The Legal Status of the Arabs in Israel

David Kretzmer

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Published in cooperation with the International Center for Peace in the Middle East, Tel Aviv

The International Center for Peace in the Middle East (ICPME) gratefully acknowledges the Ford Foundation for making this project possible. The views expressed in the publications of the ICPME are those of the authors and do not necessarily reflect the views of the trustees, officers, or staff of the ICPME.

The Status and Condition of the Arabs in Israel *A project under the direction of Professor Henry Rosenfeld*

The 750,000 Israeli Arabs are a national minority making up 17 percent of the population of Israel. In 1987 the International Center for Peace in the Middle East, together with Professor Henry Rosenfeld, director of the project, initiated a comprehensive research project on the status and condition of the Arabs in Israel. The focus of the research is on the Arabs' legal status, health and social services, and local authority in Arab communities. The books prepared by the project members report the empirical findings from the project and offer a penetrating analysis of the degree of social, economic, and political integration between Arabs and Jews, the extent of discrimination, and the degree to which rights and opportunities are shared by all.

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This study examines how the Israeli legal system copes with two major issues. The first is the tension between the constitutional definition of Israel as both a Jewish state and a democracy committed to equal rights for all of its citizens. The second issue is the delicate position of a national minority in a state that since its establishment has been involved in a bitter conflict with the Palestinian nation to which that minority belongs.

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 1990 by Westview Press

Published 2019 by Routledge
52 Vanderbilt Avenue, New York, NY 10017
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Routledge is an imprint of the Taylor & Francis Group, an informa business

Library of Congress Cataloging-in-Publication Data
Kretzmer, David.
The legal status of the Arabs in Israel.
(Westview special studies on the Middle East)
1. Palestinian Arabs—Legal status, laws, etc.—Israel.
2. Palestinian Arabs—Israel. 3. Israel—Ethnic relations. I. Title. II. Series.
LAW 342.5694’0873 89-25115
345.69402873

ISBN 13: 978-0-367-29348-2 (hbk)

Dedication

This study is dedicated to the memory of my friend and colleague, Chamman P. Shelach, his wife, liana, and daughter, Zelil, who were murdered at Ras Burka in October, 1985. The questions discussed in the study were always of paramount interest to Chamman. Had he been alive there is little doubt that the writer would have benefited from his insights.

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Preface

The law is only one, and not necessarily the most important, of the factors that determine the status of a national, ethnic or religious group in any given society. Furthermore, the law itself is not an isolated and self contained phenomenon unaffected by social, economic and political ideologies, interests and attitudes. On the contrary, it reflects such ideologies, interests and attitudes. Nevertheless, the law does exist as an autonomous discipline, and it may be described and analyzed as such without explicitly exposing and examining the social, economic and political factors that lie behind it. The main purpose of this study is to provide such a description and analysis of the legal status of Israel's Arab minority.

This study grew out of a report that was originally prepared as part of a wide-ranging research project on Israel's Arab minority. The project, directed by Henry Rosenfeld, is funded by a Ford Foundation grant administered by the International Center for Peace in the Middle East. Each part of the project is limited to one aspect of the general topic and makes no attempt to present a complete picture of the position of Arabs in Israeli society. The reader who wishes to gain a more complete picture of the Arabs' status in Israel should read all the studies which have been or will be published.

The emphasis in this study is on the current legal status of Israel's Arab minority. While the history of various legislative and other legal arrangements is sometimes highly relevant in this analysis, historical developments that have no direct bearing on the current situation have not been examined in any detail. Thus, certain legal arrangements which were crucial at certain stages in determining the relationship of the organs of state towards its Arab citizens, but are no longer prevalent, are not discussed. The main example is the system of military government which was imposed in most of the areas in which Arabs resided from 1948 until 1966.

Since the Six Day War of June 1967, most attention regarding the conflict between Israel and the Palestinian Arabs has been devoted to the status and political future of the Palestinians resident in the areas occupied by Israel in the course of that war, as well as Palestinians residing outside those territories. This study does not deal with this issue, but is confined to the status of the Arabs who reside within the pre-1967borders of Israel.

Osama Halabi served as my research assistant in preparing the original report. He deserves credit and thanks for his very able research. Itzchak Zamir, Frances Raday, Henry Steiner, Elia Zureik, Pnina Lahav, Miri Gur-Arye, Stan Cohen and Menachem Hofnung read drafts of the original report, or parts thereof, and were kind enough to comment thereon. Special thanks and appreciation go to Ruth Gavison, whose advice and encouragement were invaluable. Judith Fattal did an excellent job in preparing the manuscript for printing. It goes without saying that the willingness of friends and colleagues to read and comment on the study implies neither agreement with the general approach of the study nor acceptance of the views expressed therein. Responsibility for those rests with the author alone.

Last, but not least, I'd like to thank my wife, Marcia, for her editorial assistance and continuous support, and my children Yoel, Hava and Yonatan Yaakov for their patience with a father who spends so much time at his word processor.

David Kretzmer
Jerusalem

Introduction

The Declaration on the Establishment of the State of Israel of 14 May, 1948 contains three statements that are central in analyzing the legal status of Israel's Arab minority. First, the state was established not merely as a new governmental apparatus to replace that of the departing British Mandatory regime. It was declared to be a "Jewish state in Eretz Israel" that "would open its doors to every Jew and grant the Jewish people the status of a nation with equal rights among the family of nations."[1] At the same time, the new state promised that it would develop the country for the benefit of all its inhabitants, and that it would maintain complete equality of political and social rights of all its citizens, irrespective of race, religion or sex. Finally, the Declaration included an appeal, "in the midst of the onslaught which has been continuing against us for months," to the Arabs resident in the State of Israel "to preserve the peace and to take part in the building of the state on the footing of full and equal nationality and appropriate representation in all its organs."

These three statements form the background for the discussion of the legal status of the Arab minority in Israel. There is, on the one hand, the tension between definition of the state as Jewish and the promise of equality between Jew and non-Jew. There is, on the other hand, the delicate position in a nation state of a minority which belongs to a nation locked in conflict with that state.

The status of the Arabs within the Jewish state concerned Zionist thinkers and politicians long before the declaration of Israel's independence.[2] It was, in fact, a question that could hardly have been ignored, for the majority of the inhabitants of Eretz-Yisrael-Palestine when Zionist settlement first began there in the late 19th century were Arabs. From the Zionist perspective, the return of the Jews to their ancient homeland, and the establishment there of a home for the Jewish people, were seen as revolutionary steps that would liberate the Jewish people from their status as a persecuted minority in the countries of the Diaspora.[3] The Arabs of Palestine neither could, nor did, share this vision of the Zionist enterprise.[4] They viewed the settlement activities, political program and way of life of the Zionists as highly threatening. The result was a head-on collision between the Palestinian Arabs and the Zionist settlers.

When the UN General Assembly decided on November 29,1947 that Palestine should be partitioned into two states — Jewish and Arab — there were indeed many members of the Zionist movement who were dismayed that the Jewish home would be confined to only part of Palestine. Some Zionist parties openly rejected the idea of partition. However, the leaders of the Jewish Agency, the main political body of the *Yishuv* (the Jewish community in Palestine), accepted the Partition Plan. They considered that Jewish independence and sovereignty were the primary interest of the Jewish people, even if the price to be paid was loss of part of its historic homeland. For their part, however, the leaders of the Palestinian Arab community, as well as the governments of the surrounding Arab countries, totally rejected partition. They claimed that it was an illegal way of depriving the majority of the inhabitants of Palestine of their right to self-determination and expressed readiness to use force in order to frustrate implementation of the plan.[5]

Immediately following passage of the Partition Resolution the Palestinian Arabs launched an armed campaign against the Jews in Palestine in an attempt to prevent its implementation. The

result was, for all intents and purposes, a civil war between the two communities in Palestine. After the independent State of Israel was declared on 14th May, 1948, Palestine was invaded by the armies of five neighboring Arab states and full-scale war ensued. Armistice agreements were signed between Israel and the neighboring countries in 1949 but peace has continued to elude the region and wars have erupted periodically. A peace treaty was signed with Egypt in 1979, but a formal state of war still exists between Israel and the other Arab states and the conflict with the Palestinian Arabs continues to this day.

Although the Partition Plan was based on a two-state solution to the Arab-Jewish conflict in Palestine, it did not envisage that the population of each state would be confined to the members of one community. According to the report of the United Nations Special Committee on Palestine (UNSCOP), which drew up the partition plan adopted by the General Assembly, there were 538,000 Jews and 397,000 Arabs in the area allotted to the Jewish state and 10,000 Jews in the area allotted to the Arab state. In the course of the 1947–48 war the majority of Arabs who lived in those parts of Palestine that were taken by the Israeli army fled or were expelled.[6] Nevertheless, over 150,000 Arabs remained in the area included in the borders of Israel under the 1949 Armistice Agreements.[7] Today there are approximately 655,000 Arabs living within the pre-1967 borders of Israel and they constitute 16 per cent of the total population.[8]

A number of factors were obviously dominant in shaping the initial relationship of the institutions of the newly independent State of Israel towards the Arab minority that remained within its borders. First, the state was established as a Jewish national state to solve the problem or the Jewish people. Some attempt was indeed made to accommodate the interests of the Arabs in the state, and to soften the implications for them of having to live in a Jewish state.[9] Nevertheless, the Arabs could not have been expected to identify with the ideological basis of the state, nor was it to be expected that the problems of the Arab minority would be foremost on the agenda of the new state's political leadership. Second, the state was established after a long and bitter struggle between the national movements of the Jews and Arabs in Palestine, a struggle that did not end with the establishment of the state and that continues to this day. From the Jewish point of view, the most serious part of this struggle was the civil war which ensued after the Arabs rejected the Partition Resolution of 29 November, 1947. Until the Jewish forces went on the offensive in April, 1948 the Jewish community had suffered a number of serious set-backs and Jewish leaders were by no means certain that the Jewish state which they planned to declare when the British left Palestine on May 15 would manage to survive.[10] The struggle was a struggle between two collectives and as members of "the other collective" the Arabs were regarded as real or potential enemies. Furthermore, in addition to fighting the war, the state was immediately faced with a vast influx of Jewish immigrants from all comers of the globe. Most of these were refugees who had survived Hitler in Europe or were fleeing from Middle Eastern countries. They arrived destitute and were totally dependent on the institutions of the new state and of the Jewish people to provide them with housing, employment and basic services, such as education and health. The pressing needs of these immigrants took precedence over those of the Arab population, towards whom there was no small degree of hostility and resentment.

Upon independence the political leadership of the *yishuv* became the leaders of the new state. The move from the leadership of a community to leadership of a sovereign, independent state did not free those leaders from the particularistic perspective that was natural for community leaders. Policies of the Zionist movement turned into policies of the state itself, which could now use its law-making monopoly in order to implement them. This was most apparent in the struggle over land—the major bone of contention between the Zionist settlers and the Palestinian Arabs since

the early days of Zionist settlement. Law was also used in order to control the movement of the Arab minority, by subjecting the areas in which they resided to military government.

In spite of their particularistic perspective, the political elite were committed to turning Israel into a modern democracy. Conscious as they were of the fate of Diaspora Jews as persecuted minorities in many countries of the dispersion, they realized that the state of the Jews could do no less than promise full equality to all its citizens, Jew and non-Jew alike. Besides the promise of equality included in the Declaration of Independence, the main manifestations of this commitment to democracy, vis-à-vis the Arabs in the state, were the provisions in the first legislative act passed after independence that Arabs who recognized the state would be incorporated in the provisional organs of government, and the adoption of universal franchise in the very first elections held in 1949. Thus it was that the Arabs enjoyed equal political rights from the start, even when their freedom of movement was severely restricted and draconian laws were being passed in order to allow the institutions of the state to gain control over land resources that had previously been in Arab hands.

As time passed and Israel's democratic structure became entrenched, advances were made in the relationship between the institutions of state and the Arab minority. The single most important step in this direction was the abolition in 1966 of the military rule in the areas inhabited by the majority of the Arab population. Another step was the opening up of the *Histadrut* (General Labor Federation) and the major Zionist political parties to full Arab membership and the inclusion of Arab candidates on Zionist party lists rather than as candidates on separate satellite Arab lists.

The abolition of military government took place only a year before the Six Day War in 1967, during the course of which Israel took control over the whole area of Palestine that was, according to the UN Partition resolution, to have been partitioned into a Jewish and an Arab state. This event was a watershed that was to have far-reaching implications both for the political direction of Israel and for the position of its Arab minority. Israeli law was not applied to the areas taken in 1967 (with the exception of East Jerusalem and the Golan) and they are ruled to this day under a regime of belligerent occupation. The Palestinian residents of these areas are not Israeli citizens; they have no political rights and owe no allegiance to Israel. This serves to highlight the difference in the situation of the Arabs in Israel itself, and to underline the distinction between the Israeli Arabs and the Arab residents of the West Bank and Gaza. Paradoxically, the distinction between Palestinian Arabs who are citizens of the state and those who are not may have helped to legitimize the demands of the Israeli Arabs for full equality. On the other hand, the continued Israeli occupation of the West Bank and Gaza has served as a catalyst for the recognition by the world of a distinct Palestinian nationalism. Contact between Israel's Arabs and their brethren in the occupied territories has tended to deepen the identification of Israel's Arabs with Palestinian nationalism.[11]

In the years that have passed since independence Israeli democracy has matured and developed, especially in the constitutional protection of basic rights, such as freedom of expression and equality. This has produced its effects on the Arab community, the main manifestation of which is the growth of authentic Arab political movements, that seek power on the national and municipal levels and maintain a struggle for genuine equality in allocation of national resources. At the same time, the growing political assertiveness of the Arab minority has strengthened tendencies on the Jewish side to demand explidtidentification of the Arab minority with the ideological foundations of Israel as a Jewish state. The constitutional implications of Israel's definition as a Jewish state, deliberately left vague for many years, have now been made

explicit, sometimes in a way that is both controversial and problematic.

In spite of the enormous changes that have taken place in the forty two years that have passed since independence, the statements made in the Declaration on the Establishment of the State of May 14,1948 still set the tone for any discussion of the legal status of Israel's Arab minority. The main object of this study is to examine how the legal system of Israel has handled the tension between the principled commitment to equality and both the definition of the state as Jewish as well as the requirements of security, as perceived by those in positions of power.

Notes

1. See Proclamation on Establishment of State of Israel, 5708 *Official Gazette* 1.

2. The approach of Zionist thinkers to this question is thoroughly canvassed by Y. Gomi, *Zionism and the Arabs, 1882–1948* (Oxford: Clarendon Press, 1987).

3. On the Zionist perspective see W. Laqueur, *A History of Zionism* (London: Weidenfeld and Nocolson, 1972); B. Halpem, *The Idea of the Jewish State* (Cambridge, Mass.: Harvard U. Press, 1961). Also see A. Elon, *The Israelis: Founders and Sons* (N.Y.: Holt, Rinehart and Winston, 1971).

4. See Laqueur, *ibid.*, 596: "Seen from the Arab point of view, Zionism was an aggressive movement, Jewish immigration an invasion." The most forceful presentation of the Palestinian perspective on Zionism and the establishment of the State of Israel is E. Said, *The Question of Palestine* (London: Routlegde and Kegan Paul, 1979). Also see W. Khalidi, "The Arab Perspective" in Wm. Roger Louis and R. Stookey (ed.). *The End of the Palestine Mandate* (Austin: Texas University Press, 1986), 104.

5. For a discussion on the attitudes to partition see A. Cohen, *Israel and the Arab World* (London: W. H. Allen, 1970), 381–403. The Jewish attitude is discussed in S. Dothan, *Partition of Eretz Israel in Mandatory Period: The Jeioish Controversy* (Jerusalem, 1979) and the Arab attitude was set out in Arab Office, London, *The Future of Palestine* (Geneve: Typ. Imprimerie Centrale, 1947), 70–77.

6. The exact reasons for the exodus of the Palestinians have always been disputed. The official Israeli version was that they were encouraged to leave by the Arab leaders in order to return once the Jews had been defeated: see, e.g., A. Granott, *Agrarian Reform and the Record of Israel* (London: Eyre & Spottiswoode, 1956), 86–87. The Arabs claimed that they had been expelled by the Israeli forces. Recent research shows that neither claim presents the full truth: see B. Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (Cambridge: Cambridge U. Press, 1987). Morris phrases his conclusion as follows (at 286):

> The Palestinian refugee problem was born of war, not by design, Jewish or Arab. It was largely a by-product of Arab and Jewish fears and of the protracted, bitter fighting that characterized the first Israeli-Arab war; in smaller part, it was the deliberate creation of Jewish and Arab military commanders and politicians.

7. According to the census carried out in November, 1948 there were in Israel 716,700 Jews and 156,000 non-Jews: see 39 *Statistical Abstract of Israel 1988 (SAI 88)*, 31. In the first six months after independence 100,000 immigrants entered Israel: see T. Segev, 1949, *The First Israelis* (New York: Free Press, 1986), 95. Thus the number of Jews in Palestine in May, 1948 was approximately 620,000.

8. According to the *SAI 88*, 31, the total population of Israel at the end of 1987 was 4,406,500, of whom 614,500 were Moslems, 103,000 were Christians and 76,100 were members of the Druse and other communities. The Arab residents of East Jerusalem (who number approximately 136,700) are included in this number. As this study is restricted to the position within Israel's pre-1967 borders the Arab residents of East Jerusalem are not included in the size of the Arab population mentioned in the text. If one includes the Arabs of East Jerusalem in the figures, there are nearly 800,000 Arabs in Israel and they constitute 18% of the total population. According to a moderate estimate in population growth carried out by the Central Bureau of Statistics, by the year 2010 the Arabs will constitute 25% of the total population of Israel (including Jerusalem): *ibid*.

9. Thus, for example, when the name for the new state was being considered the name "Zion" was rejected by the special committee set up to decide on the name, as "this name, in its Arabic translation, is likely to cause grave difficulties for the Arab citizen in the Jewish state." see M. Nisan, *The Jewish State and the Arab Problem* (Tel Aviv: Hadar, 1986) 21 (quoting from the minutes of the special committee).

10. See Morris, note 6 *supra* 61–62.

11. See S. Smooha, *The Orientation and Politicization of the Arab Minority in Israel* (Haifa: University of Haifa, 1984), 47.

1

Israel's Constitutional and Legal System

It is impossible to understand the legal status of the Arabs in Israel without an appreciation of the general constitutional and legal framework of the country. A brief introduction to Israel's constitutional and legal system is therefore in order.

The Constitutional System

Lack of a Formal Constitution

Israel's Declaration of Independence of May 14, 1948 stated expressly that the new state's permanent and elected governmental organs would be established under a constitution to be determined by an elected constituent assembly. The said constituent assembly was duly elected, but even before its election opinion was divided over whether the time was ripe for drawing up a formal constitution. The result of this debate was a compromise, known as the Harari Resolution. According to this resolution Israel's constitution would not be drawn up immediately by the constituent assembly, which by then had become the first Knesset, but would be enacted step by step in a series of "basic laws" to be prepared and submitted to the Knesset by its Constitution and Law Committee. On the strength of this resolution a number of basic laws have been enacted by the Knesset. While these basic laws, which include basic laws on the Knesset, Government, Judiciary and Army, are an important contribution to Israel's constitutional structure, the state's *formal* constitution is still far from complete. In the first place, in spite of a number of attempts to present a bill of rights to the Knesset, no such bill has been enacted. Secondly, no law as yet deals with the relationship between the basic laws and the ordinary laws of the Knesset. In the absence of a law giving the basic laws superior normative status the Supreme Court has held that the basic laws have no inherent superior status.[1] This means that the "Knesset as the legislative branch of the state is sovereign and has the power to pass any law it likes…"[2]

In the first years of the state, before any basic laws had been passed, attempts were made to persuade the Supreme Court that it could base judicial review of statutes on principles enshrined in the Declaration of Independence, such as the principles of equality and freedom of religion.[3] The Supreme Court was not receptive to these attempts; it held that the Declaration of Independence is not a "constitutional law which determines the validity or invalidity of ordinances and statutes."[4]

In the light of the above, the following summary of the constitutional position must be accepted as central to the present discussion; with one exception, which relates to laws that are inconsistent with one of the few entrenched clauses in the basic laws,[5] the Supreme Court of Israel will not undertake judicial review of the validity of primary legislation, i.e., statutes passed by the Knesset or British Mandatory legislation that has the status of Knesset legislation. Thus

even statutes which offend basic civil rights, or contradict principles enshrined in the Declaration of Independence, such as the principle of equality, will not be struck down on this account by the Supreme Court.

Civil Rights in the Absence of a Formal Constitution

The fact that a statute which offends civil rights may not on that account be invalidated by the Supreme Court does not mean that civil rights have no status in Israel's legal system. In a long series of decisions, which began with the historic decision of Agranat J. in *Kol Ha'am v. Minister of Interior*,[6] the Supreme Court has held that certain basic civil liberties, while not entrenched in the statute book, enjoy the status of legal principles in Israel's legal system.[7] These principles guide the courts in interpreting statutes, in determining the limits of administrative discretion and in examining the validity of delegated legislation. Thus, while civil liberties, such as freedom of speech and the right to demonstrate, do not enjoy the status they enjoy in a system such as the American one, in which statutes inconsistent with them may be struck down, they do fulfil an important function in the Israeli legal system.

Equality as a Legal Principle

Among the principles that have been judicially recognized as constitutional principles in the manner described above is the principle of equality.[8] This principle was stated in the following way by Haim Cohn J. in *Yafora Ltd. v. Broadcasting Authority*:[9]

> It is the law (although at present unwritten) that any discrimination on the grounds of race, sex, belief, political or other opinion, …, is forbidden for every body acting under law.

In a leading case, that dealt with the attempt of the authorities to prevent purchase of property by a German Christian missionary, the Supreme Court explained the special status of the equality principle in the following manner:

> When we were exiled from our country and removed from our land we became victims of the nations of the world among whom we lived, and throughout the generations we tasted the bitterness of persecution, oppression and discrimination merely because we were Jews "whose religion is different from that of other peoples." Given this sorrowful experience, which deeply affected our national and human consciousness, it is to be expected that we will not adopt these aberrant ways of the nations of the world, and now that our independence has been renewed in the State of Israel we must be careful to prevent any hint of discrimination towards any law-abiding non-Jew among us who wishes to live with us in his own way, according to his religion and belief… We must exhibit a human and tolerant attitude towards anyone created in the divine image and maintain the great rule of equality in rights and obligations between all persons.[10]

Similarly, the Attorney General, in a leading opinion which will be discussed below, wrote as follows:

> Equality before the law is a basic principle of Israel's legal system… [This principle] has grown to become a well-rooted, binding legal rule.[11]

On the basis of this principle of equality the Supreme Court has held that a local authority which leases out its premises, although not bound by law to dp so, may not discriminate between

citizens on the basis of their religious belief.[12] It has declared that "discrimination on grounds of religion or race will be regarded as improper use of administrative discretion, even if that discretion is absolute,"[13] and that all statutory provisions must be construed so as to further the principle of equality before the law.[14]

The most important legal document regarding the legal implications of the principle of equality vis-à-vis the Arabs in Israel is not a decision of the Supreme Court, but rather an opinion of the Attorney General.[15] The background to this opinion was a clause in the coalition agreement between two political parties in the local council of Kiryat Arba, a Jewish settlement on the outskirts of the West Bank town of Hebron. According to this clause the parties undertook to dismiss all Arab employees of the local council, and to encourage private Jewish employers to dismiss Arab employees and to engage Jewish employees in their stead. The law which applied to this agreement was West Bank law, and not domestic Israeli law, but the Attorney General, in his opinion on the legality of the said clause, analyzed the position under Israeli law before turning to an analysis of West Bank law. The Attorney General stressed the centrality of the equality principle in the Israeli legal system, and the seriousness with which the law regards discrimination on the basis of race or national origin. He ruled that in light of this principle the clause in the coalition agreement was void, as it was illegal, immoral or against public policy.[16] Finally, the Attorney General declared:

> It is absolutely clear that if this agreement had been made by a local council in Israel the courts would have forbidden the council to rely and to act on [the] clause [..], as it violates the principles of administrative law.[17]

Statutory Recognition of Equality Principle

The principle of equality has not remained solely the creation of judicial legislation. It has been given express statutory recognition in two pieces of legislation, one primary, the other delegated.

The Employment Service Law, 1959. This statute obligates employers who wish to employ workers in certain sectors of the economy to do so through the official labor exchange. The original statute forbade the labor exchange to discriminate between workers in sending them to work; it also forbade employers who employed workers through the exchange to discriminate in accepting them for work. It did not, however, prohibit discrimination in employment in those sectors in which there was no duty to employ through the labor exchange. The statute was amended in 1988, and section 42(a) now provides:

> In sending persons to work the labor exchange shall not adversely discriminate against a person on account of his age, sex, race, religion, national group, country of origin, views or party affiliation, and a person requiring an employee shall not refuse to engage a person on account of any of these, whether the person was sent to work through the labor exchange or not.[18]

The interesting thing about this provision, besides the statutory adoption of the equality principle discussed above, is that the principle is applied to private employers, and not only to the official labor exchange, which, as a public body acting under law, would in any case be bound by this principle. As we shall see below, this is an exception to the ordinary rule which allows private individuals the liberty to discriminate.

Higher Education Council Rules (Recognition of Institutions), 1964. The Higher Education Council Law, 1959 grants the Council for Higher Education sole authority to grant recognition to

institutions of higher education in Israel. Section 24 of the said law empowers the Council to promulgate rules for control of degree-granting in institutions of higher education. Rule 9 of the above-mentioned rules states:

> In accepting students and appointing academic staff, an institution of higher education shall not discriminate between different candidates solely on account of their race, sex, religion, national group or social status.

Limitations of Equality Principle

It should now be apparent that the principle of equality is not merely a pious statement of intent adopted in the Declaration of Independence. The principle has been granted legal status both in decisions of the Supreme Court and in legislative acts. Nevertheless, the importance of this principle notwithstanding, it is essential to appreciate its limitations. The first limitation, which may be regarded as a corollary of the lack of a formal constitution, is a limitation of all judicially legislated principles in the Israeli legal system. These principles are "soft" legal principles. They cannot overcome contrary provisions in primary legislation. Thus, for example, a statute of the Knesset which adopts a criterion for allocation of benefits that involves covert discrimination against Arabs, may not be struck down on that account by the courts.

The second limitation of the equality principle flows from the need to define the notion of equality, or the other side of the coin, discrimination, in individual cases. I shall return to this question in the chapter on discrimination.

The Legal System

The General Sources of Law

The first piece of legislation passed by the Provisional Council of State after independence was called the Law and Government Ordinance, 1948.[19] Section 11 of this ordinance states:

> The law in force in Eretz Yisrael on 14 May, 1948, will remain in force, in so far as it does not contradict this ordinance or other laws which will be passed by the Provisional Council of State and subject to changes which flow from the establishment of the state and its organs.

The principle adopted in this section, that the prevailing law would remain intact, was adopted by the British when they took Palestine from the Turks 31 years earlier. Article 46 of the Palestine Order-in-Council, 1922, declared that the prevailing Ottoman law would remain in force unless modified by legislation. It also provided, however, that where the courts found gaps in the law (*lacunae*) they were to apply the rules of English common law and equity. Thus during the British Mandatory period the law of Palestine was comprised of a number of layers. The bedrock was Ottoman law; the next layer was the legislation passed by the British Mandatory authorities and the top layer the rules of common law and equity applied by the courts in cases of *lacunae.* This was all subject to one important gloss. Under the *millet* system prevalent in the Ottoman Empire, and left intact both during the British Mandate and in post-independent Israel, matters of personal status, such as marriage and divorce, were handled by the various religious communities.

The effect of section 11 of the Law and Government Ordinance quoted above was to superimpose one more layer on to the existing legal system: original Israeli legislation. This legislation may be of two types: primary legislation, i.e., legislation passed by the Knesset itself, and secondary or delegated legislation, i.e., legislation passed by bodies, such as municipal councils or ministers to whom the Knesset has given limited legislative authority.

Most of the Ottoman legislation still in force in 1948 has since been replaced by Israeli legislation. Much of the British Mandatory legislation has also been replaced. However, important pieces of British legislation still remain intact and as they will play a significant role in the present study their nature should be explained.

Legislation passed during the Mandatory period may be roughly divided into two categories. The first consists of laws aimed at modernizing the legal system to meet the changing needs of the society. Into this category go laws such as the Criminal Code Ordinance, the Companies Ordinance, the Road Traffic Ordinance and the Civil Wrongs Ordinance. The second category consists of laws passed to deal with specific political problems in Palestine, or to grant the authorities powers to clamp down on the population who were resisting British rule. The most important pieces of legislation of this second type were the Palestine Order-in-Council (Defence), 1937 and the Emergency (Defence) Regulations, 1945, passed thereunder. The Defence Regulations,[20] which were passed in order to grant the military the powers to crush the growing Jewish resistance movement,[21] were castigated by many Jewish leaders at the time.[22] Thus, for instance, the Jewish Lawyers Association passed a resolution declaring that the Regulations "undermine the foundations of law, are a serious danger to freedom of the individual and his life, and institute a regime of arbitrariness without judicial supervision."[23] Among the powers granted to the military under the Regulations were the powers of administrative arrest and restriction, curfew, closure orders, censorship and licensing of the press. Special military courts were given jurisdiction to deal with offences under the Regulations and no right of appeal was recognized.

With the exception of a few sections which dealt with Jewish immigration to Palestine, the Defence Regulations were not expressly repealed by legislation after establishment of the state. Attempts were made, however, to have the Regulations declared invalid by the Supreme Court, but these were rejected.[24] Bills to repeal the Regulations by legislation were also introduced in the Knesset, but they met with no more success.[25] The Defence Regulations, in large part, remain in force to this day.[26] Their relevance to the present topic will be discussed in the chapter on security.

Judge-Made Law

No description of the Israeli legal system would be complete if it did not include some reference to judge-made law that has become one of the most important sources of law in certain fields such as administrative law, which will be of central concern to us in the present discussion.

The Supreme Court of Israel fulfils two main functions: it serves as the final court of appeal in both criminal and civil actions and it serves as a High Court of Justice. In the latter capacity it has jurisdiction to issue orders to all bodies exercising public functions under law to do, or to refrain from doing, any act in the fulfillment of their duties. It also has the jurisdiction to deal with any matter in which it perceives a need to grant a remedy for the sake of justice, provided

that it is not within the jurisdiction of any other court or tribunal.

Precedents of the Supreme Court sitting as a High Court of Justice have created over the years a wide range of principles and rules which bind public bodies acting under law in the exercise of their governmental powers. I have already had occasion to refer to the decisions recognizing basic civil rights, such as freedom of expression, freedom of occupation and equality as legal principles that are part and parcel of the Israeli legal system. As we have seen, the principle of equality is a cardinal principle of Israeli constitutional and administrative law. A public body acting under law may not discriminate between people on the basis of race, religion, sex, national group or any other factor regarded by the court as irrelevant. The Supreme Court will interfere in the use of administrative discretion if, *inter alia*, it can be shown that the discretion was wielded in a discriminatory fashion.[27] It will also interfere if it finds that the discretion has been used for a purpose other than that for which the power was granted; if irrelevant considerations have been taken into account; if the public body has either ignored or ascribed insufficient weight to basic rights; if the administrative decision is patently unreasonable or if procedural rules of natural justice have been ignored.

While the above judge-made rules were forged mainly in decisions of the Supreme Court sitting as a High Court of Justice, they are applied in all courts called upon to rule on the legality of administrative decisions or actions. Furthermore, there is strong judicial support for the view that some of the rules, especially the rule against discrimination, apply not only to statutory bodies and bodies that are part of the formal central or local governmental structure, but to corporations and other institutions that fulfil public functions, such as public utility corporations and universities.[28] As purely private bodies are not generally bound by these same rules, the classification of a body may determine whether it is bound by the equality principle. In the present context, the question of classification arises in relation to the "Jewish National Institutions" that generally restrict their activities to the Jewish sector of the population. I shall return to this question in the discussion of the status of these institutions.

Notes

1. See Negro v. *Stateof Israel* (1973) 28P.D.1640; *Kaniel v. Minister of Justice* (1973) 27 P.D. I 794; *Ressler v. Chairman of Central Elections Knesset Committee* (1977) 31 P.D. II556. The basic laws do contain a few "entrenched provisions"; i.e., provisions that may not be abolished or amended unless a special majority approves the measure in the Knesset. The Supreme Court has recognized the validity of such entrenched provisions and has on a number of occasions struck down laws which are inconsistent with them and were passed without the required special majority: see *Bergman v. Minister of Finance* (1969) 23 P.D. 1693; *Agudat Derech Eretz v. Broadcasting Authority* (1981) 34 P.D. IV1; *Rubinstein v. Knesset Speaker* (1982) 37 P.D. III 141.

2. Per Berinson *).*, in *Rogozinski v. State of Israel* (1970) 26 P.D. 1129, 136. For an analysis of the reasons for the adoption of this approach by the Supreme Court, and trends that might one day lead to its abandonment see D. Kretzmer, "Judicial Review of Knesset Decisions" (1988) 8 Tel Aviv Studies in Law 95, 109–118. The Court's approach is criticized in Y. Tal, "An All-Powerful Legislature?" (1984) 10 *Iyunei Mishpat* 361.

3. See *Zeeo v. Gubemik* (1948) 1 P.D. 85.

4. *Ibid.*, 89. For discussion of the legal status of the Declaration of Independence see B. Akzin, "The Declaration on Establishment of The State of Israel," *Sefer Yovel le Pinchas Rosen* (1962) 52; A. Rubinstein, *The Constitutional Law of the State of Israel*, 3rd ed., (Tel Aviv: Schocken, 1980) 23–26.

5. See note 1 *supra*.

6. (1953) 7 P.D. 871.

7. See, e.g., *Israel Film Studios v. Geri* (1962) 16 P.D. 2407; *Feinstein v. High School Teachers Organization* (1971) 25 P.D. I 129; *Ofek v. Minister of Interior* (1978) 33 P.D. III 480; Soar v. *Minister of Interior and Police* (1979) 34 P.D. II 169; *Miterani v. Minister of Transport* (1981) 37 P.D. III 337; *Neinum v. Chairman of Central Elections Committee* (1984) 39 P.D. II225. And see Lahav and Kretzmer, "The Bill of Human Rights: A Constitutional Achievement or an Illusion?" (1977) 7*Miskpatim* 154; Shapira and Bracha, "The Constitutional Status of Individual Rights" (1972) 2 *Iyunei Mishpai* 20.

8. See, e.g., *Bergman v. Minister of Finance*, note 1 *supra; Rubinstein v. Knesset Speaker*, note 1 *supra; Shakdiel v. Minister for Religious Affairs* (1987) 42 P.D. II221; *Poraz v. Tel Aviv Municipality* (1987) 42 P.D. II310.

9. (1971) 25 P.D. II 741, 743.

10. See *Emma Berger v. District Planning Committee* (1972) 27 P.D. II 764, 771.

11. See Directives of the Attorney General, Constitutional and Administrative Law, *Racial Discrimination in a Coalition Agreement*, No. 21.480 of August 1, 1985, 2.

12. See *Peretz v. Kfar Shmaryahu Local Council* (1962) 16 P.D. 2101. Although this decision dealt with discrimination on the basis of religious belief there is no doubt that the principle applied was a general principle that would apply to discrimination on the basis of race or national origin as well.

13. Per Olshan P. in *Registrar of Companies v. Kardosh* (1961) 16 P.D. 1209, 1224.

14. See *Abu-Hatzeira v. Attorney General* (1981) 35 P.D. IV 561.

15. See Directives of the Attorney General, note 11 *supra*.

16. The Contracts Law, 1973 states: "A contract whose formation, contents or purpose are illegal, immoral or against public policy is void."

17. Directives of the Attorney General, note 11 *supra*, 4. The Attorney General goes on to hold that the same principle applies to the military commander of the West Bank, and any body which fulfils a governmental function there, "including local councils which are established by, and act under, an order of the military commander."

18. It should be noted, however, that section 42 (b) of the statute states:

> It shall not be regarded as discrimination when the type or essence of the job or matters of state security prevent sending or accepting a person for a given job. This proviso obviously opens the way for circumvention of the law. The question of limited employment opportunities on grounds of state security will be discussed below.

19. As the Provisional Council of State was not an elected legislature it refrained from calling its pieces of legislation "laws" or "statutes." Instead it chose to follow the British Mandatory terminology and call them "ordinances." Thus "ordinances" may be pieces of primary legislation passed by the High Commissioner at the time of the Mandate, or by the Provisional Council of State which held legislative power from independence until the election in February, 1949, of the Constituent Assembly, which became the First Knesset.

20. In spite of their name the Defence Regulations, having been promulgated by the High Commissioner himself under the Order in Council, had the status of primary legislation: see Rubinstein, note 4 *supra*, 219. This became a significant factor after independence when attempts were made to have Mandatory emergency legislation declared invalid by the courts: see *Zeev v. Gubemik* (1948) 1 P.D. 86.

21. On the background to the Defence Regulations see B. Bracha, "Restriction of Personal Freedom Without Due Process of Law," (1978) 8 *Israel Yearbook on Human Rights* 296.

22. See the minutes of a protest meeting of the Jewish Lawyers Bar Association, attended by leading members of the bar, some of whom, such as Bernard (Dov) Joseph and Y. S. Shapira, were to hold major legal posts after independence: (1946) 3 *HaPraklit* 58. Also see B. Joseph, *British Rule in Eretz Yisrael, The Failure of a Regime* (Jerusalem: Mossad Bialik, 1948) 220–229. Writing of these Regulations Joseph, who subsequently became Minister of Justice in the Government, wrote (at 223):

> Freedom of the individual in Eretz Yisrael is something of the past or a hope for the future: in all events it does not exist at present.

23. See (1946) 3 *HaPraklit* 62.

24. See *Zeev v. Gubemik*, note 20 *supra; El-Ard Company v. District Commissioner* (1964) 18 P.D. II340.

25. In 1951, after the Defence Regulations had been used to place under administrative detention Jews suspected of belonging to a "religious underground," the Knesset passed a resolution calling on the Government to present a bill to repeal the Regulations within two weeks: 9 *Divrei HaKnesset* 1828, 1831. A bill was indeed presented *(ibid.*, 1966–68, 1975–76, 1978), but it never became law.

26. One important exception relates to administrative detention. The Emergency Powers (Detention) Law, 1979, abrogated regulation 111, which dealt with administrative arrest and substituted a new form of administrative detention which is subject to strict judicial review. The same law also abrogated regulation 112 which dealt with the power of expulsion. Thus an Israeli citizen or permanent resident may not be expelled or deported.

27. See, e.g., *Peretz v. Kfar Shmaryahu Local Council* (1962) 16 P.D. 2101.

28. See *Micro-Dafy. Electricity Corporation* (1986) 41 P.D. II 449.

2

The Jewish State: Constitutional Implications

Israel was established as a Jewish state, regarded, according to its Declaration of Independence, as the culmination of the striving of the Jewish people for a state of their own. The meaning of Israel's self-definition as a *Jewish* state has never been clearly defined and is a matter for controversy among both Israelis and Diaspora Jews. The different perceptions range from minimalist descriptive notions, which regard the fact that the country has a Jewish majority as being the only real element that makes it the "State of the Jews," to messianic views that regard the state as a means of bringing the millennium.

The concept of a "Jewish state" may be discussed on many levels. In the present study our concern is solely with the constitutional and legal dimensions of the question as it effects the legal status of the Arab minority.[1] It is this question that shall be discussed in the present chapter.

The main constitutional document defining Israel as a Jewish state is the Declaration on the Establishment of the State of Israel (often referred to as the Declaration of Independence). While this document is not a formal constitution on the strength of which the courts may declare legislation invalid, it does define the "aspirations of the people and its fundamental credo."[2] This has not been regarded merely as a statement of ideology or political belief, but has had important constitutional implications. Before examining these implications, however, I shall review explicit statutory expressions of the Jewish nature of the state.

The Jewish State: Statutory Manifestations

The idea that Israel is a Jewish state finds expression in a number of statutes passed by the Knesset.

Law of Return, 1950

This is the most important expression of the notion of the Jewish state, for it gives statutory recognition to the major political tenet of Zionism: the connection between the Jewish people in the Diaspora and the State of Israel.[3]

Section 1 of the Law of Return, 1950 states:

> Every Jew has the right to come to this country as an *oleh*.[4]

The Law of Return is not restricted to the right of Jews to immigrate to Israel. Section 4 of the Law declares:

> Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an *oleh* under this Law.

The importance of this section, which appears at first glance to be merely of declarative value, lies in the close connection between the Law of Return and the Nationality Law, 1952, that deals with the acquiring of Israeli nationality.[5] This connection was stated in the explanatory notes which accompanied the Nationality Law Bill:

> The special feature of a people gathering from its dispersion in its historical homeland is expressed in this law by the provision which grants the absolute right of Israeli nationality to an *oleh* under the Law of Return, that is to every Jew who comes to settle in Israel, and to every Jew who was born there.[6]

The distinction between Jews and non-Jews as regards the acquiring of nationality will be discussed below. For the moment I wish only to stress the special status given to all Jews vis-à-vis the right to settle in Israel and to acquire Israeli nationality. There can be no doubt that this is the major statutory manifestation of Israel's character as a Jewish state.[7]

The Status of Jewish National Institutions

The World Zionist Organization and Jewish Agency (Status) Law, 1952 contains a number of declaratory provisions. Section 1 states:

> The State of Israel regards itself as the creation of the entire Jewish people, and its gates are open, in accordance with its laws, to every Jew wishing to immigrate to it.

The Law goes on to recognize the historic role played by the WZO and the Jewish Agency and to declare that these organizations will continue as previously to encourage immigration and to supervise immigrant absorption and settlement projects in the country. Special status is granted to these organizations and an apparatus set up to coordinate between them and the government.

State Education Law, 1953

This law instituted state education instead of the sectarian education run by the political movements before independence. Section 2 of the Law defines the object of state education as follows:

> The object of state education is to base elementary education in the state on the values of Jewish culture and the achievements of science, on love of the homeland and loyalty to the state and the Jewish people, on practice in agricultural work and handicraft, on *dudutzic* (pioneer) training, and on striving for a society built on freedom, equality, tolerance, mutual assistance and love of mankind.

Section 4 of the Law, which deals with curricula, does indeed provide that "in non-Jewish educational institutions, the curriculum shall be adapted to the special conditions thereof." This provision cannot change the fact, however, that the statutory definition of the *objects* of state education appears to ignore the fact that the entire population of the country is not made up of Jews.

A law connected to the State Education Law is the Broadcasting Authority Law, 1965. Among the tasks of the Broadcasting Authority, established under this law as a semi-autonomous body responsible for all radio and television broadcasting in the country, are included "strengthening the connection with the Jewish heritage" and "furthering the objects of state education." It should

be mentioned, however, that another of the tasks of the Authority is to "hold broadcasts in Arabic for the needs of the Arabic speaking public."

Foundations of Law Act, 1980

According to Article 46 of the Palestine Order-in-Council, 1922, the courts were to fill gaps (*lacunae*) in the law by applying the principles of English common law and equity. This provision remained in force after independence, thus creating a somewhat anomalous situation in which the courts of the new state were to resort to a foreign legal system as a binding source of norms. Article 46 was repealed by the Foundations of Law Act, 1980 which resolved the *lacuna* problem by the following provision:

> Where the court, faced with a legal question requiring decision, finds no answer to it in statute law, case-law or analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.

The phrase "principles of freedom, justice, equity and peace of Israel's heritage" is intentionally vague and was a source of some controversy.[8] Some would interpret the phrase as synonymous with Jewish law; others reject this interpretation.[9] Whatever the interpretation, this law must be included among laws which give statutory recognition to the idea of Israel as a Jewish state.

The Jewish Religion

The Turkish *millet* system, under which the religious communities and their courts have jurisdiction over matters of personal status, and especially marriage and divorce, is still in force in Israel. Thus matters of marriage and divorce of Jews are dealt with by the rabbinical courts which apply rabbinical law (*haladla*). This cannot be seen as statutory expression of the idea of a Jewish state, however, as Moslems, members of most Christian denominations and Druse are also subject to their respective religious laws. There are indeed some differences in the scope of matters in the jurisdiction of the various religious courts, but their background is purely historical.

One statute that does give special status to the Jewish religion is the Chief Rabbinate of Israel Law, 1980. This law defines the composition and functions of the Chief Rabbinate Council and provides for its election and the election of the two Chief Rabbis. The statutory functions of the Chief Rabbinate Council are defined in fairly general terms and include functions such as "the giving of response and opinions on matters of *halacha* (religious law) to persons seeking its advice" and "the conferment of eligibility upon a rabbi to serve as a rabbi and marriage registrar." They also include, however, "activities aimed at bringing the public closer to the values of *tora* (religious learning) and *mitzoot* (religious duties)." Another statute, the Prevention of Fraud in Kashrut Law, 1983, grants the Chief Rabbinate the sole power to certify *kashrut* (i.e. that restaurants and food products are kosher), or to authorize local rabbis who may give such certification.

No laws grant a non-Jewish religious body statutory status similar to that of the Chief Rabbinate. Thus, even though its functions are somewhat nebulous, the statutory status given to the Chief Rabbinate must be regarded as another of the legal manifestations of the idea of the

Jewish state.

Days of Rest and Remembrance

According to section 18(a) of the Law and Government Ordinance, 1948, the Jewish sabbath and religious festivals are the official days of rest in the State of Israel. This same section adds, however, that non-Jews shall be entitled to days of rest on their sabbath and festivals.[10]

The Martyrs' and Heroes' Remembrance Day Law, 1959designates the 27th of Nissan (roughly corresponding to April in the Jewish lunar calendar) as a day devoted to "the commemoration of the disaster which the Nazis and their collaborators brought upon the Jewish people and of the acts of heroism and revolt performed in those days."

National Flag, Emblem and Anthem

The Flag and Emblem Law, 1949 provides that the national flag and emblem will be those decided upon by the Provisional Council of State. The Council decided on the 28th October, 1948 that the flag adopted at the First Zionist Congress as the flag of the Zionist movement would be the official flag of Israel. The flag is inspired by the Jewish prayer shawl, the *tallit*, and includes the symbolic Shield of David. The emblem is the seven-branched *menorah* (candelabrum), one of the prominent features in the Tabernacle and in the First and Second temples.[11]

The national anthem of Israel is *Hatikva* (the hope), the hymn of the Zionist movement that expresses the yearning of the Jewish people to be "a free people in our own land." Although the music of *Hatikoa* is played on state occasions and the hymn is sung at the end of many national events, the anthem has no legal status. Some attempts have been made to formalize its status as the national anthem, but they have been unsuccessful. It seems to be fairly widely understood that *the Hatikva* is a singularly Jewish anthem that could not be sung with any meaning by the non-Jewish citizens of the state, and that there is therefore no point in changing the present status of the anthem.

Cultural, Educational and Memorial Institutions

Two laws of the Knesset give statutory recognition to cultural and educational institutions and define their aims in strictly Jewish terms. The first such law is the Yad Yitzchak Ben-Zvi Law, 1969. The Yad Yitzchak Ben-Zvi Institute is established as a statutory institution. Its aims are, *inter alia*, to "deepen the people's consciousness of the continuity of Jewish settlement in Eretz Yisrael and for that purpose to foster research on history of that settlement." As in the Chief Rabbinate Council Law, which refers to the "public" when the reference is clearly only to the Jewish public, this law refers to the general term "people" in a similar way.

The second law is the Mikve Yisrael Agricultural School Law, 1976. This law gives statutory recognition to the first agricultural educational institution founded in Eretz Yisrael and provides that the school will continue to further its aims. The objects are defined as "educating youth in Israel for a life of agriculture and settlement and to impart to it a general education, as well as

Jewish culture and a Hebrew education in accordance with Israel's heritage, as customary in educational institutions in the state."

The Martyrs' and Heroes' Commemoration (*Yad Va-Shem)* Law, 1953 establishes the Remembrance Authority, *Yad Va-Shem*, to commemorate the six million members of the Jewish people who were murdered by the Nazis and their collaborators.

The Jewish State: An Incontrovertible Constitutional Fact?

The constitutional significance of the definition of Israel as a Jewish state cannot be gauged solely in terms of the statutory expressions of the Jewishness of the state. The most important context in which this issue has arisen relates to the right to participate in the political process and to run for election to the Knesset of groups which do not accept the notion of the Jewish state.[12] This question has arisen in major decisions of the Supreme Court. The question of participation in the elections was also addressed in an amendment to a basic law passed by the Knesset in 1985.

The El-Ard Cose[13]

The decision in this case was one of a number of decisions of the Supreme Court relating to the organization in Israel in the late 1950's and early 1960's of an Arab political movement called *el-Ard* (the Land).[14] According to the Ottoman Law on Associations then in force, a voluntary association was obliged to send notice of its existence to the District Commissioner, who would maintain a register of the associations. The leaders of the *el-Ard* movement sent notice of their association to the District Commissioner, but he refused to register the association on the grounds that under its declared aims it was an unlawful association. The leaders of the movement applied for an order of the High Court of Justice directing the Commissioner to register the association.

The Supreme Court examined the articles of association of the Association, which defined its aims to be, *inter alia*, the following:

> (c) finding a just solution to the problem of Palestine—while seeing it as an indivisible unit — according to the wishes of the Palestinian Arab people, [a solution] which will meet its interests and aspirations, restore its political existence, ensure its full legal rights, and see it as the party with the primary right to determine its own future within the framework of the highest aspirations of the Arab nation.
>
> (d) support for the movement of liberation, unity and socialism in the Arab world, by all lawful means, while seeing that movement as the decisive force in the Arab world which requires Israel to relate to it positively.

There were differences in nuance in the opinions of the judges in the Supreme Court who dismissed the petition of *el-Ard.* Witkon J. emphasized that the *el-Ard* movement refused to accept the right of the Jews to their own state, and that in no part of the platform was recognition accorded to the fact that Israel had been established in part of Palestine. He was not prepared, however, to rest his decision on this point alone. He expressed skepticism about the commitment in the movemen's platform to lawful action, given the explicit identification with the Arab national movement, which was bent on the liquidation of Israel by force, and went on to say:

> Which simpleton would believe that this program [of *el-Ard* to solve the Palestinian question—D.K.] can be achieved by

> persuasion and peaceful means, and that it does not mean subversive and hostile activity? It is hardly surprising, therefore, that the *el-Ard* movement has won enthusiastic praise from Arab nationalistic propaganda organs, which constantly urge the destruction of Israel…[15]

Landau J. took a somewhat different line. He placed the emphasis on subsection (d) of the movemen's platform in which the movement expressed identification with the "movement of liberation, unity and socialism in the Arab world." Landau J. saw this as dear identification with the Nasserite movement, regarded at the time as the spearhead in the Arab world of the fight against Israel. Identification with forces in the Arab world that believed in the use of force as a means of resolving the conflict with Israel was regarded as a factor that delegitimized political activity, even if there were no evidence that action had been taken actively to promote the use of force.

Given the emphasis in the opinions of both Witkon and Landau JJ. on the identification with the enemies of Israel bent on its *physical* destruction, one cannot regard the *el-Ard* precedent as holding that a movement which rejects the notion of Israel as a Jewish state is *per se* unlawful. Significantly, however, the judges saw fit to ask counsel for the petitioners during the course of argument, whether his clients "recognize the sovereign State of Israel, together with its principles and aims, including free Jewish immigration and the return of the Jewish people to its homeland."[16] The approach implicit in this question was later made explicit in the PLP case that will be discussed below.

Some time after the decision in the *el-Ard* case the Minister of Defence, exercising authority granted under the Defence Regulations, declared the *el-Ard* movement an unlawful association.[17]

The Yardor *Decision*[18]

Israel's elections are based on the proportional representation system, in which voting is for lists of candidates. Among the lists presented to the Central Elections Committee before the elections for the Sixth Knesset in 1965, was a list of Arab candidates called the Socialist List. Five of the ten candidates on this list had been members of the *el-Ard* movement.

The Elections Law, which defines the powers of the Central Elections Committee, did not at the time empower the said committee to disqualify a list from participating in the elections on the basis of its platform or program.[19] Nevertheless, acting on the opinion of its chairman, Justice Moshe Landau, the Committee decided that the Socialist List could not participate in the elections. The grounds given for this decision were that the list was "an unlawful association, because its promoters deny the integrity of the State of Israel and its very existence."[20] The list's agent appealed the decision before the Supreme Court.

Each of the three judges who heard the appeal wrote an opinion. In a very strong dissent, described by Agranat P. as "enlightening and, if I may say, courageous," Haim Cohn J. argued that in the absence of a statute granting the Elections Committee the power to exclude a list on the basis of its program, it had no power to do so for any reason whatsoever. The majority were not prepared to accept this view. Sussman J., in a brief opinion, emphasized that the object of the list was an illegal object which he defined as "destruction of the state, bringing catastrophe on the majority of its inhabitants for whom it was established and joining up with its enemies,"[21] He held that the Elections Committee was duty-bound to exclude such a list from participation in the elections. The main opinion in favor of rejecting the appeal was, however, that of Agranat P. It is

this opinion which is most relevant to the present discussion.

Agranat P. regarded the question before the court as a question of primary constitutional importance. He examined the relevant "constitutional facts" and stated:

> There can be no doubt—and the words of the Declaration of Independence state this explicitly—that Israel is not only a sovereign, independent state which strives for freedom and which is characterized by a regime of rule by the people, but that it was established as a 'Jewish State in Eretz Yisrael,' that the act of its establishment was based, first and foremost, on 'the natural and historical right of the Jewish people to live, like any other nation, independently in its own sovereign state,' and that this act was 'the realization of the yearning of generations for the redemption of Israel.'
>
> It must be pointed out, at this stage in the life of the state, that these words express the aspirations of the people and its basic credo and that it is therefore our duty to keep them in mind 'when we interpret and give meaning to the laws of the land'… The meaning of this basic credo is that the continued existence — and, if you will, the eternity — of the State of Israel is a 'fundamental constitutional fact,' which no authority in the state — be it an administrative, judicial or quasi-judicial authority—may deny when exercising any of its powers.[22]

Having established the "fundamental constitutional fact," Agranat P. proceeded to draw his conclusions regarding the issue before the court:

> The question of whether or not to act in order to destroy the state and deny its sovereignty may not be placed on the agenda [of the house of representatives — the Knesset], as the very act of raising the question is contrary to the will of the people in Zion, their aspirations and basic credo.
>
> The conclusion is that a list of candidates who reject the above fundamental principle, does not have the right, as a list, to participate in the elections for the house of representatives … It is clear that a group of persons whose aim is not merely, as the Chairman of the Elections Committee stressed, 'to change the internal constitutional regime of the state' but to 'undermine its very existence' may not *a priori* hold the right to take part in the process of forming the will of the people, and it may therefore not stand for election in the Knesset elections.[23]

It is clear from the above dictum that at least Agranat P. held that Israel's existence as a Jewish state is a "fundamental constitutional fact" that may not be challenged. What is not clear, however, is what conclusions Agranat P. himself was prepared to draw from this fact *alone.* For from the way he continued his opinion it becomes apparent that Agranat P. did not base his judgment solely on the finding that the *el-Ard* movement rejected the idea of a Jewish state. He stressed that no regime would accord recognition to a movement aimed at undermining the regime itself, and pointed to identification of the *el-Ard* movement with Israel's declared enemies.[24] Thus, while at least one major commentator does indeed take the view that the *Yardor* decision of Agranat P. holds that mere denial of Israel as a Jewish state is, of itself, a factor which would justify excluding a list from participating in the Knesset elections,[25] it is by no means clear that this is the only possible reading of Agranat P.'s opinion. In all events, Agranat P.'s opinion was one of three opinions and cannot be regarded as the binding opinion of the court. What the court really decided in the *Yardor* case was the subject of detailed discussion in the later *Neiman I* case and it is to that case that I now turn.

The Neiman I Case[26]

The Central Elections Committee for the Eleventh Knesset elections in 1984 decided to disqualify two lists. The one was the racist Kach list of Meir Kahane; the other, the Progressive List for Peace (PLP) headed by Muhamed Miari and Matityahu Peled. Agents of both the lists appealed to the Supreme Court, which allowed both appeals. The appeal which interests us in the present discussion is the appeal in the case of the PLP.[27]

The background to the decision of the Elections Committee was as follows. The first candidate on the joint Arab-Jewish PLP, M. Miari, had been a member of the *el-Ard* movement. Shortly before the Elections Committee was to meet to approve the lists submitted for the elections, the Minister of Defence informed the leaders of the list that he was considering declaring the list to be an unlawful association. He offered them the opportunity to present any arguments they wished to make before he made his decision. The Minister heard the representatives of the list and examined classified evidence presented to him by the security service. He then decided that although he was convinced that "there are subversive elements and tendencies among groups who are part of the list, and that central figures in the list act so as to identify with the enemies of the state,"[28] he would not declare the list an unlawful association so as not to interfere in the electoral process. When the matter came before the Elections Committee the Minister refused to present the classified evidence to the Committee. By a majority vote the Committee nevertheless decided to disqualify the list. It informed the list's agent that it's decision rested on the evidence that had been presented to the Minister and an affidavit that had been presented to the Supreme Court four years previously[29] and added:

> The majority of the committee were convinced that this list believes in principles that endanger the integrity and existence of the State of Israel, and preservation of its distinctiveness as a Jewish state in accordance with the foundations of the state as expressed in the Declaration of Independence and the Law of Return.[30]

The Supreme Court accepted the appeal of the PLP. It held that the *Yardor* precedent only applies to lists which deny the very existence of the state and wish to destroy it[31] or, as phrased by two of the judges, lists which "deny the very existence of the state or its integrity."[32] The court had no hesitation in holding that there was no evidence before the Elections Committee on which it could base its finding that the PLP met this test.[33]

The decision in this case did not really clarify the issue which interests us here. In the *Yardor* case, Agranat P. emphasized the 'fundamental credo' of Israel as a *Jewish* state. The decision of the Elections Committee to disqualify the PLP clearly relied on this view of the *Yardor* case.[34] The judges in the *Neman I* case, however, preferred to emphasize the "destruction of the state" or "denial of its integrity." Does this mean that a list that is committed to the continued existence of the State of Israel, but suggests that the state be defined as a bi-national or a-national state, is not covered by the *Yardor* precedent, even though such a list contests the 'fundamental credo' of the state, as seen by Agranat P. in the *Yardor* decision? What of a list that explicitly wishes to repeal the Law of Return, but is sincerely committed to achieving this by the legislative process alone? The statements of the judges in the *Neiman I* case would seem to imply that such a list, which is not committed to *physical* destruction of the State, may not be disqualified under the *Yardor* precedent.

The Aftermath of Neiman I: Amendment to the Basic Law

The main conclusion from the preceding discussion must be that while before 1985 there was some judicial support for the view that the Jewish nature of the State of Israel is an incontrovertible constitutional fact, it was not at all clear what the implications of this were. Most specifically, it was not clear whether a challenge to the said nature of the state, or explicit rejection of the idea, which was not accompanied by support for use of force to bring an end to

the Jewish state, were to be regarded as ideas that have no place in the arena of legitimate parliamentary activity.

In the *Neitnan I* case the Supreme Court left the *yardor* precedent intact, but gave it a restrictive interpretation. The majority on the court also ruled that, in the absence of parliamentary legislation, anti-democratic and racist lists could not be excluded from the electoral process, a position that some of the judges felt ought to be changed.

After the decision in the *Neitnan I* case, the Knesset stepped into the picture and amended the Basic Law: The Knesset, so as to provide for disqualification of certain lists from participation in the Knesset elections. While the immediate object of the new legislation was to allow for exclusion of anti-democratic and racist lists, the legislation defined all categories of lists that could be disqualified. The original bill referred to lists that deny the existence of the state according to the Declaration of Independence, language that may be seen as an attempt to give statutory standing to Justice Agranat's view in the *Yardor* case. However, in the course of the legislative process, the original bill underwent significant changes, as a result of which the definition of lists that may be excluded for rejecting the "incontrovertible Jewish nature of the state" was widened. The *Yardor* precedent may therefore now be of mainly historical and academic interest.

The new legislation added Section *7A* to the Basic Law: The Knesset. This section states:

> A list of candidates shall not participate in the elections for the Knesset if its aims or actions, expressly or by implication, point to one of the following:
>
> (1) denial of the existence of the State of Israel as the state of the Jewish people;
> (2) denial of the democratic nature of the state;
> (3) incitement to racism.

The provision which interests us here is the provision in subsection (1). This provision met with fierce parliamentary opposition. The problematic nature of the section from the point of view of the Arab citizens of Israel was most forcefully put by veteran Knesset member Tewfik Toubi, of the Israeli Communist Party, who said:

> To say today in the law that the State of Israel is the state of the Jewish people, means saying to 16% of the citizens of the State of Israel that they have no state and that they are stateless, that the State of Israel is the state only of its Jewish inhabitants, and that the Arab citizens who live in it reside and live in it on sufferance and without rights equal to those of its Jewish citizens… Don't the people who drew up this version realize that by this definition they tarnish the State of Israel as an apartheid state, as a racist state?[35]

M.K. Toubi proposed that instead of the above version the law refer merely to "denial of the existence of the State of Israel." Another proposal, submitted by M.K. Peled of the PLP, was that the law refer to Israel as the "state of the Jewish people and its Arab citizens."[36] Both proposals were rejected. The Chairman of the Knesset Constitution and Law Committee, who presented the bill for its final readings, pointed out that the Declaration of Independence speaks of the establishment of a state of the Jews.[37]

The present legal position is then that recognition of Israel as the state of the Jewish people has indeed become an "incontrovertible constitutional fact," in the sense that a party that rejects this fact is denied the right to participate in the elections, even if it is truly and sincerely committed to lawful action alone. Furthermore, according to an amendment introduced into the Knesset Rules, the Knesset Presidium may not allow presentation of a bill before the Knesset which is, in their opinion, "essentially racist or denies the existence of the State of Israel as the

state of the Jewish people."[38]

The interpretation of section 7A of the Basic Law: The Knesset became an issue at the time of the elections in 1988. The Central Elections Committee decided to disqualify the virulently anti-Arab Kach list of Meir Kahane on two grounds: that it denied the democratic nature of the state and incited to racism. By a majority of one the Committee rejected a proposal to disqualify the PLP as a list that denies the existence of Israel as the state of the Jewish people. The Supreme Court unanimously upheld the Committee's decision to disqualify Kach; by a majority of 3–2 it confirmed the decision of the Committee not to disqualify the PLP.

In dismissing Kach's appeal the Supreme Court ruled that the list's platform and past actions, which included advocating denial of political rights to Arabs and systematic incitement against them, revealed that the list denied the democratic nature of the state, a central feature of which is the commitment towards equality, and that it was blatantly racist.[39] The issue that concerns us here — the Jewish nature of the state — arose in relation to Kahane's argument that there is an inherent contradiction between the definition of the state as the state of the Jewish people and its definition as democratic, and that a list which wishes to promote the Jewishness of the state may therefore not be disqualified as being antidemocratic.

The court categorically rejected this argument. The president of the court, Justice Shamgar, referred to the dual commitment of Israel both to its character as the state of the Jews, as well as to its democratic character. He proceeded to state:

> There is no merit in the argument about the apparent contradiction between the paragraphs of section 7A. The existence of State of Israel as the state of the Jewish people does not deny its democratic nature, just as the Frenchness of France does not deny its democratic nature.[40]

The parallel between the Frenchness of France and the Jewishness of Israel signifies a minimalist conception of the Jewish character of Israel. This conception is, however, totally inconsistent with the stand taken by the majority of judges in the PLP case that was decided at the same time as the Kach case, though the full reasoned judgment was published some months later.[41] The PLP case is also more relevant to the present discussion since it deals directly with the meaning of section 7A(1), namely that Israel is "the state of the Jewish people," and with the implications of this section for the Arab citizens of the state.

The issue before the court in the PLP case was whether the PLP was to be regarded as a list that "denies the existence of Israel as the state of the Jewish people." This issue required the court to analyze two questions: first, what conditions must be met in order for a list to be regarded as denying the existence of Israel as the state of the Jewish people? Second, was there sufficient evidence before the Central Elections Committee to show that the PLP could be so regarded?

The main split between the majority and minority judges related to the second question. The majority took the view that the clear, convincing and unambiguous evidence required to disqualify a list was lacking. As each of the five judges wrote a reasoned opinion it is impossible to state an accepted view of the court on the first question. It seems, however, that there was general agreement that section 7A(1) does not merely grant statutory recognition to the *Yardor* ruling. It allows for disqualification of a list that rejects the ideological underpinnings of Israel as the state of the Jewish people, even if there is no subversive element involved, and no perceivable danger to state security. The two dissenting justices took the line that any attempt to redefine Israel as the state of all its citizens (even if accompanied by acknowledgment of special ties with the Jewish people), is tantamount to denial of the state as the state of the Jewish people.

According to their interpretation of section 7A, a list that demands total equality between Arabs and Jews, not only on the individual level but on the national level as well, necessarily rejects the state of Israel as the state of the Jewish people. Two of the majority justices refused to enter into "unneeded ideological definitions." They held that a minimum definition of Israel as the state of the Jewish people is based on three fundamentals: a majority of Jews in the country, preference for Jews, over other groups, to return to their land and a reciprocal relationship between the state and the Jews of the Diaspora.[42] A list that rejects these fundamentals must be disqualified.

The implications of section 7A(1), as interpreted in the PLP case, must be discussed on two levels. The first, and most obvious, level relates to participation in the parliamentary process. This is denied to a list that rejects the particularistic definition of Israel as the state of the Jewish people, even if the list is committed to achieving a change in this constitutional fundamental through the parliamentary process alone. This in itself is hardly consistent with basic democratic principles. It implies a model of Israel as a Jewish state that is quite different from the "Frenchness of France." Four of the judges in the PLP case explicitly agreed that a list that advocates repeal of the Law of Return must be disqualified. Would a French political party that objected to a French law granting immigration privileges to persons of French origin be denied the right to run for election on the grounds that it denied the Frenchness of France?

The wider implications of section 7A(1) are even more significant than its implications in the electoral context. These wider implications, which were articulated in the most radical fashion by the dissenting justices in the PLP case, are that on the decidedly fundamental level of identification and belonging there cannot be total equality between Arab and Jew in Israel. The state is the state of the Jews, both those presently resident in the country as well as those resident abroad. Even if the Arabs have equal rights on all other levels the implication is abundantly clean Israel is not *their* state.

Notes

1. For a full treatment of this subject see K. Klein, *Le Caractere Juif De L'etat d'Israel* (Paris: Cujas, 1977).

2. See Zero v. *Gubemik* (1948) 1 P.D. 85, 89.

3. In presenting the Law of Return together with the Nationality Law before the Knesset, Prime Minister David Ben-Gurion declared:

> The Law of Return and the Nationality Law which are before you are closely connected and have a common ideological basis, that derives from the historical uniqueness of the State of Israel, a uniqueness that relates to the past and the future… These two laws determine the special character and purpose of the State of Israel which carries the message of the redemption of Israel…

6 *Divrei HaKnesset* 2036–37.

4. A Translators' Note to the official translation of this Law states: "*aliya* means immigration of Jews, and *oleh* (plural: *olim)* means a Jew immigrating, into Israel." The Law contains a number of exceptions to the right granted in section 1, which are not relevant in the present study.

5. The Law of Return Bill and the Nationality Law Bill were originally presented to the Knesset together, but the latter bill was held up in the legislative process, while the former was passed almost immediately.

6. 5710 *Hatzaot Hok*, 194.

7. The commitment to Jewish immigration as *the* function of the State is repeated in section 5 of the World Zionist Organization and Jewish Agency (Status) Law, 1952 which states:

> The mission of gathering in the exiles, which is the central task of the State of Israel and the Zionist Movement in our days, requires constant efforts by the Jewish people in the Diaspora…

8. See M. Cheshin, "Israel's Heritage and the Law of the State," in R. Gavison (ed.), *Civil Rights in Israel, Articles in*

Honour of Haim H. Cohn (Tel Aviv: Kamat, 1982), 47.

9. See the opinions of Elon J. and Landau P. in *Handels v. Kupat Am Bank* (1980) 35 P.D. II785.

10. Also see Hours of Work and Rest Law, 1951 which lays down that the day of rest for Jews is the Jewish sabbath while for a non-Jew it is "the sabbath or Sunday or Friday, whichever is regarded by him as his weekly day of rest." As in most other societies in which the day of rest of a religious minority differs from the general day of rest, implementation of these provisions is not free of difficulties: see A. Rubinstein, *The Constitutional Law of the State of Israel* (Tel Aviv: Schocken, 1980), 155–159, 177.

11. The *menor ah* was the symbol of Judaism in the first century of the common era and was frequently displayed on tombs and monuments. The *menorah* from the Second temple was taken to Rome by Vespasian and is portrayed on the Arch of Titus.

12. For a discussion of this question see R. Gavison, "Twenty Years after Y*ardor*. The Right to Run for Election and Lessons of History," in R. Gavison and M. Kremnitzer (ed.), *Essays in Honour of Shimon Agranat* (Jerusalem, 1986) 145.

13. See *Sabri Jiryis v. District Commissioner* (1964) 18 P.D. IV 673.

14. The other cases were *Kardosh v. Registrar of Companies* (1960) 15 P.D. 1151; *EUArd v. District Commissioner* (1964) 18 P.D. II 340 and the *Yardor* decision discussed at length below.

15. See *Sabri Jiryis v. District Commissioner*, note 13 *supra*, 677–678.

16. *Ibid.*, 678. Counsel's reply was positive, but the court regarded this reply with skepticism.

17. See 5725 *Yalkut HaPirsumim* 633.

18. See *Yardor v. Central Elections Committee for the Sixth Knesset* (1965) 19 P.D. Ill 365.

19. The law authorizes the Committee to examine whether a list has met the procedural requirements of the law, such as the need for a specified number of sponsoring signatures, and submission of consent forms signed by the candidates. The Committee is a political body made up of representatives of the parties in the outgoing Knesset. It is, however, chaired by a Supreme Court judge. In 1965 the judge was Justice Moshe Landau, who had written one of the opinions in the *el-Ard case* reviewed above.

20. See *Yardor* decision, note 18 *supra*, 369.

21. *Ibid.*, 389.

21. *Ibid.*, 385–386.

23. *Ibid.*, 387.

24. *Ibid.*, 388. Agranat P. quoted the following statement from Ernest Baker, *Reflections on Government*:

> a party owing a foreign allegiance, and only acting in the democratic system in order to overthrow the system can hardly in justice claim the benefit of the system.

25. See Rubinstein, note 10 *supra*, 23.

26. See *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset* (1984) 39 P.D. II233.

27. The decision of the court is a joint decision in both appeals. However, all of the judges make a clear distinction between the grounds for allowing the two appeals.

28. See the statement of the Minister's spokesman submitted to the Elections Committee and quoted in the *Neiman* decision, note 26 *supra*, 251.

29. The said affidavit had been submitted by the Officer Commanding the Northern Command in support of a restrictive order which had been imposed on the head of the list, M. Miari.

30. *Neiman I* case, note 26 *supra*, 238.

31. See *ibid.*, 243, 275–276 (Shamgar P.); 304, 307 (Barak J.).

32. *Ibid.*, 288 (Elon J.); 324 (Bejski J.). The fifth justice on the bench, Ben-Porath D.P., took the view, similar to that of Cohn J. in the *Yardor* case, that absent express statutory authority, the Elections Committee did not have the power to disqualify a list on any grounds. She therefore did not need to analyze the meaning of the *Yardor* precedent.

33. The court held that the Committee was not entitled to rely on the Minister of Defence's statement that he had seen such evidence. It had to base its decision on evidence which it had seen itself.

34. This does not mean to say that the Committee had any evidence that the list rejected this credo. As emphasized by the court, the Committee had no evidence of any sort on which it could base a decision to disqualify the list.

35. See 42 *Divrei HaKnesset* 3899–3900 (31.7.85).

36. *ibid.*, 3906.

37. *ibid.*

38. 5746 *Yalkut HaPirsumim 772.* The background to this amendment was the decision of the Supreme Court in *Kahane v. Knesset Speaker* (1984) 39 P.D. IV 85, in which the court held that in the absence of a specific clause in the Knesset Rules the Speaker had no authority to refuse to place a racist bill on the agenda. The validity of the amendment to the Knesset Rules was upheld in *Kahane v. Knesset Speaker* (1985) 40 P.D. IV 395.

39. See *Neiman v. Chairman of Central Elections Committee* (1988) 42 P.D. IV177 *(Neiman II*). Writing for the court, it's president, Justice Shamgar, referred, *inter alia*, to the

> constant intentional abuse of defined portions of the population distinguished on the grounds of national-ethnic origins, and their degradation in a manner that is distressingly similar to the worst experiences of the Jewish people;

*ibid*197.

40. *Ibid.*, 189.

41. See Elections Appeal 2/88, *Ben-Shalom v. Central Elections Committee for the 12th Knesset* (1988) 42 P.D. IV 749, reasoned opinion of 19.9.89. (At the time of writing this decision had not yet been published in the official reports).

42. The President of the Court, Justice Shamgar, did not discuss the meaning of the section 7A(1). He rested his decision on the requirements laid down in the *Neiman II* case for disqualification of any list under section 7A. Included among these requirements are that the "disqualifying grounds" must be a central aim of the list and not a marginal issue; the list must act to promote that aim and see that it materializes; participation in the elections must be a means of achieving the disqualifying aim or furthering the activities of the list to promote it, and that the disqualifying aim must be given extreme expression. Justice Shamgar held that there was no clear, convincing and unambiguous evidence that these conditions had been met.

3

Citizenship and Population Registration

The establishment of a Jewish state in Palestine could not have been achieved without a Jewish majority and land for Jewish settlement. Thus it was that the efforts of the Zionist movement during the pre-state years were directed at ensuring a flow of Jewish immigration and acquiring land. It was these very factors that were the basis for Arab demands before and throughout the period of the British Mandate: a stop to Jewish immigration and restrictions on the rights of Jews to purchase land.[1] The partial acceptance by the British Mandatory authorities of these demands was the cause of constant friction with the Zionist leadership.[2] Zionist leaders argued that by acceding to these demands the British were violating their obligation under the League of Nations Mandate to promote the establishment in Palestine of a home for the Jewish people.[3]

Section 13 of the Law and Government Ordinance, 1948, the first legislative act passed by the Provisional Council of State after independence, retroactively revoked the legislative arrangements adopted to enforce the limits on Jewish immigration and place restrictions on purchase of land by Jews. Doing away with the restrictions on immigration and land sales to Jews was not regarded as sufficient, however. The law was to be used so as to pursue the traditional goals of Zionism: promotion of Jewish immigration and ownership of land. This chapter reviews the law relating to citizenship and the related question of population registration; the following one reviews the law relating to control of land.

Nationality Law

The Law of Return and Citizenship

Under the Law of Return every Jew is granted the right to settle in Israel as an *oleh*,[4] and every Jew already settled in the country or born there is deemed to be a person who came into the country as an *oleh.* The right given in the Law of Return to Jews to immigrate to Israel is one of the only cases in Israeli legislation in which an overt distinction is made between the rights of Jews and non-Jews. The former are entitled to come into the country and settle there; the latter may only enter the country and settle there if they are granted permission to do so under the Entrance to Israel Law, 1952. As we have seen, this aspect of the Law of Return is generally regarded as a fundamental principle of the State of Israel, possibly even its very *raison d'etre* as a Jewish state.[5] The present chapter will focus on the legal implications of the connection between the Law of Return and the Nationality Law for the respective rights of Jewish and Arab *residents* of Israel (as opposed to its implications for non-residents who wish to enter the country).[6]

The connection between the Law of Return and the acquiring of Israeli nationality or

citizenship has been briefly discussed above. Section 2 of the Nationality Law provides that all *olim* under the Law of Return are entitled to Israeli citizenship by way of return. As all Jews who immigrated to Israel at any time, or were born in Israel, are deemed to have the rights of *olim* under the Law of Return, the real meaning of this section is that all Jews in Israel are entitled to citizenship by way of return. Arabs cannot acquire Israeli citizenship by way of return; they must do so by residence, birth or naturalization. Thus according to the Nationality Law different rules apply to the acquiring of citizenship by Jews and non-Jews. The effects of this were most apparent when the Nationality Law was first enacted. All Jewish residents of the state acquired Israeli citizenship automatically by way of return; Arab residents acquired citizenship only if the conditions for acquiring citizenship through residence applied. Since then, important changes have been introduced into the law, so that both Arabs and Jews born in the country generally become Israeli citizens through birth. The distinction in the manner of acquiring citizenship has therefore lost most of its practical importance.

I shall now review the law regulating the acquisition of citizenship other than by way of return.

Citizenship by Residence

As a major change was introduced into the law in 1980, the discussion of citizenship by residence must be divided into two: the period following passage of the original version of the Nationality Law, 1952 until amendment of that law in 1980, and the subsequent period.

1952–1980. Section 3 of the Nationality Law states:

> (a) A person who, immediately before the establishment of the state, was a Palestinian citizen and who does not become an Israeli citizen under section 2, shall become an Israeli citizen with effect from the day of the establishment of the state if —
>
> (1) he was registered on the 1st March, 1952 as a resident under the Registration of Residents Ordinance, 1949; and
> (2) he is a resident of Israel on the day this law comes into force; and
> (3) he was in Israel, or in an area which became Israel territory after the establishment of the state, from the day of the establishment of the state to the day this law comes into force, or entered Israel legally during that period.
>
> (b) A person born after the establishment of the state who is a resident of Israel on the day this law comes into force, and whose father or mother becomes an Israel citizen under subsection (a), shall become an Israeli citizen with effect from the day of his birth.

The first thing to note about this section is that it applies to persons who did not acquire citizenship under section 2, that is to say to non-Jews not entitled to citizenship by way of return.

The conditions laid down in section 3 for the acquiring of citizenship by non-Jews are cumulative. Failure to prove any one of the conditions means that the person is not entitled to Israeli citizenship.[7] During the first years of the state's existence quite a number of Arabs found it difficult to prove that they met all the conditions laid down in section 3. As a result they lacked legal status in the country and sometimes even faced the risk of deportation[8]

In the early years of the state the borders of Israel, especially the one with Jordan which

occupied the West Bank, were far from secure, and people managed to cross from one side to the other without going through the official entry posts. Many Arabs who had fled their homes, or had been expelled, to neighboring countries during the war managed to cross the border back into Israel. They were subsequently anxious to formalize their status. A fair number of cases reached the Supreme Court, in which persons who had returned to their homes in Israel from neighboring countries demanded recognition of their status as residents and registration in the Population Register, both conditions under section 3 for acquiring citizenship. The general approach taken by the court was that persons who had been *expelled* from the country and returned within a reasonable time did not lose their residency status. They were entitled to registration in the Population Register, even if they had crossed the border back into Israel illegally.[9] On the other hand, persons who had left the country out of choice were not entitled to re-enter without permission. If they did so they were not entitled to residency status and could be deported.[10]

Residency was not the only problematical condition for acquiring citizenship; the other conditions—presence in Israel under section 3(a)(3) and registration in the Population Register on the specific date set in section 3(a)(1) — sometimes presented difficulties too.[11]

The rationale behind the conditions in section 3 was to prevent acquiring of citizenship by Arabs who had fled from their homes during the War of Independence and had then returned illegally. However, even those who accepted the legitimacy of this rationale were critical of the harsh conditions laid down in the law.[12] Eventually the government submitted a bill to the Knesset aimed at amending the Nationality Law so as to alleviate some of the hardships created therein for Arab residents of Israel.[13] The original bill proposed was not passed by the Knesset, but in its stead another amendment to the Nationality Law was passed and it is that amendment which must now be examined.

Since 1980. The 1980 Amendment to the Nationality Law leaves the original version of section 3 intact, but it adds section 3A. This section distinguishes between persons born before and after establishment of the state.

A person born before the establishment of the state is entitled to Israeli citizenship if the following five conditions are met:

1. he did not become an Israeli citizen under any other provision of the law;
2. he was a Palestinian citizen before the establishment of the state;
3. on 14th July, 1952 he was a resident of Israel and registered in the Population Register;
4. on the day the amendment came into force he was a resident of Israel and registered in the Population Register;
5. he is not a citizen of a country listed in the Prevention of Infiltration Law.[14]

An Arab born after the state was established is entitled to Israeli citizenship if the following three conditions are met:

1. he did not become an Israeli citizen under any other provision of the law;
2. on the day the amendment came into force he was a resident of Israel and registered in the Population Register;
3. he is the offspring of a person who meets the first three of the five conditions listed above.

The amendment to the Nationality Law waives the condition laid down in section 3(a)(3)—

that the person was in Israel from the establishment of the state until the Nationality Law came into force.[15] It does not do away with the distinction between the conditions of acquiring citizenship for Jews and non-Jews. It also retains the requirement of Palestinian citizenship for persons born before establishment of the state. Arabs born before the establishment of the state who were not Palestinian citizens may only acquire Israeli citizenship by naturalization.

Citizenship by Birth

Section 4(a)(1) of the Nationality Law provides that a person born in Israel whose father or mother is an Israeli citizen will be a citizen by birth. According to subsection (2), a person born out of Israel whose mother or father is an Israeli citizen by way of return, residence, naturalization, or birth under subsection (1) will also be an Israeli citizen by birth.

There is no difference in the manner of acquiring citizenship for Jews and Arabs born in Israel, if one of their parents is a citizen. The manner in which the parent acquired Israeli citizenship is irrelevant in determining whether the child shall be entitled to citizenship by birth.

The Law of Return does indeed state that all Jews born in Israel are regarded as if they were *olim* under that law. Section 2 of the Nationality Law states, however, that every *oleh* under the Law of Return becomes an Israeli citizen, by way of return, "unless he acquired Israeli citizenship through birth under section 4 [of this law]." Thus, Jews born in or out of Israel to parents, one of whom is an Israeli citizen, acquire citizenship by birth rather than by way of return. This means that there is no discrimination in the method of acquiring citizenship for Jews and non-Jews born to parents one of whom is a citizen. It should be remembered, however, that every Jew born in Israel would be entitled to citizenship by way of return even if he were not entitled to citizenship by birth.[16] It would seem then that the real "citizenship beneficiaries" of section 4(a)(1) regarding citizenship by birth are Arabs born to parents one of whom is an Israeli citizen.

Naturalization

Acquiring citizenship by naturalization is not a right but a privilege dependent on the discretion of the Minister of Interior. Under section 5 of the Nationality Law the minister may grant Israeli citizenship to a person who applies to become a naturalized citizen and who fulfils six conditions:

1. he is in Israel;
2. he was in Israel for three of the five years preceding his application;
3. he is entitled to be permanently resident in Israel;
4. he has settled in Israel or intends to do so;
5. he has some knowledge of the Hebrew language;
6. he has renounced his prior citizenship or has proved that he will cease to be a foreign citizen upon becoming an Israeli citizen.

As Jews are entitled to citizenship by way of return the law of naturalization is generally only relevant in the case of Arabs or other non-Jews who did not acquire citizenship by residence or

birth. The law makes one concession to Arabs of the older generation who were not educated in Israeli schools and therefore may not have had the opportunity to learn Hebrew. Under section 6(c), a person who was a Palestinian citizen before the state was established is exempt from the condition regarding some knowledge of Hebrew. This section does not apply to Arabs who were not Palestinian citizens (such as members of the Druse community who were allowed to join their families in Israel and were previously Syrian or Lebanese nationals).

Conclusion

The amendments to the Nationality Law have alleviated the situation created under the original version under which a considerable number of Arab residents of Israel were not entitled to Israeli citizenship. It would be fair to say that today the law grants the right of citizenship to virtually all Arab residents of the state. As time passes the difficulties created by the original version of the Nationality Law will probably become matters of historical importance only, as the rule will become acquiring citizenship by birth.

It must be stressed that the manner of acquiring citizenship is not relevant in determining the rights of citizens. All rights that are dependent on citizenship, such as the right to vote and to stand for election in the Knesset elections, or the right to hold certain official posts, apply to all citizens, no matter how they acquired citizenship. For those entitled to citizenship it makes no practical difference whether the entitlement is by way of return, residence or birth.[17]

Registration in the Population Register

The meaning of the term “Jew” used in the Law of Return is a highly controversial issue both in Israel and among Jews of the Diaspora. In Israeli jurisprudence this question has been linked to the right of individuals to have their “nation” registered as “Jew” in the Population Register. The religious parties in Israel have aigued that both the definition of “Jew” in the Law of Return and the right of registration as a Jew in the Population Register should be based on the rabbinic definition.[18] Secular Jews in Israel, and Jews in the Diaspora who belong to non-Orthodox streams of Judaism, have resisted this demand. From the point of view of the Arabs in Israel this internecine Jewish dispute is of no importance. However, the general question of registration must be addressed.

The Duty of Registration

Under the Population Registry Law, 1965 all residents of the state must be registered in the Population Register. The law stipulates the details that must be registered. Among the details listed in the law are “nation”[19] and religion.[20] The law requires all residents over the age of 16 to carry identity cards which contain some of the information included in the Population Registry. According to regulations promulgated by the Minister of Interior pursuant to his authority under the statute, the identity card includes the “nation,” but not the religion, of the bearer.

The Population Registry Law does not include a definition of the term “nation,” nor does it define any of the various recognized “nations.” The only definition is that of the term “Jew,”

added by an amendment to the law passed in 1970.

Whether people may choose how to be registered, or even whether information about their "nation" or "religion" be registered at all, are questions that have arisen in a number of cases. These cases have related to registration of Jews, but the principles laid down would apply, *mutatis mutandis*, in the case of non-Jews as well.

The first relevant distinction is between original registration and changing of an item that has already been registered. Under section 19C of the Population Registry Law, the registrar may not change registered information (with the exception of the place of abode) unless he is presented with a public document verifying the new information. Persons who wish to change the registration of their "nation" or "religion" must therefore produce a declaratory judgment of a court (or, in the case of religious conversion, an official conversion certificate) confirming the new details.[21] On the other hand, in the case of the original registration (such as in the case of a new-born child or a new immigrant) information is registered on the strength of a declaration made by the registree (or in the case of an infant, the registree's parents). The registrar may not register information against the will of the registree.[22] The Supreme Court has held that one is not obliged to register one's religion or nation, and may choose to leave one or both of these items blank.[23] Arab and Jewish residents may therefore decide not to register any religion or nation for their children.

A far more complicated question arises when a person demands a specific form of registration under the heading of "religion" or "nation." As the term "Jew" is now defined in the law, a person may not demand to be registered as a Jew unless he or she meets the statutory definition. The Supreme Court has also refused to allow those who object to the statutory definition to use alternative epithets, such as "Hebrew."[24]

The principles laid down in cases dealing with registration of Jews may have implications as far as Arab residents are concerned in a number of contexts. First, the policy of the government has always been to register members of the Druse community as part of a separate nation. The question arises whether members of the Druse community who so desire may be registered as "Arabs." A further question is whether an Arab resident may register his or her children as "Palestinians," rather than as "Arabs."[25]

In the celebrated *Shalit* case[26] a majority of the Supreme Court held that the registrar has no power to overrule the *bom fide* declaration of persons who declare themselves members of a given nation. Following this decision a statutory definition of the term "Jew" was introduced, thereby doing away with the subjective test as far as Jews are concerned. However, the *Shalit* ruling itself still stands, and should apply in any case other than the case in which a person demands registration as a Jew. Druse who declare in good faith that they regard themselves (or their children) as members of the Arab nation, are entitled to registration as such.[27]

The second question — registration as a Palestinian rather than as an Arab — is somewhat more complicated, and clearly more sensitive. A parallel question arose in a case in which a person who had been registered as a Jew, applied to the District Court for a declaration that his nation was "Israeli."[28] The Supreme Court decided that the *bona fide* declaration test only applies to the right of a person to registration as a member of an existing nation; an individual may not force the registrar to recognize a "nation" merely by his subjective declaration that he regards himself as a member of that nation. If the nation is not recognized by the registrar the onus is on the individual to prove that such a distinct nation exists. There are a number of elements that characterize a nation. When the argument is that a group that had been part of one

nation has evolved into a separate nation, it must be shown that an appreciable number of people belonging to the former nation no longer identify with that nation, whose members may be scattered all over the world, and have no sense of mutual inter-dependency and common destiny with them.[29] On the strength of this test the court dismissed the argument that a separate "nation" of Israelis, who were no longer part of the Jewish nation, had evolved.

If Arabs in Israel were to demand registration as members of the Palestinian, rather than the Arab, nation, they would presumably have to prove the existence of a separate national entity of Palestinians, under the test adopted in the above case. While they would have no difficulty showing that a substantial number of Arabs in Israel believe that the term "Palestinian" describes them well,[30] they may have difficulty in meeting the requirement that these people believe that their national identity as Palestinians has replaced their national identity as Arabs.

The Significance of Registration

From the strictly legal point of view, registration of nation and religion in the Population Register has virtually no significance. Israeli law does not make duties or obligations dependent on one's nation or religion. Furthermore, the Population Register Law, 1965 provides, by implication, that registration of a person's nation or religion in the Population Registry is not evidence of the accuracy of that registration. In the one case in which the religion of a person has legal relevance, determining the jurisdiction of the religious courts, these courts are not dependent on the registration of a person's religion in the Population Registry and establish religious affiliation according to their own criteria.[31]

What, then, is the significance of the registration? On this question judges of the Supreme Court have expressed radically opposing opinions. One view belittles the registration and regards it as a purely technical matter connected with gathering statistics.[32] Another opinion sees the matter of registration as a basic human right of the individual, connected with the right to determine one's own identity.[33] However, even this debate does not have any real practical implications, over and above the actual act of registration itself.

Given the difficulties involved in defining the term "Jew" a number of proposals have been made over the years to scrap the statutory requirement for registration of "nation." In an unprecedented step, the Supreme Court itself referred such a proposal to the government before it heard full aigument in the *Shalit* case.[34] This, and other proposals, have all been rejected.

It is indeed true that registration of religion, and especially of ethnic group or nation, is not unique to Israel. It is common practice in multinational countries, such as USSR and Yugoslavia. Nevertheless, as the registration in Israel has no legal implications and has been a constant source of political controversy, it is worthwhile asking why the attachment to registration of these items persists. There are two possible answers to this question.

The first answer is connected with notions of security, that place importance on the identification by police of the nation of a person by examining that person's identity card. The assumption that lies behind this argument is, of course, that Arabs pose a security risk, while Jews do not.

According to press reports at the time of the Supreme Court proposal in the *Shalit* case, the security authorities had no objection to adoption of the proposal to drop registration of nation. Thus it would seem that the security argument is not the real reason for demanding registration

of nation. Rather it appears to derive from the fundamental philosophy of the State of Israel, that actively discourages an assimilationist approach towards the Arab minority. The philosophy reflects the idea that Israel, as the nation-state of the Jewish people, has a definite function: preserving the discrete national identity of the Jewish people. Registration of "nation" in the Population Registry is one of the mechanisms for maintaining the distinction between citizens of the state who belong to the Jewish people and those who do not. Registration of "nation" is irrelevant in determining the rights and obligations of citizens, but it strengthens the dichotomy between the state as the political framework of all its citizens, and the state as the particularistic nation-state of the Jewish people.

Notes

1. The first political expression of Arab opposition to Zionism was in 1891. A group of Jerusalem notables sent a petition to the government in Istanbul demanding prevention of further Jewish immigration and purchase of land: see Y. Porath, *The Emergence of the Palestinian-Arab National Movement 1918–1929* (London: F. Cass, 1974) 26. This opposition grew after the Balfour Declaration of November, 1917 and the granting to Great Britain of the Mandate over Palestine. That immigration and land purchases were indeed the main factors that Palestinian Arabs saw as threatening was well recognized by Zionist leaders. Thus, for example, writing in 1936, the Jewish National Fund leader, A. Granott, stated:

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

See A. Granovsky (Granott), *The Land Issue in Palestine* (Jerusalem, 1936), 10 (emphasis in original).

2. The reaction of the Zionist leadership to the White Paper of May, 1939, that placed restrictions on immigration of Jews to Palestine at their hour of utmost need, was particularly harsh. The Jewish Agency issued the following statement the day after the White Paper was published:

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

See A. Cohen, *Israel and the Arab World* (London: W. H. Allen, 1970), 216.

3. See, e.g., A. Granovsky, note 1 *supra*, 15–16.

4. Section 2 of the Law grants the Minister of Interior discretion to refuse to grant a visa as an *oleh* to a Jew in three cases: (1) if he is engaged in activity directed against the Jewish people; (2) if he is likely to endanger public health or the security of the state; (3) if he is a person with a criminal past who is likely to endanger the public peace.

5. The Declaration of Independence states that the State of Israel will open its gates to immigration of Jews. This principle is reaffirmed in the World Zionist Organization and Jewish Agency (Status) Law, 1952. The Supreme Court has decided that this is one of the fundamentals of Israel, as the state of the Jewish people: see *Ben-Shalom v. Central Elections Committee for the 12th Knesset* (1988) 42 P.D. IV 749 (the PLP case, unpublished at the time of writing).

6. The discrimination in immigration rights has generally been justified by Israeli theorists on the grounds of the right of every sovereign state to determine its own immigration policy: see B. Akzin, "Problems of Constitutional and Administrative Law," in *International Lawyers Convention in Israel* (Jerusalem, 1959) 161, 182; A. Rubinstein, *The Constitutional Law of the State of Israel*, 3rd ed., (Tel Aviv: Schocken, 1980) 180–181. Rubinstein cites the Convention on the Elimination of All Forms of Racial Discrimination which specifically provides that nothing in the convention should be interpreted to invalidate laws of states relating to nationality or citizenship, provided those laws do not discriminate against a specific nation. The Law of Return does not discriminate *against* any racial group; it merely grants members of one group, the Jewish people, a privilege not granted to the members of any other group. Rubinstein cites as an example of another country with a law of return, the case of the Federal Republic of Germany. Article 116(1) of the Basic Law of 1949 grants the basic rights to "Germans," who include persons of "German descent" who entered territory of the German Reich as it was in 1937 as refugees or displaced persons.

7. See *Saad and Hoda Badar v. Minister of Police* (1954) 8 P.D. 970.

8. See *Badar v. Minister of Interior*, *ibid*.

9. See, e.g., *Khaldi v. Minister of Interior* (1951) 6 P.D. 52; *Raas v. Minister of Interior* (1951) 6 P.D. 480; *Badar v. Minister of Interior* (1952) 7 P.D. 366; *Abu Daoud v. Minister of Interior* (1952) 7 P.D. 1081; *Quiyon v. Minister of Defence* (1953) 8 P.D. 301. In one case the court even decided that if a person who had been given permission to return to Israel entered the country illegally he would be regarded as a legal resident: *Saiefv. Commissioner of Police* (1952) 7 P.D. 257.

10. See, e.g., *El-Badawi v. Military Governor of Galilee* (1951) 5 P.D. 1241; *Hassin v. Minister of Interior* (1951) 6 P.D. 1386; *Abu I'ash v. Military Governor of Galilee* (1951) 6 P.D. 221; *Kis v. Minister of Interior* (1951) 8 P.D. 617; *Na'mne v. Police Inspector of Zevulun District* (1954) 8 P.D. 1439.

11. See *Shaiahv. Minister of Interior* (1960)45Psakim308 in which a person who had been a Palestinian citizen, but was not in Israel from independence until the passing of the Nationality Law was denied citizenship; *Badar v. Minister of Police*, note 7 *supra*. A person was not registered in the Population Register on the required date (1st March, 1952) though at a later date he was registered under a court order. The court held (at 973–974) that it was "bound to follow the requirement of [section 3(a)(1)] and may not waive the date fixed in that section, even if it is the opinion that the delay in registration was not due to the fault of the individual concerned,"

12. See Rubinstein, note 6 *supra*, 411–412.

13. See Nationality Law (Amendment) Bill, 1980. The reason for the amendment was explained in the following manner:

> There are in Israel residents who were prevented from acquiring nationality by [section 3(a)(3)] since they could not prove that their permanent place of residence from the day of the establishment of the state until 14 July, 1952 was in Israel or in territory which became Israeli territory after the establishment of the state. As more than 27 years have passed since the said condition was laid down and it became apparent that it was difficult to prove it, it is proposed to repeal this condition. At the same time it is proposed to amend the condition in [section 3 (a) (1)] which refers to a date which is no longer relevant.

14. The countries listed are Lebanon, Syria, Jordan, Iraq, Yemen and Egypt: section 2A of the Prevention of Infiltration (Offences and Jurisdiction) Law, 1954.

15. It should be noted that even before the amendment was passed the Supreme Court softened this requirement when it ruled that presence in Israel under section 3(a)(3) did not have to be continuous. If a person was in Israel most of the time he could be regarded as a person who was in Israel during the stated period: *Mussa* v. *Minister of Interior* (1960) 16 P.D. 69, confirmed at a further hearing before five justices in *Minister of Interior v. Mussa* (1962) 16 P.D. 2467.

16. Thus, for example, a person born in Israel to a Jewish mother becomes an Israeli citizen by way of return, even if neither his mother or father are Israeli citizens. But see section 2(c)(5) of the Nationality Law, which makes an exception in the case of a person neither of whose parents is registered in the Population Register.

17. It must be pointed out, however, that the connection between the Law of Return and the Nationality Law has importance when it comes to the right of the foreign spouse of a citizen to enter the country and acquire citizenship. Under section 4A, the spouse of a Jew is entitled to the benefits of return, including citizenship. Thus, even the non-Jewish spouse of a Jewish citizen has a right to enter Israel and to acquire Israeli citizenship. The non-Jewish spouse of a non-Jewish citizen must obtain a resident's visa to live in the country and may acquire citizenship only by way of naturalization. The Nationality Law states, however, that the spouse of a citizen may be granted citizenship by naturalization even if he or she does not meet the requirements laid down in section 5.

18. In *Shalit v. Minister of Interior* (1968) 23 P.D. II477, decided before there was a definition of the term "Jew" in either the Law of Return, or the Population Register Law, the Supreme Court held that an Israeli couple were entitled to register their child as a Jew in the Population Register, even though the child was not a Jew under rabbinic law, as the mother was not Jewish and had not been converted. As a result of this decision both the above laws were amended. A "Jew" is now defined as a person who was born to a Jewish mother, or who was converted, and who is not the adherent of another religion. The main argument at the moment revolves around the question of conversion. The court has decided that people may be regarded as Jews under both the above laws if they were converted by any of the streams of Judaism (orthodox, conservative or reform) while the religious parties want a monopoly to be given to orthodox institutions.

19. The binding Hebrew version of the law uses the term "leom." This has been literally translated as "nation." The official Arabic translation of the term "leom" is "kowamia" (nationality).

20. The Hebrew term is "dat" and the official Arabic translation is "din."

21. See *Staderman v. Minister of Interior* (1970) 24 P.D. I 766.

22. See *Ben-Menashe v. Minister of Interior* (1969) 24 P.D. 1105; *Schick v. Attorney General* (1972) 27 P.D. II3.

23. *Ibid*. It should be pointed out, however, that according to section 19E of the Population Register Law the chief registration officer may apply to court for a declatory judgment regarding a person's religion, nation or personal status in order to register details not registered in the population register. In *Tamarin v. State of Israel* (1970) 26 P.D. 1197 Justice Kahan voiced the opinion that this would seem to indicate that the right not to have these details registered is not absolute.

24. See *Shalit v. Minister of Interior* (1972) 26 P.D. 1334; *Shelach v. State of Israel* (1975)31 P.D. II421.

25. The question does not necessarily relate to children, rather than adults. However, an adult would have to change the existing registration, which requires a public document attesting to the change, whereas a child is registered according to the declaration of the parents. As we have seen above, the registrar may not register the religion and nation of a child against the

will of the parents. In *Kaiouf* v. *Minister of Interior* (1977) 32 P.D. 1306, the petitioner had been registered, on the strength of his father's declaration, as being a "Druse" both in his religion and his nation. He petitioned the Supreme Court to order the registrar to register his nation as "Arab." Following the precedent in the *Staderman* case (note 21 *supra)* the Supreme Court held that the petitioner would have to apply to a district court for a declaratory judgment, since only on production of such a judgment would the registrar be empowered to change the existing registration.

26. Note 18 *supra*.

27. "Good faith" in this context would presumably mean an honest belief in the truth of the declaration (as opposed to use of the declaration in order to achieve some other purpose, such as exemption from military service).

28. See *Tamarin v. State of Israel* note 23 *supra.* The applicant was motivated by his ideological objection to the statutory adoption of the rabbinic definition of "Jew."

29. *Ibid.*, 206.

30. See S. Smooha, *The Orientation and Politicization of the Arab Minority in Israel* (Haifa, 1984), 48, who conducted a survey which showed that over half the Arabs in Israel take this view.

31. See P. Shifman, *Family Law in Israel* (Jerusalem: 1984) para. 20.

32. See the opinions of Justice Sussman in the *Shalit, Staderman* and *Ben-Menashe* decisions (notes 18, 21, 22 *supra)* and of Justice H. Cohn in the *Staderman* case (note 21 *supra).*

33. See the opinion of Justice Witkon in *Shelach v. State of Israel*, note 24 *supra*, 430 who stated:

> Registration of an individual, against his will and in the face of his objections, as belonging to the Jewish nation, is nothing but coercion of conscience and a severe infringement of one of the basic rights.

Also see the highly programmatic decisions of Justice Silberg in the *Shalit* case (note 18 *supra)* and of Justice Agranat in the *Tamarin* case (note 23 *supra*).

34. Note 18 *supra.*

4

Control of Land

Jewish ownership and control of land was seen by the Zionist leaders of the pre-state era as the major component of success in the struggle for a Jewish state. Writing in 1904, Menahem Ussishkin, who was to head the Jewish National Fund (JNF) during most of the British Mandatory period, stated that establishment of a Jewish state was dependent on the majority of land in Palestine being in Jewish hands.[1] Avraham Granott (Granovsky), another prominent JNF leader who wrote extensively about the land issue both before and after the state was established, explained in a book published by the JNF in 1936 why Jewish control of land was "quite literally [a question] of life and death for Zionism and the Jewish National Home."[2] Land was needed not only as a resource for settlement of Jews; it was needed in order to transform the social and economic structure of the Jewish people who had been removed "from that vocation which is fundamental for all other peoples and is followed by large numbers of their populations because it is the source of all production: Agriculture."[3]

In order to facilitate acquisition of land in Palestine for the settlement of Jews, in 1901 the Fifth Zionist Congress decided on establishment of the Jewish National Fund (JNF). Before the state was established the JNF operated as the main arm of the Zionist movement in the acquisition of land. Thereafter it continued to operate as a body which performs both functions as a guardian of "Jewish national land" and certain state functions, such as land reclamation and development.

The area of land included in Israel's borders set by the 1949 armistice agreements was 20,255 sq.km.[4] In spite of the tremendous efforts that had been made by the Zionist Movement to purchase land in Palestine only a small proportion of this land was owned by Jewish institutions or individuals.[5] The Government of Israel inherited the lands that had belonged to the British Mandatory government, but most of these were uncultivable, waste lands or roads and forest areas that were at the disposal of the public.[6] Most of the rest, especially the cultivable land, was owned by Arabs.[7]

Thus it was that the Jewish national movement had achieved *sovereignty* over the land, but it did not possess the *ownership* of land[8] needed to pursue its immediate goals: maintaining and expanding agricultural production,[9] bolstering Jewish presence in all parts of the country and settling Jewish immigrants who flocked to the country from all parts of the globe.[10]

The opportunity of extending Jewish control and ownership over land that had been in Arab hands was presented by the flight and expulsion from Israeli territory during the 1947/48 war of the majority of the Palestinian Arab population.[11] The political leadership of the fledgling state had taken the decision that those Arabs who had left would not be allowed to return. This decision not only eased the demographic and security problems that would have been faced by a Jewish state with a large and hostile Arab minority; it also opened the way for a public authority to seize the lands of absentee owners. The armistice agreements signed with the neighboring states in 1949 did not bring peace to the area and certainly did not resolve the conflict between the Jewish and Palestinian national movements. Gaining control over land resources was still

perceived as a crucial means of furthering the Jewish interest in this conflict.[12]

It is not my intention here to review the land issue in the context of the Israel-Arab conflict.[13] The land policies that were adopted through a series of laws and legal arrangements had important implications for the Arabs who remained in Israel. It is with these implications that the present study is concerned.

The land policy of the Zionist movement in the pre-state era was based on purchase of land on the open market by Jewish institutions (mainly the JNF) and subsequent freezing of the ownership so as to ensure that the purchased land would be in Jewish hands in perpetuity. After the state had been established, the law-making power and control of executive powers could be used so as to adopt a method of land acquisition that had not been available when governmental power was in the hands of the British: expropriation. Alongside this method of land acquisition, the policy of freezing ownership once land had been transferred into Jewish hands was maintained. In this chapter I shall review the two stages in land control: expropriation and freezing of ownership.

Land Expropriation

The issue of land expropriation is possibly the most painful in the relationship between the Arabs in Israel and the Jewish state. It is an issue that has caused tremendous resentment and bitterness among Israeli Arabs and has galvanized them into political action. This action reached a peak in the general strike of March 30th, 1976, which culminated in serious confrontation with the police in the course of which six Arabs were killed. March 30th, known now as “land day,” has since become a national day of protest and commemoration of the Arab community in Israel.

Some of the laws that will be described in this chapter are no longer in force, or even if still in force, are no longer applied. In some respects, the expropriation issue is therefore mainly one of historical importance that has no place in a study on the current legal status of the Arabs in Israel. The issue is nevertheless discussed here for a number of reasons. First, as stated, the question of land ownership by exclusively Jewish institutions was a fundamental aim of the Zionist movement. It is important therefore to examine how this issue was dealt with once the state was established. Furthermore, this issue is generally regarded, at least by the Arabs themselves, as the most serious issue regarding their status in Israel.[14] No analysis of their legal status could therefore be regarded as complete without discussion of the legal aspects of this issue. It has also been assumed that the expropriation of land had a strong influence on the patterns of employment in the Arab sector.[15] While recent research doubts how strong this influence really was,[16] the legal regime which at least contributed to this changeor expedited it, remains relevant in understanding the status of the Arabs in Israeli society today. Finally, while at the present time there are no wide-scale expropriations of land, in some cases the legal proceedings connected with the expropriation of, and compensation for, expropriated land continue.[17]

The laws dealing with land expropriation may be divided into a number of categories. The only category that will be considered at any length consists of laws that were passed after the establishment of the state for the specific purpose of expropriating, or facilitating expropriation of, land from Arabs. Before dealing with this category a brief summary will be given of other laws that were used to expropriate land from Arabs, or to prevent its use by Arab owners.

Land Expropriation and Restriction of Use

General Land Expropriation Law. The Land (Acquisition for Public Purposes) Ordinance, 1943, promulgated by the British Mandatory authorities during World War II, is the main general land expropriation law in force in Israel to this day. It has been used to acquire land for public purposes from Jews and Arabs.

The law gives the Minister of Finance the power "where he is satisfied that it is necessary or expedient for any public purpose" to acquire the possession or use of any land for a definite period, and to acquire an easement over land or any other right thereon. "Public purpose" is defined as any purpose certified by the Minister to be a public purpose, and publication in the government gazette of a notice of an intention to acquire land is "deemed to be conclusive evidence that the Minister has certified the purpose for which the land is to be acquired to be a public purpose." A person whose rights in land have been acquired for public purposes is entitled to compensation based, subject to a number of qualifications, on the amount which the land, if sold in the open market by a willing seller, might be expected to realize.

A number of cases in which this law was used to expropriate land belonging to Arabs in order to build towns for Jews have caused great resentment among the Arab population. Land of Arabs in the Galilee was expropriated in the 1950's and in the 1960's in order to build the development towns of Upper Nazareth and Carmiel.[18] When the government decided in 1976 to expropriate 20,000 dunams, 6,000 of which belonged to Arabs, for development of the Galilee, resentment of land expropriations had become so intense amongst the Arab population that the events of land day followed.[19] Since then no new large land expropriations have taken place, though apparently proceedings to complete the 1976 expropriation do continue.[20]

Land Laws with Expropriatory Effect. The Land (Settlement of Title) Ordinance, 1928, regulates settlement of land rights in areas in which land has not been properly registered. It provides that all land in which no private rights are established is to be registered in the name of the state. This has meant that lands that had in fact been regarded as village lands to be used for grazing, extensive agriculture and even residential purposes were registered in the name of the state. Under the Land Law, 1969 the right to use some of these lands for grazing and other common uses was also affected by narrowing the definition of lands that had been regarded as *metrouka* (public lands) under the Ottoman land laws.[21]

The State Property Law, 1951, provides that all land of the Mandatory government shall be registered in the name of the state.

During the time of the British Mandate, the land settlement officer who was empowered to settle rights in land, at times registered land surrounding villages in the name of "the High Commissioner for the time being on behalf of the village of…" In some cases a comment was added in the servitudes' column that "Registration is being made in the name of Government as there is no legal body to represent the village."[22]

In the case of *Yafia Local Council v. State of lsrael*[23] the meaning of this registration was the issue. The government argued that under the State Property Law, 1951, the property should simply be registered in the name of the State of Israel, (without the addition "on behalf of the village of Yafia"). The local council of Yafia argued that the land should be registered in its name.

There was an interesting difference in perspective on this peculiar type of registration. The government argued that such registration had in fact been carried out so as to remove lands so

registered from lands available for purchase by Jews in accordance with Article 6 of the Mandate over Palestine, that obligated the Mandatory Power to facilitate Jewish immigration and settlement on state lands and waste lands not needed for public purposes. The local council argued that the land actually belonged to the village, but could not be registered in its name as the village was not at the time recognized as a legal entity. Once the village gained the status of a local council the land should be registered in its name.

The Supreme Court was not prepared to decide which version of history was the correct one, and it rejected the arguments of both sides. It accepted the government's claim that the State of Israel should replace the High Commissioner, but not that it could free itself of the registration "on behalf of the village of Yafia." It rejected the local council's argument, since the type of land involved — *miri* — was not land which could be registered in name of a local authority. Thus the land was registered in the name of the "State of Israel on behalf of the village of Yafia." What rights this registration gives the villagers is not at all clear.

According to the Ottoman Land Law that remained in force in Israel until it was repealed by the Land Law, 1969, a person who cultivated *miri* land, the most common form of rural land, for a period of ten years was entitled to title in that land. The Prescription Law, 1958 extended this period to fifteen years, for land title in which had not been settled, and twenty-five years for title-settled land. The law also provides that if a person had begun to hold possession after March 1, 1943, the first five years after the law came into force would not be taken into account. Section 29(b) of the law stipulates that the new provisions apply *even if the period of years laid down in the Ottoman Law had elapsed before the law came into effect.* Thus a person who had already acquired title through possession under the Ottoman law could be deprived of that title by the extension in the prescription period and its application even if the original period had expired.[24]

It has been claimed that by the changes effected in the prescription period for land 205,000 dunams of land were in effect expropriated from Arabs.[25] The present writer has no way of corroborating or refuting this figure. It seems unlikely, however, that there could be definite figures on the amount of land in which Arabs would have acquired rights (of title or even protected possession) had the period of years remained unchanged. Possibly the figure relates to the amount of land in which Arabs *claimed* rights on the ground of possession and which was nevertheless registered in the name of the state.

Security and Emergency Laws. Regulation 125 of the Defence Regulations, 1945 authorizes the military commander to declare land to be a "closed area." Once so declared no person is permitted to leave or enter the area without special permission.

In the 1950's regulation 125 was used in order to restrict access of Arabs to their lands.[26] As we shall see below, it was sometimes used together with the Validation of Acts and Compensation Law in order to facilitate expropriation of land under that law.

In recent years regulation 125 was used to maintain closure of an area known as "Area 9."[27] This area, in the vicinity of the villages of Sakhnin, Arrabe and Dir-Khana, was used by the British for military training between the years 1942–1944. From 1952–1956 the Israel Defence Forces also used the area for occasional military exercises. Movement of the villagers on their lands in the area was only restricted during the exercises and compensation was paid for damage caused to crops. In 1956 the Chief-of-Staff issued an order under regulation 125 closing the whole area — including an area which included about 29,000 dunams of agricultural land. This order caused a public outcry as a result of which the authorities backed down. The area remained a closed area but villagers were given permits to enter the area in order to work their lands, save for the days when military exercises were going on. This *modus vivendi* continued until

February, 1976, when the heads of the villages received notice from the local police that "Area 9" was a closed area and that entrance was forbidden. Following this notice an arrangement was worked out according to which the area would be divided into two zones: the one, smaller, zone in which the old *modus vivendi* would continue; the other, larger, zone to which entrance would be allowed only by special permit. Thus the access of the villagers to all their lands was limited. Later, the limitations were somewhat relaxed and a non-formal arrangement worked out which allowed access to most of the village lands when exercises were not in progress.[28]

"Area 9" was a source of great resentment among Arabs in the Galilee. In August, 1986 a ministerial committee decided that the area would no longer be used for military purposes and that the closed lands would be returned to the villagers for cultivation.

Other emergency laws used in the 1950's were the Emergency (Security Areas) Regulations, 1948, which were allowed to lapse in 1972,[29] the Emergency Regulations Concerning the Cultivation of Waste Lands and the Use of Unexploited Water Resources, 1949 that were formally repealed in 1984, and the Emergency Land Requisition (Regulation) Law, 1949, that only applied for a restricted time.

Nature Protection Lam. It has sometimes been claimed that implementation of nature protection laws has had an "expropriatory effect" on use of lands held by Arabs.[30] It is hard to assess to what extent these claims are substantiated. It is especially difficult to gauge whether implementation of such laws has effected Arabs any more than Jews in their use of land. To complete the present picture of the land issue, brief mention must be made of two nature protection laws which, judging from legal sources, may have had an expropriatory effect on Arab-owned land.

According to the Forests Ordinance, 1926 the Minister of Agriculture may authorize a forest officer to take under his protection forest lands which are private property in respect of which it appears that the destruction of trees is diminishing or likely to diminish the water supply, is injuring the agricultural conditions of neighboring lands, or is imperilling the continuous supply of forest produce to the village communities contiguous to such lands. So long as any forest land is under the protection of the Government it shall be deemed to be a forest reserve, to which the numerous restrictions on land use in such reserves apply.

In the court decisions one comes across cases in which claims by Arabs to rights of use in land have been met by the argument that the land is part of a forest reserve (generally declared as such before establishment of the state).[31]

Under the National Parks, Nature Reserves and National Sites Law, 1963 the Minister of Interior, on the recommendation of the Minister of Agriculture or in consultation with him, may declare a nature area to be a nature reserve. Once so declared restrictions on land use apply to land in the reserve.[32] It has occasionally been claimed that declaration of an area as a nature reserve has led to restrictions on use of land by Arab landowners.[33]

Special Land Expropriation Laws

While the above laws were certainly used to expropriate land from Arabs or to place restrictions on its use, there can be little doubt that the major expropriations of land belonging to Arabs were carried out under two laws that were specifically passed for this purpose. These two laws require somewhat more detailed discussion.

Absentees' Property Law, 1950. The declared object of this statute was both to protect the property of absentee owners, and to facilitate use of this property for the development of the economy and the state.[34] The statute directs the Minister of Finance to appoint a Custodian for Absentees' Property and provides that

> all absentees' property is hereby vested in the Custodian as from the day of publication of his appointment or the day on which it became absentees' property, whichever is the later date. (Section 4(a)(1)).

The law empowers the Custodian to take care of absentees' property, manage it, and expel occupants, who in the Custodian's opinion, have no right to occupy it. It does not give an absentee the right to return of his property. Instead it gives the Custodian the power, in his sole discretion, and on the recommendation of a special committee, to release vested property. Where the vested property has been sold "the property sold becomes released property and passes into the ownership of the purchaser and the consideration which the Custodian has received becomes held property." (Section 28(c)).

Given the far-reaching powers of the Custodian, and the severe consequences, vis-à-vis a land-owner, of his property being deemed "absentees' property," the most important provision in the statute is the definition of the term "absentees' property." And it is in this very provision that the "catch" in the statute lies.

Section 1 of the statute defines the term "absentee," as follows:

(b) 'absentee' means —

(1) a person who, at any time during the period between the 16th Kislev, 5708 (29 November, 1947) and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, (5708–1948), that the state of emergency declared by the Provisional Council of Stateon the 10th of Iyar, 5708(19th May, 1948) has ceased to exist, was the legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who at any time during the said period —

(i) was a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans-Jordan, Iraq or the Yemen, or
(ii) was in one of these countries or in any part of Palestine outside the area of Israel or
(iii) was a Palestinian citizen and left his ordinary place of residence in Palestine

(a) for a place outside Palestine before the 27th Av, 5708 (1st September, 1948); or
(b) for a place in Palestine held at the time by forces which sought to prevent the establishing of the State of Israel or which fought against it after its establishment;

(2) a body of persons which, at any time during the period specified in paragraph (1), was a legal owner of any property situated in the area of Israel or enjoyed or held such property, whether by itself or through another, and all the members, partners, shareholders, directors or managers of which are absentees within the meaning of paragraph (1), or the management of the business of which is otherwise decisively controlled by such absentees, or all the capital of which is in the hands of such absentees;

Examination of this definition reveals that a person may be an "absentee" under the law, even

though he was present in Israel when his property was deemed to have become "absentees' property." There are, in other words, persons who have become known as "present absentees."

Status as a "present absentee" is not merely theoretical, since the law defines "absentees' property" as property "*the legal owner of which at any time… [after] 29th November, 1947… was an absentee.*"[35] In other words, if a person is an absentee at any time, his property becomes absentees' property, whether he is still an absentee or not.[36]

There is one exception to the above rule. The law recognizes the right of a person, who may be defined as an absentee, to confirmation that he is not an absentee, and therefore to release of his absentee property, if the Custodian is of the opinion that he left his place of residence —

(1) for fear that the enemies of Israel might cause him harm, or
(2) otherwise than by reason or for fear of military operations, (sec. 27).

The onus is on the person seeking confirmation that he is not an absentee to prove that the reason for leaving his residence was one of the reasons which entitle him to such confirmation.[37] On a number of occasions the Supreme Court did interfere in the decision of the Custodian and directed him to grant confirmation of non-absentee status.[38] It is fair to assume, however, that the majority of Arabs who left their homes during the period following the Partition Resolution of November 29th, 1947 did so "by reason or fear of military operations." Thus, the majority of the "present absentees" are not entitled to repeal of their absentee status.

All in all it has been claimed that 75,000 persons, who remained in the country after the war, became "present absentees."[39]

Under the original statute, the Custodian had the power, subject to the recommendation of a special committee, to release absentee property to its owners. However, judging by one case which came before the Supreme Court, the said committee was reluctant to recommend release of land needed for agricultural settlement and the court refused to interfere in the policy of the committee.[40]

The law forbids sale of absentee property, subject to one crucial exception: the property may be transferred to a Development Authority to be established under a law of the Knesset. This Development Authority was indeed established under the Development Authority (Transfer of Property) Law, 1950. On September 29th, 1953 an agreement was made between the Development Authority and the Custodian of Absentee Property under which all the absentee property held by the Custodian was transferred to the Development Authority.[41] Henceforth, under section 28(c) of the law, the "absentee property" held by the Custodian became the consideration received for the property. An absentee who applied for release of his property was entitled only to the consideration.[42]

A law passed in 1973 replaced the system of consideration with a scheme of compensation.[43] Under this law, absentees no longer have the right to apply for release of their property; their only right is one to compensation.

Finally, it should be mentioned that the Absentees' Property Law did not apply only to land held by private individuals. Under section 1(d) it also applied to property of the Moslem Waqf, whose administrators had become absentees.[44] Under an amendment to the Absentees' Property Law, some of the Waqf land which had passed to the Custodian was later released to the Moslem community in towns in which "trust committees" were appointed by the government.[45]

Land Acquisition (Validation of Acts and Compensation) Law, 1953. In the wake of the War

of Independence and the political and social upheaval which accompanied and followed it, large tracts of land owned by Arabs were taken over either for military purposes or for use by existing or newly established Jewish settlements. The declared object of this statute was to "validate" these acts and at the same time to provide for compensation to be paid to owners of land which had been taken over.[46]

The law authorized the Government to delegate a minister for its administration. It then goes on to provide:

> 2. (a) Property in respect of which the Minister certifies by certificate under his hand —
>
> (1) that on the 6th Nisan, 5712 (1st April, 1952) it was not in the possession of its owners; and
> (2) that within the period between the 5th Iyar, 5708 (14th May, 1948) and the 6th Nisan, 5712 (1st April, 1952) it was used or assigned for purposes of essential development, settlement or security; and
> (3) that it is still required for any of these purposes — shall vest in the Development Authority and be regarded as free from any charge, and the Development Authority may forthwith take possession thereof.

The government delegated the Minister of Finance to administer the law and during the period of one year provided for under section 2(b) of the law for issuance of certificates, certificates were issued in relation to large quantities of land.

The conditions laid down by the said law for expropriation of land, as interpreted by the Supreme Court, were harsh. The Minister had no duty to grant a hearing to a land-owner before issuing a certificate in respect to his land and the certificate was regarded as conclusive evidence that the conditions of the law had been fulfilled.[47] Furthermore, the possession of an owner, to avoid application of the first condition, had to be actual possession.[48] If the owner was not in actual possession, for any reason whatsoever, and the other conditions also applied, his property could be expropriated. Even if access of the owner to his land was restricted by an order issued pursuant to regulation 125 of the Defence Regulations closing the area in which he resided, the Minister could certify that the owner was not in possession.[49]

As in the case of absentee property, land expropriated under the Validation of Acts and Compensation statute did not have to be private land. Waqf property was also subject to expropriation.[50] It has been claimed that 70,000 dunams of Waqf land were expropriated under this law.[51]

Compensation. Both the Absentees' Property Law and the Validation and Compensation Law provide for payment of monetary compensation to land-owners whose land was expropriated. The latter law provides that where the property was used for agriculture, and was the main source of livelihood of an owner who has no other land sufficient for his livelihood, the Development Authority is obligated, on the owner's demand, to offer him alternative land, either for ownership or for lease, as full or partial compensation. In such a case, a special committee determines the category, location, area, terms of lease and value of the leased property.[52] There is no obligation to provide land of the same kind as the expropriated land.[53]

Significant changes have been made over the years in the rate of compensation and in the linkage of unpaid compensation so as to mitigate the effect of inflation.[54] According to the latest figures released by the Israel Lands Administration, by the end of March, 1988, 14,364 persons

had claimed compensation under the two statutes. Qaims have been settled with respect to 197,984 dunams of land. NIS. 2,724,137 have been paid over the years in compensation. 53,710 dunams of land have also been given as compensation under the Validation and Compensation Law.[55]

The Extent of Expropriated Land Under the Above Statutes. What is the extent of the land expropriated under the above two statutes? The official government figure for rural land which became vested in the Custodian for Absentees' Property is 3.25 million dunams.[56] According to figures published by the Israel Lands Administration 1,225,174 dunams of land were acquired under the Validation and Compensation law, 325,000 dunams of which had been privately owned.[57] It may be assumed, however, that part of the land acquired under the latter law was in fact absentees' land (of real or present absentees) that had also been vested in the Custodian under the Absentees' Property Law. The really difficult question, and the one most relevant for the present study, is how much of the expropriated land belonged to Arab residents of the state. No figures for this are available. One writer has claimed that the figure reaches one million dunams,[58] but he gives no basis for this assessment. In the absence of authoritative figures one cannot assess the real figure. It is clear, however, that the effect of these laws on the land reserves of many Arab villages was substantial.[59]

Freezing of Land Ownership

During the pre-state era Jews could not gain control over land resources suitable for settlement unless the economy were freed so as to enable them to purchase land on the open market. Maintaining control over that land once it had been acquired by Jewish institutions, however, required that Jewish ownership be frozen.[60] Thus it was that the Zionist movement strenuously opposed legal restrictions on sale of land to Jews, and at the same time laid down a land policy that forbade sale of land that had been purchased by Jewish national institutions. This policy, which furthered public rather than private ownership of land, was consistent both with the dominant collectivist trends in the Zionist movement and with Jewish tradition according to which "the land shall not be sold in perpetuity" (Lev. 25, 23).

Following the land expropriations under the Absentees' Property and Compensation and Validation Laws described above, and the inheritance by the State of Israel of all lands previously held by the British Mandatory Government, more than 90 per cent of the land in the country was owned by three bodies: the state, the Development Authority and the Jewish National Fund (JNF), that had been the main arm of the Zionist movement for acquisition of land in Palestine before 1948. What is the status of these lands? What is the relationship between the JNF land, which is held as the eternal property of the Jewish people, and land held by the Jewish state? The answer to these questions is provided in special legislation passed in 1960.

The Basic Law: Israel Lands states that the ownership in "Israel lands," namely lands in Israel of the state, the Development Authority or the JNF, shall not be transferred by sale or in any other manner.[61] Under the Israel Lands Administration Law, 1960 the Israel Lands Administration (ILA) was established as a government authority whose task is to administer all "Israel lands."[62]

With the ownership in Israel lands frozen, the rights of possession and use in these lands is regulated through leases administered by the ILA. The issue that interests us here is how this

system of land leases affects the Arab residents of Israel.

Israel lands include both JNF lands and state lands (which, for all intents and purposes, include Development Authority lands). In discussing the issue of land leases a distinction has to be made between these two categories of Israel land.

Jewish National Fund Land

In order to appreciate the special problems associated with use of JNF land the background and history of the JNF must be briefly reviewed.

JNF Background and History. The fifth Zionist Congress, meeting in Basle in 1901, decided on establishment of the JNF to purchase land in Palestine and Syria for the settlement of Jews. All property of the fund would become "the perpetual property of the Jewish people." While the JNF was established as an official organ of the Zionist Organization (later the WZO) it was separately registered in London as a limited company.[63]

As an organ of the WZO, the status of the JNF was determined by the World Zionist Organization and Jewish Agency Status Law, 1952 that applies to all institutions of the WZO. However, the lands purchased by the JNF were registered in the name of the limited English company. The Jewish National Fund Law, 1953 was passed so as to facilitate transfer of title in all these lands to an Israeli company. The statute authorized the Minister of Justice to approve the memorandum and articles of a new Israeli company and stated that if this company were to reach an agreement to that effect with the existing English company, upon approval of the above documents by the Minister and their publication in the official government gazette, all land in Israel registered in the name of the English company would be registered in the name of the new company. The memorandum and articles of association of the Israeli JNF company were duly approved and published under the terms of the statute[64] and JNF lands in Israel were subsequently registered in the name of the newly-formed Israeli company, called the *Keren Kayemet le'Yisrael*.[65]

The memorandum of the new company, approved by the Minister of Justice under the 1953 law, states the objects of the JNF. The main object, as defined in section 3a of the Memorandum, is

> purchasing, acquiring by lease or exchange, receiving by lease or in any other way, lands, forests, rights of possession or easements and all other such rights, as well as immovable property of any sort, in the designated area (which includes the State of Israel and any area controlled by the Government of Israel) *for the purpose of settling Jews on the said lands and property*, (emphasis added)

The memorandum contains a long line of objects, such as "leasing part of its lands under conditions decided by it," and using monies received from contributions "to further… any charitable aim which in the opinion of the company might be beneficial, directly or indirectly, to people of Jewish race, religion or descent" but also includes the following proviso:

> provided that the object stated in sub-section a. of this section shall be regarded as the main object of the company, while the powers listed in the following sub-sections shall be carried

out so as to assist, in the opinion of the company, in achieving the said object.

In other words, acquiring rights in land for the purpose of settling *Jews* is the main object of the JNF. While it is not expressly stated in the memorandum, this has been taken to mean that lands belonging to the JNF may not be leased, at least on a long-term basis, to non-Jews.

From the time of its creation until establishment of the state the JNF concentrated on purchase of land in Palestine. When the state was established it owned 936,000 dunams of land in the territory of the state,[66] most of which had been leased to Jewish agricultural settlements.[67]

As seen above, the law relating to absentee property permitted the Custodian of Absentee Property to sell absentee property to the Development Authority that was specially established under the Development Authority (Transfer of Property) Law, 1950. This law provides that the Development Authority is permitted to sell its property to one of four bodies: the State of Israel, the JNF, local authorities and an institution for settling landless Arabs. Sale of land to local authorities is restricted to urban land within their local jurisdiction (on which the JNF must be given the right of first refusal) and the institution for settling landless Arabs mentioned in the statute was never established. Rural land could therefore be sold only to the state or to the JNF.[68]

Even before the Development Authority had been formally established the government decided to sell most of the absentees' rural land to the JNF. Under one agreement signed in January, 1949 1,101,942 dunams were sold to the JNF, 98.5 per cent of which were rural lands.[69] In October, 1950another agreement was reached according to which a further 1,271,734 dunams were sold to the JNF, practically all of which was rural land.[70] Thus it was that by a combination of expropriation and land transfers over two million dunams of rural land that had belonged to Arabs, some of whom were still resident in the state as "present absentees," were placed in the hands of an institution whose declared policy was that its land should not be made available to non-Jews.

Under the agreements mentioned above, a large proportion of the rural lands that had been expropriated from Arabs who were real or present absentees were sold to the JNF, which thereby increased its holdings of land from just under one million dunams to three-and-a-half million dunams.[71] At the same time, by acquiring the expropriated Arab lands that had not been sold to the JNF, waste and barren lands, and public lands formerly owned by the Mandatory Government the state had become the largest landowner in the country.[72] By the late 1950's over 90 per cent of the land in Israel was Israel land. The JNF no longer needed to acquire lands, and its functions became land reclamation, land development and afforestation.

Management of JNF Land. The 1960 legislation under which all Israel lands were to be administered by the ILA was preceded by extensive negotiations between the government and the JNF. After the legislation was enacted a formal covenant was signed between the government and the JNF which reflected the agreement that had been reached in those negotiations.[73] The declared aim of the covenant was to do away with the overlapping in dealing with public lands, now that the State of Israel had become the owner of most of the land in Israel and the JNF's main function was no longer acquisition of lands but land reclamation. In return for agreeing that its land would be administered by a government body, control over rural land development and afforestation was placed in the hands of a special JNF body, the Land Development Authority (not to be confused with the statutory Development Authority). The Israel Lands Council, which under law was to be appointed by the government to set land use policy, would be comprised of thirteen members, seven of whom would be government officials and six of whom nominees of the JNF. The Land Development Authority would also be managed by a board of thirteen, but on

this board the majority of seven would be JNF appointees and the minority of six, government nominees.[74] Furthermore, the government undertook to consult the JNF before appointing the ILA director.

The covenant lays down the policy both for administration and development of state lands. All state lands must be administered according to the principle that land is not sold, but is leased according to the land policy fixed by the Israel Lands Council. *JNF lands must abo be administered in accordance with the memorandum and articles of association of the JNF*. Land development policy must be determined by the board of the Land Development Authority "according to the agricultural development plan of the Minister of Agriculture."

Approximately 19 per cent of the Israel lands administered by the ILA are JNF lands,[75] which, according to the JNF covenant, must be administered in accordance with the memorandum of the JNF. As seen above, the accepted interpretation of this memorandum is that JNF land may not be leased (at least on a long-term basis) to non-Jews. Thus the ILA administers the JNF land according to a policy which forbids leasing that land to Arabs. This policy is implemented through clauses in all lease agreements which forbid subletting or transfer of the lease unless prior consent is received from the ILA. If the prospective new lessee is non-Jewish, consent may be withheld.

The legality of the ILA's adherence to JNF policy has never been ruled on by a court in Israel. In some cases in which Arabs have applied to lease JNF land in urban areas the ILA has avoided confrontation by adopting a "legal device" aimed at circumventing the restriction on leasing such land.[76] This involves transferring the JNF land to the Development Authority (a transaction that is allowed under the Israel Lands Law, 1960). The land, which, as Development Authority land, is not bound by the restriction on JNF land, is subsequently leased to the Arab applicants.

Would the refusal of the ILA to allow leasing of JNF property to Arabs stand up in court? Would it not offend the principle that a governmental organ may not discriminate between citizens on the basis of race, religion or national origin unless expressly authorized to do so by statute? While it is not possible to give an authoritative answer to this question, I shall point out the likely arguments to be made for and against the legality of the said policy.

On the one hand, it may be argued that the JNF is not a body established or even directly controlled by the state. It is an organ of the WZO which remains a voluntary organization. There is no restriction on the setting up of voluntary organizations which aim to further the interests of one religious, ethnic or national group. Thus, for example, a religious order or institution may restrict use of its property to members of the particular religious persuasion. Property of the Moslem Waqf may be devoted to use by Moslems. According to this approach there is no reason, even after the state was established, why a voluntary organization may not continue to pursue its aim of furthering the interests of Jews (just as there is no reason why an organization may not further the interests of other groups, however defined—Arabs, Moslems or Christians). It is indeed true that the JNF lands are *administered* by a government organ, but they remain the sole property of the JNF. If the JNF itself is entitled to lease its land to Jews alone, there is no reason why the ILA, which acts merely as an agent of the JNF, may not do the same on its behalf. One may draw a parallel between the public custodian, who may administer property left by a will for the enjoyment of one particular group according to the terms of that will, and the ILA, which acts as a custodian of JNF property.

Furthermore, by including JNF land among the Israel lands, without expropriating it, or changing the memorandum of the JNF which was approved under the JNF law of 1953, the Knesset must be seen to have expressly authorized the ILA to administer that land according to

the memorandum. In the Knesset debate on the 1960 legislation there is indeed support for the view that members were conscious of the restrictions that would be imposed on use of JNF land, as opposed to other categories of Israel land.[77]

The counter-argument is based on the following points:

1. The JNF has in actual fact lost its status as a purely voluntary body and must be regarded as an arm of the government. The factors which led to this change in the character of the JNF are the special statute regulating the formation of the new JNF company; the inclusion of JNF lands amongst the lands defined by law as Israel lands; the legislative provision that the JNF lands are to be administered by a statutory body; the handing over of sole authority to deal with what are essentially state functions—afforestation and land preparation—to the JNF; the conclusion of a covenant between the government and the JNF which, inter alia, gives the JNF status in appointing members to a statutory body whose function is determining the land policy of the state, and the granting the JNF exemption from a wide range of taxes.

2. Administration of JNF lands is in the hands of a public body acting under law. The covenant between the JNF and the government does provide that the JNF lands will be administered in accordance with the memorandum of the JNF which declares that these lands are to be used for the settlement of Jews, but the terms of a covenant between the government and another body cannot change a basic principle of Israeli constitutional and administrative law, viz., the principle of equality according to which a body exercising public functions under law may not discriminate between citizens on the basis of their religion or national origins. One may even go further and argue that, according to the opinion of the Attorney General on the Kiryat Arba coalition agreement discussed in chapter 1 above, insofar as the object of the said clause in the covenant is to obligate the ILA to discriminate between Jews and non-Jews in the administration of JNF lands, the clause should be regarded as invalid.

3. The assumption of the above argument is that all JNF lands were purchased by the JNF on the free market. This assumption is not well-founded. As seen above, many of the JNF lands[78] were expropriated from Arabs and thereafter sold to the JNF. Although the JNF paid for these lands it is hard to see how the government, which is no doubt bound by the equality principle in the way it deals with land, can effectively suspend operation of that principle by transferring the land to another public body.

It is not my intention here to express an opinion on the chances of each argument to be accepted in court. However, the legal position can be summarized as follows:

1. JNF lands are regarded, under law, as “Israel lands”;

2. According to the memorandum of association of the JNF, approved under law by the Minister of Justice, JNF lands are meant for the settlement of Jews. JNF policy is therefore not to lease these lands to non-Jews, at least not on a long-term basis;

3. All “Israel lands” are administered, under law, by a statutory body, the ILA;

4. According to the covenant between the government and the JNF, the JNF lands must be administered according to the JNF memorandum;

5. The legality of the above arrangement, which allows discrimination between Jews and Arabs by a statutory body, has never been confirmed by a court.

State Lands

The legal arrangements described above, which prevent leasing of land to non-Jews, apply only to JNF lands. Under the principle of equality that binds all public authorities the ILA may not refuse to lease other Israel lands, i.e., lands belonging to the state or to the Development Authority, to Arabs. In practice such lands are indeed leased to Arabs, mainly for urban use, but they are also sometimes leased to Arabs for agricultural use too, especially in the Negev where fairly large tracts of land have been leased to Bedouin as part of a government policy to regulate the status of Bedouin land rights in that area.

The area of land outside the Negev leased to Arabs for agricultural use is limited. There are a number of reasons for this. First, most of the agricultural land in the hands of private individuals is owned by Arabs.[79] This may in part explain why the share of public land in private farms (as compared to collective and co-operative villages) is about 70 per cent in the Jewish sector and only 50 per cent in the Arab sector.[80] Second a substantial proportion of the publicly owned cultivable land belongs to the JNF.[81] The reserves of non-JNF land available for lease are limited. Thirdly, for reasons that will be explained below in the chapter VI, new agricultural settlements have not been established in the Arab sector, while in the Jewish sector much of the agricultural land that was not leased to existing settlements is leased to new settlements. Finally, most oftheagriculturallandisleasedtoco-operativeandcollectivesettlements, *kibbutzim* and *moshaoim*, that are run by Zionist settlement movements, and Arabs are effectively prevented from leasing such lands.[82]

The leasing policy of the ILA for agricultural land is based on two types of leases: single-*nakhala* leases and non-*nakhala* leases.[83] Both types contain clauses that ensure that land leased to Jews will remain in Jewish hands.

The "singe-*nakhala* agreement" is used for long-term leases of land. In recent years this type of lease is used almost exclusively for leasing land to members of *moshaoim* (co-operative settlements in which members work their own plots). Like all other lease agreements of the ILA, it stipulates that the plot may not be sublet or transferred without prior permission of the ILA. A specific stipulation is also included that permission of the ILA will not be granted unless the new candidate is a "qualified lessee," who is defined in the agreement as a person permitted, under the decisions of the Israel Lands Council, to be the lessee of a *nakhala* in Israel lands, and who is not the owner of another *nakhala.* Decisions of the Israel Lands Council provide that a "qualified lessee" must receive the approval of a special committee made up of representatives of the settlement movement to which the particular settlement belongs, the Jewish Agency, if the settlement is still sponsored by it, and the head of the *moshav's* council.[84] In effect this means that the chance of an Arab being recognized as a "qualified lessee" is negligible.

There are various kinds of *non-nakhala* leases. One such lease is for land leased to collective or co-operative settlements themselves, rather than to members of those settlements. The lease incorporates a tripartite agreement, the parties to which are the ILA, the Jewish Agency and the particular settlement. The formal lessee is the Jewish Agency which, the agreement states, "under the WZO-Jewish Agency Law, 1952 and the covenant made thereunder, deals with settling Jews in the state on Israel lands." The Jewish Agency undertakes to use the land to develop the particular settlement (either a *kibbutz* or a *moshav*). Neither the Jewish Agency nor the settlement may transfer their rights under the agreement without the permission of the ILA and the agreement specifically states that the ILA will not approve use of the land by anyone who is not a member of the settlement. In the case of a *moshav* the agreement even states that a list of the members of the *moshav* is appended to the agreement and that any change in the membership requires the permission both of the Jewish Agency and of the ILA.

Most of the land leased under *non-nakhala* agreements is leased for short terms of one to three years, where the lease is tied to a specific crop. New leases must be approved by a district leasing committee that includes representatives of the Jewish Agency Rural Settlement Department, the *kibbutz* and *moshav* movements and the JNF Land Development Authority. The committee may not approve a lease for more than three years. Any lease of agricultural land for a period of more than three years must be in accordance with the policy set by the Agricultural Planning Authority. It must also be approved by a special Land Committee of that authority, that is comprised of representatives of the Ministry of Agriculture, the Jewish Agency, the ILA and the settlement movements.[85]

In summary: there are no *legal* impediments to lease of non-JNF Israel lands to Arabs. Such lands are indeed leased to them both for residential and agricultural use. However, institutional constraints of the land-lease system restrict the extent of land leased to Arabs, especially in the agricultural sector where the collective and co-operative settlements established by the Zionist settlement movements enjoy a favored status.

Agricultural Settlement Law, 1967

During the 1960's Jewish settlements which had been established on land leased to them by the ILA (which was often, but by no means always, JNF land) began subletting part of the land to Arabs, many of whom had lost their lands by one of the various methods of expropriation. While such subletting was in contravention of the lease agreements, the ILA found it difficult to act against such settlements. In an article published in the daily *Ha'aretz* in October, 1966 entitled, in a play on words, "*Keren Kayemet Le Yishmael*" — Ishmael's National Fund, the writer quoted from interviews with senior ILA and JNF officials who spoke of "Arab farmers returning to work on land which had been expropriated or redeemed" and of "*moshavim* and even *kibbutzim* which sublease lands which were expropriated or redeemed with the help of Zionist funds, in ways which are always disguised so as to prevent us from acting, so that only a clear law will solve the problem." The writer concluded the article with the following statement:

> If this process is not halted and thecustom of handing land over to Arab cultivators is not terminated, the program of developing the northern area will become an empty vision.

A short while after this article was published, the government introduced the "clear law" in the Knesset. This law, the Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, forbids a person in possession, under a lease agreement or license, of agricultural land which is Israel land to engage in "irregular practices" in respect to that land. It also forbids such a person who has been granted a water allocation to transfer that allocation or to allow another person to use his allocation. Section 1 of the law defines the term "irregular practices." These include:

> 1) transferring or conveying any right the person in possession has in the land or part thereof, or placing a charge on that right; save that work by hired workers or cultivation by independent contractors at the expense of the person in possession shall not be regarded as an irregular practice;
>
> 2) forming a partnership in the land or its produce, except for a partnership between

residents of the same settlement if the partners share the work equally;

3) granting a right to reside on the land.

According to section 7 of the law, the rights of a person in possession of Israel land who engages in irregular practices may be forfeited. The land is then returned to the person who gave the land to the former possessor and that person may not thereafter lease the land to anyone else without the consent of the ILA.

This law bolsters the legal and administrative structures under which agricultural land outside the Negev is leased almost exclusively to Jewish collective and co-operative settlements. It makes sure that Jewish lessees will not in fact allow use of the land by Arabs.

Notes

1 See the Ussishkin Book (1939) 104, quoted in B. Kimmerling, *Land Conflict and Nation Building: A Sociological Study of the Territorial Factors in the Jewish-Arab Conflict*, (Department of Sociology and Social Anthropology, Hebrew University of Jerusalem, 1976) 59.

2 See A. Granott, *The Land Issue in Palestine* (Jerusalem, 1936), 12.

3 *Ibid.*, 14.

4 This is the official figure given in Israel Lands Administration, *Report for 1961/62*, (Jerusalem, 1962), 7. And cf. E. Omi, *Land in Israel: History, Policy, Administration, Development* (Jerusalem: Jewish National Fund, 1981) 43 who gives the figure as 20,550 sq.km.

5 See A. Granott, *Agrarian Reform and the Record of Israel* (London: Eyre and Spottiswoode, 1956), 28. Granott gives the total area of land owned by Jews as 1,734,000 dunams (a dunam is approximately one quarter of an acre; there are 1000 dunams in 1 sq.km.). The breakdown is as follows: JNF—933,000; PICA (which held the land purchased by Baron Edmond de Rothschild) — 435,000; private purchasers — 366,00. To this could be added approximately 195,000 dunams of state land that were held by Jews on various tenancies: see J. Ruedy, "Dynamics of Land Alienation" in I. Abu-Lughod (ed.), *The Transformation of Palestine: Essays on the Origin and Development of the Arab-Israeli Conflict* (Evanston: Northwestern University Press, 1971) 119,134.

6 See Granott, *ibid.*, 90.

7 *Ibid.*, 92. Orni (note 4 *supra*, 43) gives the breakdown of Arab-owned land as follows: 1,373,000 dunams of arable land; 1,700,000 dunams that had been tilled infrequently and haphazardly by Bedouin and 2,720,000 dunams of totally waste and barren surfaces. This figure is also cited by Granott (note 5 *supra*, 89) who maintains, however, that the total figure should be considerably reduced since there was doubt as to title in waste lands and lands in the Northern Negev. On the other hand, the UN Conciliation Commission for Palestine estimated that more than 80 per cent of the land in Israel had belonged to Arab refugees, and that more than 4,574,000 dunams of this land were cultivable: see Ruedy, note 5 *supra*, 135.

8 The distinction between sovereignty and ownership over the land is developed by Kimmerling, note 1 *supra*, 35–44..

9 As a large part of the agricultural land in the territory that was incorporated in Israel's armistice borders had been cultivated by Arabs, the exodus of most of the Arabs resulted in a large drop in agricultural production in the period immediately following the establishment of the state: see Granott, note 5 *supra*, 93–96. Practically all the rural land that belonged to the JNF and other Jewish institutions and individuals was already leased out to agricultural settlements.

10 According to official Jewish Agency figures, between May 1948and the end of 1952 over 700,000 new immigrants entered Israel: see *The New Standard Jewish Encyclopedia* (Jerusalem: Massada, 1970) 74.

11 As stated in the introduction I have no intention here of examining the detailed causes for the departure of most of the Arabs from Israeli territory and have accepted the conclusion of Benny Morris that there was not one cause, but that it "was born of war, not by design, Jewish or Arab… [and] was largely a byproduct of Arab and Jewish fears and of the protracted, bitter fighting that characterized the first Israeli-Arab war." See Introduction, note 16.

12 See Kimmerling, note 1 *supra*, 131–243.

13 This issue has been extensively reviewed by others: see D. Peretz, *Israel and the Palestinian Arabs* (Washington D.C.: The Middle East Institute, 1958); Kimmerling, note 1 *supra*; Granott, note 5 *supra;* Ruedy, note 5 *supra*.

14 See I. Lustick, *Arabs in the Jewish State* (Austin: University of Texas Press, 1980), 12–16. Also see S. Jiryis, *The Arabs of Israel* (Beirut: Institute for Palestine Studies, 1976). Jiryis devotes a major section of his analysis to the land question *(ibid., 7*5–134). And see Sabari, "The Legal Status of Israel's Arabs" *(1972) 2 Iyunei Mishpat* 568.

15 See Y. Oded, "Land Losses Among Israel's Arab Villagers," *New Outbok*, Sept. 1964, 10–25.

16 See R. Klinov, *Arabs and Jews in the Israeli Labor Force* (Working Paper #214, Jerusalem: Departments of Economics, Hebrew University of Jerusalem, July, 1989) 10. Klinov claims that land expropriation "may have been less important in shaping the long-term pattern of employment and earnings of the Arab labor force."

17 See, for example, report in *Jerusalem Post* of October 17, 1989, page 2, of a planned strike in the villages of Ein Mahil,

Ka'ana, Reina and Mash'had to protest against enforcement of a 1976 expropriation order relating to3600dunams of land.

18 Attempts to challenge the expropriation of the Nazareth lands in court were unsuccessful: See *Nazareth Lands Defence Committee v. Minister of Finance* (1955) 9 P.D.1261; *Kassam v. Minister of Finance* (1957) 12 P. D. 1986. The land expropriations for the building of Carmiel are discussed by Kimmerling, note 1 *supra*, 231; they were the subject of a Knesset debate reported in 33 *Divrei HaKnesset* 1126–30.

19 See Rekhes, *Israeli's Arabs and the Expropriation of lands in the Galilee* (Tel Aviv: Shiloah Institute, 1977).

20 See note 17 *supra*.

21 See J. Weisman, *The Land Law, 1969: A Critical Analysis* (Jerusalem: Institute for Legislative Research and Comparative Law, 1970) 33–34.

22 See *Hatwv. State of Israel* (1974) 30 P.D. II 440 and the further hearing of this case in *Yafia Local Council v. State of Israel* (1976) 31 P.D. II 605; *Touran Local Council v. JNF* (1964)18 P.D. III 596.

23 Note 22 *supra*.

24 See *al-Tabash v. Attorney General* (1958) 12 P.D. 2006. This was an action for eviction and a declaration that a certain plot of land in the Arab town of Shefaram belonged to the state. The defendants claimed that they had been in possession of the land and had cultivated it since 1941. Thus, had they proven their claim, they would have been entitled to title in the land in 1951 (before the action was started). However, the Prescription Law had changed the period of years to 15, and the court therefore held that even if the defendants had proven their claim they would not have succeeded, as the new period of 15 years had not yet lapsed when the action was brought.

25 See Sabari, note 14 *supra*, 569, citing the Communist Party newspaper *al-Ittiyad*.

26 The most famous case was probably the case of the village of Rabesia, in which the first attempt of the authorities to use regulation 125 was thwarted by the Supreme Court which ruled that the order was invalid as it had not been published in the official gazette: see *Asslan v. Military Commander* (1951) 6 Psakim 134. The authorities later overcame this difficulty and the order was later confirmed by the court, which nevertheless recommended that a solution be found for the villagers who had been prevented form returning to their homes: see *Asslan v. Military Commander of the Galilee* (1951) 9 P.D. 689.

27 See R. Kislev, *Ha'retz*, 27.7.1976.

28 See Attalah Mansour, *Ha'retz*, 17.8.1986.

29 See A. Rubinstein, *The Constitutional Law of the State of Israel*, 3rd ed. (Tel Aviv: Schocken, 1980) 189.

30 See S. Jiiyis, *The Arabs in Israel* (Beirut: Institute for Palestine Studies, 1969), 82. Also see the article by the town planner M.M. Brodnitz, *Ha'retz*, October 23, 1989, p. 11. Brodnitz writes that the

> Hebrew National Revival Movement did things that could be interpreted as use of nature reserves and forests in order to gain control of land that was regarded by the Arabs as Arab. *Metruka* lands that were used for grazing, lands of abandoned villages that had been destroyed and lands of villages of present absentees were planted as forests or declared to be reserves. Their previous owners, their heirs, relatives or members of their people, saw this as symbolic of the Hebrew control of Arab land.

31 See *Local Council of Touran v. JNF* (1964)18 P.D. Ill596; *al-Tabash v. Custodian of German Property* (1963) 17 P.D. 2675.

32 The law itself does not list all the restrictions. These are generally included in the approved plans for the area and in regulations: see Nature Reserves (Arrangements and Conduct) Regulations, 1979.

33 See Knesset debate on Ministry of Agriculture, 104 *Divrei HaKnesset* 2692 (May 20, 1986) and 105 *Divrei HaKnesst* 3128 (June 17, 1986). Opposition members claimed that declaration of a nature reserve had impeded building in the village of Beit Jan.

34 See the address of the Knesset Finance Committee Chairman, who presented the bill to the Knesset: 4 *Divrei HaKnesst* 868–870 (27.2.1950). The statute was preceded by Emergency Regulations dealing with absentees' property. Section 38 provides that an act done before the statute came into force which would have been valid had the statute been in force shall be deemed to have been validly done. The meaning of this provision is somewhat obscure: see *Custodian of Absentee Property v. Samara* (1955) 10 P.D. 1825.

35 The statutory definition refers to the period between November 29, 1947 and the day on which it is declared that the state of emergency declared by the Provisional Council of State, on 19th May, 1948, has ceased to exist. That day has yet to arrive.

36 In the Knesset debates on the Absentees' Property Law, 1950 a number of M.K's suggested that the definition of "absentee" be changed so that it would only apply to persons not legally in Israel at the time of the law: 4 *Divrei HaKnesset* 870–871; 918. All these proposals were rejected: see the speech of the Knesset Finance Committee Chairman, *ibid.*, 872. His main arguments against these proposals were that the land of people who had left the country may have been taken over by others, who could not automatically be expelled from such land, and that the security situation was still serious and war could breakout any minute. He stated:

> I think that this law is also for the good of the absentees. It is a constructive law, which protects the people's rights… The law does not cause injustice to anybody. Whatever is due to people, they will receive. Peace will come and matters will be satisfactorily resolved.

37 See *al-Fahoum v. Custodian of Absentee Property* (1963) 17 P.D. 2271.

38 See *Kauer v. Custodian of Absentee Property* (1950) 4 P.D. 654; *Palmoni v. Custodian of Absentee Property* (1952) 7 P.D. 836.

39 See Kislev, *Ha'retz*, 25.7.1976.

40 See *al-Fahoum v. Custodian of Absentee Property*, note 37 *supra*.

41 See 1955 *Government of Israel Yearbook* 47. Under this agreement 69,000 apartments or houses and businesses were transferred to the Development Authority: State Comptroller, *Report No.9 for financial year 57/58*, 52. According to Granott (note 5 *supra*, 111–112) about 2,370,000 dunams of absentees' rural land had been acquired by the JNF under agreements with the government that preceded enactment of the Development Authority Law.

42 Section 19 provides that the absentee property must be sold for its "official value." Under section 19(c) "official value" is a function of the net annual value of the property for property tax purposes in the year 1947–1948 "provided that the Minister of Finance may reduce any of the rates … in the case of property the possibilities of using which are, in his opinion, limited owing to damage or neglect or for another similar reason." Considering that between 1947and 1953—the date of the transfer agreement with the Development Authority—there was inflation in the value of Israeli currency, the amounts due under the original law were considerably lower than the real value of the property (even if we ignore the raise in value of property and assume that the "official value," defined as a function of net value for property tax purposes would have reflected the real value of the property in 1947/48). This problem was alleviated by the Absentees Property (Compensation) Law, 1973. See note 43 below.

43 See Absentees Property (Compensation) Law, 1973. This law provides for compensation to Israeli residents for property which became absentees' property and had not been released, according to readjusted property values. The amounts of compensation for urban property are once again a function of the net value for property tax purposes. However the amount may be more than 200 times the original "official value." For rural property the amount is on fixed values per dunam of land, depending on the type of land. The compensation is paid in government bonds which are linked to the cost of living index and carry interest of 3% p.a. These bonds are due for payment in fifteen annual installments, beginning one year after the sum of compensation has been finally determined.

44 In *Bulus v. Minister of Development* (1955) 10P.D. 673 the Supreme Court held that in actual fact the rights *to administer* Waqf property passed to the Custodian iftheadministratorswereabsentees. Also see Sabari, note 14*supra*, 569;Jiryis, note 14 *supra*, 117–121.

45 See Absentees Property (Amendment No. 3) (Release and Use of Trustee Property) Law, 1965. And see chapter 9, below.

46 See explanatory note to bill in 5712 *Hatza'ot Hok* 234.

47 See *Yonas v. Minister of Finance* (1954) 8 P.D. 314.

48 *Ibid.;* also see *al-Nahdafv. Minister of Finance* (1955) 11 P.D. 785.

49 See *Yonas v. Minister of Finance*, note 47 *supra*.

50 See *Waqf Ala A-Din Ashkuntna v. Development Authority* (1960) 15 P.D. 1278.

51 See Sabari, note 14 *supra*, 569.

52 And see Acquisition of Land (Validation of Acts and Compensation) (Determining Alternative Property as Compensation) Regulations, 1954, which lay down guide-lines for the committee's decision.

53 See *Uda v. Competent Authority* (1958) 12 P.D. 1513.

54 The rate of compensation for absentees' property is fixed in a schedule to the Absentees' Property Law, 1973. Until February, 1988 these sums were linked to 80% in the rise of the cost of living index and carried interest of 6%. Since then they are fully linked, but carry interest of 4%: see Israel Lands Administration, *Report for 1987 Budgrt Year* (Jerusalem, 1988), 138.

55 *Ibid.*

56 See 1959 *Government of Israel Yearbook* 74.

57 See *Report for 1987 Budget Year*, note 54 *supra.*

58 See Jiryis, note 14 *supra*, 138.

59 See the study by R. Kislev published in a series of articles that appeared in *Ha'retz* on July 23, 25, 26, 27, 29 and 30, 1976.

60 See Kimmerling, note 1 *supra.*

61 Adoption of the principle that "Israel lands" could not be sold was regarded as a victory for JNF officials (especially the head of the JNF, A. Granott) who argued that the JNF principle of inalienability of land should be adopted by the state: see Orni, note 4 *supra*, 46. The basic law states that the principle of inalienability shall not apply to classes of lands and transactions determined by law. The Israel Lands Law, 1960, that was passed together with the basic law, specifies the exceptions to the inalienability principle. One of the exceptions relates to transfer to absentees, or heirs of absentees, who are in Israel, of Israel lands in substitution for lands that were vested in the Custodian of Absentee Property.

62 The bill originally submitted by the government was termed the Basic Law: People's Land. There was some objection to this title, as the term "people" could be taken to refer to the Jewish people, whereas non-JNF land belongs to all citizens of the state, Jew and non-Jew alike. The title was therefore changed and the term "Israel lands" adopted. This term is somewhat ambiguous. Israel is the name of the state, and in this sense the lands may be regarded as state lands. However, Israel is also the name of the Jewish people, and so Israel lands may also be regarded as lands of the Jewish people.

63 The incorporation took the form of an "association limited by guarantee" which ensured permanent control by the Zionist Executive: see Orni, note 4 *supra*, 22.

64 See 1954 *Yalkut HaPirsumim* 354.

65 "*Keren Kayemet le'yisrael*" which literally means "the Perpetual Fund for Israel" was the Hebrew name for the JNF from its inception. The official name of the English company is the Jewish National Fund Ltd.

66 See Orni, note 4 *supra*, 40.

67 See Granott, note 5 *supra*, 99.

68 See Granott, note 5 *supra*, 104, who states:

> Thus a great rule was laid down, which has a decisive and basic significance — that the property of absentees cannot be transferred in ownership to anyone but national public institutions alone, namely, either the State itself, or the original Land Institutions of the Zionist Movement.

69 *Ibid.*, 107–108.

70 *Ibid.*, 109–111.

71 As seen above when the state was established the JNF owned 936,000 dunams. According to Granott's figures a total of 2,373,677 dunams of "abandoned land" was sold to the JNF under the two agreements with the government. The total land holdings of the JNF in 1962 were 3,570,000 dunams: see Israel Lands Administration, *Report for 1961/62* (Jerusalem, 1962) 7. This means that at least two thirds of the JNF land were lands that were expropriated from Arabs who had either left the territory of Israel or were still residents of the state.

72 According to the 1962 Report of the Israel Lands Administration the state (including the Development Authority) owned 15,205,000 dunams. (1,480,000 dunams were privately owned and the rest belonged to the JNF). The state's land includes the entire Negev region which covers approximately half of Israel's territory: *ibid*. Some of this land is land in which Bedouin clans have claimed to have traditional rights, based mainly on use for grazing and extensive agriculture. (Granott claimed that about 1,700,000 dunams in the northern Negev were normally tilled by Bedouins or pastured flocks "which use of land was equivalent to a form of ownership." See Granott, note 5 *supra*, 89.) For a variety of reasons that will not be examined here, the legal basis of *otonership* rights that had never been registered was dubious, and the traditional tribal rights of the Bedouin were not recognized as ownership rights by the government. The government stand was that a country with the limited land resources of Israel could not tolerate extensive agriculture of the traditional Bedouin type. It also argued that proper education, health and social services could not be provided to a fairly small population spread out over a huge area. Government policy was therefore to settle the Bedouin in seven special settlements that were built on state land in the Negev. This policy has been rejected by some of the Bedouin who continue to demand recognition of their traditional land rights. The dispute with some of the Bedouin clans continues to this day.

73 The covenant was published in 5728 *Yalkut HaPirsumim* 1597.

74 The size of these bodies was subsequently increased but the principle of a majority of one for the government in the Lands Administration and for the JNF in the Land Development Authority was maintained: see *Report for 1987 Budget Year*, note 54 *supra*.

75 According to the Report of the Israel Lands Administration for 1962 the JNF owned 3,570,000 dunams out of a total land area of 20,255,000 dunams. If the JNF land holdings have increased only slightly since then the JNFownsl8% of the land in Israel and 19–20% of the Israel lands administered by the ILA.

76 In 1987 a petition was submitted to the Supreme Court in which an Arab real estate agent from Haifa challenged the legality of the restrictive policy. The petition was withdrawn after this "legal device" was used to transfer the land in question to the agent's clients.

77 See 27 *Divrei HaKnesset* 2955.

78 See Granott, note 5 *supra*, 111.

79 See Z. Tsur, "The Jewish National Fund's Heritage and the Formation of the Public Land System in Israel" in *Karka (Land), Collection of Essays on the Occasion of the JNFs 80th Anniversary* (Jerusalem: Land Research Institute, 1983), 59, 64. Of the 630,000 dunams of agricultural land held by private individuals 450,000 dunams are owned by Arabs.

80 See *Rural-Urban Land Use Equilibrium* (Tel Aviv: Ministry of Agriculture, Rural Planning and Development Authority, 1979) 43.

81 See Granott, note 5 *supra*, 253.

82 According to figures for the year 1976, of a total of 4,180,000 dunams of agricultural land 2,775,000 dunams were in the hands of collective and cooperative institutions. Almost 99% of this land was public land of one sort or another: *Rural-Urban Land Use Equilibrium*, note 80 *supra*. Of the public land leased for agricultural use, 77% was leased to collective and co-operative institutions.

83 According to biblical sources every family in Israel was entitled to a plot of land that would pass from father to first-born son for generations. This plot was called the *nakhala*, i.e., heritage or estate.

84 See Resolution 185 of the Israel Lands Council of January 17,1977 in *Resolutions of Israel Lands Council* (Israel Bar Association), 31.

85 This general arrangement for non-*nakhala* leases does not apply to leasing of agricultural land to Bedouin in the Negev. A special committee was set up to decide on such leases. The leases are *non-nakhala* leases for a short term (10 months for grazing and one year for crops): see Resolution 29 of the Israel Lands Council, *ibid.*, 173.

5

Political and Social Equality: The Problem of Discrimination

The Declaration of Independence promises that the citizens of Israel will enjoy complete equality in political and social rights, irrespective of race, religion or sex. In this and the following chapters I shall examine to what extent the legal system tolerates encroachments on this principle in laws or legal arrangements that discriminate between Jews and non-Jews.

The discussion starts with a brief review of the conception of the term equality adopted in Israeli jurisprudence and an explanation of the categories of discrimination that shall be employed in the course of the discussion.

The Meaning of Equality

It is beyond dispute that the principle of equality is an accepted principle of Israeli constitutional law. The principle is, however, subject to a number of limitations. First, in common with all other constitutional principles in Israeli law, it is subordinate to the supremacy of parliamentary legislation. Thus, in a clash between the equality principle and the clear language of a Knesset statute, the latter will prevail. Second, the term equality is notoriously difficult to define. In Israel the equality principle was established by the courts and it is interpreted and applied by them. Even when it does not clash with Knesset legislation, the principle has to be defined, refined and applied in specific instances. Understanding the status of this principle in Israel must therefore be based on an appreciation of the way the courts have interpreted and applied it. In the present context the questions to be asked are: what conception of equality has been adopted by the courts and how do they treat allegations of discrimination on grounds of national-ethnic origins?

In discussing these questions a distinction will be made between two issues:

What does a plaintiff have to prove in order to establish a claim of discrimination?

Is the right to equality an absolute right, or may discrimination on the grounds of national-ethnic origins, religion or sex sometimes be justified?

Establishing a Claim of Discrimination

It is highly unusual for governmental decisions to be based on overtly discriminatory grounds. The more usual case is one in which the ostensible grounds for a decision have nothing to do with religion, national-ethnic group or sex, though the individual wishes to argue either that the real grounds for the decision were such grounds, or that even if these were not the actual grounds for the decision, the effect of the decision is discriminatory. What has to be proved in order to substantiate a claim of discrimination and do the discriminatory effects of a decision taint it even

if the grounds for the decision were not discriminatory?

The claim that the real grounds for a decision were discriminatory was pressed in *Nazareth Lands Defence Committee v. Minister of Finance*.[1] This case concerned expropriation of land for the building of a government center in the vicinity of the town of Nazareth, whose population is almost exclusively Arab. The land-owners challenged the validity of the expropriation. They argued that the order had been issued because they were Arabs. While the court accepted that an expropriation order which is based on discriminatory grounds is invalid, it held that the onus is on the person challenging the order to prove that it was indeed based on such grounds. The court stated:

> 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.[2]

The idea expressed here, that the plaintiff must prove not only that the fact that he or she is an Arab was *one* of the factors that influenced the authority to make a decision, but that it was this fact, and no other, that dictated the decision, was rejected in latter decisions. In the *Emma Burger* case[3] it was argued that property had been expropriated under a town planning scheme because the owner was a German Christian missionary and people in the vicinity objected to her presence. Although there were some valid planning considerations behind the expropriation decision, the court held that the decision was invalid on grounds of discrimination. Two of the judges based this decision on their finding that the national and religious affiliation of the petitioner had been the main and dominant reason for the decision. The third judge, Justice Kahan, did not accept this finding. He held, however, that the above factor had had a real influence on the decision, and that this was sufficient in order to make the decision invalid.

The “real influence test” weakens the harshness of the test adopted in the *Nazareth Lands* case, but it still places a heavy burden on the plaintiff. This burden is particularly heavy in those cases in which restricted decisions are made that affect the rights or interests of some individuals. Such decisions necessarily involve classifications, i.e. distinctions between those who are adversely affected and those who are not. In such cases things are going to be much easier for the authorities if the persons adversely affected by the administrative decisions or actions are those with least political and economic power. Finding fairly rational reasons for this is generally not difficult. This may be the reason why one finds very few decisions of the courts that invalidate administrative decisions of the above type on grounds of discrimination.[4]

In the *Nazareth Lands* case the court expressed the opinion that only if discrimination were intentional and malicious would it be regarded as grounds for interfering in an administrative decision. This view has since been rejected in a number of cases.[5] The Supreme Court has held that the motives behind a decision are not determinative. If the grounds for the decision are in fact discriminatory, the decision will be tainted even if the intention of the decision-making body was to further legitimate governmental interests.[6] However, even this test is process-oriented, rather than result-oriented. The Israeli courts have yet to hold that the *results* of a policy or decision can make it discriminatory, even if the grounds for the decision were perfectly legitimate.[7]

Equality as an Absolute Right

In one of its early decisions the Supreme Court held that there is a difference between "discrimination" and "distinction."[8] The characteristic feature of discrimination is an unequal and unfair relationship towards different groups of people.[9] Generally, a distinction that rests on the religion, national group, ethnic origins or sex of a person will be regarded as unfair, thereby turning the distinction into discrimination. Are there cases in which a distinction that rests on such grounds may be justified, notwithstanding the discrimination involved?

In a country like Israel, in which there is no separation of state and religion, and in which religious courts and functionaries of different religious communities are given official status and funded by the state, it is dear that there will be cases in which the religion of a person is an essential qualification for a certain public post. Thus, for example, non-Jews may not be appointed to the Chief Rabbinate or the rabbinical courts; non-Moslems may not be appointed as *kadis* in the Moslem courts.[10] Clearly, in such cases disqualification of a candidate of the "wrong" religion would not be regarded as discrimination.

What is the position, however, in less obvious cases, that do not require a clear connection between the religion of a person and the religious nature of a certain post? This question first arose in the Supreme Court decision in the *Bourkhan* case.[11] The case concerned the reconstruction of the Jewish Quarter in the Old City of Jerusalem, in which Jews had lived for generations until they were expelled by the Jordanians who occupied the Old City in 1948. After the Old City was taken by Israel in the 1967 Six Day War, Arab residents were evacuated from premises in the Quarter, old houses were renovated and new houses built. The public company in charge of the reconstruction project invited offers for purchase of apartments in the Quarter, stating that only those who had served in the army, or were new immigrants (i.e. Jews and their families who came to Israel under the Law of Return), would be entitled to purchase an apartment. The petitioner, an Arab who had been forced to vacate premises in the Quarter which he claimed to have occupied since 1947, applied to purchase an apartment, but his application was rejected as he did not fit the above criteria. In his petition to the Supreme Court he argued that the criteria adopted by the Company discriminated against Arabs and were therefore invalid.

Counsel for the defendant Company conceded in court that the real intention behind the said criteria was to restrict sale of apartments in the Jewish Quarter to Jews. The Supreme Court nevertheless refused to interfere. It 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.

This is not the place for a critical analysis of the *Bourkhan* decision.[12] The court was careful to restrict its decision to the specific circumstances of the reconstruction of the destroyed Jewish Quarter, alongside the quarters of the other communities, and to reiterate that "the rule that one does not discriminate between persons on the grounds of race, sex, national group, ethnic group, country of origin, religion, outlook or social class is a basic constitutional principle, that is intertwined in our fundamental legal concepts and forms an integral part of them."[13] Nevertheless, it is clear that the *Bourkhan* decision contains the seeds of an approach that could conceivably be used to justify discrimination for "special historical reasons." Were this approach to be adopted, the principle of equality could be seriously undermined. Fortunately, with one possible exception,[14] this reading of the *Bourkhan* decision has not been followed in other cases. Furthermore, in an opinion relating to criteria for granting benefits to returning citizens, the Attorney General of Israel expressly refused to extend the *Bourkhan* ruling beyond its specific context. According to criteria adopted by the Ministry for Absorption of Immigrants, only

citizens who would have been entitled to immigrate to Israel under the Law of Return had they not been citizens, were entitled to the said benefits. This meant, of course, that only Jews or family members of Jews were entitled to the benefits. The Attorney General rejected the argument that the *Bourkhan* ruling justified granting special privileges to Jewish citizens who were returning to the Jewish state. He held that the criteria discriminated between equals, and that the Ministry must not act on them.[15]

One possible way of viewing the *Bourkhan* decision is to regard it as judicial acceptance of "positive discrimination," i.e. use of distinctions based on ethnic or national group or on sex so as to improve the situation of a disadvantaged group.[16] The decision of the Supreme Court in the recent *Avitan* case[17] suggests that the court is indeed prepared to accept the legitimacy of positive discrimination. A Jewish citizen applied to the Israel Lands Administration to lease property in a Bedouin settlement that had been set up as part of a government plan to encourage Bedouin to settle in permanent villages and to abandon their semi-nomadic way of life based on grazing of flocks and extensive agriculture. When his application was turned down he challenged both the refusal to lease him land on the same, highly subsidized, terms under which it was leased to Bedouin, as well as the refusal to lease him land in the settlement on any other terms. The court ruled that the government policy as regards the Bedouin was a legitimate policy aimed at overcoming the problems of the Bedouins' previous way of life, and that it was perfectly justifiable for the government to offer special terms for Bedouin that were not offered to any other groups. It refused to interfere in the decision to restrict lease of land to non-Bedouins, stating that no issue of discrimination based on ethnic or national group was involved, as Bedouin had been favored not because they were Bedouin, but because of their nomadic way of life. The court declared:

> The character and way of life of nomads who have no proper permanent settlements, with all that that entails, is what makes the Bedouin a unique group, which the respondents believe is entitled to assistance and encouragement, with special consideration that involves discrimination in their favor, and not the fact that they are Arabs.

It is difficult to accept the court's statement that no discrimination on ethnic grounds was involved in the government decision, for the only criterion for entitlement to land was the applicant's ethnic group. What the court really seems to have decided, however, is that ethnic and national affiliation may be a legitimate criterion for distinguishing between persons, when it is used so as to overcome disadvantages suffered by a given ethnic or national group. Unfortunately, the court did not impose any special burden on the government to prove that use of discriminatory criteria is necessary in order to overcome the said disadvantages, and that it could not pursue its policy without adopting such criteria. This would seem to be inconsistent with the leading decision of the court in *Poraz v. Mayor of Tel Aviv*.[18]

The *Poraz* case dealt with discrimination on grounds of sex, but as the court made it quite clear that the guidelines it defined are not confined to discrimination on grounds of sex,[19] these guidelines desove consideration in the present discussion. The basic approach of the court in the *Poraz* case is that while the equality principle is not absolute, it must take the central place in any balancing with legitimate conflicting particular interests. The equality principle may be violated only if it is impossible to realize the particular goals of a specific statute without encroaching on equality. Even in such a case practical ways must be found that will ensure, as far as possible, material—if not total — realization of the conflicting interests.

The only way to reconcile the *Avitan* and *Poraz* cases is to distinguish between cases of "positive discrimination" and those of discrimination for other policy reasons (such as achieving

the legislative goal of a statute). In cases in which a decision is taken to grant an advantage to members of a disadvantaged group, that will be denied to members of all other groups, the government agency need merely show that it has taken the decision in a manner consistent with the general requirements of Israeli administrative law.[20] When the decision is taken to deny members of one group of something granted to other groups, the burden is on the governmental agency to show that it could not have achieved the legitimate statutory aim without discriminating, and that it has attempted to find a balance between the principle of equality and the said statutory aim.

The idea that a distinction is not discrimination, if the grounds for it are legitimate, becomes important when the grounds offered for excluding Arabs are "security grounds." This is extremely common in the field of employment. Many industries and services in Israel are security-related and employment in them is dependent on security clearance. The vast majority of Israeli Arabs are not drafted for military service and are therefore effectively prevented from gaining security clearance. Judging from the remark of Justice Haim Cohn in the *Bourkhan* case, and the general reluctance of the court to interfere in security matters, it is unlikely that the courts would interfere in criteria based on army service unless there were no possible connection between the post and the required security clearance. The consequence, therefore, is that Arabs are excluded from employment in some of the country's major industries and services.[21]

The question of army service as a classificatory criterion will be discussed in detail in the chapter on covert discrimination.

Private vs. Public Discrimination

Under Israeli law different principles guide the actions of private individuals and bodies and those of public bodies. While a private individual or body is entitled to do any act that is not forbidden by law, a public body may only do such acts that it has been empowered to do by law. The main manifestation of this principle relevant in the present context is that private individuals and bodies are entitled in their dealings to discriminate unless forbidden to do so under some specific statutory provision,[22] public bodies are forbidden to discriminate unless some statutory provision allows them to do so, or unless the type of distinction made is regarded as clearly relevant in the specific context.

There is no general statute in Israel similar to the U.S. Civil Rights Act, 1964 or to U.K. Race Relations Act, 1976 which forbid discrimination by private individuals in specific contexts such as housing and employment. However, the Employment Service Law, 1959, as amended by the Employment Service (Amendment No. 6) Law, 1988, prohibits discrimination in employment on grounds of age, sex, race, religion, ethnic or national group, views or political party affiliation. While the principle behind this law is clear, the statute provides no mechanism for enforcement of the principle and relies entirely on the criminal process, which is quite inappropriate and therefore ineffective. The lack of enforcement procedures is especially glaring in light of the detailed statutory procedures that were recently adopted for treating claims of discrimination on grounds of sex.[23] The only conclusion one can draw from this blatant disparity between discrimination on grounds of sex and discrimination on grounds of religion or national-ethnic group, is that the law merely pays lip-service to the notion of non-discrimination in employment on grounds of the latter type. It expresses no real commitment to eradicating such discrimination.

An important development in the field of private discrimination is the ruling of the National

Labour Court that a section in a collective agreement that discriminates between employees on the grounds of race, national origins, religion or sex may be regarded as contrary to public policy and therefore invalid.[24] Thus private employers may not lawfully discriminate in the terms of employment of workers employed under the same collective agreement. However, this ruling applies only when the discrimination on grounds of sex or national group is between workers employed in the same type of work. If the distinction were to be made between different types of work, the ruling would probably not be applied even if, in actual fact, the types of work were divided along lines of sex or national-ethnic group.

Given the difference in the right to lawfully discriminate between private individuals and bodies, on the one hand, and public bodies, on the other, the dividing line between public and private bodies becomes crucial. I have referred to this question above in our discussion of the application of the principle of equality. We saw that all central and local governmental bodies and all bodies exercising statutory powers are public bodies. The difficult question relates to bodies that fulfil functions which are by their nature public functions without being part of the governmental structure from an administrative point of view. Examples are government corporations, such as the Electricity Corporation, or universities. There is now important judicial support for the view that such bodies are indeed bound by the principle of equality.[25]

The discussion that follows shall not deal with private discrimination, but shall concentrate on those legal rules or arrangements that license discrimination by public bodies.

Discrimination under Law

The present study is concerned with the *legal* status of the Arabs; no attempt is being made to deal with the general question of discrimination in Israeli society. Even though there may be a considerable discrepancy between the situation under law and the situation in fact, the discussion will be confined to those legal rules or arrangements that either outlaw or institutionalize discrimination.

In discussing discrimination under law a distinction will be made between the following types of discrimination:

Overt discrimination: Under the rubric of overt discrimination only those cases are included in which a statutory instrument expressly distinguishes between the rights or duties of Jews and non-Jews, or grants special status to Jewish organizations that lays the legal basis for discrimination between Jews and non-Jews.

Covert discrimination: This term is employed to cover cases in which statutory instruments adopt criteria which in fact imply discrimination between Jews and non-Jews, without actually using the explicit criteria of Jew and non-Jew or Arab. Also included are laws which do not on the face of it employ discriminatory criteria, but which were passed with the clear intention of implementation only in the Arab sector of the population.

Institutional discrimination: This refers to areas of the legal system which allow for adoption by administrative agencies of policies that in fact lead to discrimination between Jews and non-Jews. They may be policies of discrimination in implementation of laws or general policies of resource allocation in areas in which the executive branch of government possesses wide discretionary authority.

Besides the above categories there is also the question of discrimination by individual officials within the administration. Examples of such discrimination would be the cases of the driving

examiner who applies stricter criteria to Arabs than to Jews, or the traffic policeman who is quicker to fine Arabs than Jews. While there are no doubt cases of this type in Israel (as in practically any other heterogeneous society) it is not possible in a study of the present kind to discuss this type of discrimination. The discussion shall therefore be confined to the categories of overt, covert and institutional discrimination.

Notes

1. (1955) 9 P.D. 1261.

2. *Ibid.*, 1266. The head of the Development Authority gave evidence before the court that the land, expropriated in order to build a government center in the Galilee, had been chosen fora number of reasons, most of them topographical. He also stated that one of the most beautiful spots in the area had been chosen, as it was appropriate that the center of the government in a district should be in such an area. The court accepted that it was legitimate to choose a central site for a government center "as the government had done in choosing the site for the Jerusalem government center when it expropriated much land of (Jewish) private owners." *ibid.*, 1264.

3. See *Emma Burger v. District Planning Committee* (1972) 27 P.D. II 764.

4. The one exception is the *Emma Burger* case. But even in this case Justice Kahan stated:

> The main difficulty which faces the court when legitimate and non-legitimate aims are mixed is how to discover the intention of the authority and to reveal the hidden factors. Obviously, when an improper factor is present the authority does not run to reveal it, and when it is revealed it is not easy to assess whether the proper or improper factor was the real or main factor, and what influence the improper factor had on the act of the authority: *ibid.*, 773.

5. See *Landau v. Minister of Agriculture* (1962) 16 P.D. 2540, 2544; *Poraz v. Mayor of Tel Aviv* (1987) 42 P.D. II310. But cf. *Babcock v. Securities Exchange* (1977) 32 P.D. II 377,384. And see S. Shetreet, "Affirmative Action for Promoting Social Equality: The Israeli Experience in Positive Preference" (1988) 18 *Israel Yearbook on Human Rights* 241,265 who states that the reference in this last decision to the requirement of intention "was erroneous and does not reflect the prevailing case law."

6. See *Poraz v. Mayor of Tel Aviv*, note 5 *supra*, 333–334:

> The question is not only the motive of the decision-makers; it is also the result of the decision. The decision is invalid, not only when the motive is to violate equality, but also another motive is involved, but equality is in fact violated.

7. See Shetreet, note 5 *supra.*

8. See *Yosipoffv. Attorney General of Israel* (1950) 5 P.D. 481,490.

9. *Ibid.* See also *Nazareth Lands Defence Committee v. Minister of Finance*, note 1 *supra*, 1265.

10. The *Kadis* Law, 1961 expressly states that only Moslems are eligible to be appointed as *Kadis.*

11. See *Bourkhan v. Minister of Finance* (1978) 32 P.D. II800.

12. It should nevertheless be pointed out that the court's conclusion, that Arabs maybe excluded from purchasing apartments in the Quarter, does not necessarily flow from recognizing reconstruction of the Jewish Quarter as a legitimate governmental function. One could argue that the nature of the Jewish Quarter is that the majority of residents are Jews, and not that no non-Jews are allowed to reside in the Quarter.

13. *Ibid*, 806, per Shamgar J. But cf. the comment of Bechor J. at 805:

> It is one of our cherished rules that we should not lend our hand to any matter that is tainted by discrimination between persons on the grounds of religion or national group, but at the same time in applying this important rule we must not ignore reality and the facts on the ground, and we must ensure that we do not create discrimination of another type or of the opposite type, nor to harm security of the person.

Bechor J. did not elaborate. It seems that his reference to discrimination of the opposite type refers to the fact that at the time of the *Bourkhan* decision Jews found it almost impossible to buy or rent apartments in the other quarters of the Old City of Jerusalem. The petitioner in the *Bourkhan* case admitted that his religion forbade him to sell property to Jews. Since the *Bourkhan* case was decided a fair number of Jews have taken up residence in the Moslem

quarter, and have even established religious academies there. Bechor J.'s reference to security of the person was obviously sparked off by the opinion of Haim Cohn D.P., who claimed that restricting sale of apartments to citizens who had served in the army was based on security grounds: *ibid.*, 805.

14. See *Wattad v. Minister of Finance* (1983) 38 P.D. Ill 113. In this case the petitioners, Arab members of the Knesset, challenged government policy of paying benefits, reserved by statute for those who had served in the armed services, to *yeshiva* (Jewish religious academy) students who had not served in the army. Under a government decision benefits were to be paid to all students in religious seminaries. The petitioners argued that such seminaries existed only in the Jewish sector of the population and that this policy therefore implied discrimination against Arabs. In her opinion in the case Ben Porat J. emphasized the traditional place of the *yeshiva* student in Jewish communities and regarded this as a factor which justified special treatment for such students. However, the court made it clear that were religious academies to be started in other religious communities, full-time students in those academies would be entitled to the same benefits as full-time *yeshiva* students. For a discussion of the *Wattad* case see the chapter on covert discrimination below.

15. See letter of Attorney General to Minister of Absorption, dated 1 September, 1987 (on file with the writer). The Supreme court has held that the opinions of the Attorney General have legally binding force for government bodies and agencies: see *Kach Faction v. Knesset Speaker* (1985) 39 P.D. Ill 141,152.

16. See Shetreet, note 5 *supra.*

17. See *Avitan v. Israel Lands Administration*, as yet unreported judgment of the court in H.C. 528/88, handed down on October 25, 1989.

18. Note 5 *supra.*

19. The court stated:

> Equality reaches all parts of life and the state. Equality must therefore be maintained between persons who belong to different religions, national groups, ethnic groups, races, political parties and outlooks." *ibid.*, 332.

20. As seen above this means that the decision must have been based on relevant considerations, that no irrelevant factors influenced the decision, that there was an evidential basis for the decision and that due consideration was given to conflicting interests.

21. In a Knesset debate on the employment problems of Arab professionals in December, 1986 the minister then in charge of minority affairs, M. Arens, cited the fact that the Israeli economy is largely based on defense-related industries as a major cause of these problems: see 106 *Divrei HaKnesset* 880 (24.12.86). The Employment Service Law that outlaws discrimination in employment contains an express provision that if considerations of state security prevent a person from being sent for a job, not sending that person shall not be considered discrimination.

22. See *Peretz v. Kfar Shmaryahu Local Council* (1962) 16 P.D. 2101, 2115.

23. The original statute dealing with discrimination on grounds of sex and marital parental status was the Equal Opportunity in Employment Law, 1981. As the enforcement procedures in this law were inadequate it was replaced by the Equal Opportunities in Employment Law, 1988. Under this law the onus is placed on the employer to prove that there was no discrimination if the candidate shows that he or she had the qualifications laid down by the employer for the job; special powers are given to the labor court to issue injunctions and to award special damages; the minister of welfare and labor must appoint inspectors to ensure enforcement of the law and a special public advisory committee is established to advise the minister about measures to promote equality in employment.

24. See *El-Al Stewards Committee w. Edna Chasin* (1973) 4 P.D. A. 365. In this case the court ruled that a provision in the collective agreement between El Al, Israel's national airline, and its employees which discriminated between stewards and stewardesses was invalid.

25. The *Bourkhan* case involved an action against a government corporation. The court stated that had it accepted the argument of discrimination it would have interfered: 32 P.D. II806. Also see *Micro-Dafv. Israel Electricity Corporation* (1986) 41 P.D. (2) 449, in which the Supreme Court held that certain of the principles of administrative law, such as the rule against discrimination, apply to public bodies that are not part of the government bureaucracy.

6

Overt and Covert Discrimination

The main limitation of the equality principle in the Israeli constitutional system is that it is subject to the doctrine of parliamentary supremacy. The Knesset has the power to enact laws that infringe upon all basic constitutional principles, including the principle of equality. In this chapter I shall review those statutory provisions that violate the equality principle by adopting either overt or covert discriminatory arrangements.

Overt Discrimination

Under the rubric of overt discrimination I have included those cases in which statutes either expressly adopt the criterion of Jew, non-Jew or Arab in defining rights or obligations, or give special status to organizations that adopt such criteria as a basis for their operations.

Nationality Law

In the chapter on citizenship I discussed the Law of Return and its connection with the Nationality Law. There is no need to repeat that discussion here. However, these pieces of legislation must be mentioned, as they are the only instances of legislation that expressly uses the criterion of "Jew" as a condition for a right or privilege. Under the Law of Return every Jew has the right to settle in Israel as an *oleh.* This special privilege granted to all Jews is regarded as the fundamental principle of Israel as a Jewish State. Under the Nationality Law "return" is one of the ways of acquiring Israeli citizenship. This way of acquiring citizenship is open only to Jews (and family members of Jews). Arabs in Israel acquire citizenship through residence, birth or naturalization. Until 1980, even Jews born in Israel acquired citizenship by way of return; following an amendment to the law passed in that year all persons born in Israel acquire citizenship through birth if at least one parent is an Israeli national. The formal distinction between the method of acquiring citizenship of Jews and Arabs born in the country has been abolished.

Jewish Religious Services Law (Consolidated Version), 1971

This statute regulates the establishment of Jewish religious councils alongside local authorities and provides for their budgeting. It is included amongst the statutes that adopt overt criteria of discrimination because it provides only for Jewish religious councils. This restriction of the statute to Jewish religious services was severely criticized by several members of the Knesset in the Knesset debate on the bill. The Minister of Religious Affairs conceded that provision had to made for non-Jewish religious services as well, and declared that his ministry was preparing a

bill to deal with these services. Such a bill has never been presented to the Knesset and religious services for non-Jews are provided by the Ministry under its general governmental powers.

While no religious councils exist for provision of religious services to non-Jews, there are statutory provisions that deal with some such services. These will be discussed in the chapter on group rights.

Status of Jewish National Institutions

An understanding of the law which grants special status to the Jewish National Institutions requires some knowledge of their historical background.

World Zionist Organization (WZO). Originally called the Zionist Organization, WZO is the official organizational body of the Zionist Movement, founded at the First Zionist Congress convened by Theodor Herzl in Basle in 1897. It was the main organizational framework for Zionist political activity, both in Palestine and abroad, in the pre-state era. It still operates today as the formal framework of the Zionist Movement. Its governing organs are comprised of representatives of Zionist movements in Israel and the Diaspora.

Jewish Agency. The Mandate over Palestine granted to Great Britain by the League of Nations in 1922 provided that

> an appropriate Jewish agency shall be recognized as a public body for the purpose of advising and cooperating with the administration of Palestine in such matters as may affect the establishment of the Jewish National Home and the interests of the Jewish population in Palestine…

The Mandate went on to provide that as long as the Zionist Organization and its constitution would appear appropriate to the Mandatory Power, it would be regarded as the Jewish agency. Until 1929 the WZO indeed functioned as the Jewish agency. In that year the membership of the agency was expanded so as to include Jewish leaders in the Diaspora who did not regard themselves as Zionists. The Jewish Agency for Palestine becamea separate body which worked in close cooperation with the WZO. The separation of the two bodies continued until 1942 when they merged again. In 1970another attempt was made to widen the ranks of the Jewish Agency and the position reverted to the 1929–1942 position.

The Jewish Agency played an important role in the events which led up to establishment of the State of Israel in 1948. In the absence of an independent state the local leadership of the Agency was regarded as the leadership of the "state on the way."

Jewish National Fund. The background of this institution and its functions in present-day Israel were discussed in the chapter on land.

All the above bodies were established in the pre-independence era as institutions of the "state on the way" whose main purpose was to further the political aim of Zionism — establishment of a national home for the Jews in Palestine—and to assist the Jews in Palestine in their endeavors. In lieu of state'governmental organs these institutions operated as the political institutions of the Jews in Palestine. What was to be their status once the main political aim of Zionism had been achieved and the governmental institutions of the Jewish state had been established? Should they not have been disbanded and their functions (except, possibly, the functions connected with Jews abroad) transferred to the organs of the newly established state? This very question was

addressed by the late M.K. Eliezer Livne in his Knesset speech during the debate on the World Zionist Organization — Jewish Agency (Status) Law, 1952:

> What was the main function of the Zionist Organization and the Zionist movement until establishment of the state? Its function was to organize the Jews in the Diaspora so as to build up the land. What did the Zionist movement engage in during the time of the Mandate? Settlement, absorption and education of immigrants — here in the land [of Israel]. Why did it engage in all of these? Because it was "a state on the way"… In other words, the Zionist Organization served as a substitute for the state; the offices established in Jerusalem, the activities that the Zionist Organization carried out through the Jewish Agency were the activities of a surrogate state. And here there has been a change. A state now exists. Why should the state not do all these things? This function of the Zionist movement has come to an end.[1]

The above question of M.K. Livne — why should the state not do all these things?—has a direct bearing on our present topic. The "National Institutions," as the WZO, Jewish Agency and JNF are often called, were established as *Jewish* institutions aimed at furthering Jewish aims, and Jewish aims only. The State of Israel, on the other hand, while created as a Jewish state, committed itself in its Declaration of Independence to complete equality of political and social rights for all its citizens, regardless of race, religion or sex. Granting official status and sole authority to deal with functions which are by their nature governmental functions to the National Institutions, without changing their historical mandate to further only Jewish interests, could be regarded as inconsistent with this commitment to equality.

The government did not accept the view expressed by M.K. Livne. It stood behind the bills it had presented to the Knesset whose purpose was to grant official status to the National Institutions. Prime Minister Ben-Gurion explained the government's attitude in his reply to M.K. Livne:

> The state finds it necessary to grant authority and status within the state to the Zionist Organization to carry out certain activities which are in essence state activities *par excellence* — immigration and settlement, especially within the State of Israel. M.K. Livne believes that now, after establishment of the state, the Zionist Organization should not deal with these two activities, and should devote its energies to pioneering Zionist education amongst Jews in the Diaspora. There is much to be said for this argument, but the issue has been determined on the strength of other factors and the state has decided to grant the Zionist Organization authority over immigration and settlement within its borders.[2]

What is the status of the National Institutions under the laws of the Knesset and what are the implications of this status vis-à-vis the Arabs in the state?

World Zionist Organization — Jewish Agency (Status) Law, 1952. When the original version of this statute was passed there was no separation between the WZO and the Jewish Agency. After agreement was reached in 1971 to expand the ranks of the Jewish Agency the original law was amended and the functions of the two separate bodies defined. In the introduction to the amendment bill the government explained that the WZO would

> continue its Zionist activity in the traditional fields of furthering political Zionist goals, while the Jewish Agency will deal with defined spheres of immigration, absorption, education and social welfare.[3]

The statute itself contains a few declaratory statements about the State of Israel and the historical role of the WZO and the Jewish Agency in the establishment of the state. It then goes on to declare that the state recognizes these two bodies as

> agencies authorized to continue acting within the State of Israel for developing and settling

> the land, absorption of immigrants from the Diaspora and coordination in Israel of Jewish institutions and organizations active in these fields.

The statute provides that the details of the status of these bodies and the form of cooperation between them and the government will be fixed in covenants to be signed between the government and each of the institutions.

Covenant between the Government and the WZO. This covenant, signed in June, 1979, with retroactive force from June, 1971, defines the functions of the WZO. Many of these functions are connected with immigration of Jews from the Diaspora, but the following functions have no direct connection with immigration:

> 1. Maintenance and support, both in Israel and abroad, of cultural, educational, scientific, religious, sports and social welfare institutions;
> 2. Agricultural settlement and purchase and development of land by the institutions and funds of the WZO;
> 3. Participation in the founding and extension of development projects in Israel;
> 4. Encouragement of capital investment in Israel;
> 5. Support for cultural enterprises and institutions of higher learning and research;
> 6. Support for the elderly, handicapped and other deprived groups in need of assistance and social services.

There is one important proviso: the WZO will carry out only such duties as defined above, which the Jewish Agency does not in fact carry out.

The covenant sets up a joint Govemment-WZO committee to coordinate activities and prevent overlapping. It also grants the WZO, its institutions and funds exemption from a wide range of taxes.

Covenant between the Government and the Jewish Agency. Most of the provisions of this covenant are identical to the provisions in the WZO covenant. The main difference lies in one general clause in the covenant which defines the functions of the Jewish Agency. According to this clause it is the duty of the Agency to perform

> by itself, or in cooperation with other institutions, every activity, whose purpose is to assist immigrants and needy persons to be absorbed into the social life of Israel.

Implications of Legal Status. The formal legal status of the WZO and Jewish Agency does not rest only on the above laws and covenants. Numerous laws of the Knesset acknowledge the right of these two bodies to representation in various agencies, especially in agriculture. Thus the statutes setting up marketing boards to deal with various agricultural products provide for representatives of the WZO and Jewish Agency to be members of the boards.[4] The laws dealing with development of the Negev and of the Galilee also stipulate that representatives of the Jewish Agency or the WZO will sit on the councils established to promote development.[5]

However, the real implications of the special status granted to the WZO and Jewish Agency do not emerge from an examination of statutory instruments alone. It is necessary to examine how these bodies actually operate in performing the tasks allotted to them under the statutes and covenants. While a comprehensive description of these operations is beyond the scope of the present study, analysis of the legal documents would not be meaningful without some description

of these activities. A brief account of Jewish Agency activities in the field of rural settlement follows, from which a fair picture can be gained of their implications as far as they affect the Arabs in Israel.[6]

Under its mandate pursuant to the covenant with the government, the Settlement Department of the Jewish Agency deals with the following:

Planning of New Rural Settlements. Initial planning of new rural settlements in Israel is carried out by the Settlement Department of the Jewish Agency. At the planning stage the Agency's role may be described as monopolistic. Proposals of the Settlement Department are subject to review and approval by a number of political and professional bodies, which are composed both of government officials (generally belonging to the Ministry of Agriculture) and Agency officials.[7] Agency officials do not function in a merely advisory capacity: they are intimately involved in every stage of the decision-making. The intimate connection between the Agency and the government ministry officials indicates that the Agency is in fact, if not in theory, a type of governmental authority.[8]

Funding New Settlements. The Jewish Agency finances the development projects needed to create new rural settlements, including access roads, preparing the land for building (preparing the land for agricultural use is carried out by the JNF), and connection to the national water supply and national electricity grid. It shares in the financing of public buildings. (Private homes are generally the responsibility of the Ministry of Construction and Housing). It also grants substantial loans and subsidies to finance the economic base of the settlement that are used for such things as machinery, seed, fertilizers and pesticides or raw materials. Funding generally continues until such time as the settlement is recognized as established and is expected to be independent. The Agency also provides its new settlements with "water rights," which are purchased from Mekorot, the national water development company, generally via Agency participation in the financing of water plants.[9]

Development of Regional Agricultural Plants. The Jewish Agency provides capital for building four types of regional agricultural plants: plants for preparing agricultural produce for marketing, such as sorting, packing, ripening and cold storage plants; processing plants; agricultural service plants and service stations for farm machinery.[10]

Industrialization in Rural Settlements. The Jewish Agency provides support for industrialization in rural settlements, mainly when agriculture cannot provide an adequate economic base. This takes numerous forms — financial and professional assistance for industrial projects in well-established settlements, planning and developing projects in new settlements, establishing industrial plants in regional centers and helping establish regional agriculture-related plants.

The implications of the Jewish Agency operations as far as the Arabs of Israel are concerned should be abundantly dear. The entire process is directed to the establishment of *Jewish* settlements. It may be seen as a continuation of the Zionist program for Jewish settlement in the Land of Israel, which is regarded as justified both on ideological and security grounds.[11]

The Arab citizens of Israel are entirely excluded from the process, whether as decision-makers or as beneficiaries. This means not only that no new Arab agricultural settlements have been established in Israel since independence, but that basic services in Arab villages lag far behind those in all new rural settlements. The Jewish Agency, as we have seen, is responsible for developing the infrastructure in new rural settlements. It finances a whole range of development works, including public buildings (such as community centers) and such basic services as sewage and water systems and connection to the national water supply and electricity grid. Most Arab

villages still have no proper sewage disposal facilities. There are over forty “non-recognized” Arab villages that are not connected to the water supply, the electricity grid or the telephone system. The reason often given for lack of the most basic facilities in established Arab villages is that the buildings are widely scattered and that installation of modern facilities would therefore be prohibitively expensive. The fact remains, however, that there is not one Jewish rural settlement without basic facilities. One reason for this is that the Jewish Agency finances development costs in new rural settlements whereas the costs in Arab villages would have to be met by the government.

Summary. The activities of the Jewish Agency in Israel are not restricted to agricultural settlement. They encompass a wide field, including establishment and support of educational institutions, the Project Renewal urban housing project that will be discussed in the next chapter, and provision of social services not provided by the state. All the *direct* beneficiaries of these activities belong to the Jewish sector of the population.[12] Thus an official publication of the Annual Assembly of the Jewish Agency states:

> In one way or another, Jewish Agency programs and services affect directly the lives of some 600,000 *Jews* in Israel — and indirectly many more.[13] (emphasis added).

How may the legal status of the WZO and the Jewish Agency, at least as regards their activities within Israel, be summarized? On the one hand it is difficult to describe these organizations as ordinary voluntary organizations. They have been entrusted, under law, with tasks, some of which are clearly governmental activities. Their legal status has been defined in special statutes of the Knesset. Their officials are intimately involved in government decision-making in some fields, such as rural settlement. They cannot therefore be compared to other voluntary organizations that enjoy no special statutory status.

On the other hand, it is clear that these organizations are not government organs in the conventional sense. Practically all of their funds come from contributions of world Jewry, and not from the Israeli tax-payer. This is generally the main factor cited in order to justify restricting the activities of the National Institutions to the Jewish population. The philosophy behind the restriction is that the people who donate the money are contributing to a Jewish organization, that cater to the needs of Jews. Furthermore, the functions of these institutions were not detailed in the statutes of the Knesset, but in the covenants between them and the government. The need for a covenant with these organizations emphasizes their independent role and the fact that they are not controlled by the state.

The status of the National Institutions is problematical because while entrusted with tasks that are *par excellence* tasks of a governmental nature,[14] their mandate restricts them to dealing with the Jewish sector of the Israeli population. This means that they do not see themselves as bound by the basic legal principle that public bodies may not discriminate between citizens on the basis of religion, ethnic group or national origins. The activities of the WZO and Jewish Agency in Israel, the most important of which is rural settlement, are confined to the Jewish sector.[15] Furthermore, there is no parallel governmental agency that deals with the same activities for those not covered by the WZO and Jewish Agency activities. The result is that an area such as new agricultural settlement in Israel is in effect restricted to the Jewish sector. New agricultural settlements for Arabs are unknown[16] and attempts to establish such settlements have been frustrated. This was brought home a number of years ago when a group of Negev Bedouin who, under government policy, were to be settled in specially built townships, applied to the Minister of Agriculture to allow them to establish a settlement on the lines of the co-operative *moshao.*

Their request fell on deaf ears. When the present writer questioned a senior ILA official on the matter he replied quite candidly that *moshaoim* are set up with Jewish Agency money which is meant for Jews and not for Arabs.[17] More recently, a group of Druse citizens, headed by a senior officer in the IDF reserves, applied to take over an "observation point" (a type of small settlement established in rural areas in the Galilee in an attempt to boost Jewish presence there).[18] The "observation point" was established on land that had been expropriated from the village of Jatt but it had been abandoned by its original Jewish settlers. The head of the Jewish Agency Settlement Department was adamant in his opposition to the plan, and it was rejected.[19]

The exclusive nature of Jewish Agency activities is recognized by government decision-makers and is sometimes utilized in order to realize policies that may not be adopted by governmental agencies bound by the equality principle. Reference was made above to the opinion of the Attorney General according to which the Ministry for Absorption of Immigrants may not grant benefits to Jewish citizens returning from abroad that are not also granted to Arab citizens. One of the benefits discussed in the opinion was a travel and moving loan. The Attorney General had this to say about it:

> As regards the travel and moving loan, we were informed by you that the Jewish Agency participates in part of these expenses, while the rest is paid for from the state budget. If this assistance were to be given wholly by the Jewish Agency, it could be given according to directives fixed by the Jewish Agency in co-operation with the Ministry for Absorption of Immigrants. However, if the assistance continues to be financed, in whole or in part, by the state, it will be necessary to ensure that there will be no discrimination between equals in the granting of the loan.[20]

The source of funds for WZO and Jewish Agency activities is the most widely used justification offered for the restricted nature of these activities. Given the fact that many of these activities are of a governmental nature, and that no parallel body exists to provide similar services to non-Jews, one may question whether allowing a body which is restrictive in its nature sole authority over these activities is consistent with the duty of the state to ensure equal rights to all citizens, irrespective of race, religion and sex.[21]

Covert Discrimination

The use of the express criterion of Jew or non-Jew as a distinguishing criterion in Israeli legislation is extremely rare. Lawyers examining discrimination under law cannot confine themselves, however, to the explicit use of discriminatory criteria in legislation. They must examine whether other seemingly non-discriminatory criteria are employed which lead *in fact* to different rules or arrangements being applied to different groups, divided along ethnic, religious, national or sexual lines. That this must be the attitude to discrimination was recognized by the Israel Supreme Court in a case that will be reviewed below. Tirkel J. stated:

> In examining whether discrimination exists one must not examine only the written text; one must also examine that which is hidden from the eye, in case "disguised discrimination" is hiding here.[22]

This section reviews mechanisms of "disguised discrimination" in Israeli legislation.

Military Service

Background. The Defense Service Law (Consolidated Version), 1986 imposes a duty on every resident of Israel who reaches the age of 18 to serve in the Israel Defense Forces. (The basic period of regular military service at the moment is three years for men and two for women. After demobilization residents are subject to annual reserve duty which may amount to 60 days per year.) While the law does not distinguish between residents on the basis of religion or national origins, recruiting officers may exercise discretion in recruitment. Since the establishment of the state they have refrained from recruiting Arabs, except for male members of the Druse community who have been recruited since the late 1950's.[23]

There would appear to be two reasons for exempting the Arabs from military service. The official reason is the wish not to present the Israeli Arabs with the conflict of having to take up arms against members of their own people (and possibly, even their own families).[24] It would, however, be naive to believe that the fear that some Arabs might be tempted to use their arms against the Jewish state, rather than in defending it, was not an equally weighty reason. For present purposes the reasons for the exemption are less important than the fact that the vast majority of Jews are conscripted; the vast majority of Arabs are not. Thus use of military service as a criterion for entitlement to rights or benefits means that most Jews enjoy the entitlement while most Arabs do not.

The Military Service Criterion as Discrimination. Employment of the criterion of military service, which means that Arabs who are not conscripted are not entitled to a certain benefit, does not *necessarily* imply that the criterion employed is discriminatory. For discrimination means that persons who should be treated equally are treated unequally, or, put another way, that a distinction is made between persons on grounds that should be considered irrelevant. Persons who serve in the army for three years of their lives and persons who do not, for whatever reason, are not in an equal position in all respects. A distinction between them is therefore not necessarily a distinction on grounds that should be considered irrelevant. Many countries provide discharged soldiers with benefits not available to others. On the other hand, as use of the military service criterion for provision of benefits or services means, in the Israeli context, dividing the society largely — although by no means entirely — along ethnic-national lines, care has to be taken lest the criterion be exploited for that purpose.

In discussing the use of the military service criterion, the first question should be whether the criterion is employed in circumstances in which it should be considered relevant. Relevancy in this context depends on the connection between the military service of the beneficiary, and the disadvantages incurred thereby, and the particular benefit. For example, granting benefits to soldiers or discharged soldiers that are directly and reasonably connected to their period of service, or may be seen as a reasonable form of compensation for the time spent in service, should not be regarded as a form of discrimination, even if as a result the majority of Arabs are not entitled to the benefit and the majority of Jews are.

On the other hand, payment of benefits that bear no reasonable connection to the period of military service of the beneficiary may fairly be regarded as a covert method of discriminating between Jews, most of whom are entitled to the benefits, and Arabs, most of whom are not. The borderline between the types of benefits is not always easy to detect, but it seems to the present writer that the principle involved is clear. Furthermore, as use of the military service criterion in Israel necessarily results in a distinction between Jews and Arabs, in cases of doubt the criterion should be regarded as suspect. The burden should therefore be to show that the criterion is *not* discriminatory, and not that it is.

Supplementary Children's Allowances. The National Insurance Law entitles all insured

persons (i.e., residents between the ages of 18 and 67) to allowances for their minor children. The law makes no distinction between different types of insured persons. Military service is irrelevant in determining the status of a person as an insured person or of that person's entitlement to the allowance. The only relevant factors are whether the potential beneficiary is insured and the number of his or her minor children.

In 1970, an amendment was passed to the Discharged Soldiers (Return to Work) Law, 1949. This law deals with the right of discharged soldiers to return to the place of work they occupied before their conscription, although the 1970 amendment has nothing to do with this matter. The amendment gives the Minister of Labor, in consultation with the Minister of Finance and the approval of the Knesset Finance Committee, authority to promulgate regulations that will entitle soldiers or their families to monthly payments for their minor children. It defines "soldier" as

> a person who is serving, or has served, in the Israel Defense Force, police or prison service, or who served before 15th May, 1948 in military service which has been recognized by the Minister of Defense…[25]

Pursuant to the authority granted in the above amendment, the Minister of Labor promulgated the Grants to Soldiers and their Families Regulations, 1970. These regulations follow the above statutory definition of "soldier," define "family members" as the "spouse, children or parents of a soldier" and provide:

> 2. Soldiers or family members are entitled to grants for their third child and every additional child as long as they have two [minor] children older than them.

The grant provided for in these regulations is paid in addition to the ordinary children's allowances paid to all insured persons under the National Insurance Law. The grants are paid through the National Insurance Institute, though they are funded from the general government budget and not from National Insurance premiums. The result is that "soldiers" and "family members" of soldiers with three or more children are paid higher children's allowances than persons with the same number of children who are neither soldiers nor family members of soldiers.[26]

This does not mean that no Arabs are entitled to the larger allowances, nor that all Jews are entitled to them. Some Arabs (mainly members of the Druse community and Bedouin) serve in the Israel Defense Force; others serve in the police or prison service. They and their family members are entitled to the higher allowances. Some Jews do not serve in the army, police or prison service and they have no statutory right to the higher allowances. However, the net outcome of the above arrangement is that the vast majority of Jewish families with three or more minor children are entitled to the larger allowances, while the vast majority of Arab families of the same size are not so entitled.

It seems clear to the present writer that payment of extra children's allowances to "soldiers" and "family members" is an instance of covert discrimination. There is no reasonable connection between service in the army and the extra allowances, as can be seen if the following factors are considered:

1. A soldier is a person who served at any time in the past in the army, and for any length of time. Thus, for example, a person who served for a month thirty years ago and was then discharged automatically becomes eligible for the extra allowances.

2. The allowances are paid to the family members of people who served in the army and not

just to discharged soldiers in respect of their dependents. Thus a person whose child has served in the army is entitled to the allowance. Furthermore, a person one of whose parents served in the army at any time is entitled to the allowance.

3. The type of payment, a children's allowance for medium-size and large families, bears no relation to the criterion for payment: service in the army, police or prison service. This type of payment is clearly a social benefit and not some kind of benefit given to ex-soldiers to enable them to adjust to civilian life. Benefits of this type paid either universally, or according to income criteria, are understandable. But it is difficult to understand how army service at any time, or a family relationship with a person who has done army service, can be regarded as a relevant criterion for entitlement to such benefits.

The only possible argument which may be raised in defense of this criterion for payment of extra children's allowances is that the state wishes to accord some form of recognition or to display some form of gratitude to people who have fulfilled their "patriotic duty." It does this by paying them benefits not paid to others. It is very difficult to accept this argument. Arabs who do not serve in the army are not breaking the law in any way. They do not serve because the Minister of Defense has so decided.

Finally, there is also the question of the burden of proof mentioned above. According to generally accepted legal principles, if the outcome of a certain legislative arrangement or policy discriminates between classes of persons on the basis of race, religion or national origins, there is a presumption that that arrangement or policy is discriminatory. The burden of proof is on those who wish to justify the arrangement or policy to show why it should not be regarded as discriminatory.[27] It is hard to believe that the burden of proof could be lifted in the present case.

Other Statutory Privileges. A number of statutory provisions give discharged soldiers privileges for a certain period of time following their release from service:

Discharged Soldiers Law, 1984. This statute gives discharged soldiers a number of privileges for a period of three years from the time of their release. In order to qualify for these privileges the person must have served in the regular army for at least two years, in the case of a male, and one-and-a-half years, in the case of a female (or have been released before the said period elapses because of an army-related disability).[28] The privileges granted are the following:

> (i) Preference over non-discharged soldiers in being sent to work by the Labor Exchange in certain types of employment;
>
> (ii) Preference in acceptance to work in certain public forms of employment, provided the discharged soldier meets the job requirements and is no less qualified than other candidates;
>
> (iii) Preference in acceptance for occupational training courses run by the state;
>
> (iv) Partial exemption from fees in occupational training courses run by the state, or subsidization of the fees if the course is not run by the state;
>
> (v) Subsidization of fees for completion of high school education;
>
> (vi) Preference in acceptance to university, or for a place in university residence, provided the discharged soldier meets the requirements of the particular university for acceptance to the given course of study, or place in residence;
>
> (vii) Loans for payment of fees for post high school education;
>
> (viii) Enlarged government-subsidized loans for purchase of apartments.

Assessing the nature of the above privileges is no easy matter. On the simplest level they may

be regarded as a form of *quid pro quo.* Persons who serve in the army are removed from civilian life for a period of time, forfeiting earnings, career advancement or continuation of their studies. It is only just and fair that in recompense for these disadvantages arrangements should be made to help them adjust to civilian life and build careers. The main factors supporting this view of the privileges are that they are restricted to people who have served for a significant period in the army and also that they are limited to the three-year period following demobilization. There would therefore appear to be a close and reasonable connection between the service and the privileges. These privileges in no way exceed those granted in other societies to ex-servicemen, and are in some ways more limited than elsewhere.[29]

Employing the relevancy test leads to the conclusion that employing the military service criterion for entitlement to the above-mentioned benefits should not be regarded as a form of covert discrimination. In some contexts this raises the question whether the relevancy test can be regarded as the sole test for assessing the legitimacy of the criterion. In a restricted market some of the privileges granted to discharged soldiers may mean that people who are not discharged soldiers are, in effect, excluded from enjoyment of certain services. For example, the privilege of preferred entrance to university courses or places in university residence may, if taken literally, mean that these are restricted to discharged soldiers. This would result in the exclusion of most Arabs from certain courses or from places in university residence. The factor which can prevent such a consequence is the proviso that the discharged soldier meets the acceptance requirements of the given university for a place in the particular course of study or place in residence. As the acceptance requirements for courses are usually based on grades the question of army service is likely to come up only if two persons vying for one place have exactly the same grades.[30] As far as places in university residences are concerned, all the universities include military service as one of the criteria for a place in residence, though the weight ascribed to this criterion differs from university to university. As a result, in some universities employment of the criterion has considerably reduced the chances of Arabs gaining a place in residence, especially in universities with very limited residential facilities.[31] This case illustrates the influence of military service as a criterion in a highly restricted market, severely limiting the access of Arabs to a service and, in extreme cases, even leading to their exclusion.

Another statute granting benefits to discharged soldiers is the Discharged Soldiers (Readjustment Grant) Law, 1988, which provides that soldiers who have served for at least six months are entitled upon their release to a yearly payment of NIS 900 for each of the three following years. Soldiers who served less than three years are entitled to one third of the sum for each year served. This law has a clear connection to the service and its length, and the payments may be regarded as partial compensation for the time spent in the army when the beneficiaries were denied the opportunity of working and earning.

It seems to the present writer that direct compensation of soldiers for actual time spent in military service is to be preferred to weighting the criteria for access to limited services, as is done in the case of university residence. Direct compensation is paid out of the public pocket and is therefore shared by all who benefit from the security provided by military service. Weighting military service in a restricted market means that the price is paid by those who are excluded.

Income Tax. According to the Income Tax (Benefits for Discharged Soldiers) (Temporary Provision) Law, 1981 a discharged soldier who has served at least two years service (one year for women) and begins work in certain defined industries (production, agriculture, construction and hotels) within six months of release from service, is entitled to tax credits. The extent of these credits depends on the length of employment and is restricted to defined tax years.[32]

Once again, as in the case of the privileges reviewed above, these may be viewed from two perspectives. These credits might be seen simply as a way of encouraging discharged soldiers to go into these defined industries by raising their net earnings in the period after their release. It may be argued, however, that since some of these industries, such as construction, hotels and production, employ large numbers of Arabs the effect of the law is to create a discrepancy in the earnings of Arabs and Jewish employees. On the whole this argument is not convincing. Tax credits are given only to discharged soldiers who begin work in the defined industries within six months of their release and not to all discharged soldiers. Its application is also restricted in time. In this case there appears to be a reasonable connection between the service and the tax credit.

Discretionary Use of Military Service Criterion. All the instances cited have been instances of legislative adoption of the military service criterion as a factor in granting privileges or in paying benefits. However, this criterion is sometimes adopted by the use of administrative discretion in areas which are not regulated by statute. Following the classification suggested above, these instances should be dealt with under the rubric of what has been termed "institutional discrimination," for they involve use of covert discrimination in general policy, rather than in legislative instruments. Nevertheless, because of their obvious connection to the subject under discussion, two main instances of employment of the military service criterion will be reviewed here: government support in housing and subsidization of university fees.

Government Housing Assistance. Young couples wishing to purchase apartments are entitled to government subsidized mortgages. The mortgages are administered through the regular banks and mortgage banks, but the mortgage conditions are set by the Ministry of Construction and Housing and are identical in all the banks. The size of the mortgage loan to which a couple is entitled is based on a point system; the greater the number of points, the larger the loan to which the couple will be entitled.

According to the policy established by the Ministry of Construction and Housing and administered by the banks, military service is an important factor in determining the size of the mortgage loan to which a young couple will be entitled. However, the duration of military service or the period of time which has elapsed since discharge are regarded as irrelevant. The only criterion is whether one of the couple has a military identification number. Such a number is assigned to all who serve in the army, no matter how long they serve. The difference in the size of the loan given to people who have a military identification number and those who do not is considerable and may amount to 150 per cent.[33]

This policy of the Ministry of Construction and Housing is inconsistent with section 12 of the Discharged Soldiers Law, 1980. That section does indeed authorize the Minister of Construction and Housing to increase the size of the loans available to discharged soldiers. But, as we have seen, according to the said law entitlement to benefits is dependent on a minimum period of regular service and is restricted to the three-year period following discharge from the army. The policy of the Ministry of Construction and Housing ignores both of these restrictions. It is doubtful whether this policy could stand up in court. Given that there does not appear to be a reasonable connection between *actual* military service and entitlement to the larger loan, and that the result of this policy is that most Jews are entitled to the laiger loan while most Arabs are not, it should be regarded as a form of covert discrimination.

Another example relates to the right to public housing privileges in development areas. The Ministry of Construction and Housing provides substantial housing assistance for families in development areas, in the form of outright grants or loans for the purchase or building of apartments or houses (that may amount to as much as 95 per cent of the price), low-rental

apartments or subsidization of rent. The guide-lines laid down by the Ministry provide that the above forms of assistance are only available to a "*Yotzei Zava*" (literally, a person of military age), which the Ministry defines as "a person who has served, or whose father, mother, brother, sister, son or daughter has served, in the Israel Defense Force, police or prison service." Once again it seems that, as in the case of the mortgage loans, the legality of this covert discrimination is highly dubious. In 1984, a petition was submitted to the Supreme Court by an Arab resident of the development town of Kiryat Shemoneh, who had been refused Ministry assistance. An order nisi was issued against the Minister of Construction and Housing to show cause why the criterion of military service should not be repealed.[34] The case was subsequently settled out of court, probably because the Ministry was not prepared to defend its criteria in court.[35]

Subsidized University Fees. In March 1982, the Minister of Education and Culture appointed a public committee, under the chairmanship of the Deputy Minister of Construction and Housing, Moshe Katzav, to determine fees and students' loans and grants in the universities. The Committee submitted its report in May, 1982 and it became the basis for the system of fees and assistance in the universities from the 1983/4 academic year.

The Katzav Committee adopted two criteria which may be regarded as discriminatory towards Arab students: status as amember of a "soldier's family" and residence in a development town or renewal neighborhood.[36]

The system of government financial aid and subsidization of university fees is administered by a Ministry of Education fund called the Fund for Loans to Students in Institutions of Higher Learning. Students who come from families with four or more minor children *that are entitled to supplementary children's allowances as soldiers or family members of soldiers* receive a grant which covers half the university fees.[37] Once again it is difficult to understand why the criterion adopted — entitlement of the family to extra children's allowances—should be regarded as a legitimate criterion for help of a social nature and this should be regarded as yet another instance of covert discrimination.

Extension of Children's Allowances. Under the statute reviewed above only soldiers and family members of soldiers are entitled to extra children's allowances. This means that the majority of Arab families are not entitled to these extra allowances. However, there is also a category of Jewish families who do not meet the minimum statutory requirements of military service: the families of students in *yeshivot* (Jewish religious seminaries), who, under a political agreement reached soon after independence, are exempt from military service as long as they continue their *yeshiva* studies. For a long time the extra children's allowances were in fact paid to these *yeshiva* students even though they had no statutory right to them. In *Wattad v. Minister of Finance*[38] two Arab members of Knesset petitioned the Supreme Court to rule that the allowances should be paid to Arab families aswell. They could notattack the statutory arrangement whereby the allowances are paid only to "soldiers" and their family members, since, as we have seen above, there is no judicial review of statutes in Israel. They could, however, attack the discretion wielded by the Minister of Finance, which had no statutory backing. Their argument was that this discretion was used in a discriminatory fashion, and that if the allowances were paid to some Jewish families who did not meet the statutory requirements they should be paid to Arab families as well. Before the court could decide the matter, the Attorney General ruled that payment of the statutory benefits to people who did not meet the statutory requirements was illegal and he ordered the practice stopped. In the wake of the Attorney General's ruling, the Ministerial Committee on the Interior and Services decided that every full-time student of religious studies would be entitled to child support.[39] The petitioners argued that

this meant that in feet all Jewish families would be entitled to extra children's allowances, while most Arab families would not. They also argued that although the said decision made no distinction between Jewish and other religious studies, in actual fact the only institutions for full-time religious studies were Jewish institutions. Thus, the decision implied discrimination between Jews and Arabs. Both of these arguments were rejected. The court held that the claim that in practice the allowances were paid to all Jewish families had not been proved. It went on to hold that religious institutions of other religious denominations could be established in the future and that full-time students in such institutions would be entitled to the allowances. Furthermore, even if such institutions were not established there was no discrimination between *equals.* The court also saw fit to stress the special place of the *yeshiva* student in Jewish history and the legitimacy of state support for such students.

The net result is that as the position stands at the moment all "soldiers" and their family members have a statutory right to extra children's allowances and full-time students in religious institutions receive allowances under the above-mentioned ministerial committee decision.[40] Even if there are indeed Jewish families who are not entitled to the allowances under either head it is dear that the ministerial decision underlines the covert discrimination inherent in this arrangement.[41]

Geographical Categorization

Covert discrimination may also involve allocation of benefits according to geographical location and the drawing of boundaries so as to include Jewish settlements and exclude Arab ones. The general power to grant the benefits is defined in a statute, but the division of the zones is defined in delegated legislation, i.e., regulations promulgated by the minister with authority over execution of the specific statute.

Development Areas. According to the Encouragement of Investments Law, 1959, government subsidies and tax benefits are available to industries located in development areas. The law authorizes the Ministers of Finance and of Industry and Trade, with the approval of the Knesset Finance Committee, to define the development areas. These areas are defined in orders issued by the Ministers.[42] While a few Arab villages do indeed appear in the defined areas, for all intents and purposes the areas are drawn so as to include Jewish settlements and to exclude Arab towns and villages. Publications by the Ministry of Industry and Commerce list the towns which are development areas. All the towns listed are Jewish.[43] This was recognized in a government resolution that will be discussed below in which it was decided to increase equality of the Druse and Circassian communities (whose sons are drafted for military service). One of the measures mentioned was redefinition of development areas so as to include the villages of these communities.

Tax Credits. According to the Income Tax (Reduction in Tax In Settlements on Northern Border) Regulations, 1985[44] residents of named settlements on the northern border of Israel are entitled to a reduction in income tax of up to 10 per cent of their taxable income. The original regulations named 65 settlements, of which only one (Hurfeish, a Druse village) was non-Jewish, and another (Ma'alot municipal council, which includes the Arab village, Tarshiha) a mixed township. Proximity to the border was not the only criterion by which the list of settlements was compiled, as there were Arab villages not included in the list which are closer to the border than Jewish settlements, which were included. The argument was that the tax benefit should be given

to those who have to bear the security burden of living on Israel's troubled northern border and should be paid only if residents of the settlement serve in the army (hence the inclusion of the Druse village of Hurfeish). Furthermore, shells and rockets fired across the border are aimed at Jewish settlements. The counterargument was that in actual fact shells and rockets fired into Israeli territory from neighboring Lebanon make no distinction between Jewish and Arab settlements. Following a petition to the Supreme Court by residents of Arab villages in the area, and the firing of shells on the Arab village of Fassuta, the list was amended so as to include four Arab villages.[45]

Notes

1. 13 *Divrei HaKnesset* 37 (4.11.52).

2. 13 *Divrei HaKnesset* 60 (5.11.52), The Prime Minister did not specify what the other factors were. It would seem that at least one factor had to do with the marshalling of the resources of Jews abroad to help in the development of the State of Israel, and most especially in the absorption of the hundreds of thousands of new immigrants who entered the country after independence. In order to be recognized as tax-deductible, contributions had to be made to non-governmental organizations. Another reason might have been the desire to maintain Jewish National Institutions that could openly deal exclusively with the Jewish population.

3. See 5734 *Hatzaot Hok* 162.

4. See section 4(c) of Fruit Board (Production and Marketing) Law, 1973; section 5 of Groundnut Production and Marketing Board Law, 1959; section 5 of Vegetable Production and Marketing Law, 1959 and section 5 of Poultry Board (Production and Marketing) Law, 1963.

5. See Negev Law, 1986, sec. 4(6) and (7), and Galilee Law, 1988, sec. 3(b).

6. As seen above, according to the WZO covenant the WZO will not deal with those matters with which the Jewish Agency deals in practice. The Jewish Agency's settlement department deals with rural settlement within Israel itself while the settlement division of the WZO deals with rural settlement on the West Bank: see *Report of the* WZO *Executive to the 29th Zionist Congress*, Jerusalem, 1978.

7. The main bodies that deal with agricultural settlement are the following:

Ministerial Committee on Settlement. This committee, which is the highest level policy-making body on settlement in Israel, is composed of an equal number of cabinet ministers and members of the Jewish Agency executive. Its mandate is to decide on the creation of new settlements in Israel, the West Bank and Gaza. Its decisions may be appealed by cabinet members before the full cabinet. The committee has been very active at some times, dormant at others.

The Joint Authority for Agricultural Planning and Development. Before the state was established the WZO-Jewish Agency Settlement Department dealt not only with settlement but with research and development in agriculture. Upon establishment of the state agricultural matters were transferred to the Ministry of Agriculture. In order to ensure coordination of activities between the Ministry and the Settlement Department the Joint Authority for Agricultural Planning and Development was set up. The Authority is a professional body within the Ministry of Agriculture which includes representatives both of the Ministry and of the Jewish Agency. Its head is a Ministry official. As its name suggests, it has general control over planning and development of agricultural settlements in Israel.

Programs Committee. This is a sub-committee of the Joint Authority which is composed of two Ministry officials and one Jewish Agency official. It is in fact probably the most important governmental body active in the process of developing new rural settlements. The Programs Committee reviews proposals to establish new rural settlements in Israel, examines their economic viability, decides on the appropriate branches of agriculture if the settlement is to be an agricultural settlement, and, possibly most important in the Israeli context, determines the allotment of water for agricultural purposes. If the Programs Committee recommends a proposal unanimously it is brought before the Management of the Joint Authority for formal approval. If there is disagreement in the Committee the matter is discussed by the Management.

Agricultural Planning Administration. A body of 15–20 members, headed by the Minister of Agriculture, and comprising senior Ministry officials, treasury officials, leaders of the settlement organizations and Jewish Agency officials. This body is meant to deal with recommendations of the professional decisions made by the Programs Committee after they have received the approval of the Joint Authority Management. As this body has proved somewhat unwieldy decisions are often made by a sub-committee composed of the head of the Joint Authority (a Ministry official), the director general of the Ministry, the Water Commissioner and the head of the Jewish Agency Settlement Department. The decisions of this sub-committee are in theory subject to the approval of the Planning Administration, but they are apparently not always brought before that body but are instead brought before the Minister of Agriculture for his stamp of approval.

Settlement Department of the Jewish Agency. Carries out the initial planning of new rural settlements and submits its proposals to the Programs Committee. In theory other bodies may submit proposals to the Programs Committee, but in actual fact virtually all proposals are those prepared by the Settlement Department.

8. The intimate connection between Jewish Agency and government activities has budgetary implications as well. Thus,

for example, in appearing before the Knesset Finance Committee that was discussing the proposed government budget a senior official stated:

> I must, of course, speak here not only of the "*blue* money" [that is money in the blue budget books — D.K.], but of the budget totalling 16m and 580m, where the difference of 710m is the part that appears in the Jewish Agency budget that is approved in the Finance Committee and that we regard as if it were part of the budget.

See Knesset Finance Committee, Minutes No. 349 of29.2.72, cited by M. Hofnung, *Social Protest and the Process of the Public Budget—Effects of the Black Panther Protests on Allocations for Welfare and Social Purposes*, Master's thesis submitted to the Department of Political Science, Hebrew University of Jerusalem (1982), 60.

9. See State Comptroller's Reports No. 15 (1964) 258–260 and 21 (1971), 352–356; *Report of WZO Executive*, note 6 *supra*, 93.

10. *Report of WZO Executive*, note 6 *supra*, 94.

11. *Ibid.*, 75.

12. In some cases, however, the activities may benefit Arabs indirectly. Thus, for example, support for institutions of higher education, which under law, and in practice, are open on equal terms to all citizens, benefits both Arabs and Jews. The same applies to centers for cultural activities in the main cities (such as the convention hall in Jerusalem which is owned and maintained by the WZO).

13. See Annual Assembly of the Jewish Agency for Israel, *The Jewish Agency for Israel, A Brief History and Description* (Jerusalem, undated), 6.

14. It must be pointed out that whether a task is a governmental task depends to a large degree on the type of political and economic regime in a given society. There can be little doubt that in the Israeli context of dominating governmental influence in economic and agricultural planning, many of the tasks of the Jewish Agency are indeed governmental tasks. As seen above, this was conceded by Prime Minister Ben-Gurion in the Knesset debate on the law granting special status to the National Institutions.

15. In recent years there has been one departure from this policy. Project Renewal, that is a joint project of the Government and the Jewish Agency, and that was originally restricted to the Jewish sector, has now been expanded so as to include some Arab neighborhoods as well.

16. See A. Levontin, "A Lawyer's View" in A. Hareven (ed.), *One in Six Israeli's* (Jerusalem: Van Leer, 1982) 212:

> It may be asked why Arab *moshavim* have not been established. I think — as least as regards areas within the green line — that terms such as "national land," "state land" and so forth hint that land, according to the Zionist outlook, according to the purpose for which this state was established, is reserved for Jewish settlement, and not so that it should be equally available for the establishment of new Arab settlements.

17. This very same attitude is also discussed in Lustick, *Arabs in the Jewish State* (Austin: University of Texas Press, 1980), 106.

18. Observation points" are small settlements set up on the hills in the Galilee as part of the plan to increase Jewish presence in the area.

19. See reports in *Ha'aretz* of April 3, 1989 (p. 2) and April 7, 1989 (p. 4b).

20. See letter of Attorney General to Minister for Absorption of Immigrants, dated 1 September, 1987 (on file with writer).

21. It may be argued that the Declaration of Independence refers to equality in political and social rights and omits any reference to *economic* rights. It is not quite clear why the Declaration does not refer to economic rights, seeing that the UN Partition Resolution which laid the basis for some of the commitments of the Declaration specifically mentions economic rights. Whatever the reason, it is quite clear that the status of fundamental rights in Israel does not rest solely on a literal reading of the Declaration of Independence. Thus, for example, freedom of speech is a fundamental constitutional principle although it is not even mentioned in the Declaration of Independence. There can be little doubt today that the government may not discriminate on the grounds of religion, ethnic-national group of sex, in the sphere of economic rights. This is recognized in the opinion of the Attorney General mentioned above.

22. See *Wattad v. Minister of Finance* (1983) 38 P.D. III 113, 121–122.

23. Recruitment of members of the Druse community began after a request by leaders of that community: see A. Rubinstein, *Constitutional Law of the State of Israel*, 3rd ed. (Tel Aviv: Schocken, 1980), 190. A large number of Bedouin also volunteer for military service.

24. See Rubinstein, *ibid.*

25. The reference to military service in the pre-independence era is to service in one of the Jewish underground groups: *Hagana, Etzel* and *Lehi.*

26. The following chart shows the amounts of children's allowances paid in April, 1989 (in new shekels):

No. of Children	Basic Allowance	Extra Soldier's Allowance	Total Allowance

3	130	43	173
4	260	187	447
5	332	302	634
6	404	432	836
7	476	562	1038
8	548	692	1240
9	620	822	1442
10	692	952	1644
11	764	1082	1846
12	836	1212	2048

27. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell v. Green*, 411U.S. 792 (1972).

28. It should be noted, however, that section 2 of the statute authorizes the Minister of Defense, with the consent of the Minister of Finance, to extend application of the privileges to persons released from army service, who do not meet the general conditions required to qualify for the privileges.

29. See, e.g., *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1976). In this case a woman challenged the constitutionality of a Massachusetts statute which gave veterans in the public service absolute hiring privileges for life/The petitioner argued that this led to discrimination against women, and managed to produce convincing evidence to show this. The Supreme Court upheld the statute. It ruled that granting privileges to veterans was a legitimate state interest and that as no discrimination was intended the fact that it was the result of the statute did not invalidate it.

30. It should be pointed out that the interpretation of the law whereby grades are the only criterion for acceptance may be attacked as inconsistent with the statute. It may be argued that the university has to set a minimum grade requirement for acceptance to a given course of study and that preference should then be given to all discharged soldiers who have the minimum grade. Only after their acceptance should place be made for others with the minimum grade. In certain courses of study in which the demand far exceeds the supply of places, employment of this system would in fact mean that persons who were not discharged soldiers would be excluded entirely. This would clearly be intolerable as Arabs could not be admitted at all. The unreasonable consequences of accepting this interpretation is a good enough reason for rejecting it.

31. The figures for places in residence given to Arab students (relative to the number of students at the particular university and the number of places available) were provided in a Knesset debate: see 109 *Divrei HaKnesset* 818–820 (9.12.87).

32. The original law restricted the credits to the 1981–1983 tax years. Later it was extended to the tax years of 1984 and 1985: see section 13 of the Discharged Soldiers Law, 1984. Since then it has been extended each year. The most recent extension applies to soldiers discharged in the 1989tax year: see Income Tax Order (Benefits for Discharged Soldiers) (Extension of Qualifying Period), 1989, 5749 *Kovetz HaTakanot* 531.

33. In a small study carried out in 1987 the position of young couples was examined. The circumstances of the couples were identical in both cases, the only variable being the husband's holding a military identification number. It was discovered that with the number the couple would be entitled to a loan of NIS 19500 ($13000); without it they would be entitled to a loan of NIS 13300 ($8,866).

34. H.C. 85/84, *Attaf Azav v. Minister of Housing*, order nisi issued on February 12, 1984.

35. One of the terms of the settlement with the petitioner was that the details of the deal made with him would remaift confidential. This would seem to increase the suspicion that the Ministry is aware of the dubious legal validity of its criteria. The court file ends with an application by the petitioner's lawyer to cancel his petition as "the parties have found an arrangement which is satisfactory to the petitioner."

36. As seen above, all the development towns are in fact Jewish towns. The renewal neighborhoods were also originally all Jewish but in recent years some mixed neighborhoods and Arab neighborhoods in mixed towns have been included.

37. Students from development areas or renewal neighborhoods are entitled to loans which cover one third of the fees. If the student continues to reside in the development area or renewal neighborhood for the period of one year after completion of his or her studies the loan becomes a grant. While these loans are also restricted to Jewish students one could regard them as incentive loans to encourage students to remain in those areas of the country which the government regards as important to maintain in order to further its policy of population dispersion.

38. (1983) 38 P.D. Ill 113.

39. There is no statutory basis for these payments. However, under the rules of Israeli administrative law the government has the power to grant non-statutory subsidies or benefits provided these are covered in the budget approved by the Knesset. But even in the case of non-statutory benefits or subsidies the government must act in a non-discriminatory and reasonable fashion: see, e.g., *Ashkenazi* v. *Minister of Labor* (1982) 37 P.D. 195; *Amdar v. Minister of Defense* (1972) 26 P.D. II63.

40. Such students do not have a *right* to the allowances. Though the Supreme Court would no doubt interfere if an *individual* student were refused the allowance, it would not interfere if the policy were reversed and the payments to the

whole group were terminated.

41. It must be pointed out, however, that under the government decision full-time students in Moslem (or Christian) seminaries would also qualify for the allowances. At the time the decision was taken there were no Islam seminaries in Israel, and Moslem students who wanted to study in religious seminaries had to study in academies or seminaries on the West Bank, in Gaza or in Egypt. In recent months one seminary was opened in Taiba and two more planned in Baka al-Gharbiya and Umm el-Fahm: see report of Attalah Mansour in *Ha'retz* of October 11, 1989, p. 3. Under the government decision it is clear that full-time students in these seminaries who have three of more children will be entitled to the extra children's allowance.

42. See 5738 *Yalkut HaPirsumim* 1249; 5739 *Yalkut HaPirsumim* 1193.

43. See Ministry of Industry and Commerce, Development Areas Unit, *Information for Investors*, October, 1984.

44. 5746 *Kovetz HaTakanot* 159.

45. See 5747 *Kovetz HaTakanot* 181, which adds to the list Gush Halav, Mailiya, Aramshe and Fassuta.

7

Institutional Discrimination

The’Israeli government bureaucracy, like most other modern bureaucracies, wields a great deal of discretionary power. Even if there were no instances of overt or covert *statutory* discrimination between Jews and Arabs, this discretion could be used so as to create significant *de facto* discrimination between Jews and Arabs in the enjoyment of government largesse of one sort or another. In this chapter I shall attempt to classify the kinds of cases in which discretionary power is typically wielded by the bureaucracy in a way that may be discriminatory to Arabs. This is what has been termed in this study “institutional discrimination.” This term has been used so as to distinguish this type of discrimination from individual discrimination by officials within the administration which is not part of a policy or pattern.

The fact that institutional discrimination is an established feature of government decision-making is best revealed by a formal resolution adopted by the government in 1987. The text of this resolution, as published in a press release of the Government Secretariat in April, 1987, reads as follows:

> By a majority vote, that met with no opposition, the Government made a number of decisions aimed at furthering the Druse and Circassian populations so as to achieve equality in practice, on the basis of a detailed plan that includes designation as development settlements parallel to nearby Jewish settlements, subject to the changes that circumstances require; incentives in the areas of mortgages, encouragement of industry, education, vocational training, welfare services and local council and development budgets, all of which is to be carried out within the framework of the powers of the various ministries, and subject to the fixing of budgetary frameworks in inter-ministry consultations.

By passing this resolution the government admitted not only that there had been no proper equality in these fields in the past; by implication it also conceded that the principle of equality would only be applied to the Druse and Circassian communities, and not to the general Arab community.[1] Given the constitutional obligation of the government not to discriminate on the basis of ethnicity, national group or religion, this is a remarkable statement It does, however, reflect the reality of government decision-making in many spheres.

In dealing with institutional discrimination a number of points must be stressed:

a. The emphasis here is on the *result* or *impacts* of certain policies or programs and not necessarily on the intentions behind them. Whether policies are devised so as to discriminate, or in spite of the fact that they discriminate, is not important. In many, if not most, areas, discriminatory policies vis-à-vis the Arabs probably result more from lack of attention or indifference than a deliberate policy of discrimination.

b. In a study of the present nature it is not possible to analyze all of the areas in which the potential place exists for institutional discrimination in Israel.[2] In the present study of the *legal* status of the Arabs the object is not to provide a comprehensive picture of institutional discrimination, but merely to characterize typical cases of such discrimination and to examine why such cases are tolerated in a legal system committed to the principle of equality.

c. When confronted with the discrepancies in allocation of resources to the Jewish and Arab sectors of the population, official committees and spokesmen invariably point to the vast

improvements in the situation of the Arab community since 1948. Thus, for example, speaking on behalf of the government in a Knesset debate before a general strike declared by the major Arab organizations in Israel in June, 1987, the minister in charge of Arab affairs cited figures showing the improvement in health services, infant mortality and school attendance in the Arab community.[3] The special committee on Arab education set up in the Ministry of Education and Culture in 1985 also stressed the tremendous advances in educational services for Arabs since the state was established as a mitigating factor in the discrepancy between educational services offered to the Jewish and Arab sectors.[4]

The starting points for Jews and Arabs in 1948 were indeed entirely different. Thus, for example, there was a wide network of Jewish schools in 1948 but there was no corresponding network in the Arab sector and the percentage of Arab children in schools was far lower than the percentage of Jewish children. Similarly, in the area of industrial development, the Jewish economy of 1948 had a solid industrial base while the Arab economy was largely agricultural.[5] While the advances in some fields such as education and health-care are impressive, the question is whether these starting points should still be relevant more than 40 years after the state was established, and after the Jewish population of the state has itself undergone a total transformation as a result of the large influx of immigrants from all parts of the globe. It could even be argued that under the equality principle the state must adopt a policy of benign discrimination in order to overcome unequal starting points. This argument shall not be discussed here. My attitude will be that in discussing discrimination in any given society one must compare contemporary sectors of the population, rather than the situation of the same community over time.

d. Describing an area in which institutional discrimination typically exists does not necessarily imply that existing discrepancies bet ween Jews and Arabs in that area are solely, or even mainly, a result of institutional discrimination. First, in some areas the unequal starting points may still be relevant. Furthermore, in certain fields part of the responsibility for provision of services lies with local government rather than with the central government While discrepancies in services provided by local councils in Jewish and Arab towns is, as we shall see, to a large extent the result of differences in the rates of government funding, the responsibility of the Arab local councils themselves for this state of affairs bears examination. Once again I shall not discuss the causes for the state of inequality but shall confine the discussion to the differential use of discretionary powers.

Institutional discrimination may be divided into the following rather rough categories:

Budgetary discrimination;
Resource allocation;
Implementation of laws.

Budgetary Discrimination

The Budget Law is enacted annually by the Knesset as the basis for the Govemment’s operating budget. Sometimes the budget spedfies amounts to be spent in the non-Jewish sector.[6] More often it does not include a breakdown of all items on the approved budgets of the various ministries. Unless bound by statute in allocation of benefits, the ministries enjoy a wide degree

of discretion in the detailed allocation of funds approved in the budget. Room is thereby created for budgeting policies which discriminate between different sectors of the population. The following examples illustrate how this discretion may be used in a manner which is discriminatory towards the Arab sector:

Local Government Funding. The Ministry of Interior has both legal and administrative control over all forms of local government. The annual national budget includes large sums which are to be granted to municipalities as participation in their budgets. The recent research of al-Haj and Rosenfeld documents the extent of the differences in the funds provided to Jewish and Arab local councils. First, the very system for determining the central government contribution to local government budgets differs in the Jewish and Arab sectors. In the Jewish sector it is based on a "basket of services," i.e., the services the local government is legally bound to provide. In the Arab sector it is based on the expansion of existing services, which are generally on a low level and do not approach the "basket of services." While 12 per cent of the population live in exclusively Arab towns or villages, these towns and villages receive only 2.3 per cent of the budget allocated to local government. The average sum budgeted per capita in the Arab municipal budgets is25–30per cent of that of the Jewish municipal budgets.

In a study in which seven similar Jewish and Arab towns and villages were examined, al-Haj and Rosenfeld found that in recent years the average ratio of ordinary central government contributions to local government budgets in the Jewish and Arab sectors was 3:1. The ratio in development grants was 5:1.

On the positive side it must be mentioned that in recent years the discrepancy has narrowed. In some fiscal years when there were cuts in local budgets, these cuts did not apply to the budgets of Arab local councils, in which there was a small increase. Furthermore, while the increases in budgets for Arab municipalities are on a par with increases in population in those municipalities, increases in budgets of Jewish municipalities are lower than the rate of population increase.[7] The average discrepancy between contributions to ordinary budgets which in the 1970's stood at 13.1:1, had been narrowed to 3:1 by1982, while later figures suggest that the gap has been closed even further.[8] In summarizing these changes al-Haj and Rosenfeld state:

> … the representatives of both the establishment and the Arab population all agree on many points: progress has been made, but the discrepancy between the two populations persists, and further steps must be taken to ameliorate the situation.[9]

Education. As the percentage of Arab children within the state education system is 20 per cent,[10] one would expect the percentage of resources devoted to education in the Arab sector to be somewhere in the same region. The Committee on Arab Education set up in the Ministry of Education and Culture found that it was not.[11] One of its recommendations was that in future budget years the Ministry should allocate 20 per cent of the regular and development budgets for education to education and other youth activities in the Arab sector.[12]

Religious Services. In 1987 Moslems made up 14 per cent of Israel's population, Christians 2.3 per cent and Druse and other religions 1.7 per cent.[13] The budget of the Ministry for Religious Affairs for 1988 included the sum of NIS 27,144,000 for provision of religious services. Of this sum NIS 2,189,000 (8%) is for Moslems, MS 171,000 (0.6%) for Christians, and NIS 75,000 (0.3%) for Druse services.[14] Once again, on the positive side, the percentage of the budget for Moslems was almost double what it was in 1986.

Allocation of Resources

Cases in which government bodies are responsible for the provision of services of various kinds fall under this head. While these cases may be regarded as part and parcel of the budgetaiy issue, they shall nevertheless be discussed separately.

Within this category special projects and everyday functioning of government offices may be distinguished. There follows a discussion of one special project: Project Renewal.

Project Renewal. In 1977 then Prime Minister Menachem Begin announced that the government would embark on a project for the renewal and reconstruction of depressed and dilapidated neighborhoods. Diaspora Jewry was to be called upon to participate in the financing of the scheme. This announcement gave birth to Project Renewal. Conceived as a joint project of the government and the Jewish Agency, the project encompasses over 80 neighborhoods into which resources have been poured in order to improve both the physical state of apartments and apartment buildings, roads, sidewalks and public areas as well as the social and welfare services.[15] All the neighborhoods originally chosen were Jewish neighborhoods, in spite of the fact that the state of many neighborhoods in Arab towns and villages and in mixed towns such as Haifa and Lod are in an as bad, if not worse, condition than some of the Jewish neighborhoods selected.[16] The rationale offered was that the funding came from the Jewish Agency, and was therefore restricted to Jewish beneficiaries.[17] However, the problem with this rationale is, first, the general question of principle discussed above, namely whether the Jewish Agency may be regarded as a purely voluntary private organization which in the post-independence era should still be free to restrict its activities to the Jewish segment of the population. The difficulty in so regarding the Jewish Agency is aggravated when it works in close partnership with the government. The second difficulty is that an examination of the figures in the present case reveals that the government partnership with the Agency is not a very even one. The State Comptrollers Report for the year 1984 shows that the government had committed itself to spending $381.2m, and had actually spent $250.5m, on Project Renewal, while the Jewish Agency had spent only $164.4m.[18] Figures showing expenditure up until March 31, 1985 reveal a total government expenditure of $428m and a total Jewish Agency expenditure of$172m. According to figures published by the Ministry of Construction and Housing, by March, 1988 the government had spent $525m, while the Jewish Agency had spent $282m.[19] The breakdown of the figures is also revealing. By 1985 the government and Agency spending on social projects was more or less equal ($88m and $77m respectively). On public buildings Agency spending was far in excess of the government's ($95m as opposed to $15m). However, apartments, housing and infrastructure were all funded by government expenditure alone ($330m), with no Agency contribution.[20] The implications of these figures in the present context should be abundantly clear. Project Renewal may not be regarded as a purely Jewish Agency project.[21] Jewish Agency participation in the project served to justify adoption of clearly discriminatory criteria in allocation of government resources.

As a result of criticism, some of it from well-placed political figures, changes were gradually introduced into the project, so as to include Arab neighborhoods in the mixed towns of Tel Aviv-Jaffa, Haifa, Lod, Ramie and Ma'alot-Tarshiha.[22] Those parts of the project that are funded from the government budget (housing improvement and physical infrastructure) are now carried out in Arab neighborhoods as well and there is a tendency, supported by some Jewish communities that have adopted specific neighborhoods, to extend use of Jewish Agency funds to these

neighborhoods too.

Regular Services. There follow some examples of unequal allocation of government resources between the Jewish and Arab sectors of the population:

Education. The discrepancy in general funding of schooling in the Jewish and Arab sectors has been mentioned above. A closer look reveals that there is discrimination in the provision of certain "educational services."

Truant Officers. In the Jewish sector truant officers cover 86 per cent of school age children. At the time the Committee on Arab Education wrote its report, although the drop-out rate in the Arab sector was three times greater than that in the Jewish sector, only 12 per cent of Arab children were under the supervision of truant officers. The Committee recommended that the Ministry of Education and Culture "approve participation in the salary of a truant officer in every Arab settlement, within two and-a-half years and as is the practice in the Jewish sector."[23] Since the report was submitted some advance has been made. However, according to figures given to the Knesset by the Minister of Education and Culture in July, 1988, of the 98 truant officers funded by the Ministry only 10 were working in the Arab sector.[24] This is half what it should be if the proportionate number of Arab and Jewish children in the school system were the criterion, and even less than that if need, judged by the drop-out rate, is the criterion.

Physical Plant. There is a wide discrepancy between the buildings provided for basic education in the Jewish and Arab sectors. The local authorities, which are legally responsible for school buildings, share some of the responsibility for this state of affairs, but as most of the funding for buildings is provided by the central government the notion of institutional discrimination creeps in again. One of the indicators of the discrepancy between the buildings in the Jewish and Arab sectors is the number of rented classrooms used by schools, as these are not properly suited to their purpose and are spread out. The Committee on Arab Education reported that a disproportionate number of classrooms in the Arab schools are rented or below standard for other reasons.[25] Another indicator is the number of children per class. The average in the Jewish sector is 27 and in the Arab sector it is 30.8.[26] 11.1 per cent of the classes in elementary education in the Arab sector had more than 40 children per class, as opposed to 5.6 per cent in the Jewish sector.[27]

Classroom Hours. The Committee on Arab Education found that "the average number of work units per class in the Arab classroom was 16.6 per cent lower than that in the Jewish classroom; 1.46 and 1.73 work units per class for the 1983 school year."[28] The Committee explained that "the basic work unit load per class is equal in both sectors, but in the Jewish sector there are additional "baskets of hours" in order to supplement the teaching, according to various criteria of the pupils, such as encouragement activities [for socially underprivileged children], project renewal and pedagogic initiatives. Special education classes exist only in some Arab schools and advanced classes [for gifted children] do not exist at all."[29]

Furthermore, while vocational schools account for approximately 50 per cent of the post-primary school pupils in the Jewish sector, they account for only one fifth of the Arab pupils.[30] There are 194 special schools for the handicapped in the Hebrew system (out of a total of 1,511 schools), while in the Arabic system there are only 16 such schools (out of a total of 336 schools).[31]

Telephones. Telephones are the responsibility of the central government.[32] Recent research on the geography of the Israeli Telecommunications System reveals a wide discrepancy in services available in Jewish and Arab settlements.[33] The percentage of households with telephones in

Jewish settlements far exceeds that in Arab settlements.[34] This of itself may not necessarily reveal discrimination in provision of services as the researchers had no details on applications for telephones. In an attempt to overcome this problem they tied possession of a telephone to a general indicator of socio-economic standard: ownership of a family car. They showed that there is little difference in car-ownership per household between Jewish and parallel Arab towns and yet there is a large discrepancy between the numbers of households with telephones.[35] In summarizing their findings the researchers stated:

> It is possible to explain this state of affairs by the rate of demand for telephones or differences in the investment in infra-structure in the two sectors. The first explanation was not examined in the present study, but the data at our disposal reveal that part of the explanation lies in differences in the extent of investments or in institutional interference. In the Haifa district (not including metropolitan Haifa), for example, the ratio between the number of pending telephone applications and installed lines (on 31.3.83) was 0.31… But for exchanges in areas with non-Jewish populations such as Shefaram and Kfar Yassif the ratios were 1.24 and 0.91, respectively. Similarly, while in the Tiberias district the average ratio was 0.41, in the area of the Ilbun exchange the ratio between pending applications and installed lines was 1.85.[36]

Public Housing. The Ministry of Construction and Housing builds public housing projects in various parts of the country. While there is an acute shortage of housing in the Arab sector[37] there is a disproportion between the number of housing projects in Jewish and Arab areas of the country.[38] Another main form of assistance given to couples in need of housing is by subsidized mortgages, provided through the regular banks and mortgage banks, and as we saw in the discussion of covert discrimination one of the factors that determines the size of a mortgage is army service, a factor that works against the vast majority of Arab citizens, who are not drafted. Another factor is the location of the housing. Large subsidies are granted for housing in development areas. As Arab towns and settlements are not included among the designated development areas, this factor is also detrimental to Arabs. The sums available for subsidized mortgages for homes in Arab towns or villages are considerably less than those available for houses in nearby development towns.[39]

Implementation of Laws

The previous categories of institutional discrimination are both instances of "general governmental powers" which are unregulated by statute. These are by their very nature powers which depend on ministerial policy and therefore leave room for wide governmental discretion. The category of institutional discrimination that will be discussed now is somewhat different. It involves implementation of statutory powers in an uneven fashion. This may be done in three ways. The first may be termed non-implementation. This implies that certain statutory powers which are related to provision of services or allocation of largesse are simply not exercised in relation to some sectors of the population. The second may be termed selective enforcement. This means that laws are only enforced among some sectors of the population. The final category may be termed differential implementation. This involves employing different criteria in implementation of the law among different sectors of the population.

Non-implementation. The most glaring examples of this type of institutional discrimination relate to the provision of general social services. Under the Social Services Law, 1958 local authorities are bound to appoint social welfare officers to deal with provision of social services. While the formal legal duty is imposed on the local authorities, implementation of this duty is

totally dependent on support from the central government, that must approve the staff positions and provide most of the necessary funds. A comparison carried out between eleven Jewish local authorities and non-Jewish authorities with similar size populations showed that approximately one third of the number of social welfare staff positions approved in the Jewish authorities had been approved in the non-Jewish authorities.[40] Some of these services are in the hands of the central government (or at least wholly or partially financed by it); others are in the hands of local authorities. It is difficult to examine the variance in services offered by different local authorities, because it is not always clear whether this variance results from incompetence, inexperience, ignorance or indifference by the local authorities, or from institutional discrimination by the central government in the funding of services.[41] The most telling information is therefore that which relates to towns with mixed populations. Here the various welfare laws should be applied equally to all sections of the population, according to relevant welfare criteria. Aziz Haidar's recent study on the welfare situation of the Arab population in the mixed town of Lod shows quite clearly that this is not the case. The local authority either does not implement certain welfare laws among the Arab population, or implements them inadequately.

Selective Enforcement. In the discussion of the land issue a number of statutes were mentioned which make no distinction between Arab and Jew but which have been enforced only, or almost only, among the Arab sector of the population. The prime example is the Absentees' Property Law, under which property of Jews who are in fact absentees has not been subjected to expropriation in the same way as property of Arab "present absentees."[42] Another example is the Validation of Acts and Compensation Law which was only applied to land belonging to Arabs.[43]

In the next chapter I shall be discussing the implementation of the security laws as far as the Arab population is concerned. The issue is complex and cannot simply be cast in terms of selective enforcement, for the notion of selective enforcement implies unequal enforcement policies among groups in like situations. Given the nature of the Israel-Arab conflict it would take a certain amount of naivety to maintain that there could not be valid security reasons for applying some security measures in cases of Arab citizens which have not been applied to Jews. This is an issue to which we shall return. Even so, there are some glaring instances in which measures have been applied *en bloc* to Arabs and not to Jews. The prime example is the case of closed areas under regulation 125 of the Defence Regulations, 1945.

Regulation 125 authorizes a military commander to declare an area closed. Once such a declaration, which does not require publication in the Official Gazette, has been issued, no person is allowed to enter or leave the area without a permit. The basis of the military government which was maintained until 1966 in the areas populated by Arabs was a series of closure orders under this regulation. However, while the application of these closure orders was universal they were in fact enforced only in respect to Arabs. The State Comptroller, in his report on the Military Government in 1957/58 criticized the use of a norm which has general application but is only enforced when broken by members of one group.[44] Abolition of the military government in 1966 was not achieved by repealing the closure orders, but by issuing general permits for all citizens to enter and leave the main closed areas.[45] These orders can once again be selectively enforced.[46]

Another case of selective enforcement is the trying of security cases before military courts. According to the Defence Regulations the authorities have the discretion to lay charges for certain offences, such as membership of a terrorist organization and terrorist activities, before a military court, rather than a civil court. Many cases involving charges against Arab citizens of

Israel have been laid before the military courts.[47] On the other hand cases involving Jews charged with similar offences have been tried before the civil courts.[48]

According to the Defence Service Law (Consolidated Version), 1986 all Israeli residents are obligated to serve in the army after they reach the age of eighteen. The law makes no distinction between Jews and non-Jews. Nevertheless, recruiting officers refrain from recruiting Arabs (except for male members of the Druse community).[49] Applications of individual Arabs to do military service must be considered, but the authorities have no obligation to grant them.

The grounds for the exemption from military service were outlined in the previous chapter. It should be pointed out that this is one form of non-implementation that exempts the Arabs from a duty, rather than denying them a right or privilege. Leaders of the Arab community have always rejected proposals that Arabs be drafted, or even that compulsory national service be instituted as an alternative to military service.

Differential Implementation. This is possibly the most prevalent form of institutional discrimination in the implementation of statutory powers. Haidar's research reveals that services that are regarded as essential in the Jewish sector are non-existent or exist on a much lower level in the Arab sector. Many of these are services which the authorities are bound to provide by law, and include appointment of welfare officers under various statutes by the Minister of Labor and Welfare.[50]

Another major sphere in which there have always been allegations of institutional discrimination of the type under discussion here is agriculture. In addition to complaints regarding land expropriations, there are allegations relating to water allocation and production and export quotas. A comprehensive examination of all these allegations is not possible in the present study. I shall, however, describe some of the legal arrangements which make such forms of discrimination possible.

Water Quotas. Israel suffers from a severe shortage of water. Under the Water Law, 1959 all water sources in the country were nationalized and a regime established which allows for strict control over the use of water. The law authorizes the Minister of Agriculture to declare parts of the country to be rationing areas. The Minister used this power in order to declare virtually the whole country to be one large rationing area.[51] The Water (Use of Water in Rationing Areas) Regulations, 1976 specify the rules for rationing of water. For agricultural use the regulations distinguish between two types of agricultural units: "planned settlements" and other users. The latter are entitled to the amounts of water listed in a schedule attached to the regulations, these amounts being a function of two criteria: the ecological zone and the type of crop. "Planned settlements," i.e., the *kibbutzim* and *moshamm*,[52] are not subject to the same regime. Their water allocation is in theory a function of the water they were licensed to draw in previous years, "but the Water Commissioner may change the amount of water allotted to a 'planned settlement,' according to the needs of the settlement for its existence and development." (Reg. 18). In practice, the water quotas to planned settlements are based on criteria set down by two committees appointed by the government in the 1960's: the Horin and Hazani committees.[53]

Opinions diverge on the implications of the variations in water allocation criteria. In a Knesset debate on the Ministry of Agriculture, opposition members charged that there were significant differences in the water quotas allotted to neighboring Jewish and Arab agricultural settlements.[54] The Minister of Agriculture denied this claiming that the figures were distorted because the settlements in question were in different ecological zones.[55] The figures published by the Central Bureau of Statistics indeed show a vast difference in the amounts of water *used* by

Jewish and Arab agricultural settlements. In 1983/84 Arab farms in Israel cultivated 17.6 per cent of the country's land allotted to field crops, 17.8 per cent of that allotted to fruit and 23.5 per cent of the land allotted to vegetables.[56] Yet they used only 2.72 per cent of the agricultural water.[57] *Kibbutzim* and *moshaoim* (planned settlements) cultivated 76 per cent of the area of field crops, 57 per cent of the area of fruit orchards and 61.3 per cent of the vegetable area.[58] They used 81.5 per cent of the agricultural water.[59] These figures themselves do not necessarily point to discrimination in allocation of water quotas because of differences in crops grown,[60] ecological zones and whether or not cultivation depends on irrigation. Nevertheless the discrepancy is so great that it is hard to believe that at least some part of it is not attributable to institutional discrimination.

Production Quotas. Under a series of laws, growing, marketing and export of agricultural produce in Israel is strictly controlled.[61] These laws authorize the Minister of Agriculture, marketing boards or quota committees to fix individual quotas for growing agricultural produce for the local market and for export. Though the Minister, the marketing boards and the quota committees are no doubt bound by the Israeli administrative law principle of equality, these marketing boards and quota committees, at least in those branches of agriculture in which there are both Jewish and Arab growers, are composed of representatives mainly (though not entirely) of Jewish agricultural organizations. The Jewish Agency is guaranteed representation on the marketing boards, and most of the other members are representatives of organized agricultural interests in the Jewish sector. Thus, for example, the Vegetable Production and Marketing Board, from whose members the quota committees are selected, is composed of government representatives, two representatives of the Jewish Agency, recommendees of representative growers' organizations, representatives of retailers and consumer representatives. According to section 8(a) of the Vegetable Production and Marketing Board Law, 1959 the representatives of the growers' organizations and the Jewish Agency must together make up at least half of the board. Arab growers, who cultivate approximately 235 per cent of the land allotted to vegetables, have only two representatives (out of 40) on the board.[62] With all the best will in the world it is unlikely that representatives of vested interest groups are going to be able to deal fairly with the interests of those who are not strongly represented on the board.

Arab growers are represented on the boards that deal with those branches of agriculture in which Arab farmers contribute a significant proportion of the production. They are not represented on the boards of those branches on which they at present do not contribute a significant share of the produce. This may contribute to perpetuation of the present division of agricultural branches between the Jewish and Arab sectors, for permits are required for agricultural production.[63] Claims are indeed sometimes made that the discretion of the boards on which there is minimal representation of Arab growers, or none at all, is used in a manner which discriminates against Arab growers in the approval of especially lucrative lines in agriculture.[64]

Legal Analysis of Institutional Discrimination

We have seen above that the Israeli legal system is committed to the principle of equality. It is indeed true that primary legislation which violates this principle is nevertheless valid, but absent such legislation the principle will be upheld. Institutional discrimination has been defined, for the purpose of this study, as use of administrative discretion in a manner that discriminates against

the Arab sector, although there is no statutory law which licenses such discrimination. How is the phenomenon of institutional discrimination tolerated by the legal system?

There are a number of possible answers to this question. The first is that instances of institutional discrimination would not stand up to attack before a court of law. The reason they persist is simply that they have not so far been challenged on legal grounds. There is probably some truth to this view. This is borne out by the fact that when such discrimination has been challenged the government has sought to prevent a judicial ruling by settling the case out of court or the Attorney General himself has stepped in and ruled against the discrimination.[65]

An interesting question that arises, if one accepts this view, is why so few attempts have been made to challenge instances of institutional discrimination in court. A number of possible answers suggest themselves. First, there is a definite lack of awareness of the potential of using the legal system as a mechanism for promoting equality. Second, there may well be a certain degree of skepticism about the chances of using the legal system successfully in the arena of discrimination, especially seeing that in the few cases in which decisions have been handed down, such as the *Nazareth Lands*, *Bourkhan* and *Wattad* cases discussed above, the results have not been encouraging. Thirdly, many attempts have been made in the last few years to further equality in such fields as local government funding, by using political pressure (including strikes and demonstrations). The gains made may have encouraged people to continue with this form of political action. There is also the question of expertise. Lawyers working in the Arab sector have generally specialized in fields that are far removed from the field of constitutional law. With the increase in litigation promoted by public-interest groups that specialize in litigation in constitutional matters, such as the Association for Civil Rights in Israel (ACRI), this could well change in the future. Finally, one cannot exclude the possibility that some forces in the Arab community may have been reluctant to use the judicial system for political reasons.

A second possible answer to the question posed — why institutional discrimination persists, in spite of the constitutional principle of equality — is that many cases of discrimination of this type are somewhat amorphous, and would be difficult or impossible to challenge, let alone prove, in a court of law. This answer also has something to it. As seen above, it is not always apparent whether a definite *policy* of discrimination exists, or whether the discrepancy in services or resources enjoyed by different sectors of the population is a function of other factors, such as unequal starting points or incompetency of local councils. As we saw above, the Israeli legal system demands that public authorities refrain from adopting non-discriminatory criteria in implementing policies, but it has not as yet demanded that the authorities take positive steps in order to remove existing inequalities. Existing inequality among sectors of the population does not in itself imply that the government has violated the principle of equality, as understood in Israeli administrative law. It should be pointed out that the Declaration of Independence refers to equality of political and social *rights*, and not to political and social equality.

The next answer revolves around the reluctance of the courts to interfere in government decisions which are regarded as matters of policy, and especially matters of national priorities.[66] It is indeed true that the court has held that it will interfere if a policy is discriminatory,[67] but it seems that the court will require evidence of patently discriminatory criteria before it does so.[68] If there is doubt the court will bow to the discretion of the administrative body.

The difficulties of defining discrimination have been discussed above. Allocation of scarce resources necessarily requires making choices that benefit some persons and not others. Serious difficulties are therefore involved in mounting a legal attack on what appear to be discriminatory policies.

Finally, we must recognize the limitations of law in any society. The real explanation for institutional discrimination is not, of course, the lack of legal principles but political, historical, social and even psychological factors that are often stronger than the declared legal principles. The willingness of the government to pass a resolution such as the one dted at the beginning of this chapter, in which it openly concedes that institutional discrimination exists and that it does not intend to do very much about it, is evidence of the strength of these factors in Israeli society.

Notes

1. The singling out of the Druse and Circassian communities is based on the notion that they are entitled to equality in rights, as their menfolk serve in the armed forces and therefore they are "equal in duties." This notion of the connection between "equality in rights" and "equality in duties" is widely held among the Jewish public and decision-makers. It totally ignores the fact that the Arabs do not serve in the army because they are not drafted, and not because they refuse to fulfill their legal duty to serve.

2. Some of these areas, such as social welfare and local authorities, have already been studied in detail: see M. Al-Haj and H. Rosenfeld, *Arab Local Government in Israel* (Tel Aviv: International Center for Peace in the Middle East, 1988); A. Haidar, *Social Welfare Services for Israel's Arab Population* (Tel Aviv: International Center for Peace in the Middle East, 1987). Unless otherwise stated the data on local government and welfare services cited in this chapter are based on these two studies. One of the most serious issues in which there are constant complaints of institutional discrimination is the question of demolition of illegally built houses, i.e., houses built without planning permission, generally on agricultural land or land that has been expropriated. A number of government committees have looked into the issue and made recommendations for resolving it. Opinions are split on the factors which lie behind the illegal building. Leaders of the Arab community claim that the main reasons for the illegal building are that the planning schemes for Arab towns and villages are out of date, that proposed amended plans have been held up at government level and that there is a scarcity of residential land reserves in the Arab towns and villages. People desperate for housing who cannot receive planning permission to build are forced to do so without permission. The government committee which looked into the matter most recently claimed that the main reasons for illegal building are the reluctance of private owners of land in Arab settlements to sell their land, the drop in the value of agricultural land, reluctance to accept expropriations of land and the subsequent building on expropriated land in order to create a *fait accompli* and building on state land in the hope of receiving compensation: see *Inter-Ministerial Committee on Illegal Building in the Arab Sector* (Ministry of Interior, August, 1986), 21. The issue certainly merits an in-depth study which is not possible here.

3. See 108 *Divrei HaKnesset* 3140–3143 (22.6.87).

4. See Ministry of Education and Culture, *Report of the Committee to Examine Arab Education* (Jerusalem, 1985).

5. See Ian Lustick, *Arabs in the Jewish State* (Austin: Texas University Press, 1980) 153.

6. See, e.g., Budget Law, 1989 which lists amounts to be spent in Druse and Circassian settlements on infrastructure, development, public buildings and new suburbs.

7. See R. Klinov, *Arabs and Jews in the Israeli Labor Force*, Working Paper #214 (revised) (Jerusalem: Department of Economics, Hebrew University of Jerusalem, 1989), Appendix.

8. See al-Haj and Rosenfeld, note 2 *supra*, 124.

9. *Ibid., 122.*

10. See 39 *Statistical Abstract of Israel* (1988) 612–613. Of a total of 997,743 pupils in primary and post-primary education, 202,661 were in the Arab education system.

11. See *Report of Committee to Examine Arab Education*, note 4 *supra*, chapter 3.

12. *Ibid.*, 11.

13. See 39 *Statistical Abstract of Israel* (1988) 3.

14. See Budget Law, 1988.

15. See State Comptroller, *Report No*. 34, *for the year 1984*, 115–135.

16. The feet that Arab neighborhoods had been overlooked in the mixed towns, despite their parlous condition, was cited in a report on Juvenile Delinquency in the Arab Sector as a factor which aggravated the feeling of discrimination among Arab youth: see *Report of Committee on Juvenile Delinquency in the Arab Sector* (Toledano Report), (Jerusalem: Ministry of Labor and Welfare, 1984) 5.

17. According to a *Jerusalem Post* report the mixed neighborhood of Kiryat Wolfson in Acre applied to be included in the Project Renewal, but was rejected as the number of Arabs in the neighborhood made it an Arab area which was not eligible for Jewish Agency Funds: see "Split Personalities." *Jerusalem Post Magazine*, August 1, 1986, 5.

18. See *State Comptroller's Report*, note 15 *supra*, 116.

19. See Ministry of Construction and Housing, *Proposed Budget for 1989*, 118.

20. See Ministry of Labor and Social Welfare, *Proposed Budget for the Financial Year 1986*, Explanatory Notes submitted to the Eleventh Knesset, Booklet 11, (Jerusalem, January, 1986), 225. Also see Government Yearbooks for 1984/5

and for 1985/6.

21. Perusal of the government budget for the year 1989 shows that significant sums are allocated for neighborhood renewal. Theordinary budget of the Ministry of Housing and Construction includes the sum of NIS 2,210,000 for this purpose and its development budget NIS 21,874,000 (with authority to undertake obligations of up to NIS 49,915,000); the budget of the Ministry of Labor and Welfare includes the sum of NIS 7,582,000.

22. Ma'alot is a development town inhabited by Jews, and Tarshiha is an Arab village. They are ruled by a common local council.

23. *Report of the Committee to Examine Arab Education*, note 4 *supra*, 20. It should be noted that while legal responsibility for the appointment of truant officers belongs to the local authorities the Education Ministry pays 75% of the cost. Part of the responsibility for lack of officers lies no doubt with the local authorities themselves. From the recommendations of the Committee it seems, however, that the lack of central funding is at the very least a major reason for the sparseness of these officers in the Arab sector.

24. See 37 *Divrei HaKnesset* 3846 (20.7.88).

25. See *Report of the Committee to Examine Arab Education*, note 4 *supra*, 29–30.

26. 39 *Statistical Abstract of Israel* (1988) 618. It should be noted that this gap has narrowed in recent years. In 1979/80 the figures were 25.8 as opposed to 31.0, and in 1984/85 they were 26.8 as opposed to 31.4: *ibid.*

27. See 39 *Statistical Abstract of Israel* (1988) 617.

28. *Report of the Committee to Examine Arab Education*, note 4 *supra*, 21.

29. *Ibid.*

30. See 39 *Statistical Abstract for Israel* (1988), 612–613. One of the reasons for this discrepancy is that many of the vocational schools are run, or funded by Jewish philanthropic organizations, such as Ort.

31. *Ibid.*, 609.

32. Until 1982 they were the direct responsibility of the Ministry of Communications. In that year responsibility for telephone services was transferred to Bezek, a government corporation.

33. See Han Salomon and Eran Razin, *The Geography of the Israeli Telecommunications System: Patterns and Implications* (Jerusalem: Jerusalem Institute for Israel Studies, 1986).

34. *Ibid.*, 41–42. According to a detailed chart of the percentage of telephones per household in towns with populations exceeding 10,000 the lowest percentage in a development town is 52.2 (Bet Shean) while the highest percentage in an Arab town is 20.2 (Shefaram). The percentage in Nazareth (an Arab town) is 18 and in the neighboring Jewish town of Upper Nazareth it is 53.7.

35. *Ibid.*, 46–48. For example approximately 40% of the households in both Nazareth and Upper Nazareth have cars. The numbers of households with telephones are 18% and 53.7% respectively. 28% of the households in Bet Shean have cars; 52.2% have telephones. 35% of the households in Shefaram have cars; 20.2% have telephones.

36. *Ibid.*, 47–48. It must be noted that these figures are for the year 1983. The Minister of Communications from 1984–1987, Professor Amnon Rubinstein, committed himself to a policy aimed at closing the gap between Jewish and non-Jewish towns. Special regulations were issued that forbade discrimination between applicants for telephones, and the Bezek corporation was required to give preference to applicants who had been waiting a long time and to install their telephones within a prescribed period of time. See 104 *Divrei HaKnesset* 1649 (10.2.86). I have no figures which would reveal whether this policy has been implemented and whether the gap has been closed.

37. One indicator of this is that the average housing density (i.e. average number of persons per room) among Jewish households is 1.05 and among non-Jewish households it is 1.99:39 *Statistical Abstract of Israel* (1988) 314. For a review of housing standards in the Arab sector see Haidar, note 4 *supra*, 49–52.

38. A report carried out in 1977 for the Prime Minister's Public Council on Social Welfare estimated that in the year 1970–71 the Arab sector received no more than 1 % of the budget of the Ministry of Housing. Recent research maintains that the position has not improved much since then: see Haidar, note 4 *supra*, 52–54. However, according to a report by Attalah Mansour in *Ha'retz* of August 24, 1986 the Ministry of Construction and Housing stepped up public housing projects in the Arab sector in recent years. And see State Comptroller, *Report No. 38 for the year 1988*, 119–129, in which the State Comptroller reviews building supported by the Ministry of Construction and Development in Al-Tira. The Comptroller is highly critical of the way the project was handled by the Ministry.

39. See Haidar, note 4 *supra*, 53. It should be noted that there is no legal impediment on Arabs buying apartments in development towns. In one case discussed above an Arab resident of a development town challenged the refusal of the Ministry of Housing to provide him with the subsidized loan, and the Ministry stepped down rather than defend the decision in court. In spite of the fact that there are no legal impediments on Arabs living in development towns tensions between Arab and Jewish residents discourage it. The mayor of the largest development town in the Galilee, Carmiel, recently went on record as objecting to Arabs living in the town (though he recognized that they have a legal right to do so). He claimed that the town had been built for Jews and that experience had proved that it was a bad idea for Jews and Arabs to live together: see *Ha'retz*, 6.10.89, p. 2.

40. See A. Haidar, note 4 *supra*, 164 who cites R. Canaan and E. Hayman-Kochli, *A Comparison of the Allocation of Professional Human Resources for Social-Personal Services in the Jewish Sector and in the Non-Jewish Sector* (Tel Aviv: Union of Social Workers, 1983). The number of posts allocated for a population of 150,000 in the Jewish sector was 172.65; in the Arab sector it was 64.14. Haidar points out that the discrepancy is even more glaring when one takes into account that the level of need for social services is greater in the Arab sector than it is in the Jewish sector.

41. Thus, for example, local authorities are responsible under law for setting up social welfare bureaux and the

appointment of social workers to man those bureaux: see Welfare Services Law, 1957. Most of the budget for such bureaux is provided by the Ministry of Labor and Welfare. The Ministry budget for 1989 includes NIS 45,308,000 for payment of staff in local authorities. Figures for the year 1978 show a wide discrepancy in the number of social workers per capita in Jewish and Arab local authorities. In Nazareth, the ratio was 0.28 per 1,000 while in Upper Nazareth it was 0.73. In Shefaram the figure was 0.15 while in Afula it was 0.98: see *Social Profile of Settlements in Israel* (Jerusalem: Ministry of Social Welfare, 1980).

42. See A. Rubinstein, *The Constitutional Law of the State of Israel*, 3rd. ed., (Tel Aviv: Schocken, 1980) 187.

43. *Ibid*, 185–186.

44. See State Comptroller, *Report No. 9 on the Defense Ministry for the year 57–58*, 78.

45. See Rubinstein, note 42 *supra*, 186.

46. One of the acts that preceded "land day" in March, 1976 was a notice sent to villages surrounding "area 9" reminding them that it was closed and warning them not to enter. There have also been reports that Bedouin in the Negev have been excluded from areas which are in law "dosed areas," but are nevertheless open to the public.

47. In three cases defendants unsuccessfully tried to challenge the decision to try them in a military court: *see Mustafa v. State of Israel* (1976) 30, P.D. III 477; *Ploni v. Lod Military Court*, (1981) 35 P.D. III 156; *Ploni v. Attorney General* (1981) 35 P.D. III 417.

48. The prime example is the case of what is known as the "Jewish underground" who were tried before the district court in Jerusalem.

49. Some Bedouin volunteers are also accepted now for military service (in the past Bedouin volunteers served only as scouts): see 104 *Divrei HaKnesset* 2455 (April 2, 1986).

50. See, e.g., Social Services Law, 1958 and Youth (Care and Supervision) Law, 1960. Once again it should be noted that the local councils must probably share some of the responsibility for this situation. It seems that not all councils are aware of their right to demand certain services from the central government.

51. See Water Declaration (Rationing Area), 1961, 5762 *Kovetz HaTakanot* 59; Water Declaration (Rationing Area) (No.2), 1962, 5762 *Kovetz HaTakanot* 2328; Water Declaration (Rationing Area), 1963, 5764 *Kovetz HaTakanot* 399.

52. See State Comptroller, *Report no. 30 for the year* 1980, 337.

53. *Ibid.* The Comptroller remarked that in some cases the quotas were in fact higher than the recommended quotas and in other cases they were lower. At the time of the said report the Water Commissioner informed the State Comptroller that the allotments to planned settlements were being re-examined.

54. See 104 *Divrei HaKnesset* 2705–2706 (20.5.1986).

55. *Ibid*.

56. See 36 *Statistical Abstract of Israel* (1985) 396–397.

57. *Ibid.*, 414.

58. *Ibid.*, 396–397.

59. *Ibid.*, 414.

60. Thus, for example, Arab formers cultivate 80.8% of the country's olive groves, which make up 71 % of the fruit orchards cultivated by Arab farmers. *(Ibid.*, 396–397). *Moshamm* and *kibbutzim* cultivate 96.6% of the land for cotton.

61. See, e.g.. Vegetable Production and Marketing Board Law, 1959, c. 3; Fruit Board (Production and Marketing) Law, 1973, c. 7; Fruit and Vegetable Products Boards (Production and Export) Law, 1973, c. 3; Flower Board (Export and Marketing) Law, 1976.

62. See Notice on Public Representatives on Vegetable Production and Marketing Board, 5741 *Yalkut HaPirsumim* 2080. There are no Arab representatives on the quota committees for fruit: see 5735 *Yalkut HaPirsumim* 1320. However, Arab growers cultivate only 6% of the land allotted to fruit (excluding olives of the Syrian strain, for which there is a separate board on which the representatives of Arab growers have the majority: see 5742 *Yalkut HaPirsumim* 992).

63. See, e.g., section 20 of the Fruit Board (Production and Marketing) Law, 1973 and Fruit Board (Production and Marketing) (Regulation of Planting Fruit Orchards), 1975.

64. See 104 *Divrei HaKnesset* 2692 and 2706 (20th May, 1986).

65. See *Wattadv. Minister of Finance* (1983) 38P.D. III 113. Also see the opinions of the Attorney General dted above, in which legal action was probably avoided after the Attorney General ruled that discriminatory administrative decisions were illegal.

66. See *Music Festival of Abu Gosh v. Minister of Education and Culture* (1971) 25 P.D. II 821; *United Dairies v. Dairy Board* (1983) 37 P.D. IV 516; *Monifv. Bank of Israel* (1982) 36 P.D. III 466: *Lishkat Mafilei Autobusim Lettyur v. Minister of Finance* (1982) 37 P.D. II 115.

67. See *Shila-Ashkenazi v. Minister of Labor* (1982) 37 P.D. 197.

68. This would seem to be implied in the decision of the court in *United Dairies v. Dairy Board*, note 66 *supra*.

8

The Security Issue

This chapter reviews restrictions on the rights of Arabs in Israel imposed on security grounds. Two forms of security control will interest us here: use of specific legal powers in order to place restrictions on liberties of individuals and exercise of general administrative discretion, in fields which, ostensibly at least, are not security related, in order to distinguish between what are often called, in official parlance, “positive” and “negative” elements.[1]

The Concept of State Security

Background

The issue of security control cannot be examined in a vacuum. It must be seen in the light of the Arab-Israel conflict and the struggle between the Jewish and Palestinian national movements that preceded the establishment of the state, and that continues to this very day.

The Declaration of Independence gives expression to the dilemma which faced the State of Israel from the start. Zionism, the Jewish national movement, had come into head-on collision with the national aspirations of the Palestinian Arabs. Establishment of the Jewish state was declared in the midst of the armed struggle between the Jews and Arabs in the country and while the armies of the surrounding Arab states were preparing to invade Palestine in order to frustrate implementation of the U.N. Partition Resolution. In this struggle Jew was pitted against Arab. While there were some Arabs who had forged pacts with the Jews, and many who did not actively take part in the armed struggle, for all intents and purposes the war which broke out after the U.N. adopted the Partition Plan was first and foremost a war between Jews and Arabs in the country itself. In this situation it was hardly surprising that both the Jewish leaders and the Jewish public would regard the Arabs in the country as their real or potential enemies. It was also not surprising that this view of the Arabs, understandable in the context of the war itself, did not disappear once the war was over. It became a central element in the formulation of policy towards the Arab population of the state in the country’s formative years.

The State of Israel has, from its inception, faced very real security problems. Even after the 1949 armistice agreements were signed the surrounding countries did not recognize Israel and vowed to destroy it. The borders were not secure and were frequently crossed by *fedayeen* who attacked civilian targets. Wars between Israel and her neighbors came in cycles and terrorist attacks within the country occurred intermittently. As the conflict continued unabated, the political leadership was required from the start to formulate a policy of how to manage that conflict.

The very real nature of the country’s security problems does not imply that the wide-scale use of legal mechanisms to limit the liberties of Arab citizens was justified on security grounds. Before discussing the use of these mechanisms two issues must therefore be examined: the

conception of security that prompts "security-related decisions" and the connection required between the acts of an individual and the harm to state security.

Conceptions of Security

Some acts will be regarded as security offences in any society. These include espionage activities, organization of armed resistance to the authorities and planning or execution of terrorist acts. Like other countries, Israel has used the legal system to deal with acts such as these, whether the perpetrators have been Jews or Arabs. There can be little doubt, however, that the concept of "security," as understood by the authorities in the Israeli context, encompasses a wider range of activities.

The notion of "state security" in Israel, as perceived by the authorities, is intimately bound to the definition of the state as a *Jewish* state, the political-military context in which the legitimacy of this state has been rejected by the Arab world and the conflict with the Palestinian people of which the Arabs in Israel are a part. Security of the state is synonymous with security of the Jewish collective, and that is often seen as being dependent on promoting "Jewish national goals." Acts that strengthen the Jewish collective are perceived as acts that promote security. On the other hand, acts that tend to strengthen Arab nationalist aspirations among Israeli Arabs are regarded as threatening to the Jewish collective. They are seen as acts that ultimately affect the security of the state, even if they take the form of political expression.

Thus it is that two models of security exist side by side. The first is the traditional model of security *stricto sensu;* the second is what I shall define here as the "conflict-management model" in which the political dimensions of security play a major part.

The prime example of the way the paramountcy of Jewish national interests are perceived as security-related lies in the field of land ownership and settlement. The perception of Jewish ownership of land and settlement as essential mechanisms of maintaining the security of the Jewish collective means that security measures which restrict basic liberties of Arab citizens may be employed to facilitate them.[2]

Two decisions illustrate the operation of the conflict-management model of security in judicial decision-making. In *Ein-Cal v. Film and Play Censorship Board*[3] the Film Censorship Board had refused to allow public screening of a film that dealt with the purchase of land by the Zionist movement in pre-state times and the expropriation of land after independence. The film presented the Arab perspective of the land issue and the creation of the Palestinian refugee problem, ignoring the Zionist perspective of these aspects of the Arab-Israel conflict. The Supreme Court was at pains to point out the "historical inaccuracies of the film," created, in the court's mind, by one-sidedness. It stated, however, that perversion of historical facts was not a good enough reason for disallowing the film as "there is no one historical truth and each historian has his own truth, and besides since when does untruth in a film or play justify preventing its showing in a country in which freedom of speech is assured?"[4] Nevertheless, the court decided that the Censorship Board's decision was justified because of the "inciting nature of the film." It explained this as follows:

> The false propaganda this film is meant to serve takes many forms — it serves to hold Israel up for contempt in hostile propaganda aimed at world public opinion, but more than that, it is a tool in the argument which attempts to legitimize murderous acts by the terrorist organizations inside the country. If this film were to be shown in Israel there is a very near danger that because of the special persuasive power of visual material, it would be an effective tool for incitement and

preparing the minds of Arabs resident in the state to assist in perpetration of such criminal acts…[5]

In other words, exposure of the Arabs in Israel to visual material that puts across the Arab version of central aspects of the Israel-Palestinian conflict will "incite" them against the state. Since the Arabs have tried to destroy the Jewish state by force, Arabs who are incited against the state will also resort to force, which will take the form of internal terrorist activities. The conclusion is that security of the state demands that exposure of Arabs to such material be prevented.

In *Sabri Jiryis v. Military Commander*[6] the petitioner was a lawyer who had been one of the leaders of the *el-Ard* organization. After that organization was outlawed a restriction order was placed on the petitioner's movements. Even though the petitioner declared that he had stopped his activities in *el-Ard* once it had been outlawed, the court found that he "had not ceased to identify with the aims which were once the aims of the association" and that there was therefore no reason to interfere in the restriction order. The readiness of the court to accept that identification with *aims* of an association was sufficient ground for using security powers is a clear indication that the model of security employed was the conflict-management model.

The idea that identification with Arab or Palestinian national aspirations must imply identification with, and possibly even advocacy of, use of force in order to realize those inspirations was also evident in the *el-Ard* cases discussed in chapter 2. The Supreme Court was keen to establish whether the members of *el-Ard* "recognize the sovereign State of Israel, *together with its principles and aims, including free Jewish immigration and the return of the Jewish people to its homeland.*"[7] Identification with the "movement of liberation, unity and socialism" in the Arab world was regarded as identification with Nasser's aim of liquidating Israel. Expression of Palestinian identity, without also mentioning Israel's right to exist, could only imply subversive and hostile activity.

While there is no doubt that the conflict-management model of security has had a profound effect on decision-making in the field of security-control, it is impossible to gauge the *extent* of that effect on specific decisions to restrict liberties of Arab citizens. Israel has never been free of pure security problems, such as internal acts of terror, and as the reasons for a specific decision are usually privileged on grounds of state security, it is rare for one outside the decision-making framework to have the knowledge necessary to assess whether a given decision was based on the strict security model or the "conflict-management" model. While it is clear that use of security-related powers is not restricted to "pure security" cases, it is just as clear that their use is not confined to "conflict-management" cases either.

It must be stressed that legal restrictions are not placed on all forms of nationalistic expression of the Arabs in Israel. The majority of Arab citizens who are active in the various political movements that are looked on with disfavor by the authorities, such as the New Israeli Communist Party (Rakah), the PLP or the more extreme rejectionist groups such as Sons of the Village (Ibna al-Balad), have never had formal legal restrictions placed on their civil or political liberties. However, the wide view of "subversive activities" and "security threats," does pervade official thinking and it plays a main role in decision-making in the second form of security control (which involves "security criteria" in the use of discretion) that will be reviewed below.

One of the problems created by the employment of the broad view of security, accompanied by the fact that in most cases the evidence for a given decision is not revealed, is that those who reject the accepted notions are almost certainly going to regard all security-related decisions of the authorities with a great deal of suspicion. Decisions of the courts upholding security-related

restrictions on the liberties of an individual may be seen purely as a means of legitimizing political decisions. This is one facet of the price that is paid for adoption of the broad view.

Balancing Security and Individual Liberties

The Supreme Court of Israel has refused to accept that "state security" is an absolute value any threat to which may justify restrictions on the liberties of the individual. If there is a head-on clash between the two interests, which leaves no possible way of protecting state security without restricting the individual interest, state security is to be preferred.[8] However, in the more usual case where the two interests may be balanced without sacrificing the duty to protect state security, a proper balance must be found between the two.

What kind of balancing test is applied in cases of political activity, that of itself has no *inherent* subversive component, but that is regarded as posing a danger to state security? This question first arose in the *Kol Ha'am* case.[9] The case dealt with the statutory power of the Minister of Interior, under British Mandatory legislation, to suspend publication of a newspaper if he is of the opinion that matters therein "are likely to endanger the public peace." The Supreme Court held that the Minister may not exercise that power unless the danger to the public peace meets the "probable danger test." The "probable danger" test, that has generally been applied so as to *limit* government power to curb free speech, has since become the standard test for balancing free speech and public safety or state security.

Even though the probable danger test is the dominant balancing test in freedom of speech cases, it is not always applied in free speech cases that fit the "conflict-management" model. Furthermore, when it has been applied in such situations the court has been quick to find that the test has been met.[10] Abandonment of the probable danger test is notably apparent when measures are taken to counter the influence of the PLO and other Palestinian organizations, that have been declared "terrorist organizations," though it is also apparent in relation to some activities of anti-Arab groups.[11] Thus, the Supreme Court has held that a connection between a newspaper and one of the outlawed Palestinian organizations is a good enough reason for withdrawing the license to publish, even if the military censor has no objection to the contents of the paper.[12] What is at issue here is an overall attempt to control and manage the Israel-Palestinian conflict on a level in which the borders between security in its narrow sense and political aims becomes blurred.[13]

Restrictions on political activities without need to show the harm, or probable danger of harm, that such activities cause to state security is manifest in Knesset legislation that criminalizes acts of identification with outlawed organizations. According to a 1980 amendment to section 4 of the Prevention of Terrorism Ordinance, 1948, an act is an offence if it —

> reveals identification or sympathy with a terrorist organization, by raising a flag, presenting a symbol or slogan or causing an anthem or slogan to be heard, or any other similar overt act which clearly shows such identification or sympathy, provided these are carried out in a public place or in a manner that people present in a public place can see or hear the said expression of identification or sympathy.[14]

The implication of this section is that any identification with the PLO, by raising a flag or

singing an anthem, is a criminal offence for which the maximum punishment is three years' imprisonment. There is no need to prove that the said act of expression in fact poses a "probable danger" to state security.[15] This type of legislation is based on the wide "conflict-management" approach to security, an approach that sees the containment of the *political* influence of the PLO and other Palestinian organizations on Israeli Arabs as a security matter.

While the probable danger test is the dominant test for balancing security and free speech, the Supreme Court has so far generally resisted attempts to import it into situations in which the restricted liberty is not free speech. In the *el-Ard* cases that dealt with the right of political organization and participation in the electoral process, the court ignored the balancing question.[16] On a number of occasions it has been argued that the probable danger test should also apply to restrictions on freedom of movement.[17] In reply the court has held that there is not one balancing test that is valid in all circumstances. The present trend is to adopt the line taken by Barak J. in the *Neiman I* case when he said:

> In setting the probability formula one cannot adopt a general and universal criterion, as everything depends on the strength of the opposing values in a given legal context… The question is always whether the extent of the damage, discounted by the probability that it will not occur, justifies the violation of a civil right in order to prevent the danger…[18]

This means, of course, that in each context the matter has to be examined separately. The court has come up with a variety of balancing tests for non-speech cases, such as the "sincere and serious suspicion" test and the "reasonable possibility" test. In a recent case it did not rule out the possibility that the probable danger test itself might be appropriate in some non-speech cases.[19]

Security Legislation

Defence (Emergency) Regulations, 1945

Background. The main powers of security control are contained in the British Mandatory Defence (Emergency) Regulations, 1945 which, subject to certain amendments, have remained in force until the present time. These regulations provided the legal basis for the system of military rule which existed in most of the areas in which the majority of Israel's Arab population resided, until its abolishment in 1966 by the government of Prime Minister Levi Eshkol. Today they provide the legal basis for various restrictions on individual liberties which are periodically imposed on individuell Arab citizens of Israel.

The Defence Regulations themselves make no distinction whatsoever between Jew and non-Jew or Arab. They may be equally applied to all sections of the population. Some of the powers contained in the regulations have on occasion been exercised so as to impose restrictions on Jews. There is no doubt, however, that the primary use of most of the powers in these regulations has been to impose restrictions on Arabs. This does not necessarily imply that there has been institutional discrimination in the use of these regulations, for given the general security context outlined above there may have been valid security considerations for applying the regulations in the case of the Arabs and not in the case of Jews. Nevertheless, whether this is a form of institutional discrimination or not, the fact that Arabs have largely been on the receiving end of these regulations is beyond doubt. This alone justifies their review in the present context.

Two themes run through the Defence Regulations. First, decisions to restrict the liberties of an

individual are made by administrative rather than judicial bodies. No *prior* judicial approval is required for such decisions and the regulations themselves do not require that an individual be afforded a hearing before the decision restricting his liberties is made. The regulations make no provision for *ex post facto* judicial review, but the decisions are subject to review of the Supreme Court sitting as a High Court of Justice. Second, the administrative authorities entrusted with the powers to restrict personal liberties under the regulations are generally, though not invariably, *military commanders.* A military commander, according to the regulations, is a commander appointed as such by the Chief of Staff, with the approval of the Minister of Defense.[20]

Restrictions of Movement. The most common form of restriction is a police supervision order under regulation 110, under which an individual may be required to live in a specified place, not to leave the area of a town or village without permission, to present himself at the police station at designated times and to remain within the confines of his home from one hour after sunset until sunrise. According to an Amnesty International report, town arrest orders issued under this regulation were imposed on twenty-four Arabs from the beginning of 1980 until August, 1984.[21]

Regulation 108 stipulates that an order under regulation 110 may be issued only if the military commander "is of the opinion that it is necessary or expedient to make the order for securing the public safety, the defense of Israel, the maintenance of public order or the suppression of mutiny, rebellion or riot." The Attorney General has also issued directives that when it has been found necessary to impose a restriction order every possible way of minimizing the damage to the individual involved must be considered.[22]

Regulation 125 authorizes a military commander to issue a closure order in respect to any area in his jurisdiction. Once a closure order has been issued no person within the area may leave the area, and no person outside the area may enter it, without a permit. In fact, as pointed out in the discussion of institutional discrimination, during the time of the military government many of the rules applying to closed areas were only applied to Arabs while Jews were allowed to move in and out of the areas freely. The State Comptroller was critical of this discriminatory arrangement.

Freedom of Association. Regulation 84 empowers the Minister of Defense to declare anybody of persons, whether incorporated of unincorporated, to be an unlawful association. Once such a declaration has been made, persons who join the organization or attend its meetings may be charged with an offence under the regulations and are liable to fine or imprisonment.

Regulation 84 has been used in order to outlaw Arab organizations. In 1965 the *el-Ard* movement was declared to be an unlawful association and in 1980 the organizing committee of what purported to be a congress of the Arabs in Israel was also declared an unlawful association.[23] For reasons best known to the members of these associations themselves, no attempt was made to challenge these declarations in court.

Licensing of Newspapers. In 1933 the British authorities enacted the Press Ordinance which instituted a system of newspaper licensing and gave the authorities far-reaching powers to control the press. The licensing powers contained in this ordinance were not regarded as sufficiently drastic and a provision was therefore included in regulation 94 of the Defence Regulations that has been described by the Supreme Court of Israel as "inimical to basic concepts of freedom of speech and expression in a democratic society."[24] This provision requires anyone who wishes to publish a newspaper to obtain a license from the district commissioner, and provides that the commissioner may refuse the license as he sees fit and without giving any reason whatsoever for his decision. In at least two cases the district commissioner has refused to grant a newspaper license to Israeli Arabs.[25] The first case related to the application of the *el-Ard*

group to publish a paper; the second to the application of a lecturer at the Hebrew University of Jerusalem. In both instances the Supreme Court refused to interfere in the decision of the district commissioner.

The power to refuse a license includes the power to revoke a license under the same conditions, namely without the legal duty to give reasons for the decision. Under prevailing rules of Israeli administrative law, however, the commissioner may not revoke a license without affording the publisher an opportunity of a hearing. The power to revoke a license is not used frequently, but it was exercised in 1989 in order to revoke the license for a newspaper called *al-Raiah* published by the *Ibna al-Balad* (Sons of the Village) group, that is generally identified with the rejectionist front. The authorities claimed the paper was the organ of the Popular Front for the Liberation of Palestine led by George Habash, and that this organization was involved in the editing, financing and distribution of the paper. The publishers did not request judicial review of the license cancellation.[26]

Besides cancellation of a license under the Defence Regulations, the Minister of Interior has the power under the Press Ordinance to order suspension of publication of a paper for a period he thinks fit, if he is of the opinion that matters appearing therein "are likely to endanger the public peace." The Supreme Court has held that this power may only be exercised if the danger meets the stringent "probable danger" test.[27] Possibly because of the stringency of this test, the power is not often used. It was used, however, before Land Day in 1988 in order to suspend publication of the Arabic organ of the Israeli Communist Party (Rakah), *al-Ittihad*, for a week. The grounds given were "incitement to rebellion of the Arab population in Israel and encouraging it to strike on land day'."[28] The publishers did not seek judicial review.

Administrative Detention

The power of administrative detention was originally covered by regulation 111 of the Defence Regulations. In 1979 a law was passed which repealed regulation 111 and replaced it with a new scheme of administrative detention which is more restricted than the previous scheme and is subject to a strict system of judicial review.[29] In the first few years after the new law was introduced there were very few cases of administrative detention in Israel itself and some of those were cases of Jewish extremists suspected of planning terrorist acts against the Arab population.[30] In recent years a few orders have been issued for the detention of Arabs suspected of planning violent actions on behalf of outlawed Palestinian organizations, such as *al-Fatah*, the Popular Front for the Liberation of Palestine and the Abu Mussa faction of *al-Fatah*.[31]

The new law restricts the use of administrative detention to cases in which the Minister of Defense "has reasonable cause to believe that reasons of state security or public security require that a particular person be detained."[32] Within 48 hours the detainee must be brought before the judge-president of a district court who may confirm or set aside the detention order or shorten the period of detention. The decision of the judge-president may be appealed to the Supreme Court.

The reviewing judge may depart from the rules of evidence and may even hear evidence without the detainee or his counsel being present, if he is satisfied that disclosing the evidence may impair state or public security. The courts try to mitigate this departure from due process by allowing counsel for the detainee to draw up questions which the judge himself puts to the security officers who present the evidence to him.[33] The Supreme Court has also held that the

authorities must show that the gravity of the danger to state or public security makes it essential to accept this restriction on the detainee's right to defend himself and the resultant limitations on the foundations of judicial review.[34]

There can be no doubt that the new law considerably improves the rights of the administrative detainee, first and foremost by ensuring a system of strict judicial review. The fact that the security service must present all the evidence to a judge and convince him that the detention is necessary is not a cast-iron guarantee that the system will not be abused; it must, however, have an inhibitive influence on the readiness of the security service to use this mechanism, unless it really believes there to be a strong case. From the reported decisions, it does seem that the cases in which administrative detention is used in Israel itself (as opposed to the occupied territories) are extreme cases in which the arguments for preventive detention are based on pure security grounds, rather than on conflict-management policies.

In spite of the welcome changes introduced by the new law, the question of principle remains whether this form of detention can be justified at all. Both the courts and the Attorney General have made it clear that the object of administrative detention is not to punish a person for past acts but to prevent a danger to state security or public security.[35] The law may not be used if the evidence can be revealed in open court, and the detainee can therefore be charged.[36] The Attorney General has added that even where a danger to state or public security exists administrative detention should not be used if less drastic means are available.[37]

Travel Restrictions

Section 9 of the Law and Government Ordinance, 1948 grants the executive branch of government power to promulgate emergency regulations that can change any law.[38] Such regulations are valid for only three months unless the Knesset extends their validity. The government has exercised this power in order to promulgate regulations of various sorts. Some of these have afterwards received Knesset approval and for all intents and purposes have become part of the country's permanent laws. Among regulations of this type are the Emergency Regulations (Leaving the Country), 1948.

Regulation 6 of the above regulations grants the Minister of Interior power to "forbid a person from leaving Israel, if there is ground for suspicion that his leaving is likely to harm the security of the state." In the early 1950's this regulation was used so as to prevent a Jewish communist from going abroad.[39] More recently it was used so as to prevent an Arab official of the Progressive Movement (which is one component of the PLP) from leaving the country. The reasons for this decision were that the said official was to receive money from organizations connected to the PLO in order to fund projects in Israel. Justice Bach made it clear that

> the fact that the activities of a citizen abroad do not seem desirable, or even seem harmful to the national or political aspirations of the elected government or the majority of residents in the country, does not of itself justify issuing an order forbidding that citizen from leaving the country.[40]

Nevertheless the bench was unanimous in its opinion that the order should be upheld. While there was a difference of opinion over the degree of danger to state security that can justify an

order under the regulations, all agreed that facilitating flow of PLO money into Israel was a sufficient danger to state security to justify the travel restriction order.

Judicial Review

The Administrative Detention law provides for a built-in system of judicial review. The onus is on the government to bring the detainee before a judge who must decide whether to confirm the detention order. While there is still some disagreement whether the task of the judge is merely to check that the grounds for the order were indeed connected to state or public security or to examine the necessity for the extreme measure of detention, in practice the judges go into the intricacies of the matter and examine the justification for detention. The most serious problem of due process in this system of review is the problem of evidence that is not made available to the detainee or his counsel. I shall return to this issue below.

As opposed to the Administrative Detention law, the Defence Regulations and other legislative provisions described above, do not themselves provide for judicial review. However, the Supreme Court exercises its general jurisdiction as a High Court of Justice to hear petitions challenging the use of the various security powers. How has the court exercised this jurisdiction?

The answer to this question must be seen in light of the development in the Supreme Court's approach to judicial review over the last forty years. The clear trend has been the widening of the scope and extent of judicial review over governmental action. The Supreme Court originally distinguished quite clearly between the jurisdictional issue and the merits issue. It adopted a strict approach on matters of jurisdiction and procedure, but was reluctant to enter into decisions on their merits. The philosophy behind this approach was that administrative decisions are entrusted by the legislature to the executive branch, and that by interfering in such decisions on their merits the court would be perverting the intention of the legislature and usurping the power of the executive.[41]

The present approach of the Supreme Court is far removed from that philosophy. While it still takes a strict stand on procedural issues, it is far from reticent on the merits issue, and as a matter of course it examines the reasons and justifications for governmental decisions of all sorts. The current theory is that substantive judicial review is an essential ingredient of the rule of law.

The development in the theory of judicial review has had its mark in cases dealing with security powers.[42] In the early years the Supreme Court adopted a strict approach on the jurisdictional issue. This meant that failure to comply with all the formal requirements of the Defence Regulations or other security legislation led to invalidation of administrative restrictions placed on individuals.[43] However, the Supreme Court was not inclined to interfere with administrative restriction orders on the merits, or even to examine the justification for those orders. Its approach was that the only non-procedural grounds for interference were bad faith.[44] Thus, for example, in the *Abu-Ghosh* case the Minister of Defense had issued an order that the petitioner be banished to another town. The court itself expressed doubt whether the order was indeed dictated by security necessity, but refused to interfere as it was convinced that the Minster had considered security grounds when he took the decision. It stressed that the decision whether a restriction order is necessary for reasons of state security is one for the competent authorities to make and not for the court.[45]

Over the years the Supreme Court began to display less reluctance than in the past to examine

the nature of the "security considerations" offered as the grounds for administrative actions.[46] This was not necessarily accompanied by a readiness actually to interfere in discretion of security officials.[47] The court still showed special deference to the security services and stated time and again that the scope of its interference in security considerations must necessarily be extremely limited.[48] The result was "that in actual fact until recently there were no cases in which the court invalidated a decision of a security authority in a security matter because of a fault in discretion."[49]

The *theory* that the court should show greater restraint in security matters has been rejected by Justice Aharon Barak.[50] In his important decision in the *Schnitzer* case[51] Justice Barak explained the philosophy behind the general extension of judicial review, even when the statutory powers are defined in subjective terms. He then related to review of discretion in security matters and stated:

> In the past the security nature of administrative discretion deterred judicial review. Judges are not security personnel, and they should not interfere in security considerations. Over the years it has become clear that when it comes to judicial review there is nothing special about security considerations. Judges are not administrators, but the principle of separation of powers requires them to supervise the legality of decisions taken by administrators. In this security considerations have no special status… Just as judges are capable and obligated to examine the reasonableness of professional discretion in every field, they are capable and obligated to examine the reasonableness of discretion in security matters.[52]

Does the change in theory really signify a greater readiness to interfere in security considerations, by placing them on the same par as other governmental activities, such as transport and health? It is doubtful whether it does. As the former Attorney-General, Professor I. Zamir, has put it:

> The court placed security authorities and other authorities on the same level only in the strict legal sense, that is to say on the level of legal rules and tests. When it comes to applying the law to a given case, they are not on the same level. In actual practice, there is a great difference, in favor of security matters, between such matters and other matters. The difference exists not on the theoretical level, but in practice.[53]

Even if there is still a discrepancy between the theory of review in security matters and the willingness to actually intervene, the very readiness of the court to examine security considerations is significant. It has no doubt resulted in greater scrutiny of the security grounds for restriction orders.[54] The type of case like the *Abu-Ghosh* case mentioned above, in which the court upheld a restriction order though it had serious doubts whether it was justified on security grounds, is unthinkable today. The court demands a full explanation for the restriction order, and examines the case on its merits. This must have had an inhibitive effect on the issue of restriction orders by the authorities, even if it has not resulted in more intervention by the court in those cases in which the orders are subjected to judicial review.[55] It is matter for conjecture whether the court's restraint is a function of the care exercised by the authorities not to issue orders that cannot stand up to the new standard of review, or of built-in constraints that make courts everywhere reluctant to interfere in security matters, especially in situations of conflict or crisis.

Evidence

The main legal problem facing a person against whom a restriction order has been issued is the problem of evidence. The person is not always informed of the detailed reasons for the restriction

order, and if he applies to the High Court of Justice in an attempt to challenge the order, he is generally confronted with a certificate signed by the Minister of Defense stating that all, or part, of the evidence on which the decision to issue the restriction order was based is privileged on grounds of state security.

Until 1968 the presentation of such a certificate virtually closed the matter* as the court had no authority to look into the justification for the claimed privilege. A statutory change in the rules of evidence in 1968[56] has led to a change in the practice. According to the amended evidence rules, if a certificate of privilege on state security grounds is issued by the Minister of Defense, a party to the proceedings may apply to a judge of the Supreme Court to have the evidence revealed. The judge examines the evidence, listens to the account of the authorities and then decides whether maintaining the privilege is to be preferred to doing justice in the individual case.

While the statutory function of the judge is only to examine whether the privilege should be maintained or not, the practice has developed of requesting the bench which hears the case itself to see the privileged evidence and examine not only the privilege, but whether the evidence provided a sufficient basis for the restriction order.

The system of denying the petitioner or his counsel access to the evidence on the basis of which the order against him was made is clearly highly problematical. The said practice of the court mitigates the harshness of the privilege to some extent as it prevents the authorities from hiding behind the general phrase “state security considerations” without having to render any account whatsoever of the nature of these considerations. It does not, however, overcome the problem of the “faceless accuser.”[57] The petitioner is given no real opportunity either to refute the evidence by cross-examining the witnesses or by bringing counterevidence, or by arguing that on the evidence the restriction is not justified. Even if the judge does his utmost to protect the rights of the absentee petitioner, he is totally dependent on the evidence presented by the security authorities. The latter may be mistaken, or worse, may even intentionally mislead the court.[58] Furthermore, even if justice is in fact done, it is not seen to be done.[59]

The risks to intelligence sources by revealing evidence is regarded as the major justification for special administrative procedures, as opposed to ordinary criminal proceedings. Given the security problems which still face Israel the only real alternative would be to change the rules of evidence in criminal cases by allowing hearsay evidence, and possibly even evidence that is not revealed to the defendant. This would possibly be even more undesirable than the present system. As it is unlikely that the legal regime which permits decisions restricting basic liberties to be based on privileged evidence will be changed, suggestions have been made to mitigate the system further by ensuring that a lawyer with special security clearance will be present when the judge sees the evidence in order to protect the interests of the petitioner or defendant in an adversarial proceeding.[60]

Besides the question of admissibility and disclosure of evidence another issue dealt with by the courts relates to the weight of evidence needed to justify a restriction order. At one stage the rule was that the evidence has to be of such a nature that a reasonable man would rely on it.[61] However, in a number of decisions handed down by the President of the Supreme Court, Justice Shamgar, the idea has been developed that the greater the restriction on the liberty involved the heavier the burden of proof must be.[62] In cases of administrative limitations on basic rights the evidence on the security dangers must be “clear, convincing and unambiguous.”[63] This is all subject to the fundamental limitations of evidence not revealed to the person affected.

Administrative Restrictions: The Justification

Even if the various forms of administrative restrictions are subject to judicial review of one sort or another they involve serious inroads into accepted principles of civil liberties in a democratic society. The most basic liberties of the individual can be restricted without that individual having been tried for, and convicted of, a specific and defined offence before a court of law. What justification is offered for this state of affairs?

The response generally given cites the state of emergency which has existed since 1948, the numerous wars between Israel and its neighbors which have taken place since then, the lack of peace agreements with all the belligerent states except Egypt, and, most important, the continuing terrorist attacks against civilian targets in Israel.[64] It is pointed out that other democratic countries adopted emergency legislation in times of crisis, such as World War II, and used the powers granted in this legislation to impose serious restrictions on the freedoms of their citizens which would not have been tolerated in times of peace.[65]

This is not an entirely convincing argument for the existence of the administrative restrictions. For even if we accept the premises behind the argument, they of themselves do not lead to the conclusion that accepted legal guarantees of due process must be waived. The real question is why ordinary rules of criminal law and criminal procedure are inadequate to meet the situation. Citing Israel's precarious security situation provides no answer. Furthermore, the fact that other countries have adopted similar legislation in times of war, and have no doubt responded to crisis in a far more draconian manner than Israel, is not a good enough argument either. In retrospect it is quite evident that, for instance, the infamous internment in the U.S. of Japanese Americans, was neither a rational nor justifiable response to Pearl Harbor. Why then does the special situation of Israel demand administrative powers to restrict personal liberties?

A reply to this question was offered by Justice Shamgar in the *Baransa* case.[66] The petitioner in that case had been served with an order under regulation 110 restricting him to his village, and imposing the other restrictions provided for in regulation 110. The Supreme Court held that on the evidence presented it was clear that the petitioner was active in trying to persuade those who would listen to him that there must be an armed struggle against Israel "and his past proves that he knows how to translate his opinions into action."[67] Petitioner's counsel argued that if there were evidence that showed his client had engaged in activities which were in contravention of the law, he should be tried before a competent court; if there were no such evidence there could be no justification for the restriction order. Justice Shamgar stressed that administrative restriction orders of any type may not be used to punish persons for past acts or to take the place of criminal proceedings. The restrictive powers are preventive and may only be exercised so as to prevent future dangers. He went on to add, however, that there may be cases where the authorities have reliable evidence regarding a person's planned activities and in which it is not possible to bring the person before a court because of the apprehensions of the witnesses.[68] More commonly, the point made in favor of the use of this system rather than the criminal process is that the evidence is invariably based on intelligence sources and its presentation before a court would inevitably lead to disclosure both of the methods of intelligence gathering and the identity of informants.[69]

This, then, is the main justification offered for administrative restrictions: the difficulty of producing admissible evidence and the risks involved in allowing subversive activities to go unchecked. The extent of these risks is a function of Israel's peculiar situation.

Whether one finds these arguments acceptable depends, of course, on a number of factors: an assessment of the security dangers facing Israel and the efficacy of alternatives to the criminal law in curbing them; the price which may be paid in terms of accepted civil liberties in a democratic society faced with such dangers and one's attitude to the type of activities that may be regarded as "subversive."

Administrative Discretion and Security Control

The wide discretionary powers that are delegated to the various branches of the executive are sometimes used in order to exert "security control" over Arab citizens.

A major decision of the Supreme Court in 1960, which related to the initial attempts of the *el-Ard* movement to organize, dwelt on the legality of this type of control. The *el-Ard* leaders had applied to register a company which was to publish a newspaper. Under the Companies Ordinance the Registrar of Companies has absolute discretion to decide whether to register or refuse to register a company. The Registrar, acting on the advice of the security service, informed the applicants that he was refusing to register the company "on grounds of state security and public good." The Supreme Court overruled the decision of the Registrar.[70] It held that even though the statute granted the Registrar absolute discretion, he was to use that discretion to further the aims of the statute. Protecting the security of the state was not an aim of the powers given to the Registrar; it was an improper purpose from his point of view, and although he had acted in good faith he had exceeded the bounds of his authority.

According to this precedent it is clear that administrative bodies that are given discretionary powers are not necessarily permitted to exercise those powers in order to further what they perceive to be the security interests of the state. This should not be taken to mean that "security considerations" are never relevant for authorities other than the various security authorities themselves. Everything depends on the nature of the authority and the pertinence of "security considerations" in the particular context of that authority. Thus, in the leading case of *Sheib v. Minister of Defense*[71] the former leader of the *Lehi* underground organization had applied for a teaching post at a high school. The principal was prepared to employ him subject to approval by the director of education in the Ministry of Education. The director informed the principal that he could not employ the petitioner, as the Ministry of Defense objected.[72] The Supreme Court held that the Ministry of Defense had no authority to veto employment of teachers and that the director of education could not blindly accept the view of the Ministry. It added, however, that the director of education was free to consult with others, including security officials. Had the director himself come to the conclusion that on the strength of the information given to him by the Ministry, the petitioner was not fit to be a teacher the court would not have interfered. This is a highly significant point because the field of education is the major field in which administrative discretion is used as a means of "security control."

Security Considerations in Education

The public education system in Israel is operated on two levels. Primary schools are run directly by the Ministry of Education and Culture. The teachers are employees of the state itself, while the physical plant is the administrative responsibility of the local authority. At the high

school level, schools are generally owned and operated either by the local authorities or by public bodies, although most of the funding comes from the Ministry of Education which also lays down educational policy and curricula. The teachers are the employees of the body which operates the school.

The difference in legal framework accounts for the difference in the system of control over Arab teachers. On the elementary school level, the Ministry of Education and Culture, as the employer, exercises direct control over the employment of Arab teachers. Individuals regarded as "undesirable elements," generally because of past political activity, are simply not given employment. On the high school level the position is somewhat more complicated, because the Ministry is not the employer. The Schools Supervision Law, 1969, however, gives the Ministry a certain degree of control over schools in which the teachers are not government employees. According to this law, such schools may not employ teachers unless they have written confirmation that the Director General of the Ministry of Education has no objection. The Director General may not withhold approval from a qualified teacher unless one of the grounds specified in the statute applies. Two possible grounds are that the teacher has been convicted of an offence against the security of the state or that "it has been proved to the satisfaction of the Director General that the conduct of the teacher would have a harmful effect on the pupils." The Director General is bound to grant a teacher a hearing before refusing to grant approval, and a teacher who has been denied approval may appeal to the Minister.

While the above provisions provide the legal basis for some form of "security control" over Arab teachers, in practice the control is exercised in a non-statutory fashion. A school which wishes to employ a teacher must receive the permission of the Ministry of Education. The Ministry employs clearly political criteria in deciding whether to grant permission. If there are a number of candidates for the post it prefers those candidates who were not politically active in what are deemed "extreme" activities, such as Arab student committees at the universities, even if they are less qualified.[73]

It seems to the present writer that there is no legal basis for this system of control. As the law provides a system of control, any other system (especially if it does not meet the stringent procedural safeguards of the statutory system) must be regarded as illegitimate.[74] From a Supreme Court petition submitted in 1987in which a teacher challenged the refusal to grant permission to employ him, it would seem that the attitude of the Ministry of Education is that it has some kind of general power of control over schools which allows it to exercise the type of control discussed here. This view could not stand up in court, which probably explains why the Ministry stepped down after the petition had been submitted and informed the court that it had no objection to the employment of the petitioner.[75] So far there have been no published cases in which the legality of the whole system has been challenged in court

One matter which is regulated, and which has reached the courts on a number of occasions, is the appointment of principals for elementary schools. Under the State Education (Methods of Supervision) Regulations, 1956 the Director General of the Ministry of Education appoints principals after consulting the local council of the town in which the school is located. In practice, the consultation is carried out by setting up committees which interview the candidates and make their recommendation to the Director General. These committees are comprised of representatives of the local council and the teachers' union, the regional school supervisor and Ministry officials. In the case of Arab schools the Ministry officials generally include the head of the Arab education in the Ministry. From a number of cases which have reached the Supreme Court it would seem that Ministry officials use their position so as to influence the Director

General's decision after the committee has made its recommendation. In one case the head of the Arab education department went so far as to completely misrepresent the recommendations of the committee in the memorandum of the committee's meeting which he prepared for the Director General.[76] It seems that there was a political motive behind this conduct, which was strongly censured by the Supreme Court.

This form of control is not restricted to qualified teachers. It is also exercised so as to screen candidates for teacher-training colleges. The Ministry of Education, which supports these colleges, has a say over the selection of candidates for the restricted places. The colleges must receive Ministry approval for Arab candidates, and this approval process is in effect a form of security control of the type described above.

Besides the major question of whether there is any legal basis for the system of control described, another question relates to the conception of security adopted by the authorities. All the evidence indicates that this form of control is based on the conflict-management conception of security, and that it is used as a form of political control over more nationalistic and radical Arab citizens.

Summary

The system of security control described above, though prevalent, has reached the courts far less than the formal system of administrative restrictions based on express statutory powers. When it has reached court, it would seem that the authorities prefer to step down in the individual case rather than defend the system.

The main reason why this system of control has reached the courts less than the exercise of formal powers seems fairly obvious. It is difficult to prove that discretion wielded behind closed doors has been exercised as a form of security or political control. It is also possible that people have been conditioned to live with the system. They may not be aware of the possibility of challenging this form of control through the legal system, or have little confidence in their chances of success if they were to try. They may also fear that the exposure involved in such a contest could exacerbate the attitude of the security service towards them. Whatever the reasons for this reticence, it has prevented the judicial system from coming to grips with the issue. The reticence of people affected by the system to challenge it in court, and the reluctance of the authorities to defend the system in those cases in which it has been attacked, have prevented the courts from ruling on its legality.

Notes

1. In limiting the discussion in the present study to these two forms of control I do not imply that these are the only forms of "security control" exercised over the members of Israel's Arab minority. There is at least one other form of control which is prevalent: exertion of pressure of one sort or another over Arabs in order to encourage them to "toe the line." This form of pressure lies in the grey area of activity which certainly does not involve use of legal powers, or even wielding of administrative discretion, and may in fact involve illegal forms of "persuasion." Located in the grey area of what may be termed "quasi-legal activity" it is possibly the most difficult to deal with, because, given its nature, its very existence is often denied. It is not the difficulty of dealing with the topic, however, that has led me to exclude it from the present discussion, but the notion that this form of control, together with the wider issue of general political control, does not really belong to the issue of legal status and should be the subject of a separate study.

2. Soon after the establishment of the state practically all of the areas inhabited by Arabs were placed under military government. While the security reasons for this during and immediately following the 1948 war were clear, as time passed the

grounds for maintaining it became less than clear, and were the subject for public and political criticism. As a result of this controversy Prime Minister Ben-Gurion appointed a three-man committee to examine whether the powers of the military government could be restricted. The committee recommended that the military government be maintained, subject to a number of administrative changes that would ease the lot of those subject to it. In a secret appendix to its report the committee stated that a main reason for maintaining the military government was the "problem of security settlement by Jews in the area of the [military] government." See Y. Salomon, *In My Own* Way (Jerusalem: Idanim, 1980) 284–290. (Salomon was a member of this committee and he quotes extensively from the secret report which, he claims, was written on his initiative).

3. (1978) 33 P.D. I 274.

4. *Ibid.*, 277.

5. *Ibid.*, 280.

6. (1965) 19 P.D.I260.

7. See *Sabri Jiryis v. District Commissioner* (1964) 18 P.D. IV 673, 678 (emphasis added).

8. See *Schnitzer v. Chief Military Censor* (1988) 42 P.D. IV 617, 630.

9. (1953) 7 P.D. 871.

10. Two cases in which the Court lias held there to be a probable danger that justifies restrictions on speech are both conflict-management cases: *Ein-Gal v. Film and Play Censorship Board*, note 3 *supra* and *Omar International v. Minister of Interior* (1982) 36 P.D. (1) 227. The background to the *Omar International* decision was the publication by an East Jerusalem Arabic daily of articles which hailed violent actions against the Israeli army on the West Bank, and most specifically commended an assassination attempt against a Palestinian regarded as a collaborator with the Israeli authorities. The court refused to interfere in the Minister of Interior's decision to suspend publication of the newspaper for a month. Significantly, although this is not the only case in which Arab citizens were involved (the *Kol Ha'am* case also involved the Arabic language newspaper of the Communist Party), it is the only Supreme Court case in which offensive speech by an Arab related directly to the Israel-Palestinian conflict. For a critique of the way the court applied the probability test in this case see P. Lahav, "Israel's Press Law" in P. Lahav (ed.) *Press Law in Modern Democracies* (New York: Longman, 1985), 265,273. It must also be pointed out that even in cases that do not involve "conflict-management" the court has not always turned to the probable danger test: see P. Lahav, "On Freedom of Speech in the Decision of the Supreme Court" (1977) 7 *Mishpatim* 375.

11. See *Hama'agal HaLeumi v. Jerusalem Municipality* (1986) 40 P.D. IV 13 in which the court declined to interfere in the refusal of the Jerusalem Municipality to allow posting on municipal billboards of posters warning of the danger of "too many Arabs in the country;" *Servetman v. Commander of Police* (1985) 40 P.D. IV 550 where the court refused to interfere in a police decision not to allow a demonstration of a racist group outside the Egyptian Embassy in Tel Aviv.

12. See *Asali v. District Commissioner* (1983) 37 P.D. IV 837.

13. In *al-Hatib v. Distrid Commissioner for Jerusalem* (1986) 40 P.D. III 657, the Supreme Court upheld the decision to cancel the licenses of two East Jerusalem Arabic newspapers on the grounds that they were organs of George Habash's PFLP. Justice S. Levin explained why the licenses could be revoked even though all material in the papers had passed the military censor:

> In our opinion, it is inconceivable that the State of Israel should permit terrorist organizations that are bent on destroying it to establish businesses in its territory, however "legitimate" they may be, and especially to run magazines and publish newspapers, whatever their contents, just as it is inconceivable that a sovereign and civilized state would tolerate a "legitimate" business, run by organized crime. The question is not what damage will be caused to the public by running such a "legitimate" business. The question is one of public policy, that the state should not lend its hand to those who wish to destroy it: *ibid.*, 661.

14. A "terrorist organization" is defined as a "group of people who, in their activities, resort to violent acts likely to cause death or bodily injury, or threats of such acts of violence." However, the government also has the power to declare an organization to be a terrorist organization. In this case, the burden to prove that the organization is not a terrorist organization according to the above definition passes to the defendant. The government has exercised the above power in order to declare the PLO and several other Palestinian organizations, such as the Popular Front for the Liberation of Palestine, as terrorist organizations.

15. A further amendment to the Prevention of Terrorism Act, passed in 1986, outlaws any contact between an Israeli citizen or resident and an official or representative of a terrorist organization. Once again, there is no need to prove any harm, or intention to harm, state security, by that contact. It should be pointed out that while the amendment dealing with acts of identification with terrorist organizations is aimed almost entirely at expressions of identification by Arabs, the amendment dealing with forbidden contacts is aimed at the political activities of both Jews and Arabs. The only prosecutions under this amendment so far have been of Jewish peace activists who have met with PLO representatives.

16. It will be recalled that in the *Yardor* case, (1965) 19 P.D. Ill 365, the dissenting judge, Justice Haim Cohn, argued that even if the Elections Committee did have the power to disqualify party lists it could only exercise this power if there was a clear and present danger to state security and that there was no evidence that any such danger would arise from participation of the list in the elections. The majority judges, who favoured disqualifying the *el-Ard* list, did not even discuss whether the danger to state security met the probable danger test (or any other balancing test) or what actual damage would be caused to state security by participation of the list in the elections.

17. See *Dahar v. Minister of Interior* (1985) 40 P.D. II 701; *Athamalla v. Officer Commanding Northern Region* (1987) 42

P.D. IV 708; *Agabaria v. State of Israel* (1988) 42 P.D. 1840.

18. See *Neiman v. Chairman of Central Eletions Committee* (1984) 39 P.D. II 225, 311

19. See *Athamalla v. Officer Commanding Northern Region* note 17 *supra.*

20. See Regulations 2 and 6. Internal regulations issued by the General Staff provide that only the Chief of Staff himself or one of the officers commanding the regions into which Israel is divided may exercise the powers of military commanders under the regulations.

21. See Amnesty International, *Town Arrest Orders in Israel and the Occupied Territories* (2 October, 1984). This figure does not include people placed under restriction orders on the West Bank, in the Gaza strip, in Jerusalem and on the Golan Heights.

22. See Directives of the Attorney General, *Restriction Orders under Regulation 110 of the Defence Regulations*, No. 21.932 of September 1, 1984.

23. See 5741 *Yalkut HaPirsumim* 700. Also see the declaration in 5741 *Yalkut HaPirsumim* 1375, relating to a group called the "National Co-ordination Committee."

24. See the judgment of Landau D.P. in *al-Assad v. Minister of Interior* (1979) 34 P.D. 1505, 513.

25. See *el-Ard v. District Commissioner* (1964) 18 P.D. II340; *Makhoul v. District Commissioner* (1981) 37 P.D. 1789. Other cases in which newspaper licenses have been refused under regulation 94 have reached the Supreme Court, but these cases have related to newspapers in East Jerusalem. Although Israeli law now applies in East Jerusalem this study does not deal with the peculiar legal problems of the Arab population in that part of the City.

26. See the article by Attalah Mansour, "A series of blows to *Ibna al-Balad*" *Ha'retz*, 9.3.1989, p.13. Mansour claims that the publishers did not request judicial review of the decision, as they had no confidence in the court system, following the confirmation by the court of the administrative detention of the editor, Raja Agabaria. In the detention case the court held that there was more than a reasonable basis for holding that if the editor were released he would be involved in violent and other illegal activities: see *Agabaria v. State of Israel* (1988) 42 P.D. 1840. At the time of the hearing on the administrative detention, the paper's license had not yet been revoked and the detainee's counsel argued that it was unreasonable to detain him if the *Ibna al-Balad* movement had not been declared an unlawful association, and the paper's license had not been cancelled. The court held that there was no necessary connection between the paper's license and the detention of the editor.

The power to revoke a newspaper license was also used in February, 1988 to cancel the license of a newspaper called *Derech Hanitzotz* that was published by Jews. The grounds were similar to those given in the *al-Raiah* case, namely that the paper was funded by an outlawed organization, in this case the Democratic Front for the Liberation of Palestine of Naeif Hawatmeh. The editors, who did not contest the license revocation in court, were later convicted of performing a service for an unlawful association.

27. See *Kol Ha'am v. Minister of Interior* (1953) 7 P.D. 871.

28. See *Ha'aretz* of 25.3.88. According to the *Jerusalem Post* report of the closure order (25.3.88) two examples of the incitement by the paper were a poem calling on readers to join the fight for freedom and an article by the Mayor of Nazareth, M.K. Tawfik Ziad hailing the Palestinian uprising in the occupied territories. And see the article of Z. Segal, "Suspending publication of newspapers," *Ha'aretz*, 28.3.88, p. 11.

29. See Emergency Powers (Detention) Law, 1979. This law also abolished the power to deport permanent residents of Israel.

30. See *Kahane v. Minister of Defense* (1980) 35 P.D. II253; *Ben-Yoseph (Green) v. Minister of Defense* (1980) 35 P.D. Ill 474; *Lerner v. Minister of Defense* (1982) 42 P.D. Ill 529.

31. See *Ploni v. Minister of Defense* (1986) 41 P.D. II 505; *Ploniv. Minister of Defense* (1986) 41 P.D. II 508; *Agabaria v. State of Israel* (1988) 42 P.D. 1840; *State of Israel v. Attamne*, unpublished decision of Deputy President of Haifa District Court of 15.7.88.

32. Emergency Powers (Detention) Law, 1979, section 2. Under section 1 the law applies only during a period in which a state of emergency has been declared. A state of emergency was declared on May 19, 1948 and has never been lifted.

33. See, e.g., the decision of the Deputy President of the Haifa District Court in *State of Israel v. Atamne*, note 31 *supra*.

34. See *Kahane v. Minister of Defense* (1980) 42 P.D. 1253, 259; *Agabaria v. State of Israel* (1988) 42 P.D. 1840, 845.

35. See *Kawasma v. Minister of Defense* (1982) 36 P.D. 1666; *Ploni v. Minister of Defense*, note 31 *supra;* Directives of the Attorney General, *Administrative Detentions According to Emergency Powers (Detention) Law, 1979*, No. 21.927 of December 12, 1982. In the *Kawasma* case Justice Kahan held that a detention order issued so as to keep a person acquitted of terrorist acts in detention pending the appeal was a misuse of administrative detention and that the order was therefore invalid.

36. See *Lerner v. Minister of Defense*, note 30 *supra*, 531; *Agabaria v. State of Israel*, note 31 *supra*, 846.

37. See Directives of the Attorney General, note 35 *supra*.

38. Exercise of this power is dependent on the declaration of a state of emergency by the legislative branch. And see note 32 *supra.*

39. See *Kaufman v. Minister of Interior* (1953) 7 P.D. 534.

40. See *Dakar v. Minister of Interior* (1985) 40 P.D. II 702, 717.

41. An early case which dealt with the declaration of a Jewish group as a terrorist organization typifies this approach. The court was asked to examine the justification of that declaration. It refused to do so and explained that "this court must not turn

into a kind of supervisory committee that examines the way the [governmental] institution carries out its duties." *Braun v. Prime Minister and Minister of Defense* (1948)1 P.D. 108, 113.

42. See S. Shetreet, "The Scope of Judicial Review of National Security Considerations in Free Speech and Other Areas: Israeli Perspective," (1989) 18 *Israel Yearbook on Human Rights* 47.

43. See *al-Karbutli v. Minister of Defense* (1948) 2 P.D. 5; *al-Khouri v. Chief of Staff* (1949) 4 P.D. 34.

44. See *Alyubi v. Minister of Defense* (1950) 4 P.D. 220; *Sabri Jiryis v. District Commissioner* (1964) 18 P.D. IV 673; *al-Asmar v. Officer Commanding Central Region* (1971) 25 P.D. II 197.

45. See *Abu Ghosh v. Military Commander* (1953) 7 P.D. 941.

46. See I. Zamir, "Human Rights and National Security" (1989) 19 *Miskpatim* 17, 36–38. Also see *Samara v. Commander of Judea and Samaria* (1979) 34 P.D. IV1; *Drveikat v. Government of Israel* (1979) 34 P.D. 11.

47. See Zamir, note 46 *supra*, 36–38.

48. *Ibid.*

49. *Ibid.*, 37. Zamir explains the reasons for this reticence in the following way:

> This attitude of the court is not surprising. It mainly reflects the feeling of importance and sensitivity that surround the field of national security… The duty of protecting security has by law been entrusted to the security authorities. The court does not want to make it difficult for them to carry out their duty. The consequences of their decisions may be critical. The court does not wish to be a partner in the responsibility for those consequences. One may generalize by saying that the court tends to show special consideration, and to act with a high degree of restraint, towards the security authorities because of the heavy responsibility, the seriousness of the consequences and the public sensitivity that accompanies security matters.

50. See *Shalelam v. Fire-Arms Licensing Officer* (1980) 36 P.D. 1317; *Schnitzer v. Chief Military Censor* (1988) 42 P.D. IV 617.

51. *Ibid.*

52. *Ibid.*, 639–640.

53. See Zamir, note 46 *supra*, 33.

54. See *Baransa v. Officer Commanding Central Region* (1981) 36 P.D. IV 247. In this case which dealt with an order under regulation 110 Shamgar D.P. stated (at 251):

> There is no doubt that regulation 110 gives drastic power, which must be used with the proper care and after strict compliance with the preconditions, which justify its use. For this reason the court will also examine the exercise of the power with proper diligence, and the court no longer exercises the self-imposed restrictions and limitations which characterized the parallel English cases… and which was reflected in the [judgment of this court in the *Alyubi* case].

55. It has, however, led to interference in two leading cases on security matters that do not relate to the types of decisions dealt with here. The most dramatic case was the Elon Moreh case that involved requisitioning of private land on the West Bank for the establishment of a Jewish settlement. In spite of an affidavit by the Chief of Staff stating that the settlement would fulfil an important military function, the Supreme Court held that the dominant reason for the establishment of the settlement on that particular site was political and not military. It therefore held that the requisition was invalid: *Dweikat v. Government of Israel*, note 46 *supra.* The second case is the *Schnitzer* case (note 8 *supra)* in which the Supreme Court overruled a decision by the Chief Military Censor to forbid publication of a report about expected problems and personnel changes in Israel's secret service.

56. See Law of Evidence (Amendment) Law, 1968.

57. In the case of *al-Assad v. Minister of Interior* (1979) 34 P.D. I 505, Justice Landau spoke of the danger of allowing the authorities to restrict an individual's liberties on the basis of evidence supplied by a faceless accuser. In this case a certificate of privilege had not been submitted to the court. The respondent gave his reasons for denying a license for a newspaper but was not prepared to reveal the evidence on which those reasons were based. As the petitioner refuted the reasons the court ruled that the respondent had not proved that denial of the license was justified. It seems that it was as a result of this decision that the authorities learnt their lesson and began submitting a certificate of privilege in practically every case.

58. See Zamir, note 46 *supra*, 35 and the remarks of Justice Landau in *al-Assad v. Minister of Interior*, note 57 *supra*.

59. See Zamir, note 46 *supra.*

60. *Ibid.* The lawyer would not be permitted to reveal the secret evidence to the affected person, and so the chance of refuting the evidence would still be restricted.

61. See *Shaheen v. Commander of IDF in Gaza* (1984) 39 P.D. 1307, 327.

62. See, e.g., *Neiman v. Chairman of Central Elections Committee* (1984) 39 P.D. II 225, 249–250.

63. *Ibid.* Also see *Berman v. Minister of Police* (1976) 31 P.D. II687.

64. See B. Bracha, "Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945,"(1987) 8 *Israel Yearbook on Human Rights* 296, 297–298; S. Shetreet, "A Contemporary Model of

Emergency Detention Law: An Assessment of the Israeli Law," (1984) 14 *Israel Yearbook on Human Rights* 182, 197.

65. See A. Rubinstein, *The Constitutional Law of the State of Israel*, 3rd ed., (Tel Aviv: Schocken, 1980) 218–219.

66. Note 54 *supra.*

67. *Ibid.*, 249. The petitioner had in the past been convicted of security offences.

68. *Ibid.*, 252.

69. See *Daharv. Minister of Interior*, note 17 *supra*, 719; *Ploni v. Minister of Defense* (1986) 41 P.D. II505. Also see Shetreet, note 64 *supra*, 196–197.

70. See *Kardosh v. Registrar of Companies* (1960) 15P.D. 1151, affirmed in a further hearing before a bench of five justices in *Registrar of Companies v. Kardosh* (1961)16 P.D. 1209.

71. (1950) 5 P.D. 401.

72. In a letter to the petitioner the Minister of Defense informed him that the grounds for the Ministry's objection was that "in your book and paper you call for use of arms against the Israel Defense Force and the Government of Israel in cases which seem appropriate to you." *ibid.*, 403.

73. The information contained here is based on an interview with a person who is fully conversant with the system, but who, for obvious reasons, must remain anonymous.

74. One other possible source of authority is the Local Councils (Procedure for Accepting Employees) Order, 1977. According to this order a local council must put out a tender for posts. Rule 40(b)(2) exempts the council from the tender requirement in a number of cases. One of the cases is thecaseof teachers, provided the Ministry of Education approves the position. It is not quite clear from the wording of the rule whether Ministry approval is required for the particular candidate or for filling the post.

75. See High Court Petition 633/86, *Raabi v. Director of Department for Arab Education and Culture* (on file with the Association for Civil Rights in Israel).

76. See *Hahla v. Director General of the Ministry of Education and Culture*, unpublished judgment of May 18, 1986.

9

Group Rights

The Concept of Group Rights

The equal treatment of individual members of minority groups is only one aspect of the concept of minority rights. The other aspect is that of collective rights of minority groups. This chapter examines the extent to which Israel's legal system recognizes collective rights of its Arab minority.

In any discussion of equality the guiding principle is that the individual's group affiliation should be irrelevant in determining his or her rights and duties under law. The notion of group or collective rights relates to those spheres in which group affiliation is of great importance to the individual. The question then becomes not whether the law is oblivious to group affiliation, but whether it is prepared to accord it recognition and will allow for free expression of aspects of group belongingness which members in the group have an interest in maintaining.

The main yardstick for defining the nature of group rights in the post-colonial period appears to be the provision in article 27 of the International Covenant on Civil and Political Rights of 1966. This article states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

At first glance, this provision may seem to ignore *national* minorities and therefore not cover the situation of the Arabs in Israel. However, the discussions which preceded the drafting of the article reveal that it was worded in the broadest terms possible so as to include, rather than exclude, national minorities.[1] Even though the Arabs in Israel are a national minority, they are dearly an ethnic and linguistic minority as well, and the standards of artide 27 are therefore relevant in assessing their group rights.

Article 27 does not impose a positive duty on states to promote or support minority culture, language or religion, but merely to tolerate them.[2] It would therefore seem somewhat narrower than prevalent concepts of group rights, which favor positive support for minority institutions and even go further in promoting polides aimed at ensuring adequate representation of minority groups in the political institutions of the country,[3] affirmative action polides aimed at overcoming historical disadvantages suffered by members of minority groups, or even limited autonomy for national minorities.[4]

Characterization of the Arabs in Israel as an ethnic or linguistic minority is very obviously incomplete, for it ignores the national element. Israel is a nation state and the Arabs in Israel are manifestly a national minority.[5] However, even if we accept that article 27 is not meant to exclude national minorities, who may in a sense be regarded as ethnic groups or who will generally have a common language or religion different from that of the majority, it is by no means due to an oversight that international treaties, covenants and declarations since the end of

World War II have played down the idea of national minorities. Many, if not most, countries have national minorities and given the ideas of self-determination accepted as a principle of international law since the War, the fear has been that recognition of national minorities may imply the right of such minorities to self-determination, which in turn may imply secession.[6]

The problems of recognizing a national minority are compounded in the situation of Israel and its Arab minority. Israel was established as the nation state of the Jewish people in the midst of a bitter conflict between two national movements which was not resolved with the establishment of the state and continues to this day. Given the fact that the Arabs are part of a nation which has rejected Israel's legitimacy as the nation-state of the Jewish people, and which is overwhelmingly still in a state of war with it, it is hardly surprising that recognition of the rights of the Arabs in Israel, as a *national* minority, should be regarded as problematical. Added to the psychological factors involved, is the fear that such recognition would inevitably lead to political demands, such as the demand for autonomy or even secession, which Israel, like all other states, would certainly reject.[7]

The result has been that while on the individual level Arabs are recognized as members of the Arab nation, and are registered as such in the population register, on the group level there has been a definite reluctance to recognize the Israeli Arabs as a national minority. No provisions are made for recognition of national rights on the political level, and the political leadership of the state has veered away from recognizing political institutions, such as the National Committee of Chairmen of Arab Local Authorities, as representative institutions of the Arab minority.[8] The attempt in 1980 to organize a general congress of Israeli Arabs was stopped by the authorities.[9]

In spite of the reluctance to grant formal recognition to the Arabs as a national minority, the approach of the law to Arabs (and all other non-Jews) is anti-assimilationist. In keeping with this approach, and with the spirit of article 27 of the 1966 Convention, group rights of the Arabs in language, education and religion are accorded recognition. The remainder of this chapter will be devoted to examining these spheres.

Language [10]

The status of the Hebrew and Arabic languages in Israel has not been clarified by law since the establishment of the state and the major provision regarding this status is still contained in Article 82 of the Palestine Order-in-Council, 1922. This article states:

> 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.

This Article was not expressly revoked after independence, though section 15(b) of the Law and Government Ordinance, 1948, states that any provision in the law requiring the use of English is repealed. In 1952 a private member's bill was submitted to the Knesset according to which the Hebrew language would become the only official language of the state.[11] This bill was opposed by the Prime Minister and was defeated.

While no general statute gives the Hebrew language priority over Arabic, in practice Hebrew is the main official language of the country.[12] Laws are enacted in the Hebrew language and decisions of the courts are written in Hebrew. Section 24 of the Interpretation Law, 1981 states

that the binding version of any law is the version in the language in which the law was promulgated. Thus the binding version of laws passed by the Knesset is the Hebrew version. Furthermore, the Nationality Law, 1952 provides that one of the conditions which must be met by a person who wishes to acquire Israeli citizenship by naturalization is "some knowledge of Hebrew." The Chamber of Advocates Law, 1961 also requires sufficient knowledge of Hebrew as a condition for registration as an articled clerk.

Although Hebrew is, in fact, the main official language, Arabic still retains its status as a second official language.[13] Pursuant to Article 82 of the Order-in-Coundl laws and regulations must be translated into Arabic, although it takes some time before the translations are available. Arabic may be used in the Knesset, in the courts and in correspondence with government offices.[14]

Failure to fulfil the duty to translate laws and regulations into Arabic does not effect their validity.[15] There is some indication, however, that if injustice is in fact caused to a person because of the lack of an Arabic translation that person might be entitled to relief.[16] Furthermore, some statutes specifically require that certain notices be published in Arabic.[17] Failure to comply with such a statutory requirement will invalidate the notice, at least vis-à-vis an Arabic-speaking person who was apprised of the content of the notice.[18]

Religious Organization

Freedom of Religion and Worship

The Declaration of Independence promises freedom of religion and conscience and although the Declaration does not have the status of a constitution, freedom of religion, worship and consdence are recognized as basic principles of Israel's constitutional law.[19] Complaints that this prindple is not entirely respected under Israeli legislation have related to religious coercion of Jews, and not to curtailment of the religious freedom of non-Jews. All non-Jews, Arabs or others, retain the full freedom to practise their religion, subject only to the requirements of public order.[20] While the Jewish sabbath and religious festivals are the national days of rest, the law provides that non-Jews are entitled to rest on their sabbath and festivals.[21] The recognized festivals of each of the non-Jewish communities are fixed by a government dedsion pursuant to the government's power under section 18 of the Law and Government Ordinance, 1948.[22]

Personal Status Law

Under the *millet* system that was established throughout the Ottoman Empire in the 15th century, autonomy was granted to non-Moslem religious communities.[23] Every dtizen belonged to a *millet* (nation) representing his or her religious group and was subject to its jurisdiction. This system was still in existence in Palestine when it was taken by British forces in 1917 and the British retained most aspects of the system. Some modifications were introduced after independence but in essence the *millet* system still endures.

Under the *millet* system the law applying to matters of personal status, as defined under law, is

that of the religious community to which a person belongs, and the sole jurisdiction to deal with certain of these matters, namely marriage and divorce, rests with religious courts of those communities which have been granted legal recognition. The jurisdiction of the Moslem courts is somewhat wider than that of the courts of the other communities and includes matters which are not in the sole jurisdiction of the other courts. Jews, Moslems, Druse and several Christian denominations have their own courts. Those of the Jews, Moslems and Druse are regulated under statute; their judges are appointed by the President of Israel on the recommendation of special appointment committees and their salaries are paid by the state.

Organization of Religious Communities

The jurisdiction of religious courts in matters of personal status was not the only manifestation of the *millet* system retained by the British Mandatory authorities. They also retained the principle that religious communities could be empowered to set up institutions to provide services to community members and to levy a tax on members to finance these services. The legal basis for the organization of the Moslem community differed somewhat from that of the other communities, and as this legal basis is part of the present-day legal structure, the Moslem and Christian communities require separate treatment. I shall also discuss the Druse community which was granted official recognition after independence.

Moslem Community. The Supreme Council for Moslem Religious Matters was established under an order promulgated in 1921. The council was empowered to administer all matters of the Moslem community, including administration of Waqf property. In 1937 Waqf matters were removed from its jurisdiction and placed in the hands of a special committee appointed by the High Commissioner under the Defence Regulations (Moslem Trusts), 1937. Members of both the council and the special committee left the country during the War of Independence and the Moslems who remained in the Jewish state were left without organized religious institutions. Waqf property became absentees' property to be administered by the Custodian of Absentee Property. An amendment to the Absentees' Property Law passed in 1965 empowered the government to appoint trustee committees in seven towns with large Moslem populations. These trustee committees would administer that part of the Waqf property released to them for the benefit of the Moslem community in the following matters: assistance to the poor, bursaries for schoolchildren, vocational training, health, religious studies, funding of religious ceremonies or customs and any other purpose approved by the government. The said law does not obligate the Custodian to release all Waqf property to the trustee committees, but it stipulates that Waqf property which remains in the hands of the Custodian must be administered by him for the same purposes as property administered by a trustee committee. In fact trustee committees have not been established in all the towns mentioned in the law, and only a small proportion of the Waqf property has been released to be administered by the trustee committees. The rest is administered by the government. A special committee decides on allocation of funds received from the property. Aprivate member's bill under which all Waqf property would be placed in the hands of an elected Moslem council was defeated in 1985.[24]

Christian Communities. The legal basis for the organization of the non-Moslem communities at the time of the Mandate was the Religious Communities (Organization) Ordinance, 1926. This ordinance empowered the High Commissioner, if requested to do so by a recognized community, to promulgate regulations setting out the organizational structure of the community's institutions

and empowering those institutions to levy taxes on members of the community, recoverable in the same way as municipal taxes and fees. The only community which was interested in such powers was the Jewish community.[25] The Christian communities did not apply to the High Commissioner to so use his powers nor have they requested the Israeli government, which inherited the powers of the High Commissioner, to wield them. Thus the structure of the recognized communities is not regulated, and if legal problems arise they must be decided on the basis of prevailing practice.[26]

Druse Community. The Druse community was formally recognized as a religious community in 1957 when regulations were promulgated by the Minister of Religious affairs under the Religious Communities (Organization) Ordinance, 1926. According to these regulations the Druse community is headed by a religious council, appointed by the Minister of Religious Affairs. With the approval of the Minister this council is empowered to levy fees for the services it provides. The religious courts of the Druse community were established under the Druse Religious Courts Law, 1962.

Education

Under the Compulsory Education Law, 1949 schooling for all children in Israel from the ages of 5–16 (or completion of 10th grade) is both compulsory and free. Until the age of 18 (or completion of 12th grade), while not compulsory, it is free (although in practice budget cuts in recent years have forced parents to absorb some of the costs). Separate schools exist for members of the Arab community in which the language of instruction is Arabic, though Arab parents may register their children in Hebrew speaking schools, if they so desire.[27]

As seen above, the State Education Law, 1953, defines the aims of education in a manner which appears oblivious to the fact that not all the children in the school system are Jewish. In 1975, an attempt was made to skirt the statutory definition by defining the aims of state education in the Arab sector in an administrative policy decision. This decision reads as follows:

> State education in the Arab sector in Israel will be based on the values of Arab culture, the yearning for peace between the State of Israel and its neighbors, the love of country common to all citizens of the state, loyalty to the State of Israel, while emphasizing the common interests of all the citizens of the state as well as the special character of the Arabs of Israel … and on the striving for a society built on freedom, equality, tolerance, mutual aid and love of one's fellow-man.[28]

While in defining the *aims of* state education the State Education Law ignores the non-Jewish minorities, it states expressly that in non-Jewish institutions the curriculum will be adjusted to suit their "special conditions." The law also empowers the Minister of Education to promulgate regulations in order to adjust all, or part, of its provisions to meet the needs of non-Jewish pupils, and to establish councils for that education. Under regulations issued by the Minister, in matters relating to non-Jewish education the Director General of the Ministry of Education is authorized to transfer the powers of the Pedagogical Secretariat, a body appointed by the Minister to oversee educational policy, or of a regional director of the Ministry, to the director of the Ministry's Department for Arab Education and Culture.[29] The director of a special department, which for years controlled the system of state education for Arabs in the country,[30] was recently replaced by a head of Arab education within the Pedagogical Secretariat.[31] Thus, while the law recognizes the special educational needs of the Arab population, it also ensures that the central bureaucracy maintains control over the form and substance of the curriculum.[32] The bureaucracy has tried to

maneuver between the general aims of education, as defined under law, and the specific aims, as defined in the administrative decision cited above. In keeping with the reluctance to recognize the Arabs in Israel as a national minority, which is reflected in the tone of administrative decision on Arab education, Palestinian Arab culture and history are ignored.[33] Arab schools spend approximately the same amount of time on studying Jewish and Arab history, whereas the time spent in the Jewish schools on the study of Arab history is negligible.[34] Moslem pupils also spend more time on studying Old Testament and other Jewish texts than they do on studying Koran and Islam texts, though the time they spend on Old Testament and Jewish texts is far less than that spent in Jewish schools.[35]

Israeli law allows for the establishment of private educational institutions. Under the Schools Control Law, 1969 all such institutions are subject to supervision by the Ministry of Education. Many of the Christian communities run such institutions.

The laws outlined above concern primary and secondary schooling, but not higher education. Higher education in Israel is regulated under the Council for Higher Education Law, 1958 which lays down that an institution of higher education in Israel may only be operated with the approval of the Council for Higher Education. At present, there are Arab students at all the general institutions of higher education in the country, which are forbidden by law to discriminate in acceptance of students or employment of faculty on the basis of "race, sex, religion, national origin or social status."[36] Any program of Arab citizens to establish a specifically Arab university would have to be approved by the Council for Higher Education. But, judging by the reception that an idea for an Arab university in the Galilee met with a few years ago, it is not likely that the Council would approve an Arab university.

In considering this summary of the legal regulation of education it must be remembered that a distinction has been made in the present study between the formal legal situation and what has been termed "institutional discrimination." One of the areas in which institutional discrimination is almost endemic is education. This, and the tight bureaucratic control over substance, color the group right of the Arabs to education in their own language, and according to a specially tailored curriculum. The Arab system of education is separate (though not in the sense that Arabs may not study in the Hebrew system), but it is not equal. In the context of national, linguistic and religious minority rights, the opportunity for separate, state-funded education must be regarded as an important group right. However, in order for that right to be complete, the separate system of education must also be equal. In this sphere, the system still has a long way to go.

Notes

1. See F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (U.N. E/CN.4/Sub.2/384/Rev.l, 1979); Thomberry, "*Is* There a Phoenix in the Ashes?—International Law and Minority Rights" (1980), 15 *Texas International Law Journal* 421, 448. But cf. Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) 84, who points out that "[s]ignificantly, the reference to "national minorities" was defeated and the commission finally adopted the expression 'ethnic, religious or linguistic minorities'."

2. See Thomberry, *ibid.*, 449; Jay A. Sigler, *Minority Rights: A Comparative Analysis* (Westport, Conn.: Greenwood Press, 1983) 79.

3. See R. Hauser, "International Protection of Minorities and the Right to Self-Determination" (1971), 1 *Israel Yearbook of Human Rights* 102.

4. See C. Klein, *Israel as a Nation-State and the Problem of the Arab Minority: In Search of a Status* (Tel Aviv: International Center for Peace in the Middle East, 1987).

5. In the major work of Inis L. Claude, *National Minorities* (Cambridge, Mass.: Harvard Press, 1955) a national minority is defined as follows (at p. 2):

> a national minority exists when a group of people within a state exhibits the conviction that it constitutes a nation, or part of a nation, which is distinct from the national body to which the majority of the population of that state belongs, or when the majority element of the population of a state feels that it possesses a national character in which minority groups do not, and perhaps cannot, share.

It is abundantly clear that the Arabs of Israel are a national minority according to both parts of this definition.

6. On the relationship between self-determination and secession see Buchheit, note 1 *supra;* M. Pomerance, *Self-Determination in Law and Practice* (The Hague: M. Nijhoff, 1982).

7. The U.N. General Assembly's 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples* follows a strong statement on the right to self-determination with the following provision:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations.

G. A. Res. 1514, 15 U.N. GAOR, Supp.16, at 66, U.N. Doc. A/4684 (1960), cited in Buchheit, note 1 *supra*, 86. Also see A. Cristescu, *The Right to Self-Determination. Historical and Current Development on the Basis of United Nations Instruments* (UN Doc E/CN.4/Sub 2/404/Rev 1, 1981).

8. Paradoxically this committee was originally formed with the encouragement of government officials. When it started to take a stand on political issues the government tried to boycott it, but later took the stand that it would deal with the committee on matters concerning local government: see al-Haj and Rosenfeld, *Arab Local Government in Israel* (Tel Aviv: International Center for Peace in the Middle East, 1988).

9. See text accompanying note 23 in chapter 8 above.

10. For a general discussion of the status of the Arabic language in Israel see Fisherman and Fishman, "The Official Languages' of Israel: Their Status in Law and Police Attitudes and Knowledge Concerning Them" in *Multilingual Political Systems, Problems and Solutions* (Quebec: Les Presses de L'Universtie Laval, 1975) 497.

11. See 12 *Divrei HaKnesset* 2550. Also see the Hebrew Language Bill, 1982 which aims at encouraging the Hebrew language without making it the only official language.

12. See A. Rubinstein, *The Constitutional Law of the State of Israel*, 3rd. ed., (Tel Aviv: Schocken, 1980) 75:

> The change which came about in the status of the Hebrew language as the primary official language did not result from a provision in the law. Its official status still derives from Article 82 of the Order in Council. The new reality is what gave Hebrew its senior status.

13. See Directive of the Attorney General, *Use of Arabic Language*, no. 21556 of May 1, 1971 and Rubinstein, note 12 *supra*, 77. That Arabic is an official language under Article 82 was acknowledged by the late Minister of Finance, Pinhas Sapir, speaking on behalf of the government in the Knesset on February 16, 1966: 44 *Divrei HaKnesset* (5726) 653. On the other hand, the Minister of Justice, Haim Zadok, replying to a question in the Knesset on March 9, 1976, stated that the status of the official languages was not regulated under legislation and that the government intended including a provision in a basic law to be presented to the Knesset that Hebrew is the official language of the state and that Arabic speaking residents of the state may use the Arabic language in any matter: 76 *Divrei HaKnesset* 2048.

14. See Directive of Attorney General, note 13 *supra.* It must be pointed out that there is a fair gap in this matter between the legal situation and reality. As the number of persons in the court system and in the government bureaucracy who know Arabic is fairly limited, use of Arabic might meet with administrative problems. This question has been raised a number of times in the Knesset: see Rubinstein, note 12 *supra, 79.* In 1986 the Association for Civil Rights in Israel (ACRI) questioned the registrar of the Supreme Court about a delay in hearing a petition in which the documents had been submitted in Arabic. In a letter dated February 20, 1986, (on file with ACRI) the registrar stated that the court administration would indeed translate the documents so that the judges could read them. However, this would take time and he therefore recommended that the petitioners' counsel see to the translation so as to expedite the proceedings.

15. See Directive of Attorney General, note 13 *supra.*

16. See Rubinstein, note 12 *supra*, 78.

17. See, e.g., section 89 of the Building and Planning Law, 1965.

18. See *Halaf v. District Planning Committee* (1974) 29 P.D. II319.

19. The formal basis for this may be found in article 83 of the Palestine Order-in-Council, 1922, which remains in force and guarantees freedom of conscience and worship: see Rubinstein, note 12 *supra*, 134. It must be pointed out, however, that given the approach of the Supreme Court to fundamental rights and freedoms in general, freedom of religion would have been a recognized right even if article 83 had not existed. It must also be remembered that in the absence of a formal constitution all basic rights may be curtailed by Knesset legislation. Thus the courts have not been prepared to interfere in Knesset legislation which restricts religious freedom by giving sole jurisdiction to religious courts in matters of marriage and divorce:

see *Rogozinsky v. State of Israel* (1970) 26 P.D. 1129, 136.

20. See article 83 of the Order in Council, 1922and *Yousipouf v. Attorney General* (1950) 5 P.D. 481, 499.

21. See section 18 of the Law and Government Ordinance, 1948 which was added under the Days of Rest Ordinance, 1948and section 7 of the Hours of Work and Rest Law, 1951.

22. Eight days are recognized as Christian festivals, four as Moslem festivals and two as Druse festivals: 5714 *Yalkut HaPirsumim* 1284.

23. See Sigler, note 2 *supra*, 70; M. Shava, *The Personal Law in Israel*, 2nd. ed., (Givataim: Masada, 1983) 33–37. The Moslem courts were courts of general jurisdiction.

24. See 102 *Divrei HaKnesset* 3406.

25. See Rubinstein, note 12 *supra*, 121.

26. *Ibid.*, 132.

27. This choice is only a real option for those Arabs who reside in towns with mixed populations, such as Haifa. Elementary schooling in Israel is run along neighborhood lines and even in the mixed towns Arabs generally live in neighborhoods in which the school is an Arab school. In the Arab towns and villages the schools are all Arab schools. In a few cases parents of children in villages have chosen to send their children to Hebrew speaking schools in nearby towns.

28. See *The Arab Citizens of Israel, Relations Between Jews and Arabs in Israel, Intermediate Edition*, (Jerusalem: Ministry of Education and Culture and Van Leer Institute, 1984), 86.

29. See regulation 22 of State Education (Inspection) Regulations, 1956.

30. See *Report on Arab Education*, (Ministry of Education and Culture, 1985).

31. See 1987–8 *Government of Israel Yearbook* 507.

32. It should be noted, however, that the curriculum in Jewish schools, is also largely controlled by the central bureaucracy though there is some parent input, and a fair number of recognized, but not official, schools in which there is more independent control over many parts of the curriculum. According to the State Education Law, 1953, parents of the children in a school may request that up to 25% of the curriculum be devoted to an enrichment program which they propose. Such a program is subject to the approval of the Minister.

33. See S. Mar'i, *Arab Education in Israel* (New York: Syracuse University Press, 1978) chapters 3 and 4.

34. *Ibid.*, 70–77; *Arab Citizens of Israel*, note 28 *supra*, 85.

35. See Mar'i, *ibid.*, 85.

36. See Rule 9 of the Council for Higher Education (Recognition of Institutions) Rules, 1964.

Epilogue

National minorities exist in most, if not all, nation states and many models have been suggested, and at times tried, for defining their legal status.[1] The approach adopted in this study was not, however, to compare the status of Israel's Arab minority to that of minorities in other countries, nor to examine whether it fits one of the "minority-models." Rather it was to discuss the status of the Arabs in Israel in the light of two factors that characterize the Israeli case. First, the definition of Israel as a nation state is not only a sociological description but an ideological one that finds expression in the constitutional framework of the state. Israel was established with the express purpose of solving the national problem of the Jewish people and it is constitutionally defined as a Jewish state. Second, the Arabs in Israel are part of a people locked in bitter conflict with the Jewish state. They are citizens of a country that is in a state of war with their people. The main question addressed in the study was how the principled commitment of the state to equality of rights between all citizens, regardless of race, religion or sex has been affected by these factors.

Though full equality between the Jewish and Arab sectors of the population has not been achieved, there can be little doubt concerning the *formal* commitment of the legal system to equality. Some of its manifestations have been discussed above. Another manifestation that warrants mention is the response of the legal system to the appearance on the parliamentary scene of a political party that openly advocates discrimination between Jew and Arab, the denial of political rights to Arabs and their eventual expulsion. An initial attempt was made to exclude this party from the electoral process on the grounds that its platform is inconsistent with the democratic foundation of the state. When the Supreme Court held that in the absence of express statutory power to do so the Central Elections Committee could not disqualify a party list on these grounds,[2] special legislation was introduced to exclude from the electoral process parties that reject the democratic nature of the state or incite to racism.[3] This legislation was later invoked by the Central Elections Committee in order to exclude this party from the elections. The committee's decision was upheld in a unanimous judgment of the Supreme Court that rejected the legitimacy of a political program based on degradation of the Arabs and denial of their political rights.[4] During the period in which the said party was represented in the Knesset, every attempt was made by the Knesset Speaker to prevent tabling of racist bills that would, in his view, have constituted contempt of the Knesset.[5] When his attempts were found to be inconsistent with the prevailing Knesset Rules, he initiated an amendment in the rules and they now prohibit the tabling of bills that are racist in essence.[6] Finally, the Penal Code was amended so as to include a specific offence of intentional incitement to racism.[7]

Encroachments on equality, despite the legal *system's formal* commitment to it and its response to attempts to undermine this commitment, reflect the ambiguity in the notion of Israeli nationhood. There are two conceptions at the heart of Israeli nationhood of which sometimes one and sometimes the other gains the upper hand. Israel is a democratic state, and as such it is the state of all its citizens. Yet "Israel" is also the name of the Jewish people, and the state may be perceived as "Israel's" alone.[8] The formal commitment to equality is an expression of the former conception of Israel. Recent legislation that mandates disqualification of party lists that reject

Israel as the "state of the Jewish people" exemplifies the latter meaning. As a democratic state Israel must serve the needs of all its citizens; as the state of the Jewish people its function is to pursue particularistic goals.

The tension between these two conceptions of Israeli nationhood explains the relative importance of the various forms of discrimination examined in this study. The closer we are to formal laws and legal arrangements, the greater the influence of the former conception of Israel. The further removed we are from express and formal laws the stronger the influence of the latter conception becomes. Thus it is that the instances of what I have called overt discrimination are few and far between; instances of covert discrimination are more prevalent, while institutional discrimination, that relies on administrative discretion rather than on any formal legal arrangements, is without doubt the most common form of discrimination by the institutions of government.

Maintaining the two conceptions of Israel side by side sometimes involves a legal dichotomy between state and nation, illustrations of which are to be found in such areas as the control of land, registration in the Population Register and exercise of security powers.

The struggle during the pre-independence era was for control of land by the Jewish people. Land, once acquired, was regarded as "admat le'om" or land of the nation. Once Israel had been established as the state of the Jewish nation all such land should have become state land. However, in keeping with the democratic conception of nationhood, this would have implied that the land was the property of all its citizens, Jews and Arabs alike, which was considered inconsistent with the Jewish national goals for which the land was acquired. The JNF, one of the National Institutions of the Jewish people that had acted as the "state-in-making," therefore continues to operate alongside the institutions of state. It retains ownership of land acquired before independence as "admat le'om." Furthermore, its land holdings were increased by the transference to it of expropriated land needed for Jewish settlement As nongovernmental institutions, the JNF and other National Institutions are used to maintain the dichotomy of state and nation, without infringing the democratic principle of equality to which the organs of state are constitutionally commited.

The legal requirement of registration of "nation" in the Population Register and the identity card, in spite of the political problems that this has caused regarding the registration of Jews, underlines the distinction between nationality (or citizenship) and nation.[9]

The state/nation dichotomy has been exacerbated by the Arab world's rejection of the legitimacy of Israeli nationhood and the unresolved conflict between Israel and the Palestinian Arabs. Some of the measures taken in response to the perennially grave security situation may seem mild when compared to measures adopted by other democratic countries faced with war or internal insurrection. However, the nature of the conflict and the position of the Israeli Arabs caught in the middle has meant that the use of wide-ranging security powers is almost exclusively directed against members of the Arab minority. The combination of this fact with the real possibility of security powers being used to promote Jewish national interests[10] once again reflects the tension between the two conceptions of nationhood. The tension persists despite the use of these same powers to protect state security, *stricto sensu*, and their occasional use against Jews suspected of planning actions against Arabs.

The uneasy coexistence of the two conceptions of nationhood has led in recent years to the emergence of two apparently contradictory trends. Recognition that the prevalence of institutional discrimination is inconsistent with the principled commitment to equality, alongside other factors such as the growing importance of the Arab vote, has led to a narrowing of the gap

in the allocation of resources between the Jewish and Arab sectors of the population in certain crucial areas. The main example is the reduction in the discrepancy between government participation in the budgets of Jewish and Arab local councils. Consistent with this trend, that reflects the first conception of nationhood, is the thwarting of attempts to pass legislation or to adopt policy decisions that employ the military service criterion as a means of covert discrimination.[11]

On the other hand, there have been the steps described in chapter 2 to buttress the particularistic definition of Israel as the "state of the Jewish people." This is partly a reaction to the growing political assertiveness of Israeli Arabs. It also results from the change in Israel's political institutions themselves, as political power has passed from the pragmatic branch of Zionism, which dominated Israeli politics until the mid-seventies, to a more triumphalist branch.

The ambiguity of Jewish nationhood and its implications for perceptions of security is faithfully mirrored in the attitude of the legal system to group rights. The Jewish national movement, nourished as it is by Jewish tradition, is anti-assimilationist in its approach to the Arab minority. Hence it is completely accepting of the right of the Arab minority to use the Arabic language in official state forums, such as the Knesset, to be educated in state schools in that language and to exercise religious freedom. However, recognition of Israeli Arabs as a distinct national group is withheld, for fear of shifting an already fragile balance in the direction of a bi-nation state or encouraging demands for autonomy or even eventual secession of those parts of the country in which Arabs are the majority. Thus it is that only those aspects of group affiliation that are tied to language, education and religion are encouraged. School curricula ignore the national identity of Palestinian Arabs and no formal recognition is afforded to representative bodies of the Arab minority.

The tension between the two notions of Israeli nationhood that is central in determining the legal status of the Arabs in Israel is unlikely to fade in the near future. Its alleviation depends more on political developments in the relationship between the State of Israel and the Palestinian people as a whole, than on the relationship between the Jewish state and its Arab minority. The eventual settlement between Israel and the Palestinians that must surely be achieved in the future — though at which juncture it is impossible to predict — may open up new options for redefining the status of the Arabs in the state in a way that will resolve some of the ambiguities that are a feature of the present situation.

Notes

1. These models have recently been analyzed, with special reference to the Israeli situation: see C. Klein, *Israel as a Nation-State and the Problem of the Arab Minority: In Search of a Status* (Tel Aviv: International Center for Peace in the Middle East, 1987).

2. See *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset* (1984) 39 P.D. II 233 (*Neiman I).*

3. See section *7A* of the Basic Law: The Knesset, cited in chapter 2, above. This amendment also excludes party lists that deny the existence of Israel as the state of the Jewish people.

4. See *Neiman v. Chairman of the Central* Elections *Committee for the 12th Knesset* (1988) 42 P.D. IV 177 *(Neiman II).*

5. See chapter 2, note 38 above.

6. See text accompanying note 38 *ibid.*

7. See sections 144A - 144E of the Penal Law, 1977.

8. "Racism" is defined as "persecution, humiliation, degradation, manifestation of enmity, hostility or violence, or causing strife toward a group of people or parts of the population — because of color, affiliation with a race or national-ethnic origins."

9. Section 144B states that anyone who publishes any matter with the intent of inciting to racism is liable to five year's imprisonment.

10. See the discussion of section *7A* of the Basic Law: The Knesset in chapter 2 above. As pointed out there, the most extreme expression of this vision of Israel is to be found in the opinions of the dissenting justices in *Ben-Shalom v. Central Elections Committee for the 12th Knesset* (1988) 42 P.D. IV 749, note 41 *ibid.*

11. Perhaps the most important manifestation of this distinction is to be found in the decision of the Supreme Court in *Tamarin v. State of Israel* (1970) 26 P.D. I 197. In this case the court rejected the application of a person originally registered in the Population Register as a Jew that his nation be defined as "Israeli." In a highly programatic judgement the president of the court, Justice Agranat, held that creation of a new Israeli nation instead of the Jewish nation would be inconsistent with the very basis of creating the state as the state of the Jewish people.

12. See, e.g., note 2 in chapter 8, above.

13. The first attempt related to a bill to provide support for large families that was prepared by one of the government ministries. One of the criteria suggested for entitlement to such support was military service by a member of the family. Government approval for the bill was withheld when Justice Ministry officials, led by the then Attorney General, Professor I. Zamir, expressed the opinion that the bill was inconsistent with the constitutional commitment to equality. The second attempt was a government proposal that military service become an important criterion in determining the size of a student's university fees. The proposal was dropped because of public opposition the basis of which was that such a system of fees would be discriminatory towards Arab students.

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