

**THEORIZING AND TRACING THE LEGAL DIMENSIONS OF
A CONTROL FRAMEWORK:
LAW AND THE ARAB-PALESTINIAN MINORITY IN
ISRAEL’S FIRST THREE DECADES (1948–1978)**

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INTRODUCTION

This Article analyzes the main ways in which Israeli law was involved in the lives of Israel's Arab-Palestinian minority in the first thirty years of Israeli statehood—from its establishment in 1948 until the period soon after the first Land Day in 1976. This is a detailed and complex story, which requires a theoretical or analytical key to cut through the complexity and sort out the abundance of data by relevancy and importance. The potential theoretical contribution of this Article derives from the effort to develop such a theoretical or analytical key, and from an attempt to gain a deeper understanding of the ways in which law is involved in the intriguing stability of certain exploitive intercommunal relationships.

First, the Article asserts that the study of law's involvement in the minority's life should be conducted through an understanding of its function in the socio-political framework of the intercommunal relationship in society. Hence, if we identify this framework and understand its aims and needs, we are provided with a map that helps us comprehend and sort out the various legal norms by relevancy and impact. Furthermore, this map assists in answering the question of whether the legal system or certain legal norms act or acted as a servant to or a subversive element against this socio-political framework.

Subsequently, I proceed to the core of the Article, which is an application of this structure of analysis to the case of Israel. Lustick's pioneering work defined, theorized, and detailed the "control" model as the socio-political framework that operated during the first thirty years of Israel's existence.¹ This Article finds that the legal system in this period acted as the efficient servant of this framework. Hence, this Article contributes to the understanding of the control model by tracing and analyzing its legal dimensions. Among other things, the Article attempts to answer the following questions: in what ways did the law serve to deepen minority dependence, to co-opt its elites and divide its community; and how did it partly disguise and partly legitimize this state of affairs?

This line of analysis opens the door for a comparative legal analysis of divided societies in which the control framework is or was imposed upon the minority. Obvious examples worthy of further exploration, which are beyond

¹ IAN LUSTICK, *ARABS IN THE JEWISH STATE: ISRAEL'S CONTROL OF A NATIONAL MINORITY* (1980); see also Ian Lustick, *Stability in Deeply Divided Societies: Consociationalism Versus Control*, 31 *WORLD POL.* 325 (1979) [hereinafter Lustick, *Stability in Deeply Divided Societies*].

the scope of this Article, are Northern Ireland and its Irish-Catholic minority from 1921 to 1968,² Sri Lanka and its Tamil minority from the 1970s forward,³ and possibly also the Kurdish minority in Turkey.⁴

The first two Parts of this Article (I and II) develop the theoretical and analytical key for unlocking the legal norms that were most pertinent to the minority's status in Israel's first three decades. The next two Parts (III and IV) provide a detailed analysis of the major legal norms and state practices that helped shape the minority's vulnerability and exploitation. Part III discusses the ways in which common citizenship rights—the classic, basic rights—lost much of their potency to protect the minority. Part IV unfolds the poverty of the minority's group-differentiated rights, which bore the same impact. The last substantive Part, Part V, tackles the issue of the potential stabilizing effect of the law, and, more concretely, how the law was integrated at the time into the stabilizing mechanisms of the “control framework,” thus enabling its prolongation.

I. LAW AND MINORITIES IN DEEPLY DIVIDED SOCIETIES—OUTLINING A STRUCTURE FOR ANALYSIS

Analysis of the involvement of the law in the lives of its subjects is more demanding than it may seem at first glance. A standard approach would focus on the legal arrangements addressing the minority citizens directly—conferring rights and imposing obligations—but that is not all that the law does.⁵ It also shapes a set of second-level norms—the meta-norms—which establish the powers and procedures by which the primary norms are enacted and which establish state institutions that adopt policies; regulate restrictions, freedoms, and allocations; and apply and enforce the norms.⁶ These institutions interrelate in a complex web of cooperation, competition, and mutual checks

² See Sammy Smooha, *Control of Minorities in Israel and Northern Ireland*, 22 COMP. STUD. SOC'Y & HIST. 256 (1980) [hereinafter Smooha, *Control of Minorities*] (discussing and comparing the conflict between groups and application of the control framework in Northern Ireland and Israel).

³ ILAN PELEG, *DEMOCRATIZING THE HEGEMONIC STATE* 183–87 (2007); Maya Chadda, *Between Consociationalism and Control: Sri Lanka*, in *MANAGING AND SETTLING ETHNIC CONFLICTS: PERSPECTIVES ON SUCCESSES AND FAILURES IN EUROPE, AFRICA, AND ASIA* 94, 94–95 (Ulrich Schneckner & Stefan Wolff eds., 2004).

⁴ Umit Cizre, *Turkey's Kurdish Problem: Borders, Identity, and Hegemony*, in *RIGHT-SIZING THE STATE: THE POLITICS OF MOVING BORDERS* 222, 222 (Brendan O'Leary, Ian S. Lustick & Thomas Callaghy eds., 2001).

⁵ See H.L.A. HART, *THE CONCEPT OF LAW* 91–95 (1961).

⁶ *Id.*

and balances. In addition, the impact of the norms that these institutions generate is often unforeseen because these norms are employed by different social players in an attempt to bring about social change.⁷ The legal analysis aspires, therefore, to expose simultaneously how the law is involved in the mechanisms that conserve the existing order, as well as how it may become a lever for those wishing to modify the order of things.

The reciprocal relationship between law and society as it pertains to a minority is compounded further by several issues, two of which are enumerated here. First, the law is but one of various social, political, economic, and cultural mechanisms that shape social reality. As such, its power should not be overestimated. The law may indeed at times render another mechanism superfluous, but likewise it may be replaced or be overshadowed by other social mechanisms.⁸

Second, and from a different angle, a society is not merely an arena of social players competing to shape its direction by way of the law or other means, nor simply a framework of vying mechanisms of influence and guidance, of which law is one; it also has its exigencies. The legal system often serves several masters, and several social needs, of which the intercommunal relationship pattern concerning a specific minority is but one.⁹ Hence, for example, a state may be divided along more than one communal rift and contain more than one intercommunal relationship pattern. In such a case a variety of social demands are met through one normative framework, often yielding important and sometimes unpredicted results, a phenomenon that I shall call “peripheral radiation.” This term refers to the notion that it is difficult to design or apply legal norms selectively due to their generic nature. This is

⁷ See Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT'L L. & POL. 885, 886 (2004) [hereinafter Saban, *Minority Rights*]; John Morison, *How to Change Things with Rules*, in LAW, SOCIETY AND CHANGE 5, 9–14 (Stephen Livingstone & John Morison eds., 1990); Claire Palley, *The Role of Law in Relation to Minority Groups*, in THE FUTURE OF CULTURAL MINORITIES 120, 121–26, 157–59 (Antony E. Alcock et al. eds., 1979); Robert Wirsing, *Dimensions of Minority Protection*, in PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES 3, 12–14 (Robert Wirsing ed., 1981).

⁸ HART, *supra* note 5, at 91–95.

⁹ See Ann Elizabeth Mayer, *A Benign Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT'L L. & FOREIGN AFF. 237, 328–29 (2001) (discussing Israel's deference to religious communities' autonomy in an effort to “avoid[] exacerbating inter-communal tensions” and balance this interest against Israel's obligations under the Convention on the Elimination of Discrimination Against Women).

especially true with respect to the decisions of courts,¹⁰ but it also often applies to legislation. For instance, it is not easy to devise an electoral system that protects Favored Minority A while simultaneously working to the disadvantage of Marginalized Minority B. As a result, although the state may want to protect a certain minority, oftentimes another minority will inevitably receive protection as well.

This complexity (the different kinds of legal norms, the various state authorities, the various social players, the many needs that the law addresses, and the peripheral radiation) tends to obscure the relevant legal norms having the greatest impact on the minority. There is therefore a need for an analytical key to help us gain access to this complexity. The following two steps are suggested. First, I suggest beginning with the socio-political set-up before proceeding to the law, rather than the other way around. Thus, we start with an effort to understand public policy toward the minority—its purposes, requirements, and main methods of achievement, while also identifying the minority's response to this policy. Second, we seek to discover which of the legal norms—general or particular, targeted directly or indirectly toward the minority—participate in and serve the policies pertaining to the minority, as opposed to those that are counteractive and weaken or help transform these policies.

The first step of the proposed analysis—state policy toward the minority and the minority's response—is encapsulated in a vital variable: the pattern(s) or the framework(s) of intercommunal relationship vis-à-vis the minority in the given deeply divided society during a period under review. This socio-political framework may change over this period or remain operative. There are three main patterns—three paradigms—of intercommunal relationships: the integrative-civil paradigm, the consociational paradigm, and the ethnic paradigm. They each diverge along the lines of three questions. The first question pertains to the power differentials between majority and minority groups and asks whether the purpose of a state's policy is to preserve and exploit power disparities to the detriment of the minority. In other words, to what extent is the relationship pattern hierarchical and abusive as oppose to one of partnership? The second question asks whether the policy aims to maintain the distinctness of the communities or to bridge and unify them by

¹⁰ Mark Tushnet referred to this point when he discussed “the inevitable openness of reasoning by analogy.” MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 40 (1981).

encouraging an overarching and superseding common identity,¹¹ and whether the weaker community is coerced or pressured to accept this dimension of the framework. The third question concerns how the relational framework attempts to remain stable in the face of its sources of antagonism.

The integrative-civil paradigm, sometimes called the nation-building paradigm, aspires to forge a bridging identity within society and thus veers away from hierarchies, at least in its statement of intent.¹² It strives to render common citizenship the overarching identity prevailing over identities of origin.¹³ This paradigm has at least two sub-divisions. One is more intensive and rigid and aims to enforce a melting pot reality. It is referred to as a republican framework and is applied, among other places, in France and Turkey.¹⁴ The second sub-division of the integrative-civil paradigm serves the same purpose but strives to attain it with less coercion and less direct involvement of the state.¹⁵ By means of a dominant language (used in the education system, the labor market, and by the mass media) and a dominant culture, and by projecting social expectations, the state allows assimilation or integration to take its gradual but consistent course.¹⁶ Well-known cases in point are large immigration states such as the United States, Canada, and Australia.¹⁷

By contrast, the consociational paradigm reconciles itself with the centrality of the original identities in the lives of the members of each community and, moreover, treats them with a fair measure of equality.¹⁸ This is a horizontal framework of basic partnership (albeit often a tense one)

¹¹ In other words, is the relational framework divisive or integrative?

¹² See Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 *ETHNIC & RACIAL STUD.* 389, 390 (1990) [hereinafter Smooha, *Minority Status in an Ethnic Democracy*] (describing “nation-building” as, among other things, a process in which a state “forges a common language, identity, nationalism, and national institutions for its citizens”).

¹³ *Id.*

¹⁴ See Leora Bilsky, *Uniforms and Veils: What Difference does a Difference Make?*, 30 *CARDOZO L. REV.* 2715, 2715 (2009); Maximilien Turner, *The Price of a Scarf: The Economics of Strict Secularism*, 26 *U. PA. J. INT'L ECON. L.* 321, 322–23, 330–31 (2005).

¹⁵ See Ilan Saban, *Appropriate Representation of Minorities: Canada's Two Types Structure and the Arab-Palestinian Minority in Israel*, 24 *PENN ST. INT'L L. REV.* 563, 572 (2006) [hereinafter Saban, *Appropriate Representation of Minorities*].

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 1–8 (1977).

between the communities that make up a society.¹⁹ Classic examples include Switzerland, Belgium, and Canada (as relating to the French-speaking minority).²⁰ One recent attempt in this direction is Northern Ireland after the 1998 Belfast Agreement.²¹ The relationship between secular and religious Jewish communities in Israel is another such example.²²

The third paradigm, the ethnic paradigm, resembles consociationalism in that it maintains the separateness of the communities comprising a society, but differs essentially from consociationalism in that it is a distinctly hierarchical framework.²³ This is the paradigm that Israel maintains toward its Arab-Palestinian minority.²⁴ As mentioned above, it also characterizes Northern Ireland's approach toward its Catholic minority, at least until the early 1970s,²⁵ and that of Sri Lanka vis-à-vis the Tamil minority in recent decades.²⁶ Another example of this paradigm can be found in Macedonia's treatment of its Albanian minority, certainly until the Ohrid Agreement in 2001.²⁷ This paradigm is divided into three sub-types.²⁸ Israel oscillates between two and does not seem likely to attain the third in the foreseeable future.

The two subtypes within which the status of the Arab-Palestinian minority should be viewed are the control framework, to which this Article devotes much attention, and the "ethnic-democracy" framework.²⁹ The third and last subdivision of the ethnic paradigm lies between the ethnic and the consociational—and this is the "autonomy" framework.³⁰ Had the minority in Israel enjoyed autonomy, it would have improved its socio-political status

¹⁹ *Id.*; see generally AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984) (comparing consociational democracy—which Lijphart here calls consensus democracy—to majoritarian democracies).

²⁰ LIJPHART, *supra* note 18, at 121–27.

²¹ See Christine Bell & Kathleen Cavanaugh, "Constructive Ambiguity" or Internal Self-Determination? *Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 *FORDHAM INT'L L.J.* 1345, 1362–65 (1999).

²² LIJPHART, *supra* note 18, at 130.

²³ Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 573–74.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Graham Holliday, *From Ethnic Privileging to Power-Sharing: Ethnic Dominance and Democracy in Macedonia*, in *THE FATE OF ETHNIC DEMOCRACY IN POST-COMMUNIST EUROPE* 139, 155–58 (Sammy Smoooha & Priit Järve eds., 2005).

²⁸ Saban, *Minority Rights*, *supra* note 7, at 922, 987.

²⁹ See Smoooha, *Minority Status in an Ethnic Democracy*, *supra* note 12, at 391 (depicting the application of ethnic democracy "by focusing on Israel as a democratic ethnic state and on the discord as to the status of the Arab minority in it").

³⁰ See Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 573–74.

fundamentally. Although it would not have become a full partner in the state, it would have ascended to a notch above the status of a “protected” minority.³¹ The Arab-Palestinian minority would then have enjoyed the power to self-administrate important internal spheres of its communal life.³²

These three paradigms and their sub-divisions together comprise the variables in the socio-political status of a minority in deeply divided democracies.³³ They provide the spectrum of possible patterns of intercommunal relationships in those societies. Each pattern describes a strategic framework within which the majority and minority interact in a given time span.³⁴ In examining this spectrum of frameworks we acquire several theoretical tools. First, the spectrum enables us to conduct a comparative political analysis—between different societies, between different minorities within a certain society, and between different periods of time over the life of a certain society.³⁵ Second, the differences between each paradigm, and each subdivision within a paradigm, assist us in foretelling which social changes are more likely to occur—naturally a full paradigmatic change is much more demanding in comparison to an inner-paradigmatic change.³⁶ Third, and most important in this context, the pattern of intercommunal relationships lends a kind of mapping of the main objectives of the public policy implemented toward the minority group and what issues must be addressed in order to realize them (as a result, among other things, of the minority’s reaction to these objectives).³⁷ Such a map helps one to discern the function and effect of the legal arrangements, recognize the more important of them, and explore these norms’ modes of participation (on the spectrum between servitude and subversion) in the purposes and needs of the pattern.

I now move to apply this proposed structure of analysis to the case of Israel.

³¹ See Saban, *Minority Rights*, *supra* note 7, at 979–82.

³² See *id.*

³³ For an expanded review, see *id.* at 919–24.

³⁴ See Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 572–74.

³⁵ See *id.*

³⁶ See, e.g., Saban, *Minority Rights*, *supra* note 7, at 994–97 (describing the potential effect of changes in the legal status of Arabic on its “sociolinguistic status,” and describing the absence of systemic support for this change in Israel).

³⁷ See Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 565–66 (describing the potential nature and effect of affirmative action).

II. THE CONTROL FRAMEWORK: THE SOCIO-POLITICAL STATUS OF THE ARAB-PALESTINIAN MINORITY IN THE FIRST THIRTY YEARS OF ISRAEL'S STATEHOOD

A. *Background on the Minority's Socio-political Status*

An intercommunal relationship pattern, which delineates a minority's socio-political status, is a result of the basic facts and features pertaining to a society and the way in which it opts to deal with them.³⁸ The following is a selection of fundamental data concerning the Arab-Palestinian minority in the period under review.

The war that accompanied the establishment of the State of Israel (1948–1949) resulted in many casualties and rendered about 600,000–760,000 Palestinians refugees.³⁹ Preceding the establishment of the State, quite wide international support was expressed in UN General Assembly Resolution 181 of November 29, 1947,⁴⁰ for partitioning Mandatory Palestine into Jewish and Arab states, and granting Jerusalem special status.⁴¹ In the background hung the Jewish Holocaust of World War II, an unprecedented horror in human history.⁴² The Palestinians and the Arab states rejected the partition resolution, and war erupted.⁴³ After the war, an Arab state in Palestine was not established—even on narrower territory than would have been allocated to it by the partition resolution. Rather, the State of Israel was established within the borders of the 1949 Armistice agreements with the neighboring Arab states; the West Bank was controlled and ruled by Jordan, the Gaza strip was controlled and ruled by Egypt, and Jerusalem was physically divided between two sovereign entities, Israel and Jordan.⁴⁴

³⁸ *Id.* at 572–74.

³⁹ BENNY MORRIS, BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947–1948 1 (1987); *see also* U.N. Conciliation Comm'n for Palestine, General Progress Rep. and Supplementary Rep., Dec. 11, 1949–Oct. 23, 1950, app. 4, ¶ 15, U.N. Doc. A/1367/Rev.1 (Oct. 23, 1950) (estimating the number of refugees at approximately 711,000).

⁴⁰ G.A. Res. 181, U.N. Doc. A/516 (Nov. 29, 1947).

⁴¹ MORRIS, *supra* note 39, at 27–29.

⁴² Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 75 (2003).

⁴³ MORRIS, *supra* note 39, at 29.

⁴⁴ Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 937–38 (2003).

At the end of the war, about 160,000 Arab-Palestinians were left within Israel's cease-fire borders and became Israeli citizens.⁴⁵ The war left the Palestinian people devastated. They became at once a stateless and a trans-state people (spread between Israel and all its neighboring countries: Jordan, Lebanon, Syria, and Egypt).⁴⁶ The *nakba*, the 1948–1949 disaster of the Palestinians, had personal repercussions as well. The dispossession and expulsion of many Palestinian communities left a great part of the refugees with a strong sense of injustice and grief.⁴⁷ Those who remained in Israel became an indigenous, vanquished minority.⁴⁸ They were dominated by newcomers (who conceived of themselves as returnees).⁴⁹ Some of the Arab-Palestinians who remained in what became Israel were internal refugees, uprooted from their birthplaces that had been destroyed.⁵⁰ Those who stayed were mainly a traditional, rural, farming population.⁵¹ They were internally segmented further into three communities—the Muslim community and the two other, smaller, communities—Christian-Arabs and Druze.⁵² In short, the

⁴⁵ *Id.* The numbers have of course changed, and quite dramatically, since 1948–1949. The Arab population constituted in 2008 about 20.2% of all residents of Israel (1.48 million people). Press Release, Ctr. Bureau of Statistics (Isr.), Demographic Situation in Israel—2008 (Dec. 16, 2009), http://www.cbs.gov.il/hodaot2009n/01_09_280e.pdf [hereinafter Demographic Situation in Israel—2008]. The internal segmentation of the Arab population in Israel is as follows: 153,100 Christian residents, 121,900 Druze, and 1,240,000 Muslims. CTR. BUREAU OF STATISTICS (ISR.), STATISTICAL ABSTRACT OF ISRAEL 2009 (2009), available at http://www.cbs.gov.il/shnaton60/st02_02.pdf. These figures include the Palestinian residents of East Jerusalem as well as Israeli citizens who have settled in the territories. Demographic Situation in Israel—2008, *supra*. East Jerusalem was annexed to Israel in 1967 by its domestic law (but not according to international law). Yehezkel Lein, *The Holy City in Human Dimensions: The Partition of Jerusalem and the Right to Social Security*, 26 NETH. Q. HUM. RTS. 199, 208 (2008). The Palestinians of East Jerusalem are now residents of Israel but not Israeli citizens. *See id.* at 209–10. At present, they number approximately 277,000 people. *OPT: Displacement Risk for Palestinians in East Jerusalem*, IRIN (Jan. 17, 2011), <http://www.irinnews.org/report.aspx?ReportID=91648>.

⁴⁶ *See* WILLIAM L. CLEVELAND, A HISTORY OF THE MODERN MIDDLE EAST 357–58 (2000); BARUCH KIMMERLING & JOEL S. MIGDAL, PALESTINIANS: THE MAKING OF A PEOPLE 146–56 (1993); ELIA ZUREIK, PALESTINIAN REFUGEES AND THE PEACE PROCESS 9–10, 16–27, 29–64 (1996) [hereinafter ZUREIK, PALESTINIAN REFUGEES].

⁴⁷ *See* MERON BENVENISTI, SACRED LANDSCAPE 254, 308–09 (2000); RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF A MODERN NATIONAL CONSCIOUSNESS 177–79, 190–95 (1997); KIMMERLING & MIGDAL, *supra* note 46, at 127–29; EDWARD W. SAID, THE END OF THE PEACE PROCESS: OSLO AND AFTER 267 (2000).

⁴⁸ *See generally* CLEVELAND, *supra* note 46, at 340–41 (describing Israel and its occupied territories during the War).

⁴⁹ Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 NATIONS NATIONALISM 475, 485 (2002).

⁵⁰ HILLEL COHEN, THE PRESENT ABSENTEES: THE PALESTINIAN REFUGEES IN ISRAEL SINCE 1948 7, 21–25 (2000).

⁵¹ MORRIS, *supra* note 39, at 8–9.

⁵² *See id.* at 199–201.

minority was fragmented, elite-less, and economically deprived, comprising about 12.5% of the overall population of Israel at the time.⁵³

War, terror, violence, and counter-violence remained clear and continuous marks of Israel's relations with the Palestinians and with the Arab states.⁵⁴ The minority was trapped within a state that was in deep and long conflict with the minority's people and its brethren nations.⁵⁵ In the eyes of the Jewish majority community, this rendered the minority a perpetual threat, a disloyal populace.⁵⁶

A double minority syndrome evolved, whereby each side of the national divide in Israel felt itself at once a minority and a majority.⁵⁷ The Arab-Palestinian community is a minority in Israel but part of a regional majority, whereas the Jewish majority community in Israel is a small minority in the Middle East.⁵⁸ Thus, a permanent element of instability surfaced—a sort of inherent manic-depressive factor in the psychology of each side of the divide.

In 1967, with the occupation of the West Bank and Gaza Strip, the Arab-Palestinian minority within the 1949 Armistice borders of Israel (“Green Line” or “Israel proper”) were physically reunited with a major part of its people by way of their joint subordination to one power—the State of Israel. However, the civic status of these two Palestinian groups is substantially different: the members of the minority are citizens of Israel, while the Palestinians under Israel's Occupation are “protected persons” according to international law.⁵⁹

⁵³ GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 111 (2002).

⁵⁴ SABRI JIRYIS, THE ARABS IN ISRAEL 138–40 (1976); *see also* KHALIDI, *supra* note 47, at 177–209 (describing the Palestinians' state of mind following the 1948 War); MICHAEL B. OREN, SIX DAYS OF WAR 4–12 (2002).

⁵⁵ JIRYIS, *supra* note 54, at 138–40 (describing violence between Israeli forces and Arab communities).

⁵⁶ *Id.* This complex, multilateral relationship is the reason the minority in Israel experienced and continues to experience fluctuations in this relationship. *See, e.g., id.* at 140–53. The harshest example of this in the period under review was the *Kfar Qassem* Massacre, on the eve of the 1956 Suez Operation. *See id.* For further discussion of the multilateral relationship, *see generally* ALAN DOWTY, *THE JEWISH STATE: A CENTURY LATER* 211–12 (1998); LUSTICK, *supra* note 1, at 84–86; SHAFIR & PELED, *supra* note 53, at 134; Dan Rabinowitz, *The Palestinians Citizens of Israel, the Concept of Trapped Minority and the Discourse of Transnationalism in Anthropology*, 24 *ETHNIC & RACIAL STUD.* 64 (2001); Smooha, *Control of Minorities*, *supra* note 2, at 259, 262; Oren Yiftachel, Debate, *The Concept of “Ethnic Democracy” and Its Applicability to the Case of Israel*, 15 *ETHNIC & RACIAL STUD.* 125 (1992).

⁵⁷ JON CALAME & ESTHER RUTH CHARLESWORTH, *DIVIDED CITIES: BELFAST, BEIRUT, JERUSALEM, MOSTAR, AND NICOSIA* 153 (2009).

⁵⁸ *Id.*

⁵⁹ Rabinowitz, *supra* note 56, at 73–74.

Additionally, the self-image of the minority and its image in the eyes of the majority community differ in several ways. The minority possesses a hybrid identity: it shares Palestinian national affiliation and sense of nationhood but carries Israeli citizenship; and, it has specific cultural and political features—bilingualism is one example, an idiosyncratic political agenda another.⁶⁰ Moreover, by and large, the Arab-Palestinian minority has never joined the armed conflict.⁶¹ However, the Jewish majority community tends to ignore these intricacies, most noticeably in times of severe external strife.⁶²

The Jewish majority's nationalism is of the "ethnic" type.⁶³ It is characterized by a rather exclusionist notion of belonging, based upon particular conceptions of shared history, ethnic affinity, cultural foundations, and more.⁶⁴ The majority community has no wish to assimilate the Arab-Palestinian minority, and the feeling is reciprocated, with the minority wishing to uphold its own national identity and cultural and religious affiliations.⁶⁵ So we find in Israel a non-absorbing majority alongside a non-assimilating minority.

Another important fact is that the Jewish community in Israel is divided further within itself—between a secular majority and a religious minority,⁶⁶ and between Ashkenazi Jews (originally immigrants from Europe and from

⁶⁰ Cf. Ilan Saban, *Citizenship and Its Erosion: Transfer of Populated Territory and Oath of Allegiance in the Prism of Israeli Constitutional Law*, 2 L. & ETHICS HUM. RTS. 9, 9–10 (2010) [hereinafter Saban, *Citizenship and Its Erosion*]; Nadim Rouhana & As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of Palestinian Citizens in Israel*, 30 INT'L J. MIDDLE E. STUD. 321, 324–27 (1998); Mohammed Saif-Alden Wattad, *Israeli Arabs: Between the Nation and the State*, 6 INDIGENOUS L.J. 179, 179–80 (2007).

⁶¹ Saban, *Citizenship and Its Erosion*, *supra* note 60, at 9.

⁶² See Ilan Peleg, *Otherness and Israel's Arab Dilemma*, in *THE OTHER IN JEWISH THOUGHT AND HISTORY: CONSTRUCTIONS OF JEWISH CULTURE AND IDENTITY* 258, 258–59 (Laurence J. Silberstein & Robert L. Cohn eds., 1994).

⁶³ Saban, *Minority Rights*, *supra* note 7, at 922.

⁶⁴ By contrast, civic nationality is based upon consent accompanied by an important factor of choice. It is more open to the absorption of others and does not set such demanding conditions for belonging. Essentially, it is a joint domination over the civic territory, common language, and shared primary values. It is important to remember, however, that the type of national affiliation within a given society may change over time. For example, there might be a shift from ethnic to civic nationality. For elaboration on this point, see ANTHONY D. SMITH, *NATIONAL IDENTITY* 11 (1991); Raymond Breton, *From Ethnic to Civic Nationalism: English Canada and Quebec*, 11 *ETHNIC & RACIAL STUD.* 85 (1988).

⁶⁵ See Smooha, *Control of Minorities*, *supra* note 2, at 260–61 (describing how the "tremendous Arab-Jewish separation is by and large voluntary" as regards both "social and institutional separation"); cf. Michael M. Karayanni, *In the Best Interests of the Group: Religious Matching Under Israeli Adoption Law*, 3 *BERKELEY J. MIDDLE E. & ISLAMIC L.* 1, 58–59 (2010).

⁶⁶ See ASHER COHEN & BERNARD SUSSER, *ISRAEL AND THE POLITICS OF JEWISH IDENTITY: THE SECULAR-RELIGIOUS IMPASSE* xi–xiv (2000).

North and Latin America) and Mizrahi Jews (originally immigrants from North Africa and the Middle East).⁶⁷ These myriad rifts and differences (together with the cleavage vis-à-vis the Arab-Palestinian minority) are all administered by *one legal system*.⁶⁸ Therefore, the peripheral radiation of the law (its occasional, unintended consequences that are the outcome of its basically generic nature), as mentioned above, is to be expected.

A major factor to bear in mind regarding the status of the Arab-Palestinian minority is that the purposes of the State of Israel, at least during the period under review, were immensely exacting.⁶⁹ The Jewish majority community was fully committed to a gigantic project perceived as moral in the highest degree.⁷⁰ It was bent upon the resurrection of the Jewish nation after its colossal destruction in the Holocaust, providing a safe haven for a persecuted people, and ensuring the national and cultural revival of the Jewish nation and the ingathering of its dispersions in its historic patrimony.⁷¹ Moreover, post-1948, Israeli society had to handle at once the repercussions of a war that cost approximately 6500 casualties (out of a population of only 650,000 peoples),⁷² hostile neighbors along lengthy borders, and a quadrupling of its population in the span of twenty years.⁷³ These exigencies called for prioritization, and special preference was given to security, ingathering, and absorbing the Jewish newcomers, and settlement.⁷⁴ The first preference meant building up military might and minimizing security threats.⁷⁵ The second preference entailed the fulfillment of the *raison d'être* of the State and required enormous financial resources to ensure housing, food, education, and health care for the rapidly growing population.⁷⁶ The third preference was perceived as serving the first

⁶⁷ Sammy Smooha, *Jewish Ethnicity in Israel: Symbolic or Real*, in UZI REBHUN, *JEWS IN ISRAEL: CONTEMPORARY SOCIAL AND CULTURAL PATTERNS* 47, 61 (2004). For an extensive discussion of the composite cleavages in Israeli society from a socio-political and historical standpoint, see, for example, GAD BARZILAI, *COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES* (2003); DAN HOROWITZ & MOSHE LISSAK, *TROUBLE IN UTOPIA: THE OVERBURDENED POLITY IN ISRAEL* 64–83 (1989); BARUCH KIMMERLING, *THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY* 110–11 (2001); SHAFIR & PELED, *supra* note 53, at 30–32.

⁶⁸ Saban, *Minority Rights*, *supra* note 7, at 899.

⁶⁹ See MORRIS, *supra* note 39, at 17 (describing the Jewish majority as being “united around a single national purpose—statehood”).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See HOROWITZ & LISSAK, *supra* note 67, at 70, 244.

⁷³ *Id.* at 69–73.

⁷⁴ See MORRIS, *supra* note 39, at 16–28.

⁷⁵ See *id.* at 16–17.

⁷⁶ See *id.* at 16.

two and entailed geographical dispersion of Jewish settlements across the country and particularly along its borders.⁷⁷

This state of affairs elucidates a crucial understanding: it is impossible to comprehend the status of the minority in the first thirty years of Israel's existence without grasping that this period was the peak of the Jewish settlement project within 1949 Armistice borders of Israel.⁷⁸ The minority was exposed not merely to a hierarchic status quo—it was subject to the dynamics of a takeover.⁷⁹ Indeed, one of the prominent traits of the relationship with the Arab-Palestinians in Israel at that time was the extensive dispossession of their land.⁸⁰ Land that was until then the property or possession of Arab-Palestinian citizens (some of them now internally displaced persons) was nationalized in various ways and later allocated almost exclusively to Jews.⁸¹ A parallel feature of Israel in that period was an immigration policy that encouraged the incoming of Jews while barring the return of Palestinian refugees.⁸²

Two events that took place in the latter years of the period under review are worthy of special note in concluding the main background data necessary for this Article. The first event is the abolition of military rule to which the minority was subordinated from 1949 until 1966,⁸³ and the second is the 1967 war—the second-most crucial of Israel's wars after that of 1948–1949. In the 1967 war, Israel conquered the remaining parts of the historical Land of Israel or Mandatory Palestine, among other areas.⁸⁴ The deep change that occurred in

⁷⁷ See *id.* at 24.

⁷⁸ Ilan Saban, *The Legal Status of Minorities in Democratic Deeply-Divided Countries: The Arab Minority in Israel and the Francophone Minority in Canada* 229 (2000) [hereinafter Saban, *The Legal Status of Minorities*] (unpublished Ph.D. thesis, The Hebrew University of Jerusalem) (on file with author).

⁷⁹ See Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967*, 33 N.Y.U. J. INT'L L. & POL. 923, 945–47 (2001); see also Uri Ben-Eliezer & Ronen Shamir, *A Comment on "The Emergence of Militaristic Nationalism in Israel,"* 4 INT'L J. POL., CULTURE & SOC'Y 387 (1991); Shulamit Carmi & Henry Rosenfeld, *The Radical Change: From a Socialist Perspective to Militarism (Rejoinder to Ben-Eliezer and Shamir)*, 4 INT'L J. POL., CULTURE & SOC'Y 577 (1991).

⁸⁰ See Saban, *Minority Rights*, *supra* note 7, at 891–93.

⁸¹ See DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 49–69 (1990).

⁸² Saban, *Minority Rights*, *supra* note 7, at 914, 961–63.

⁸³ MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* 90–94 (1996); JIRYIS, *supra* note 54, at 54–55; SHAFIR & PELED, *supra* note 53, at 125; Yair Bauml, *The Attitude of the Israeli Establishment to the Arabs in Israel: Policy, Principles, and Activities: The Second Decade, 1958–1968*, 167–73, 176–80, 186, 189 (2002) (unpublished Ph.D. thesis, University of Haifa) (on file with author).

⁸⁴ Some of the implications of this war have yet to unfold. At this juncture, suffice it to say the following: the Israeli occupation in 1967 has rendered a large portion of the Palestinian people an occupied people in their own land—the West Bank and the Gaza Strip are under Israeli military occupation and without Israeli democratic civic protection. That is, the Palestinians are without civil and political rights to participate in

the wake of this war is multidimensional and ongoing; however, it will not be discussed here.

Abolishing the military rule over the Arab-Palestinian citizens of Israel a year earlier, in 1966, contributed to the gradual appearance of a budding civil society within this minority.⁸⁵ Ten years later, the minority gave vent for the first time to some of its sentiments with respect to the continuing land appropriation, in the form of the 1976 Land Day.⁸⁶ It was a day in which heated demonstrations erupted in a few villages in the Galilee region in reaction to another wave of land appropriation.⁸⁷ The lethal response by the State led to the deaths of six Arab-Palestinian citizens.⁸⁸

The changes in the 1970s also impacted Israeli society in general. Enormous control efforts were transferred to new arenas—especially to the West Bank and the Gaza Strip, and the Israeli settlement project in those territories began its fateful march.⁸⁹ At the same time, and somewhat paradoxically, concurrent with the 1967 occupation, democratization was afoot within Israel proper.⁹⁰ Jewish social movements had appeared before the 1973 war, and political movements emerged in the wake of this war. Some of these political movements led to the protests and demonstrations that accompanied the first war with Lebanon in 1982–1983.⁹¹ Israeli media came to be somewhat

shaping their own destiny. See KIMMERLING & MIGDAL, *supra* note 46, at 209–12; OREN, *supra* note 54, at 307. Additionally, Israel has initiated an extensive settlement project in the territories it has occupied, thereby adding land appropriation to occupation. SHAFIR & PELED, *supra* note 53, at 159–65, 184–210; see also SAID, *supra* note 47, at 103–05, 169–70, 270–72; Oren Yiftachel, *The Territorial Restructuring of Israel/Palestine: Settlement Versus Sumud*, in TENSION AREAS OF THE WORLD 105, 114–19 (D. Gordon Bennett ed., 1997). Moreover, this massive settlement project is interpreted by the Palestinians as demonstrating an intention to make the occupation permanent. See SAID, *supra* note 46, at 104, 169–70. Thirdly, for the first time since 1948, major parts of the Palestinian people were rejoined physically (but with a different civic status) under the rule of one political entity, the State of Israel. See NUR MASALHA, *IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION* 21–24 (2000).

⁸⁵ Shany Payes, *Palestinian NGOs in Israel: A Campaign for Civic Equality in a Non-Civic State*, 8 ISR. STUD. 60, 70 (2003).

⁸⁶ Eli Rekhess, *The Evolvement of an Arab-Palestinian National Minority in Israel*, 12 ISR. STUD., Fall 2007, at 1, 9 (2007).

⁸⁷ *Id.*

⁸⁸ The Land Day events and the thoughts they provoked led to a real slowdown in the appropriation of private land in the Galilee and the Triangle region (*ha-Meshulash*). However, in the south (the Negev) the State continued its efforts to consolidate its hold over the Bedouin areas, and generally the *Judaization Project* there continued apace. See SHAFIR & PELED, *supra* note 53, at 112–17; OREN YIFTACHEL, *ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE* 188–210 (2006).

⁸⁹ CLEVELAND, *supra* note 46, at 354–57.

⁹⁰ Saban, *The Legal Status of Minorities*, *supra* note 78, at 335–38.

⁹¹ *Id.*

more independent and critical.⁹² Finally, supervisory mechanisms appeared busier and more assertive—including the Supreme Court, the Attorney General, and the State Comptroller—and beginning in the second half of the 1970s, Israeli jurisprudence underwent important overall changes.⁹³ Moreover, following the 1977 elections, the *Mapai* Party, which in 1968 became the “Israeli Labor Party,” lost its hegemony and two blocs came to compete on the Israeli political arena—the Labor and *Likkud* Parties.⁹⁴ All of these changes may be linked to cultural developments of the time, including a rise in the acknowledgement of human rights standards within Israel proper and a more impetuous individualism.⁹⁵

Such developments also contributed to the empowerment of the Arab-Palestinian minority. The minority joined the Israeli political scene, albeit as a lightweight competitor, and shed the image of helplessness.⁹⁶ The relationship pattern was shifting in the latter half of the 1970s, so much so that Smoocha argues that Israel had moved from the control framework to an *ethnic democracy*.⁹⁷ To the degree that this term is aimed at defining Israel’s relational framework vis-à-vis the minority in recent decades, I am of the opinion that it is suitable.⁹⁸

The above unfolds the main background facts, aims, and needs in light of which the socio-political status of the minority during the period under review should be understood. The axis of this status—the intercommunal relationship pattern—has been dealt with in the literature;⁹⁹ therefore, this Article is limited

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See generally Sammy Smoocha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 *ETHNIC & RACIAL STUD.* 389 (1990).

⁹⁸ *Id.* This term, “ethnic democracy,” unlike the actual argument regarding the moderation of the relational pattern in Israel, is very controversial. Oren Yiftachel & As’ad Ghanem, *Towards a Theory of Ethnocratic Regimes: Learning from the Judaization of Israel/Palestine*, in *RETHINKING ETHNICITY: MAJORITY GROUPS AND DOMINANT MINORITIES* 179, 188–94 (Eric P. Kaufmann ed., 2004). I have attempted to grapple with the question before. I believe the term is pertinent because it underscores the preference for the majority (Jewish) community and at the same time contains part of the secret of its stability—the threshold of human rights that it preserves. However, in view of the past forty-three years of occupation and colonization of the West Bank, it becomes indeed truly difficult to utilize this term to characterize Israel as a whole. See Saban, *The Legal Status of Minorities*, *supra* note 78, at 336–37.

⁹⁹ LUSTICK, *supra* note 1; Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 325–44; Smoocha, *Control of Minorities*, *supra* note 2.

to a brief presentation of this pattern before proceeding to the core of the Article—analyzing the pattern's legal dimensions.

B. The Control Framework

Some of the research into the status of the Arab-Palestinian minority rightly viewed as its point of departure the centrality of the Jewish settlement project carried out in Israel proper in the period under review.¹⁰⁰ Zureik, for example, examined the status of the Arab-Palestinian minority from the theoretical starting point of a “settlers society” and “internal colonialism.”¹⁰¹ However, another angle emerged when Lustick, in his groundbreaking work, proposed a different concept as a theoretical framework—the control framework—and he and other scholars applied it extensively to the Arab-Palestinian minority in Israel in this period.¹⁰²

This Article shall not compare the control framework concept to the internal colonialism theory as explicators of the question at hand. I believe they are to a large extent complementary. The control framework mainly explains the political stability of exploitive systems and this explanation may be insufficient. By way of illustration, both the Catholic minority of Northern Ireland in 1921–1968 and the Arab-Palestinian minority in Israel in the period under review were under “control.”¹⁰³ However, in Ireland, colonization and land dispossession happened mainly in the seventeenth through nineteenth centuries,¹⁰⁴ whereas in Israel they were a vital and consuming project throughout the period reviewed in this Article.¹⁰⁵ This difference—between control as such and control as part of a colonization project—obviously has far-reaching significance in terms of the political and legal arrangements to which a minority is subject.

Having said this, one must add that Lustick was careful enough to describe the control framework as a colonial or colonial-like pattern between a ruling

¹⁰⁰ See, e.g., ELIA ZUREIK, *THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM* (1979).

¹⁰¹ See, e.g., *id.* at 5, 13. Oren Yiftachel developed a model using this perspective and called it the “ethnocratic” model. See YIFTACHEL, *supra* note 88.

¹⁰² LUSTICK, *supra* note 1; Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 325–44. See generally Smooha, *Control of Minorities*, *supra* note 2.

¹⁰³ See, e.g., Smooha, *Control of Minorities*, *supra* note 2 (applying the control framework to both Northern Ireland and Israel).

¹⁰⁴ BRENDAN O’LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* 54–102 (1997).

¹⁰⁵ Kedar, *supra* note 79; KRETZMER, *supra* note 81.

community and a minority community.¹⁰⁶ Aspiring to a malleable minority is a mark of such a relationship.¹⁰⁷ It is an almost pseudo-democratic system, just a hairbreadth away from forfeiting the right to be considered democratic.¹⁰⁸ As examples of the control framework, Lustick and other writers named Northern Ireland from 1921 to 1968, the southern states of the United States between the end of the American Civil War and the 1960s, Israel in the first thirty years of its existence, and other instances of “formal Democracy.”¹⁰⁹

Self-perpetuation is the control framework’s primary concern.¹¹⁰ A manifest communal rift maintained within a rigid all-encompassing hierarchical regime is difficult to legitimize and its stability is inherently fragile.¹¹¹ Violent disruption is a constant possibility.¹¹² The minority in such a system is naturally inclined to effect change and the control structure protects itself by blunting the wish to act toward change and clogging the effectiveness of such actions where they occur.¹¹³ There are complex mechanisms involved in engendering deterrence within the minority group—dividing it and infiltrating it, as well as ensuring its dependence.¹¹⁴ These mechanisms are all aimed at maintaining stability without open and harsh repression; in fact, all-out repression is rare in this framework—violence is usually a mark of its failure.¹¹⁵

The major contribution of Lustick’s control framework to the understanding of the status of the Arab-Palestinian minority in Israel is to elucidate the socio-political mechanisms by which this community was kept docile. The exertion of control impacted the minority on three planes: it

¹⁰⁶ Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 325–44.

¹⁰⁷ LUSTICK, *supra* note 1, at 69–81.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 338–42; *see also* Smootha, *Control of Minorities*, *supra* note 2; John McGarry & Brendan O’Leary, *The Macro-Political Regulation of Ethnic Conflict*, in *THE POLITICS OF ETHNIC CONFLICT REGULATION* 1, 23–25 (John McGarry & Brendan O’Leary eds., 1993). *See generally* RONALD WEITZER, *TRANSFORMING SETTLER STATES: COMMUNAL CONFLICT AND INTERNAL SECURITY IN NORTHERN IRELAND AND ZIMBABWE* (1990).

¹¹⁰ Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 325; Smootha, *Control of Minorities*, *supra* note 2, at 257.

¹¹¹ Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 326–27; Smootha, *Control of Minorities*, *supra* note 2, at 256.

¹¹² Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 326–27; Smootha, *Control of Minorities*, *supra* note 2, at 264, 266.

¹¹³ Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 325–27; Smootha, *Control of Minorities*, *supra* note 2, at 266.

¹¹⁴ Lustick, *Stability in Deeply Divided Societies*, *supra* note 1, at 339.

¹¹⁵ *See id.*; Smootha, *Control of Minorities*, *supra* note 2, at 273.

restricted minority members' ability to consolidate a joint political action, barred access of individuals from the minority to independent sources of economic support, and carved out an effective invasion route for the ruling group into the subordinated one for the purpose of supervision and expropriation of assets.¹¹⁶ Three main mechanisms were employed: (1) *separateness*—insulating the minority from the majority and from external forces and dividing it from within; (2) cultivating *dependency* of the minority on the majority; and (3) *cooptation*—bribing or otherwise tempting the elite or potential leaderships and captivating them.¹¹⁷

I shall now proceed to the heart of the matter—how the law enters this framework. As proposed, the answer should be sought in the role the law played with respect to the aims, needs, and means of the control. I contend that in the period at hand, Israeli law was the able servant of the control framework. It served well the complex needs of this framework, needs that often pull in different directions.

One final, preliminary comment is in order. The context of the discussion here is law and society; hence, normative questions are only rarely dealt with. I have thus not attempted to answer whether Israel can partially justify the measures it used based on the background of the demanding circumstances that accompanied its first decades of statehood.

III. LAW AND THE COMMON RIGHTS OF CITIZENSHIP AND THE WAYS IN WHICH THEY WERE WEAKENED

A. *The Common Rights of Citizenship*

Human rights—the common rights of citizenship and personhood—are the rights granted to every person by virtue of his humanity or on the basis of his citizenship. One would expect that conferring these rights and upholding them would provide meaningful protection to individuals of the national minority group.¹¹⁸ However, if this is the potential of the common rights of citizenship, we may both contemplate and check the following assumptions related to the way these rights are expected to appear and be applied within the control framework in Israel. The scope and exercise of these rights are expected to be restricted, such that they would not seriously impede the achievement of the

¹¹⁶ See LUSTICK, *supra* note 1, at 78–81.

¹¹⁷ *Id.* at 82–231.

¹¹⁸ WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 26 (1995).

control framework's aims vis-à-vis the minority's weakness; at the same time, stability (and the self-perception of the majority as holding democratic values) demands that a threshold of minimal civil and political rights be preserved and that discrimination be, as much as possible, "reasonable."¹¹⁹ Put differently, it is expected that there be a delicate balance: on the one hand, rights cannot be taken too seriously, otherwise land appropriation and other major tasks may be blocked, and dependency, deterrence, division, and cooptation will not crystallize¹²⁰—dependency cannot survive an assertive and well-protected norm prohibiting discrimination based on group affiliation. On the other hand, stability is served when the restriction of rights is not too obvious or is not conducted in an openly biased manner.¹²¹ Israeli law of the time confirms these expectations.

Israeli law has maintained an almost full *formal equality* in the common rights of citizenship¹²²—that is, it has been characterized by a serious effort to avoid formal discrimination on ethnic grounds relating to the articulation of individual rights and obligations, immunities and subjugations.¹²³ Hence, official discriminatory norms have not appeared in the context of political rights, such as the rights to vote and be elected, freely express oneself, demonstrate and associate, and not even in relation to the rights to own property and move about freely.¹²⁴ The extensive appropriation of Arab-Palestinian land and imposition of military rule on the Arab-Palestinian citizens were exercised on the strength of norms of a *general nature*, purportedly without the Arab-Palestinian minority as their object.¹²⁵ Moreover, from the outset the State has been careful to uphold minimum safeguards of the minority's civil and political rights.¹²⁶

Official deviations from the principle of equality were few and appeared almost only in the context of Arab-Palestinian *group-differentiated rights*. These rights are different: while common citizenship rights are granted due to the very humanity of a person or her/his citizenship, irrespective of group

¹¹⁹ KRETZMER, *supra* note 81, at 77.

¹²⁰ *See id.* at 52.

¹²¹ *See id.* at 127–29.

¹²² *Id.* at 77.

¹²³ *Id.* at 77–78.

¹²⁴ *See id.* at 83–84; *see also* HOFNUNG, *supra* note 83, at 75–76.

¹²⁵ DOWTY, *supra* note 56, at 197–200.

¹²⁶ KRETZMER, *supra* note 81, at 3–4; Sarah Ozatski-Lazar, *The Crystallization of Mutual Relations between Arabs and Jews in the State of Israel: The First Decade: 1948–1958*, 162, 202–03 (1996) (unpublished Ph.D. thesis, University of Haifa) (on file with author). *See generally* Bauml, *supra* note 83.

affiliation, group-differentiated rights are conferred upon certain persons specifically for their group affiliation.¹²⁷ These rights are the prerogative of cultural minorities and they have two aims.¹²⁸ They strive first to allow minority members to protect their cultural identity, values, and major customs in the face of the dominant culture, and second to enable them to participate in the society's wider institutions that are supposed to safeguard them against divestment and discrimination.¹²⁹

More concretely, group-differentiated rights define the extent of partnership granted to a minority group in the State's allocation of various assets, and the scope of self-administration the community enjoys in areas such as education, religion, and regional development.¹³⁰ As discussed in Part IV, some form of group-differentiated rights has been accorded to members of minority cultural groups in Israel, but they have not been allocated evenly. For instance, they were accorded to the religious minority within the Jewish community, while they were not accorded—or were accorded to a lesser extent—to the Arab-Palestinian minority.¹³¹ Among other things, the former group has enjoyed autonomy in education while the latter has not.¹³² Unless otherwise dictated by statute, the State decided it was under no obligation to accord to minorities group-differentiated rights, and even felt no obligation to avoid discrimination after according such rights to one minority and not to another.¹³³

The Supreme Court of Israel affirmed this position during its first years. The *el-Saruji* case of 1963 is a telling example.¹³⁴ In this case, the petitioners, Muslim Arab residents of the city of Acre, challenged the Minister of Religious Affairs' decision to appoint a committee to act on his behalf regarding the Muslims of Acre's personal status and religious needs.¹³⁵ Justice Landau's ruling on behalf of the Court was as follows:

¹²⁷ See KYMLICKA, *supra* note 118, at 26–33.

¹²⁸ See WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 81–82 (2001) [hereinafter KYMLICKA, *POLITICS IN THE VERNACULAR*].

¹²⁹ See *id.*

¹³⁰ See, e.g., Saban, *Minority Rights*, *supra* note 7, at 900–01.

¹³¹ See *infra* Part IV.

¹³² See, e.g., *id.*

¹³³ See *id.*

¹³⁴ HCJ 282/61 *El-Saruji v. Minister of Religious Affairs* 17(1) PD 188 [1963] (Isr.), *reprinted and translated in* 5 *SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL* 14 (1963–1965).

¹³⁵ *Id.* at 15.

[The petitioners] would prefer the autonomy of the Moslem community regarding all the matters raised in their petition, but that is certainly a public-political problem not for this Court to be concerned with. Under the democratic regime existing in our country, the Knesset is the arbiter in matters of this kind and it possesses the authority to initiate changes in the existing position through the enactment of new laws, if it finds it proper to do so I have found no basis for the vague submission of petitioners' counsel in his summation, that the right to control the funds of these trusts lies in any event with the Moslem residents now living in the country. No precedent was cited to base this view.¹³⁶

In other words, group-differentiated rights have been administered beyond the reach of the courts' power to enforce the principle of equality. Israeli law's candor on this issue derives mainly from the fact that even the multicultural version of liberalism does not make a clear-cut case for obligatory equality in group-differentiated rights.¹³⁷

However, that is not the case where individual (common citizenship) rights are concerned—there the principle of equality is assertively demanded. As such, a structure aiming to preserve the hierarchy used for exploiting the subordinated minority, while maintaining its stability and democratic threshold and image, must be sophisticated in its discriminatory practices respecting individual rights. One of the key methods of achieving this goal during the period under review was to adhere to formal equality, while weakening individual rights and thereby bypassing the shield they could have provided.

B. How did the Potential Inherent in the Common Rights of Citizenship Lose its Potency?

1. Allocation of Sweeping State Powers Accompanied by Extensive Discretion

The general weakness of individual (common citizenship) rights in Israel during the period under review, and the fact that they could be abused so easily, are due to the extensive and almost unfettered authority vested in the

¹³⁶ *Id.* at 16–17.

¹³⁷ KYMLICKA, *supra* note 118, at 152; KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 128, at 53–55, 152–76.

legislature, and especially in the executive, under Israeli law during this period.¹³⁸

a. The Role of Majoritarianism

The Israeli regime at the time almost completely fits the majoritarian paradigm (the Westminster model), which attributes supremacy to the principle of majority rule. The first major expression of this model was that the principle of parliamentary (Knesset) sovereignty reigned supreme.¹³⁹ The Knesset was virtually unrestricted by a constitution, judicial review of legislation, or a powerful judiciary.¹⁴⁰ Human rights stood lower in the pyramid of norms than Knesset legislation; in a clash, they would have to give way to the latter.¹⁴¹ Hence, any achievement in the realm of minority protection could quite easily be annulled by subsequent legislation, and Knesset legislation was not subject to judicial review.¹⁴² It was with good reason that Kretzmer used the term “‘soft’ legal principles”¹⁴³ to describe the basic human rights norms recognized and promoted through Israeli Supreme Court decisions at the time. Otherwise stated, constitutional restrictions upon legislation hardly ever entered into Israeli law during this period.¹⁴⁴ Indeed, the Declaration of Independence mentions a constitution that was supposed to have been drafted quite promptly, and few steps in this direction had been taken,¹⁴⁵ but the process was deferred and a breakthrough did not occur until the 1990s.¹⁴⁶

The second embodiment of the majoritarian paradigm is the power invested in the executive (or, the government)—the political body that, in Israel, serves as the representative *par excellence* of the majority community. Under the emergency circumstances that accompanied Israel’s first thirty years (and

¹³⁸ Cf. KRETZMER, *supra* note 81, at 89–108.

¹³⁹ *Id.* at 77.

¹⁴⁰ The exception was the Israeli proportional representation system of elections (party-list), as opposed to a single-member plurality system (first past the post). *The Electoral System in Israel*, KNESSET.GOV.IL (2002), http://www.knesset.gov.il/elections16/eng/about/electoral_system_eng.htm.

¹⁴¹ CA 228/63 Azuz v. Azar 17(1) PD 2541, 2547 [1963] (Isr.).

¹⁴² KRETZMER, *supra* note 81, at 89–108.

¹⁴³ *Id.* at 11.

¹⁴⁴ *Id.* at 8.

¹⁴⁵ See Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3, 4 (1948) (Isr.).

¹⁴⁶ Things changed in the 1990s with the Israeli “constitutional revolution.” For an analysis and review, see AMNON RUBINSTEIN & BARAK MEDINA, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* ch. 26 (5th ed. 1996); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995) (discussing the changes in Israeli constitutional law during the 1990s).

continue to this date), the government enjoyed comprehensive powers and dominance. This state of affairs was manifested in several ways—first in the formal interplay of power between the executive and the legislature.¹⁴⁷ For example, some of the authority vested in the executive included emergency regulations that could temporarily override legislation.¹⁴⁸ The norm upon which this power rested was mainly Section 9 of the Law and Government Ordinance 1948.¹⁴⁹ Second, the allocation of powers between central and local governments possessed a very centralist structure.¹⁵⁰

The majoritarian impact on the Arab-Palestinian minority's legal status can be illustrated by three examples, all of which demonstrate that the supremacy of the majoritarian principle allowed the government to avoid obstructions from the direction of the courts. The first example is the promulgation of the Land Acquisition (Validation of Acts and Compensation) Law 1953,¹⁵¹ passed in response to judicial pressure after uprooted persons (internal refugees) from the village of Al-Jalame petitioned the Supreme Court regarding the appropriation of their land.¹⁵² Wary of this petition, and of possible similar subsequent recourse to the courts, the Land Acquisition Law was enacted and carried retroactive effect: it sanctioned earlier land appropriation, even that which had been exercised with no legal basis—as was indeed the case in Al-Jalame and other villages.¹⁵³

The second example is the Supreme Court's decision in the *Aslan* case.¹⁵⁴ The Court endorsed the Arab-Palestinian petitioners' claim that the enclosure order of Rabsayeh village, which had been issued under the authority of Regulation 125¹⁵⁵ of the Mandatory-period Defence Regulations (State of Emergency) 1945, must be officially published to be valid.¹⁵⁶ As the enclosure order had not been properly published, the Court annulled it.¹⁵⁷ The Prime

¹⁴⁷ See, e.g., HOFNUNG, *supra* note 83, at 52.

¹⁴⁸ KRETZMER, *supra* note 81, at 45.

¹⁴⁹ For an extended discussion, see HOFNUNG, *supra* note 83, at 51–67.

¹⁵⁰ See Eran Razin, *The Impact of Decentralization on Fiscal Disparities Among Local Authorities in Israel*, 2 SPACE & POLITY 49–69 (1998). For a more detailed discussion, see *infra* Part V.A.2.

¹⁵¹ Land Acquisition (Validation of Acts and Compensation) Law, 5713–1953, 7 LSI 43 (Isr.).

¹⁵² See HOFNUNG, *supra* note 83, at 117–20.

¹⁵³ HCJ 14/55 Al-Nadaf v. Minister of Finance 11(1) PD 785, 788 [1957] (Isr.); HCJ 36/52 Al-Nadaf v. Minister of Defence 6(2) PD 750, 751 [1952] (Isr.). For a detailed description of the case, see HOFNUNG, *supra* note 83, at 117–20.

¹⁵⁴ HCJ 220/51 Aslan v. Military Governor of Galilee 5 PD 1480, 1482 [1951] (Isr.).

¹⁵⁵ HOFNUNG, *supra* note 83, at 66.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Minister and the Minister of Defense promptly issued emergency regulations under the above-mentioned Section 9 of the Law and Government Ordinance and so validated, retroactively, the order that the Court had annulled.¹⁵⁸ Later, the Knesset amended Section 10(c) of the Law and Government Ordinance so that the obligation to publish no longer applied to orders issued per the Mandatory Defence Regulations.¹⁵⁹

A third illustrative example is the Supreme Court's decision in *Bulus*.¹⁶⁰ There the Court challenged the state proclamation that a certain *waqf* land was to be treated as "absentee property."¹⁶¹ The State rose to the challenge and proposed a bill to amend the applicable legislation: Absentee Property Law (Amendment No. 3) Release and Use of Endowment (*Waqf*) Property 1964.¹⁶² This bill was passed and enacted soon thereafter.¹⁶³ The reasoning that accompanied the bill was straightforward:

The proposed law is intended to dispense doubts that arose after the decision of the [HCJ decision *Bulus v. Minister of Development*], and confirm the original intention of the legislator, according to which the custodian is given full possession of the property of the waqf, whose *mutawalli* [trustee] is considered absentee.¹⁶⁴

Without constitutional restrictions on the state's authority to legislate in violation of human rights, the State could easily undo the courts' liberal rulings. But there existed an even more immediate and less visible path than amending legislation. From the outset, important parts of the legislation conferred sweeping jurisdiction upon the executive, in terms of both the range of matters and the extent of administrative discretion it could apply in these matters.¹⁶⁵ Moreover, regarding the supreme priorities of the Israeli control framework—security, demographics (immigration and naturalization), and

¹⁵⁸ Emergency (Confirmation of Validity of Provisions) Regulations, 1951, KT 5712, 286 (Isr.); HOFNUNG, *supra* note 83, at 66.

¹⁵⁹ For a full description, see HOFNUNG, *supra* note 83, at 66–67; RUBINSTEIN & MEDINA, *supra* note 146, at 259–60.

¹⁶⁰ HCJ 69/55 *Bulus v. Minister of Development* 7 PD 147, 151 [1955] (Isr.).

¹⁶¹ *Id.*

¹⁶² See Absentees' Property Law (Amendment No. 3) Release and Use of Endowment Property, 5725–1964, SH No. 445 p. 58 (Isr.).

¹⁶³ *Id.*

¹⁶⁴ HCJ 69/55 *Bulus v. Minister of Development* 7 PD 147, 151 [1955] (Isr.). For a discussion of the case and for more about the history of the Muslim endowments, see Moussa Abou Ramadan, *The Shari'a in Israel: Islamization, Israelization, and the Invented Islamic Law*, 5 UCLA J. ISLAMIC & NEAR E.L. 81, 113–23 (2005).

¹⁶⁵ Saban, *The Legal Status of Minorities*, *supra* note 78, at 259–60.

land—both the legislature and the judiciary showed special leniency toward the executive.¹⁶⁶

For the sake of fairness, it should be added that sweeping governmental powers were the rule and not the exception in Israeli law during this period, and that, in part, this was the primary legacy of British Mandatory rule.¹⁶⁷ After the establishment of the State, this centralism served not only the ethnic pattern vis-à-vis the Arab-Palestinian minority but also the nation-building integrative pattern toward some of the sub-groups within the Jewish majority.¹⁶⁸ Moreover, centralism served the exigencies of the young state that faced such incredible dangers and challenges, especially so soon after the Holocaust. The same statist centralism was behind the disbanding of the Jewish underground militias, the establishment of the Israeli army (“IDF”), and the institution of state education, state-printed press, and state monopoly over the electronic media (for a long period of time).¹⁶⁹ It also partially explains the clear hierarchy among the planning and building authorities and the subordination of local authorities to the government.¹⁷⁰ One of the marked manifestations of this general centralist trend was the continued existence of comprehensive certification requirements in economic, occupational, and other spheres.¹⁷¹ Thus, many human liberties were subjected to governmental permission, and dependency upon the government was enhanced.

The Arab-Palestinian minority was further subjected to a special version of the regime of certification that I discuss below—military rule, the heart of the control framework until 1966.¹⁷² For seventeen years (1949–1966), the State applied leftover British Mandatory emergency regulations to create military-ruled zones.¹⁷³ The regulations created an “abnormal” society-wide norm that was selectively used to cover only Arab-populated regions. In other words, military rule was a particular instance of selective use of the general legal norm

¹⁶⁶ See, e.g., *infra* text accompanying notes 250–667.

¹⁶⁷ See *infra* notes 171–74 and accompanying text.

¹⁶⁸ See *infra* Part IV.A.2.

¹⁶⁹ HOROWITZ & LISSAK, *supra* note 67, at 151–56.

¹⁷⁰ ISSACHAR ROSEN-ZVI, TAKING SPACE SERIOUSLY 151–53 (2004).

¹⁷¹ The certification regime rested mainly on the following: (1) the Defence (Emergency) Regulations 1945 promulgated following the Palestine Order-in-Council 1937; (2) the Emergency Regulations on the authority of Section 9 of the Law and Administration Law 1948; and (3) orders emanating from the Commodities and Services (Control) Law 1957 (and the legislation that preceded it). For a more detailed discussion, see HOFNUNG, *supra* note 83, at 47–67 (describing emergency legislation in Israel); RUBINSTEIN & MEDINA, *supra* note 146, at 46, 814–16, 1165; Saban, The Legal Status of Minorities, *supra* note 78, at 259.

¹⁷² See *infra* text accompanying notes 199–223.

¹⁷³ See *infra* text accompanying note 200.

providing for sweeping governmental authority. On the basis of the Defence Regulations (State of Emergency) promulgated in 1945, military commanders sealed off certain areas—those in which the Arab-Palestinian minority resided.¹⁷⁴ Moreover, as will be expanded upon *infra*, it was not the legislature that imposed this invasive, all-encompassing, long and oppressive regime, and indeed it was the executive that abolished it almost twenty years later.¹⁷⁵ This example serves as a lucid vindication of the claim regarding the near limitlessness of executive power at that time.

b. The Difficulties of Battling Discrimination Under Israeli Law During Military Rule

The breadth of governmental powers would not have necessarily resulted in deep discrimination against the minority if a comprehensive norm prohibiting discrimination had existed and been upheld by the power-bearers or enforced by an assertive supervisory body. But this was not the case. Unlike most other political and civil rights, the principle of equality was not then recognized as a basic protected right.¹⁷⁶

Moreover, Israeli legal doctrine considers it the political authorities' unhindered prerogative to set the priorities for material and especially financial allocations. Not wishing to tie themselves down, the authorities avoided setting criteria for funding, and there had been no detailed standards defined for even the most basic public services, such as education, health, religious services, public transport, and housing.¹⁷⁷ This flexibility also applied to state financial allocation to private bodies engaging in public activities¹⁷⁸ and was consolidated through the government's residual authority.¹⁷⁹

In the absence of criteria determining eligibility for state funding, discrimination complaints consisted mainly of the following: state allocation to A in itself obliges allocation to B, who is similar to A. Unfortunately, here the

¹⁷⁴ *Id.* at 14–15.

¹⁷⁵ *Prime Minister Announcement in the Knesset*, KNESSET.GOV.IL (Aug. 11, 1966), http://www.knesset.gov.il/review/data/heb/plenum/kns6_081166.pdf.

¹⁷⁶ Yitzhak Zamir & Moshe Sobel, *Equality before the Law*, 5 L. & GOV'T 165, 182–95, 232–34 (1999).

¹⁷⁷ KRETZMER, *supra* note 81, at 123, 128–29; Saban, *The Legal Status of Minorities*, *supra* note 7, at 267–68.

¹⁷⁸ See *infra* notes 192–98 and accompanying text.

¹⁷⁹ This state of affairs only changed in the 1980s after several cases that led to the enactment of the Budgetary Principles Law 1985, which provided a statutory obligatory procedure in regard to many state financial allocations. Budgetary Principles Law, 5745–1985, 25 SH 61 (Isr.).

minority faced a series of hurdles. First, at least until the 1960s, the Supreme Court ruled in several cases that discrimination is not itself sufficient cause to warrant remedy.¹⁸⁰ The norm was that granting a remedy depends on the existence of an “essential right.”¹⁸¹ An essential right was a right acknowledged by law, or an interest that Israeli court precedent recognized as protected.¹⁸² Hence, “discrimination cannot serve as cause for [the Court’s] interference if the petitioner has not shown [the Court] that such act adversely affects some right he possesses.”¹⁸³

Second, the burden of proof that discrimination occurred lay entirely with the petitioner.¹⁸⁴ This burden was made more difficult because, at that time, the Supreme Court demanded, among other things, proof of the authority’s discriminatory motivation.¹⁸⁵ In his ruling regarding *Nazareth Lands Defence Committee v. Minister of Finance*,¹⁸⁶ Justice Witkon decreed:

It is not sufficient for the petitioners to argue that they are Arabs and that only land of Arabs was expropriated, when it would have been possible to expropriate the lands of non-Arabs or to use government lands. They had to show that the fact that they are Arabs, and no other fact, is what moved the respondents to expropriate specifically their land This was not proven.¹⁸⁷

Needless to say, proving such motivation is very demanding.¹⁸⁸

¹⁸⁰ See, e.g., H CJ 29/62 Cohen v. Minister of Defence 16(2) PD 1023 [1962] [hereinafter Cohen] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 160, 163 (1975). The Supreme Court upheld the annulment of a media correspondent’s military press card. *Id.* at 160. The army claimed, and the Court upheld, that it had acted properly based on its prerogative to distinguish “ordinary” from anti-institutional press such as the correspondent’s journal, *Ha-Olam Ha-Ze Weekly*. *Id.* at 161–62. See also H CJ 159/73 Yitzhaki v. Minister of Justice 28(2) PD 692 [1974] (Isr.) (acknowledging the power of the State not to allocate access to state information and to regulate its use by former state employees); H CJ 130/62 Stamps Traders’ Union of Israel v. Minister of Postal Services 16(2) PD 1101 [1962] (Isr.); cf. H CJ 262/62 Peretz v. Kfar Shmaryahu 16(3) PD 2101 [1962] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 191, 191 (1975) (holding that local council unlawfully discriminated against members of a “Progressive Judaism” religious group by denying their application for use of a hall to conduct religious services).

¹⁸¹ Cohen, *supra* note 180, at 162–63.

¹⁸² *Id.* at 163–65.

¹⁸³ *Id.* at 163.

¹⁸⁴ KRETZMER, *supra* note 81, at 78–79.

¹⁸⁵ *Id.* at 78.

¹⁸⁶ H CJ 30/55 Nazareth Lands Defence Committee v. Minister of Finance 9 PD 1261 [1955] (Isr.).

¹⁸⁷ *Id.* at 1266.

¹⁸⁸ The obligation to prove motivation was not even moderated by the United States’s protection of “insular minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). American law exercises strict scrutiny, substantial and evidential, in cases where discrimination could be suspected. Eyal Benvenisti &

Third, differential allocation is not considered discriminatory in the presence of relevant differentiation. Thus, procedures reserved exclusively for the Jewish community could be classified as affirmative action rather than selective preference.¹⁸⁹ A case in point is *Bourkhan*,¹⁹⁰ from the late 1970s, in which the Court endorsed barring Arabs from buying an apartment in the Jewish quarter of the old city of Jerusalem, pointing to “special historical reasons.”¹⁹¹ Another relevant differentiation is invoked in the title “discharged soldiers” (veterans), who enjoy preference in a wide range of public allocations, including in spheres unrelated to military service.¹⁹²

Last, the norm of non-discrimination was not meaningfully applicable at that time to non-governmental bodies in Israel. Social players in the private sector did not have to avoid discriminating, unless otherwise explicitly directed by law, and such instances were few and far between.¹⁹³ This situation made it extremely difficult to use the law to combat the discrimination against Arabs that non-governmental bodies carried out in a myriad of ways. A few such non-governmental bodies are especially notable in this context: the *Histadrut* (*Histadrut ha-Ovdim ha-Ivrim*—the major workers’ union); *Tnuva* (the cooperative for agricultural marketing); and especially the “National Institutions” (the Jewish Agency, the Jewish National Fund, and *Keren ha-Yesod* (United Israel Appeal)).¹⁹⁴ The National Institutions were established before the state to help foster its creation.¹⁹⁵ One could have expected them to be dismantled after the state’s establishment, but they continued to operate, guided by their declared commitment to the interests and purposes of the

Dahlia Shaham, *Facially Neutral Discrimination and the Israeli Supreme Court*, 36 N.Y.U. J. INT’L L. & POL. 677 (2005) (comparing U.S. and Israeli courts’ approaches to minority discrimination and arguing that Israel claims to promote equality yet turns a blind eye to its actual implementation).

¹⁸⁹ KRETZMER, *supra* note 81, at 80–81.

¹⁹⁰ HCJ 114/78 Bourkan v. Minister of Finance 32(2) PD 800 [1978] (Isr.).

¹⁹¹ The Supreme Court held that “reconstruction of the traditional Jewish Quarter, as a *Jewish* quarter, alongside the Moslem, Christian, and Armenian quarters, was a legitimate governmental objective which was not flawed because of its exclusive Jewish nature.” *Id.* at 806; KRETZMER, *supra* note 81, at 80.

¹⁹² KRETZMER, *supra* note 81, at 98–107.

¹⁹³ *Id.* at 83–84.

¹⁹⁴ For the relevant law, see KRETZMER, *supra* note 81, at 63, 94–98. Explicit legislation dictated appointing National Institutions officials as counselors and participants in various decision-making capacities. *Id.* at 63. But even without this formality, the officials were very influential in decision-making: setting agriculture production quotas, deciding which poor neighborhoods would receive rehabilitation budgets, dictating public land use, overseeing urban building plans and certification, and setting broadcasting policy. *Id.* at 94–98. Regarding use of the National Institutions as a discrimination tool against the Arab-Palestinians, see DOWTY, *supra* note 56, at 197–98; JIRYIS, *supra* note 54, at 215–16; KRETZMER, *supra* note 81, at 64, 93–98; LUSTICK, *supra* note 1, at 97–109; Bauml, *supra* note 83, at 83–86.

¹⁹⁵ See LUSTICK, *supra* note 1, at 97.

Jewish people.¹⁹⁶ By contrast, the major workers' union (the *Histadrut*)¹⁹⁷ and the cooperative for agricultural marketing (*Tnuva*) were seemingly society-wide private agents; however, in practice they acted fully at the majority's service.¹⁹⁸ The state aided this discriminatory arrangement by creating monopoly conditions for those agents.¹⁹⁹

c. Military Rule and the Appropriation of Land

The weakness of the common citizenship rights previously described paved the way for some important mechanisms directed in practice at the minority and crucial to its welfare during those years: the military rule and the appropriation of land. Exploring the legal basis of the two reveals the pattern described above—seemingly ethnically neutral legislation selectively enforced and applied by authorities that were allowed near-limitless flexibility, and that were rarely subjected to meaningful monitoring by supervisory bodies such as the courts.

Military rule was legally based on enclosure orders issued under Regulation 125 of the Defence Regulations (State of Emergency) 1945.²⁰⁰ In areas near the borders another authority was used: Emergency Regulations (Security Zones) 1949.²⁰¹ These legal measures, and the use to which they were put, are well-trodden ground,²⁰² therefore I shall add just three short comments.

Military rule meant much more than restriction of freedom of movement, since it effectively constrained the exercise of all other civil and political

¹⁹⁶ KRETZMER, *supra* note 81, at 63–66.

¹⁹⁷ For use of the *Histadrut* as means for discrimination, see LUSTICK, *supra* note 1, at 95–97, 164–65; UZI BENZIMAN & ATALLAH MANSOUR, SUBTENANTS, THE ARABS OF ISRAEL: THEIR STATUS AND THE POLICIES TOWARDS THEM 175, 181 (1992).

¹⁹⁸ JIRYIS, *supra* note 54, at 215; KRETZMER, *supra* note 81, at 94–98; LUSTICK, *supra* note 1, at 154. To take the *Tnuva* example, agricultural production and marketing boards' directives authorized its monopoly—for example, Section 44 of the Poultry Board (Production and Marketing) Law 1963. See KRETZMER, *supra* note 81, at 94–98. The monopoly of the National Institutions in planning and developing new settlements was the result of administrative de facto practice. *Id.* For *Tnuva*'s use of its monopoly on the supply of milk and other agricultural products, see JIRYIS, *supra* note 54, at 215; LUSTICK, *supra* note 1, at 154.

¹⁹⁹ See *supra* note 197.

²⁰⁰ KRETZMER, *supra* note 81, at 54; LUSTICK, *supra* note 1, at 177–78.

²⁰¹ See Emergency Regulations (Security Zones), 5709–1949, 3 LSI 5079 (Isr.).

²⁰² For a legal and political discussion of the military rule period, see Alina Korn, *Military Government, Political Control and Crime: The Case of Israeli Arabs*, 34 CRIME L. & SOC. CHANGE 159 (2000). See also JIRYIS, *supra* note 54, at 15–22; KRETZMER, *supra* note 81, at 136–41. For a socio-political discussion, see BENZIMAN & MANSOUR, *supra* note 197, at 175; Bauml, *supra* note 83, at 161–96; Ozatski-Lazar, *supra* note 126, at 6, 11, 70–78, 114–15.

rights, for which movement is often a prerequisite (especially during a period that contained many fewer transmission and coordinating technologies).²⁰³ Hence, movement restriction significantly withered effective speech and freedom of association, among other liberties.²⁰⁴ Moreover, appropriation of land was facilitated, as restriction of movement was used to uproot people from their land and impede their possession and cultivation of thereof, rendering the land “vacant/abandoned.”²⁰⁵

The “enclosed areas” were divided under three separate army commands: north, south, and center.²⁰⁶ This division rendered political organization extremely exacting, certainly on a national level.²⁰⁷ Since most workplaces were outside the enclosed areas, employment depended upon travel permits, and those were allocated in a manner that served the control framework’s policy needs: augmenting dependency, deterrence, elite cooptation, and distancing “radical” leadership.²⁰⁸ Moreover, the enclosures enabled the government to weaken the electoral campaigns of opposition parties, such as the Communist party and *Mapam*.²⁰⁹ Demonstrations could easily be aborted by proclaiming a place a “closed military zone.”²¹⁰

Nevertheless, military rule did become less harsh over the years, notably from the late 1950s and especially after 1963, until its abolishment in 1966.²¹¹ In many cases, travel permits were issued on an annual rather than daily or weekly basis, and in daytime, movement from the enclosed areas into the main cities was allowed.²¹²

²⁰³ See JIRYIS, *supra* note 54, at 15–31.

²⁰⁴ See *id.* at 16–17; Bauml, *supra* note 83, at 165. The certification regime crystallized a restriction the public could not comply with; this resulted in inevitable transgressions, which resulted in the criminalization of the Arab-Palestinian community, and proved a lever for consolidation of deterrence, dependence, and selective implementation. Korn, *supra* note 202, at 175.

²⁰⁵ See Korn, *supra* note 202, at 165; JIRYIS, *supra* note 54, at 27.

²⁰⁶ JIRYIS, *supra* note 54, at 16.

²⁰⁷ See MAJID AL-HAJ, EDUCATION, EMPOWERMENT, AND CONTROL: THE CASE OF THE ARABS IN ISRAEL 29–35 (1995); HOFNUNG, *supra* note 83, at 86–97; LUSTICK, *supra* note 1, at 122–29; Bauml, *supra* note 83, at 165.

²⁰⁸ JIRYIS, *supra* note 54, at 27–28. These control mechanisms will be discussed in detail *infra*. For a further discussion of their actual use, see generally HILLEL COHEN, GOOD ARABS: THE ISRAELI SECURITY AGENCIES AND THE ISRAELI ARABS (Ivrit 2006). See also HCJ 89/71 Al-Asmar v. Officer Commanding Central Region 25(2) PD 197 [1971] (Isr.); LUSTICK, *supra* note 1, at 202–09.

²⁰⁹ See HOFNUNG, *supra* note 83, at 91, 154–55; LUSTICK, *supra* note 1, at 123–29; Ozatski-Lazar, *supra* note 126, at 5–51, 75–76.

²¹⁰ See LUSTICK, *supra* note 1, at 123–29; Ozatski-Lazar, *supra* note 126, at 166.

²¹¹ HOFNUNG, *supra* note 83, at 90–94; JIRYIS, *supra* note 54, at 54–55; Bauml, *supra* note 83, at 167–73, 176–80, 186, 189.

²¹² HOFNUNG, *supra* note 83, at 92–93.

On the legal plane, there is one point that I have already mentioned above, but it is worth repeating. Laying down military rule, modifying it over time, and finally abolishing it did not at any point involve the Israeli legislature, the Knesset.²¹³ Military rule was legally established by executive discretion, and so it was modified and finally abolished.²¹⁴ A Knesset majority, had one been found for the purpose, could have ended military rule by legislation, but the point remains that such a majority had not been forthcoming. Even more importantly, Israeli law allowed the subjugation of a whole population of citizens to a military regime without the need for approval, even periodically, by the Knesset.

The second convoluted procedure (a companion to the military rule) was the appropriation of land from Arab-Palestinian citizens. From a legal point of view, two things are noticeable: first, the enormous arsenal of legal tools used to nationalize the land; second, the recurring pattern by which governmental power was applied selectively and without hindrance.²¹⁵ This arsenal consisted of a vast array of legal arrangements and administrative procedures regarding ownership, possession, and use of land.²¹⁶ As these have been quite exhaustively discussed elsewhere,²¹⁷ I will only enumerate a few of the arrangements that were involved.

One major appropriation tool was declaring land “absentee land,” and then controlling and transferring it to a governmental body called the “Development Authority,” which then allocated much of it to new Jewish settlements.²¹⁸ Not only were swaths of Palestinian refugees’ land dispossessed in this way, but also the land of uprooted, internally-displaced Arab-Palestinian citizens. It is for this reason that the latter are labeled, in an Orwellian way, “Present Absentees.”²¹⁹

The other side of this dispossession was divesting Arab-Palestinian citizens of land rights and deeply discriminating in land allocation. More concretely, the possibility to gain land rights through long possession and cultivation of

²¹³ *Prime Minister Announcement in the Knesset, supra* note 174.

²¹⁴ *Id.*

²¹⁵ *See* JIRYIS, *supra* note 54, at 75–136; KRETZMER, *supra* note 81, at 51–69.

²¹⁶ *See* KRETZMER, *supra* note 81, at 51–69.

²¹⁷ *See* JIRYIS, *supra* note 54, at 75–136; KRETZMER, *supra* note 81, at 49–76; LUSTICK, *supra* note 1, at 170–82.

²¹⁸ KRETZMER, *supra* note 81, at 62; LUSTICK, *supra* note 1, at 173.

²¹⁹ *See* Kedar, *supra* note 79, at 945.

public land was terminated.²²⁰ Arab-Palestinian land use was closely monitored, especially concerning house building.²²¹ At the same time, large parcels of land were leased for long periods of time to Jewish settlement movements, while very little land was granted to Arab citizens, and on short-term leases.²²² Moreover, the jurisdiction of local Arab authorities was strictly limited.²²³ Hence, the biased use of the State's allocating power existed alongside the misuse of its taking power toward the minority.

The discussion above unfolded the various ways in which the law rendered common citizenship rights (individual rights) devoid of much of their meaning, thereby making them quite ineffective: majoritarianism; sweeping state powers accompanied by extensive discretion; a very weak non-discrimination norm; a regime of "military rule"; and a variety of state powers providing for the dispossession of Arab-Palestinian land.

This state of affairs could have been restrained had the courts and other protective and monitoring bodies played an assertive role.²²⁴ Here the picture is more nuanced, but the control framework still functioned "well."

2. *The Weakness of Supervisory Bodies, such as the Courts, in Protecting the Minority*

During the period under review, some of the extensive governmental powers that were often used selectively against the minority were gradually checked. These checks were important then, and became much more important in the years beyond the period analyzed in this article. The picture outlined thus far is nevertheless accurate, in that those checks that operated in the period did not erode the control framework; on the contrary, in a significant way *they served it*, in a manner that shall be explained below.

²²⁰ *Id.* at 953.

²²¹ See OREN YIFTACHEL, *PLANNING A MIXED REGION IN ISRAEL: THE POLITICAL GEOGRAPHY OF ARAB-JEWISH RELATIONS IN THE GALILEE* 159–94 (1992) (discussing Israel's public policy over land control).

²²² See Kedar, *supra* note 79, at 946–47.

²²³ ROSEN-ZVI, *supra* note 170, at 132.

²²⁴ This state of affairs could have also been restrained by minority group rights, such as by way of Arab-Palestinian representation in decision-making bodies dealing with planning or administration of land in Israel. *Id.* at 131–32; YIFTACHEL, *supra* note 221, chs. 5, 10; Yishai Blank, *The Location of the Local: Local Government Law, Decentralization and Territorial Inequality in Israel*, 34 HEBREW U. L. REV. 197, 267–68 (2004) (Isr.). See generally Part IV *infra* for a description of the poverty of minority group-differentiated rights.

These checks on governmental powers were the result of the activity of supervisory bodies or arbitral agents, whose function is, *inter alia*, to protect the minority.²²⁵ Supervisory mechanisms protect the minority from without, and, as such, they differ from mechanisms or procedures in which the minority is actively involved in protecting itself, or in which it shares in decision-making powers. The supervisory or arbitral bodies can be domestic or international organs, but in either case they are distanced from each of the communities and mandated to settle disputes and safeguard human rights. The courts are intra-state supervisory agents, as are the State Comptroller, the Ombudsman, and the Central Bank.²²⁶ Experts in these institutions who make official decisions enjoy long-term appointments and an ethos of professionalism and independence, and are not directly accountable to an electorate.²²⁷ These aspects render them more natural “majoritarian checks,” endowed with a fair amount of institutional autonomy, which both frees them to a certain extent from seeking consensus and partially insulates them against pressures from the majority.²²⁸ People expect some of these bodies, the courts being a prime example, to govern themselves with rules of argumentation, open debate, neutrality, and coherence.²²⁹

What expectations do we entertain of these bodies in the first thirty years of Israel’s statehood? What is favorable (and what is detrimental) to a control model? On the one hand, we would expect these bodies not to impede the majority from making use of the power disparities. But, on the other hand, we would expect this power imbalance not to be overly repressive, as blatant exploitation of the minority would deepen the legitimacy crisis always hovering over the control framework and threatening to destabilize it. There is therefore a vital need under this framework for agents to curb arbitrariness and exploitation and thus moderate the legitimacy crisis among the minority. This framework, however, demands the maintenance of a fragile equilibrium. The control framework cannot function when supervision and arbitration are truly powerful if the supervisory bodies’ purposes differ substantially from those of the majority community. On the other hand, a correct dosage of checks on

²²⁵ For a general discussion of supervisory bodies or arbitral agents and their socio-political functions, see Arend Lijphart, Ronald Rogowski & R. Kent Weaver, *Separation of Powers and Cleavage Management, in DO INSTITUTIONS MATTER?: GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD* 302, 306, 313 (R. Kent Weaver & Bert A. Rockman eds., 1993); Saban, *Minority Rights*, *supra* note 7, at 971–72.

²²⁶ Lijphart et al., *supra* note 225, at 302, 306, 313.

²²⁷ *Id.*

²²⁸ *See id.* at 320–21.

²²⁹ *See supra* text accompanying note 10.

governmental activity contributes to the efficacy of control because it provides a modicum of legitimacy.²³⁰ And indeed, this is exactly what happened in the Israeli context—arbitral agents existed and the executive could not ignore them, but the agents did not threaten the control structure in any real sense. They were not powerful enough to constitute such a threat, even had they so chosen, and in any case they pursued a path that did not diverge radically from that of the political branches of the State.

a. The Ambivalent Role of the Israeli Supreme Court

What influence did the Israeli Supreme Court have on the intercommunal relationship pattern in the first thirty years of statehood? Overall, the Court's influence on the minority's status was markedly ambivalent. On the one hand, the Supreme Court, especially when acting as the High Court of Justice—which hears petitions against the government and its agencies—exercised judicial review of executive actions (regulations, orders, allocations, etc.) and gradually narrowed the margin of maneuver allowed the executive. On the other hand, in the sensitive areas most relevant to the minority—security, immigration, and land—the Court left the executive barely constrained, in a variety of ways.

To elaborate, in the absence of a constitution or constitutional foundations to Israeli law at the time, the Supreme Court did not view itself as authorized to invalidate Knesset legislation.²³¹ Moreover, until the early 1990s, it opted not to intervene even in the validity of emergency legislation (emergency regulations) issued by the government.²³² Nonetheless, the Court did pave ways to defend the common rights of citizenship and narrow the freedom of action of the government. Let us look now at a few of those ways.

The first way the courts defended rights was through strict observance of the explicit restrictions of the authority vested in the executive that impinges

²³⁰ Compare Ilan Saban, *Hashpaa't Bayt-Ha'Mishpat Ha'Aliyone Al-Ma'ámed Ha'Aravim Bi'Yisrael* [The Impact of the Supreme Court on the Status of the Arabs in Israel], 3 LAW & GOV'T ISR. 541, 553–54 (1996) [hereinafter Saban, *The Impact of the Supreme Court*] (Isr.), with Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, 24 LAW & SOC'Y REV. 781, 784–85 (1990) (addressing the role and impact of the law, particularly of the Supreme Court, with regard to the status of the Palestinians under occupation). A comparison between the status of Arab-Palestinians within the Green Line in the first thirty years of statehood (1948–1978) and that of the Palestinians in the occupied territories during the long years of occupation (since 1967) remains to be carried out. Should it be conducted, it is bound to yield interesting theoretical insights.

²³¹ See *supra* text accompanying notes 139–55.

²³² Saban, *The Legal Status of Minorities*, *supra* note 78, at 369.

upon human rights. The reference here is to either explicit restrictions on the empowering law or to the principle of legality—in other words, conditioning the validity of state actions upon statutory authorization. Thus, for example, in the heat of battle during 1949, the Court invalidated two administrative detentions because the detentions violated expressed restrictions in the Defence Regulation (State of Emergency) 1945.²³³ In one of the most important cases of the first days of statehood, the Court emphasized the legality principle and it was decided that the government could not impinge a basic right—freedom of employment, in this case—absent statutory authorization, express or at least implied.²³⁴ Another like instance is the sensitive issue of the internal refugees, the uprooted villagers of Iqrit.²³⁵ The Court decreed that the government should allow the villagers to return to their village because the State had not proven that it had exercised its authority legally in expelling them.²³⁶

The case of Iqrit, however, attests to the limited ability to defend the minority by adhering to formal legality alone, as well as to the frailty of the Court at the time. When the petitioners of Iqrit requested that the Court enforce the judicial remedy granted to them in the previous hearing but disregarded by the authorities, the Court made the following unusual reply:

As stated, a decisive order was issued, that the petitioners were permitted to return to their village on the 31st of July 1951. However, despite this order, issued by the High Court of Justice of Israel, in the aforementioned case, the respondents [the military authorities] did not comply. The petitioners [*Iqrit's* expellees], instead of resorting to the legal relief that the law provides in instances such as this, waited and apparently put their faith in all manner of promises made them, until, on the 10th of September 1951, they were sent expulsion orders according to Regulation 8 of the [relevant] regulations.²³⁷

Simply put, the highest judicial instance decreed against the executive, the executive ignored the Court and soon legalized the expulsion by retroactively issuing evacuation orders, and the Court saw no way to avoid affirming

²³³ HCJ 95/49 Al-Khoury v. Chief of Staff 4(1) PD 34, 41, 48 [1949] (Isr.); HCJ 7/48 Al-Kharbutly v. Minister of Defence 2(1) PD 5, paras. 14–15 [1948] (Isr.).

²³⁴ See HCJ 1/49 Bejerano v. Minister of Police 2(1) PD 80, 84 [1949] (Isr.); see also Ron Harris, *Ha-Mishpat Ha-Yisraeli: 5708–5718 [Israeli Law, the Formative Years 1948-1958]*, in *THE FIRST DECADE OF INDEPENDENCE* 243, 258–57 (Hanna Yablonka & Zvi Zamereth eds., 1997).

²³⁵ See HCJ 64/51 Daoud v. Minister of Defence (Daoud I) 5(2) PD 1117, 1122 [1951] (Isr.).

²³⁶ See *id.*

²³⁷ HCJ 239/51 Daoud v. Security Zones Appeals Committee (Daoud II) 6(1) PD 229, 230 [1955] (Isr.). Shortly after, the village was razed. See Ozatski-Lazar, *supra* note 126, at 28.

them.²³⁸ The utter disregard of the executive for the judiciary, here and in a few other cases,²³⁹ was a warning signal that the Court could not have missed.

On the other hand, a second and far-reaching process took shape at this time; a gradual departure from formalism.²⁴⁰ The Supreme Court began to develop a kind of “common law”—important doctrines of public law and of interpretation—that carried significant bearing on law and judicial review of administrative actions. First, these doctrines elevated the basic rights of individuals to an indivisible part of Israeli law and to a higher normative status than secondary legislation (regulations, by-laws, etc.) and administrative action.²⁴¹ Second, the Court derived from the basic rights and some other basic principles a set of obligations binding each administrative authority.²⁴²

These obligations and other developments emerged as the result of two steps—a gradual change in the interpretive theory applied by the Court, and a budding conceptualization of the administrative authority, the executive, as the public’s trustee in a democratic state.²⁴³ Once grasped, this concept gave rise to a series of obligations formulated through court rulings that apply to the executive, restricting its authority and its discretion in using it. There appeared, for example, a prohibition of “non-relevant purposes”;²⁴⁴ obligations emanating from natural justice including the “right to be heard”;²⁴⁵ a demand for a high threshold of evidence as a basis for administrative actions impinging

²³⁸ HCJ 239/51 Daoud v. Security Zones Appeals Committee (Daoud II) 6(1) PD 229, 230–31 [1955] (Isr.).

²³⁹ See RUBINSTEIN & MEDINA, *supra* note 146, at 236 (discussing HCJ 288/51 Aslan v. Military Commander of the Galilee 9(1) PD 689 [1955] (Isr.)).

²⁴⁰ Menachem Mautner, *Yeridat Ha'phormalizm Ve'aliyat Ha'rachim Bemishpat Ha'yisraeli* [*The Decline of Formalism and the Rise of Values in Israeli Law*], 17 TEL AVIV U. L. REV. 503, 519–20 (1983).

²⁴¹ See *infra* notes 259–61.

²⁴² See *infra* notes 243–47.

²⁴³ See HCJ 262/62 Peretz v. Chairman of Kfar Shmaryahu 16(3) PD 2010 [1962] (Isr.), *reprinted and translated in* 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 191, 201 (Asher Felix Landau & Peter Elman eds., 1975) (using the term “public trustee” for one of the first times). This case detailed and implemented the prohibition of discrimination by an administrative authority. *Id.* at 192–93, 202–03.

²⁴⁴ It is the *Kardosh* ruling that stands out here, concerning annulment of the registrar’s decision to reject the request of an Arab political movement called *al-Ard* to register a publishing house company. FH 16/61 Registrar of Companies v. Kardosh 16(2) PD 1209 [1962] (Isr.), *reprinted and translated in* 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 32, 54 (Asher Felix Landau & Peter Elman eds., 1975); HCJ 241/60 Kardosh v. Registrar of Companies 15(2) PD 1151 [1960] (Isr.), *reprinted and translated in* 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 7, 31 (Asher Felix Landau & Peter Elman eds., 1975). For a discussion of *al-Ard*, see *infra* text accompanying notes 268–90.

²⁴⁵ Jeffrey M. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245, 1253–56 (1969).

upon basic rights;²⁴⁶ the certain independence of the authority bearer (the bureaucrat) vis-à-vis the upper (political) echelons of government,²⁴⁷ and more.

These doctrines emanating from court rulings are what I referred to earlier as “peripheral radiation”—the way in which the Court impacted the status of the Arab-Palestinian minority on the basis of general norms that it shaped in contexts usually disconnected from the minority.²⁴⁸ These contexts were for the most part a form of interaction between the authority and an individual, corporation or group, and between political, factional, economic, and ideological interests within the majority group.²⁴⁹ Because legal norms are of a general nature, their impact is wide; hence the limitation of governmental power that they generated was applicable to the government vis-à-vis the Arab-Palestinian minority as well.²⁵⁰

A development with profound cross-section implications was the gradual transition of the court to jurisprudence directed by a theory of interpretation labeled “purposive interpretation.”²⁵¹ The *Kol Ha’am* case, one of the most important rulings the Supreme Court ever formulated, illustrates this gradual transition.²⁵² The case addressed the operation of censoring power and the ability of the State to close down a newspaper.²⁵³ Legally, it mainly dealt with an interpretation of governmental discretionary power when it clashes with freedom of expression: specifically, the power to close down a newspaper on

²⁴⁶ Saban, *The Impact of the Supreme Court*, *supra* note 230, at 556.

²⁴⁷ See HCJ 70/50 Michlin v. Minister of Health 4(1) PD 319, 324 [1950] (Isr.); HCJ 144/50 Sheib v. Minister of Defence 5(1) PD 399 [1951] (Isr.), *reprinted and translated in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962).

²⁴⁸ See *supra* text accompanying note 10.

²⁴⁹ Saban, *The Impact of the Supreme Court*, *supra* note 230, at 550–51; Saban, *Minority Rights*, *supra* note 7, at 899.

²⁵⁰ Saban, *The Impact of the Supreme Court*, *supra* note 230, at 550–51.

²⁵¹ See, e.g., Nir Kedar, *Ha-mahapachah Ha-parshanit: Aliyatah Shel Shitat Ha-parshnoot Ha-tachlitit Bi-Yisrael [Interpretive Revolution: The Rise of Purposive Interpretation in Israeli Law]*, 26 TEL AVIV U. L. REV. 737, 758 (2002) (describing a social and historical view of the development of purposive interpretation in Israeli law).

²⁵² HCJ 73/53 *Kol Ha’am Co. v. Minister of Interior* 7(2) PD 871 [1953] (Isr.), *reprinted and translated in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 94–97 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962) (annulling the Minister of Interior’s decision to shut down the Communist Party’s Hebrew- and Arabic-language journals, *Kol Ha’am* and *Al-Itihad*, for several days); see also PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 112 (1997) (analyzing the Court’s decision and the use of purposive interpretation of Section 19 of the Press Ordinance 1933).

²⁵³ HCJ 73/53 *Kol Ha’am Co. v. Minister of Interior* 7(2) PD 871 [1953] (Isr.), *reprinted and translated in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 94 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962).

the basis of Section 19 of the Press Ordinance 1933, a Mandatory-period legislative provision that was adopted into Israeli law as most other legal norms of the Mandatory regime.²⁵⁴ The section authorized closing down a paper “if any matter appearing in a newspaper is, in the opinion of the [Minister of Interior], likely to endanger the public peace.”²⁵⁵ The decision comprises two far-reaching formulations. First, the Court averred that all legal norms, including (and even more pronouncedly) the legacy of the Mandatory legislator, must be read and interpreted in light of Israel’s democratic nature:

It is incumbent upon us to bear in mind the things that it [the Declaration of Independence] proclaimed when we come to interpret and imbue with meaning the laws of the State, including legislative provisions that were promulgated during the Mandate and adopted by the State after its establishment It is after all a well known axiom that the law of a people must be studied through the prism of its national life order.²⁵⁶

From this point on, this interpretation theory was supposed to accompany all legal norms and hence all governmental powers, especially those that limit human rights.²⁵⁷ The power-bearers were to be aware of the rights they restrict and the magnitude of the restrictions and to weigh them against the protected public interest with which the liberty would seem to clash.²⁵⁸

Second, this interpretation formulates a general balancing test for conflicts between the basic right and the threat to a protected public interest—this is the “probable danger test.”²⁵⁹ It is an exacting test, demanding high probability for a serious harm to a protected public interest (here, in *Kol Ha’am*, public peace) before permitting restriction of the freedom of expression.²⁶⁰ Later on this balancing test expanded to cover other important basic rights.²⁶¹

²⁵⁴ *Id.*

²⁵⁵ Press Ordinance, 1933, § 19(2), *reprinted in* 2 THE LAWS OF PALESTINE 2588 (Robert Harry Drayton ed., rev. ed. 1934).

²⁵⁶ *See* HCJ 73/53 *Kol Ha’am Co. v. Minister of Interior* 7(2) PD 871 [1953] (Isr.), *reprinted and translated in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 105 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962).

²⁵⁷ *See id.*

²⁵⁸ *See id.* at 105–09.

²⁵⁹ LAHAV, *supra* note 252, at 112.

²⁶⁰ HCJ 73/53 *Kol Ha’am Co. v. Minister of Interior* 7(2) PD 871 [1953] (Isr.), *reprinted and translated in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 103–09 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962) (“[T]he *Kol Ha’am* decision is set upon a broad conceptual base.”).

²⁶¹ Saban, *The Legal Status of Minorities*, *supra* note 78, 379–83.

These developments—peripheral radiation, purposive interpretation, and an exacting balancing test—carried a promise; but how effectively did these developments translate the promise into the practical protection of human rights, and especially those of the Arab-Palestinian minority? The potential was circumscribed for two reasons. First, the consolidation of judicial review of administrative actions following these path-breaking steps was slow, partial, and inconsistent.²⁶² Second, the inconsistency appeared especially in the sensitive and minority-related areas: security, immigration, and land.²⁶³ Thus, simultaneously with such revolutionary cases as *Kol Ha'am*, the everyday jurisprudence quite rarely benefited the minority. The Supreme Court in this period did not often venture beyond the bounds of a formalistic type of judicial review: insisting on the doctrine of legality (statutory authorization for governmental power that restrict basic rights) and on the *explicit* boundaries of the powers demarcated by the statute.²⁶⁴ It took thirty years for the *Kol Ha'am* decision to resurface and for the Court to seriously implement it.²⁶⁵ Moreover, the Court opted not to tread on certain “protected spheres of activity” of the government.²⁶⁶ The legal biography of *al-Ard* (“the Land”) is a prime illustration of this disinclination. *Al-Ard* was a local Arab-Palestinian national movement with a pan-Arab (Nasserite) orientation that enjoyed only a short life span—from the late 1950s until it was disbanded by the Minister of Defense in 1965.²⁶⁷

b. The Al-Ard Movement as a Case Study

Al-Ard's first encounter with the Supreme Court was surprisingly promising.²⁶⁸ In *Kardosh*, the state refused to register a publishing house company established by *Al-Ard*. It pointed at Section 14 of the Companies Ordinance which stipulated at the time that the Registrar of Companies,

²⁶² See *infra* note 265 and accompanying text.

²⁶³ See *infra* note 266 and accompanying text.

²⁶⁴ KRETZMER, *supra* note 81, at 146–48; see HOFNUNG, *supra* note 83, 205–06.

²⁶⁵ Harris, *supra* note 234, at 259–60.

²⁶⁶ See FH 16/61 Registrar of Companies v. Kardosh 16(2) PD 1209 [1962] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 32, 39 (Asher Felix Landau & Peter Elman eds., 1975).

²⁶⁷ See JIRYIS, *supra* note 54, at 187–96; LAHAV, *supra* note 252, at 181–89; Ron Harris, *Democratiya Yehudit Oopolitica Aravit: T'nooyat Al-Ard B'Bayt Ha-Mishpat Ha-Aliyone [Arab Politics in a Jewish State: al-Ard Movement and the Supreme Court]*, 10 PLILIM 107, 107–55 (2001) (Isr.).

²⁶⁸ See H CJ 241/60 Kardosh v. Registrar of Companies 15(2) PD 1151 [1960] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 7, 10–11 (Asher Felix Landau & Peter Elman eds., 1975); LAHAV, *supra* note 252, at 183–85.

empowered with authority by the Minister of Justice, “may in his absolute discretion either authorise or refuse the incorporation of the company.”²⁶⁹ The Supreme Court laid down important rules regarding administrative authority, circumscribing to a large extent the interpretation of “absolute discretion.” It ruled that though wide, the discretion in the Ordinance is still limited to the purposes for creating this authority, and those purposes are subject to interpretation.²⁷⁰ The Court’s interpretation in the *Kardosh* case stated that the purposes for granting the Company Registrar authority did not include restriction of freedom of expression and association in the name of state security.²⁷¹ State security, the Court held, is placed in the hands of other organs on the basis of different powers.²⁷² Hence, the Registrar pursued “irrelevant (‘foreign’) purposes,” and this motivation invalidated his decision.²⁷³ The Court declared *al-Ard* free to form a printing and press company.²⁷⁴

However, the *Kardosh* case was the exception, and the future of *al-Ard* would illustrate the more typical attitude of judicial review in matters that purportedly concerned state security. A few years after the *Kardosh* case, when the Ministry of Interior’s Northern District Commissioner closed down a newspaper published by *al-Ard*, it soon transpired that the *Kol Ha’am* ruling would not be a relevant precedent.²⁷⁵ In the *Kol Ha’am* case, the Court had interpreted narrowly the authority stemming from the Press Ordinance to limit freedom of expression.²⁷⁶ However, it declined to apply the same yardstick to a like authority when the authorities relied on Regulation 94 of the Defence Regulations (State of Emergency) 1945, explaining that its narrow review is dictated by the privileged evidence of the State.²⁷⁷ In other words, the law and

²⁶⁹ HCJ 241/60 *Kardosh v. Registrar of Companies* 15(2) PD 1151 [1960] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 7, 7 (Asher Felix Landau & Peter Elman eds., 1975) (quoting the Companies Ordinance § 14).

²⁷⁰ FH 16/61 *Registrar of Companies v. Kardosh* 16(2) PD 1209 [1962] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 32, 35 (Asher Felix Landau & Peter Elman eds., 1975).

²⁷¹ *Id.* at 40–41.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 42.

²⁷⁵ HCJ 39/64 *Al-Ard Ltd. v. District Commissioner of the Northern Region* 18(2) PD 340, 344 [1964] (Isr.).

²⁷⁶ *Supra* notes 253–56 and accompanying text.

²⁷⁷ *See* HCJ 39/64 *Al-Ard Ltd. v. District Commissioner of the Northern Region* 18(2) PD 340, 345 [1964] (Isr.) (rejecting the petition). “Had the commissioner provided his reasons, though not legally compelled to do so, we could have of course examined their viability and reasonableness,” but since he did not, it was decreed that “discretion is indeed absolute” and the plea was rejected. *Id.* at 344–45. Some scholars believe that this is a case of divergent paths in the realm of the press, open to flexible manipulation by the

the Court left the State an alternative route of exercising its authority to close down a newspaper, a route almost empty of legal hurdles.

Later, when *al-Ard* wished to become an Ottoman Society (a non-profit organization), the Ministry of Interior's Northern Region District Commissioner turned down the request, and the Supreme Court sustained his decision (the *Jiryis* ruling).²⁷⁸ Shortly after, the *al-Ard* movement was disbanded by proclamation of the Minister of Defense under Regulation 86 of the Defence Regulations (State of Emergency) 1945,²⁷⁹ and its central activists were placed under administrative detention or restrictive orders.²⁸⁰

The *Yardor* case²⁸¹ completed the legal saga of *al-Ard*. The Court decided in a majority opinion not to overrule the decision of the Central Elections Committee denying the Socialist List (with *al-Ard* as its backbone) standing in Knesset elections.²⁸² This was a surprising and troubling decision because the legislation of the time, the Knesset Elections Law 1959,²⁸³ did not bestow upon the Central Elections Committee the authority to disqualify a list on the basis of its program or deeds but only on technical grounds.²⁸⁴ The majority in this case (Justices Agranat and Zusman) crossed doctrinal lines, previously shaped by the Court in cases considered less threatening.²⁸⁵ Justice Zusman reasoned that it was an exceptional case, justifying his decision to disregard the legality doctrine (the requisite of legal authority to justify restricting basic rights).²⁸⁶ Moreover, the majority Justices waived the obligation to prove the “probable

executive. See Ronen Shamir, *Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity the Case of Israel*, 19 INT'L J. SOC. L. 45, 56–58 (1991); see also Harris, *supra* note 267, at 139.

²⁷⁸ See HCJ 253/64 *Jiryis v. the District Commissioner of the Northern Region* 18(4) PD 673 [1964] (Isr.).

²⁷⁹ See Defence (Emergency) Regulations 1945, Palestine Gazette No. 1442 (1945) (Isr.).

²⁸⁰ See HOFNUNG, *supra* note 83, at 165–68; JIRYIS, *supra* note 54, at 95–192; Harris, *supra* note 267, at 130–37. Other cases also show the unsuccessful attempts to challenge restriction orders against *al-Ard*'s members. See, e.g., HCJ 89/71 *Al-Asmar v. Officer Commanding Central Region*, 25(2) PD 197 [1971] (Isr.); HCJ 56/65 *Jiryis v. Military Commander* 19(1) PD 260 [1965] (Isr.).

²⁸¹ EA 1/65 *Yardor v. Central Elections Committee for the Sixth Knesset* 19(3) PD 365 [1965] (Isr.).

²⁸² See *id.* at 387.

²⁸³ Basic Law: The Knesset, 5718–1958, SH No. 244 p. 69 (Isr.), available at http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Basic%20Law-%20The%20Knesset%20-1958-%20-%20updated%20translatio.

²⁸⁴ See EA 1/65 *Yardor v. Central Elections Committee for the Sixth Knesset* 19(3) PD 365, para. 17 [1965] (Isr.).

²⁸⁵ Compare HCJ 1/49 *Bejerano v. Minister of Police* 2(1) PD 80 [1949] (Isr.), with HCJ 73/53 *Kol Ha'am Co. v. Minister of Interior* 7(2) PD 871 [1953] (Isr.), reprinted and translated in 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962).

²⁸⁶ See EA 1/65 *Yardor v. Central Elections Committee for the Sixth Knesset* 19(3) PD 365, paras. 2, 6 [1965] (Isr.).

danger test” of serious harm to public peace that would have occurred if the list were allowed to stand for elections—thus, they disregarded the balancing test laid down in the *Kol Ha’am* precedent.²⁸⁷

We should draw at least two lessons from the *al-Ard* saga. One is that the executive consistently obstructed minority attempts to organize as an independent social player with a non-apologetic and assertive Arab-Palestinian agenda.²⁸⁸ Second, the Court did not upset the control framework in any meaningful way. It left the executive free to pursue aims it deemed vital by leaving bypasses to its own checks upon governmental powers. See the example of restricting Section 19 of the Press Ordinance, on the one hand, while leaving unscathed the Defence Regulations that allowed imposing even harsher restrictions upon newspapers, on the other hand.²⁸⁹ This is an illustration of the *course of divergent paths* discussed below.²⁹⁰

Two other issues influenced the role of the Court in the period under discussion. First, among the factors affecting potential intervention of the Court are the obstacles of accessibility to it, which take on both formal and non-formal nature.²⁹¹ One of the most relevant doctrines of accessibility is “standing.” Justice Witkon’s opinion in the Supreme Court case *Becker* reflects an opinion that was common until the late 1970s: “the more public the object of the grievance . . . the stricter the demand should be that the petitioner be

²⁸⁷ See *id.* para. 12 (Cohen, J., dissenting); see also Claude Klein, *The Defense of the State and the Democratic Regime in the Supreme Court*, 20 ISR. L. REV. 397, 410 (1985). The *Yardor* ruling left uncertain the question of what constitutes sufficient reason for disqualifying a list from standing for elections. Must it threaten the existence of the State or is it enough to attempt to change its Jewish character? Do the tactics advocated by a list standing for elections matter—in other words, is it a necessary condition for disqualification that violence be advocated?

²⁸⁸ The boundaries of tolerance were marked by Maki and Rakah, dissenting factions from the Communist sector of Israeli politics, who in no way questioned the existence of the State. See HOFNUNG, *supra* note 83, at 176–80; see also JIRYIS, *supra* note 54, at 180–85; LUSTICK, *supra* note 1, at 113–14, 237–52; Bauml, *supra* note 125, at 244–49; Harris, *supra* note 268, at 122–27; Rekhess, *supra* note 86, at 8–9.

²⁸⁹ See *supra* notes 275–78 and accompanying text.

²⁹⁰ See *infra* notes 429–34 and accompanying text. Moreover, where an administrative authority did not or could not opt for a divergent path vis-à-vis a minority cause, the differentiation appeared in the administrative body’s implementation of its authority and in the Court’s judicial review thereof. Thus, when the Films and Plays Censorship Board claimed to apply the demanding “probability” test in the banning of the screening of a documentary pro-Palestinian film, the Court was inexplicably lenient in review of the application of the test. See HCJ 807/78 Ein-Gal v. Film and Play Censorship Board 33(1) PD 274 [1978] (Isr.). In this point, I join the opinion of Kretzmer. See KRETZMER, *supra* note 81, at 137–39.

²⁹¹ Cf. William L.F. Felstiner, Richard L. Able & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 636–37 (1980).

someone who suffered real injury in his private domain.”²⁹² Thus, the Court rejected “public petitioners,” and this policy negatively impacted the budding civil society.

Second, the influence of the court on the minority’s status also should be assessed in terms of its legitimizing function of the existing order. The following summarizes the above statements: the Court did not erode the control framework because even its few decisions in favor of the minority did not force the control framework to undergo any meaningful change.²⁹³ At the same time, since these court decisions were favorable to the minority they contributed to the control framework’s stability by lending it a modicum of legitimacy.²⁹⁴ This Article expands upon this point in Part V.

IV. LAW AND THE POVERTY OF GROUP-DIFFERENTIATED RIGHTS OF THE ARAB-PALESTINIAN MINORITY MEMBERS IN THE FIRST THIRTY YEARS OF STATEHOOD

This Article suggests an analytical key for unlocking the complexity of the law’s involvement in the status of a minority community: it claims that this complexity is the product of the compounded intricacies of law, society, and their intersection, and it suggests starting with society’s main dimensions. Understanding the major policy purposes of the state toward the minority, and the basic minority reaction to it, helps us trace the concrete ways in which law served or obstructed the existing order. Following Lustick, this Article demarcates the constituting elements structuring the life of the minority in the period under review—the control framework—and highlighted its needs. It notes that the needs of the framework carried inner tensions—between exploitation and stability, and between exploitation and the promise of a democratic society. The Article then moved to analyze the ways in which the law and the courts operated within this structure. The Article makes certain assumptions as to how law can accommodate the control framework, and I moved to examine whether in reality law was accommodative, facilitating, or

²⁹² HCJ 40/70 Becker v. Minister of Defence 24(1) PD 238, 247 [1970] (Isr.). In the 1980s, in the period beyond the one covered here, the “standing doctrine” went through dramatic changes. See Ariel L. Bendor, *Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience*, 7 *IND. INT’L & COMP. L. REV.* 311, 313 (1997) (touching upon the “standing” doctrine and its dynamics, but concentrating on another doctrine that directly influences the issue of accessibility, the doctrine of “justiciability”); see also John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 *VAND. J. TRANSNAT’L L.* 73, 91–94 (2002).

²⁹³ See *supra* text accompanying notes 276–86.

²⁹⁴ *Id.*

the opposite—subversive. To this point in the analysis, we have encountered law that acted as an able servant of the control framework. The Article analyzes some of the ways in which law helped serve the exploitive features of the control framework. The very broad powers that the law allocated to the executive were also detailed: the non-existence of constitutional checks on legislation; the limited assertiveness of the courts; and, the leeway left to the executive once it chose to stand its ground. In short, this Article indicated the ways in which the modest promise of common citizenship rights, the classic basic rights, remained more of a promise than an element of reality for Arab-Palestinian citizens during this period of time.

More legal analysis is needed. One must verify whether weakness also characterizes the other type of rights that minorities sometimes enjoy—group-differentiated rights—and one must discover the ways in which law interacted with the stabilization mechanisms of the control framework.

What are group-differentiated rights, and which of them did Israeli law in that period grant to the Arab-Palestinian minority? As mentioned above, rights conferred upon certain persons based specifically on their group affiliation are group-differentiated rights. They are the prerogative of cultural minorities and they have two aims. First, to allow minority members to protect their cultural identity, values, and major customs in face of the dominant culture; second, to enable them to participate in the institutions of the wider society in order to safeguard themselves against divestment and discrimination.²⁹⁵ Kymlicka, in his groundbreaking work, describes three categories of group-differentiated rights: (1) “accommodation rights”; (2) “self-government rights”; and (3) “special allocation and representation rights.”²⁹⁶

“Accommodation rights” are the least demanding category. They impose obligations on the state to help protect the language, culture, and society of designated minorities.²⁹⁷ A primary illustration is public funding of minority education—a duty that extends beyond protecting the freedom to establish private minority schools.²⁹⁸ Other examples include exemptions for minority members from norms that are prejudicial to their religious or cultural practices,

²⁹⁵ Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 566–72.

²⁹⁶ See KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 128, at 51, 81; Jacob Levy, *Classifying Cultural Rights*, in *ETHNICITY AND GROUP RIGHTS* 22, 29–34, 43–46 (Ian Shapiro & Will Kymlicka eds., 1997); *see also* Saban, *Minority Rights*, *supra* note 7, at 906–19.

²⁹⁷ Saban, *Minority Rights*, *supra* note 7, at 908–09.

²⁹⁸ *Id.*

such as Sabbath laws, mandatory dress codes, and occupational restrictions, such as on hunting or grazing.²⁹⁹

Similar to accommodation rights, the second category of minority rights, “self-government rights,” seeks to protect the minority’s culture and its capacity to self-develop.³⁰⁰ The two kinds of rights, however, operate on different levels. Self-government rights decentralize state power and endow minority communities with autonomy in areas critical to their survival, including education, culture, and religion.³⁰¹ Hence, in the context of education, the right of self-government entails more than a publicly-funded education system for the minority (an accommodation right) and requires that the minority community administer this education system.³⁰²

“Special representation and allocation rights,” the third category of minority rights, differs from the previous two categories because they focus on the national government.³⁰³ They rebalance the political power of the minority community within the institutions of the state. This rebalancing involves rights related to the following two questions: (1) to what extent does the minority group have access to the goods that are allocated by societal institutions; and (2) to what extent is the minority community an active participant in the allocating institutions themselves—the most important of which are the parliament, the government, the judicial authority, and civil service?

Group-differentiated rights affect the power imbalance between the relevant communities because self-government and special representation and allocation rights free the minority from dependency upon the monitoring institutions of the state (or the international community) and involve its members in the implementation of their various rights. Moreover, group-differentiated rights have a function that the common rights of citizenship alone cannot fulfill, as can be exemplified by the issue of the vitality of the minority language. Dictating non-discrimination toward speakers of the minority language and providing state protection of their liberty to express themselves in that language usually would not suffice to sustain the language and its embedded culture. Economic and cultural pressures urge the minority to

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 909–10.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Ilan Saban & Muhammad Amara, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, 36 ISR. L. REV., Summer 2002, at 5, 16; Saban, *Minority Rights*, *supra* note 7, at 909–10.

adopt the dominant language and replace its own, unless special means of protection are established.³⁰⁴ These special means are the group-differentiated rights, such as minority entitlement to full public funding of a comprehensive education system in the minority language, or the entitlement to use and find this language in the public (society-wide) sphere.³⁰⁵

In view of their nature and potency, group-differentiated rights and the control framework are almost anathema to one another. I use the word “almost” here because the picture is complex. On the one hand, these rights indeed threaten the power disparity between the majority and minority and, as such, interfere with exploitation and may disrupt the stabilizing mechanisms. On the other hand, group-differentiated rights provide for something that the control model desires (when part of the ethnic paradigm): they provide tools for preserving the separateness between the two communities. Indeed, encountered here, once again, is the tension which the control framework engenders because of its conflicting purposes. How are the tensions expected to be handled? We can expect a “good,” well functioning control framework to alleviate this tension between exploitation and continued separateness by choosing to recognize only the weaker type of group-differentiated rights, the accommodation rights.

Indeed, Israeli law in the period under review meets this expectation. Here again, law behaved as expected from a servant. The Arab-Palestinian minority members enjoyed few group-differentiated rights and they were predominantly of the accommodation kind. They moderated linguistic assimilation and fostered social separateness, whereas the more potent group-differentiated rights granting self-administration and special representation and allocation were nearly completely absent.

A. The Group-Differentiated Rights of the Arab-Palestinian Minority—What Was Granted and What Was Withheld?

1. The Predominance of the Accommodation Type of Group-Differentiated Rights

There were five group-differentiated rights granted to the minority: (1) the status of Arabic as an official language; (2) the division of public education such that it contained an elementary and high school system conducted in the

³⁰⁴ See KYMLICKA, *POLITICS IN THE VERNACULAR*, *supra* note 148, at 111, 158.

³⁰⁵ See *id.*

Arabic language; (3) the group exemption from the obligation of military service; (4) the preservation of the Ottoman *Millet* system, in which each person is subject—in the field of family law—to the religious law of her or his religious community, and in certain matters even to the exclusive jurisdiction of the religious courts of her or his community; and (5) the right of workers and business owners to observe their days of rest and holidays. I will briefly discuss each of these five group-differentiated rights below.

Among these rights, the legal status of Arabic is puzzling. The other four rights are typical accommodation rights,³⁰⁶ but the status of Arabic more closely resembles a kind of partnership—a right of special allocation and representation in the sphere of language.³⁰⁷ Article 82 of the Palestine Order in Council, 1922, forms the basis for the status of Arabic in Israel.³⁰⁸ This is Mandatory-era legislation that Israel adopted (with almost all other pieces of Mandatory legislation) into law with the establishment of the State in 1948.³⁰⁹ Under the subtitle “Official Languages” Article 82 states as follows:

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[.]³¹⁰

Such a far-reaching communal right is unexpected within the control framework, especially in light of the fact that, soon after the establishment of the state, the Knesset kept the legal obligations towards the Arabic while annulling the obligation to use English (with Section 15(b) of the Law and Administration Ordinance 1948).³¹¹ There are two possible explanations for this seeming incongruity: first, Israeli law did not formulate a structure of official bilingualism, as in Canada for example;³¹² second and more

³⁰⁶ See Saban, *Minority Rights*, *supra* note 7, at 908–09; Saban & Amara, *supra* note 303, at 15.

³⁰⁷ See Saban & Amara, *supra* note 303, at 16.

³⁰⁸ Palestinian Order in Council, 1922, art. 82, *reprinted in* 3 THE LAWS OF PALESTINE 2588 (Robert Harry Drayton ed., rev. ed. 1934).

³⁰⁹ Saban & Amara, *supra* note 303, at 15.

³¹⁰ Palestinian Order in Council, 1922, art. 82, *reprinted in* 3 THE LAWS OF PALESTINE 2588 (Robert Harry Drayton ed., rev. ed. 1934).

³¹¹ See Mala Tabory, *Language Rights in Israel*, 11 ISR. Y.B. HUM. RTS. 272, 279–80 (1981).

³¹² Saban & Amara, *supra* note 303, at 15, 18–21; John D. Richard, *Separation of Powers: The Canadian Experience*, 47 DUQ. L. REV. 731, 747–48 (2009); *see also* Canadian Charter of Rights and Freedoms, § 16, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

importantly, the impressive legal status of Arabic was never enforced in practice.³¹³ In other words, there was always an enormous disparity between the de jure and the de facto status of Arabic. In reality, Arabic carries virtually no weight in the common public sphere in Israel, whereas Hebrew was and more or less continues to be the exclusive language of our public sphere.³¹⁴ It is the language of governmental bureaucracy, of higher education, and most importantly, of most segments of the Israeli labor market.³¹⁵ In fact, the practical status of Arabic in the period under review was therefore commensurate with the expectations of the ethnic paradigm: a state deeply identified with the majority community.³¹⁶ Israel basically consigned the status of Arabic to the protection of the right to education in the minority's mother tongue, and as such it was commensurate with accommodation rights.³¹⁷

The right to education in Arabic has always fallen within the restricted category of accommodation rights because it has not been accompanied by a more general right of self-government in the sphere of education, such as has been granted to certain minority groups within the Jewish majority, like the various Jewish religious schools—either those that are state-run or those run by the ultra-orthodox community.³¹⁸ Indeed, there were, and still are, a few private Arabic schools (which are church-run but that also integrate many Muslims pupils), but they have fared only slightly better in terms of their independence from the state schools.³¹⁹ As I have explained elsewhere, any effort to create an autonomous minority education system was blocked, and moreover, the minority has not been granted the freedom and means to present its culture, worldview, or history in the mainstream (Jewish) schools and curriculum.³²⁰

In the realm of religion and personal status, important group-differentiated rights were conferred by the decision to preserve the Ottoman *Millet* legacy as the British Mandatory regime had done.³²¹ The main significance of this legacy was twofold. First, the family law that pertains to the establishment and dissolution of a family and to parent-child relations is to a large extent

³¹³ Saban & Amara, *supra* note 303, at 22–33.

³¹⁴ *Id.*

³¹⁵ *Id.* at 22–27; see also Tabory, *supra* note 311, at 283–301.

³¹⁶ Saban, *Minority Rights*, *supra* note 7, at 938.

³¹⁷ See Tabory, *supra* note 311, at 294–97.

³¹⁸ Saban, *Minority Rights*, *supra* note 7, at 950–51.

³¹⁹ *Id.* at 939, 953–54.

³²⁰ *Id.* at 938–40, 950–54; see also AL-HAJ, *supra* note 207, at 94–101.

³²¹ Saban, *Minority Rights*, *supra* note 7, at 900, 943.

religious law—the set of norms created by the religious community to which the individual belongs.³²² “Second, these matters . . . are partially subjected to the exclusive jurisdiction of the religious courts of the individual’s religious community.”³²³ The upshot of this legacy was, “a religious endogamy, as most of the religious communities recognize only intra-religious marriage.”³²⁴

The *Millet* structure accorded well with the ethnic paradigm to which Israel belonged and continues to belong. It acted in accordance with the wishes of the majority community, which had been seeking to maintain its relative social separation from the minority community.³²⁵ Furthermore, it provided another advantage for the control framework: nourishing religious identities—as subgroup identities within the Arab-Palestinian minority—detracted from the minority’s ability to construct a single, powerful national identity.³²⁶ What made the *Millet* system less problematic is that it was not pursued unilaterally: it reflected a common desire among the majority of individuals comprising all the relevant religious communities.³²⁷

In addition, the minority also held certain group power at the level of local government in the form of Arab local authorities.³²⁸ This power, however, was primarily based on the geographical-communal separation of Jews and Arabs in Israel and the right of every individual to vote and be elected in local elections. Therefore, to analytically classify this state of affairs in terms of group-differentiated rights is somewhat dubious.

A very important group-differentiated right enjoyed by the minority in the period under review was exemption from military conscription.³²⁹ This right was not explicitly stipulated in the law, either due to its sensitivity or in order to allow flexibility.³³⁰ In fact the right provides another example of the legislative technique of granting extensive, seemingly unrestricted, discretion

³²² *Id.* at 943.

³²³ *Id.* Article 83 of the Palestine Order in Council, 1922 provides as follows: “Each religious community recognized by the government will enjoy autonomy for the internal affairs of the community subject to the provisions of any Ordinance or Order issued by the High Commissioner.” Palestine Order in Council, 1922, art. 83, *reprinted in* 3 THE LAWS OF PALESTINE 2588 (Robert Harry Drayton ed., rev. ed. 1934). *See* Abou Ramadan, *supra* note 164, at 98–99; KRETZMER, *supra* note 81, at 166–68.

³²⁴ Saban, *Minority Rights*, *supra* note 7, at 944.

³²⁵ *Id.* at 944–45.

³²⁶ *Id.* at 945 n.220.

³²⁷ *Id.* at 945.

³²⁸ HENRY ROSENFELD & MAJID AL-HAJ, ARAB LOCAL GOVERNMENT IN ISRAEL 30–31 (1990).

³²⁹ Saban, *Minority Rights*, *supra* note 7, at 948.

³³⁰ *Id.*

to the executive in pivotal issues. However, this time it worked to the advantage of the Arab-Palestinian minority. The law authorized the Minister of Defense to exempt a person from universal conscription.³³¹ In the case of the Jewish ultra-orthodox minority, the Minister applied it as a matter of course.³³² With regard to the Arab-Palestinian minority, the personal exemption system was not applied;³³³ their mechanism for exemption from military service was the non-enforcement of the general conscription order that applies to them along with all others of the same age. Twenty-four months after this general order is issued it becomes ineffective toward them.³³⁴

This exemption may be classified as a group-differentiated right because it is granted on the basis of group membership.³³⁵ Its moral justification concerned the national distinctness of the Arab-Palestinian minority and the conflict between its people and the state of its citizenship.³³⁶ While it must be acknowledged that humane consideration for the special situation of the Arab-Palestinians was not the only reason for their exemption from military service—as the security interests of the majority community favored this arrangement in any case³³⁷—this does not detract from the importance of the exemption. It constitutes a major element of protection regarding the culture, language, and national identity of the Arab-Palestinians in Israel, and it also has implications for the internal unity of the minority community. This point regarding the internal unity of the minority comes to light in the case of the distinct cultural community sociologically adjacent to the Arab-Palestinian minority, namely, the Israeli Druze. The young men of this community serve in the army.³³⁸ What we encounter here is a complex cause-and-effect relation. On the one hand, the willingness to engage in military service among Druze men stems, most likely, from a special collective identity (Druze-Arab, as distinct from the Arab-Palestinian identity);³³⁹ on the other hand, military service has helped greatly in sustaining and structuring this differentiated identity.³⁴⁰

³³¹ Defence Service Law, 5746-1986, SH No. 1170 § 36 (Isr.).

³³² See Saban, *Minority Rights*, *supra* note 7, at 948.

³³³ See *id.* at 949 (describing a court decision overruling a collective exemption for Orthodox Jews).

³³⁴ Defence Service Law § 20.

³³⁵ Saban, *Minority Rights*, *supra* note 7, at 948.

³³⁶ See *id.*

³³⁷ *Id.*

³³⁸ *Id.* at 948 n.235.

³³⁹ *Id.*

³⁴⁰ See KAIS M. FIRRO, THE DRUZES IN THE JEWISH STATE: A BRIEF HISTORY 144–45, 152–53, 245–47 (1999); Oren Yiftachel & Michaly D. Segal, *Jews and Druze in Israel: State Control and Ethnic Resistance*,

The Supreme Court declined to intervene in the communal nature of the conscription exemption. This case was decided in the early years of statehood in *Hassunah v. Prime Minister*.³⁴¹ The Supreme Court explained:

[The Druze petitioner's] argument is that because he belongs to one of the minority communities he must not be coerced to enlist. We cannot trace this argument to any valid basis. The Defense Service Law 1949 applies to all citizens of the State answering specified particulars. It is not for us to explore and decide what motivated the authorities not to apply the law until now *to one group of people or another*.³⁴²

2. Centralism and the Depletion of the Minority's Self-Government Rights

A control framework is hard put to use for its stabilizing mechanisms (creating dependence, cooptation of minority elite, internal division of the minority, etc.) in the face of a viable self-administration. One would assume, therefore, that minority rights of the self-government type did not exist, or rarely existed, in Israeli law in the period under review. Legal analysis confirms this assumption, as well.

The geographical separation of Jews and Arabs seemed to offer real opportunities for minority self-administration through Arab local councils. However, the legal and practical dependency upon the central government, of all local councils, Jewish and Arab alike, rendered this potential almost impossible to utilize.³⁴³ First, the Ministry of Interior controlled the financial welfare of the local councils, their municipal status, and jurisdiction.³⁴⁴ Second, the Arab local authorities were and are poorer, and were hence more dependent upon the central government.³⁴⁵ Third, they were discriminated against on all relevant levels of government discretion—in budgets,³⁴⁶ size of

21 ETHNIC & RACIAL STUD. 476, 485 (1998). See *infra* text accompanying notes 493–96, for further elaboration on the way in which the differentiating conscription policy deepened the divide between the Druze community and all other Arab citizens of Israel.

³⁴¹ H CJ 53/56 *Hassunah v. Prime Minister* 10(1) IsrSC 710 [1956] (Isr.).

³⁴² *Id.* at 710 (emphasis added).

³⁴³ ROSEN-ZVI, *supra* note 170, at 151–53, 162.

³⁴⁴ See *id.* at 162; ROSENFELD & AL-HAJ, *supra* note 328, at 28–29.

³⁴⁵ See ROSENFELD & AL-HAJ, *supra* note 328, at 24–25.

³⁴⁶ See Razin, *supra* note 150, at 22–23. Demarcation of municipal jurisdictions created common situations whereby Arab-Palestinian owners of land resided in an Arab local authority while their land was located in a Jewish local authority's jurisdiction, and they had to pay their property taxes to the locality in which they did not in fact reside. See JIRYIS, *supra* note 54, at 226–27; Blank, *supra* note 224, at 224.

jurisdiction,³⁴⁷ municipal status,³⁴⁸ indeed in the very right to come into being and hold elections.³⁴⁹ Certain Arab-Palestinian communities were incorporated in and subordinated to a dominantly Jewish municipality, as for example Ma'alot-Tarshiha and Tel Aviv-Jaffa.³⁵⁰ Moreover, local Arab authorities run by the Communist Party suffered more severe discrimination in funding and services, and, during that period, were under constant threat of being replaced by an appointed committee.³⁵¹

Self-administration was depleted of content in the case of education as well. The state education system functioned almost without any Arab-Palestinian representation among the higher echelons of its bureaucracy and was not obliged in any way to act otherwise.³⁵² This was due to: (1) the minority having no rights of representation in public institutions;³⁵³ (2) the fact that Israeli law did not (and does not) provide the courts with the authority to remedy selective allocation of group-differentiated rights;³⁵⁴ and (3) the fact that education legislation was relatively silent on the objectives of the Ministry of Education in regard to Arabic state education. This point is noteworthy when compared to the Jewish religious state education.³⁵⁵

As regards religion and personal status, the *Millet* system could have allowed substantial self-administration, since it founded a comprehensive family court system along the lines of religious affiliation, and it provided religious institutions with certain powers over education (the private church-owned schools) and control over important property (mainly land).³⁵⁶ However, the self-government potential of the *Millet* system has diminished over the years in several ways. It has been diluted via state influence over

³⁴⁷ See JIRYIS, *supra* note 54, at 227. Until the 1960s many Arab-Palestinian localities had no local authority. See, e.g., *id.* at 226–27; AL-HAJ, *supra* note 207, at 30–34; BENZIMAN & MANSOUR, *supra* note 197, at 183–84; ROSENFELD & AL-HAJ, *supra* note 327, at 30–34, 120–22.

³⁴⁸ See ROSEN-ZVI, *supra* note 169, at 60–61. Except Nazareth and Shafa Amr (Shefar'am), Arab-Palestinian towns were only accredited as such in the 1980–90s. See JIRYIS, *supra* note 53, at 227.

³⁴⁹ See Municipalities Ordinance 1 LSI 247, §§ 1, 6 (1967) (Isr.); JIRYIS, *supra* note 54, at 227.

³⁵⁰ YIFTACHEL, *supra* note 221, at 201–03; Oren Yiftachel & Haim Yacobi, *Urban Ethnocracy: Ethnicization and the Production of Space in an Israeli 'Mixed City,'* 21 ENVIR. & PLAN. D: SOC'Y & SPACE 673, 680 (2002).

³⁵¹ See AS'AD GHANEM, *THE PALESTINIAN-ARAB MINORITY IN ISRAEL, 1948–2000*, at 137–53 (Russell Stone ed., 2001); LUSTICK, *supra* note 1, at 140–43.

³⁵² See KRETZMER, *supra* note 81, at 169–70.

³⁵³ See *supra* text accompanying notes 147–50.

³⁵⁴ See *supra* text accompanying notes 151–64.

³⁵⁵ See Saban, *Minority Rights*, *supra* note 7, at 940, 950–52, for more details.

³⁵⁶ See KRETZMER, *supra* note 81, at 166–70.

appointments to these courts.³⁵⁷ The system's *qadis* (the judges of the *Shari'a* courts) are appointed by a nine-member committee according to the Qadis Law 1961.³⁵⁸ A certain degree of self-government is guaranteed by the requirement that at least five members of the committee must be Muslims.³⁵⁹ Nevertheless, the choice of the Muslim and non-Muslim members is not made by the minority community itself.³⁶⁰ Apart from the two *qadis* who are members of the appointing committee, two other members are government ministers; three are Members of the Knesset elected by a majority of the Knesset; and the two remaining members are chosen by the Israel Bar.³⁶¹ Apart from the *qadis*, all others are members of Jewish-controlled bodies.³⁶²

Moreover, the rhetoric which accompanied the *Millet* system—of autonomy and non-intervention in the “internal affairs” of minority groups—has a dark side to it, which is the license to be more indifferent, or less responsible, for these groups.³⁶³ This rhetoric also lends support to elites that “report” more to the authorities than to their group. The “non-intervention” argument often provides these elites with certain immunity vis-à-vis their community when they strike deals that are favored by the state but resented by major parts of their alleged constituencies.³⁶⁴

3. *The Non-existence of Special Representation and Allocation Rights*

The third and final category of group-differentiated rights concerns the degree to which the minority participates in the allocation of political, material,

³⁵⁷ See *infra* text accompanying notes 356–60.

³⁵⁸ Qadis Law, 5721-1961, SH No. 339 p. 118 arts. 1, 4 (Isr.) [hereinafter Qadis Law].

³⁵⁹ *Id.* art. 4.

³⁶⁰ *Id.*; see also Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 565–66 (discussing the difference between two types of minority representation—a “classic” type, which appoints or elects members of minority communities to certain posts without directly involving the community to which the targeted individuals belong, and another type of representation in which the minority community determines (or is a partner in the determination of) who will be chosen, who will represent, and how).

³⁶¹ Qadis Law, art. 4.

³⁶² *Id.*; see JIRYIS, *supra* note 54, at 198.

³⁶³ Badi Hasisi & Ronald Weitzer, *Police Relations with Arabs and Jews in Israel*, 47 BRIT. J. CRIMINOLOGY 728, 729 (2007). See generally Allen E. Liska & Mitchell B. Chamlin, *Social Structure and Crime Control Among Macrosocial Units*, 90 AM. J. SOC. 383, 393–95 (1984) (describing the phenomenon of neglect in the realm of state handling of law and order problems within minority communities).

³⁶⁴ See *supra* text accompanying notes 134–36 and *infra* text accompanying note 382 for a discussion of the *el-Saruji v. Minister of Religious Affairs* case. Compare H CJ 232/76 Shukri v. Shari'a Court 31(1) IsrSC 413 [1976] (Isr.), and CA 205/74 Board of Trustees of Jaffa v. Zuhdi Siksik 28(2) IsrSC 545 [1974] (Isr.), with CA 3997/91 Trustee Committee of the Muslim Waqf v. Yosi Inv. Co. 49(5) IsrSC 766 [1996] (Isr.). I would like to thank Raef Zreik and Moussa abou Ramadan for the point raised here. See Abou Ramadan, *supra* note 164, at 118–21.

and symbolic power in the state. First, does it have rights to a fair allocation of public goods, both material (e.g., jobs, budgets, public services, tax easements, immigration quotas, and land) and symbolic (e.g., signs and emblems, heroes, narratives, educational goals, etc.)? Second, does it share in the political goods of the society—does it have a right to be represented in the allocating institutions themselves?

The assumption is that this type of group-differentiated rights, perhaps the most demanding, would not be granted to a minority in the control framework. The fulfillment of these rights requires making the minority a partner in public institutions, and such a partnership would contradict the hierarchical and exploitive nature of the ethnic paradigm of which the control model is the most radical sub-type. Again, Israeli law in the period under review verifies this assumption.

Elsewhere I have dealt in detail with the poverty of legal norms demanding a fair share for the Arab-Palestinian minority in Israel's material and symbolic goods.³⁶⁵ Here, I will deal only with the political goods. The law of the period in question contained no guarantee of a group-differentiated right necessitating Arab-Palestinian participation in any decision-making on matters pertaining to general society.³⁶⁶ During the period under review, Arab-Palestinian Members of Knesset ("MKs") (from non-Zionist factions) could not serve as members of important Knesset committees,³⁶⁷ and a majority political taboo barred them from participating in the government.³⁶⁸ There was no obligation to ensure

³⁶⁵ Saban, *Minority Rights*, *supra* note 7, at 960–70.

³⁶⁶ See *supra* text accompanying notes 134–36 for a discussion of the *el-Saruji v. Minister of Religious Affairs* case; see also Saban, *Appropriate Representation of Minorities*, *supra* note 15, at 591–92. In the Declaration of Independence of Israel appears a paragraph that was not translated into anything legally meaningful:

WE APPEAL—in the very midst of the onslaught launched against us now for months—to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.

THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL para. 16 (Isr. 1948).

³⁶⁷ See HOFNUNG, *supra* note 83, at 201–02. The known-but-unofficial practice of the period regarding participation in important Knesset committees was the one applied in the case of the Knesset's Foreign Affairs and Security Committee—entitlement to representation in the committee only to parties having at least one MK more than Maki in the relevant Knesset. *Id.*; see also H CJ 115/55 Zilber v. Minister of Internal Affairs 9(2) IsrSC 1244 [1955] (Isr.) (denying a petition by *Maki* (the Communist Party), which was complaining of its exclusion from the Central Elections Committee of the Municipal Elections among soldiers). The Court averred that "no party has a natural right to representation in this committee." *Zilber*, *supra*, at 1245.

³⁶⁸ Saban, *Minority Rights*, *supra* note 7, at 972.

their representation in the civil service, nor was there even a norm to consult with members of the minority before making governmental decisions even if they had special bearing on the minority.³⁶⁹

It should, however, be admitted that this state of affairs corresponded with a general feature of the Israeli regime at the time—a very strong centralism, including an absence of a general legal obligation to involve any communal sector in governmental procedures, be it a Jewish sub-group or Arab.³⁷⁰ The nation-building paradigm that directed the intercommunal relationship within the Jewish community negated sectarian representation in public policy-making (except for religious sub-groups).³⁷¹

On the other hand, the fact that control over the Arab-Palestinian minority was not the prime reason for the non-existence of an obligation to consult communities does not mean that, once in place, this order of things did not serve the purposes of the control. Control mechanisms evolve not only from minority-oriented socio-political or legal endeavors, but also from the general *modus operandi* of state authority and the structural and historical circumstances of the society.³⁷² More concretely, what was in play here is again selectivity: the Jewish religious sub-groups did not need a general or a legal obligation to consult them or their members; they gained representation through political practices unhindered by legal norms.³⁷³ The rule in Israeli law at the time was that the administrative authority can exercise its discretion in consulting whomsoever it sees fit, so long as the purpose of consultation is relevant to the issue at hand.³⁷⁴ This discretion opened the door to selectivity, and the religious Jewish subgroups squeezed through the door while the Arab-Palestinian minority did not.³⁷⁵ It should be added, however, that on certain specific issues the Jewish religious sub-groups enjoyed explicit norms that granted them representation or self-administration; the most notable example is

³⁶⁹ *Id.* at 972, 975.

³⁷⁰ SHAFIR & PELED, *supra* note 53, at 17–19.

³⁷¹ *Id.*; KIMMERLING, *supra* note 67, at 65–67.

³⁷² *See* LUSTICK, *supra* note 1, at 80–81.

³⁷³ *See* SHAFIR & PELED, *supra* note 53, at 17–23 (describing the evolution of Israel's incorporation regime).

³⁷⁴ *See* Itzhak Zamir, *Administrative Law*, in *THE LAW OF ISRAEL: GENERAL SURVEYS* 51, 54–63 (Itzhak Zamir & Sylviane Colombo eds., 1995).

³⁷⁵ *See supra* text accompanying note 164; *see also infra* notes 424–25 for the concept of *habitus* and further thoughts on the mechanisms of this selectivity in a purportedly neutral realm.

the above-mentioned regulation of the state religious education system and the independent ultra-orthodox education system.³⁷⁶

Here and there, certain legal requirements of consultation appeared that could have been relevant to the Arab-Palestinian minority.³⁷⁷ An example is Section 4 of the Protection of Holy Places Law 1967, which states:

The Minister of Religious Affairs is charged with the implementation of this Law, and he may, after consultation with, or upon the proposal of, representatives of the religions concerned and with the consent of the Minister of Justice make regulations as to any matter relating to such implementation.³⁷⁸

However, no regulations have been formulated with regard to Christian and Muslim holy places.³⁷⁹ By contrast, regulations were enacted for Jewish holy sites through the Preservation of Places Holy to Jews Regulations 1981.³⁸⁰ This differentiation was made (legally) possible because the statute leaves discretion to the Minister of Religious Affairs whether to regulate or not,³⁸¹ and it also appears to be a result of the lack of clearly defined representatives of the Muslim religion in Israel. This state of affairs, in turn, stems largely from the State's own desire to avoid creating or nurturing such official representatives.³⁸² Indeed, the vagueness surrounding the issue of minority representation—who it should be, how it is to be recognized, and by whom—is not incidental. It is an important asset for the control framework. A telling example appeared in the above-referenced *el-Saruji v. Minister of Religious Affairs* case.³⁸³ This is what the Court had to say:

In so far as the council is entrusted with [allocating] money for the community, it does so as an emissary of the Ministry of Religion. It is the business of the Minister of Religion to select his own counselors in this area, which he thinks worthy of the duty of community representatives, nor will this court direct him to choose for himself

³⁷⁶ See *supra* text accompanying notes 300–302.

³⁷⁷ See, e.g., Protection of Holy Places Law 5727–1967, 21 LSI 76, art. 4 (1966–1968) (Isr.).

³⁷⁸ *Id.*

³⁷⁹ Saban, *Minority Rights*, *supra* note 7, at 975 n.337.

³⁸⁰ Preservation of Places Holy to Jews Regulations, 1981, KT 4252, 1212 (Isr.).

³⁸¹ Protection of Holy Places Law 5727–1967, 21 LSI 76, art. 4 (1966–1968) (Isr.).

³⁸² See JIRYIS, *supra* note 54, at 231 (describing how the Israeli authorities were reluctant to set up local councils in the Arab sector and neglected them once they were formed).

³⁸³ H CJ 282/61 *el-Saruji v. Minister of Religious Affairs* 17 PD 188 [1963] (Isr.), *reprinted and translated in* 5 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 14, 18 (1963–1965).

other, worthier, counselors . . . the impression one obtains . . . is of conflict between contending groups of political activists.³⁸⁴

In other words, the absence of a procedure, by which the minority can decide upon its representatives, enables the State—with the court’s approval—to dismiss real conflict between co-opted and opposition elites, as a “conflict between competing groups of political activists.”³⁸⁵ The Court never even recommended that the state ascertain, by any acceptable procedure, who genuinely represents the minority; and thus, it paved the way for the co-opted elites and for government control over them.

In short, the minority was divested of representation (and self-government) rights in decision-making junctures, with the inevitable result that discrimination in allocation became the practice almost across the board.³⁸⁶ Arguably, this harmed the discriminating majority as well, by isolating it in a bubble of uniform interests and viewpoints. Without external contribution, the majority community was deficient in its ability to fine tune, review, and amend its decisions.

B. The Role of the Law in Perpetuating the Social Separateness of the Ethno-National Communities in Israel

Besides hierarchical order and stability, the ethnic paradigm is comfortable (and often content) with prolonging its diversity—it is comfortable with its bi-communal or multi-communal structure (sociologically speaking).³⁸⁷ How did the legal arrangements discussed above correspond with this structure?

First, it should be noted that social separation in Israel did not require much legal assistance—it was (and continues to be) voluntary, forceful, consistent, and, to a large extent, mutual.³⁸⁸ The fact that the national divide coincided with a religious, cultural, and linguistic divide and the persistent external Arab-

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ See KRETZMER, *supra* note 81, at 118–22, 125–27 (discussing welfare services, public housing, budgeting of local councils, of education, of religious services, quotas of water and of agricultural production, and marketing allocation of public land); see also YIFTACHEL, *supra* note 221, at 149–57, 303–04 (discussing planning and building); YIFTACHEL, ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE, *supra* note 88, at 140–42 (discussing land allocation); Alexandre Kedar & Oren Yiftachel, *Land Regime and Social Relations in Israel*, in 1 SWISS HUMAN RIGHTS BOOK: REALIZING PROPERTY RIGHTS 129, 140–44 (Hernando de Soto & Francis Cheneval eds., 2006).

³⁸⁷ See *supra* text accompanying notes 23–28.

³⁸⁸ Smooha, *Control of Minorities*, *supra* note 2, at 260–61.

Israeli conflict constantly nurtured the intercommunal separation. Other contributing factors were the structure of the labor market and the spatial relations.³⁸⁹ As to the latter, the land regime (norms and practices concerning land ownership, expropriation, allocation, development, and usage), and other practices created geographical proximity between Arab-Palestinian and Jewish localities, but not shared residential areas.³⁹⁰ Only about one tenth of the Arab-Palestinians in Israel have lived in mixed towns (predominantly Jewish), and in most of those towns the neighborhoods are quite often ethnically segregated; Jews in general have not lived in Arab-Palestinian localities.³⁹¹

However, certain factors emerged that did somewhat erode this segregation. The bilingual and bicultural pressures bearing on the minority, scarcity of independent employment opportunities and the shortage of housing and land, forced young Arab-Palestinian couples and individuals to seek further afield.³⁹² Still, the factors perpetuating separation were stronger by far than those counteracting it, especially with regard to the most comprehensive and profound demarcation line—the family bond. The incidence of intermarriage in Israel is remarkably low, and the *Millet* legal system discussed above both reflected and reified it.³⁹³ Moreover, the entitlement of the Arab minority to public education in Arabic and the non-enforcement of universal conscription upon its members contributed as well to maintaining the intercommunal separation.

One last legal involvement in segregation is worthy of mention—the distinction in Israel between nationality and citizenship. It was the Supreme Court itself that unequivocally affirmed the position that “Israeli Nationhood” does not exist.³⁹⁴ In its ruling in the case of *Tamarin*,³⁹⁵ it rejected a petitioner’s demand to recognize his right to register his nationality as Israeli.³⁹⁶ The Court reasoned that the petitioner “was very far from proving the existence of an Israeli nation.”³⁹⁷ In other words, contrary to popular use of

³⁸⁹ Aziz Haidar & Elia Zureik, *The Palestinians Seen Through the Israeli Cultural Paradigm*, 16 J. PALESTINE STUD., Spring 1987, at 68, 83–84.

³⁹⁰ RASSEM KHAMAI, PLANNING AND HOUSING AMONG THE ARABS IN ISRAEL 148–49 (1990); YIFTACHEL, *supra* note 221, at 63–64.

³⁹¹ YIFTACHEL, *supra* note 221, at 63–64; Smooha, *Control of Minorities*, *supra* note 2, at 261.

³⁹² Yiftachel & Yacobi, *supra* note 350, at 324–25.

³⁹³ Saban, *Minority Rights*, *supra* note 9, at 943; Smooha, *Control of Minorities*, *supra* note 2, at 261.

³⁹⁴ See CA 630/70 *Tamarin v. Israel* 26(1) IstrSC 197, 225 [1970] (Isr.).

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

the term, there is no Israeli nationality; there is only Israeli citizenship. The nationality of the Israeli citizen population is divided mainly between Arab-Palestinian and Jewish national affiliations.³⁹⁸ Israeli law directed that the distinction be registered as stipulated in Section 2 of the Population Registry Law 1965 (Obligation to Register Religion and Nationality in the Population Registry) and Regulation 2 of the Population Registry Regulations (Entries in Identity Card) 1990.³⁹⁹

Thus far we have dealt with the involvement of legal norms in shaping the power gaps between the majority and minority in Israel in its “formative years” and maintaining intercommunal separation. We encountered the weak common rights of citizenship, which supervisory institutions such as the courts largely failed to buttress, and we found only a few minority (group-differentiated) rights that assisted the minority in maintaining certain important elements of its identity but were not potent enough to allow the minority to empower itself and to moderate power disparities and their exploitation to its detriment. It is now time to turn to the involvement of the law in the stabilizing mechanisms that prolonged this state of affairs and shielded it from a violent breakdown.

V. LAW AND THE STABILITY OF THE CONTROL FRAMEWORK

We have reached the last Part of the Article, and it is the place where I tackle the fundamental questions of law and stability and law and social change.

The control framework manifestly wronged the minority. Indeed, the control mechanisms did not pressure the minority to assimilate, mainly due to the majority community’s goals;⁴⁰⁰ but, for the minority, the years 1948–1978 held fresh memories of defeat, expulsion, the uprooting of many, massive disenfranchisement from land, grave limitations on freedom of movement and other liberties, as well as deep discrimination and marginalization.⁴⁰¹ All this was contained under the shadow of an all-encompassing, violent, external national conflict.⁴⁰² What kept such a perforated structure stable? Some say the Arab-Palestinian citizens of Israel “are among the quietest national minorities

³⁹⁸ *See id.*

³⁹⁹ Population Registry Law, 5725–1965, 19 LSI 288 (1948–1987) (Isr.); Population Registry Regulations (Entries in Identity Card), 1990, KT 5243, 282 (Isr.).

⁴⁰⁰ *See supra* text accompanying notes 63–65, 102–03.

⁴⁰¹ *See, e.g., supra* text accompanying notes 38–58.

⁴⁰² *See id.*

in the twentieth century.”⁴⁰³ How did this come about? The primary answer lies in the complex set of stabilizing mechanisms that were at work and that fulfilled their function in the period under review.

Stability and docility can be partially attributed to the slight but consistent improvement of the order of things over time—the easing of control, especially through moderating the military rule from the end of the 1950s until its abolishment in 1966.⁴⁰⁴ However, gradual improvement does not suffice to ensure stability; it often achieves the opposite when perceived as too little too late.⁴⁰⁵ But in Israel it worked. At any rate, the equilibrium in Israel at that time rested on more factors: mechanisms typical of the control framework. They were mentioned by their names above, but this Part will analyze them in detail and describe how the law was integrated in them.

These stabilizing mechanisms fall into three main patterns: (1) mechanisms that aim to fend off minority *motivation to change the existing order*; (2) mechanisms that aim to stop the minority from *reverting to action*, especially violent action; and (3) mechanisms that *blunt the efficacy of challenging actions* if and when taken. To the first type belong mechanisms that disguise the wrongs of the existing order or attempt to mitigate, or even justify, them. The mechanisms of the second type are usually means of deterrents or procedures that ensure the dependency of the minority upon the state. The third type uses tools that isolate the minority from the majority and from the international community, dividing it internally and garnering the collaboration of part of its elites. Cooptation of minority elites is, in turn, greatly supported by minority’s dependency upon the state, and by the flexibility the government may have in selective exercise of its powers—favoring only certain elites.⁴⁰⁶

A. *Involvement of the Law in Mechanisms to Fend off Minority Motivation to Change the Existing Order*

The distinction between *disguise* and providing *justification* (or excuse) in the control context is slight, as justification or excuse often takes the form of masking an abuse. They are all connected to a de-politicization effect because

⁴⁰³ Azmi Bishara, *The Arab in Israel: A Study in a Political Debate*, in ZIONISM: A CONTEMPORARY CONTROVERSY 312, 315 (Pinhas Ginosar & Avi Bareli eds., 1996).

⁴⁰⁴ See *supra* text accompanying notes 211–12.

⁴⁰⁵ See Claire Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 ANGLO AM. L. REV. 368, 409–11 (1972) (discussing the reformation of the “Home Rule” regime in Northern Ireland).

⁴⁰⁶ Saban, *Minority Rights*, *supra* note 7, at 975–76.

they serve to marginalize issues that, without them, may have headed the list of grievances. For the sake of clarity, however, a distinction should be attempted. I shall denote as *disguise* the mechanisms that cover up the very process of abuse, the physical fact of its taking place, and I will denote legitimacy, or *justification* or *excuse*, as the mechanisms that help whitewash or cast doubt on the negative character of the state practice.

Of all the goals of the control framework, these two are the most difficult to attain. The true state of affairs in the control framework is usually too clear to hide and too difficult to justify to its victims. Moreover, in a multiply divided society, such as in Israel, disguise and legitimization are more difficult to achieve because along each of the rifts a comparison may be made, and the differences cannot be veiled easily from the deprived minority. In short, a legitimacy crisis is a common eventuality, or at least a reasonable possibility under control conditions. Disguise and justification, therefore, are used more often to separate the minority from potential allies (within the majority community and the international community), who are distant, ignorant, or dissociated enough from the abuse to make do with the kind of effect that these mechanisms are able to produce.

1. *Disguise and the Law*

a. *Preferring the Circuitous to the Explicit*

Kretzmer discusses the enormous disparity between the extent of open discrimination towards the Arab-Palestinian minority and the institutional and concealed types of discrimination.⁴⁰⁷ This disparity will therefore only be summarized, with a few added points.

First, there was a clear preference for neutral legal norms, and a serious effort that discrimination would appear in implementation alone.⁴⁰⁸ This choice was maintained mainly by endowing the government (the administrative bodies) with general and extensive authority.⁴⁰⁹ Judicial review failed to curb this authority, and if it did in some minor manner, it regularly left alternative routes, allowing the policies and practices to be continued.⁴¹⁰ In one of the examples given, when the Court interpreted restrictively the authority to

⁴⁰⁷ KRETZMER, *supra* note 81, at 89–108.

⁴⁰⁸ See *supra* text accompanying notes 248–50, 262–66.

⁴⁰⁹ See *supra* Part III.B.1.

⁴¹⁰ See *supra* Part III.B.2.

(temporarily) shut down a newspaper on the basis of the Press Ordinance, this shutdown was allowed, even permanently, on the basis of the Defence Regulations.⁴¹¹ In the sphere of state allocations, likewise, the law did not limit the scope of executive discretion by obligating it to set standards.⁴¹²

The second practice that aided disguise was opting to threaten, rather than actually cause, harm and preferring the use of state power to allocate selectively, rather than its authority to coerce. An illustration of this practice is how the State chose to prevent the minority from forming associations. Any number of direct restrictions could have been imposed: the Ottoman Law on Associations of 1909;⁴¹³ the Defence Regulations 1945 (Regulation 74 allowed confiscation of assets);⁴¹⁴ and the Ordinance Extending the Emergency Regulations (Departure for Abroad) 1949, which could prevent associations from fundraising.⁴¹⁵ All of these legal instruments could have put any association out of business, but they were carefully used.⁴¹⁶ The authorities opted for indirect methods. For example, members of such associations would not be appointed to positions controlled or influenced by the State (such as teachers, in both the public and private education systems, as will soon be elaborated),⁴¹⁷ or the association would not be accorded recognition by the establishment in which it was embedded, as happened to Arab-Palestinian student organizations in universities.⁴¹⁸ The converse of this was also employed—endowing Jewish-controlled bodies, such as the *Histadrut* (the major labor union),⁴¹⁹ with the kind of status that made it worthwhile to join

⁴¹¹ See *supra* text accompanying notes 268–74 (discussing the *al-Ard* case).

⁴¹² See *supra* note 177 and accompanying text.

⁴¹³ Cf. Marc Makary, *Notification or Registration? Guarantees of Freedom of Association in Non-Democratic Environments: Case Studies of Lebanon and Jordan*, 10 INT'L J. NOT-FOR-PROFIT L. 77, 78 (2007).

⁴¹⁴ *Defence (Emergency) Regulations*, B'TSELEM, http://www.btselem.org/english/Legal_Documents/Emergency_Regulations.asp (last visited Apr. 4, 2011).

⁴¹⁵ Emergency Regulations (Foreign Travel) Law, 5709–1948, 2 LSI 17 (1948–1949) (Isr.).

⁴¹⁶ See, e.g., JIRYIS, *supra* note 54, at 194–95, 220 (describing how direct pressure on Arab labor unions and their members in the first years of statehood resulted in their “voluntary” dissolution, and how like treatment of Arab sport clubs in the 1960s had the same result). Only organizations that failed to take the hint and “self-dissolve” were at times declared illegal. See, e.g., *id.* at 194–95; HOFNUNG, *supra* note 83, at 165–68; LUSTICK, *supra* note 1, at 128, 247–52. For a more comprehensive discussion, see COHEN, *supra* note 208, at 33–45.

⁴¹⁷ See *infra* text accompanying notes 428–31.

⁴¹⁸ DOWTY, *supra* note 56, at 197; JIRYIS, *supra* note 54, at 196–97.

⁴¹⁹ See LUSTICK, *supra* note 1, at 211–13; see also Collective Agreements, 5717–1957, SH No. 221 p. 63, §§ 3–4 (Isr.) (discussing the definition and status of labor union organizations).

them and not others—thus inducing members of the minority to “choose” or lose.⁴²⁰

It was a working assumption, often verified by reality, that weakness tends to become self-perpetuating. Therefore, in congruence with this line of thought, it was considered vital to keep the potential foci of minority self-empowerment weak.⁴²¹ Weakness rendered minority organizations impotent in the eyes of potential activists and sympathizers, and thus not worthy of their efforts or of the risk that at times may be involved.⁴²² The absence of strong anti-discrimination norms protected by assertive courts, and the lack of a norm demanding involvement of the minority at least in societal decisions concerning it, were important contributions of the law to perpetuating this organizational impotence.⁴²³

Another fact that made frequent use of explicit discrimination expendable was the same mechanism that distinguished *de facto* between the Jewish national-religious minority and the Arab-Palestinian minority when the formal legal arrangements regarding them were similar.⁴²⁴ Pierre Bourdieu provided a theoretical explication for such phenomenon, in the concept of *habitus*.⁴²⁵ *Habitus* is a set of mind; a product of social norms; a backdrop of unquestioned attitudes which “define the social expectations that shape the contours of our comfort zones, molding what we expect from one another.”⁴²⁶ Concretely, majority members in Israel (including, of course, its bureaucratic elites) knew, without explicit directive or guidance, what and who is “preferred” and how to serve them.⁴²⁷

⁴²⁰ LUSTICK, *supra* note 1, at 211–13; *see* AL-HAJ, *supra* note 207, at 171–72 (illustrating the professional organization of Arab teachers); *see also* JIRYIS, *supra* note 54, at 196–97 (discussing the relationship between the Arab student councils and their universities); LUSTICK, *supra* note 1, at 192–95 (discussing the establishment of competing organizations by the *Histadrut*).

⁴²¹ Saban, *The Legal Status of Minorities*, *supra* note 78, at 318.

⁴²² *See* COHEN, *supra* note 208, at 126–27.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ DAVID SWARTZ, *CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* 95–96 (1997). Bourdieu sensed correctly the atmosphere of non-reflective, intuitive, almost automatic, understandings on the part of the majority that simply clones the existing order without the need for explicit verbal directives or declared legal norms. *See id.* at 100–05.

⁴²⁶ *Id.* at 100–01; Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 *YALE J.L. & FEMINISM* 79, 83 (2009).

⁴²⁷ ARIELA AZULAY & ADI OPHIR, *THIS REGIME WHICH IS NOT ONE: OCCUPATION AND DEMOCRACY BETWEEN THE SEA AND THE RIVER* (1967-), 400–04 (2008).

b. The Course of Divergent Paths

Another important disguise mechanism that we have already met a few times is the course of divergent paths. It is a hard-to-trace form of discrimination that is built upon the existence of parallel societal and state bodies constructed around real differences—in language, religion, or place of residence—such as public schools in Arabic being separated from Hebrew-language schools, separate electronic media in Arabic, religious services, and most of the local authorities. How does this set of things help discrimination be more disguised? These divergences seemed non-artificial and agreed-upon; however, they were operated, supervised, or financed differently—and this was concealed because their (natural or artificial) complexity rendered the comparison and exposure of underlying bias difficult to detect.

Take, for example, the complexity of the separate educational systems—the public systems including Hebrew-speaking, Arabic-speaking, and the national-religious (Jewish) systems, and the private education systems (the ultra-orthodox Jewish system and the church-run Arab system). These *five* systems are funded in such a complex manner that only by examining a large body of data can we try to assess the sum total of funding in each case and perhaps conduct a sensible comparison.⁴²⁸ The following are just a few of the factors that enter the calculation and that differ between the various systems: the number of pupils per class; the ratio between pupils and staff; the length of the school day; the distance of a pupil's residence from the school; the school's infrastructure; learning support provided; incentives for staff to work in less popular vicinities; teacher training for the relevant system; and supplementary funding from local authorities.⁴²⁹ Not accidentally, an attempt at comparison is often futile.⁴³⁰ Add to this complexity the legal dimension—the absence of an obligation to set explicit and fair standards for allocation and a norm ordering that they be published⁴³¹—and the stage is set for subterfuge.

Another example of divergent paths is the military censorship of the press, which at the time was divided between statutory and “voluntary” mechanisms.⁴³² The statutory path was based on the British Mandatory

⁴²⁸ Zama Coursen-Neff, *Discrimination Against Palestinian Arab Children in the Israeli Educational System*, 36 N.Y.U. J. INT'L L. & POL. 749, 753–55 (2004).

⁴²⁹ VARDÁ SHIFER, *THE HAREDI EDUCATION SYSTEM: ALLOCATION, REGULATION AND CONTROL* 36–38 (1998).

⁴³⁰ *Id.*

⁴³¹ Coursen-Neff, *supra* note 428, at 751.

⁴³² HOFNUNG, *supra* note 83, at 132–42.

Defence (Emergency) Regulations 1945, and ostensibly covered all press; however, a separate, “voluntary” path existed in that period, covering newspapers party to the “Editors Committee Agreement.”⁴³³ This latter path imposed a more lenient censorship regime, and it is no coincidence that only (mainstream) Jewish newspapers enjoyed it.⁴³⁴

c. Constricting the Information Market and Diverting It

In the context of the law’s involvement in disguise mechanisms there is, of course, another issue: the norms dealing with the marketplace of ideas, narratives, and images.

Positive legal developments, some already mentioned above, in freedom of expression had occurred and carried a gradual eroding effect on the efficacy of disguise.⁴³⁵ It is also true that the empathy for the Arab-Palestinian minority by the Hebrew press was small from the outset.⁴³⁶ However, a vibrant and diverse Hebrew press, with better access to governmental and other sources of information, exposed state policies—including in areas specific to the minority.⁴³⁷

On the other hand, that is only part of the story. Here, too, indirect means of influencing the marketplace of ideas were preferred over direct restrictions upon speech. The State advanced its ideas, perceptions, and interpretations both directly, as society’s most powerful speaker, and less directly via its power to allocate accessibility to effective speech sites and mediums. The State had exclusive control over the curriculum of state schools⁴³⁸ and over the electronic media of the time if it was media originating in Israel.⁴³⁹ It also

⁴³³ *Id.*

⁴³⁴ *Id.* at 132–42; see also Moshe Negbi, *Paper Tiger: The Struggle for Press Freedom in Israel*, 39 JERUSALEM Q. 17 (1986); Zeev Segal, *Army Censorship: Its Authority, Judicial Control of Its Activities and Suggestions for an Alternative Arrangement*, 15 TEL AVIV U. L. REV. 311 (1990).

⁴³⁵ See *supra* text accompanying notes 254–55.

⁴³⁶ COHEN, *supra* note 208, at 136–40; Alina Koren, *The Coverage of Land Day in the Israeli Press*, 2 PATUAHK 3, 7, 14 (1994) (Isr.).

⁴³⁷ See JIRYIS, *supra* note 54, at 140–53 (describing the way information was exposed to the Arab-Palestinian minority after the 1956 *Kfar Qassem* Massacre); Israel Koenig, *Top Secret: Memorandum-Proposal—Handling The Arabs of Israel*, AL HA-MISHMAR DAILY, Sept. 7, 1976, reprinted in Israel Koenig, *The Koenig Report*, 6 J. PALESTINE STUD., Autumn 1976, at 190 (providing a blatant memorandum of the Ministry of Interior Northern District Commissioner which was leaked and published in the *Al ha-Mishmar Daily* of September 7, 1976).

⁴³⁸ See *supra* text accompanying notes 320, 354–55; see also Saban, *Minority Rights*, *supra* note 7, at 939–40.

⁴³⁹ JIRYIS, *supra* note 54, at 170–71.

selectively supported journals in Arabic⁴⁴⁰ (through *Histadrut* and governmental funding), and it could block accessibility to state-controlled media or to media influenced by it. For example, the state broadcasting station *Kol Israel* refused to broadcast a call to attend an Arab-Jewish assembly propounding abolition of the military rule over the Arab citizens.⁴⁴¹ One of the declared reasons offered for the refusal, found in the *al-Khazen* court ruling of the early 1960s, was that the broadcasting station's internal directives were ostensibly neutral and stipulated that only messages from "municipalities, local authorities and public, education, culture and art institutions" were to be aired.⁴⁴² The state representative added in Court that political parties' announcements may be aired as well;⁴⁴³ however, he provided no explanation as to why civil society organizations of a political nature are barred from accessing public media resources monopolized at the time by the State.

Moreover, at the time, freedom of information was not a legal norm in Israeli law, and even after the Court acknowledged a limited version of the right to information in the mid-1960s—in so far as it concerned a request by an individual for information gathered on her or him⁴⁴⁴—it was not extended to general information from a public authority.⁴⁴⁵ Hence, among other things, administrative authorities were not legally obliged to publish the directives which regulate their discretionary powers.⁴⁴⁶ In addition, because civil service was almost exclusively Jewish, the Arab-Palestinian minority had an even

⁴⁴⁰ *Id.* Regarding the state intervention in the Arabic-language press, the government supported two dailies: *al-Yum* and *al-Anba*. *Id.* The first was published by a purportedly independent association. In addition, the main visual news of the day—*Yomanei Carmel*—which was basically the government's voice, was translated into Arabic. See Ozatski-Lazar, *supra* note 126, at 61–62. What role did the law play here? I posit the law provided: (1) the absence of a clear norm of impartiality—no restriction upon state selective allocation; and (2) the absence of a group-differentiated right to minority representation in the management and the contents of state-owned fora and cultural engines.

⁴⁴¹ HCJ 345/61 *Al-Khazen v. Director of the National Broadcasting Service* 15 PD 2364, 2367 [1961] (Isr.).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ Compare HCJ 337/66 *Estate of Kalman Pittel v. The Tax Assessing Committee of Holon Municipality* 21(1) PD 69 [1967] (Isr.), with HCJ 142/70 *Shapira v. Jerusalem District Committee of the Israel Bar* 25(1) PD 325, 336 [1971] (Isr.).

⁴⁴⁵ See *Yitzchaki v. The Minister of Justice* 28(2) PD 692, 700 [1974] (Isr.).

⁴⁴⁶ *Id.* A state obligation to publish directives was imposed by the Court only at the beginning of the 1990s. See HCJ 5537/91 *Efrati v. Ostfeld* 46(3) PD 501, 514–15 [1992] (Isr.). In this context, the laxity on the part of the authorities to inform the Arab-Palestinian population of the social benefits programs to which it was entitled, or of mitigating conditions on the restrictions to which it was subject, is very clear. See, e.g., ZEEV ROSENHEK, *THE HOUSING POLICY TOWARD THE ARABS IN ISRAEL IN THE 1950S–1970S*, 36 (1996) (describing the minority's meager use of housing assistance to which they were entitled).

narrower access to governmental information. Finally, private bodies were even better “protected” from having to divulge information. Hence, the Jewish National Fund, for example, did not divulge information about its transactions.⁴⁴⁷

2. *Law and the Production of Legitimacy*

Comments about the involvement of the law in legitimizing the control framework were already mentioned, but a few others are in order. These will be limited to the mechanisms in which the law clearly played a direct part.

First, it is vital to distinguish here between two distinct audiences—the majority and the minority. In the public discourse of the time, there were justifications and excuses for the state of affairs, which were voiced by the State and were entirely unconvincing to the minority. Other arguments put forth by the majority community had the potential to influence the minority. Whether or not they influenced the minority depended largely on the intermediary that not only provided the information, but who interpreted it; in other words, some of the information reached the minority through its own elites. If those intermediaries were co-opted, they would at least partly legitimize the information they passed on. Moreover, the ability of the minority to push for change depended upon coalition with partners from within the majority community, and here the legitimizing efforts of the State diminished the chances for such a coalition, since they nourished majority’s self-righteousness.

Second and most important, the law supported legitimizing efforts by being instrumental in maintaining a minimal threshold of formal democracy.⁴⁴⁸ It avoided explicit distinction on the basis of ethno-nationality and gradually improved the status of human rights in Israel.⁴⁴⁹ Thus, the law inculcated a hope for change. There was ambivalence—a seeming inconsistency in the policy towards the minority—which cultivated hope. There were at least two sources for this apparent inconsistency. On the executive level, two agents were at work simultaneously—the “bad,” which was the military rule, and the “good,” who was the advisor on Arab affairs.⁴⁵⁰ On the wider plane, the Supreme Court frequently acted as the “good guy” and emerged with

⁴⁴⁷ Saban, *The Legal Status of Minorities*, *supra* note 78, at 325.

⁴⁴⁸ *See supra* text accompanying notes 138–45.

⁴⁴⁹ *Id.*

⁴⁵⁰ *See JIRYIS*, *supra* note 54, at 60–61.

surprisingly courageous decisions, thereby encouraging a belief in the potential for improvement of the lot of the minority.⁴⁵¹ During the period under discussion, this belief was wishful thinking, a stabilizing factor, and a product of a mainly hollow hope. Indeed, Jiryis, one of *al-Ard*'s leaders, retrospectively lamented the faith his movement had placed in the Israeli judiciary for such a long time.⁴⁵² "One of [*al-Ard*'s] obvious mistakes was to trust in Israeli justice and democracy," he later wrote.⁴⁵³ Hence, law, and especially the courts, added a shade of grey to the image of the Israeli regime of the time.

Another example may clarify this point further: often practices that harm the minority stem from general legal principles which, in other contexts, may benefit it. Thus, for example, the principle of personal merit, which allegedly is a major criterion in appointment to civil service and a justification or excuse for not appointing many Arab-Palestinian citizens to its ranks, is the same principle that aids in the internal struggle against nepotism or familial allocations (*Hamula*) in the Arab local authorities. Exposure to these two facets of the same coin sometimes blunts the sense of injustice.

B. Involvement of the Law in Mechanisms to Curb the Translation of a Motivation into Action Aimed at Changing the Existing Order

Even after a member of the minority becomes motivated to act for change, the system may still deter her or him from active involvement in that struggle either by intimidation or by trying to replace her or his motivation by another.

The pivotal axis in this context was the dependence of the minority on both dispensations of the State and its power to restrict and to sanction.⁴⁵⁴ This dependence was augmented by the flexibility allowed the government in implementation of allocation and restriction, which gave it almost full sway to deter and bribe, reward and punish.⁴⁵⁵ These mechanisms were all used to divide the minority and co-opt its elites. Flexibility lent itself to the granting of privileges or lifting of restrictions in response to requests of *certain* representatives of the minority, thus rendering them indispensable in the eyes

⁴⁵¹ See *supra* text accompanying notes 246, 254–58, 270, 271.

⁴⁵² JIRYIS, *supra* note 54, at 195.

⁴⁵³ Compare *id.*, with Shamir, *supra* note 230, at 784–79 (arguing that Supreme Court procedures in the occupied territories—as opposed to those in Israel—in the 1970s and 80s actually added legitimacy to the Court's perceived impartiality).

⁴⁵⁴ LUSTICK, *supra* note 1, at 169.

⁴⁵⁵ See *supra* text accompanying notes 267–72.

of their community.⁴⁵⁶ In addition, a system of favors and bribes ensured collaboration of the “representatives.”⁴⁵⁷ The following is an illustration.

*Dependence, Deterrence, and Cooptation, Mixed with Legitimization—
Arab-Palestinian Teachers as an Illustration*

Analysis of the labor market in the period under review reveals that the white-collar jobs open to Arab-Palestinian citizens were mainly the few positions in the Arab local authorities, among these, teachers and headmasters of the Arabic-language schools; the general civil service was basically closed to them.⁴⁵⁸ The catch was that the positions in the state-run Arab schools entailed giving up political activity—in other words, education workers were given a choice between earning a living and political involvement—and it was, and still is, hard to contest this dichotomy as there is a certain logic in barring teachers from active political involvement. The problematic nature of the Israeli situation then becomes more obvious—it has to do with coercing part of the potential elite of the minority to an employment course that seemingly legitimately neutralizes them from political activity toward social change.⁴⁵⁹ Moreover, “political” often equals “controversial,” and the question is of course: “In whose eyes?” Unsurprisingly, Zionist narratives in the curriculum were hence considered natural or neutral, while Palestinian narratives were conceived political and even radical.⁴⁶⁰

Political activity within a state educational institution was forbidden on the basis of Section 19 of the State Education Law 1953,⁴⁶¹ and it was restricted in private educational institutions, too, under Section 8 of the Education Ordinance (new version) 1978,⁴⁶² Sections 16, 18, and 32 of the Supervision of

⁴⁵⁶ COHEN, *supra* note 208, at 42.

⁴⁵⁷ *See, e.g., id.* at 37–47.

⁴⁵⁸ *See* AL-HAJ, *supra* note 207, at 61–68, 203–13; COHEN, *supra* note 208, at 139–58; GHANEM, *supra* note 351, at 139.

⁴⁵⁹ Another connected problem is pointed out by Cohen. Because of the restrictions accompanying the teaching profession when it came to Arab citizens, talented teachers were not the ones who wound up teaching. COHEN, *supra* note 208, at 170. Put differently, the highly educated teachers, and those who could better relate to the students, be their role models, etc., were not teaching. *Id.* In addition, we should remember that the option for Arab-Palestinian teachers to generate social change through their profession was much curtailed, as they had no meaningful control over the curriculum—neither of their schools nor of wider society’s schools. *See supra* text accompanying notes 320, 354–55, 438.

⁴⁶⁰ *Cf.* COHEN, *supra* note 208, at 171–72 (discussing the state’s reaction to pupils who wished to engage in memorizing the *nakba*).

⁴⁶¹ State Education Law, 5713–1953, SH No. 131 p. 137 (Isr.).

⁴⁶² The Education Ordinance (New Version), 5738–1978, 31 LSI 607 § 8 (Isr.).

Schools Law 1969,⁴⁶³ and the State Education (Recognized Institutions) Regulations 1953.⁴⁶⁴ Teachers in public education institutions were also barred from certain kinds of political activity *outside* the school, and this prohibition was imposed in the disciplinary regulations of the civil service and the local authorities.⁴⁶⁵ A main norm in this context was the Civil Service (Restriction on Party Activity and Fund Raising) Law 1959, which, notwithstanding its title, restricted involvement in political activity in the wider sense, such as in demonstrations or marches with “a political character” (especially Sections 1, 4, and 5 of this Law).⁴⁶⁶ The Civil Service (Discipline) Law 1963 and the Local Authorities (Discipline) Law 1978 formulated a vague framework offense of “improper behavior,”⁴⁶⁷ or an action that “transgressed against the civil service disciplinary code.”⁴⁶⁸ An important ruling at this time is *Katz-Shmoueli* in which the Court confirmed the layoff of a teacher due to Communist activity, though it was not “carried out among pupils.”⁴⁶⁹

As mentioned, in the case of Arab-Palestinian teachers, even those who were not part of the state system were subordinated to strict restrictions regarding political activity outside the school.⁴⁷⁰ These restrictions were partly self-imposed by the Arab church-run private schools out of caution and due to two other mechanisms. One we can call state (partial) funding for state supervision;⁴⁷¹ and the other is the Minister of Education’s authority with regard to approving appointment of teachers, even in private schools, according to the Mandatory Education Ordinance—now the Education Ordinance (new version) 1978⁴⁷² and Article 16 of the Inspection of Schools

⁴⁶³ Supervision of Schools Law, 5729–1969, SH No. 180 §§ 16, 18, 32 (Isr.).

⁴⁶⁴ State Education (Recognized Institutions) Regulations, 1953, KT 5714, 104. Teachers in teacher seminaries were subject to basically the same restrictions as appeared in Section 19 of State Education Law. They also appeared in State Education Order (Teachers and Kindergarten Teachers Seminaries), 1958, KT 763, 586 (Isr.).

⁴⁶⁵ See Public Service Law (Discipline) 5723–1963, SH No. 390 p. 50 (Isr.). In the same context, see the Special Declaration of the government published in the Official Gazette in 1972 (Public Service Law (Discipline) 5723–1963, SH No. 390 p. 50 (Isr.); Special Declaration of the Government, Reshumot No. 1882, p. 678 (Isr.)), especially Section 4(2), stipulating that a teacher “who advocated disloyalty to the State of Israel or behaved in a way to suggest such disloyalty on his own part, whether in or outside his work, will be brought before a disciplinary tribunal.”

⁴⁶⁶ Civil Service (Restriction on Party Activity and Fund Raising) Law, 5719–1959, SH 289 p. 190 (Isr.).

⁴⁶⁷ Public Service Law (Discipline), 5723–1963, SH No. 390 p. 50 (Isr.).

⁴⁶⁸ Local Authorities (Discipline) Law, 5738–1978, SH 902 p. 153 (Isr.).

⁴⁶⁹ See HCJ 76/55 *Katz-Shmoueli v. Minister of Education and Culture* 9(3) PD 1839, 1844 [1964] (Isr.).

⁴⁷⁰ See Saban, *Minority Rights*, *supra* note 7, at 938–42, 950–54.

⁴⁷¹ *Id.*

⁴⁷² The Education Ordinance (New Version), 5738–1978, 31 LSI 607 (Isr.).

Law 1969.⁴⁷³ Legally, the Minister's right to intervene was relatively limited, but in practice, his or her control over the education employees of private Arab schools was not significantly different from his or her control in the state system.⁴⁷⁴

Arab-Palestinian teachers would not have been quite so vulnerable had they enjoyed the backing of a strong labor union. Teachers' unions had a voice by dint of collective agreements and they sent representatives to parity committees (joint meetings of government and union representatives) that discussed dismissal of teachers.⁴⁷⁵ But in fact these committees provided Arab-Palestinian educators with no real protection. A case in point is the joint committee of the Ministry of Education and the Teachers Union that in 1957 discussed the dismissal of three leaders in the Teachers Union accused of political sympathy with the Nasserite nationalist line.⁴⁷⁶ Not one Arab-Palestinian representative was on that committee, and no protection was secured.⁴⁷⁷ As mentioned above, no general legal norm of minority representation or consultation was in existence.⁴⁷⁸

However, political activity was not only curtailed in the case of employed teachers. Applications for a teaching position could be turned down on the basis of the politics of the applicant prior to submission.⁴⁷⁹ In an official report Israel submitted to the UN Committee for the Elimination of Racial Discrimination, it admitted to having applied a general security screening system as a matter of course in the case of Arab-Palestinian candidates for teaching until 1994.⁴⁸⁰ The collective nature of the modus operandi here reflected the general attitude toward the Arab-Palestinian minority as a suspicious group.⁴⁸¹ This was indeed the attitude during military rule, and in certain areas it persisted long after military rule was abolished.

⁴⁷³ Inspection of Schools Law, 5729–1969, 23 LSI 180, art. 16 (1968–1969) (Isr.).

⁴⁷⁴ KRETZMER, *supra* note 81, at 152–54.

⁴⁷⁵ AL-HAJ, *supra* note 207, at 164–65.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Supra* note 366 and accompanying text.

⁴⁷⁹ COHEN, *supra* note 208, at 172.

⁴⁸⁰ Comm'n on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention, Ninth Periodic Report of States Parties Due in 1996, Addendum, Israel, ¶ 105, U.N. Doc. CERD/C/294/Add. 1 (1997); AL-HAJ 1995, *supra* note 207, at 169–71; KRETZMER, *supra* note 81, at 153–54.

⁴⁸¹ See AL-HAJ, *supra* note 207, at 170.

To shortly cup up: the story of the Arab teachers shows how a mixture of occupational dependency, flexibility in the State's appointing and discharging power, and legitimacy excuses facilitated the cooptation of minority elites.

C. Involvement of the Law in Mechanisms to Render Actions Ineffective to Promote Change

When minority members undertake an action that runs counter to the control framework, the state can still neutralize or weaken it. The courses utilized in the Israeli context mainly entailed insulating the minority from the majority community (physically or emotionally), internally dividing the minority, blocking mobilization resources (money, communication, and other means of organization and networking), and co-opting an elite to substitute the one that opposed the system. Most of these courses have been discussed above. The one that remains is the involvement of the law in dividing the minority.

The Law and the Internal Division of the Minority

The mechanisms of dividing the minority rested mainly on social reality rather than legal endeavors. In other words, these mechanisms rested upon the deep heterogeneity of the Arab-Palestinian minority itself—geographical, tribal, familial, and religious—and upon other differences, such as between the traditional and the modern, the urban and the rural.⁴⁸² Public policy was, then, a “rider” of existing segmentation; however, it sought to perpetuate and, when possible, deepen it.⁴⁸³ So, for example, the long period of military rule strengthened localism and hindered nation-wide ties.⁴⁸⁴ Moreover, the law can be shown to have taken part in at least two other axes of internal division—the religious-communal split between Muslims, Christians, and Druze, and the demarcations of extended families (*hamula*). Let us begin with the latter.

The survival of familial affiliation in Arab society, despite partial urbanization and modernization, is attributed with great justice to the sharp dependence of the minority on the majority in Israel.⁴⁸⁵ The extended family was perceived by many minority members as deeply needed in the face of the state policy of exclusion.⁴⁸⁶ The shortage in white-collar positions created

⁴⁸² *Id.* at 15–18 (describing the divisions during the Ottoman and British Mandate periods).

⁴⁸³ LUSTICK, *supra* note 1, at 128–29.

⁴⁸⁴ AL-HAJ, *supra* note 207, at 25–27; Bauml, *supra* note 137, at 72.

⁴⁸⁵ LUSTICK, *supra* note 1, at 202–03.

⁴⁸⁶ ROSENHEK, *supra* note 746, at 38.

tough competition for the few posts offered by local authorities, and the local leading extended families, for their part, wished to improve their own chances of enjoying the scarce public assets available, and so they were engaged in an effort to perpetuate their advantage in local Arab politics.⁴⁸⁷

On the other hand, the courts at times reduced familial-biased allocations in the municipalities and somewhat deterred local officials from treating their official powers as a private domain. The courts did so mainly by applying the obligations of administrative law that bind every administrative authority (governmental or local). However, in the absence of comprehensive efforts by both the state and the minority society to erode the deep-seated factors that nurture the *hamula* politics, the courts were fighting an uphill battle.⁴⁸⁸

In the religious-communal division, the part played by the law is difficult to pin down. It can be said to be connected to diversification through two main areas. First, the general influence of the law on cultural change in Israel is seen in the directions of modernization and relative secularization. Second, the law's role is seen in the absence of meaningful self-administration for the minority; namely, its contribution to the fact that since the establishment of the State of Israel, the Arab-Palestinian minority has had no public sphere wide and free enough to encourage "community building."

But there were legal norms that affected the minority intra-religious divide more pronouncedly, such as the Religious Communities (Organisation) Ordinance 1926,⁴⁸⁹ which made it possible to recognize the Druze as a separate religious community. This recognition occurred only when and after Israel came into being, and it took the form of the Religious Communities Regulations (Organization) (the Druze Community) 1957⁴⁹⁰ and the Druze Religious Courts Law 1962.⁴⁹¹ Moreover, the State recognized the Druze as a separate national group registered differently in the identification card and in the population census.⁴⁹²

⁴⁸⁷ LUSTICK, *supra* note 1, at 207–09; *see also* AL-HAJ, *supra* note 207, at 162–64, 188–90; GHANEM, *supra* note 351, at 139.

⁴⁸⁸ HCJ 628/76 Tarrif v. Head of Council of Joulis 31(2) PD 544, 548 [1977] (Isr.).

⁴⁸⁹ Religious Communities (Organisation) Ordinance, 1926, *reprinted in* 2 THE LAWS OF PALESTINE 1292 (Robert Harry Drayton ed., rev. ed. 1934).

⁴⁹⁰ Religious Communities Regulations (Organization) (The Druze Community), 1996, K.T. 127 (Isr.).

⁴⁹¹ Druze Religious Courts Law, 5723–1962, 17 LSI 27 (1962–1963) (Isr.).

⁴⁹² JIRYIS, *supra* note 54, at 200; *see also* KRETZMER, *supra* note 81, at 42.

Executive discretion, based on the law and the courts' interpretation thereof, is at the basis of another dividing procedure—enforcing conscription on Druze men while not on Muslims or Christian Arabs, and allowing Bedouins to volunteer for service on a personal basis.⁴⁹³ As explained above, military service has helped greatly in sustaining and structuring a Druze distinctive identity.⁴⁹⁴ Moreover, economics—specifically, employment needs—were at play here as well.⁴⁹⁵ Military service became a favorable, and at times necessary, prerequisite for many employment opportunities: police, prison guards, security personnel in airports or sea-ports, and, of course, for a professional soldier or officer career. These positions became a major part of the Druze citizens' employment horizon, and this state of affairs locked them into a strong dependency upon the State, for the jobs that are the most disruptive to their relations with other fellow Arabs.⁴⁹⁶

The army service and the differentiating policy regulating conscription thus served the stabilizing mechanisms of the control framework in several ways. To begin with, the army service provided economic incentives on a prolonged basis to an economically weak group, the Druze citizens, and “in return” they were co-opted as a group.⁴⁹⁷ Moreover, serving or not-serving in the IDF was (and still is) a major group identity factor and a major disruptive element for internal relations within sub-groups among the Arab citizens.⁴⁹⁸ Finally, differentiating conscription policy aided in legitimizing state discrimination: the state could claim that distinctions based on army service are non-ethnic in nature as they cover both Jews and non-Jews.

The last divide worth mentioning here relates to both the religious-communal and the familial rifts but transcends both: the political division. This division is a clear example of the cooptation mechanism. The hegemonic party of the time, *Mapai*, exerted great effort in creating puppet factions.⁴⁹⁹ These factions served as its satellite parties and functioned until the 1970s.⁵⁰⁰ Dependence of minority members upon the powers that be, and the freedom of allocation with which both the law and the judiciary furnished the executive,

⁴⁹³ See *supra* text accompanying notes 401–16.

⁴⁹⁴ Saban, *Minority Rights*, *supra* note 7, at 948 n.235.

⁴⁹⁵ See FIRRO, *supra* note 340, at 128; LUSTICK, *supra* note 1, at 93–94, 209–11.

⁴⁹⁶ See Yiftachel & Segal, *supra* note 340, at 486.

⁴⁹⁷ LUSTICK, *supra* note 1, at 93–94, 209–11.

⁴⁹⁸ See Yiftachel & Segal, *supra* note 340, at 486–87.

⁴⁹⁹ LUSTICK, *supra* note 1, at 136–38, 202–09; SHAFIR & PELED, *supra* note 53, at 128–30.

⁵⁰⁰ LUSTICK, *supra* note 1, at 136–38, 202–09.

paved the way to the electoral success of these parties.⁵⁰¹ The government basically paid in material gain for political support.⁵⁰²

This deliberate cooptation is tellingly reflected in the thinking of one of the most influential officials in the context of the minority at the time, Israel Koenig, the Northern District Commissioner on behalf of the Ministry of Interior.⁵⁰³ The following is an excerpt from a memorandum he wrote when the control system was beginning to show difficulties in the mid-1970s.⁵⁰⁴ The memo was leaked and was dubbed the *Koenig Report*.⁵⁰⁵ In it he propounded the following analysis and political parry:

The usurping by RAKAH [the communist party] of “quasi governmental” institutions, such as the local councils, creates a legitimate basis for a political nationalistic activity, both overt and clandestine, adopting methods that were in use by the Jewish community in the “pre-state era,” as well as worldwide communist methods.

...
... To deny RAKAH its “priority” in carrying out a national struggle and representing Israeli Arabs and to provide a valve for communities still sitting on the “fence,” a sister Labor Party should be established in which the stress will be on ideas of equality, humanism and language, social struggle and on raising the banner of peace in the region. The establishment has to prepare itself to maintain covert presence and control in that party.⁵⁰⁶

CONCLUSION

This Article represents an ambitious journey aimed at making significant progress on three related fronts: (1) the search for a deeper structure for analyzing the legal status of minorities in deeply-divided societies; (2) advancing the understanding of the ways in which the law sometimes helps sustain exploitive power-relations; and (3) a concrete analysis of the interrelations between law and society vis-à-vis the Arab-Palestinian minority in the early formative years of Israeli statehood.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ Koenig, *supra* note 437, at 190.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at 192–93.

I will summarize the way I advanced on front (3)—the concrete front regarding the Arab-Palestinian minority—based upon the understandings and insights gained on fronts (1) and (2).

There are four lines of thought, or the assumptions, that guided my analysis of the ways in which the law was involved in the reality of the minority in the period under review. The first assumption was that if we understand the socio-political relational-pattern of the time, the “control framework,” we might expect certain legal arrangements to serve it and others to obstruct it. Second, these expectations unfold a map in which the norms that most affected the status of the minority can be traced. Third, I assumed that analysis of the law in view of those expectations would reveal many cases in which reality confirmed the expectation of law’s servitude, but that I might find incongruous cases too. Fourth, I have assumed that various insights can help me comprehend the latter instances.

My main finding is that Israeli law served the control framework well in the period under review. It was found both massively involved in shaping the disparity in power between Israel’s two national communities, and very instrumental in removing the edge of potential violent disruption inherent in the control order.⁵⁰⁷ Its assistance in doing so came about through its function within the stabilizing mechanisms of the control framework. At the core of these mechanisms we found the deep dependence of the minority upon the state and the comprehensive flexibility of the state in exploiting this dependency to deter, co-opt, and divide the minority. However, there is another element in the equilibrium: state policies and practices cannot be too repressive, as blatant exploitation of the minority would deepen the legitimacy crisis always hovering over the control framework. There is, hence, a crucial need for agents that can curb arbitrariness and the magnitude of exploitation. Law played the role of a check on this arbitrariness to a limited, but important, extent.

The following, by way of conclusion, is a summary of how all these *were achieved legally*.

First, discrimination appeared not on the face of the norms, but rather through their implementation. The exception was the plane of group-differentiated rights in which even liberalism is not *a priori* committed to equality.

⁵⁰⁷ See *supra* text accompanying note 110.

Second, the law assisted in generating the minority's great dependence upon the state through four main means. First, the law conferred sweeping authority and discretion upon the executive in a wide range of spheres of life. Second, at times the Court indeed intervened and somewhat narrowed these sweeping powers; thus, it provided the system with a certain legitimizing facade; but at the same time both the law and the judiciary maintained an expedient path to "amend" or bypass the "problematic" court rulings—via the Knesset's power to legislate. The Knesset had the last word in the Israeli legal system at the time since there were almost no constitutional limitations upon it. Third, the Knesset often saw no urgent need to resort to altering court rulings by legislation, because if the court limited an administrative authority, the law (and the Supreme Court) usually left a diversion in the form of an alternative state authority that could achieve the same on another legal basis. This technique of diversions existed most notably in the sensitive spheres of security, immigration, and land. Fourth, at times, the Court exercised heightened self-restraint by adhering to doctrines concerning its own discretion, such as the "standing" doctrine.

Third, from the outset, the executive was almost unconstrained legally in the exercise of its power of allocation. This is attributable to the fact that no general norm forbidding partiality *per se* existed at the time. Moreover, the law did not lay down obligations that would justify judicial intervention, such as "reasonableness" or "proportionality," until much later. Discrimination and its obfuscation also enjoyed the creative intervention of the divergent paths for the two communities—in education, local government, religious service, state-controlled media, and more. The separate paths seemed non-artificial as they revolved around social realities such as language and religious differences, and they were often voluntary. Furthermore, they made it possible to apply discriminatory standards of allocation, because the complexity of their subject matters helped disguise the bias.

Fourth, the law, and especially the Supreme Court, maintained a tricky balance. The Court handed down a few surprisingly courageous decisions, but at the same time the Court and the law guaranteed that the government would eventually win the day whenever it insisted.

Last, with regard to the mechanism of disguise, the control framework also benefited from the absence of a legal norm obliging an extent of transparency in the exercise of authority. Only toward the end of the period under review was the right to information (narrowly) recognized. Inaccessibility of the

minority to information was aggravated by the absence of group-differentiated rights oriented toward involving members of the minority in decision-making, even in the lower echelons of civil service.

The conclusion that Israeli law served the control framework well in Israel's three first decades is not an astounding revelation. If the law, which is basically a powerful social engine, would have operated differently, the control framework most likely would have been abandoned earlier. Still, the close examination conducted here with regard to the interrelationships between the control framework and the legal system of the time is, in my view, of fundamental importance for several reasons. First, it exemplified in details (and hopefully, in depth) *the analytical structure*, which this article suggests employing in any analysis of the legal status of minorities in deeply-divided societies—comprehending the law's actual role in serving or subverting the aims and needs of the socio-political relational framework that is at work. Second, the detailed analysis of the concrete framework that was in work vis-à-vis the Arab-Palestinian minority in Israel's three first decades hopefully captured the major legal dimensions of “control”—in other words, it traced the *concrete legal mechanisms that structured and maintained* this problematic power relations model. Finally, but beyond the scope of this article, this proposed structure of analysis can significantly aid in *explaining dynamics*—explaining the interrelation between changes in the law and major socio-political changes.⁵⁰⁸

⁵⁰⁸ Had we looked further than the second part of the 1970s, we would have noticed socio-political changes in Arab-Jewish relations within Israel attended by developments in Israeli law and in the jurisprudence of the courts. See Saban, *The Impact of the Supreme Court*, *supra* note 230. I refer to the shift from the control structure to a more moderate relationship toward the Arab-Palestinian minority, which for good reason coincided with important transitions in Israeli law and jurisprudence. *Id.* The control framework could not easily accommodate these kinds of transitions, and as such, they accelerated its demise. See Saban, *The Legal Status of Minorities*, *supra* note 20, 335–457.