisoned.

217. The Supreme Court rejected Mr. Al-Asmar's petition noting that he did not challenge the legality of the restricting order, rather only its geographic designation. It denied Al-Asmar's allegation that issuing the restricting order was arbitrary aimed at depriving him from working. The Court underscored its limited discretion in reviewing military orders:

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[290] HCJ 5100/94 *Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817 (1999).

[291] Report of the Commission of Inquiry about the Shin Bet's Interrogation Methods relating to Hostile Terrorist Activity, Part I, p.30, (Jerusalem, 1987).

> The power vested in the respondent according to regulation 110 is a broad one, and the Court will not interfere in its application, unless it was done in bad faith and based on considerations that are not related to those enumerated in regulation 108.[292]

218. Saleh Baranse who claimed that he required medical examination abroad and received an invitation to conduct such examination was barred from leaving the country based on a military order that restricted his movement to his town Taybeh for six months and was consistently renewed. The Supreme Court rejected his petition holding that it was satisfied that the undisclosed material of the military which it considered ex parte demonstrated a possible risk for state security that could arise from Mr. Baranse's departure from his town. The Court indicated, without providing any detail, that according to this information the petitioner had been a supporter of armed struggle against Israel. It held that such restricting orders should not be applied as a punitive measure, rather a precautionary one. Their aim is the prevention of a future possible risk to security, but the military authorities can rely on past information to realize this purpose.[293]

219. The Minister of Interior issued an order preventing attorney Kamal Daher from leaving the country for one year. The attorney who was affiliated with MK Miari's Progressive List for Peace intended to collect donations from abroad for a local fund that supported humanitarian causes and students. Some of the sought after financial support would be generated from funds affiliated with the Palestine Liberation Organization designated under Israeli law at the time as a terrorist organization. Based on undisclosed information that the Israeli Security Agency (Shin Bet) provided to the Minister of Interior the latter issued his barring order. The Supreme Court rejected Daher's petition who was represented by the Association for Civil Rights.

220. The Court was content with the *serious and sincere concern* standard applied by the Minister regarding the materialization of the alleged security risk from a person's leaving the country. It did not accept the petitioner's argument that the standard should be higher, *near certainty*, identical to the one adopted by the Supreme Court regarding restricting freedom of expression. The Court also failed the petitioner's request to disclose the Shin Bet's information, and added that it could have reached the same conclusion based solely on information that was available in the public domain regarding the activity of the petitioner:

> I was close to think that information available in the public domain was sufficient to determine, that the respondent's decision was reasonable and did not justify our intervention. Not only did the petitioner acknowledge in his affidavit that he met with PLO leaders and officials in his trips abroad – which could be used against Israel – as if this is not enough – but he also admitted that he raised funds for the "Land Foundation" and for foundations that would be established in the future. The petitioner alleges in his petition, that these are foundations that are affiliated with a political party, of which he is one of its leaders and spokespersons, but given that this party is not part of the current proceedings I will refrain from mentioning its

[292] HCJ 89/71 *Fawzi Yousef Al-Asmar v. Commander of the Central Command*, 25(2) PD 197, 199-200 (1971).
[293] HCJ 554/81 *Saleh Baranse v. Commander of the Central Command*, 36(4) 247 (1982).

name. The foundations are: the 'Land Foundation' (mentioned above), which has a bank account at Bank Hapoalim, and others (yet to be formed), the purpose of which is establishing kindergartens and support students. The petitioners allege that the "Land Foundation" is voluntary and its goals are merely innocent and humanitarian. Yet, we have been shown a pamphlet of this foundation, and its content undermines the petitioner's innocence allegation. It does not distinguish between occupied territories and areas that are integral part of Israel, and it includes harsh statements that do not relate to sympathy with Israel. On the contrary, it projects clear hostility. In any case, it is difficult to say, that the pamphlet's content coincides with state security. Therefore, had the respondent considered that based on publicly available information there was serious and sincere concern that the petitioner's departure from Israel will result in a risk to state security, as mentioned, I would have been inclined not to interfere.[294]

221. In 1987 Mr. Gassan Atamleh was subjected to a military restricting order that confined his movement to his village Reineh and placed him under constant police supervision. In 1981 he was convicted for illegal possession of a weapon and for throwing Molotov cocktail at a bus. He was sentenced for one year imprisonment. The Supreme Court rejected his petition, including the legal argument relating to raising the standard for the materialization of the alleged possible risk for state security to near certainty. The Israel Security Agency (Shin Bet) contended based on undisclosed information that Mr. Atamleh was supporter of Al-Fatah organization, Abu Nidal faction and could be a member in this organization. The Supreme Court ex-parte examination of this information reinforced its decision without finding a justification to disclose it to Mr. Atamleh.[295]

222. Author, journalist and translator Mr. Antwan Shalhat did not intend to leave the country, but the Minister of Interior decided in 2005 to issue an order prohibiting his departure for one year on the grounds that it could generate a security risk for the state. The Minister had sent several orders to Mr. Shalahat that included contradictory and inconsistent information. Adalah challenged this order before the Supreme Court on Behalf of Mr. Shalhat.[296] The human rights organization underscored that without a person intending to leave the country, there is no basis for the Minister of Interior to utilize his draconian authority. It also argued that the Minister failed to provide any details regarding the claimed risk arising from Mr. Shalhat as well as the latter's consistent cultural activity throughout his entire adult career.

223. During a hearing before the Court held on 27 March 2007 it decided to examine the undisclosed materials demonstrating Mr. Shlahat's alleged security risk through an ex-parte session with the Israel Security Agency (Shin Bet) and representatives of the Attorney General Office. In its aftermath the Court recommended that Mr. Shalhat withdraw his petition without providing any reasoning about either party's arguments before it.

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[294] HCJ 448/85 *Attorney Kamal Daher et al v. Rabbi Yitzhak Peretz*, 40(2) PD 701, 710 (1986).
[295] HCJ 672/87 *Gassan Mohammed Hassan Atamleh et al v. Commander of the Northern Command, Yosi Peled*, 42(4) PD 708 (1989).
[296] HCJ 841/06 *Antwan Shalhat et al v. Minister of Interior*, Judgment, 27 March 2007 (the author of this report filed the petition on behalf of Mr. Shalhat).

Pilgrimage

224. Traveling to Saudi Arabia for pilgrimage through Jordan required obtaining a permit from the Minister of Interior based on article 5 of the Emergency Regulations (Exiting the Country) – 1948. In general, the Ministry has annually provided permits for those seeking to exercise this religious commandment. However, several cases considered by the Supreme Court regarding persons who were not granted such permits and were barred from traveling abroad for pilgrimage were often based on undisclosed security considerations or past criminal convictions.

225. The standard adopted by the Supreme Court regarding the authorities' discretion to provide a permit was very broad. The Court held that a governmental decision not to grant the requested permit would be justified if it was established that a mere concern that a risk for state security would occur.[297] In another instance the permit was not granted because of support to the ideas of Al-Ard group.[298] Israeli Security Agency (Shin Bet) undisclosed information disqualified Mr. Bdir for obtaining a permit because of alleged risk that he will communicate with members of PLO's Fatah faction. The Court found without reasoning that "the data before us properly demonstrate and explain the Minister of Interior's concern, and there is no reason for our intervention."[299]

226. Sheikh Raed Salah stated in an affidavit filed before the Supreme Court in 2002 that he did not plan to meet any political figure during his intended travel for pilgrimage in Saudi Arabia which was designated only for religious practice. Nevertheless, the Court favored the version of the Israel Security Agency's (Shin Bet) undisclosed materials which generated the Minister of Interior's order banning former mayor of Umm al-Fahm and leader of the Islamic movement in Israel from leaving the country. His legal representatives of Adalah and Al-Mizan Association for Human Rights underscored the constitutional status of the right to leave the country under article 6(a) of Basic Law: Human Dignity and Liberty. They were disappointed by the Court's adherence to the Shin Bet and rulings delivered prior to the enactment of the Basic Law as well as considering the general security situation which was not an argument made by either party:

> In the case before us we are dealing with an order that bars the petitioner's departure from the country, and as we have seen, it is not the most severe violation of the right to freedom of movement. The prohibiting order was issued for six months. It is not a short period, but it is not an intolerable restriction, even if the purpose of the trip abroad is to exercise the religious commandment of "Al-Omra" in Mecca, Saudi Arabia, on which Kadi Ahmad Natour, The Chief Justice of the Appellate Sharia Court, indicated its significance in his expert opinion of 30 May 2002, by stating that it is "an obligation for anyone who is adult and able…". All of this should be considered versus the security allegations against the petitioner's departure from the country. We should also remember that the petitioner seeks to

[297] HCJ 658/80 *Shafiq Mohammed Ibrahim Taha et al v. Minister of Interior et al*, 35(1) PD 249, 252 (1980).
[298] HCJ 488/83 *Khadije Mohammaed Baranse et al v. Youse Tove, Director of Citizenship and Visa Unit et al*, 37(3) PD 722 (1983).
[299] HCJ 386/85 *Abdallah Nimer Bdir v. Yousef Tov et al*, 39(3) PD 54, 56 (1985).

> travel to Saudi Arabia, an enemy state, which visiting it requires a permit…while deciding between the competing considerations it seems to me that also after the enactment of Basic Law: Human Dignity and Liberty the standard 'serious and sincere concern' which was first mentioned in the Kaufman case and subsequently adopted in the Daher case should be maintained. This standard is enshrined in the text of regulation 6 of the regulations, according which the Minister of Interior is authorized to issue an order banning the departure of a person from the country, and suffice it that there is '…a basis for concern that his departure might harm state security'. Indeed, the right to leave the country, which for generations had been acknowledged as a basic human right, was anchored in article 6(a) of the Basic Law, yet unfortunately, the risks for state security and public safety have not disappeared nor decreased, and there is a basis for the presumption that in these days they have even worsened.[300]

Freedom of Expression

The Kol Ha-Am Precedent 1953

227. The right for freedom of expression in Israel is not enumerated in any norm. Similar to the rights for equality and due process it is also missing from the 1992 Basic Law: Human Dignity and Liberty which is considered Israel's bill of rights. It was first established in 1953 as a result of a challenge before the Supreme Court launched by the Hebrew and Arabic newspapers of the Israeli Communist party against the Minister of Interior's decision based on article 19(2)(a) of the Press Ordinance - 1933 to suspend their publication for 10 and 15 days because of critical articles they published against the government. Known as Kol Ha-Am ruling it has been celebrated by Israeli jurists and legal commentators as one of the most important civil rights judgments in Israel's legal history.[301] Attorney Hanna Nakara represented the Arabic newspaper of the Communist party Al-Ittihad and attorney Haim Cohn argued for the Minister of Interior during the 1953 legal affair.

228. Few months before the landmark decision the Supreme Court rejected the Hebrew language newspaper's petition against a similar decision by the Minister of Interior through a panel of judges that included the author of the precedent setting ruling. The disputed article alleged that the American-Jewish Joint was connected to an international conspiracy to murder Soviet leaders. In a short ruling the Court concluded that "we cannot determine that the order was not in accordance with the law, the Press Ordinance, therefore the motion is denied."[302]

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[300] HCJ 4706/02 *Sheikh Raed Salah et al v. Minister of Interior*, 56(6) PD 695, 705 (2002).
[301] HCJ 73/53 *"Kol Ha-Am" Company Ltd v. Minister of Interior*, 7 PD 871 (1953); Aharon Barak, "Chief Justice Agranat: 'Kol Ha-Am' – The Voice of the People", in Shimon Agranat Book (Jerusalem: Graf Press, 1986) 129; Pnina Lahav, "Freedom of Expresion in the Supreme Court's Rulings", *7 Mishpatim – Hebrew University Law Faculty Law Review*, 375 (1977).
[302] HCJ 25/53 *Kol Ha-Am Company v. Minister of Interior*, 7 PD 165 (1953).

229. The Communist Party's articles that generated the free speech precedent critiqued a statement made by the Israeli Foreign Minister Abba Eban that Israel was willing to provide the United States' Army with 200,000 soldiers should a war erupt against the Soviet Union. The title of the Hebrew language article was 'Yelekh Abba Eban lehilahem levad' ("Abbab Eban should go/walk to fight alone"). For some reason the authors of this article were also not satisfied from the ultimatum the U.S. State Department had imposed on Ben Gurion to evacuate the Arab College in Jerusalem and from Ben Gurion's responsiveness to it.[303]

230. The Court elaborated on the importance of the right for freedom of expression as derived from a democratic regime that seeks to reach informed decisions based on consent rather than coercion, the purpose of which is to expose the truth. It is the precondition for exercising all other liberties. The Court concluded that only when there is near certainty that a risk for public safety would materialize the Minister of Interior's application of his authority to suspend the publication of a newspaper would be justified.[304] Based on this understanding of free speech the Supreme Court accepted the petition of Kach party's leader Meir Kahane against the decision of the Broadcasting Authority to limit airing his speeches and opinions.[305]

Limiting the Right to Publish Newspapers in East Jerusalem

231. The Israeli authorities have generally quelled press activity in East Jerusalem through article 94 of the Defense Regulations (Emergency) – 1945 which grants the District Commissioner in the Ministry of Interior absolute discretion to provide a permit to issue a newspaper or decline a request for a permit without having to reason its decision. Since the aftermath of the 1967 Israel – Arab war Israel has applied Israeli law and jurisdiction to East Jerusalem and in 1980 enacted Basic Law: Jerusalem Capital of Israel which pronounced the unified city as its capital. From Israeli perspective East Jerusalem was part of Israel, and Palestinians living there could theoretically apply for citizenship.[306] Internationally, these actions by Israel were considered illegal.[307]

232. Mr. Asad's successful petition before the Supreme Court against an order barring the issuance of a newspaper was an exception. Despite the broad discretion of the Ministry of Interior and alleged undisclosed information regarding Mr. Asad's ties to the Palestinian Communist party, the Court accepted his denial and overturned the decision of the Ministry

[303] The text of the two articles are annexed to the judgment. See HCJ 73/53 *"Kol Ha-Am" Company Ltd v. Minister of Interior*, 7 PD 871, 898 (Annex A) (1953).
[304] HCJ 73/53 *"Kol Ha-Am" Company Ltd v. Minister of Interior*, 7 PD 871, 882 (1953).
[305] HCJ 399/85 *MK Rabbi Meir Kahane et al v. The Board of Directors of the Broadcasting Authority*, 41(3) PD 255 (1987).
[306] Arab residents of East Jerusalem have certain civil rights vis-à-vis the Israeli authorities but they do not hold Israeli passports and they do not have the right to vote because of their lack of citizenship. See HCJ 282/88 *Awad v. Yitzhak Shamir, Prime Minister and Minister of the Interior*, 42(2) PD 424 (1988).
[307] U.N. Security Council resolution 478 of 20 August 1980 declared the Israeli enactment of Basic Law: Jerusalem, Capital of Israel which purported to confirm East Jerusalem as part of Israel, a violation of international law, null and void.

by a two to one ruling.[308] A request to expand the distribution of a newspaper published in East Jerusalem to the West Bank and Gaza was rejected on the grounds that it served the purposes of the banned Communist party in those areas.[309]

233. Al-Fajr newspaper was suspended for 30 days by the Minister of Interior for covering protest in the occupied territories. The alleged controversial reporting which according to the Supreme Court reached the level of near certainty to cause public disorder was also in English relating to past events.[310] In addition, its editor Hanna Siniora was convicted for publishing in 1986 an interview with PLO Chairman Yasser Arafat conducted in Iraq without submitting it first to the military censorship in line with its order from the same year. Siniora alleged that the order was signed by a non-authorized military commander. The Supreme Court declined to accept this argument conceding with the Attorney General that the signed order merely informed Mr. Siniora of his obligation, in accordance with article 86 and 97 of Defense Regulations (Emergency) – 1945, irrespective of the fact that the signing person was not authorized to issue the order according to the same regulations.[311]

234. Al-Shira' newspaper was shut down based on undisclosed information originating from the Israel Security Agency (Shin Bet) that it was affiliated with the Popular Front for the Liberation of Palestine which was designated under Israeli law as a terrorist organization. The Ministry of Interior decided to close the newspaper despite its adherence to military regulations regarding the obligation to present the newspaper's editions to military censorship prior to their publication, the censorship's approval of its content and, at times, deletion of certain news items. According to the Shin Bet, even if the editorial personnel would be replaced it would not affect the newspaper's alleged affiliation based on the undisclosed information. The Supreme Court conceded with these arguments.[312] The same scenario occurred with two additional newspapers published from East Jerusalem who faced similar allegations based on identical nature of evidence, Al-Mithaq and Al-A'hd.[313]

235. Dr. Najwa Makhoul was an Israeli citizen who lived in Jerusalem and lectured at the public health section in the faculty of medicine of the Hebrew University. Her academic interests were modernizing agriculture, public health and nutrition, sociology of science, the status of women in society, and political economy. She sought to issue a newspaper called "Progressive Magazine". The Israeli authorities denied her request based on confidential security grounds. The Supreme Court declined to order the Ministry of Interior to unveil this information upholding its arbitrary decision.[314]

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[308] HCJ 2/79 *Asad Abdel Munem AL-Asad v. Minister of Interior*, 34(1) PD 505 (1979).
[309] HCJ 619/78 *Al-Taliea Weekly et al v. Minister of Defense*, 33(3) PD 505 (1979).
[310] HCJ 644/*81 Omar International Inc. New York et al v. Minister of Interior, Ministry of Interior*, 36(1) PD 227 (1981).
[311] CA 5590/90 *Siniora v. State of Israel*, 46(5) PD 548 (1992).
[312] HCJ 541/83 *Walid Mohyi El-Din Asali et al v. Jerusalem District Commissioner*, 37(4) PD 837 (1983).
[313] HCJ 562/86 *Mahmoud Al-Khatib et al v. The Ministry of Interior's Jerusalem District Commissioner*, 40(3) PD 657 (1986).
[314] HCJ 322/81 *Dr. Najwa Makhoul v. Jerusalem District Commissioner*, 37(1) PD 789 (1983).

Speech as Incitement

236. The Attorney General filed criminal charges with the purpose to stifle racist speech of extremist right wing activists and against an Arab author who poetically praised youth throwing stones at Israeli soldiers in the Occupied Palestinian Territories. Rabbi Ido Elba from Hebron wrote and distributed among his students in 1994 a pamphlet titled "How to Kill a Gentile". He was convicted for inciting to racism in violation of article 144B of the Penal Law – 1977.[315]

237. Meir Kahane's son, Binyamin, published towards the parliamentary elections in 1992 a pamphlet that called to bomb an Arab village in Israel, emphasizing Umm al-Fahm in particular, for every attack that foreign forces carry out against Israel. Additional hearing conducted by the Supreme Court overturned his acquittal by this court sitting as an appellate criminal instance. A majority ruling of five to two found that his conviction by the District Court for sedition pursuant to article 134 of the Penal Law – 1977 should be maintained.[316]

238. A similar procedure with an opposite result occurred regarding Umm al-Fahm native journalist Mohammad Jabareen. A four to three ruling at an additional hearing of the Supreme Court overturned his conviction for supporting terror under article 4 of the Terror Prevention Ordinance – 1948.[317] The subject of the indictment against Jabareen was a 1991 article published in the context of the ongoing Palestinian uprising in the Occupied Palestinian Territories in which he praised youth who threw stones at soldiers.

239. The Knesset censored calls to boycott Israeli academics or products by defining such a call a civil wrong that could be subjected to a tort law suit. In addition, the Preventing of Damage to Israel through Boycott Law- 2011 set administrative and financial sanctions that could be invoked by the government against individuals and organizations. Within Israel some academics and human rights activists had advanced this call publicly as a protest against the Israeli occupation of Palestinian territories and its practices there. The Supreme Court upheld the constitutionality of the law, except for the provision that authorized courts to determine punitive damages in a law suit against a person who called for boycott.[318]

<u>Social and Economic Rights</u>

The Arab Minority's Social-Economic Condition and the Legal Standard

240. For decades the Arab minority has been ranked at the lowest levels of the social and economic standing in Israel. According to the 2008 census of the Israeli Central Bureau of Statistics which designated all local authorities in the country based on social and economic criteria, Arab local councils have occupied the bottom of the list. The research

[315] CA 2831/95 *Rabbi Ido Elba v. State of Israel*, 50(5) PD 221 (1996).
[316] AHC 1789/98 *State of Israel v. Benyamin Kahane*, 54(3) PD 145 (2000).
[317] AHC 8613/96 *Mohammad Yousef Jabareen v. State of Israel*, 54(5) PD 193 (2000).
[318] HCJ 5239/11 *Uri Avnery et al v. The Knesset et al*, Judgment, 15 April 2015.

created 10 clusters of local authorities based on their social and economic conditions. Out of 252 local authorities in Israel, 79 are Arab. 77 of them are situated in the lowest four clusters.[319]

241. The scope of social and economic rights are not proclaimed by law.[320] In 2001 the Supreme Court set a very basic standard for social and economic rights while considering a civil appeal of an impoverished song writer and academic against his wife's claims regarding collecting her alimony debt:

> A person who lives in the streets with no housing, is a person whose dignity as a human being has been violated; a person who is hungry for bread, is a person whose dignity as a human being has been violated; a person who has no access to elementary medical treatment, is a person whose dignity as a human being has been violated; a person who is compelled to live in humiliating material conditions, is a person whose dignity as a human being has been violated…this applies to the dignity of any person, including the dignity of a person who cannot pay in time a ruled upon debt, and the dignity of a debtor according to alimony debt that had arisen from a judgment.[321]

242. While considering the government reduction of the National Insurance's guaranteed minimal income, the Supreme Court articulated certain obligations of the state to uphold social and economic rights that stem from a person's right to dignity pursuant to Basic Law: Human Dignity and Liberty:

> We can presume therefore for our purposes – without making conclusive conclusions – that from the state's obligation according to Basic Law: Human Dignity and Liberty derives the obligation to maintain a system that would guarantee a "safety net" for those impoverished in society so that their material deprivation would not lead them to an existential destitute. In this framework it should guarantee that a person would have sufficient nutrition and drink for his existence; a housing place where he would be able to exercise his privacy and family life as well as shelter from weather hazards; tolerable sanitation conditions and health services that would enable access to modern medical capacities.[322]

243. Adalah – The Legal Center for Arab Minority Rights in Israel has pioneered legal advocacy, before the Supreme Court in particular, also regarding social and economic rights. The major argument advanced has been discriminatory allocation of budget in relation to specific governmental programs pertaining to social services, housing, education, and health. It also systematically litigated on behalf of the communities of the unrecognized villages in the Negev. Numbering around 80,000 these communities have had tense relations with the Israeli authorities since the founding of the state. During the

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[319] See Central Bureau of Statistics, Table A2: 2008 Socio-Economic Index of Local Authorities, in Ascending Order of Index Values, and Change of Cluster compared to 2006. The additional two local authorities are in the following cluster.

[320] An exception is the Patient's Rights Law – 1996 which defines its purpose in article 1 as to: "determine the human rights of a person seeking medical treatment or is undertaking such treatment and to protect his dignity and privacy."

[321] CA 4905/98 *Professor Yousef Gamzo v. Neama Yeshiyahu et al*, 55(3) PD 360, 375-376 (2001).

[322] HCJ 366/03 *Commitment for Peace and Social Justice Association et al v. Minister of Finance*, 60(3) PD, 464, 482-483 (2006).

military rule (1966 – 1948) they were internally displaced, some of them more than once. They are considered as collective trespassers on land that the state claims is not theirs rather its own. As such they lack a municipal status and basic governmental services including water, electricity, and education.[323]

Budgets

244. The Ministry for Religious Affairs allocated in 1998 1.86% of its budget to non-Jewish religious communities which was subjected to the critique of the State Comptroller. The original petition filed before the Supreme Court alleging discriminatory allocation of budget and requesting to void the relevant sections of the annual budget law was rejected, the Court held that it was too general not specifying actual needs and requirements for Arab religious communities that requested additional funding and their cost.[324]

245. The subsequent petition in this matter filed in 2000 focused on the Ministry's budget allocation relating to cemetery services for Muslim and Christian Arab religious communities. The Court accepted the petition emphasizing the importance of the right to equality which the Ministry for Religious Affairs also conceded. Former Attorney General and Supreme Court justice Yitzhak Zamir indicated the obligation to allocate this budget in accordance with the proportion of the relevant community in total population. He also noted that a slight error of margin in this regard will not be considered legally problematic. The Court critiqued the vagueness of the budget law and the possibilities that it provided for manipulations:

> Is it not clear that a law should be clear? The law, including the budget law, should be clear not only so that any person could read and understand the law, as democracy dictates, but also so that the officials of the Ministry, any Ministry, would not carry out improper manipulations in the budget.[325]

246. Adalah's petition before the Supreme Court barred the cancelation of social services for Bedouins in the Negev and increased posts for social service personnel.[326] Following a petition against the Ministry of Labor and Social Welfare it expanded its criteria regarding the allocation of financial support for deprived individuals which was limited to persons celebrating Passover to include those who celebrate Easter and Feast of

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[323] See The Naqab Bedouin and Colonialism: New perspectives (Nasasra, Richter-Devroe, Abu-Rabia-Queder, Ratcliffe eds.)(Routledge: 2015); Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev (Amara, Abu saad and Yiftachel eds.)(Harvard University Press, 2013); Human Rights Watch, Off the Map – Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages (New York, 2008).

[324] HCJ 240/98 *Adalah – The Legal Center for Arab Minority Rights in Israel et al v. Minister of Religious Affairs et al*, 52(5) PD, 167 (1998).

[325] HCJ 1113/99 *Adalah – The Legal Center for Arab Minority Rights in Israel v. The Minister for Religious Affairs et al*, 54(2) PD 164, 180 (2000). See also HCJ 1399/00 Ittijah – The Union of Arab Community Based Organizations in Israel et al v. Ministry for Religious Affairs (a request to order the Ministry to provide equal budget for religious buildings – mosques, churches, religious courts. The Ministry committed to allocate the budget to three categories: synagogues, mikva'ot (ritual baths), and buildings for Arab religious communities).

[326] HCJ 5838/99 *The Regional Council of the Unrecognized Villages in the Negev et al v. Minister of Labor and Welfare*, Judgment, 11 September 2000.

the Sacrifice as well.[327] The distribution of the neighborhood renewal project by the Ministry of Construction and Housing designated 13% of its social budget to Arab towns. The Supreme Court found that this was a discriminatory distribution of the project's budget which relied, inter alia, on a non-relevant criteria - the level of high residential buildings that existed in a town:

> Relying on this criteria which was not included in the list of criteria was not appropriate because of its lack of inclusion and because of the ambiguity regarding the weight it was granted in relation to selection for the project.[328]

247. The Israeli government had consistently determined a national priority map according which it would designate local authorities with poor social and economic standing that would receive substantial financial assistance, including for education. According to this map two areas, A and B, list deserving local authorities, primarily those far from the center in the north and south of the country. 1998 and 2002 governmental decisions that designated local authorities to areas A and B excluded Arab local authorities.

248. Acting on behalf of the highest representative political body of the Arab minority, The High Follow-Up Committee for the Arabs in Israel, Adalah challenged the governmental designation of local authorities in relation to financial assistance for education on two grounds: discrimination and lack of governmental authority to allocate substantial state funding based on its decision rather than parliamentary legislation.

249. The Supreme Court ruled in favor of the petitioners declaring the government's decision as void, but suspended its judgment's effect for one year because of possible ramifications on the expectations of already included local authorities. It also rejected the petitioners request to include seven Arab local authorities in the south of Israel whose social and economic standing was the worst in the country. According to Justice Heshin who drafted the ruling regarding the government's power to allocate substantial funding based on its decision rather than pursuant to legislation:

> Indeed, experience has taught us that when legislative and executive powers are centered with one authority, there will be no liberty, human rights shall not exist, democracy will evaporate, and authoritarianism will dominate. We have been taught of this by no other than the father of the separation of powers theory Baron Montesquieu, in his book The Spirit of the Laws…[329]

250. The Israeli authorities did not express urgency to implement this ruling and were faced with another petition the purpose of which was to implement the Court's judgment. The Supreme Court underscored its dissatisfaction with the government's conduct and granted it additional year to implement its original decision.[330]

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[327] HCJ 2422/98 *Adalah – The Legal Center for Arab Minority Rights in Israel et al v. Minister of Labor and Social Welfare et al*, Judgment, 11 May 1998.

[328] HCJ 727/00 *The Committee of the Heads of Arab Local Authorities' Mayors et al v. Minister of Housing and Construction*, 56(2) PD 79, 91 (2001).

[329] HCJ 11163/03 *The High Follow-Up Committee for the Arabs in Israel et al v. Prime Minister of Israel*, 61(1) PD 1 (2006), para.26 of Justice Heshin's opinion.

[330] HCJ 11163/03 *The High Follow-Up Committee for the Arabs in Israel et al v. Prime Minister of Israel*, Judgment, 23 November 2008.

251. Several other cases contested the legality of governmental funding and subsidies. A 2002 amendment to the National Insurance Law – 1995 that applied greater reduction of children allowance for parents who did not serve in the Israeli forces was withdrawn pursuant to a petitioning the Supreme Court.[331] Similarly, the Supreme Court declared as discriminatory and unconstitutional an amendment to the Income Tax Ordinance - 1961 that granted tax benefits to certain local authorities, none of them Arab, without defining criteria for this designation. In addition, three Arab local authorities were included in a tax benefits scheme prescribed by the Tax Ordinance pursuant to this legal challenge. The Attorney General Office did not oppose the claims of the petitioners. According to Chief Justice Dorit Beinisch "For this reason it was sufficient to grant the petitioner's request, and if we prolonged, it is due to the severity of the matter."[332]

252. An amendment to the Guaranteed Income Law – 1980 that disqualified a person who owned a car from income guarantee entitlements was considered unconstitutional because it violated the right to minimal existence with dignity.[333] It required a petition to the Supreme Court to make The Minister of Agriculture set regulations that allowed Arab framers to apply for eggs allotment.[334]

Housing

253. Serving in the Israeli security forces, and in the Israeli military in particular, had been used as a condition to provide economic benefits or increased benefits to the detriment of the Arab minority. This issue has arisen in cases related to benefits for housing.

254. The Arab minority is not required to serve in the Israeli military, and for obvious historical reasons the vast majority of them do not desire to carry out such a service, although Israeli Communist Party Knesset member Tawfik Toubi complained in 1950 over their lack of recruitment to the military describing it a racial discrimination.[335] In any event the military's appeal to members of this minority was because of their sub dividing identities, rather than their Arabness. Such was the policy decision to recruit the Arab Druze community to the military in 1956.[336]

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[331] HCJ 4822/02 *The Committee of Arab Local Authorities' Mayors et al v. The Institute for National Insurance*, Judgment, 31 July 2003.
[332] HCJ 8300/02 *Gadban Nasr et al v. The Government of Israel et al*, Judgment, 22 May 2012, para.47 of Chief Justice Beinisch opinion.
[333] HCJ 10662/04 *Salah Hassan et al v. The Institute for National Insurance et al*, Judgment, 28 February 2012.
[334] HCJ 3815/08 *Iyad Mages et al v. Minister of Agriculture et al*, Judgment, 23 June 2013.
[335] Knesset Records 1950, pp.534-535.
[336] See Liav Orgad, "The Arab Minority and the Obligation of Security Service", *11 Ha-Mishapat – College of Management Law School Law Review*, 381, 393-394 (2007)(discussing the military's historical approach towards the Arab Druze.). The Security Service Law – 1986 places a duty on any person who was called upon by the military to abide by this call. Its language does not exclude individuals or groups based on national identity. There is no specific obligation defined by law that requires Arab Druze to serve in the Israeli military. Should this group desire so, it can advance an argument that it deserves a similar treatment to the Arab minority which its members do not receive recruiting calls to serve in the Israeli military.

255. Ministerial rules pursuant to the Law for Housing Loans – 1992 granted additional funding for those who served in the Israeli military or conducted national service. The benefits according to this law were additional to those provided in accordance with the Absorption of Released Soldiers Law – 1994. The maximum difference in the amount of loan given to applicants who have exercised the aforementioned service compared to those who have not was 125,000 shekels. The Supreme Court rejected a petition against this policy ruling that that the Absorption of Released Soldiers Law – 1994 did not constitute an exhaustive measures to benefit persons who served in the military.

256. Chief Justice Aharon Barak also concluded that "the difference between the benefit provided to those who served in the military and the one provided to those who did not, even at the highest level of entitlement that can be reached pursuant to the military service criteria, is not unreasonable".[337] A request for additional hearing alleging that the Court had ignored important precedents regarding the government's obligation to allocate substantial funding only by law rather than policy regulations was rejected as well.[338]

257. The Haifa District Court accepted the law suit filed by Arab students against Haifa University targeting its policy of preferring students who served in the Israeli military in dormitory allotment. It found that the University's policy was based on irrelevant considerations which resulted in discriminating Arab students.[339]Similarly, pursuant to petitioning the Supreme Court the Israel Land Administration retracted from including the military service condition in bids for land allotment announced in the Arab town of Rahat.[340]

Health

258. The right to receive medical care is defined in the National Health Insurance Law – 1994. One of the first legal activities of Adalah regarding the Bedouin communities in south of Israel known as unrecognized villages was to petition the Supreme Court in 1997 to order the Ministry of Health to establish preventive care clinics (mother and child clinics) in these areas. Prior to this petition only one such clinic existed run by a non-governmental organization which received state funding and foreign donations. Pursuant to this petition and a legal follow up six tentatively constructed clinics were established by 2001 as the authorities had initially committed themselves soon after filing it.[341]

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[337] HCJ 11956/03 *Suhad Bishara et al v. Minister of Housing and Construction*, Judgment, 13 December 2006, para.11.
[338] AHCJ 1241/07 *Suhad Bishara et al v. Minister of Housing and Construction*, Judgment, 14 October 2007.
[339] OM (Haifa District Court) 217/05 *Haneen Naamneh et al v. Haifa University*, Judgment, 17 August 2006.
[340] HCJ 9457/05 *Rizeq Gilawi et al v. The Administration for Advancing the Bedouins in the Negev et al*, Judgment, 15 April 2007. Some in the Bedouin community serve in the Israeli military. In the petition it was argued that including this condition created an economic incentive to serve in the Israeli military, although Arab citizens are not requested to perform such a service.
[341] HCJ 7115/97 *Adalah – The Legal Center for Arab Minority Rights in Israel et al v. Ministry of Health*, Judgment, 19 December 2001. These communities do not have a municipal status and could be evacuated for their alleged trespassing on state claimed land.

259. Three additional clinics were established following another petition filed by the Association for Civil Rights in Israel in 2000. The Supreme Court, however, denied the petitioners' request to order the Minister of Health to set clear regulations pertaining to establishing clinics in the unrecognized villages on the grounds that his power to set such rules under the National Health Insurance Law – 1994 was not mandatory. Justice Elyakim Rubenstein concluded "To my mind, the authority to set rules and conditions for establishing infrastructure to provide health services according to this law is not mandatory, rather a discretionary authority, as the language of the law indicates, which twice uses the term 'permitted'".[342] This ruling seems to depart from established jurisprudence which holds that the administrative authority should carry out its powers according to the text of the law and its purpose. It should act in a fair and reasonable manner.[343]

260. Seven unrecognized villages in the Negev sought to be connected to the national water infrastructure and receive water in an appropriate quantity and quality. The authorities' policy had been to provide tanks of water from which residents of these villages would travel to obtain water. The quality of the water, its quantity, and the hardship to obtain it amounted to either having scarce unhealthy water or not having it at all. Nearby ranches provided to individual Israeli Jewish families were connected to the national water infrastructure. The general goal of the Israeli authorities had been not to provide these communities with basic services in order to convince them to move to one of the permanent seven Bedouin towns in the Negev.

261. Pursuant to a petition filed before the Supreme Court in 2001, the authorities proposed that groups of 10 families could apply for specific water points.[344] The requests of the families who petitioned the Supreme Court for water points were rejected by the Water Commissioner on the grounds that they can extract water from existing water points. The District Court upheld the Water Commissioner's decision.[345] Some of the families' appeals before the Supreme Court were accepted and their matter was returned to the Water Commissioner for additional consideration. The appeals of the rest were rejected because they either live in relative proximity to existing water points or they have residential opportunity in one of the permanent Bedouin towns in the Negev. The Court upheld the legality and reasonableness of state policy in this regard:

> According to this policy, the tendency is to create incentives for the unrecognized villages to settle in permanent legal towns in the various alternatives that the state has provided. As long as the illegal settlement throughout the Negev continues, and as an intermediate phase until a general solution is reached regarding the Bedouin settlement, the authorized agency operates in two tracks to guarantee for the Bedouin residents access to water resources: first – establishing water centers from which water can be transported to the unrecognized villages; second – granting a

[342] HCJ 4540/00 *Labad Abu Afash et al v. Minister of Health et al*, Judgment, 14 May 2006, para. F(3) of Justice Rubinstein's opinion.
[343] See Yitzhak Zamir, "The Justice Consideration in Administrative Decisions", *7 Mishpat Umimshal – Haifa University Law School Law Review*, 623 (2005).
[344] HCJ 3586/01 *The Regional Council for the Unrecognized Villages in the Negev et al v. The Minister of National Infrastructure*, Judgment, 16 February 2003.
[345] WC 609/05 (Haifa District Court) *Abdallah Abu Msaed et al v. Water Commissioner et al*, Judgment, 13 September 2006.

specific individual water connection in certain circumstances based on the recommendation of the Water Committee, and in accordance with humanitarian considerations...the phenomenon of illegal settlement by the Bedouin dispersion in different parts of the Negev is contrary to the law and to rules of public order that obligate every citizen in the country. It has ramifications on their ability to obtain the entire benefits that citizens who reside legally on the land are entitled to.[346]

262. The Israel Land Administration (ILA) sprayed land cultivated by Bedouins in the Negev with toxic. The spraying took place from the air through an airplane without the permission of the cultivating farmers. The ILA alleged that the farmers were trespassers on state land and that they were not permitted to cultivate it. The Supreme Court declared the conduct of the ILA illegal. Justice Salim Joubran accepted the farmers' arguments advanced by Adalah that the ILA was not authorized to spray the cultivated land in order to realize its claimed land rights and that the spraying endangered the health of the farmers and the environment. Justices Arbel and Naor concurred with this ruling, holding that the ILA was authorized to conduct the spraying but the manner in which it was exercised (by airplane and without notification) endangered health and was therefore disproportionate measure carried out by the ILA to gain land rights.[347]

Cultural Rights

263. The Arab minority's cultural rights claims have demanded to learn Palestinian and Arab history without the interference and controlling dictates of the Israeli authorities, particularly its security apparatus. As in all other aspects, governmental budgets have been scarce regarding Arab education as well. Composed mostly of peasants or cheap labor, their cultural elites have struggled to spread enlightening ideas. The first clear articulation of this minority's cultural impasse was put forward in English by Sami Mar'i's 1978 book Arab Education in Israel. He underscored the fundamental contradiction between the purposes of the official Israeli education and the education of Arabs in the country. Through gaining more familiarity with the Israeli state and society, albeit not completely considering its mysterious *situation*, and an increase in self-confidence, representatives of the minority have sought to realize also equal language as well as religious rights.

Education

264. Official Education Law – 1953 defined the goals of education in Israel and the various recognized religious education for Mizrahi and Ashkinazi schools. It also determined the purposes of this education which includes to teach the history of the land of Israel and the state of Israel as well as the Torah, the history of the Jewish people, the heritage of Israel and Jewish tradition, to endow the memory of the holocaust and educate to respect them. In 2000 the law was amended and aother goal was added:

[346] CA 9535/06 *Abdallah Abu Msaed et al v. Water Commissioner*, Judgment, 5 June 2011, paras.41, 53 of Justice Procaccia's opinion.
[347] HCJ 2887/04 *Salim Abu Mdegim et al v. Israel Land Administration et al*, 62(2) PD 57 (2007).

> To be familiar with the language, culture, history, the special heritage and tradition of the Arab population and other populations in the state of Israel, and recognize the equal rights of all citizens in Israel.[348]

265. Mandatory Education Law – 1949 proclaims the obligation of parents to register their children for education at the age of five and the state's duty to provide free education together with the local authorities. The same obligation applies regarding special education for children with special behavioral, physical, or mental needs in accordance with Special Education Law – 1988. Extended Educational Day and Enrichment Law – 1997 is designated to enhance the intelligence capacities of students in underprivileged areas. Pupil's Rights Law – 2000 articulates the pupil's basic right for education as well as the prohibition on sectarian discrimination.

266. On two occasions the Supreme Court found the right for education as significant. While rejecting a petition against the Ministry of Education's decision to reduce funding for and possibly annul an educational program designated to benefit underprivileged Israeli Jewish pupils the Court declared the importance and significance of the right for education.[349]Another case involved the right of Israeli Jewish students with special needs to receive special education. The Supreme Court upheld the petitioner's right to obtain funding for special education services and announced the significance of the right to education stemming from Israeli laws. It also concluded that this right is not connected to the right for dignity and therefore does not form a basic right derived from Basic Law: Human Dignity and Liberty

> Indeed, the fundamental right for education – the creation of laws, international law and jurisprudence – stands on its own, with no necessary connection to the right for human dignity proclaimed by Basic Law: Human Dignity and Liberty."[350]

267. The legal relations between the Arab minority and Israeli law in the field of education have generated attempts to obtain equal funding and educational services as well as to contest the authorities' desire to exercise control over the minority through the educational system. 1983 petition against governmental policy which granted subsidies to Jewish religious educational institutions because of their religious practice was denied by the Supreme Court. It held that the allocation of subsidies was not discriminatory given that no similar educational institutions existed in the Arab community.[351]

268. Similarly, the Court denied two petitions challenging the application of the Extended Education Day Law – 1990. In the first petition it held that the Ministry of Education's geographic designation for the law's application which included few Arab local authorities was not biased considering that within three years the law would be

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[348] Article 2(11) of Official Education Law – 1953. The following provision, article 2(12), which was added in 2007, proclaims another purpose for the official education: to educate about the sanctity of life and caution, including caution while driving.

[349] HCJ 1554/95 *"Shoharey Gilat" Association v. Minister of Education*, 50(3) PD 2, 24 (1996).

[350] HCJ 2599/00 *Yeted – Parents Association for Children with Down Syndrome v. Minister of Education*, 56(5) PD 834 (2002), para.6 of Justice Dorner's opinion.

[351] HCJ 200/83 *Mohammad Watad et al v. Minister of Finance et al*, 38(3) PD 113 (1984).

applied to the entire country.[352] In the subsequent petition the Court considered as reasonable the Ministry of Education's discretion regarding its geographic designation for enjoying the law's benefits which included local authorities based on their location at confrontation borders.[353] A significant program of the same Ministry was applied to the Arab community in accordance with its proportion in the general population pursuant to litigation before the Supreme Court which noted that:

> From the aforementioned it appears that while the petition has been pending a significant progress has occurred in relation to the respondents' treatment regarding the application of the Shahar programs in the Arab sector, and it became clear that significant steps have been taken to amend the distortion which had taken place for years in the matter of allocating resources for education to this sector. Indeed, the background for filing the petition, as demonstrated by the materials before us, reveals a difficult picture of discriminating the Arab sector in the field of education.[354]

269. The traditional argument advanced by Arab intellectuals against the Israeli educational system is that, at best, it has been apathetic to the needs of the Arab minority or, at worst, intended to dominate this community also through education. Arab students were denied the right to learn their own history. Palestinian identity has been considered as a subversive element as such.[355]Arab teachers who expressed their views in writing were subjected to severe administrative penalties. Teacher Raja Agbaria from Umm al-Fahm, for example, was dismissed from his teaching position and his pension was stripped from him because he wrote articles expressing critical political views of Israel's policies towards Palestinians. The Supreme Court proposed to adopt less severe sanctions for his conduct.[356]

270. For decades the Arab section in the Ministry of Education included a high ranked official who was from the Israel Security Agency (Shin Bet). He occupied the post of deputy head of this section and as such exerted significant influence on Arab education including through the appointment of supervisors, headmasters and teachers. A petition filed before the Supreme Court on behalf of the National Arab Students' Parents Association led to the cancelation of this position.

271. Initially, the Attorney General Office alleged that the existence of such a person was legitimate because he provided the Ministry with appropriate information about the criminal background of candidates for work as supervisors, headmasters or teachers. The petitioners underscored that this was not the subject of the petition, and they did not opposes the rejection of candidates for teaching who had a criminal background. They

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[352] HCJ 3491/90 *Mustafa Soboh Agbariya et al v. Minister of Education and Culture et al*, 45(1) PD 221 (1990).
[353] HCJ 3954/91 *Mustafa Soboh Agbariya et al v. Minister of Education and Culture et al*, 45(5) PD 472 (1991).
[354] HCJ 2814/97 *The High Follow Up Committee for Arab Education in Israel et al v. The Ministry of Education, Culture and Sport*, 54(3) PD 233, 238 (2000).
[355] See Sami Mar'i, Arab Education in Israel (Syracuse University Press, 1978); Majid Al-Haj, Education, Empowerment, and Control: The Case of the Arabs in Israel (State University of New York Press, 1995); Khaled Abu-Asbeh, The Arab Education in Israel – Dilemmas of a National Minority (The Floersheimer Institute for Policy Studies, 2007); Khaled Abu Asbeh, "Arab Education in Israel: Between the Discourse of Struggling Identity and Low Achievement", 63 Adalah's Newsletter (August, 2009).
[356] CCA 1945/94 *Raja Agbaria v. Civil Service Commissioner*, Judgment, 2 August 1994.

alleged that such a post has no place in an educational system and emphasized the failure of the Attorney General Office, who did not deny the existence of this post, to respond to evidence about its negative interference in pedagogical matters. The subsequent response by the Attorney General Office was that the position would be canceled, and that any relevant information would be provided by the Shin Bet through the Security Section of the Ministry.[357]

272. The Administration for the Advancement of the Bedouins had managed the education rights for the unrecognized Bedouin communities in the Negev. Established in 1983 it was headed by the same person since the subsequent year Mr. Moshe Shohat. Throughout the years Bedouin leaders and academics expressed their frustration from the manner in which Mr. Shohat administered this authority and its governmental funds. He was critiqued also by an internal report of the Ministry of Education which recommended to conduct a bid for Mr. Shohat's position and that he should take a leave of absence until such a bid was carried out. In July 2001 New York based magazine The Jewish Week published an interview with Mr. Shohat in which he expressed repugnant comments about the community he was supposed to serve:

> Blood thirsty Bedouins who commit polygamy, have 30 children and continue to expand their illegal settlements, taking over state land…In their culture they take care of their needs outdoors…They don't even know how to flush a toilet.[358]

273. A petition filed before the Supreme Court on behalf of many individuals and organizations active in the field of education and Bedouin rights demanded to order the Ministry of Education to release Mr. Shohat from his position and examine his financial management of the Administration that he headed for 17 years. As a result he was dismissed from his position and serious financial mismanagement by him was discovered during the proceedings. Eventually the entire Administration for the Advancement of the Bedouins was dismantled and providing education services for the unrecognized villages was transferred to a newly planned regional council.[359]

274. Given the incompetence of the Ministry of Education and the Administration for the Advancement of the Bedouins residents of the unrecognized villages litigated their education rights before the Supreme Court achieving certain successes and some failures. Connecting schools to electrical generators, [360] and establishing two schools formed of tentative construction were realized pursuant to litigation.[361] The Supreme Court rejected a petition relating to establishing kindergartens because the unrecognized communities

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[357] HCJ 8193/04 *National Arab Students' Parents Association et al v. Ministry of Education et al*, Judgment, 29 June 2005 ; State Response, 20 October 2004; Petitioner's Reply, 3 November 2004; State Additional Response, 22 June 2005. The author of this report filed the petition before the Supreme Court.

[358] The Jewish Week, July 2001. An American Jewish public figure emphasized the distasteful and embarrassing character of these comments "His opinions are not only factually incorrect but are offensive in the extreme and an embarrassment to Jews Everywhere."

[359] HCJ 7383/01 *Megel AL-Hawashle et al v. Limor Livnat – Minister of Education*, Judgment, 3 May 2004.

[360] HCJ 4671/98 *Dr. Awad Abu Freih et al v. Administration for the Advancement of the Bedouins*, Judgment, 17 January 1999.

[361] HCJ 5221/00 *Dakhlalah Abu Gardud et al v. Regional Council Ramat Negev et al*, Decision, 16 October 2002.

lacked a municipal status and therefore it was not possible to construct permitted permanent buildings there.[362]

275. The Court issued an order to erect a bridge near an unrecognized village because of the possible danger that floods in the area could constitute to passing students.[363] It also ordered to pave and construct a proper road to a school considering the serious risk to students without such modifications.[364] The Court failed to order additional posts of officials whose task is to prevent or decrease dropout rates from schools for the Bedouin communities in the Negev who suffer from this phenomenon acutely. It ruled that a change in the Ministry of Education's policy is required but it is understandable that this would be a prolonged process given the extent of the disparity compared to the Jewish population and the limited resources at the Ministry's disposal.[365]

276. The Knesset's 2011 amendment of the Budget's Foundations Law – 2011 empowered the Minister of Finance to reduce public funding for governmentally supported bodies or individuals should they issue a publication that commemorates the Nakba (Palestinians' 1948 perceptions of the war) or undermines Israel as a Jewish and Democratic state. The legal challenge to the constitutionality of this amendment before the Supreme Court alleged that it is a violation of the Arab students' for education, in addition to stifling freedom of expression and artistic creation.

277. The Supreme Court rejected the petition on technical grounds because no concrete dispute has been demonstrated by the petitioners represented by Adalah, despite its acknowledgment of the issue's constitutional significance.[366] The Court's ruling is not in line with its firm precedents which have established that it would consider such constitutional matters which by definition pose clear general ramifications even if the petitioners have not presented a specific dispute stemming from the impugned provision.[367]

278. The Supreme Court upheld the right of a quasi-private high school in Nazareth to bar a religious Muslim female from being a student after she had been admitted because she wore a veil during preparatory classes towards the beginning of the school year. It found that the status of the school under the law (recognized but not official) placed limits on the level of intervention that the Court could invoke and afforded the school with more autonomy in its administration. Had the school been regulated differently (recognized and official), the Court added, it would have ruled in favor of the student to secure tolerance in

[362] HCJ 5108/04 *Ismail Mohammed Abu Goda et al v. Limor Livnat, Minister of Education*, 59(2) PD 241 (2004). For a similar result regarding a different location see HCJ 10030/05 *Aref Al-Amur et al v. Minister of Education*, Judgment, 26 April 2006.
[363] HCJ 3511/02 *The Association of "Coexistence Forum in the Negev" et al v. The Ministry of Infrastructure et al*, 57(2) PD 102 (2003).
[364] HCJ 6773/05 *Ali Afnan Gaboua et al v. Ministry of Education et al*, Decision, 14 September 2005.
[365] HCJ 6671/03 *Munjed Abu Ganam et al v. Ministry of Education et al*, 59(5) PD 577 (2005).
[366] HCJ 3429/11 *Graduates of the Arab Orthodox High School in Haifa et al v. Minister of Finance et al*, Judgment, 5 January 2012.
[367] See, for example, HCJ 6652/96 *The Association for Civil Rights in Israel v. Minister of Interior*, 52(3) PD 117 (1998) (reviewing the constitutionality of emergency regulations in light of Basic Law: Freedom of Occupation).

administering public schools.[368] However, the Court could have subjected the school to its review, given that it received governmental funding and has had to abide by certain administrative rules set by the Ministry of Education.

Language

279. Article 82 of the Palestine Order in Council – 1922 is considered the source for the official status of Arabic in Israel. Although the British authorities abolished it by the Palestine Act – 1948, it was maintained through the Israeli Governance and Law Order – 1948 which canceled the official status of English together with British laws that limited Jewish immigration to the country. The English version of article 82 defined a broader status for Arabic than the Hebrew text, by designating it as an official language for parliamentary debates as well, with no apparent explanation for this disparity. The English text:

> All Ordinances, official notices and official forms of the Government and all official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner, shall be published in English, Arabic and Hebrew. The three languages may be used in debates and discussions in the Legislative Council, and, subject to any regulations to be made from time to time, in the Government offices and the Law Courts.

280. The Hebrew version of this article omits the important sentence "The three languages [should be two after abolishing the status of English – MD] may be used in debates and discussions in the Legislative Council…"

281. Language rights litigation has been utilized to seek the addition of Arabic or to disqualify a conduct that omitted its use. The first occasion in which the issue of the legal status of Arabic emerged was peculiar because it did not involve an Arab side to the legal dispute and no significant constitutional violation had been raised. An Israeli Jewish resident of Jerusalem claimed in 1954 that he should not pay the municipality his share for the costs of building a sewage system because the municipality did not announce in Arabic its intention to build it. The Court implied that there was no obligation to publish municipal ads in Arabic given the change of circumstances in the country following the establishment of Israel in accordance with article 11 of the Governance and Law Order – 1948. It denied the petitioner's argument because he was not an Arab who could read Hebrew.[369]

282. A challenge against the legality of a construction plan in the village of Rameh based on the Construction and Planning Law – 1965 because it was not published in a daily Arabic newspaper as the law required pursuant to a 1973 amendment was accepted.[370]

283. Nazareth Attorney Mohammed Hawari requested to postpone the elections for Nazareth Municipality because his name was not included in the voters' registration

[368] HCJ 4298/93 *Mona Jabareen through her parents Nahia and Khaldoun Jabareen v. Minister of Education et al*, 48(5) PD 199 (1994).
[369] CA 148/54 *Yahia Kaha v. Jerusalem Municipality*, 9 PD 1247, 1250 (1955).
[370] HCJ 527/74 *Hanneh Khalaf et al v. The District Committee for Construction and Planning, Northern District et al*, 29(2) PD 319 (1975).

records. He intended to vote and run for the municipality's council. The Attorney General alleged that under the governing laws regarding municipal elections, all those who had been registered to vote in the general elections for parliament were also included in the municipal voting registration records. Mr. Hawari was not included in the former thus the absence of his registration from the latter. The Nazareth Attorney contended that he was not aware of this legal framework because the laws were not published in Arabic thus his failure to contest his absence from the registration record for the general elections. The Court only expressed sorrow at his debacle without considering the status of Arabic language and whether there had been an obligation to publish laws also in Arabic.[371]

284. A dispute over a single vote handwritten in Arabic which would have determined a seat in the local council of Hurfeish local authority generated statements about the importance of Arabic language in Israel. Elections laws permitted an interpretation that such a vote should have include Hebrew language as well in order to be valid. Nevertheless, the Supreme Court underscored the importance of Arabic language and its official status, that the elections were held in an Arabic speaking village, and that internal regulations of the National Municipal Elections Committee explicitly defined such a vote as legitimate.[372]

285. Contractors who wanted to sell newly built apartments in the Arab town Jaffa of Nazareth intended to publish Arabic ads about the sale in the predominantly Jewish town of Nazareth Illit. The latter municipality opposed the publication of the ads in Arabic claiming that a municipal law required that at least two thirds of the ads be in Hebrew. The Supreme Court ruled that the construction company was entitled to publish the ads only in Arabic holding that their right to do so was derived from the importance of protecting the freedom of commercial speech and because of the status of Arabic as an official language. It also elaborated that the supreme significance of Hebrew language in Israel as the primary language would not be affected by permitting the Arabic ads.[373]

286. The Ministry of Infrastructure and the Ministry of Transportation conceded pursuant to a petition filed by Adalah and the Arab Association for Human Rights before the Supreme Court to include Arabic writing on signs in long roads. The petitioners relied on the official status of Arabic in accordance with article 82 of the Palestine Order in Council – 1922 as well as the right to equality.[374] In a subsequent petition Adalah and the Association for Civil Rights in Israel sought to compel four predominantly Jewish municipalities (Tel Aviv- Jaffa, Ramla, Lod, and Nazareth Illit) in which substantial number of Arabs reside to use Arabic language in all of their signs. A two to one majority ruled in favor of the petitioners.

287. The Court did not base its ruling on article 82 of the Palestine Order in Council – 1922. It reiterated the Attorney General's argument that the provisions required the High

[371] HCJ 279/65 *Mohammed Nimer Al-Hawari v. Chairman of the Elections Committee for Nazareth Municipality et al*, 19(3) PD 279 (1965).
[372] PCA 12/99 *Jamel Meri v. Farid Sabek et al*, 53(2) PD 128 (1999).
[373] HCJ 105/92 *Ram Contractors Engineers Ltd. v. Nazareth Illit Municipality et al*, 47(5) PD 189 (1993).
[374] HCJ 4438/97 *Adalah – The Legal Center for Arab Minority Rights in Israel et al v. National Transport Infrastructure Company Lts. et al*, Judgment, 25 February 1998.

Commissioner to issue an order designating its applicability to local authorities. Article 82 states "official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner, shall be published in…Arabic and Hebrew". Since the High Commissioner did not issue a prescribing order, and no Israeli authority did so as well, it was not possible to derive an obligation upon local authorities to publish their official notices and signs based on this provision. The Attorney General's formalist understanding of this provision and its acceptance by the Court undermined the primary source for the official status of Arabic in the country.

288. Writing for the majority Chief Justice Aharon Barak, as in the ads ruling, underscored the superiority of the Hebrew language in Israel. Based on equality considerations, importance of Arabic, and safety allegations advanced by the petitioners regarding persons who do not understand Hebrew, he concluded that the municipalities are obligated to include Arabic in their signs. The minority opinion drafted by Justice Heshin emphasized the functional aspect of municipal signs and stressed that legal rights are provided for individuals, rather than groups.[375] A request by Ramleh municipality to conduct an additional hearing was rejected by the Court.[376]

Religion

289. Palestine Order in Council – 1922 defined the jurisdiction of religious courts for religious communities in Palestine (Muslims, Christians, and Jews) regarding personal status matters. After the founding of Israel the Sharia Court and the courts for recognized Christian communities (9 in total) continued to operate based on the provisions of the Palestine Order in Council – 1922 as confirmed, for Muslims, by the Sharia Courts Law (Confirmation of Appointments) – 1953. Rabbinical Courts Law – 1953 and Druze Religious Courts Law - 1962 defined their jurisdiction over personal status matters for these communities. Family Matters Court Law – 1995 established a civil jurisdiction for personal status issues other than marriage and divorce.

290. The Supreme Court denied an attempt to recognize the legitimacy of the Supreme Islamic Council after the founding of Israel which dispersed as a result of the 1948 war. Petitioners before the Supreme Court claimed that the Ministry for Religious Affairs has neglected the issues of Arab Muslims in the country and particularly in Acre where it appointed a committee of Muslim citizens who, according to the allegation, mismanaged public funds. In rejecting the petition the Court held that only the Israeli parliament, the Knesset, could establish by law an entity similar to the Supreme Islamic Council which seized to exist as a result of the 1948 war. The Custodian for Absentees' Property who operated pursuant to the Absentees' Property law – 1950 replaced the Supreme Islamic Council in relation to Waqf property it had controlled and managed. It also did not find any

[375] HCJ 4112/99 *Adalah – The Legal Center for Arab Minority Rights in Israel et al v. Tel Aviv – Jaffa Municipality et al*, 56(5) PD 393 (2002).
[376] AHCJ 7260/02 *Ramleh Municipality v. Adalah – The Legal Center for Arab Minority Rights in Israel et al*, Decision, 14 August 2003.

shortcomings on the part of the Ministry or its appointed committee in acre regarding managing some of the Muslim community's affairs there.[377]

291. Similarly, a group of concerned Arab Christians litigated against the official Christian leadership in the North demanding receipts regarding managing funds that were supposed to benefit the community. The Supreme Court upheld the District Court's ruling that the plaintiffs failed to establish a trusteeship relationship between them and the respondent. The Court also found that the proper instance to deliberate this issue was the relevant religious Christian Court because the plaintiffs have not demonstrated a designation of Christian Waqf property after the Trusteeship Law – 1979 entered into force.[378]

292. Unlike Muslim and Christian Arabs, Druze Arabs enjoyed the establishment of a Supreme Religious Council in 1957 pursuant to the regulations of the Minister for Religious Affairs in accordance with the mandate era Religious Communities Ordinance (Their Organization) – 1926. This Council controls the Druze Waqf, governmental budgets designated for the Druze community, and participates in appointing judges for the Druze religious courts. In the aftermath of Sheikh Amin Tarif's death in 1993, the spiritual leader of the Druze community and the head of its Supreme Religious Council for decades, and additional members of the Council, the Minister for Religious Affairs set regulations regarding the appointment of persons to the Religious Council. A group of Druze citizens unsuccessfully challenged the legality of the regulations on the ground that they did not include elections as a means to appoint the Council's members therefore paved the way for inappropriate considerations in the appointment process. A majority ruling of two to one upheld the Minister's regulations because of their effectiveness in managing the affairs of this religious community which was caught in an internal dispute following the death of its spiritual leader.[379]

293. Despite determining fatherhood was a personal status matter subjected to the exclusive jurisdiction of the Sharia Court, the Supreme Court decided that an unmarried mother could approach a civil court to obtain a ruling about the status of fatherhood for the purpose of gaining alimony for the child. The Court reasoned that several laws proclaim rights for the child that created a 'civil status' for childhood – parenthood relationship.[380]

294. After the completion of plans for constructing a tolerance museum in Jerusalem and at the beginning of construction work remnants of Muslim graves were discovered. The Sharia Court issued injunctions barring the construction. The police failed to execute these injunctions. The issue reached the Supreme Court pursuant to petitions filed by both sides: Muslim activists and human rights organizations on the one hand and Simon

[377] HCJ 282/61 *Mahmoud Al-Srouji et al v. Minister for Religious Affairs and the Muslim Committee, Acre*, 17 PD 188 (1963).
[378] CA 5444/95 *The Sons of the Galilee Archbishop Association et al v. Archbishop Maximus Salum*, 41(4) PD 811 (1997).
[379] HCJ 7351/95 *Munir Nabwani et al v. Ministre of Religions Affairas et al*, 50(4) PD 89 (1996).
[380] CA 3077/90 *Unidentified Person et al v. Unidentified Person*, 49(2) 578 (1995).

Wiesenthal Center in Los Angeles, Jerusalem Municipality, and the Israel Land Administration on the other.

295. The Court denied the exclusive jurisdiction of the Sharia Court over this matter holding that the land was not designated as Waqf. It rejected the petition against constructing the museum, subject to reaching an appropriate solution for the discovered graves in line with the proposition of the Israel Antiquities Authority: either to remove the graves to a nearby Muslim cemetery or construct in their area above the ground in a manner that would not affect their physical condition.[381]

296. A building in Beersheba which was a mosque in pre 1948 Palestine, a prison and a court house after the founding of Israel, and from 1953 a museum was the subject of litigation before the Supreme Court. In 1992 the building was declared a dangerous construction and remained vacant while the Beersheba municipality had intended to renovate it as part of a museums complex.

297. In 2002 a petition was filed before the Supreme Court alleging that the municipality's decision to make this location a museum violated the basic rights of Muslim worshipers in the area for religious freedom and dignity. The petitioners claimed that the building should be designated as a mosque and renovated for this purpose. A two to one majority ruling of the Supreme Court declined this request, but ruled that the designated museum should be dedicated to Islamic history, culture and tradition in a manner that could advance understanding and tolerance among the population in Beersheba and throughout the country.[382]

298. The District Court rejected a law suit filed by the Arab Students Committee against Haifa University because of the latter's failure to permit them to place a Christmas tree in the university's main building. The students argued for equal treatment given that the Israeli Jewish students were allowed to place religious Jewish symbols in the main building on Jewish holidays through the General Students Association. The Court held that the plaintiffs rejected placing a Christmas tree in the main building not by them rather by the General Students Association, and were not satisfied by the option of placing this tree by them in another building of the University. It perceived the matter as a struggle between students' organizations rather than an issue of freedom of religion or expression.[383]

299. The Supreme Court struck down a decision of a Sharia Court to appoint a male arbitrator for a woman in a marital dispute. The woman had proposed a female arbitrator to represent her in the arbitration before the Sharia Court, which ruled that this is not possible under the governing Islamic law. The Supreme Court held that the Sharia Court disregarded the Woman Equality Rights Law – 1951 which imposed a duty also on all

[381] HCJ 52/06 *Al-Aqsa Company for the Development of Waqf Land in Israel Ltd et al v. Simon Wiesenthal Center Museum Corp. et al*, Judgment, 29 October 2008.
[382] HCJ 7311/02 *The Association for Assisting and protecting the Rights of Bedouins in Israel et al v. Beersheba Municipality et al*, Judgment, 22 June 2011. The minority judge opined that the petition should be rejected in its entirety for procedural considerations.
[383] OM (Haifa District Court) 283/04 *Mousab Doukhan et al v. Haifa University et al*, Judgment, 23 November 2005.

judicial bodies to abide by its provisions. It further noted that this decision was not an interference in the Sharia Court's exclusive jurisdiction over personal status matters regarding marriage and divorce rather a legitimate judicial review of the Sharia Court's judicial function.[384]

Conclusion

300. The Arab minority's status in Israel as discriminated against and underprivileged is difficult to dispute. However, if this predicament is understood in the realm of the Israeli situation, then Arab citizens will discover that they are not the only discriminated or persecuted group, and that it is practically impossible to forge sincere alliances with politicians or seek the solidarity of 'progressive' individuals from the Israeli Jewish society. The Israeli situation is rigid and total as those who have maintained it for decades.

301. Law provides a suitable opportunity to understand the status of the Arabs in the country. It has been utilized in the early days of the state when the familiarity of Arab lawyers with Israeli law and its application by Israeli Jewish justices had not been ideal. During the crisis of the first Palestinian uprising minority lawyers attempted to represent arrested individuals before the Israeli military court system which undermined basic fair trial rights or filed tort law suits seeking damages for injured plaintiffs. Yet their activity was ad hoc rather than strategic.

302. Adalah – The Legal Center for Arab Minority Rights in Israel has paved the way for civil rights litigation that future generations should reflect upon and develop. The mystery of the Israeli situation will always stand in the way either as an obstacle or an analytical diversion. But there are other possibilities to advocate the law and contest its application than situating a case in court.

[384] HCJ 3856/11 *Unidentified v. The Appellate Sharia Court et al*, Judgment, 27 June 2013.

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