Living Without a Constitution

Civil Rights in Israel

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Introduction

The present study concerns the development of democracy in Israel. It examines the major political and ideological conflicts that occurred over issues pertaining to civil rights, equality, and social justice. From the very start, it seemed to me that the convenient popular myth that security problems were the reason for any Israeli failing in the area of civil rights was not all there was to tell. Thus, I embarked upon an investigation of the historical and social background of the present status of civil rights in Israel. In the process, I interviewed decision makers from various periods whose testimonies are, I believe, a unique contribution to the field.

The study examines the ideology of the founders of the Jewish settlement in Palestine at the turn of the century and the reasons behind the decision of David Ben Gurion and his followers to reject the idea of a written constitution and to preserve the state of emergency inherited from the British mandate—a definition of the situation which remains to this very day. The influence of the religious parties and organizations in Israel and the position taken by the High Court of Justice on civil rights are examined in detail in view of their prominent role in the shaping of the question. Subjects like the Military Government, which ruled over Arab citizens of Israel until 1966, and the process of absorption of new immigrants in the 1950s are discussed not only because of their historical importance but also because they reveal the attitude of the Establishment and of the bureaucracy toward those who found themselves in a position of weakness, subject to their authority.

The analysis of these issues and others is designed to provide the reader with insight into Israeli democracy: the players who determine the rules of the political game, the strengths and weaknesses of the system, the major problems, and, finally, possible ways of improving it.

In the course of my work, I discovered the extent of the refusal of the political elite to relinquish its powers and its authority. It became clear that real changes cannot be made unless the major parties in the political system change their positions.

As a result of the conclusions I drew, I established a Civil Rights Committee in the Labor party, of which I am an active member. I was also responsible for the creation of a Human Rights Committee in the International Department of the Labor party, which is responsible for liaison with parties and organizations in other countries. In recent years these committees have conducted tours and debates and made decisions on human rights issues in Israel and the territories. The situation of human rights in the territories is, of course, a major problem. As much as I would like to think that this problem is only temporary, the fact is that the committees have hardly any direct effect on government policy.

Political activity of this type requires a long-term commitment. Nevertheless, I believe there is no other way to make political changes in the intermediate and long term, and no other way to bring the subject of civil rights to the forefront of the mainstream of Israeli politics.

When I was teaching Civil Rights at Haifa University, I emphasized the daily aspects of the problem: students were asked to investigate the relations between the public service and the ordinary citizen. It is my hope that when my students rise to influential positions, they will not only possess the requisite knowledge but will also keep an open mind with respect to the citizen and his or her rights.

The areas in which I have chosen to be active reflect my own view that along with the important activities of groups such as the Israel Association for Civil Rights and the various

organizations that work for women's rights, the quality of the environment, and other matters—which deal with contingencies—it is also important to work for long-term change in the prevailing norms and rules of the political game.

It goes without saying that Israeli society is also influenced by the international climate. There is of late an increased international awareness of human rights, even to the extent of its becoming "the new secular religion." Recent developments, especially in Eastern Europe, have put the importance of democracy into sharp relief. At the same time, serious problems have developed in connection with immigrants and refugees, who have not been accorded a warm reception by all citizens of the West. Israel has been directly affected by the latest developments, as the new openness brought a fresh wave of immigration from the lands of the former Soviet Union as well as new revelations of anti-Semitism and the suppression of minority groups.

I believe that the lessons to be learned from these developments are first of all humanitarian ones. The need for keen vigilance on behalf of human rights and minority groups never ends; new challenges are forever arising and forcing us to examine anew the society in which we live and to reaffirm our own commitment to civil rights.

Haifa, October 1992

Living Without a Constitution

Civil Rights in Israel

1 The Collective before the Individual: The Ideology of the Jewish Settlement in Palestine

Personal sacrifice, determination, and commitment were necessary qualities for the survival of the Jewish settlers in Palestine at the beginning of the twentieth century. These imperatives resulted in a tendency to minimize the importance of human rights, which the settlers viewed as narrow-minded and petty in comparison with the task before them. Both the political Right and Left, together with the religious groups, combined to mold the political and ideological culture of the prestate period in accordance with the principle that the collective and its goals took precedence over the individual. Perhaps at the time, when the revolutionary historical process was at its height, this approach was unavoidable. However, it was to have far-reaching implications for contemporary Israeli society.

The present chapter will present both the myth and the reality and explore the political power dimension of the demand for sacrifice and self-abnegation. It will ask whether what began as an ideal did not become a tool in the hands of a centralized and inflexible apparatus, an organization that with the passage of time tended more and more to view itself and the power it accumulated as both the vision and its realization.

The ideology of the supremacy of the collective had various dimensions: the asceticism of the immigrants of the second and third *aliyot* (waves of immigration), the principles of Gdud Haavoda (literally, "the Work Battalion," a Utopian socialist communal movement), the living arrangements of the kibbutz family, and the life-style of the urban laborers. There was also the Revisionist movement, whose founders came from the bourgeoisie. The personal sacrifice they called for reached its height in the words of the Stern group anthem: "only death will release us from the ranks."

The religious and ultra-Orthodox elements also supported the idea of enhancing the collective at the expense of the individual, as it was part of their religious-cultural heritage. Belonging to a community and obeying its spiritual leaders were basic assumptions that opposed new tendencies toward individualism and equality, viewed as hostile and threatening to Jewish tradition.

Theodore Herzl, the visionary of the Jewish state, gave expression to the liberal-aristocratic nature of his upbringing when he described the political system of the future Jewish state as liberal, following the European model, and as elitist:

> Politics should work from the top downward. Nevertheless, in the Jewish state no person will be enslaved, because every Jew will be able to rise, if he so wishes. Thus the spirit of great ambition will flourish in our people. Every individual will think of raising himself up, and the general level will be higher. This rise should be bound to moral ideas that are beneficial to the state and serve the idea of a nation.[1]

Modern nationalism also influenced the prestate political movements' attitudes toward the individual. The Labor movement emphasized the idea of "redeeming the land," while it split into various factions over the correct way to realize this end. The Poalei Zion movement preached Marxist socialism, while the Hapoel Hatzair advocated "service to the collective" without viewing itself as endorsing a socialist perspective.

The political groups at the center and the right viewed their origins in ideologies such as those of the radical Right—a romantic national concept with elitist foundations. This was especially

true among certain factions of the Revisionist movement, especially Abba Ahimeir's Brit Habiryonim (literally, "League of Thugs," named after a group of anti-Roman zealots during the period of the Second Temple). Most members of the Revisionist movement, like those of the "General Zionists" and, to some extent, the Labor movement, viewed their ideologies as akin to political liberalism, which advocated human rights and democracy. At the same time, however, they had reservations about the liberal opposition to state interference in social processes and private life.[2]

On the personal dimension, the "pioneer image" affected the behavior of members of the Labor movement. The pioneer was a person who was ready to suffer privations for the sake of the present and future collective. The image of the pioneer encompassed both the individual and the group, and the goal was an elitist change in the individual under the influence of a new and better society in which he would make a significant contribution to the collective.[3]

In the 1920s, the emphasis on the individual and his contribution was replaced by emphasis on a ruling bureaucratic apparatus that provided services to clients. Under the leadership of David Ben Gurion and his followers from the second *aliyah* (wave of immigration), the Histadrut* apparatus opposed Gdud Haavoda, the Women Workers' movement, and the idea of the priority of the collective settlement. Ben Gurion worked to win the support of the new middle-class immigrants through centralization of power in which there would no longer be any place for outstanding, uncompromising individuals.

The revolutionary-collectivist ethos penetrated even literary creation. The young poets, who in most cases had come as pioneers to Eretz Israel (the prestate name used by the Jewish community to refer to Palestine under British mandate), were forced to conceal their artistic ambitions. Thus Abraham Shlonsky, one of the foremost poets of the time, described it:

> In the general revolution, in the general euphoria, every tone that belied sadness, lyricism, or individualism was viewed as backsliding and decadence. During the period of the [settlement of the Yisrael] Valley and Ein Harod, we had to hide the fact that we wrote poetry.[4]

The Hebrew literature of the 1920s and 1930s had many dramatic themes to work with: the successive waves of immigration, the problems of physical and economic survival, the outbreaks of violence, the creation of new settlements, and the numerous political struggles. But the literature of the period was subject to the pioneering norm, which had rules of conduct of its own and clear conceptions of social morality.[5] Thus literature was not independent; it served as an instrument, confirming the patterns and values of the mainstream and reinforcing those who had created the model:[6]

> A general survey of the literary creation of the time (mainly of that which was supposed to approximate "realism") shows that this was a literature that did not fill the "vacant places" in the social mold. It did not oppose the accepted model or reveal its inadequacies, but rather accepted the order of the day.[7]

The Labor Movement

In order to take advantage of the ideological resources at its disposal, the Labor movement in Palestine created a powerful apparatus for the encouragement of a workers' culture. Even at the dawn of its development, the movement insisted that "labor literature" serve an ideological function. Its promotion of the pioneer ethos and of the values of the Labor movement helped the

latter to consolidate its position as the true repository of national symbols, thereby increasing its advantage in the political struggles that occurred within the Zionist movement.[8]

This approach, which viewed the literary text as an instrument of expression of the collective soul, silenced or at least lessened the weight of literary, aesthetic judgment. The functional, ideological approach, combined with the suspension of literary judgment, resulted in the explicit demand for avoidance of political conflict; "this literary collection emphasizes the collective soul. And the differences and different starting points are not important."[9] Thus, in an era in which the most individualistic of endeavors was mobilized in support of collective goals, the individual was left without an avenue for public expression of his hopes and ambitions and the sufferings of his soul.

The staunchest supporter of the individual in the Labor movement was Hashomer Hatzair, a movement that eventually became a political party. Before immigrating to Palestine, David Horowitz, one of the leaders of the movement, described his world view in this way: "All the collective goals were defined as emanating from the individual, who was at the center of the world view...."[10]

Members of Hashomer Hatzair did not ignore the contradiction between individualism and socialism. They contended that individualism could be permitted in the spiritual realm, while socialism was embraced in the material one. Nevertheless, the movement's emphasis on improving the individual enabled it to tolerate extreme forms of interference on the part of the group. Horowitz described the relations among members of a Hashomer Hatzair settlement as a dynamics in which each person wished to plumb the thoughts of his neighbor and to understand his personality and motives. The result was enormous tension and pressure on every individual, which led to conflict and the disbanding of the group: "it is a social revolution within the individual. We are waging a cultural war against the entire Jewish settlement in the country, as it exists today!"[11]

Thus the prestate emphasis on the individual, who was viewed as amenable to change, allowed for strong interference that did not leave any area of life untouched.

A more moderate approach characterized the Hapoel Hatzair movement, which, inspired by its spiritual leader Ahron David Gordon, tried to strike a balance between the individual and the collective:

> ... a superior balance will not be achieved by blurring the personality of the individual and decreasing his importance, but, on the contrary, by increasing the same, through the highest recognition and freedom of the individual personality. The individual personality need not lose but rather should gain.[52]

At the same time, Gordon pointed to the importance of the group and its influence on changes that would occur in the life of the individual. He viewed the nation as the instrument of cooperation between human beings and as the foundation of their spiritual existence.[13]

This conception is what forms the basis of the Hapoel Hatzair invention—the *moshav* (cooperative agricultural village). The idea of the moshav, as designed by Eliezer Yaffe, was based on freedom of the individual, nonexploitation of the other, a bond between the human being and the land, and a laboring family; it was described as the actualization of the desire to improve the world by improving the human being.[14]

In an argument at the Zionist Congress in Vienna in 1925, Yaffe explained that the main difference between the kibbutz and moshav was in their attitudes toward the individual. The moshav people wished to defend the individual and give him an opportunity for self-actualization. They believed that the human being was basically good and just.[15]

At the last congress of the Hapoel Hatzair party before its unification with the Ahdut Haavoda party to form Mapai in 1930, Joseph Aharonovitz, a party leader, expressed his anxieties over the future of the rights and social standing of the individual, who he believed was in danger of becoming part of a herd. He exhorted the delegates to preserve individualism within the party in every small and large action and in every minor detail of the daily life of the party.[16]

Haim Arlozorov, a leader of Hapoel Hatzair and the director of the political department of the Jewish Agency, also warned of the danger of socialism oppressing the individual. In an article about the popular socialism of the Jews, he exhorted the masses of workers to demand the right to a spiritual life of their own.[17] He presented the workers with the challenge of bearing aloft the Jewish ideals of justice and human freedom, which gave them the right to march at the forefront of socialism.[18]

These warnings could not prevent the unification with Ahdut Haavoda from resulting in increased centralization. In an article written the same year, Arlozorov discussed the problem that arose when control was concentrated in the hands of the few, when the twenty members of the central organ of the party were the same twenty members who sat on the Histadrut Central Committee. He warned that the newly unified party was liable to become a mass organization in which there would be no room for personal relations between the leaders and the rank and file. Arlozorov stated that in the future the party would have thousands of members who would have no direct acquaintance with each other or with members of the central committee, not to mention more personal relations, and would feel like nameless, ineffective cogs within a huge machine. Recognizing that such a development had occurred in all the modern democracies and that it was inevitable, he nevertheless warned:

> But if we do not find any remedy, we will soon have three phenomena on our hands: the seclusion of the leadership, the entrenchment of the officials, and the indifference of the masses in the Labor party ... this tendency threatens the very essence of the endeavor.[19]

During the 1920s, the major party in the Histadrut and the Labor movement was Ahdut Haavoda, founded in 1919. After the creation of Mapai in 1930, its leadership assumed the leadership of the Labor party. Ahdut Haavoda had a clear preference for the collective over the individual, as evidenced in the writings of its leaders and thinkers. Dov Borochov, the ideologue of the movement, depicted Zionism as a movement that called on the individual to sacrifice his private career on the altar of national rejuvenation.[20]

Thus, Ahdut Haavoda viewed the kibbutz as a combination of the will of the individual and the collective, probably under the influence of Rousseau, who posited that the "general will" was an expression of universal truth and of the true will of the entire society.[21]

In contrast, Berl Katzenelson, a prominent leader of Ahdut Haavoda, did not view the kibbutz as the ideal solution to the problems of the individual, but rather as a solution to the problem of physical and economic survival, one that gave its members freedom that stemmed from not having to be economically dependent.[22] Katzenelson saw cohesive social groups as possibly the only solution for the individual, for it had become evident that the earlier expectation that the individual persevere unaided in a strange environment through the strength of sacrifice and privation alone was unrealistic.[23]

A dramatic expression of the Labor movement leadership's proclivity to centralization can be found in a number of political conflicts that occurred in the 1920s, during which time the movement would consolidate and institutionalize its power for the next fifty years.

These conflicts—with Gdud Haavoda, over the "Nir" issue, and with the women's movement

—have not received the attention they deserve. A closer look will show that they reveal the basic attitudes of David Ben Gurion, Berl Katzenelson, and other leaders toward the place of the individual in the pioneering endeavor and his subordination to the dominant political organization.

Gdud Haavoda versus the Histadrut Leadership

Gdud Haavoda was an organization based on the principle of the general commune, which was to prevent the development of acquisitiveness on the part of the individual. In contrast to the leaders of the Histadrut, who favored centralization, Gdud Haavoda advocated full equality and democratic self-management.[24] David Horowitz, a Gdud leader, stated that his comrades had been brought up to believe in lofty ideals and that they remained faithful to the spirit of the Russian Revolution. At the beginning they had stressed political ideology over the idea of communal life, but the importance of the latter gradually increased.[25] Rasnitzenko, a member of the Gdud, stated that his comrades believed in the idea of a national commune that was open, ever growing, and limited neither in territorial nor occupational base. Gdud members possessed a highly developed consciousness and sense of responsibility: "The Gdud was the bravest and most idealistic sector of the road workers."[26]

The first serious conflict between the Histadrut and Gdud Haavoda broke out in 1922–23 over the relationship between the Gdud and the Ein Harod kibbutz it had founded. The Histadrut opposed the Gdud's view that the kibbutz' monies were a part of the Gdud's own resources, contending that this amounted to exploitation of the kibbutz. The Agricultural Center, the roof organization of the Histadrut agricultural settlements, ruled that the kibbutz was to be considered an independent economic unit and that its budget was to be subject to Center approval. This decision went against the principles of Gdud Haavoda; in the end, the Histadrut won the upper hand.[27] Its threats to expel Gdud members from the Histadrut at this early stage of the conflict reveal the determination of its leadership to force Gdud Haavoda to tow the line.[28] Ben Gurion believed that if the Histadrut were to capitulate over the Ein Harod affair, it would decrease its autonomy in the prestate Jewish society and weaken its position vis-à-vis the Zionist Federation. Thus, he opined that the Histadrut had the right to enforce its authority on the settlers without having to take their ideologies into account.[29]

In September 1925 another conflict broke out, this time over Gdud Haavoda's decision to effect a merger between kibbutzim Kfar Giladi and Tel Hai, over the opposition of a minority of the members of Tel Hai. The latter brought the matter up with the Histadrut Agricultural Center, which opposed the merger. The Histadrut Council decided that kibbutz Tel Hai was to be disengaged from Gdud Haavoda and put under the authority of the Agricultural Center, in accordance with the position of the minority in Tel Hai. The Gdud executive body accepted the decision, but the members of Kfar Giladi and Tel Hai in favor of consolidation opposed it. They were expelled from the Histadrut after they were blamed for refusing to carry out decisions of the Central Committee, for violently taking over kibbutz Tel Hai, and for exploiting the minority in their midst.[30] This was followed by appeals, mainly by members of the Hapoel Hatzair party, regarding the justice of the Central Committee's show of force toward the kibbutzim even before the fact-finding commission had presented its report.[31]

Within Gdud Haavoda itself, the tendency toward politicization increased. The Gdud Executive Committee, which convened in December 1926, decided on a split.[32] After the split, most members of the urban battalions joined the Left faction, some of whose members, led by Menachem Elkind, returned to the Soviet Union, where they were later murdered by Stalin. Most members of agricultural settlements remained in the Right faction. In 1929 their kibbutzim—Kfar Giladi, Tel Yosef, and Ramat Rachel—joined the United Kibbutz Federation.[33]

The conflict between the Histadrut and Gdud Haavoda was exacerbated by David Ben Gurion's staunch belief in the transformation of the Labor movement "from a class to a nation," which involved rejecting the narrower class perspective. The Histadrut leadership presented itself as the object of identification for all sectors of the Jewish community in Palestine. Its concept of centralization conflicted with the Gdud Haavoda belief in a free association of kibbutzim and cooperatives.

The relationship between the Histadrut leadership and Gdud Haavoda was typical of the relationship between the Histadrut and the United Kibbutz and National Kibbutz federations. It was characterized by cooperation, identification and trust, on the one hand, and rejection and hostility, on the other.[34]

An illustration of the ambivalence within the kibbutz movement regarding the individual and the group can be found in the writings of Yitzhak Tabenkin, one of the founders of the United Kibbutz movement and a leader of Ahdut Haavoda. He stated that the cooperative movement was based on the belief that individual development was a value in itself and not merely the means to an end.[35] However, he also insisted that the welfare of the individual was bound up with the general welfare, as the former would benefit from the latter. The individual worker could not survive without social institutions—sick funds, the workers' bank, and national land resources.[36] Tabenkin did not accept the Gdud Haavoda idea that the individual was in danger of victimization, contending that the kibbutz framework allowed for the expression of individual desires; if this were not so, the individual would have suffered a breakdown and would not have continued to labor throughout his life. In contrast to other views apparent within the Histadrut leadership, Tabenkin considered democracy necessary for the Histadrut's own good. Here below, one detects fears of tyrannical control of the Zionist enterprise:

> The Histadrut must build on a foundation of economic and social democracy ... it must unite individuals according to their own interests, and not destroy them as separate individuals against a monolithic Histadrut.[37]

The Histadrut and “Nir”—Settlers’ Rights

At a meeting of the Ahdut Haavoda executive body in 1922, the year that Hevrat Haovdim, the financial-industrial arm of the Histadrut, was created, David Ben Gurion declared that the consolidation of agricultural settlements into one association was necessary if workers were to be unified.

> This consolidation will not be determined tyrannically or by an order from above, and it will not involve political domination. I demand that the public rule the economy. The power in which I have faith is the organized Histadrut, and if a power such as this acts in accordance with its knowledge and out of a feeling of responsibility—I don't see anything wrong with it.[38]

The final decision concerning the operative principles of Hevrat Haovdim was that these were

to include legal actions as well as moral means—in order to guarantee the unity of the Labor movement. The decision constituted a real ideological turning point: the members of the movement were no longer conceived of as equal partners, but rather as clients in a bureaucratic system controlled by leaders of the movement through organizational and bureaucratic power.

The conflict over the approval of the "Nir"—"Cooperative Settlement Company" charter began in 1925. It is important because it reflects the dilemma involved in the diminution of the status of the individual versus the organization. The Histadrut leadership wrote in the Nir charter that the Hevrat Haovdim would retain centralized supervision over the kibbutzim and moshavim through the sale of a good part of the original stocks to the company, and through a uniform, binding contract that would tie the settlers to Nir. The contract stipulated that, among other things, Hevrat Haovdim had the legal right to expel any member who violated the charter, which meant he would have to leave his homestead. The main thrust was that Nir would represent the settlers in dealings with the British government and the Zionist agencies, and that contracts would be signed between Nir and the foregoing, without the settlers themselves constituting a party to the agreements.

Eliezer Yaffe, the originator of the idea of the moshav, was at the forefront of the opposition to this idea. In an article published in *Davar,* the Labor movement newspaper, in December 1925, he explained his position:

> . . . the charter is no different from the charters of American trusts for the exploitation of cotton or tea plantations . . . and the leaders of Hevrat Haovdim are to blame . . . through the system of centralization and in the spirit of materialism [they] have gone so far as to pronounce a death sentence on the organic, spiritual creation of the agricultural workers and to force us to exchange our Histadrut for a golden calf: a limited liability corporation called "Nir."...[39]

Yaffe opposed the charter and the idea of exclusive representation of the settlers by Nir. He demanded that the Agricultural Center receive independent status and cease to be dependent on the Histadrut. Haim Arlozorov took the middle ground. He stated that even if he did not agree with Yaffe over the danger of creating centralized control within the Histadrut, he opposed Nir because he favored transferring ownership to the community as a whole and not to the Histadrut alone.[40]

Berl Katzenelson, one of the main supporters of the proposal, presented it in a speech to the agricultural congress that convened to approve the charter as a sort of "emergency measure" that was not to be executed immediately but rather when the need arose. In his opinion, the charter was not only a guarantee that it could be put into operation in the future, but also the means of preventing its use, "like many laws in a democracy." However, after he presented this seemingly moderate position, he attacked Yaffe sharply, clearly expressing his support for the centralization favored by the Histadrut leadership:

> Our movement aspires to create a new society which includes recognition of the freedom of the individual, but exaggerated individualism which views the individual as the main element and as an end in itself is not appropriate to our movement and does not derive from our culture or our ways . . . Zionism is a social movement . . . heroes like Trumpeldor ... are not the product of the encouragement of individual aesthetics but the fruit of a demanding ideal that involves obligations.[41]

The Nir affair ended in a compromise according to which every member of the cooperative agricultural villages had to join Nir, but the power of Hevrat Haovdim was reduced from 50 to 41 percent of the stocks, and in the end the plan was carried out in a form that did not arouse controversy. Thus, the conflict over the Histadrut's control of its members ended in a compromise that reflected the differences in the conceptions of Berl Katzenelson and David Ben Gurion regarding the extent of centralization that was necessary and justified.[42]

The Histadrut and the Conflict over Domination of the Women Workers' Council

The fact that the leadership of the Women Workers' Council (the Histadrut body that represented the women workers' movement) wished to make the organization an independent center of power posed a threat to the Histadrut leadership, which feared it would lend legitimization to isolationist groups. However, its agreement with the basic aims of the Women Workers' Council and its realization of the degree of political support the latter enjoyed among women workers, as well as the extent of the women's activity, prevented the Histadrut from taking decisive action against the Council. Instead, the Histadrut employed cooptation, and indeed, it was not long before the Women Workers' Council was bereft of all political power and its struggle for women's rights had been radically curtailed.

The Women Workers' Council was created in 1921, a few months after the founding of the Histadrut. However, the ideological and political organization of women workers had begun a decade earlier. The women were part of the second aliyah (most members of this wave of immigration came from Russia between the years 1904 and 1914 and had a developed socialist Zionist consciousness; they assumed leadership of the prestate Jewish society and of the state of Israel, which they maintained until the early 1960s). After a few years in Palestine, they realized that their vision, according to which the realization of Zionism would bring about gender equality, was not shared by most of their fellow workers. In the spring of 1911 they began to organize for change; the women workers at Kibbutz Kinnereth called a meeting at which they aired their grievances concerning the inferior status of women workers in the collective. They stressed their desire to make an equal contribution to the pioneering endeavor, one that would enable them to prove their abilities and attain equal status with the men.[43]

In 1914, the first regional conference of women workers was held at Merhavia, followed by four additional annual conferences. During this period, the political consciousness of the women developed rapidly; at the conference held at Sharona in the summer of 1918, one of the speakers accused her male comrades of discrimination and of refusing to consult with them on important matters:

> . . . apparently we are the only ones who can solve our problems: the comrades are not interested in our participation in the discussion of the general problems of the worker. The Agricultural Center did not even bother to invite women workers to the conference held at Poriah, and then they come and criticize us for wanting to organize separately and say we're not interested in the life of the worker.[44]

During this early period, the women workers' movement did not create an organizational structure, and its ties with its constituency were weak and sporadic. In the preparations for the founding convention of the Histadrut in December 1920, the leaders of the Histadrut refused to accord official recognition to the women workers' movement. The movement did not present a separate list, nor was it officially represented at the conference. The leaders, who were invited to participate as guests, protested the poor representation of women at the conference (four out of eighty-seven delegates) and neglect of the problems of the working woman. They decided to organize separately. Toward the closing of the conference, Ada Maimon, a leading figure in the women workers' movement, spoke. She declared that the female delegates had been chosen by the parties and not by women workers and thus did not represent them. She announced that the women planned to establish an organization of their own within the Histadrut, and she warned

that if they did not receive representation within the Histadrut Council, the executive body that was to be elected at the conference, they would hold separate elections. In the face of this open threat, it was decided to reserve two seats on the Council for women representatives chosen by the women workers.[45]

The conference of women workers, held three months later at Givat Hamoreh, was attended by forty-three delegates representing 485 women workers. They decided that for the sake of the independent development of the women workers, they should be organized as a separate body within the Histadrut, Thus, fifteen women were elected to a permanent Women Workers' Council.[46] The Council established its independence and solidarity, but this was to be short-lived, for at the second conference, held in 1922, the tensions within the movement caused it to split into two opposing factions. The women were divided on the basis of their commitment to the idea of equality, their confidence in the male leadership, and their support of the women workers' movement.

The veteran leadership, most of whom had come on the second aliyah, had learned from experience not to depend on the Histadrut leaders to protect women's interests. They were in favor of a strong women's organization free of party interference and supervision. They believed that the Women Workers' Council should serve as a direct representative of women workers and thus strengthen their relative position vis-à-vis the Histadrut leadership.

In contrast, most of the new members had come on the third aliyah (1919–23). While they recognized that women had special problems, they did not see the need for a separate women's organization. They thought the Histadrut could deal with all problems on an equal basis, and that the Women Workers' Council should limit its activities to educating women and encouraging them to take part in public life. The controversy was not just an internal matter but also reflected the interests of the Histadrut leaders, who opposed the existence of isolationist groups, contending that they would weaken the Histadrut. They agreed to accept a Women Workers' Council within the Histadrut out of sympathy for their problems, but also out of a desire to supervise its activities and decision making.[47] The fight for women's right to vote for the Representative Assembly, the legislative body of the Jewish community in Palestine during the period 1918–25, was at its height, and it had the effect of reinforcing the working women's organizational efforts and, at the same time, politicizing them. The suffragists initiated political actions and opposed the political compromises that Ahdut Haavoda tried to make with various secular and religious groups at their expense. The anti-Zionist ultra-Orthodox and the Zionist Mizrahi Orthodox parties opposed woman suffrage and refused to take part in the second session of the Representative Assembly, convened in 1922, as long as women elected on the list of the Labor movement and the Association of Hebrew Women for Equal Rights in Eretz Israel (an independent organization of educated, middle-class women) were present. The women were seen as constituting a threat to the political integrity of the Jewish community, and it was intimated that they should relinquish their rights and leave the meeting. As Ada Maimon, chairwoman of the Women Workers' Council, described it:

> It was hinted that the stubbornness of the women was liable to destroy the organization, and the 15 women sat on tenterhooks but did not leave the auditorium, for they did not believe that they were what was destroying the organization.[48]

Thus the women conducted an independent political struggle in which they refused to accept the authority of the leadership of the Labor movement, which appeared ready to compromise their basic rights. The ambivalent attitude of the Ahdut Haavoda leadership toward the Women Workers' Council can be seen in the report submitted by David Ben Gurion, the leader of the

party, to the second Histadrut conference in 1923. Ben Gurion contended that the very existence of the Women Workers' Council did not do honor to the Histadrut. In his speech to the conference, he described the Women Workers' Council as marginal and as representing the interests of a minority group—and the Histadrut as the body that should solve the women's problems:

> There is no special federation of women workers, and there is no need for such a federation. However, we cannot ignore the bitter truth, which is that the principle of equality for women is no more than a formal one . . . and there is still need for a special body for women workers that will be on the watch and work for the equal economic and social status and equal rights for the working woman.[49]

In order to tighten its control over the women workers' movement, the Histadrut leadership acted to strengthen the position of leaders loyal to it at the expense of those who were loyal to the women's movement and favored independence. At the same time, conflicts arose within the local workers' councils, organized just a short time before, over the opposition of certain members to the separate organization of women, whose leaders' loyalties lay with their female constituency and not with the local party organizations.

The conflict gradually increased until it reached crisis proportions over the election method to the local women workers' committees. The "radical" camp was in favor of direct elections, to be held at a general meeting of women workers at the local level, with no connection to their party membership. The "loyalists" (loyal to the Histadrut leadership) favored the appointment of candidates by the general secretaries of the local workers' councils, in cooperation with the Women Workers' Council. During a debate on the issue that ensued at a meeting of the Women Workers' Council in July 1926, David Ben Gurion intervened openly and hinted that if the Women Workers' Council decided on independence, it would have to pay by losing the support of the Histadrut, and that its demands were fanning party conflict within the Histadrut. Ben Gurion's warnings reflected the position of the Ahdut Haavoda leadership, which feared that the conduct of separate elections for women was liable to constitute a dangerous precedent that would lead to demands on the part of other groups and would weaken its control of the Histadrut.

In spite of Ben Gurion's warnings, the secretariat of the Women Workers' Council voted in November 1926, 12 to 8, for elected candidates. Members of Ahdut Haavoda voted against the proposal, while members of Hapoel Hatzair and the other parties voted for it. However, this vote was invalidated by a decision taken at the third Histadrut conference in 1927, where men formed a clear majority. In another attempt to bolster its position, the Histadrut leadership ousted Ada Mairnon, the leader of the "radical" faction, as general secretary of the Women Workers' Council and engineered her replacement by Golda Meir, who was nominated and supported by the Histadrut leadership.[50]

The Histadrut managed to neutralize the independent power of the Women Workers' Council, not by disbanding it but by marginalizing the women's movement both ideologically and politically. For the next fifty years, the Women Workers' Council would limit itself to narrowly defined women's concerns, while the men dealt with larger issues.

Freedom of Expression

The desire for unity under the control of the leadership was reflected not only in issues of

political organization, but also in matters pertaining to freedom of expression. Berl Katzenelson, editor-in-chief of *Davar*, the Histadrut newspaper, discussed the matter in an article published in his paper. This was after years of complaint on the part of members of Gdud Haavoda, and later of Hashomer Hatzair, whose positions on various issues were not in keeping with those of the mainstream of the Labor movement. In a letter to Dov Sadan, who had accused the editors of *Davar* of maintaining too strict a censorship, assistant editor Moshe Beilinson contended that during the five years that *Davar* had been in existence, he could not recall a single article that had been rejected by Katzenelson because of its political content. However, the statement was followed by a qualification: he was speaking of ideological articles, for the accusation might be true when it came to articles on controversial issues.[51]

One gets the impression that Berl Katzenelson's attitude toward freedom of the press was ambivalent. While he believed that any article worth publishing should be published, the truth was that his acceptance or rejection of articles was influenced by factors other than quality. In 1929 he refused to publish the proclamation of a leftist group calling itself "Brit Shalom" concerning the events of the day, and he also refused to publish a letter written by Hugo Bergman in defense of Brit Shalom. One of Katzenelson's friends protested against this in a letter to the editor, in which he reminded the editor-in-chief of their conversations about the importance of freedom of expression in the press and expressed his surprise at the restrictions Katzenelson had put on this freedom.[52]

The leaders of Ahdut Haavoda were never inclined to accept the principle of freedom of expression of the individual vis-à-vis the group; a matter affecting the general welfare was viewed as a matter for the group to decide.[53]

This attitude was expressed firmly by Ben Gurion, who led his party and the entire Histadrut in the direction of centralized control within an elected political system. At the same time, he was aware of the limitations of the Labor movement and of the need to create an open society based on economic pluralism.[54] However, there was a big difference between realistic awareness of the situation and the kind of society to which he aspired:

> I belong to the Zionist wing that believes in the necessity of power and maximum, unconditional, national authority. National authority over labor, national authority over property, even national authority over life—under conditions of human liberty and the value of human life. Everything must be subjected to the authority of the nation. This national authority is called socialism and my comrades and I are ready to accept this national authority.... *This is the goal of the Jewish state in which the Jewish people will control the interests of the individual,* rather than the private interest controlling the nation. But this authority has yet to be given to the Zionist Federation.[55]

These words, which were written at a later period, reflect Ben Gurion's awareness of the conflict between ideology and practical limitations. His almost Utopian desire was for a society in which individuals were guided by the general welfare, in which there was perfect identification with the historical mission and complete acceptance of national authority.[56]

The Individual in the Kibbutz

In the first years of the kibbutz, the question of the individual versus the group and the tension between them was usually decided in favor of the group, even if the matter pertained to privacy and family life. Families were required to put up another comrade in their room when there was a

shortage of living units. The kibbutz society did not encourage couples to give public expression to their feelings for each other. At the same time, the kibbutz was not anti-family, and the general conception was that the prevailing norms enhanced the process of women's liberation.[57]

The strong influence of the prevailing ideology of deemphasis on the individual is reflected in the memoirs of kibbutz veterans, among them Lillia Bashevitz, a member of Kibbutz Ein Harod. She was voicing her concern for her ailing child during a dry, hot spell when one of her friends suggested she take the girl away from the kibbutz.

> My friend's words sowed confusion. But I didn't hesitate for a moment. Such a solution seemed like a denial of myself and of the path I had chosen.
>
> What gave us the strength? The group, devotion to the group—that's what tempered each and every individual. That's what braced him up. In those days the group was like a large family, a kind of tribe.[58]

Collective education, according to which children live together and are raised in the children's house and not in their families, looked like the right solution to equality of the sexes. Conversely, emphasizing the value of the family at the expense of the group appeared as an escape of the individual from his obligations to the group.

The ideological foundation of this approach went beyond the question of the family and was connected with the desire of members of the kibbutz to fortify their position in the outside world through the assumption of a superior, critical attitude toward those who wished to join their ranks. As a result, the question of individual rights was the subject of constant debate.

The veteran members of Hever Hakvutzot and Gordonia, two kibbutz movements influenced by Ahron David Gordon and Hapoel Hatzair, placed the individual at the center and regarded communal frameworks with suspicion. Pinhas Lubianiker (Lavon) stated, for example, that the value of the individual was not to be relinquished for the sake of the group. He even went so far as to justify the liberal critique of socialism, stating that justice was always on the side of the individualistic liberal idea and that centralists socialism should be avoided.[59]

Due to their fear of overcentralization, the people of Gordonia advanced the idea of a small collective, which they viewed as a bridge between the ideas of communality and individual freedom, in contrast to the large kibbutz in which they feared the individual was in danger of becoming no more than a cog.[60]

Unlike the members of Gordonia, whose idea of community was based on the compatibility of members of the group, members of the veteran collective did not attribute much value to interpersonal relations. They took a jaundiced view of the individualistic concepts of the Gordonia people. They also objected to the selectivity of the Gordonia settlements, in which members viewed as disloyal by the majority were often expelled. In fact, the principle of loyalty was often interpreted in a way quite different from the intentions of the movement leaders. It often served as an excuse to expel members, mainly young female ones, who were perceived as unsuitable to the group.[61] This practice shocked young members of Gordonia abroad, and it was censured in their newspaper as immoral.[62]

Thus, as we have seen above, even the Gordonia collectives, those that advocated the most individualistic interpretation of communal life, harbored a contradiction between the theoretical belief in liberal values and the practical application of severe sanctions on individuals by the group.

An elitist, nonegalitarian approach was revealed in the fact that the founding core of each collective constituted a closed group, and workers who labored two years or more at Kinnereth, Degania, or Karkur were not accepted as members.[63] The groups had to employ workers from

outside the collective; for all practical purposes, these laborers were permanent employees. This resulted in exploitation and social gaps:

> . . . there were all kinds of forms of exploitation, reflected not only in low wages, but mainly in the fact that the members remained on the land, it was theirs, but the temporary workers lived on it for a year, two years, or three, and *still had no part in the homestead,* it wasn't their home.[64]

The changes in the attitude of the Labor movement toward the individual can almost be said to mirror the changes that occurred in the movement at different stages of its development. The process of political institutionalization from a group of laborers and guardsmen during the period of the second aliyah to the dominant economic-political structure in the prestate community during the 1940s involved far-reaching changes in attitudes. At the beginning, the Labor movement viewed the individual as the subject of self-realization in his own right and as a pioneer who marched at the fore. His qualities and the sacrifice demanded of him were one of the main foci of the world view of the movement.

Toward the mid-twenties a qualitative change occurred in the movement's attitudes, Gdud Haavoda, which was based on absolute devotion of the individual to the group, was seen as a threat to the Histadrut leadership. The latter feared the totalism of its conception and the radicalization of some of its members, who had come out against the Histadrut on several occasions. On the other hand, the Labor movement also fought the opposite tendency toward individualism, expressed in the controversy over the Nir charter. A major bone of contention in this issue was the proposal that stipulated the possibility of taking legal action, as this was seen to reflect lack of trust in the settler and in his loyalty to the movement.

The neutralization of the political power of the Women Workers' Council, together with a few of its leaders, was another stage in the Histadrut leadership's attempt to increase its power, this time at the expense of the real interests of working women, who were marginalized for a long time to come.

In the ideological struggle between those who viewed the individual as having the highest value and those who conceptualized the individual as part of the organization and, as such, as in need of supervision and discipline, the latter won the upper hand. This development was connected with several factors:

1. The fear of extreme elitist groups, on the one hand, and of individualistic ones, on the other, pushed the Labor movement toward the middle. Its leadership stressed the need to neutralize the influence of these groups on the normative dimension as well, through mechanisms designed to prevent the development of a competing elite that would derive its authority from self-sacrifice and idealism, like that of Gdud Haavoda.
2. The fight for the political middle in the Jewish community necessitated maximum centralization of power and maximum unity in the face of adversaries, some of whom were seen as endangering the integrity and power of the movement. This is especially true with regard to the fight against the Revisionists.
3. The organizational development of the Histadrut and the workers' parties, especially during the 1930s and 1940s, gave them the political and economic power of seminational bodies. They became increasingly institutionalized and hierarchical, and were oriented toward assumption of power beyond the confines of the Labor movement itself. Within the movement, a political culture developed that included two seemingly contradictory tendencies. On the one hand, there was constant political and ideological debate within its institutions, conducted in a democratic manner, and on the other, practical decisions were

made that bypassed democratic process. Ahdut Haavoda, the party of the majority, was very strict and preached institutional centralization. It was opposed by Hapoel Hatzair, which went so far as to threaten to break up the Histadrut.

During the 1930s, the tendency of Mapai to act democratically increased, due to its readiness to accept political pluralism and the democratic process. However, scholars point to the relativity of the change:

> . . . this tendency was mainly the result of practical considerations rather than ideological ones. On the ideological level, even during the 1940s there remained a strong sediment of belief in the right of the movement to employ force to realize its aims.[65]

It should be noted that the violent political culture was of special concern to those who had just escaped a war-torn Europe. A memorandum written by members of the Association of German Immigrants expressed concern over the increasing use of violence to settle internal conflicts and over the imposition of the authority of national institutions on the individual. They mentioned such examples as the pressure exerted on those who evaded paying the emergency tax, the harassment of schoolchildren for joining the youth movements of other parties, the disruption of meetings of political opponents, and the execution of traitors and informers by underground organizations.[65]

Any analysis of the attitude of the Labor movement toward civil rights necessitates making a distinction between two dimensions of the concept—"personal" rights and "organizational" rights. It can be said that the Labor movement tended to limit individual civil rights: freedom of expression (including freedom of the press), freedom of conscience, and freedom of organization —in view of the basic demand to join the movement and accept its official line. It also opposed the organization of new groups and the presentation of new demands.

In contrast, "organization rights," which include the right to vote, the system of separation of powers, and the principle of proper administration (within the limitations of the prestate period) were perceived as worthy of reinforcement and support. This was done through a constant political struggle to achieve the support of the majority. The above distinction allowed the Labor movement to embrace the democratic rules of the game while at the same time tending ideologically and organizationally toward a centralized regime.

The Revisionist Movement

Zeev Jabotinsky, the founder of the Revisionist movement and its leader until his death in 1940, believed in the principle of national unity and in the importance of the individual in the national struggle. It was his belief, however, that the individual should place his personal ambitions at the service of the national ideal.

> As long as the process of building of the Jewish state continues, the capitalist is not a real capitalist and neither is the laborer. Rather, both of them constitute materials for the edifice we are erecting. The private or class interests that change or shape them, their successes and failures are relevant to Zionism only insofar as they are likely to accelerate or inhibit the establishment of the Jewish majority in Eretz Israel.[67]

The basis of the Revisionist perspective is the subordination of all other issues to the major struggle. In the process, democratic principles could be compromised and economic and social

conflicts could be settled by a high court of national arbitration, which would require all parties to submit to the higher value of nation building.[68]

In an article about the ideology of Betar (the Revisionist youth movement), Jabotinsky described it as based on the principle of discipline. He rejected the arguments of his opponents, who viewed this idea as tantamount to converting the human being into a machine. In his opinion, the greatest achievement of free men was their ability to act together for a higher cause.[69]

In a guidance program for Betar groups, the Revisionist movement complained that the socialist organizations and others instilled in youth the negative qualities of blind pacifism, individualism, readiness to compromise, and contempt for the historical values of the nation. In contrast, the Revisionists would educate their youth in the spirit of unadulterated nationalism, esprit de corps, readiness for sacrifice, aggressiveness and commitment to the preservation of national honor.[70]

Jabotinsky's attitude to the idea of democracy, was, as expected, wrought with contradictions.

> It is a mistaken idea that a government based on the majority is a democracy. This conception is the result of the historical development of struggles against governments ruled by minorities. But this is not a true democracy. The meaning of democracy is freedom. Majority rule can also deprive one of freedom. Wherever there is no guarantee of individual freedom, there is no democracy....[71]

This ultrademocratic point of view appears to contradict the Revisionist belief that everything was to be subordinated to the single notion of realization of societal needs not grounded in the desires and ambitions of the individuals who comprised the society. It is probable that Jabotinsky's position regarding the rights of the individual stems from his liberal background and education. He apparently viewed democracy as a future vision that would be realized only after the goals of Zionism were achieved—through means that were not essentially democratic. This ambivalence was not unique to Jabotinsky, for the Betar work battalions, an unsuccessful Revisionist endeavor, also grappled with the difficulty of defining the place of the individual in the group struggle.[72]

Jabotinsky viewed himself as the political representative of the petite bourgeoisie and as an advocate of its aspirations. However, a study of his writings shows that very little space was devoted to the problem of the individual. The ambiguity of Jabotinsky's positions led to a prolonged controversy with regard to how much tension there really was in his thinking between nationalism and liberalism. This debate holds implications for the Revisionist movement and its successor, Herut. On the one hand, there are those who argue that Jabotinsky was a disciple of the liberal-democratic tradition. They claim that in later years his liberal-democratic position became stronger, and that he then placed the individual above the nation and the state. Jabotinsky stated that the individual should make his own decision as to whether or not to sacrifice his life for the homeland. Historians point out that he differentiated between the period of the struggle for statehood, during which he believed it was permissible to compromise liberal principles, and the period after statehood was achieved.[73] They contend that Jabotinsky thought that national development was a necessary condition for human development; thus the fight for statehood would have to precede the socio-economic struggle.[74]

According to this interpretation, it was Jabotinsky's position that the belief in one truth suited the period of the establishment of the state. It was argued that he set limits on the time period during which it was permissible to act in violation of liberal principles, so that these principles could later serve as the basis for the Jewish state.[75]

Jabotinsky was said to view the state in the making as a parliamentary democracy with various political parties contending within the framework of pluralism. According to this view, he recognized the danger of the power of the majority and the need to counter this danger. The state was to be a liberal democracy that was to include separation of religion and state.[76]

But other scholars take a less sanguine view of Jabotinsky's political thought. They view the hegemony of national over individual and class interests, through the enhanced position of the leader, as the major element in Jabotinsky's ideology. In their opinion, Jabotinsky had a unequivocal, centralized notion of the nation, the state, and the social regime that was to prevail within it.[77] They contend that his political thought was basically nationalistic, and that it included all the elements of nationalist ideology, including racism.[78]

The debate over Jabotinsky's ideology also involves the question of liberalism versus nationalism,[79] including the problem of whether or not he made a clear distinction between the period of the founding of the state and the period of its normal functioning.[80]

The contradictions to be found in Jabotinsky's thought are often explained by the numerous changes that occurred in it.[81] Jabotinsky believed that future national sovereignty held the promise of the free development of national culture: "when the process of selection and choice will be carried out by the society without constraints and without imposition."[82] Jabotinsky took a clear prowestern position, accepting the foundations of western culture, which he saw as including curiosity, criticism, freedom, and science.[83]

It is the writer's opinion that the main controversies regarding Jabotinsky's ideology concern his general views and not those that pertain to the period of the state in the making. Thus it may be argued that during the period of the establishment of the state and the first years of statehood, Herat had ideological justification for not striving for a liberal society. Later it was not ideology that held it back, but rather the political arrangements it was interested in preserving.

Alongside the mainstream of the Revisionist movement were individuals and minority groups with more radical points of view. Among these was Abba Ahimeir, leader of Brit Habiryonim, established in 1931 for the purpose of organizing actions against British rule as well as against the leftist group Brit Shalom and the Labor movement. Ahimeir carried the idea of the supremacy of the group even further and was much less concerned about the problem of the individual:

> The human society that is in agreement with its government has no need of such freedom. In an atheistic society of "no God, no king, no hero," people demand "freedom" ... a healthy, religiously harmonious society does not feel the (supposed) lack of freedom, just as a healthy person is not aware of the air [he breathes].[84]

The Religious Sector

The Balfour Declaration (1917) and the British occupation of Palestine toward the end of World War I constituted a turning point in the attitude of the non-Zionist Orthodox Jews toward Zionism—from both a religious and a political point of view. The Orthodox leadership did an about-face and began to work judiciously in order to come to an arrangement with the Zionist leadership that would assure them a place in the new power structure.[85]

However, the need to create political institutions for the Jewish community in Palestine led to a major controversy between the non-Zionist orthodoxy and the Labor movement over women's

right to vote. This controversy, which I mentioned earlier, was one of the main political issues in the 1918–25 period. It clearly reflected the contrast between the old *Yishuv* (pre-Zionist Jewish community in Palestine), which included many Orthodox Jews, and the newer settlements with regard to ideas of democracy and civil rights. While the old Yishuv desired a society anchored in Jewish tradition, the newcomers aspired to a society based on social justice, democracy, and gender equality.[86] The opposition of the Orthodox sector to woman suffrage was no doubt also grounded in fears that women's votes would increase the power of the Labor parties, which at the time took a negative view of religious tradition.

The fight lasted seven years, during which the secular leadership of the Jewish community in Palestine tried to placate the Orthodox sector and persuade it to agree to woman suffrage. In the first elections to the Representative Assembly, held in April 1920, separate ballots were set up for Orthodox voters so that they would not have to come into contact with women, and it was also agreed that the ballot of Orthodox men who opposed woman suffrage would count as two votes, to make up for those of their wives.[87]

After fourteen women received seats on the Representative Assembly (out of 314), the Orthodox parties demanded that no woman be elected to the National Committee, the main executive body. This resulted in a compromise, according to which a woman could be chosen only as a deputy member, on the assumption that she would exist "only on paper." But Rachel Yanait, a leader of Hashomer and of the Women Workers' movement and the woman chosen as deputy, made a point of taking part in the meetings of the National Committee. This angered the Orthodox members, who demanded that the bargain be honored.[88]

The second session of the Representative Assembly was postponed for an entire year because of this controversy. When it finally convened in 1922, the Orthodox members of the Assembly and those from the Mizrahi party boycotted the meeting, thereby threatening the cohesion of the Jewish community. The Orthodox demanded that the women leave the Assembly; otherwise they would not take part. It was hinted to the women that they had better give up the struggle.

In order to give Orthodox members a way out, it was decided that approval of the voting regulations would be postponed until the third session of the Representative Assembly. This meeting was postponed for more than two years. When it was finally convened, in July 1925, delegates were presented with an agreement reached by the chairman of the National Committee, David Yellin, and the Orthodox members, according to which the question would be put to secret ballot, and if the outcome was unfavorable to the Orthodox members, they would leave the meeting. The agreement was criticized by some of the delegates, who rejected the very idea of a secret ballot and attacked the Zionist leadership for even considering the possibility of denying the rights of half of the population. Others contended that the discussion had to be open, as the matter concerned the important issue of voting regulations.

At the end of the debate, a vote was taken and the agreement rejected 103 to 55. Delegates from the Mizrahi party and the Yemenite party left the meeting in protest.[89] The regulations approved by the Assembly provided for woman suffrage, and it was announced that elections would be held for the second term of the Representative Assembly. In accordance with a demand presented by the Mizrahi party, the National Committee then decided to hold a plebiscite on the question of woman suffrage. This motion was carried thanks to the abstention of the Labor wing. It was only at the last moment that the women managed to condition the plebiscite on the participation of women in the same. The Mizrahi leaders promised to accept the outcome. Just before the plebiscite was to take place, the Mizrahi party agreed to relinquish the whole idea because the Agudat Yisrael party had declared a boycott.

In the elections to the Second Assembly that took place in December 1925, twenty-six women were elected out of a total of 221, so that their representation rose from 4.5 percent to 12 percent of the total delegates.[90] The Orthodox sector then transferred the battle against woman suffrage to the venue of local elections. Conflicts broke out in places like Jaffa, where a rabbi's wife declared a ban against participating in the elections to the city council. In Safed a compromise was reached whereby the vote was granted to women whose husbands were out of town or had died. Women whose husbands were available were not allowed to vote.[91] The Zionist leadership generally supported the struggle for woman suffrage as a matter of safeguarding social justice and democratic freedoms, and of preventing the domination of rabbis and religious Jews living on contributions from abroad. It also saw itself as representing the immigrants yet to come.

The position of the Mizrahi party reflected the ambivalent attitude toward the question of women's rights, one that was to be found among other moderate sectors of the Orthodox movement as well. They viewed the question as a social rather than a religious one and tended to support the values of the new settlers. However, since the power of the party depended on its ability to mediate between the secular Zionist leadership and the moderates among the Orthodox, it had to take the position of the old Yishuv into account. Also, it could not afford to ignore the opposition of the rabbis, among them Rabbi Kook. In the end, the Mizrahi party agreed to take part in the elections to the Second Representative Assembly, at which women had the right to vote and be elected, thus casting their lot with the secular community.[92]

I have described the struggle for woman suffrage in some detail, because in effect it involved the question of the influence of religion and religious institutions on the political system and on the issue of equal rights in a democracy. The question of religious influence was also a focus of the debate over city charters. However, toward the middle of the 1930s, the issue lost its political significance. This occurred when the Orthodox sector, primarily the Mizrahi party, gradually consolidated its position and was recognized by the leadership of the Jewish community as the only legitimate expression of the Jewish religion in Eretz Israel. This development was the result of a number of factors, among them the Zionists' urgent need for legitimization by Orthodox religious authority, in view of the status it enjoyed among the masses of Eastern European Jews. The negative attitude of the Reform movements in Europe and the United States toward Zionism also strengthened the status of the Orthodox sector. In addition, the coalition nature of Zionist political institutions and of the Jewish community in Palestine also contributed to the increased power of the Mizrahi party.

The main expression of orthodoxy's power was to be found in the laws of marriage and divorce of the organized Jewish community in Palestine, according to which personal status matters were subject to Jewish law and could be affected only by rabbis recognized by the Chief Rabbinate. At the same time, it was possible to formally leave the boundaries of the community in order to marry outside Jewish law.

In most urban centers municipal laws were passed prohibiting public transportation on the Sabbath and the operation of nonkosher butcher shops. During the 1930s, the extremists' power gradually weakened as their dependence on the local Zionist establishment increased. Relations between the two stabilized with maximum separation and cooperation on the basis of mutual recognition and compromise.[93]

It should be noted that the Mizrahi leadership preferred to perceive Zionism as a political movement that did not aim at cultural change and did not oppose the religious way of life. The Mizrahi leadership, and especially Rabbi Reiness, chose to ignore questions dealing with the way of life in Eretz Israel. The positions of the party were determined by ad hoc considerations rather

than by general principles. Its activities were limited to strengthening religion in the Jewish community and setting up a new religious educational system within it. In contrast, the Hapoel Hamizrahi party established its own agricultural settlements and embraced the values of labor, agricultural settlement, and social justice.

The weakness of religious Zionism was apparently connected to its inability to present a broad synthesis between Zionism and religion. While it admitted that nationalism was the only way that a secular Jew should express his Jewishness, it refused to recognize the religious legitimacy of this means.[94] The attitude of religious Zionism toward human rights was thus ambivalent and tended to limit these rights when they carried religious implications. The movement was not interested in establishing a modern society; its demands were purely religious-sectarian ones. The result was that it failed to take advantage of a real opportunity to influence the molding of the new society in such a way that it was imbued with the spirit of modern Judaism.

The key figure in the few efforts to bridge the gap between Zionism and religion was Rabbi Abraham Isaac Hacohen Kook, the person responsible for the establishment of the Chief Rabbinate in Israel. Rabbi Kook viewed Zionist nationalism and the Jewish religion as working toward the same end and considered the immigration of pioneers to Eretz Israel important even if the individuals themselves were not religiously observant. For him, Zionism was allied with messianic redemption, and the readiness of the settlers to make sacrifices for the sake of redemption of the land and the Jewish people was fraught with religious significance. Like the Zionists, he viewed the Diaspora as a place in which the Jewish people lived in isolation, apart from nature and creative activity.[95]

Rabbi Kook believed that the idea that man was the measure of all things formed part of the religious world view; man affected the world and formed its image, and his moral responsibility derived from his centrality and the fact that he constituted the main content of the entire creation. In analyzing human nature, he insisted that one had to recognize the existence of both good and evil in the world and distinguish between them. He warned against overinvolvement in the details of daily life and believed that every human being had a lofty mission.[96]

Writing on the question of the individual and the group in Israel and among other nations, he pointed to the uniqueness in Judaism:

> ... all other national groups attribute only the shell of their being to the individual, while its essence is said to derive from the collective soul ... with Jews it is different, the individual soul has its source in the immortal collective treasure, and the group gives life to the individuals.[97]

In discussing the status of Jewish law in the prestate Jewish community, Rabbi Kook preached tolerance. In his opinion, the society would wish to set limits to the freedom of the individual once there was agreement over the extent of freedom necessary. Even if he believed that religion was the essence of the national survival of the Jewish people, he recognized the fact that the weakening strength of religion led to conflict between believers and nonbelievers. The existing situation was the will of God, and one therefore had to accept it with tolerance.[98]

Rabbi Kook's liberal perspective apparently won him only a partial following among Zionist religious leaders. It is difficult to point to any significant efforts made to create a religious-Zionist culture through recognition of the importance of the individual in secular society. The problems that arose in the relations between secular Zionists and the moderate religious sector may have stemmed from the lack of common definitions of the nature of these relations and of the status of the individual in the new society. The religious-Zionist sector wished to preserve older frameworks and make as few changes as possible, and changes were accepted only after

bitter struggles with the secular community, as in the conflict over woman suffrage.

Conclusion

The fact that the Labor and Revisionist movements, the two major political forces in the prestate Jewish community in Palestine, had collectivist ideologies, left its mark on the system of norms and rules of the game in the area of civil rights. These movements viewed the individual and his civil rights as secondary. Their adoption of democratic rules of the game was the result of realpolitik rather than their own world view:

> The imposition of the ideology of one group on another or even unequivocal majority rule could have caused the system to fall apart. In such circumstances, democracy presented both an ideological and an organizational challenge to the various political and ideological movements in the prestate period.[99]

It should be pointed out that since the problem of religion was secondary, the political system did not bother to study the issue but rather had recourse to compromise.

Still, there were differences between the Labor and the Revisionist movements' attitudes toward the individual. In the Labor movement, the individual was required to devote himself to the collectivity in all spheres of life, while the Revisionists generally required personal sacrifice only when it came to the issue of the struggle for statehood, and they tended to hold liberal views in other areas of life.

Yet, there were no great differences between the two movements when it came to action; both put the struggle for statehood foremost (for the Labor movement it stood together with settlement as the highest end). Circumstances led to cooperation between the two movements on the basis of bargaining, especially during the periods in which resources from abroad increased. A political culture based on coalition developed, without sufficient attention to the status of the individual in the society in formation and to the significance of civil rights in a democracy. The heritage of the prestate period that was passed on to the new state increasingly took on the image of a "consensual" political culture based on cooperation between political elites, accompanied by a certain alienation from the people they were supposed to represent.[100]

*The Histadrut is the national workers' organization. It has been considered since prestate days to be a political and economic organization and not simply a trade union. The Histadrut was the most important representative of the Labor movement in the 1920s and 1930s.

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2 Strengthening the Government at the Expense of Civil Rights: The First Years of Statehood

The Constitutional Debate: 1948–1950

The Declaration of Independence of the state of Israel explicitly states that the Constituent Assembly should draft a constitution. Article 3 of the Transition to the Constituent Assembly Act of 1949 confers temporary legislative powers on the Assembly.[1]

The Constituent Assembly held its first meeting on February 14, 1949, at which it passed the Transition Law of 1949, according to which it would thereafter be called the First Knesset.[2] The fact that the Assembly decided to change its status without first drafting a constitution as charged was the first indication that the leadership was not interested in legislating a written constitution for the new state of Israel.[3]

The Knesset later debated the issue. The disagreement was not over its authority to legislate a constitution, but rather whether it was obligated to do so at that time.[4] The constitutional debate evinced the formation of two political camps not distinguished by ideologies of the Left or the Right, but rather by power interests and considerations. Thus, movements on the Left, primarily Mapam, allied themselves with Herut (Right) and the General Zionists (center) to support a constitution, and they were opposed by Mapai and the Orthodox religious parties.

The political considerations and alliances that came into play during the constitutional debate were to remain in force in the future. Both sides advanced ideological arguments. Those in favor contended that a constitution was the basis of government and that it ordered relations between the various branches. They argued that nearly every state had a constitution, including England, although that of the latter was not a formal one. They spoke of the educational and cultural value of a written constitution, and its function as a symbol of national solidarity in a period characterized by the ingathering of the exiles.

Opponents argued that the basic principles of freedom were generally accepted and that they were mentioned in the Declaration of Independence. They contended that the state of Israel contained only a small proportion of world Jewry and that a binding constitution should not be approved before the remainder joined them. They also argued that the issue was liable to become a battleground between secular and religious conceptions of society, and that it was best avoided.[5]

At the end of the debate, three proposals were laid before the Knesset, and that of Yizhar Harari from the Progressive party passed with the support of Mapai, the Progressives, the Sephardim, and Wizo. It empowered the First Knesset to instruct its Constitution, Law, and Justice Committee to begin to prepare a constitution, which was to consist of the basic laws of the land.[6] Although the resolution favored the eventual adoption of a constitution, it did not clarify its status vis-k-vis other laws; as such, the decision had far-reaching implications for the future legal situation of civil rights.[7] It also resulted in the deemphasis of the ideological and social importance of a constitution and the cessation of attempts to formulate one for the new

state. Thus, the general aspiration for a constitution was defeated by political inertia—that is, continuity with the status quo ante, including the convenient adoption of the British legal system.[8] The obvious results were that no real decisions were taken on issues of religion and the state, and the ruling elite succeeded in withholding powers of review from the judicial branch of government—powers that would certainly have been delegated had a constitution been adopted.[9]

A close examination of the legislators' positions, as they were expressed in the Knesset debates and in personal interviews, points to the real reasons for their opposition to a constitution, and reveals the basic outlooks and priorities of those who were responsible for molding the legal framework of the state.

Between May and December 1949, the Knesset Constitution, Law, and Justice Committee devoted eight meetings to a discussion of proposals for a constitution. The Knesset debated the issue between February and June 1950.[10] The following accounts were taken from Knesset protocols and my own interviews with the people involved.

Zerah Warhaftig, the National Religious Party leader who headed the Committee charged with preparing a constitution, was opposed to the idea, contending that a constitution was superfluous. In his opinion, the conditions set by the United Nations General Assembly in its decision on the establishment of Israel, according to which the state was to have a constitution, were no longer valid, as the state had not been established by UN vote but rather by military conquest. He added that while a constitution might play an educational role, it could not replace the Book of Books, and he warned that if a constitution were adopted, the worldwide status of the Jewish people would suffer because of the weakening of its connection with the Bible.[11]

In an interview I conducted with him thirty-five years later, Warhaftig admitted that he had opposed a constitution because he knew that he would not have succeeded in legislating one to his liking:

> I tried to persuade the Constituent Assembly and its antecedent to adopt a constitution with a Jewish emphasis. I failed. I saw that they were against it. So I thought, if this is going to be a dry constitution without any shade or connection with religious tradition, why should I give a secular constitution supremacy and allow all other laws to be subordinate to it.[12]

To the question of whether as a representative of a minor party he believed he had the right to oppose the public interest on this issue, Warhaftig replied,

> Ben Gurion was more opposed to a constitution than I was. He believed that a small group should not adopt a statute that would be binding on a larger one. He also opposed the idea of laws with special status ... in his opinion, it was undemocratic.[13]

In retrospect, Warhaftig did not perceive the nonadoption of a constitution as harmful to civil rights. In his opinion, in Israel, which has had a prolonged period of emergency, civil rights have had a better record than they have in countries with constitutions, like the Soviet Union or certain Latin American states.[14]

Other spokesmen from the United Religious Front that opposed a constitution threatened during the Knesset debate that it would prove divisive to the new state. M.D. Levinstein demanded that the Torah be recognized as the one and only constitution of Israel. He warned that any attempt to adopt a secular constitution would result in a Kulturkampf.[15]

Minister of Welfare Yitzhak Meir Levin was even more adamant in his objection:

> ... do you think that what our enemies failed to do, what blood and fire failed to do, you will succeed in doing through the power of the state? No you won't! You still do not understand the Jewish soul. It will awaken and burst into a great flame. If in the Holy Land, of all places, we want to turn things upside down and to make the life of religious Jews unbearable.... Don't

> we have anything else to do besides starting a Kulturkampf, which, God forbid, might destroy us and the state? We don't want war, and you brethren—don't be evil, don't force such a war upon us. God forbid, my intention is not to threaten; I just want to make it clear to all of you that such a shock will not pass without response....[16]

In contrast, Menachem Begin, the leader of Herut (an opposition party) and future prime minister, expressed unequivocal support for a constitution, which he viewed as preventing the trammeling of the rights of the minority by the majority. He recalled Ben Gurion's promise to the Knesset Constitution Committee that a civil rights law would be among the basic laws presented to the legislature. He believed that only legislation of this sort would prevent those in power from trampling on civil rights.[17]

Begin went on to describe the implementation of the food rationing system without a court order. In his opinion, this constituted a violation of civil rights, one that accustomed the people to bow their heads in the presence of the powers that be. He did not accept the reasons for opposition to a constitution advanced by the majority:

> ... there is a ruling clique that is above the law because no constitution constrains it. The real reason for your opposition to a constitution that you're not telling the people is that you want to go on operating like this.[18]

However, there was no unanimity within the Herut movement on the constitutional issue, as revealed years later in an interview I conducted with Shmuel Tamir, one of its top leaders and a future minister of justice. Tamir described the decision not to adopt a constitution as an "original sin" which not all members of Herut worked to prevent, despite the fact that a constitution was part of the movement's platform.[19]

The position of members of the Liberal party, who wished to limit the power of the regime, was expressed by Yaacov Gil from the General Zionist party.

> If there is no constitution that obliges the regime to provide services to the citizen and constrain the government, in whose hands there is so much power—which it is liable to use for its own purposes and in pursuit of its own ends—those in power will not always be subject to judicial review ... in our present judicial system, there is hardly any instruction that guarantees the basic rights of the citizen and the elementary rights of the individual. The citizen is powerless against the government and its functionaries.[20]

Aharon Zisling of Maparn, the opposition on the Left, claimed that Ben Gurion and the religious parties shared a common interest that conflicted with that of the population at large, and that administrative convenience and a free hand were more important to them than the creation of a constitution.[21] Turning to the religious parties, he rejected their authority to interpret the past and accused them of wishing to freeze the government in the present. He told Ben Gurion that although a constitution would undergo change when ownership and the distribution of property in the state changed hands, not adopting a constitution in the present meant neglecting the finest aspirations of the present period.[22]

The speech made by Prime Minister David Ben Gurion to the Knesset during this debate contained the position of the ruling party and its basic outlook, on which future policy would be based. Ben Gurion attacked the advocates of a constitution; in what can be viewed as a major political declaration, he also rejected the position of the religious front with regard to the centrality of Jewish law in the state as befitting persons who do not accept the existence of a sovereign state:

> If Mr. Levinstein believes that only the written Torah and Jewish tradition have sovereign authority in the life of Israel, and his reference is to the state—then the implication is that the only people who have the sovereign authority to legislate and execute laws in the state of Israel are members of Agudat Ysrael, or perhaps only the rabbis of Agudat Ysrael, and that no

other Jew who is not a member of Agudat Ysrael has the right to interfere in matters of state. I doubt whether such a belief is consistent with the ideology of Israel; and I also doubt whether a state should exist under such conditions.[23]

After a discussion of the place of the constitution in ancient history as well as in the United States and France, Ben Gurion pointed to factors on which he believed the survival and future of the state depended—democracy and the rule of law:

... only in a state in which there is no arbitrariness, not of ministers and governors, nor of representatives of the people and state officials, nor of individuals and political leaders—only in such a state is freedom guaranteed to individuals and groups, to the human being and the nation. There is no freedom in a state in which the law does not reign supreme, even if its constitution includes the most vigorous and advanced Bill of Rights in the world.[24]

This theoretical approach led Ben Gurion to attack the positions of Begin and Mapam leader Meir Ya'ari, who were in favor of a constitution. He argued that they had not defined freedom correctly. In a free country, the citizen and his rights should be respected, and so should those of the generality—the nation, the state, and its security. The law was what drew the line between freedom and civil rights.[25]

Speaking of the internal dangers that threatened the Israeli democracy, he mentioned the Communist party, which he said was not afraid to openly admit that it wished to establish a single-party regime. He also hinted at additional groups and stressed that the Israeli democracy had to defend itself against all minorities, even Jewish ones, that wished to take control by force.[26] To buttress his argument, Ben Gurion alluded to the well-known example of Great Britain during the Second World War, when MP Captain Ramsey was jailed for a few years for the sake of national security, on the instructions of the minister of internal affairs, who had recourse to the emergency laws.[27]

Ben Gurion supported policies of constraint when it came to the essence of liberty and the tendency to depend on "majority rule" for its definition. His words contain the essence of the position of the ruling party, one in keeping with the heritage of the prestate period:

In a free country like Israel, there is no need for a declaration of freedoms. In this state a person is free to do anything not prohibited by law. In the eighteenth century, which was an era characterized by the rule of tyrants—there was need for a Bill of Rights. In countries in which freedom and the people's right to decide, of its own free will, what kind of government and law it desires are still denied—there is need to fight for human rights.

But in free countries, democratic lands in which the people rule, what is needed is a Bill of Obligations, which for us means—duties to the homeland, the nation, immigration, the ingathering of the exiles, the building of the country, and safety for the other, for the weak.[28]

Ben Gurion's dependence on the British pattern included an emphasis on the supremacy of law as a national value. At the same time, it has been argued that his dependence on his party as an instrument of achieving political aims led to a deemphasis on the values of pluralism, without which democracy is liable to be reduced to the process of approving the decisions of the ruling powers.[29]

In an interview with the author, Y.S. Shapira, a member of Mapai who served as attorney general at the time of the constitutional debate, analyzed the considerations that had guided Ben Gurion and his supporters in the government. In his opinion, their motives had been guided by a desire to preserve the integrity of the new state:

. . . it seemed to me and to others that while the state was still in the making, one had to be very careful in fixing a legislative framework, for fear that it might hamper free development.

For example, undoubtedly, the question of religion and the state would have been a cardinal question in the formulation of a constitution, resulting in a clash that would not have proven salubrious to the fledgling state.

> I think the fact that the vast majority received their political education as a whole or in part under the British mandatory government had a great influence... it is possible that if England had been different, let's say if it had been like France or Germany, a constitution would have been considered indispensable for independence.[30]

With the passage of the Harari proposal, political debate over the constitution ended. A subcommittee was appointed to compose a list of the matters on which basic laws should be enacted, among them civil rights—equality before the law, equality for women, national and racial equality, freedom of conscience, and freedom of religion.[31]

However, in the years that followed no laws were enacted to bolster civil rights, and by default the High Court of Justice became its major pillar of support. The issue became a dead letter in political and ideological debates as well. This can be attributed to the increasing dominance of David Ben Gurion's point of view, expressed in the Knesset speech cited above. Ben Gurion took it for granted that Israel was a democracy based on majority rule and on the obligations of the individual citizen.

In the constitutional debate, diametrically opposed arguments were voiced: the threat of Kulturkampf and the fear of the regime trampling on the citizen. Ben Gurion did not agree with either of these arguments. He did not conceal his fear of internal subversion, and he wanted his government to possess the requisite powers to counter any such attempts. The conflicts involved in the establishment of the state and the readiness of its enemies to continue the fight made him fearful of placing limitations on the powers of government.[32]

However, there are those who view the Knesset decision against the immediate adoption of a constitution as the end of a process of erosion of the legal obligations of the new state by representatives of the political majority. Those who take this view argue that the decision was made based on political and pragmatic party considerations. They contend that hindsight enables one to view the constitutional debate as an early example of the attitude of Israeli politicians toward the rule of law; it illustrates that while the idea of the rule of law is not foreign to them, their awareness of the concept and the legislation it implies is superficial. As a result, they have no binding commitment to the idea, and when political interests conflict with the rule of law, the latter is sacrificed.[33]

The Debate over the Emergency Regulations of the British Mandatory Government

In the first test of its attitude toward human rights after the decision not to adopt a constitution—the debate over a proposal to abolish the emergency regulations of the British mandatory government in Palestine—the Israeli government revealed its opposition to change and its desire for maximum centralization of power. The Defense Regulations of 1945 were enacted by the British mandatory government to aid it in its fight against the rebellious Jewish community in Palestine. The regulations included limitations on immigration, freedom of the press, freedom of speech, freedom of movement, and the freedom to demonstrate. The prestate Jewish community strongly protested these arbitrary regulations, viewing them as an instrument of suppression. Thus, once the state was established, the debate over abolition of the emergency regulations, which together with the other laws from the mandate period became part of Israeli law (with the exception of the limitations on immigration, of course), should have been short and simple.

However, it soon became clear that the government had no intention of abolishing them. This was not openly declared but was revealed in the delaying tactics used against a proposal to abolish the emergency regulations. The parties in the opposition, whether on the Right or the Left, were in favor of abolition, viewing the regulations as a symptom of overcentralization of ruling powers.

In a reply on behalf of the Constitutional Committee to a proposal to abolish the emergency regulations submitted by Aharon Zisling from Mapam, David Bar Rav Hai of Mapai stated that the Committee was of the opinion that the government should propose new laws to replace the old before abolishing them. He objected to a debate on Zisling's proposal, which he described as superfluous.[34] Zisling rejected this argument, fearing that the government had no intention of abolishing the regulations and warned prophetically of what would happen in the future:

> The argument is not over a time span of three versus five months, but of three months versus an unknown time, for we are talking about future requests for extension.... [35]

Even before that, a proposed law to replace the mandatory regulations had been discussed, and Minister of Justice Pinhas Rozen had revealed the position of the government when he stated that it wished to maintain the law as a ready instrument for use should the Knesset declare a state of emergency.[36] Members of the opposition disagreed, as they were afraid the emergency laws would be used against them. Arieh Ben Eliezer of Herut contended that the law could be turned against every citizen in the country and said that he considered it fascist.[37] In the end, the proposal failed to pass, and the regulations remained in effect.

The issue was raised once again when members of an underground organization called "Brit Hakana'im" (in Hebrew, Zealots' League) were arrested and put under administrative detention, on the strength of the emergency regulations. Brit Hakana'im was organized in 1951 for the purpose of keeping the Sabbath, preventing the conscription of Orthodox women, and the like. An arms cache belonging to the organization was seized by the police, and several dozen suspects were arrested and placed under administrative detention in the Jalame prison.[38] This measure served to illustrate the unlimited possibilities of the regulations, which could be applied against Jews and Arabs alike. Various legislators demanded that the Knesset abolish the emergency regulations without further delay, among them representatives of the United Religious Front and Mapam, as well as Menachem Begin of Herut.[39]

Israel Rokah of the General Zionists submitted a compromise resolution prohibiting use of the emergency laws in internal matters, meaning that they would be utilized only by the Military Government.[40] However, the position of the government ruling, as stated by Acting Prime Minister Moshe Sharett, was unequivocal and indicative of the considerations involved at the time:

> We will never be able to carry out these tasks (defense of democracy, development of the economy, etc.) if we don't have suitable emergency measures and if the government does not possess emergency powers that can be activated the moment the need arises, as well as emergency powers utilized on a daily basis.
>
> Every party that demands the abolition of the emergency laws without thinking of an alternative, without worrying about what will happen, takes on a heavy responsibility, and not only for what goes on in the present; they also provide a bad example.
>
> *As for the public, half are new, from one standpoint, and half are children, from another standpoint. Our population includes an abundance of people who are unable to make the simplest judgment. They don't understand and we can't expect them to really understand things.*[41]

At the end of the debate, the Knesset adopted a resolution stating that the emergency laws

contradicted the fundamental principles of democracy, and it instructed the Constitution, Law, and Justice Committee to hasten the submission of a proposal for a new law to supersede them.[42] Thus we see that during the first years of statehood, the Knesset made two major decisions that were never carried out.

One gets the impression that the decision makers were determined to prevent new legislation in this area. Thus the debate on the emergency defense law was different from the constitutional debate. While strong opposition to the regulations was voiced publicly, political interests conspired behind the scenes to prevent the passage of a new law that would do away with the emergency regulations. A close examination of the positions held by high officials reveals that the Knesset decision regarding the defense laws was merely declaratory, and that behind it lurked a real fear that the regulations might be abolished and a genuine reluctance to relinquish the power they conferred.

Even if the present perspective allows us to understand the hardships of the first years of statehood, a question must still be asked about the disparity between word and deed. The maintenance of the emergency regulations contributed to a weakening of the basic belief in a system of democratic rule. It was another example of the tendency to be satisfied with partial solutions, a tendency that was first revealed in the constitutional debate.

Y.S. Shapira, who served as attorney general and as minister of justice, was among the main opponents of the emergency regulations when they were first enacted by the mandatory government. At the time, he stated that the world ought to know that these regulations meant the end of the principles of justice in Eretz Israel.[43] However, when asked in an interview about his present opinion with regard to the adoption of the emergency regulations by the state of Israel, he replied that it had been necessary, but that everyone thought that the regulations would gradually be changed or stricken from the books. In his opinion, although there was a desire to remove them, the matter did not appear urgent.[44]

To the question of whether those in power were not reluctant to relinquish their own political power, Shapira replied:

> There is no doubt that those who occupied ruling positions when the state was first created sought, above all, to increase their ruling powers. ... I can only state what my own feeling was as someone close to the center of power. The defense regulations didn't bother me. I wanted to abolish them, but it wasn't urgent as far as I was concerned.
>
> As a disciple of the English system, I was sure that the unpleasant device called defense regulations would die a natural death caused by disuse.
>
> I think if anyone had taken it upon himself to do the job [of abolishing the emergency regulations], it would have been done.
>
> I don't think anyone in the government had the power or the ability or the desire to oppose abolition of the regulations.[45]

The General Zionists and the Liberals did not view the regulations as important either, with the exception of those who dealt with the Military Government. Rather, their attention was focused on the regulations regarding the food rationing system.[46]

In the opinion of Zerah Warhaftig, David Ben Gurion was responsible for the fact that the emergency regulations remained in force. In his opinion, Ben Gurion was afraid to relinquish power in this area due to his concern for public order. Looking back, Warhaftig was willing to say that maintaining the regulations may have been unnecessary, but it was done because of Ben Gurion. At the same time, he expressed the opinion that in certain cases administrative detention was preferable to ordinary detention, and in any case there were additional considerations:

> I believe the changes we made were desirable, but that it would have been possible to make additional ones as well. But removing such measures [administrative detention] entirely would have led to an increase of trials for those arrested and

might have been worse for them.

> As far as we know, there was evidence against most of the people arrested, but there was reluctance to bring them to trial, due to sensitive political matters. Since then [the regulations] have been changed, amended.[47]

Warhaftig also stated that Ben Gurion and his policy of centralization of power were responsible for the lack of civil rights legislation. In his opinion, this was due to the prime minister's Eastern European revolutionary socialist background, which focused on the supremacy and the good of the state.[48]

In summary, the attitude toward the emergency regulations was ambiguous: while they were considered injurious to the image of the state, they were also convenient, and no urgent need was felt to change them. Other tasks appeared more important, and some leaders believed a solution would be found in the future.

The position of David Ben Gurion, who wished to ensure the ability of the government to maintain public order, prevented the political system from making any significant change in this area, and the problem was perceived as a temporary one.

However, it is possible that soon after the establishment of the state, the regulations no longer appeared as the remnants of the mandatory government but as an efficient tool for dealing with security problems without the need for new legislation. At the same time, they also provided a convenient legal framework for the operation of the Military Government.

The Military Government: 1948–1966

The Military Government was established after the War of Independence as a temporary measure, by an order enacted in September 1948, Up to January 1950, it was active in all areas of life; after that, it limited its interventions to what were defined as security matters.[49]

The Military Government was based on the mandatory defense regulations discussed above, among them Regulation 109, which made provision for restraining orders; Regulation 111, which mentioned detention orders; and Regulations 122,124, and 125, which referred to the imposition of curfews. Under the Military Government, Arab population concentrations were divided into a number of security districts, among which movement was possible only by means of a special permit.[50]

Arab residents of the new state found themselves in difficult straits. Their national and social structure, which had begun to take shape toward the end of the British mandate, was entirely destroyed as a result of the flight or expulsion of the majority of the Arab population. Only one-fifth of those who had previously lived within the territory that became the state of Israel remained. Even without the Military Government, their political power was greatly diminished as a result of population loss. To make matters worse, about 10 percent of the Arab residents who remained in the new state were displaced persons who had left their own villages and moved to others.[51]

While Arab residents received Israeli citizenship and had representatives in the Knesset, the military governors and officials interfered in almost every aspect of their lives, creating a situation of dependency that increased as time went on. Indeed, there are those who describe the authorities' attitude as inflexible, as resembling that toward a conquered people.[52]

After the Israeli conquest of Arab towns, villages, and mixed cities, stringent limitations were

placed on their Arab residents. These restrictions were of two types. First, a curfew was imposed on large population centers and on mixed cities; this remained in effect for several months. Second, the need for travel permits separated Arab citizens from family members living in other districts and made it difficult to secure employment. The permits became a means of reward or punishment. An important factor in granting them became the "friendliness" of the applicant, his family, or his community toward the Jewish state.[53]

In the months following the war, Jewish residents of the mixed cities, Haifa among them, occupied or attempted to occupy Arab residences, and the authorities did not always provide complainants with the necessary protection. The mayor demanded that these incursions cease, but attempts to put an end to them were hampered by relations between the military and civilian police.[54]

It seems that the Israeli government had no desire to integrate the Arab population into Israeli society, especially during the first years of statehood. Rather, its main concern was to ensure the Arab population's loyalty and adherence to the rules of the political game, and the Military Government was the primary means used to achieve this end.[55]

Arab citizens' participation in the Israeli political system was limited primarily to voting in elections, which, in the early years of statehood, was interpreted as support for the regime. As time went on, the voting rates of Arab citizens gradually increased.[56] Before the elections, Mapai, the ruling party, set up party machinery in Arab towns and villages, appointing members of the traditional leadership to run it. However, the party did not bother to include the interests of Arab voters in its platform.

After the Sinai campaign of 1956, the Progressive party demanded abolition of the Military Government. The Rozen committee submitted recommendations to the same effect, but David Ben Gurion overruled them.[57]

While some feared that abolition of the Military Government would mean increased activity on the part of the Communist party, others pointed out that the Military Government had enabled Mapai and related lists (parties) to make political gains among the Arab population. Thus, the political arguments for and against continuation of the Military Government presented below involve not only security considerations but also electoral ones.[58]

In the course of the public debate, opponents of the Military Government argued that it constituted discrimination on the basis of nationality, that it widened the cleavage between the Jewish and Arab communities, that it led to extremism, especially on the part of young Arabs, and that it had a corruptive influence on the Arab community.[59]

Within the Israel Defense Forces, opinions were also divided. Yigal Allon, one of the most illustrious military strategists and a leader of the United Kibbutz movement, stated that the enemies of Israel could not have asked for a better instrument of propaganda than the discrimination perpetrated by the Military Government.[60]

Advocates of the Military Government argued that it helped guard against the formation of a Fifth Column, that it prevented Arab refugees from stealing across the borders and taking up illegal residence, and that it helped to keep military secrets, due to restrictions imposed on freedom of movement.[61]

During the 1960s, the scope of the Military Government was gradually reduced. In February 1963, Prime Minister David Ben Gurion stated in a Knesset hearing that although he was ideologically opposed to the Military Government, he justified its maintenance due to the security situation. The decision to continue it passed by one vote.

Ben Gurion resigned a short time afterward, and in October 1963 Levy Eshkol, the new prime minister, declared that restrictions on freedom of movement would be lifted, except for persons considered dangerous to state security and residents of border villages. The Military Government was finally abolished in 1966.[62]

As in the debates over the constitution and the defense regulations, the following discussion will focus on the situation as perceived by the decision makers of the period and on their ideological and pragmatic positions.

In an interview with the author, Y.S. Shapira claimed that as attorney general he had harbored doubts about the Military Government and had not been a party to its creation. Also, at the time he had been of the opinion that it should have been abolished a few years after its creation, because of the damage it did to the moral image of the state:

> Undoubtedly, there was no basis to the assumption, "it can't happen here" . . . take the best people and give them illogical powers, and eventually they will turn into monsters.
>
> . . . when you take power and do not define its limits . . . you are bound to fail. When you uproot people unrightfully and unjustly, when you violate people's rights and don't know where to draw the line . . . you are bound to go too far and become corrupt.
>
> . . . The prime minister was not responsible for not abolishing the Military Government. It should have been abolished by the collective, but the collective was not thus inclined....[63]

Describing the events many years after they occurred, Shapira opined that the Military Government had had a corrupting influence and had constituted an obstacle to the development of Israeli democracy. He declared that the system had not included sufficient controls, and that from the outset politicians should have taken steps to place restraints on the authorities.[64]

Other high officials, too, believed that the Military Government had remained in effect after it was no longer necessary. The fear, which increased with the passage of time, was that the Military Government was being exploited for electoral purposes by Mapai, the ruling party.[65]

The main opposition party, Herut, found itself in a dilemma as far as the Military Government was concerned. It could not ignore the electoral advantages that the Military Government gave Mapai, its political adversary, but as a party with a nationalistic ideology, it could not come out in favor of concessions for Arab citizens. Herut's spokesmen often adopted an extremely nationalistic position. An example of the same can be found in a speech by Member of Knesset Yohanan Bader, made during a hearing on extension of the security regulations. Bader declared that in his opinion, Arab citizens had an excellent means at their disposal for putting an end to the Military Government. All they had to do was to behave like loyal citizens and help the state to put an end to the dangers on its borders. He contended that despite his hatred of military districts and all the other security measures, the nation should take additional means to ensure its security.[66]

In a hearing conducted several years later, Haim Landau of Herat argued that the Military Government was not effective and that it was maintained because it served the political interests of Mapai. At the same time, he hesitated to propose its abolition, saying he lacked the necessary security information.[67] At the same hearing, Yohanan Bader admitted that his party had no definite position with regard to the Military Government, even if it was being misused. He stated that in the face of demands that the Military Government be abolished, Herut supported the position taken by Mapai.

> Since the Herut party supports the position of Mapai with regard to the Military Government, there is no point in Ahdut Haavoda moving to abolish it.

> ... We are well aware of the problem of equal rights for the Arabs. We have proved it in deeds, and we will do it again. We cannot consent to the violation of the principle of equal rights, including freedom of movement, for any reason except that of pure security, when there is no other solution.[68]

In his reply, Meir Argov of Mapai, chairman of the Knesset Foreign Affairs and Security committee, reported that in the committee hearings, which were confidential, neither members of Herut or those of any other party had expressed opposition to the present policy. He described the committee hearings and said that its members had received all the necessary information about arrests, travel permits, and other matters, and that no one from the opposition had questioned the information presented to him. Therefore he did not understand why they were denying this fact on the floor of the Knesset.[69]

Thus, the security problems of the new state, together with the desire of the ruling party to consolidate its power with the aid of Arab votes, resulted in the continuation of the Military Government beyond the first years of statehood. The consolidation of habits and interests, on the one hand, and the absence of a unequivocal demand to abolish it, on the other, buttressed the position of those in favor of maintaining the Military Government. It is interesting that due to its nationalistic ideology, the largest opposition party, Herut, refrained from taking a stand on behalf of civil rights that would oppose the policy of the ruling party.

Was the Herut Party an Alternative?

The question is whether Herut ever took the lead in a civil rights battle. During the prestate period, opposing parties had had to accept the idea of a ruling ideology, the main principle of which was the establishment of a state. This involved cooperation on practical matters and certain arrangements that remained in force after statehood was achieved.[70] Up to the 1970s, these arrangements, the details of which were unknown to outsiders, apparently contributed to the restraint shown by the opposition and hampered the development of an alternative elite.[71] When the state was established, the leadership of Herut had clear goals. After the elections to the First Knesset in January 1949, in which Herut received 11 percent of the votes, compared to Mapai's 36 percent, Menachem Begin decided to turn his party into an opposition party that would be loyal to the state, its democratic form of government, and the principles of liberal democracy. In his estimation, Herut would have to assume the role of the guardian of liberal democracy, because as a socialist party, Mapai could not be expected to be scrupulous in its maintenance of the rule of law, civil and minority rights, and a free economy.[72]

At the time, Herut's Knesset activities were focused on the preservation of civil rights and the rule of law. As demonstrated above, Herut favored a constitution; it also opposed extension of the mandatory emergency regulations and protested press censorship and military trials for civilians.[73]

The same concerns were expressed in the ideological dimension. The crux of Begin's speech before the second Herut party congress, held in 1951, was Herut's liberal world view, based on individual freedom, improving society, and the supremacy of the rule of law. However, he spoke only in general terms and did not present a program of action.[74]

Delegates to the congress representing the Lamerhav faction, comprised of the radical Right among Herut's intellectuals, demanded that the movement not just sit and wait until the

government fell apart but rather actively seek that end through the means at its disposal. The moderates, on the other hand, did not want Herut to be a total opposition movement but preferred to join the government led by Mapai.[75]

Menachem Begin expounded his position at the third Herut congress, held in 1954. He was vehemently opposed to the ideas of the radical Right as well as to the moderates' idea of joining the government. He argued that the only way to power was through the ballot box, and that revolution was not possible. Even if it were, he would reject it:

> . . . A military coup would mean a danger for generations to come. A nation in which military coups are common dies in its own blood ... if I make a revolution today, tomorrow someone else revolts against me, and it goes on forever and ever.[76]

There are those who view this speech as reflecting a change in Begin's approach: in 1951, he perceived democracy as a supreme and absolute value, and he recommended acting in accordance with the formalistic rules of democratic procedure that prevailed in Mapai and other parties.[77]

Thus, although Heart had begun as a strong opposition party and had aspired to create an alternative elite, after its defeat in the 1951 elections it adopted more compromising positions. It worked to establish an organizational apparatus and to create economic bodies like the Tel Hai Fund, and it became part of the coalition directorate of the Jewish Agency. It maintained its position as the second largest party in the country "by de facto relinquishment of the idea of creating an ideological and leadership alternative to the ruling party."[78]

During the 1950s, the formative years, it was the Labor party that left its mark on the Israeli democracy. The ideological and political considerations of Mapai were what determined the nature of legislation, or its absence, as well as the decisions taken on crucial issues like the Military Government.

The Government and the Citizenry: Absorption of Immigrants during the 1950s

Between 1948 and 1952, the Jewish population of Israel doubled, increasing from 700,000 to over 1.4 million. Most of the new immigrants had no prior preparation. Some of them were Holocaust survivors who had no way of making a living and no place to live; most did not speak Hebrew.

More than half of the newcomers came from North Africa and Asia, mainly from Arab countries, and are known as "Oriental" Jews. During their first years in Israel, they were housed in immigrant camps, after which they were sent to development towns where living conditions were hard, and where they remained in a position of dependency, subject to the whims of the absorption agencies.[79]

The process of demoralization and the psychological trauma experienced by the immigrants were acute. The conditions of life and the attitude toward them in the country in general and in the transit camps in particular caused an even greater shock, regardless of their country of origin or their social status prior to immigration. The shock was expressed in various forms—indifference, depression, violence, and often suicide as well. Many years later, writers would describe their feelings of loss and humiliation:

> ... my father's body lived on, but his spirit died. He was a new immigrant from Iraq, an old man with a family to support, penniless, cast into a human herd without the slightest chance of providing for his family in a dignified manner . . . and these served as the background for that other revelation, many times worse: he discovered that he belonged to an inferior race ... his spirit never overcame the stinging humiliation.[80]

The transit camp constituted a real change in thinking with regard to the absorption of immigrants: it was an attempt to cast them into the labor market under competitive conditions rather than to isolate them in a protective but enervating environment.[81] However, this meant that the poverty, impermanence, crowded conditions, and filth of the transit camps were compounded by social isolation.[82]

The employment of the new immigrants in make-work, mainly public works projects, like the draining of the Hula Lake, created a dependence on seasonal work or on governmental transfer payments. This type of employment was susceptible to violations of labor laws and the withholding of wages by private employers as well as by the state.

The Labor Exchange, frequented primarily by immigrants from Arab lands who were completely dependent on it for their livelihood, became the locus of hostility, confrontation, and violence. Even if the allocation of work days, which were tn short supply, had been fair, many of the immigrants might still have suffered from unemployment. As it was, employment opportunities were distributed on the basis of political party affiliation and ethnic origin.

> [S]ome said, "Why did you deceive us?! You took us to the transit camps . . . how did you do such a thing to us, how did you cause us such a letdown? God will punish you for what you did. Go to hell a thousand times!" And Labor Exchange officials would reply, "Go back to Iraq, go to the devil. What do you expect from us?!"[83]

The director of the Rosh Pina transit camp, a member of Kibbutz Ayelet Hashahar, described the situation that greeted him when he first came to the camp in the summer of 1950:

> We put an end to that awful scene: new immigrants would wait for weeks for their first day's work. They would all crowd together, shouting and punching one another to get to the Labor Exchange window, for hours on end, and even during the night. It caused their entire being to rebel and robbed them of self-respect, of the feeling that they were destined to become citizens with equal rights and part of organized labor in Israel....[84]

In the conflict of interests that developed between the veteran and new immigrant workers, the Labor movement was mainly concerned about the interests of the former. The majority of Mapai opposed equal wages for those engaged in public works, and a delegation of transit camp laborers was refused permission to speak at a Histadrut Council meeting held in July 1953.

The poor living conditions in the transit camps might have resulted in a threat to the privileged position of the veterans, and in order to prevent such an eventuality, the establishment instituted political supervision and initiated public works projects.

The composition of political institutions was based on proportional party representation, and this gave preference to members of existing parties over nonaffiliated new immigrants. This system was in effect at every level, from the highest office down to the hiring of sanitation workers in the transit camps. It was also very effective in preventing parties outside the government from increasing their power.

Some of the new employees in the absorption agencies were recruited from among the immigrants themselves, so that a number of immigrants were able to join the political system. Their position was in the lower echelons of a hierarchical system of dependence. In this way, the ruling party strengthened its hold over the immigrants and hampered the development of an independent leadership. The nearly total dependence of transit camp residents on functionaries

like the director of the camp, the secretary-general of the Labor Exchange and the secretary-general of the local branch of Mapai, gave these officials the status of petty tyrants. Although they were in need of the protection of thugs, who served as their body guards, and they were both despised and feared by camp residents, they received the support of party machinery.[85] For their own part, party leaders voiced fears—behind closed doors—that the new immigrants were having an adverse effect on Israeli democracy in general and on their own hegemony in particular.

The hostility that developed among the immigrants toward the absorption agencies led to dreary forecasts for the future. Pinhas Lavon, a Labor party leader later appointed minister of agriculture and then minister of defense, warned that the day might come when a hundred thousand persons housed in transit camps with no way out would arise and ignite an explosion that would destroy the Cabinet and the Knesset.[86] Levy Eshkol added that if solutions were not found for the problems of the new immigrants, they would threaten the cultural and economic independence of the state, as well as its very survival.[87]

In meetings behind closed doors, demands were heard to slow down the pace of immigration. Criticism was voiced concerning the quality of the new immigrants, many of whom were elderly and ailing. Minister of Absorption Moshe Shapira wrote to immigration officials abroad that although Israeli policy was based on the desire to open the gates to every Jew, they should encourage the immigration of those who were able to contribute to the building of the country and discourage that of those who would constitute a burden.[88]

The Jewish Agency, whose social service apparatus was falling apart, decided as early as November 1951 on a number of criteria for the selection of candidates for immigration to Israel. It was decided that 80 percent of the immigrants should be members of Aliyat Hanoar (Zionist youth cadres) or core groups that planned to settle on kibbutzim, that they not exceed thirty-five years of age, that they make a commitment to work in the field of agriculture for two years, and that they agree to take physical examinations.[89]

These decisions meant that families had to be torn apart: the elderly, the handicapped, and those unable to work were left behind in Morocco and other places, while the young and able-bodied immigrated to Israel. The regulations did not remain in force for long; after less than a year they were changed. The principle of selection remained in effect until 1956, although it was enforced less and less as time went on.

Selective immigration became an issue of public debate. The government and Jewish Agency were attacked by the opposition on both the Right and the Left. Ahdut Haavoda was vehemently opposed to selective immigration and demanded that all forms of it be abolished,[90]

The politicians who advocated slowing down the pace of immigration and allowing only the able-bodied to immigrate did not dare to bring their arguments out into the open, for they contradicted an important national goal—the ingathering of exiles. This goal was also responsible for a good part of the international support for the new state. They gave up the battle without a fight, apparently realizing the potential political damage it might do.[91]

The general attitude toward the new Oriental immigrants was that their Arab culture constituted a threat to the social, cultural, and economic achievements of the new state. It was said that bringing hundreds of thousands of unsuitable persons into the country would benefit neither Israel nor the people themselves, who in many cases would be even more miserable and bitter than they were in their countries of origin.[92]

Prime Minister David Ben Gurion was among those who perceived Israeli society prior to the

mass immigration as a cohesive society—the finest essence of the Jewish people—and the new immigrants as backward and almost subhuman:

> A good many of the immigrants are illiterate and show no signs of Jewish or human culture. Two factors are at work; time and place. They were born during a period of destruction, a period of world war and of material and spiritual decline . . . they come from backward, distant, suppressed and exploited lands.[93]

Ben Gurion charged the host society with the task of bringing out the hidden strengths of the new immigrants, whom he described as "human dust," in order "to instill in them" the values of the existing society. He optimistically described the future as a time in which the immigrants would be actively involved in social and cultural institutions.[94]

It has also been suggested that the growing inequality between the new immigrants and the host society was obscured by the fact that the unit of analysis was the whole society rather than the various social groups within it. The leaders were said to focus on the state as an egalitarian and universalistic society, ignoring the fact that the interests of the immigrants conflicted with those of veteran groups.[95]

As a result, the official explanation given for the absorption problems of the new immigrants from Arab lands focused only on the characteristics of the immigrants themselves, as perceived by political leaders and social scientists, and not on the relations between the new immigrants and other parts of the system. Thus the immigrants were blamed for their situation.[96]

At the time of the mass immigration, the claim was made that the immigrants' complaints about the absorption process originated in their own subjective perceptions rather than in the realities of life in Israel. Thus, what was in need of change were their perceptions and not the reality. This was the conclusion of a 1954 interdepartmental report on the situation in the transit camps. The reporting committee was convinced that there was no violation of the rights of any of the various Jewish groups and therefore did not recommend that any steps be taken in this regard. It noted that the government had a consistent policy of raising the standard of living of the backward residents and that it was working toward this end through the construction of housing projects, the imposition of compulsory education, and the provision of vocational training for adults. In the opinion of the committee members, the new immigrants harbored subjective feelings of inferiority that had to be changed. For this purpose, they recommended speeding up the process of absorption, and making special efforts to impress upon the immigrants the ties between them and the Israeli nation. They added that the veteran population had not done enough to welcome their brethren from India and the Arab countries.[97]

As elections neared, the political system, especially the ruling party, organized to capture the votes of the new citizens, whose sheer numbers made them an important political target. The battle over which school system the new immigrants would belong to was part and parcel of the contest for their electoral support. It allowed the various parties to present the political race as a desire on the part of the veteran community to help the new immigrants overcome their backwardness so that they would fit into Israeli society.[98] The battle was so acute that it led to the resignation of the Cabinet in 1951.[99]

Politicians from the religious parties contended that the introduction of secular education into the immigrant camps was a violation of freedom of conscience, a modern-day inquisition against the Jewish religion that exploited the miserable living conditions of residents of the transit camps.[100] The conflict appears to have caused great damage to the society in the making—it wrenched the immigrants from their cultural traditions and also led to moral turpitude on the part

of the absorption agencies. These did not always take the opinions and beliefs of the immigrants into account and, as a result, "values like individual freedom, tolerance and fair play were replaced by cynicism and political and ideological opportunism."[101]

The battle ended with the defeat of the Orthodox sector and its agreement to continue to control the same proportion of schools that it had controlled prior to the establishment of the state.[102] This meant that the lion's share of the schools, and with them the socialization of the new immigrants, remained in secular hands.

The battle for the immigrants' votes aroused fears over the future of democracy in a country a good part of whose population was unacquainted with the democratic rules of the game. It was said that until the educational level of the new immigrants was raised and they learned how to play the game, it would be difficult to rule them through persuasion alone—that is, without recourse to compulsion.[103]

The Fight for the Immigrant Votes

The ruling party was afraid that the religious parties might increase their electoral power, the outcome of which they feared would be a theocracy created by a democratic majority. Accordingly, the major absorption agencies, which were under the control of Mapai, organized to prevent this from occurring. The new immigrants were not permitted to choose which educational stream or political movement they wished to join. Their future was determined by a battle between the existing parties, in which Mapai usually had the upper hand. The immigrant who decided to join Mapai had a better chance of obtaining a job, an apartment, and other benefits. When the provision of vital services depended on being a party member, it was clear that one's motivation for joining had nothing to do with ideological commitment[104]

At election time, promises were showered on transit camp residents and various pressures were brought to bear on them. These manipulations included the actual purchase of votes. Pre-election promises, which were not followed by any improvements in the situation of the new immigrants after the elections, did not contribute to their faith in the democratic political process.[105]

Mapai's political machinations paid off in local as well as national elections. In the elections to the Second Knesset, held in 1951, Mapai captured between 37 and 50 percent of the vote in the transit camps, compared with 37 percent of the vote of the total population. In many camps, Mapai received 50 percent or even as high as 70 percent of the votes cast.[106]

In a situation where political parties increased their votes by promising housing, employment, and educational benefits in return, the differences among them lost their ideological meaning. The new immigrants went through a process of political socialization in which utilitarian values were more meaningful than ideological ones. A study of the local leadership in the development town of Rosh Haayin gave a variegated picture of the relations between the immigrants and the authorities.[107] The activities of the political parties centered on the handing out of various benefits, and some of the residents of the town were card-carrying members of several parties. Replies to questions concerning community life showed that only about 20 percent of the respondents understood the purpose of the local council and only 10 percent were of the opinion that local development depended on the residents themselves. The others believed that it was a

function of the financial aid and services provided by the central government. The author contends that the chaos created by the political parties had resulted in a lack of confidence in all local government agencies except those that assumed an authoritative stance.

There was no place for the development of a communal identity, and residents of development towns became dependent on national services; they were indifferent to local leaders, and inclined toward passivity. In another study, conducted in Beer Sheba, a town with a large new immigrant population, political socialization was described as a process in which the parties buttressed their positions through bargaining and co-opting the leaders of the various ethnic groups, in exchange for lobbying on their behalf.[108]

Since during the first years of immigration the new immigrants' support could not be obtained except through ethnic associations, Mapai maintained seven such organizations, which fought among themselves. Party institutions contained representatives from the various ethnic groups; membership was not on an individual basis. The other parties also adopted the method of ethnic representation.

In view of the foregoing, the events that occurred in Haifa's Wadi Salib neighborhood in July 1959 were atypical: a locally organized group called on new immigrants to abandon the other political parties and join them. Riots ensued. During the rioting a Mapai club headquarters and the Haifa Workers' Council building were attacked. Several shops were looted and demonstrators and police injured. This happened several years after the organized immigrants had come to Israel, and it reveals their bitterness toward the political parties and their desire for political autonomy. The Wadi Salib riots led to the inclusion of North African representatives on the lists of the various political parties.[109]

One sociological explanation attributed the Wadi Salib riots to the immigrants' lack of Zionist background and knowledge of the democratic process. This explanation has been criticized for not taking into account the economic and political structure of Haifa at the time (its political centralization) and the fact that the rise of the economic and political elite was made possible by the very dependence and inferior status of the new immigrants.[110]

In analyzing the implications of the processes of political socialization undergone by the new immigrants, one cannot help but point to the influence of the political culture and the political stability of the state. These factors were responsible for the huge gap between ideology and practice, the latter of which was based on the division of spoils between groups and individuals in return for their votes. Ideological identification was replaced by identification with persons and symbols; for example, there was an attempt to identify the achievements of the new state with the personality of David Ben Gurion.

The influence of these processes was not limited to the period in question. It has been argued that during the 1960s, the political socialization of the younger generation of new immigrants, which took place against the background of authoritarian, traditional family life, led them to reject a democratic political culture and to look for "a strong man." They were also devoid of sensitivity regarding the issue of civil rights and had little interest in politics. The opposing contention is that those who point to the lack of political activity on the part of new immigrants from Arab lands fail to connect this phenomenon with their feeling of helplessness and the political system in which that feeling developed.[111]

Sociologist Deborah Bernstein argues that the behavior of the new immigrants was connected with the attitude of the absorption authorities, which was characterized by rejection of the immigrants' culture and led to a denial of their humanity. In her opinion, all those who dealt with the absorption of immigrants—politicians and professionals alike—treated them as lacking in

judgment and as needing to shake off their previous culture in order to take on the new one.[112] Bernstein cites the words of Deborah Elinar, supervisor of social welfare services in the Jerusalem region, who described the experience of helplessness in the transit camps:

> [T]he people fell apart. Yes, they fell apart. A whole generation, about a hundred thousand people. We caused them to fall apart; we destroyed their values, their ability to decide for themselves. That is the great damage we did through our paternalism and the whole idea of sending them to transit camps ... that broke their spirits, and it continues generation after generation.[113]

The process of absorption allowed democratic pluralism to survive at the expense of the new immigrants, who were despised by the host society and came to despise themselves. The leaders continued to treat the issue of civil rights as marginal, while creating long-term relations of dependency between the immigrants and the establishment. The result of these political machinations was to reduce the importance of ideology in Israeli politics as well as to dampen the aspiration for egalitarianism and pluralism. These developments were bound to influence the political culture that emerged in the 1960s and 1970s, allowing tendencies toward isolationism and intolerance to come to the fore and widening the social and economic gaps in Israeli society.

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3 Religion, Politics, and Religious Coercion

Introduction

In Israel, freedom of religion means freedom from religious coercion and is one of the main civil rights issues. Since the establishment of the state, it has been the subject of numerous bitter social, political, and ideological conflicts.

Israel is in a unique situation when it comes to the relation between religion and state, for in all other Western democracies, the state champions universal secular values, even if its population is religiously conservative, as is the case in Italy and Spain, for example.

The controversy in Israel over religion has not been lacking in violence. Attempts made over the years to effect what is termed as "the bringing together of hearts" between religious and secular Jews have not been crowned with much success. The present chapter will examine the main implications of religion for civil rights and democracy in Israel. It will analyze the various ideological positions, the attempts on the part of the religious parties to enact religious legislation and the influence of these parties on other legislation, and the religious background of rightist movements that have gone so far as to challenge the legitimacy of the government of the state of Israel.

In the prestate period, the attitude of the leadership toward religion was characterized by uncertainty and by the unwillingness or incapability of delineating a clear policy. It is important to recall that at least in the beginning, the Labor movement was hostile toward religion. This was due to the fact that socialist Zionism aimed at creating a new society and a new Jew who was to be the antithesis of the Jew raised in traditional Jewish society. This attitude was reflected in attempts to give new meaning to traditional ceremonies and myths. For example, the kibbutzim wrote a new Passover Haggadah that revolved around nature, spring, and the nationalist aspects of the holiday.

The Labor movement's attitude was not shared by all sectors of the Jewish community in Palestine. The religious institutions were, of course, opposed to secularism, and the Revisionist movement criticized it as well. Thus as early as the Yishuv period, a number of different ideologies developed side by side within the structures of self-government of the Jewish community.[1]

As independence neared, secular mainstream Zionism became more inclined to cooperate with the religious sectors. As a result, the manner in which political leaders dealt with the issue of religious coercion was flawed from the very start; they tended to look for simple, practical solutions to problems that were in fact complex. Often, as I noted in the discussion regarding the Constitution, the interests of the religious parties coincided with those of the dominant ones, resulting in mutual support.

The most critical step in the consolidation of relations between the Labor movement and the religious parties was no doubt the famous "status quo" agreement made before the establishment of the state. In June 1947, the UN Commission convened in Jerusalem in order to draw up recommendations with regard to Eretz Israel. The Zionist leadership, which was interested in

presenting a united front, tried to prevent a situation in which representatives of the orthodoxy would appear before the Commission and express open opposition to the establishment of the state. A few days before their scheduled appearance before the Commission, a delegation of Orthodox Jews met with David Ben Gurion with a list of demands. As a result of that meeting, the leadership of the Jewish Agency, the helm of the state in the making, sent a latter to Agudat Yisrael, the contents of which came to be known as the "status quo" agreement. Signed by David Ben Gurion, Rabbi Fishman Maimon, and Yitzhak Grinboim, the letter promised that the Sabbath would be the official day of rest for Jews, that institutional kitchens intended for Jews would follow the Jewish dietary laws, that the jurisdiction of Jewish law over matters of personal status would be maintained "in order to prevent the house of Israel from splitting asunder," and that the religious educational system would continue to enjoy full autonomy.[2]

Thus the guidelines of the first government of Israel, approved on November 3, 1949, stated that freedom of religion, conscience, speech, education, and culture were to be guaranteed. The state would provide for the public religious needs of its inhabitants but would refrain from interfering in matters of religion. The Sabbath and Jewish holidays would be fixed days of rest in the new state of Israel.

In the first years of statehood, power struggles between Mapai and the other parties led to Mapai choosing the National Religious party as its coalition partner. The rationale for this choice was the belief that the National Religious party would be satisfied with religious legislation in limited spheres, beyond which it would not attempt to extend its influence. Yet Ben Gurion was aware of the pitfalls of this assumption:

> The very existence of a religious party involves a conscious or unconscious desire to impose religious laws and rabbinic tradition on the state. The freedom of religion and conscience that the religious party demands for itself is not something it is prepared or capable of granting to others.[3]

Nevertheless, Ben Gurion was in favor of ideological compromise and argued that there was no need to come to a final decision regarding issues of religion, for these would constitute a bone of contention for a long time to come. He believed that an uncompromising opposition to religion, on the one hand, or attempts to impose religious law, on the other, were liable to cause irreparable harm; at best they would inhibit the process of social consolidation which he viewed as a precondition for the survival of the state.[4]

Although the leaders of Mapai were secular Jews, they argued that for the sake of the state they had to act against their own inclinations and party platform and make concessions to the religious sector. This early policy can apparently be attributed to political expediency rather than ideological agreement.[5] However, beginning in the mid-fifties, proreligious positions taken out of political expediency—in order to compete with the religious parties for the votes of new immigrants—gradually came to be advanced for their own sake. The demand for depoliticization of religion turned into a demand to break the monopoly of the religious sector over traditional religious values, which were then said to be the property of the entire Jewish community.[6] Subsequently, more Jewish content was introduced into the curriculum of the secular public school system.[7]

While the moderate secular political parties (Mapai, the Liberal party, Herut) gave the demands of the religious parties political and even ideological consideration out of a desire to avoid offending them, other secular parties, like Mapam, viewed these demands as political blackmail and did not assent to compromise. However, when the latter became part of the coalition government, its position changed, and it tended to accept and even justify the

concessions made by Mapai.[8]

Among the parties that usually showed greater commitment to the fight against the institutionalization of religion were the General Zionists and the Independent Liberals (center) and Ahdut Haavoda (Left). The Independent Liberals were active mainly on the marriage issue. They did not demand an end to mandatory religious marriage, but rather advocated civil marriage for those unable to wed under Jewish law, basing their arguments on humanitarian considerations. The absence of a demand for separation of religion and state and for civil marriage for anyone who preferred it to a religious ceremony was a clear indication of the decreasing militancy of secular politics.[9]

Ideological Controversy over the Role of Religion

The debate over the status of religion in Israel was not limited to the area of politics; it has constituted a continuing ideological controversy between those in favor of preserving the status quo and those who would change it. A brief look at these two positions will give us further insight into an ongoing debate in Israeli society.

Even those who oppose the present status of religion do not necessarily view it as the outcome of political compromise alone. Some believe that one should not underestimate the tremendous importance of tradition and of the force of attraction of religious myth, even for the nonreligious.[10] There is also awareness of the fact that Jewish law cannot take a favorable view of the state, for that would require a change in its conceptual foundations so as to grant the government immunity from the authority of Jewish law and to acknowledge the right of the state to enact regulations and statutes that contradict Jewish law. Those who support the separation of state and religion believe that the only possible solutions to this dilemma are either special exemptions for the religiously observant or religious coercion for secular Jews. The former involves releasing individuals from certain obligations that are contradictory to Jewish law—even though everyone is aware of the fact that these tasks will be incumbent on other Jews, as the majority of Israel's citizens are Jewish. On the basis of this principle, religious Jews received exemptions from working on the Sabbath and from serving in the armed forces—for females, by declaring themselves religiously observant, and for males, by enrolling in a yeshiva.[11]

It should be pointed out that this solution is only partial: Jewish law does not allow a Jew the option of "accepting" Jewish law, for his very identity is determined by his subordination to the law. There is no possibility of arguing that those who by definition live under Jewish law do not wish to live under it. According to the Orthodox point of view, the government may make laws not contained in the Torah, but it does not have the authority to enact statutes that contradict it. Despite the fact that the authority invested in the religious establishment in Israel has its origins in decisions taken by institutions of government, under Jewish law the elected representatives of the majority have no authority over the religious minority; on the contrary, the religious minority has every right to impose its opinion on the secular majority. This paradox constitutes the basis for the argument that there is a clear opposition between Jewish law and freedom of religion as practiced in a secular state. The idea of moral autonomy is foreign to Jewish law, to which obedience is central.

In its Declaration of Independence, the state of Israel acknowledged its obligation to guarantee "freedom of religion and conscience," stressing the difference between the two. Thus in present-

day Israel the controversy is not over freedom of religion but over the freedom of the citizen in matters of religion—his right to worship God or not to worship God if he so desires. Those who advocate separation of religion and state contend that the state of Israel forces the Torah on its citizens by law, giving them no choice but to adjudicate matters of personal status in religious courts, and that it does not recognize alternative movements in Judaism.[12] Advocates of separation of religion and state also point out that a direct violation of civil rights is inherent in a religious test (the "who is a Jew" issue) that distinguishes between first- and second-class Jewish citizens. They add that there can be no freedom of conscience in matters of religion when the state deprives its citizens of basic rights like the right to marry.[13]

An intermediate approach with regard to the status of religion is the argument that every society has the right to defend its basic values, even if their origin is in religion, but that the test of whether a particular norm is worthy of becoming a binding one cannot be based on the dictates of religion but must depend on whether the norm is socially acceptable.[14] According to this argument, Israeli law is replete with examples of the imposition of religious norms that have not withstood this test. The imposition of religious laws on citizens of the state in matters of marriage and divorce, and the subjection of citizens to religious courts, the outcome of which is unnecessary suffering, are examples of the improper imposition of a religious norm.

Advocates of the intermediate approach offer a distinction between religious norms that are not socially accepted and those that are; in the case of the latter, making the norm binding does not constitute a violation of freedom of conscience and religion. The test is whether the main purpose of the law is secular and whether it is acceptable to the majority. They contend that in the present situation, the political process that is supposed to determine which norms should be imposed and which should not is flawed because the religious parties have tipped the scales in the various coalition governments. The result is that the laws enforce religious norms that are not socially acceptable, and citizens have no choice but to apply to religious authorities and accept the limitations imposed by religion.[15]

In contrast, those who support the present status of religion in the state contend that not all religious legislation constitutes coercion. They admit that the Law of Marriage and Divorce may violate the freedom of conscience of the secular individual, but they do not view it as religious coercion, because, as they see it, broad sectors of the secular public are willing to accept the law with a number of changes. On the other hand, they view the situation of the Sabbath laws as more complex, as there is increasing opposition to them; recent years have seen vociferous demonstrations organized by both secular and religiously observant Jews over the opening of cinemas in Jerusalem, Petah Tikva, and other cities on Friday evenings.

Some advocates of this approach believe that only a minority of the secular public oppose religious legislation because of its violation of freedom of conscience. The fact that the majority do not view religious marriage as coercion is evidence of the wane of secularism as a principle or ideology, and of its becoming a matter of routine or life-style bearing no significance as far as values are concerned.[16] With regard to the contention that religious legislation is mainly the outcome of coalitional negotiation, that it alienates secular Jews from religion and violates freedom of conscience and free choice on the part of the individual, they reply that Judaism is not something up to individual choice and that Jewish law is binding on the entire nation.

The religiously observant claim that their demands for religious legislation are motivated by altruism; they feel obliged to look after the whole Jewish population and to preserve the Jewish nature of the state. Among the religious sector, which is, after all, a minority, there can be discerned a growing tendency to protect its positions from external influence by forgoing the

effort to influence society as a whole. This has occurred in the wake of bitter struggles by Orthodox leaders reacting to what they perceive as secular intervention in the religious sphere, or "antireligious coercion" (in matters concerning religious education, conscription of religiously observant women, and the Law of Anatomy and Pathology, which limits organ donations and the use of corpses in medical studies).[17]

Obviously, the formal separation of religion and state will not prevent conflicts over issues like the conscription of women and yeshiva students. The ideological nature of these conflicts and the overriding desire to preserve national and political unity are the main reasons for the political compromise, involving mutual concessions, on the "status quo" agreement.[18]

The official position of the Orthodox establishment was advanced by Rabbi Simcha Miron, who until recently served as director of the Rabbinic Courts and director-general of the Ministry of Religious Affairs. In his opinion, the principle of freedom of religion facilitates the observance of religious commandments because the principles and commandments of the Jewish religion constitute a clearly distinguishable corpus; in contrast, freedom of conscience means protection of the viewpoints of each and every individual, and society cannot have an a priori obligation to every individual within it. If this were the case, one could act in accordance with any world view, and this situation could cause harm to other individuals, to social arrangements, and to the public interest, and eventually lead to anarchy. Therefore, he contends, the main purpose of religious legislation in Israel is to guarantee freedom of religion to the religiously observant and to create a basis for religiously observant and secular Jews to live together. Without it, the religious sector of the population would have to seclude itself within a social and economic ghetto.

In the past, Rabbi Miron argued that although the judicial branch of government should have served as the main source of support for religiously observant Jews—a minority whose rights need to be defended—there are almost no cases in which the High Court of Justice has granted redress to a religiously observant Jew for violations of his freedom of religion. In his opinion, the judgments of the High Court in matters of freedom of religion have caused a crisis of confidence in the religious sector.[19]

Liberal Opposition among Professionals and the High Court of Justice

Even in the first years of statehood, the "status quo" agreement was the subject of ideological as well as extraparliamentary public debate. Among the groups that opposed the increasing power of the religious sector was the Canaanite movement, a culturally oriented group that was active mainly during the first years of statehood and for short periods after the Six-Day War and the Yom Kippur War. The Canaanites preferred to ignore the connection between residents of Israel and the Jews of the Diaspora and to gloss over Diaspora history. They perceived the state of Israel as descending directly from the ancient Jewish civilization, and advocated an end to Zionism and assimilation into Semite culture. They also disapproved of Jewish institutions, which they viewed as a Diaspora development.

Another group, the League Against Religious Coercion, was organized in 1950 by a group of intellectuals. Its major efforts consisted of demonstrations and appeals to political parties and

public figures. These reached a peak in the first half of the 1960s.

In economic and professional spheres there were groups that opposed religious legislation, like the large industrial complexes for which the "Sabbath laws" caused special problems. Public transport companies also fought travel limitations on the Sabbath and on holidays, as did gas companies and sectors of the entertainment industry. Labor unions, like that of the port of Haifa stevedores, defended the right of workers to labor on the Sabbath for higher remuneration. Members of the free professions were involved in conflicts connected with their own professions. For example, physicians opposed the Law of Anatomy and Pathology, which set limitations on post mortem examinations. Lawyers made efforts to find loopholes in religious legislation. The Ministry of Justice proposed legislation in the areas of adoption and inheritance that ran counter to Jewish law, and on various occasions the attorney general defended secular interests.[20]

The position of the legal community regarding the issue or religion and the state can be explained in the ideological dimension as a fight for individual rights, and in the professional dimension as criticism of the Rabbinic Courts, a system parallel to the civil system, which they argued was not appropriate in a modern society. Artists and social scientists often expressed secular, anticlerical views. These can be attributed to the lack of social contact with Orthodox elements and to the nature of the intelligentsia in a modern society, which is largely characterized by universal values, tendencies toward socialism or liberalism, and high mobility.[21]

In cases in which there was no precedent, the High Court of Justice tended to favor antireligious traditionalism (as evidenced, for example, in permission granted to gas stations and the national television network to operate and broadcast on the Sabbath, the decision regarding "who is a Jew" appeals, and numerous other judgments in personal status matters). The pressure brought to bear by the religious parties led to a legislative change in the definition of who is a Jew under the Law of Return after the verdict of *Shalit* v. *Ministry of the Interior*, which acknowledged the Judaism of the Shalit children despite the fact that their mother was not Jewish. Thus, today a Jew is defined either as a person born to a Jewish mother, or a person who converted and is not a member of another religion. As we will see below, the Nationality Law recognizes the right of persons who do not fit this definition to immigrate to Israel. While religious legislation, like the redefinition of who is a Jew, reduced court battles against the institutionalization of religion, the campaign itself was not abandoned. Rather, the venue changed, and the target became the Rabbinic Courts.

Yitzhak Olshan, past president of the High Court of Justice, argued that although the secular political parties and their constituencies were not interested in legislation designed to strengthen the status of Jewish law, in order to keep their promises to religious partners in the coalition government, the government has had to resort to administrative means for which there is no legal authority and which contradict the principles of the rule of law. Thus, for example, when it came to the Population Registry Law, the minister of internal affairs preferred to give internal orders to his officials rather than promulgate changes in the form of regulations, for fear they would not be approved by Knesset committee. Thus, in Justice Olshan's opinion, the High Court of Justice is the only body that can prevent policymaking by administrative fiat.[22]

Olshan described how as early as the 1950s he tried to convince the Cabinet to introduce a law that would permit civil divorce for persons in mixed marriages, granting jurisdiction to the district courts. Dov Yosef, the minister of internal affairs at the time, introduced a law to the ministerial committee on legislation, but the law failed to pass due to the opposition of Minister

of Religious Affairs Zerah Warhaftig. Olshan viewed the incident as "a perfect example of how a coalition government can cause a democratic regime to lose its meaning."[23]

In contrast, Warhaftig argued that Olshan had gone too far; Olshan had not spoken with him on the matter beforehand because Olshan had been told that Warhaftig would not support such a law without first obtaining the consent of the chief rabbis. Warhaftig defended his opposition to the law, saying that he had to make sure that dissolving mixed marriages would not turn into a way of legalizing civil divorce. In his opinion, dissolving a marriage in the Rabbinic Court was to the benefit of both spouses as well as the children.[24]

Marriage and Divorce

The Rabbinic Courts Jurisdiction Law (Marriage and Divorce) of 1953 was passed by the Second Knesset after considerable controversy and debate. It provided that for Jews who were citizens or residents of Israel, matters of marriage and divorce were to be under the exclusive jurisdiction of the Rabbinic Courts, and that marriage and divorce were to follow Jewish law. At the time of its passage, acting Prime Minister Moshe Sharett argued that it was the order of the day, a supreme necessity for the unity of the Jewish people and the ingathering of the exiles. The authority in which execution of the law was to be invested, the Chief Rabbinate, would be under scrutiny. Jewish law had to be adjusted to the customs of the day, to notions of equality, human dignity, and civil rights.[25] Even before the passage of this law, the Rabbinic Courts had received a monopoly over matters of personal status with the passage of Article 5 of the Women's Equal Rights Law of 1951, which stated that the intent of the law was not to change the laws concerning permissions and prohibitions with regard to marriage and divorce.

The Rabbinic Court acts in a clearly patriarchal manner. Women are not permitted to serve as either judges or witnesses. Under Jewish law, the status of women is inferior to that of men, and they are seen as playing a passive role in both marriage and divorce: it is the husband who delivers the divorce paper to the wife. Beyond this discrimination, the biggest practical problem is that of divorce refuseniks (there are between 1,000 and 7,000 refuseniks, depending whose figures you use, in the absence of official ones). In certain cases, Jewish law allows the Rabbinic Court to force a husband to give his wife a divorce, but even in such cases the husband must grant the divorce "of his own free will." When the Rabbinic Court gives a judgment of "compulsory divorce," the district court has the authority, upon the request of the attorney general, to imprison the husband until he grants a divorce. There are some cases in which the husband has remained incalcitrant even after being incarcerated. However, the Rabbinic Courts rarely issue such judgments. The outcome of this situation is that women are often forced to agree to economic concessions in order to get a divorce.

The male divorce refusenik, on the other hand, can start a new family without fearing that the children born to the union will be bastards (meaning that they can only marry other bastards). Under certain conditions, a man may receive permission from a hundred rabbis to take a second wife without divorcing the first.[26] Thus in matters of personal status there is no gender equality before the law, and this inequity is the indirect result of legislation passed by the Knesset. Moreover, in practice an extraterritorial legal zone has come into being in which there are no guarantees of democratic process.

Women's organizations in Israel have been active in this area for years. They have set up legal

aid bureaus for women and have proposed a number of reforms designed to solve the various problems through good will. However, in view of the fact that the religious establishment in Israel is becoming stronger and more extreme, these attempts appear ineffective.

The High Court of Justice has been quite active in the area of marriage registry, due to the appeals of persons adversely affected by the existing law. Over the years a number of ways have developed to allow a couple to cohabit legally even though Israeli law forbids them to marry:[27]

1. Marriages that take place abroad are officially recognized, following the precedent-setting judgment in *Funk and Schlesinger* v. *Min- ister of Internal Affairs* (143/62) before the Supreme Court, which determined that the Ministry of Internal Affairs was obliged to register the marriage of an Israeli couple who married abroad (so-called "Cyprus marriages"). Thus, marriages of a Jew with a non-Jew, or marriages conducted by Jewish Reform, Conservative, or Reconstructionist rabbis, have become legal.
2. Marriages that take place in private ceremonies are recognized. This is a matter that affects Jewish couples forbidden to marry according to Jewish law—for example, a Cohen* who weds a divorcee, a woman who has gone through *halitza* (release from levirate marriage), or a convert. In such cases, private marriage ceremonies in accordance with Jewish law are held without the agency of the Rabbinate. The Supreme Court requires the registry of such marriages, as in the case of *Gurfinkel and Haklai* v. *Minister of Internal Affairs* (80/63).[28]
3. Common-law marriages are recognized. However, in cases in which the woman did not receive a divorce from a previous husband, any children of the union are considered bastards.

Although the present legal situation preserves the "status quo" agreement, in practice ways have been found to circumvent the law. This situation is in contradiction to international conventions and to accepted practice in democratic states. It should be pointed out that in contrast to religious law, the laws of the state of Israel do not discriminate against children born of illicit unions. In recent years social awareness of the notion of single-parent families created as a result of divorce, widowhood, and other causes has increased, and the single parent has become the recipient of various benefits.

Jewish Law and Religious Coercion

Against the background of the bitter controversies over the issue of personal status, religious leaders who wished to strengthen democracy in Israel felt they could not compromise, even if the outcome of their stance was a conflict between religious law and civil rights.[29] Moshe Nissim, a leader of the Likkud party and a former justice and finance minister, expressed the position of the religious sector without mincing words:

> whether it is the Likkud or the Alignment [of Labor and Mapam], each in its turn, the basis is the realization that [religious law] is vita! for the preservation of the integrity of the nation and its unity. *This value is more important than any other consideration, even if it conflicts with civil rights, and I say this unequivocally.*[30]

Nissim had reservations about the idea advocated by Orthodox circles of a Jewish state ruled by Jewish law; therefore he suggested a compromise that involved recognition of the supreme

authority of the legislature. At the same time, Nissim stressed that every religiously observant person wished the laws of the Knesset to derive from and be in keeping with Jewish law.[31]

Shulamit Aloni, a Knesset member at the time of this interview, now minister of education, was a leader of the fight against religious coercion and viewed the mutual relations between the state, religion, and civil rights quite differently. In her opinion, the religiously observant would like the Knesset to be subordinate to the Rabbinate. As an example, she pointed out that in the Law of Return and the Law of Population Registry the articles that pertain to the status of women are not admissible as evidence and are not binding on Rabbinic Courts.[32]

The battles over the laws of personal status, dietary laws, and the Sabbath are not the only ones in which the connection between religion and state were a question. The problem has also come up during the legislation of laws dealing with issues that have clear implications for the secular population:

1. The Military Service Act of 1949, which allows for deferment of military service for yeshiva students and exemptions for young women who declare themselves religiously observant. In 1979 an amendment was passed to make it easier for women to receive exemptions for religious reasons. In this connection, it should be mentioned that the National Service Act of 1953, the intent of which was to oblige young women who received exemptions from military service for religious reasons to serve the country in alternative ways, was never enforced due to political pressures.
2. The fight over the legislation of the 1977 amendment to the Criminal Law, better known as the abortion law.
3. The Nationality Act of 1952, which deals with the right to receive Israeli citizenship, was legislated out of religious-nationalistic considerations and led to discrimination against the Arab minority, even though large sections of the law were later amended. What follows is a detailed analysis of these issues, as they are relevant to the principles of civil rights and equality before the law.

Exemptions from Military Service

At the time of the establishment of the state, there was constant struggle between the yeshiva heads and religious parties, on the one hand, and national leaders, led by David Ben Gurion, on the other, over the granting of deferments or exemptions from military service. Ben Gurion did not accept the demand to exempt yeshiva students from military service. An agreement was reached whereby military service would be deferred for as long as students remained in the yeshiva (Article 36 [D] in the Military Service Act [Combined Version]—1986).[33]

At the time of the Knesset debate over the Military Service Act, the religious parties strongly opposed the recruitment of women into the army. Minister of Welfare Rabbi Yitzhak Meir Levin even warned that many parents would use force to prevent their daughters from being conscripted.[34] Representatives of Hapoel Hamizrahi tried to find a way in which young women could contribute to the state and at the same time not serve in the military. They came up with a proposal that women do a year of national service in which they would undergo weapons training in border areas. They opposed limiting the exemption to religious women and wanted to include all women.[35]

Zerah Warhaftig expressed the world view of the religious sector with regard to the main role of women in society and to the problem of inequality aroused by granting exemptions to women only:

> [C]onscripting women into military service endangers fulfillment of the main role of women, *the role of mother in Israel* ... conscripting the girl results in unwillingness on the part of many to accept the burden of proper family life and contradicts the idea of encouraging the birth rate ... the compromise suggested by the government ... exempting religious women from military service endangers a proper constitutional regime and runs counter to the principle of equal rights in the state. If the government and the Knesset are convinced that there is a law that will never be accepted by a large part of the population, it is better to concede that law, and not to violate the equal rights of the inhabitants by fixing different categories of citizenship.[36]

At the end of the debate, the Knesset decided to institute compulsory military service for females, but at the same time followed the suggestion of Moshe Una, representative of Hapoel Hamizrahi, to word the article dealing with exemptions for religious women (11.3) as exemptions on the basis of conscience rather than religion. While the religious parties strongly opposed the conscription of females, in the end they accepted the compromise.[37]

In 1952 the Knesset passed an amendment to the law; it stated that a woman would receive an exemption for religious reasons only if she could prove that she was religiously observant, and a declaration was not deemed sufficient for this purpose.[38] This amendment led to a situation of inequity in which the state of Israel did not grant exemptions from military service for reasons of conscience to men while it did to women. The Israel Association for Civil Rights pointed this out in its appeal to the defense minister in the case of Danny Amir, who had served in the army but refused to serve in the reserves for reasons of conscience. The Association argued that if thousands of yeshiva students as well as the young women who declared they were religiously observant could be exempted from military service without doing damage to state security, young men for whom military service was against their principles could also be exempted.[39]

The issue of freedom of conscience came up at the Knesset hearings on Amendment 13 to the Military Service Act, proposed a short time after the Likkud came into power in 1977. The amendment was part of the coalition agreement with the religious parties. Its purpose was to do away with the need for exemption committees, so that a young woman could be exempted from military service on the strength of her declaration that she was religiously observant. The effect of this amendment would be to end all provision for exemption from military service for reasons of conscience.[40]

At the hearings, Member of Knesset Amnon Rubinstein presented a long list of countries that grant exemptions for reasons of conscience, including England, the United States, West Germany, Holland, Belgium, France, and the Scandinavian states. He opposed abolishing exemptions for reasons of conscience.[41] However, Amendment 13 passed due to the votes of members representing the parties in the coalition government. It should be noted, though, that the issue of the military service obligations of yeshiva students and religious women remained on the public agenda. Even today, it constitutes one of the most salient objects of controversy between the religious and secular sectors.

The Abortion Law

Diametrically opposed positions regarding the status of women in Israeli society were reflected

in the public debate over the abortion law. Until 1977, abortions for nonmedical reasons were prohibited in accordance with Article 175 of the Mandate Criminal Law of 1936, adopted by the state of Israel. The statute provided for imprisonment of up to fourteen years for the performer of the abortion and up to seven years for the woman who aborted. In 1966 the Cabinet had proposed that the Knesset reduce these penalties, and the Knesset voted to reduce the penalty for the person performing the abortion to five years and to abolish the penalty for women who aborted altogether.

In practice, as early as the 1950s the attorney general had instructed the Cabinet not to prosecute physicians who performed abortions except in the following instances: where the abortion resulted in death, where the abortion was carried out without the woman's consent, or where it was performed by an unlicensed physician or in a negligent manner.[42] Over the years, a "black market" developed for illegal abortions. The services were performed under reasonably safe conditions, but they could not fulfill the demand for free and open abortions and caused discrimination between affluent and low-income women.

After prolonged debate, two proposed amendments were presented to the Knesset. The first, introduced by a coalition of legislators from the Right, the center and the Left, included five criteria according to which a woman could obtain an abortion and invested the authority for approving abortions in professional committees whose members were to include a doctor and a nurse. The second proposal was presented by Marcia Friedman, a leader of the feminist movement, and was supported by members of Knesset from the Likkud and the Alignment. Friedman's proposal provided for abortion on demand during the first ten weeks of pregnancy.[43]

Arguments in favor of requiring approval for abortions were advanced by a representative of the Alignment, Haviv Shimoni, who contended that a great number of abortions were being performed, only some of them in hospitals. He added that an important argument in favor of legalizing abortions was crowded living conditions, and stated that a woman should not be forced to bring unwanted children into the world. Marcia Friedman argued that a woman had exclusive rights over her own body, which did not belong to the homeland, the state, the medical committee, her husband, or her children. Citing figures indicating that abortions were three times more frequent among Ashkenazi women than among Mizrahi (Sephardic) women, she argued that the effect of abortion on demand would be to give all women an equal opportunity to obtain an abortion.[44]

The opponents of the proposed amendments, mainly members of the religious parties, argued that an abortion should not be performed except for medical reasons. The main target of their opposition was the article that allowed abortions due to the social circumstances of the woman involved. Another reason for opposition had to do with what Israelis refer to as "the demographic balance." Zerah Warhaftig called the proposed changes in the law anti-Jewish. He argued that the natural increase of the non-Jewish population was among the highest in the world, while that of the Jewish population was among the lowest. In his opinion, overpermissiveness with regard to abortions—that is, allowing abortions in cases other than those connected with the health of the mother or the fetus—would encourage the continuing decrease in the birth rate of Israel's Jewish population.[45]

What came to be known as "the abortion law" passed the second and third readings on January 31, 1977. It provided that abortions could be approved in cases in which the physical or mental health of the woman or the fetus were in danger, when the pregnancy was the result of rape or incest, or if the woman was unmarried or the father was not her husband. Finally, Article 5 allowed for abortions for family or socio-economic reasons. This provision, the purpose of which

was to aid women of low socio-economic status, those who could not afford private abortions, became the major target of opponents of the change in the law. A coalition agreement signed after the 1977 race between the Likkud and the religious parties included the repeal of Article 5. Minister of Health Eliezer Shostak presented the Knesset with figures showing that in the year and a half that had elapsed since the law came into effect, 42.8 percent of abortions had been based on Article 5.[46]

As expected, the proposal to repeal the socio-economic clause aroused public debate. Women's organizations held demonstrations and sent petitions and appeals to legislators from the parties in the coalition government asking them to oppose the repeal. The debate became one over the status of women in Israel and the right of the state to interfere in the life of a woman and her family in the name of politics and religion. During the Knesset hearing, this aspect of the issue was especially prominent in the words of Mordechai Virshuvsky, who complained that a small minority was attempting to force an untenable law on the general public. He denounced the position of the religious parties:

> Usually religious circles claim that while they oppose public desecration, they do not like to interfere with what happens in a person's home, with what goes on between a man and his wife in family life. And here they are doing the exact opposite. We now have an unequivocal political decision that tells a person, a woman, what she can and cannot do in the most intimate and personal matter in her life.... What we have here is a proposed law that is not only unacceptable but also involves interference with individual rights the likes of which can hardly be found in our statutes. I can even venture to erase the word hardly and say that such interference is unique in our laws.[47]

After a stormy debate, a roll call vote was taken. There was a tie, and the repeal did not go through. However, several months later the Cabinet once again introduced the proposal to the Knesset, and this time it passed, with the addition that abortion committees had to include a woman.[48] Both sides viewed the change as a "cease-fire" rather than as the end of the campaign, and from time to time demands have been raised by religious circles for greater strictness in the enforcement of the law, and by women's organizations for the reinstatement of Article 5.

The Nationality Act

Legislation regarding citizenship clearly reflects a preference for Jews and exemplifies the fact that Israel is a Jewish state. At the same time, the need for suitable remedies for the non-Jewish minorities in Israel has led over the years to a number of alterations in the law.[49]

Most states combine two major methods of obtaining citizenship—through birthplace (*ius soli*) and through consanguinity (*ius sanguinit*). Israel gives preference to the latter, the result of which is that a person born in Israel may not receive Israeli citizenship on the strength of birthplace alone.

According to the 1952 Nationality Act, there are six ways to obtain Israeli citizenship: through return, through residence in Israel, through birth, through a combination of birth and residence, through conferral, and through naturalization.[50] Article 2(b) enumerates the instances in which citizenship is obtained through return. The article does not mention Jews, but due to the context of the usage of the word "return," there is no doubt that the right of citizenship through return is reserved for Jews and members of their families. A Jew is defined in Article 4(b) of the Law of Return, amended in 1970 to include family members of Jews, including children, grandchildren,

spouses, and spouses of children or of grandchildren.[51] Thus the right of return and the right to citizenship through return are also granted to persons not considered Jewish by Jewish law. This amendment was passed in the wake of the public debate that arose after the Ministry of Internal Affairs attempted to revoke the right of return of persons who had suffered because of their own Jewishness or that of members of their families. As a result of the principle of citizenship through return to Israel, which was based on the principle of consanguinity, non-Jews who resided in Israel at the time of the establishment of the state found themselves without Israeli nationality.

In 1968 the law was changed in order to solve the problems of non-Jews and their children, who did not receive Israeli citizenship because they failed to fulfill the conditions of the law. Article 4(a) states that whoever was born after the establishment of the state and has never held any other citizenship is entitled to Israeli citizenship if he requests the same between his eighteenth and twenty-first birthday and has been a resident of Israel for five consecutive years prior to the request.[52] In 1980 another obstacle to obtaining Israeli citizenship was removed when Article 3 was amended. This change eliminated the necessity of those born prior to the establishment of the state to prove consecutive residence in Israel from the time of the establishment of the state to the coming into effect of the Nationality Act.

In its present form, the Nationality Act grants the right of citizenship to all Arabs living in Israel. Still, two problems remain for non-Jewish citizens. The first is that spouses are not automatically entitled to Israeli nationality, whereas they are with Jews. The second is discrimination against non-Jews regarding the rights of returning residents.[53]

Religion, Democracy, and the Conflict over the Territories

After the Six-Day War, in which Israel occupied places of great historic and religious significance like East Jerusalem, Bethlehem, and Hebron, a fundamental change took place among the leaders of the Zionist religious sector. They began to perceive themselves as increasingly bound by Jewish law and what they interpreted as its uncompromising commands. Political decisions like territorial concessions were perceived as absolutely lacking in legitimacy and as no longer subject to the democratic process.[54]

The clearest expression of this perspective is to be found in the activities of Gush Emunim, founded in March 1974 as a faction of the National Religious party. Several months later it left the party, after coming to the conclusion that it could not act freely regarding the settlements in the territories as long as it belonged to a political party that took part in the coalition government. During the last years that the Alignment was in power (1974–77), Gush Emunim concentrated on establishing settlements that had not been approved by the government, thus challenging the political-security conception included in the platform of the party that had received the highest number of votes in the previous Knesset elections. While the leaders of Gush Emunim admitted they were opposing the legal government of Israel, they argued that the government's actions against the settlements lacked legitimacy and that therefore it was permissible to oppose them, just as the White Paper prohibiting the settlement of Jews in Palestine during the British Mandate had been opposed by the prestate Jewish community.[55]

However, this analogy is far from reflecting the full issue at hand. The fact is that the ideology of Gush Emunim has its origin in religious orthodoxy, which questions the democratic authority

of the state in light of what is perceived to be the supreme authority of Jewish law. Gush Emunim ideologues like Rabbi Shlomo Aviner have declared that any decision of a political body to concede parts of Eretz Israel is illegal and contrary to the laws of the Torah, following the edict of Maimonides, "If the king decides to abolish a religious command, he is not to be obeyed." What supporters of Gush Emunim failed to realize was that the "pioneering spirit" of Gush Emunim concealed a desire to turn back the clock to the prestate period or even to establish a theocracy.

After the Begin government came into power, the new prime minister was surprised to discover that even if his policy involved clear support for Gush Emunim and its goals, the movement's leaders refused to take the political considerations of the Israeli government into account. The conflict reached its height in the fight against the Camp David Accords, in which Israel agreed to leave the Sinai Desert. During the year that preceded the final evacuation in April 1982, Gush Emunim mobilized opposition to the peace agreement. The settlers in the Pithat Rafiah area were reinforced by hundreds of Gush Emunim settlers from Judea, Samaria, and the Golan Heights. They declared that the international commitments of the government of Israel were unimportant and that the majority vote in the Knesset was not binding. The government sent the army to complete the evacuation, which became a public and media drama, when Gush Emunim activists employed force against soldiers and police. None of the members of Gush Emunim was punished for these actions.[56]

After the evacuation of the Sinai Desert, Gush Emunim's active opposition to the democratic process increased in intensity. On April 27, 1984, twenty-five members of the movement were arrested for attempting to blow up six buses carrying a full load of Arab passengers. In the course of the trial that followed, it was revealed that since 1980 terrorist groups consisting of leading figures from Gush Emunim and its supporters had been operating in the territories. Their two major missions had been to take revenge for Arab terror perpetrated in the territories and to blow up the mosque of the Dome of the Rock. Three terrorist actions had been carried out: the attempted assassination of three Arab mayors in Judea and Samaria in June 1980, the planting of explosives in Arab mosques in the Hebron area, and the attack on the Muslim college in Hebron in July 1983, in which three students had been killed and many others injured.

In his testimony at the trial, Yehudah Etzion, one of the leaders who was personally involved in the attempted assassination of the mayors as well as in the plan to blow up the mosque, justified his actions by saying that while he recognized the authority of the state, since its agents had not done their job, the movement had had no choice but to take the law into its own hands, and that this was sanctioned by Jewish law, which permits the killing of murderers.

At the margins of Gush Emunim there arose groups characterized by violence and contempt for the law, foremost among which was the Kach movement, led by Rabbi Meir Kahane. Kahane's followers were the first to execute revenge missions against the local Palestinian populations of Hebron and Halhul. They preached racism and intolerance, often in the name of religion. During its 1984 election campaign, Kach's spokespeople spread fascist propaganda aimed at the lowest common denominator and the alienated sectors of society; Kach received one seat in the Knesset.[57] In the wake of its violent and racist activities, the Knesset Elections Committee decided not to allow it to take part in the 1988 Knesset elections.

As we have seen, the question of the status of religion in Israeli society has legislative, cultural, and political implications that extend beyond religion. The issue of democracy and civil rights in Israel is even more far-reaching. The development of political movements that deny the legitimacy of government decisions in the name of Jewish law adds a new, more threatening

dimension to the phenomenon of religious coercion. Thus, a coalition of sorts has arisen between extreme nationalists and the anti-Zionist religious parties that had always questioned the authority and sovereignty of the state.

The founders of Israel wished to give it a Jewish character by adopting Jewish law in several spheres, foremost among them that of personal status matters. They believed the promises for change and modernization made by religious leaders and apparently hoped that the state of Israel would somehow manage to combine civil rights with a religious monopoly in the personal sphere. However, their decisions led to unfortunate results, ones that the political system is still trying to cope with.

Justice Haim Cohen stated that when the government of the new state deliberated whether or not to continue the Ottoman and British Mandate tradition of granting religious courts exclusive jurisdiction in matters of marriage and divorce, he had warned David Ben Gurion and others that it would be the cause of lament for generations to come. However, Rabbi Maimon, then minister of religious affairs, assured the leaders that Jewish law was amenable to modernization. This was true, but not only did the rabbis fail to keep their promise, they retrogressed and in so doing also alienated the general public from Jewish law.

Motivated by political considerations, David Ben Gurion and his Cabinet decided to preserve the jurisdiction of the various religious courts over matters of personal status. According to Cohen, Ben Gurion lived to regret that decision. A few months before his death, he invited the justice to his home in Sde Boker. During the visit, Ben Gurion told Cohen that he had invited him because he felt a need to tell him how sorry he was that he had not followed his advice.[58]

*A Cohen is a descendant of the family whose male members held senior religious positions in the Temple in Jerusalem until its destruction about 2,000 years ago. Their special religious status prohibits them from marrying a woman who has already been married.

Notes

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28. P.D.17(3), p. 204.

29. David Glass, Interview with the author, March 14, 1985.

30. Moshe Nissim, Interview with the author, March 18, 1985.

31. Ibid.

32. Shulamit Aloni, Interview with the author, April 3, 1985.

33. Warhaftig, *A Constitution for Israel*, p. 233.

34. *Knesset Protocols*, vol. 2, p. 1447 (Hebrew).

35. Ibid., p. 1552.

36. Ibid., pp. 1558–1559, emphasis in the original.

37. Warhaftig, *A Constitution for Israel*, p. 244.

38. Ibid., p. 260.

39. Israel Association for Civil Rights, protocol from a meeting of the directorate, December 23, 1979 (Hebrew).

40. *Knesset Protocols*, vol. 82, p. 2136 (Hebrew).

41. Ibid., p. 2380.

42. Warhaftig, *A Constitution for Israel*, pp. 317–318.

43. Ibid., p. 319.

44. *Knesset Protocols*, 1977, pp. 1318–1320 (Hebrew).

45. Warhaftig, *A Constitution for Israel*, p. 322.

46. *Knesset Protocols*, vol. 72, pp. 1318–1320.

47. *Knesset Protocols*, vol. 87, p. 192 (Hebrew).

48. Warhaftig, *A Constitution for Israel*, pp. 329–330.

49. Rubinstein, *Constitutional Law in Israel*, pp. 401–402.

50. Ibid., p. 404.

51. Ibid., pp. 405–410.

52. Nationality Law of 1980.

53. D. Kretzmer, *The Legal Status of the Arabs in Israel* (Tel Aviv: International Center for Peace in the Middle East, 1987), pp. 58–59.

54. D. Horowitz, and M. Lissak, *Distress in Utopia* (Tel Aviv: Am Oved, 1990), p. 190 (Hebrew).

55. E. Sprinzak, *Every Man Whatsoever Is Right in His Own Eyes* (Tel Aviv: Sifriat Poalim, 1986), pp. 123–126.

56. Ibid., pp. 123–126.

57. Ibid., pp. 136–144.

58. M. Sesher, *Haim Cohen Chief Justice* (Jerusalem: Ketter, 1989), p. 222 (Hebrew).

4 The High Court of Justice: Defender of Civil Rights

The fact that the High Court of Justice is a defender of civil rights is a cornerstone of Israel's political culture. Both its commenders and detractors point out that the Court has consistently interpreted the law so as to expand and buttress civil rights vis-à-vis the government.

The status of the High Court has increased against the backdrop of continuing decline in the status of the political system and its incumbents. Petitions on political issues and conflicts within the political system itself have multiplied. As a result, there are those who attribute to the Court powers that go beyond those actually invested in it.

The next four chapters will examine the record of the High Court of Justice as a defender of civil rights, and its limitations. The present chapter will deal with the judgments of the Court in sensitive security matters, while the chapters that follow will deal with particular civil rights issues. Specific judgments will be examined, as well as the relations between the government and the High Court of Justice.

The Status of the High Court of Justice in the Absence of a Constitution

As we have seen, political considerations, among them the refusal of the governmental elite to grant the judicial branch of government the power of judicial review, were among the main reasons that a formal constitution was not adopted.[1] Over the years, the Knesset enacted primary legislation regulating the actions of the various branches of government. These did not generate much controversy due to the fact that they did not touch on sensitive issues.[2]

The independence of the High Court of Justice was not a foregone conclusion; rather, it was established by the justices themselves in the course of their deliberations. Justice Yitzhak Olshan, past president of the High Court, recounted in his memoirs the principles he and his colleagues on the bench developed quite early in the game, among them dissociation from all the political parties and the refusal to participate in events organized by the parties.[3]

Olshan described the prevailing attitudes during the first years of statehood, when the idea of objectivity and unbiasedness had not yet taken hold. In his position as Chairman of the Elections Commission for elections to the Second Knesset, he refused to allow an additional hearing on a Mapai-supported list submitted after the deadline:

> A few days after the elections, I happened to be talking to a Mapai leader, and he told me, partly in jest and partly in offense, that my inflexibility regarding the list had cost them a loss of two Knesset seats. I had the feeling that he found my action surprising in view of my past affinity with Mapai.[4]

According to Olshan, ministers and other high officials took the High Court's issuance of orders in petitions brought against them by citizens as personal affronts. They sometimes spoke bitterly of the cases they had lost, viewing the judgments as a threat to their prestige. It was only

after some time had passed and after numerous explications on the part of the justices regarding their judgments that these officials came to understand that High Court judgments did not really constitute a blow to their own prestige and that it was desirable that differences of opinion between the government and the citizenry be aired before the judiciary.[5]

One way to influence the High Court of Justice is through the appointment of judges, and indeed, the process of appointment has been subject to a certain degree of political influence. The Judges Law of 1953 provided for a special commission of nine members: three justices, including the president and two justices, elected by the High Court for a three-year term; two Cabinet members, including the minister of justice and one other minister elected by the Cabinet; two Knesset members chosen by secret ballot; and two practicing attorneys chosen by the Bar Association for a three-year term, presided over by the minister of justice. Looking at the composition of this commission, it is clear that the members who represented partisan interests might exert considerable influence, as they constitute nearly one-half of the membership. It should be pointed out that the representatives of the Bar Association are often not without political orientations either. No significant public efforts have been made to change this situation, which seems to be quite convenient for the political system. The only public discussion of the issue has been the publication of articles in the daily press hinting at the existence of political considerations in the appointment of judges, mostly those at the lower levels.

The fact that the commission's proceedings are not publicized (following the English custom; in the United States, such proceedings are published) makes it difficult to judge the extent of political influence involved. One member of the commission has contended that political considerations have never been involved in the selection of judges. At the same time, he has admitted that the general consensus was that at least one of the justices chosen to serve on the High Court of Justice should be an expert on Jewish law and that at least one should be a member of *edot hamizrach* (Jews whose origins are in Middle Eastern countries). He also offered the opinion that the composition of the commission ought to be changed so as to halve the representation of Knesset members.[6]

With regard to the limitations of the High Court of Justice, scholars point out that it is bound by both natural and internal restraints, which ensure that it acts only at the margins of the political process and prevent its power from matching that of the legislature and the Cabinet.[7] The law constrains the courts by virtue of the fact that it must wait for a plea in order to take up a position on a specific issue. It is also limited to the interpretation of legal texts and to the facts of the case at hand.[8]

What we will see in the following pages is how, given these limitations, and in the absence of a formal constitution and Bill of Rights, the High Court of Justice has acted to defend civil rights when the issue arose in connection with the sensitive area of state security.

High Court Judgments

In the first years of statehood, when both external and internal tensions were rife, the High Court was witness to the government's neglect of certain legal stipulations and its contempt for the rights of citizens suspected of aiding the enemy. In an important verdict from 1948, the year the state came into being, the High Court stated in *Ahmed Al Karbutli* v. *Minister of Defense et al.:*

> The law applies not only to the citizen, but also to the authorities. Moreover, the government, whose duty is to ensure that the citizen obeys the law, must first of all serve as an example by itself obeying the law. The law was created by the legislature so that the state would act in accordance with it, and the government cannot ask to stand above it.
>
> This is one of the basic principles of the rule of law.[9]

The High Court of Justice declared that the government's exercise of the powers invested in it was conditioned on its fulfillment of all conditions of the law defining those powers. Therefore, administrative detention of a person on the strength of Regulation 111 of the Security Regulations of 1945 was not legal unless an advisory committee had been created to which the detainee could appeal, as stipulated in Article 4 of the regulation. The Court also declared its basic position concerning the relationship between state security and civil rights. As Justice Olshan stated:

> While it is true that state security, which requires detaining an individual, is no less important than the need to preserve civil rights, whenever it is possible to achieve both aims, one should not ignore one or the other.[10]

In 1949 Salim Al Khouri petitioned the High Court concerning the administrative detention imposed on him. The Court accepted one of the petitioner's claims—that the detention order failed to indicate the place of detention. In its judgment, the Court stated that fixing the place of detention meant determining the conditions and constraints that applied to the detainee. The legislature had ordered the place of detention to be specified in the order so as to force the authorities to decide every case on its own merits. The failure to stipulate the place of detention was a basic flaw in the order and invalidated it.[11]

When state security was central to the case at hand, the High Court of Justice almost always rejected the plea. In a 1952 hearing in the case of *Naima Nasser Hakkim* v. *Ministry of the Interior*,[12] which dealt with the granting of a permit to enter the country to the plaintiff's son, the Court stated that even if it recognized the right of a citizen to return to his country, it had decided to reject the plea because of security considerations. In another plea, one that constituted the first step in a prolonged public battle, *Daud et al.* v. *Appeals Committee for the Security Districts*,[13] the petitioners, residents of the Arab village of Ikrit, contended that their village had been declared a security zone and that they had not been allowed to return to it, despite the fact that in a prior judgment, the Court had recognized the villagers of Ikrit as permanent residents of the village.[14] The hearing focused on the authority of the Appeals Committee. The question was whether the Committee was allowed to hear the testimony of the military representative in the absence of the petitioners' counsel, who thus had no opportunity to cross-examine him. The Court rejected the plea, saying that the Appeals Committee had the right to determine its own rules of procedure in accordance with security considerations. Since that time, the residents of the village of Ikrit have continued to struggle for the right to return to their homes, without success.

In yet another case, the High Court expressed displeasure at the contentions of the respondents but did not alter its decision. *Asslan et al.* v. *Military Commander and the Military Governor of the Galilee* (1951) had to do with the refusal of the military commander to grant the plaintiffs entrance and exit permits for an area declared closed. The Court had been presented with a certificate of immunity from the minister of defense declaring that revealing the reasons for the decision would be injurious to state security. The Court stated that in view of the facts at its disposal, it was difficult to believe that security considerations were the only ones involved in the case, but it could not be certain of this. It added that surely a way could be found to satisfy the requirements of security and at the same time allow the Court to weigh the respondent's

contention that the action had been taken for reasons of security. Nevertheless, the Court rejected the petition.[15]

The judgments presented above reflect the development of a definite policy on the part of the High Court: it tended not to intervene in matters where state security was involved. This is not to say that the Court's commitment to the defense of civil rights was greater during the first years of statehood. What happened was that the Military Government was often found negligent, and in such cases, the Court insisted on its obeying the letter of the law. When the plea involved more than purely technical matters, however, it preferred to accept the arguments of the powers that be, albeit with reservations.

It is probable that the atmosphere of the period immediately following the War of Independence and the efforts to increase political stability and state security deterred the High Court of Justice from questioning the considerations of the state authorities, lest authorities' actions endanger the security of the new state. Justice Haim Cohen, who served as attorney general during the 1950s, described the prevailing attitude:

> If the chief of the Security Services told me that something was a vital necessity, I didn't give it a second thought. The security situation during the first years of statehood was such that if I was told that the security of the state required a particular action, I accepted it even at the expense of human rights.[16]

As in the case cited above, the authorities were often exempted from producing information regarding security matters. The procedure was that a representative of the State Attorney's Office presented a certificate of immunity, in which the minister of defense testified that the evidence could not be presented to the Court for reasons of state security or the conduct of proper diplomatic relations. In such cases, the justices did not view the evidence. At first, the High Court accepted such arguments without even asking for a document from the defense minister, but later the Court insisted on it. During the 1950s, certificates of immunity were usually presented as a matter of course whenever a conflict arose between Arab citizens and military authorities.[17]

The High Court expressed a number of protests against this practice, which it did not always consider justified.[18] For example, in its judgment rejecting the plea of Haya Kaufman, who had been prohibited by the Ministry of the Interior from leaving the country to take part in a European conference of the extreme Left, the Court stated that the petitioner had in fact been prevented from airing her case in court, since the arguments of the state authorities could only be disproved if they were known, and "one could not argue with the sphinx."[19]

The 1968 amendment to the Law of Evidence opened up the way for judicial review of information considered classified, even when a certificate of immunity was submitted to the High Court. This applied to cases in which the Court accepted the argument of the petitioner and concluded that if justice was to be served, the need to reveal the evidence should take precedence over the need to maintain secrecy.[20]

In cases where it was determined that evidentiary immunity was justified, the High Court initiated a proceeding not specified by law; it suggested to the petitioner that the authority in question present its evidence before the Court in the petitioner's absence. If the petitioner agreed, the Court would precede to hear the evidence, after which it would decide if its prior decision had been warranted. However, this procedure did not allow the plaintiff to hear the arguments supporting the decision and he had no opportunity to either refute them or offer evidence to the contrary.

Defense of Human Rights in the Territories

After the Six-Day War, the High Court was assigned a role unique among judicial systems in the democratic world: to serve as the major defender of the human rights of over a million inhabitants of the territories who were not citizens of the state but lived under Israeli military rule. This role was the result of a decision made by Meir Shamgar, the incumbent Attorney General (currently president of the High Court of Justice), that actions of the Military Government in the territories were to be subject to the review of the High Court of Justice, an unprecedented decision in international legal practice.

There is one difference between the deliberations of the High Court on petitions of Israelis as opposed to those brought by Arab residents of the territories: while in the former, the Court examines the legality of the government action from the standpoint of Israeli law, in the latter, the test is a double one. The facts are examined from the standpoint of local law, including both Jordanian law and the orders of the Military Government, as well as from the standpoint of international law as it is integrated into Israeli law—that is, customary international law. The Court is also willing to consider the principles of conventional international law, which have not been integrated into Israeli law. This double test sets limits on the freedom of action of the Military Government. More than anything else, the right of residents of the territories to petition the High Court of Justice ensures the preservation of rule of law. The Military Government operates under this knowledge and in accordance with the criteria laid down by the Court.[21]

The following judgments demonstrate that the High Court of Justice has become increasingly critical of the powers that be in its judgments in cases involving Arab residents of the territories. During the first years of Israeli occupation, the Court showed a clear preference for the security arguments advanced by military authorities. For example, in a hearing on the petition of Ibrahim Marar against an expulsion order (1971), the Court declared that it did not know, neither was it required to know, why deportation was preferred over detainment; it viewed the Advisory Committee (an internal body of the Military Government that handled appeals) as having had the last word in the matter. Justice Moshe Etzioni stated:

> Obviously, we cannot judge the reasons for invoking Regulation 111 [one of the Emergency Defense Regulations of 1945 still in effect in Israel and the territories], and it is not a matter that the legislator wished to place under the jurisdiction of the Court.[22]

In another petition, brought in 1971 by Sheik Abu Uda Abu Hilu and other bedouins who wished to return to Pithat Rafiah (an area in the Gaza Strip where Jewish settlements were set up), the Court rejected the claim of the petitioners on the grounds that the intervention of the High Court of Justice in what were obviously security matters, like safeguarding an area against terrorists, should be restricted to an examination of the legal authority for the decision and the question of whether security considerations were involved.[23]

In rejecting a plea brought by a student by the name of Abu Awad against a deportation order issued because of what were described as subversive activities (1979), and relating to affidavits submitted by professors from the Hebrew University in Jerusalem and Bir Zeit University, which argued that the student's actions had not involved any real danger, the Court held that although the professors were no doubt experts in their fields, they did not shoulder the burden of responsibility for the safety of persons living in the territories. This responsibility rested with the military authorities, and the Court did not wish to interfere with their decisions.[24]

When it appeared that the Court had adopted a routine position in cases involving security matters, the case of Dr. Ahmed Hamza Natsha from Hebron and Dr. Abdul Aziz Al Haj Ahmed from Al Bira (1976) caused a crisis of confidence between the High Court of Justice and the Military Government in the territories.[25] The two physicians were major candidates in the approaching municipal elections, and they were well known for their radical positions. They were deported to prevent an extremist victory. Military authorities issued expulsion orders, after which the deportees appealed to the Advisory Committee, which subsequently approved the deportations. The deportees then petitioned the High Court of Justice. At this point, military authorities made a concerted effort to expedite the orders: Attorney General Aharon Barak (currently serving as a justice on the High Court) approved the execution of the deportation orders on Saturday, March 27, only minutes before the hearing on the petition was to take place at the home of Justice Moshe Etzioni in Jerusalem.

Justice Etzioni viewed this action as a serious blow to the prestige of the High Court of Justice and as a blatant violation of the rights of the deportees; he assumed that it had been taken without the attorney general's knowledge. In the judgment, he wrote that the action, which appeared to have been taken in order to prevent a hearing on the petition from taking place, was unacceptable in a democratic state. Attorney General Aharon Barak, who became the primary target of attacks from both politicians and the press, stated that he had felt that state security was more important than saving the face of the High Court of Justice. In a document submitted to the High Court, he pointed out that from a strictly legal standpoint, he had no obligation to prevent the execution of an order simply because a petition had been submitted to the High Court. At the same time, he hinted that he might have erred.

The justices did not find this statement reassuring; they were left with the distinct impression that an attempt had been made to prevent the Court from interfering with the deportations, and that the attorney general not only had failed to prevent it, but had given the action his blessings. Henceforth, the High Court began to view the security arguments put forward by the Military Government and the Attorney General's Office with suspicion.[26]

This erosion of credibility was articulated by High Court Justice Haim Cohen in an interview years later, when he spoke about the exploitation of security arguments:

> I was witness to this later on, mainly in hearings, and there, too, I never interfered with the security considerations of the authorities, but I often had the feeling that they were far overstating the case.[27]

The landmark case was Alon Moreh. In June 1979, residents of the village of Rujaib brought a petition against Alon Moreh, a settlement created by Cabinet decision and established with governmental assistance on lands confiscated from the village. In an interim order, the Court declared a moratorium on the settlement of Alon Moreh, issued an *order nisi* against Minister of Defense Ezer Weizmann, and stated that the next hearing on the petition would be held in a special court comprised of five justices. After four months of deliberations, the justices ruled that the lands were to be returned to their lawful owners and that the Alon Moreh settlement was to be moved to another location.[28] The justices rejected the contention that the lands had been confiscated for security reasons after it became known to them that the initiative for the settlement had originated in political quarters and that the approval of the chief of staff had come after the fact. They also attached great importance to the disagreement between the defense minister, who opposed the settlement, and Chief of Staff Rafael Eitan, who supported it.

The verdict resulted in a decision on the part of Gush Emunim not to disengage from Alon Moreh under any circumstances. At the same time, Prime Minister Menachem Begin made it

clear that he had no intention of invalidating the judgment through legislation. These developments put rule of law in Israel to the hardest test it had faced since the establishment of the state. The ideological stance of Gush Emunim was that the order to settle Eretz Israel came from God, a higher authority than the High Court of Justice. This being the case, it was clear that the settlers would not be deterred from acting in contempt of court. At the same time, Menachem Begin, who identified wholeheartedly with the settlers, found it difficult to carry out the verdict, which involved uprooting a Jewish settlement by force. In the weeks that followed, the fate of the evacuation order hung in the balance, and with it, the fate of Israel as a state under the rule of law.[29]

The Alon Moreh judgment became the subject of heated political debate. Right-wing circles demanded that a way be found to preserve the settlement. The Cabinet itself was divided. Attempts were made to find legal ways of circumventing the decision, but these were opposed by the defense minister, the attorney general, and the State Attorney's Office.[30] In the end, the Cabinet demanded that the settlers compromise by moving the settlement to an adjacent hill, and the settlers complied.[31]

Incumbent Minister of Justice Shmuel Tamir revealed the difficulties the Cabinet had had in coming to its decision:

> The five justices who pronounced the Alon Moreh judgment were the same judges whose verdict had approved settlements in the area of Ben Shemen several months before.[32] When the first ruling was declared, Begin couldn't praise it enough, and he would allude to it in many of his political appearances, declaring, "There are real judges in Israel." When in different circumstances the same justices handed down the Alon Moreh judgment, there were certain elements that brought strong pressure to bear on the Cabinet to circumvent it.
>
> Five minutes after we received notification of the judgment, I left the ministerial committee meeting to see Begin—and at the end of our meeting it was absolutely clear that the court order would be executed. I met the press and told them that the Israeli Cabinet would honor the judgment of the High Court.
>
> After that there were battles. In my opinion, Begin, the Attorney General and myself showed just the right amount of flexibility and succeeded in withstanding the pressures and honoring the verdict....
>
> There were certain fears (with regard to the principle of rule of law), and once we overcame them, it was clear that the crisis had blown over.[33]

While the Cabinet's position with regard to Alon Moreh showed its commitment to the rule of law, a subsequent development enabled it to declare unregistered lands in the West Bank (which comprised about 70 percent of the land) state property. This reversed the impact of the Alon Moreh judgment, making it a turning point that led to the establishment of additional settlements.

In a recent interview, Elias Khoury, who served as counsel for the petitioners, recounted the sequence of events that followed the Alon Moreh decision. The petitioners were landowners whose properties formed part of the Alon Moreh settlement, while a good part of the settlement was located on the lands of persons not included in the petition. When it came time to implement the Alon Moreh decision, it was said that the judgment included only those plots belonging to the petitioners, and that the rest of the land could be utilized for settlement. The owners of this land turned to the State Attorney's Office, which reiterated the fact that the plots in question had not been included in the court order. After a few months' delay, a new petition was submitted to the High Court of Justice in the name of the remainder of the landowners whose properties had been seized. The state then announced to the High Court that the order it had issued in the first petition would be valid for the second as well; this was after the Court had issued an interim order and an *order nisi.* The state asked for an extension, which was granted, and in the end it evacuated the area. All forty-three families involved in the two petitions received their lands back.

Khoury contended that the policy of the Military Government changed in the wake of these

petitions. It sought ways of preventing property owners from applying to the High Court. The solution found was to declare unregistered lands state property. In case of dispute, the landowners were permitted to appeal to an administrative body appointed by the Civil Administration, which had the power to make recommendations and no more. According to Khoury, the percentage of land that must be under cultivation in order to prove ownership is a matter of policy; a liberal policy would take into account the fact that cultivation was done by primitive methods. In 1981, Khoury lodged complaints with the attorney general concerning the unlawful exploitation of lands belonging to Arab residents of the territories. In his opinion, it was these complaints that led to the establishment of the Karp Commission.[34]

The Karp Commission, headed by Deputy Attorney General Yehudit Karp, was appointed to serve as a surveillance team whose task was to investigate cases in which Israelis were suspected of violating the law in their attempts to secure land in Judea and Samaria. The team was set up after lecturers in the Faculty of Law at the Hebrew University in Jerusalem and Tel Aviv University warned that settlers were breaking the law, and that these infractions were not being investigated by the police, or, in cases in which the police did intervene, the files were closed in the first stages of inquiry.

In a report submitted to the attorney general on May 23, 1982, the Karp Commission stated, among other things, that the rule of law and order was not being upheld in the West Bank. Police inquires into complaints filed by Arab residents against settlers were carried out ambivalently, mainly as a result of the interference of Military Government officials. The Commission warned that Jewish residents of the West Bank could not continue to refuse to cooperate with the police and the State Attorney's Office under the contention that they viewed the latter as hostile elements.[35]

The designation of West Bank lands as state property has been described as a tactic designed to gain time and prevent the intervention of the High Court of Justice in the seizure of Arab lands for Jewish settlements. In the first months of 1981, at least 15,000 *dunams* of land were declared state property. It has also been argued that the attempt to replace judicial review by the High Court of Justice with military justice was completely contradictory to the intention of Attorney General Meir Shamgar, who had wished the Court to act as a check on the Military Government in the territories.[36]

Over the past decade, the High Court has been more critical than it was in the past in cases involving deportation orders. In a 1985 judgment in the petition *Shahin* v. *IDF Commander of Judea and Samaria*,[37] Meir Shamgar, president of the High Court of Justice, stated that the Court had chosen to follow the precedent set in the past:

> ... in order to make a judgment, the [judicial] authority must have reliable and convincing evidence that leaves no room for doubt.... *I am of the opinion that the evidence required to persuade [the High Court] that a deportation order is justified must be clear, unequivocal, and compelling.*[38]

Nevertheless, the petition itself was rejected because the Court was persuaded that the military authorities had evidence warranting deportation.

In the petition of *Nazal* v. *IDF Commander ofJudea and Samaria*,[39] the Court had recourse to the precedents of *Shahin* and *Bransa* v. *Commander of the Central District* (1981).[40] Its judgment stated that under the circumstances, the claims of the military authorities should not be questioned, as they had in their possession information that was clear, unequivocal, and compelling, and the petitioner's actions conformed to Regulation 100 of the Emergency Defense

Regulations.[41] In each of the foregoing verdicts, the Court emphasized the need for close scrutiny of decisions made by military authorities in order to determine whether or not they followed the letter of the law.[42]

Notwithstanding, there were only two occasions on which the Court actually handed down a judgment in favor of the petitioners—the Alon Moreh case cited above, and *Samara et al.* v. *Commander of Judea and Samaria*.[43] These were the only cases in which the Court exercised its authority in substantive matters rather than in purely procedural ones or in matters involving the misuse of authority. In *Samara* (1979), the Court declared that it had been offered no proof that the military commander's refusal to approve reunion for the Samara family stemmed from security considerations. At the hearing itself, the Military Government's counsel was unwilling to inform the Court of the criteria for its denial. In view of this, the Court declared that the granting or withholding of permission for reunion of families involved the use of administrative discretion, which was to be subject to judicial review. It rejected the state's contention that it was a matter of charity subordinate to security considerations and not a matter of concern to the Court.[44] Justice Barak explicitly rejected the claim of the military that the Court had no jurisdiction in the matter, stating that the issue could not be determined a priori and that it depended on the discretion of the judiciary.[45]

In the petition of *Kawasma* v. *Minister of Defense* (1980), the Court took a definite stand on the connection between state security and civil rights, even though it rejected the petition. The plea was submitted after the defense minister had issued an order to deport Fahad Kawasma, mayor of Hebron, Muhammed Milham, mayor of Halhul, and Rajib Tamimi, imam of Hebron, after the murder of six Jews in the Hadassah building in Hebron. The expulsion was executed immediately, without giving the deportees an opportunity to take advantage of their legal right to appeal to the Advisory Committee. The Court declared that the minister of defense was to return the deportees and allow them to state their case to the Advisory Committee—despite an affidavit submitted by the military commander of Judea and Samaria stating that their return was liable to result in a general breakdown of security and public order. After the deportees were returned and given a chance to plead their case before the Committee, the recommendation to deport them was approved. During this time public order and security were maintained, despite the claim made by the military authorities.

In his judgment, Moshe Landoy, president of the High Court of Justice, stated that those responsible for security had to act within the constraints of the law. Whatever the circumstances, they were obliged to obey the law so as to safeguard the right of the individual and the character of the state as governed by the rule of law.[46]

In a number of pleas concerning the revelation of evidence, the High Court accepted some of the arguments of the petitioners. For example, in a hearing on the petition of *Dr. Azmi Al Shuaibi et al.* v. *Military Commander of Judea and Samaria* (1986), the petitioners asked to see the evidence that formed the grounds for the deportation orders issued against them. This material was said to show that they were important leaders of terrorist organizations engaging in subversive and incitatory activities. The Court stated that in order to prevent a person against whom an expulsion order had been issued from viewing the major evidence against him, it was not enough to declare that state security was involved. The Court had to be convinced that the relevant authorities were acting in good faith and that revelation of the evidence was liable to cause real danger. Its decision was that under such circumstances, the petitioners should be informed of additional details connected with the charge of incitement, but that not all the facts had to be revealed, as the petitioners were well aware of the reasons for their expulsion.[47]

With the outbreak of the Intifada in December 1987, the security situation became more critical and additional limitations were placed on Arab inhabitants of the territories. At the same time, the High Court of Justice continued to intervene to safeguard civil rights in the territories and did not hesitate to accept arguments put forward by Arab residents. The petition of *Muhammed Matour et al.* v. *IDF Commander of Judea and Samaria* (1989) centered on deportation orders issued against the petitioners after a certificate of immunity had been submitted by the minister of defense. The petitioners asked the Court to instruct the respondents to reveal the evidence. The Court accepted their request in part and issued a directive that for two out of the four petitioners, the evidence should be revealed, as it was during the hearing. At the same time, the Court decided to reject the petitioners' request to reveal additional evidence, contending that such revelation involved a definite risk.[48]

The most important decision of the High Court of Justice in this respect was on the petition *The Israel Association for Civil Rights et al*. v. *Commander of the Central and Southern Districts* (1988). The plea concerned appeal procedures in connection with demolition or sealing orders issued in accordance with Regulation 119. The petitioners claimed that the owners of the house or its occupants were entitled to appeal before their property was damaged, since a state of emergency did not invalidate the natural rules of justice, and damage was justified only if its purpose was to prevent serious danger or to prevent government actions from being frustrated. The High Court accepted the plea, declaring that due to the extremity of the sanction, aside from cases in which there was an operational military need, such orders should inelude a statement that those affected had the right to appeal to the Military Commander or to the High Court before the order was carried out.[49]

Freedom of the Press in the Territories

Newspapers published in East Jerusalem and distributed in the territories come under the jurisdiction of Israeli law. However, the law is enforced much more strictly in East Jerusalem than it is in Israel proper. Censorship of publications in the territories is based on Military Order No. 101, the purpose of which is to prohibit incitement and the dissemination of hostile propaganda. Among the objects of censorship are expressions of anti-Semitism, calls for physical resistance to the Israeli government, and denials of Israel's right to exist.

The judgments to be examined in the following pages were handed down in petitions submitted by newspapers in East Jerusalem or the territories. The first is the 1978 case of *Al Taliya* v. *Minister of Defense et al.*,[50] submitted after the Military Government had prohibited distribution of the weekly *Al Taliya* in the territories, a severe limitation that amounted to financial ruin. The state attorney contended that the prohibition was based on the fact that the weekly was an organ of the Communist party, outlawed by Jordanian law. He also pointed out that the Communist party had an organization called The Palestine National Front that engaged in weapons training and terrorist activity. He claimed that there was no truth to the argument that the weekly was being discriminated against, in comparison with the newspapers *Al Kuds, Al Shaab,* and especially *Al Fajar,* which the petitioner claimed was distributed in the territories despite the fact that it had published numerous anti-Israeli articles. The difference was that *Al Taliya* advocated noncooperation with the Military Government, thus indirectly abetting violence and opposition to the government.

The High Court declared that the articles published in *Al Taliya* were no more radical than those that had appeared in *Al Fajar* and *Al Shaab,* whose distribution the Military Government had approved, and that therefore it could not discriminate against the petitioner. The justices also stated that the fact that the Communist party had been outlawed under the Jordanian regime did not justify the Military Government prohibiting the distribution of its newspaper, which had to be scrutinized in light of Israeli law. However, the High Court handed down a judgment in favor of the Military Government, declaring that the evidence submitted against the petitioner concerning acts of violence and terror were convincing; the issues of political freedom and freedom of the press were subordinate to state security. It was this judgment that formed the basis for jurist and author Moshe Negbi's contention that the High Court had given a clear directive to the Military Government not to prohibit the distribution of newspapers attacking Israeli policy unless the publisher expressed its opposition through violent acts.[51]

In another case, from 1980, confinement orders were issued against the chief editors of three Palestinian newspapers accused of engaging in subversive activities. The High Court declared that it could not accept their plea because the restrictions had been imposed on them for security reasons and such restrictions were well within the authority of the Military Government.[52]

A similar verdict was handed down in the 1981 case of *Dr. Najua Mahul* v. *Jerusalem District Commissioner*. The commissioner had refused to grant the petitioner a permit to publish a newspaper in Arabic.[53] The Court stated that the directive in Regulation 94(2) of the Emergency Defense Regulations limited the jurisdiction of the High Court in cases in which authorities denied a permit to publish a newspaper.[54] In this plea, as well as in that of *Aida Ayub* v. *Jerusalem District Commissioner*,[55] the Court alluded to the fact that certificates of immunity had been submitted by the minister of defense, saying that the very presentation of such documents amounted to forgoing the absolute authority granted by Regulation 94. In the eyes of the Court, the submission of such certificates was an advance.[56]

In yet another case, the Court accepted the contention of the Jerusalem district commissioner that his decision to close down the newspaper *Al Shar'a* was based on evidence that it functioned as the mouthpiece of a terrorist organization hostile to Israel. The Court declared in a 1983 judgment that the permit had not been canceled because of the content of the articles published but because the newspaper was directly connected with a terrorist organization. It stressed the requirement that the respondent's argument be anchored in solid evidence, which was to be held up to scrutiny just like any other evidence.[57]

Examining the judgments of the High Court in the pleas submitted in recent years, it is clear that the High Court has tended to favor the government, even if it has repeatedly warned that the evidence it presented would be carefully scrutinized.

Over the years, the High Court has established its position as a defender of civil rights in Israel and in the territories. At the same time, it has generally tended to accept the arguments of the state whenever the issue of security arose. In the rare cases in which the justices ruled in favor of the petitioners, it was because the state's security arguments were not grounded in evidence. Eventually, the High Court developed a more critical approach to the claims advanced by the government. This change can be discerned if comparisons are made between early and later judgments. However, whenever security was involved, the High Court of Justice exercised self-restraint, viewing civil rights as subordinate to, and in conflict with, security.

The absence of a formal constitution and the continuing state of tension combined to inhibit the High Court from developing a more critical stance, even if it had so desired. It is probable that the Court avoided direct confrontation with the executive and legislative branches of

government, so as not to risk losing its central, vital position in the Israeli democracy.

Notes

1. C. Klein, "A New Era in Israel Constitutional Law," *Israel Law Review*, no. 6, 1971, p. 379.
2. M. Shamgar, "On the Unwritten Constitution," *Israel Law Review* 9, no. 4, 1974, p. 471.
3. Y. Olshan, *Law and Judgments* (Jerusalem and Tel Aviv: Shocken, 1979), p. 214 (Hebrew).
4. Ibid., p. 233.
5. Ibid., p. 241.
6. Y. Rotenstreich, "Politicization in the Appointment Commission for Judges," *Haaretz*, January 5, 1982, p. 13.
7. P. Lahav, and D. Kretzmer, "The Bill of Rights and the Israeli Citizen: Constitutional Achievement or Deception?" *Law* 7, no. 1, June 1976, p. 177 (Hebrew).
8. Ibid., pp. 177–178.
9. *El Carbotli* v. *Minister of Defense et al.*, High Court 48[8]P.D. 2, 1949.
10. Ibid., p. 106.
11. *El Khouri* v. *Chief of Staff et al.* High Court 49[95]P.D.4, 1950.
12. *Naima Nasser Hakkim* v. *Minister of the Interior*. High Court 52[24]P.D. 6, 1952.
13. *Mabda Hana Daud et al.* v. *Appeals Committee for Security Districts, Office of the Military Governor of the Galilee.* High Court 51[239] 6, 1952.
14. *Mabda Hana Daud et al.* v. *Minister of Defense.* High Court 51[64], 5, 1951.
15. *Jamal Asslart et al.* v. *Military Governor of the Upper Galilee.* High Court 51[288]P.D.5, 1951.
16. T. Segev, "Interview with Justice Haim Cohen," *Haaretz*, March 13, 1981 (Hebrew).
17. A. Rubinstein, *Constitutional Law in Israel* (Tel Aviv: Shocken, 1969), p. 244.
18. *Asslan* v. *Military Governor*, see note 15.
19. *Kaufman* v. *Minister of the Interior*. High Court 53[111]P.D. 7, 1953, p. 541.
20. Y. Zamir, "Human Rights and State Security," *Law* 19, 1989, p. 34 (Hebrew).
21. Israel National Section of the International Commission of Jurists, *The Rule of Law in the Areas Administered by Israel* (Tel Aviv: 1981), pp. 35–41.
22. *Ibrahim Marar* v. *Minister of Defense et al.* High Court 71[17]P.D. 25 (1), 1971.
23. *Sheik Abu Hilou et al.* v. *the Government of Israel et al.* High Court 72[302]P.D. 27 (1), 1973.
24. *Abu Awad* v. *Commander of Judea and Samaria.* High Court 79[97]P.D. 33 (3), 1979.
25. M. Negbi, *Justice under Occupation* (Jerusalem: Kane, 1983), pp. 82–87 (Hebrew).
26. Ibid., p. 87.
27. M. Shesher, *Haim Cohen High Court Justice* (Jerusalem: Keter, 1989), p. 221 (Hebrew).
28. High Court 79[390]P.D. 34(1).
29. Negbi, *Justice under Occupation*, p. 70.
30. Ibid., pp. 71–72.
31. Ibid., pp. 73–74.
32. High Court 79[258]P.D. 34 (1); also Negbi, *Justice under Occupation*, pp. 47–50.
33. Shmuel Tamir, Interview with the author, March 3, 1985.
34. Elias Khouri, Interview with the author, April 16, 1988.
35. Y. Galnur, D. Avnon, and M. Bitton, *The Government of Israel* (Jerusalem: The Hebrew University, 1984), pp. 309–314 (Hebrew).
36. Ibid.

37. *Shahin* v. *IDF Commander of Judea and Samaria.* High Court 85[513]P.D. 39(1), 1985.

38. Ibid., p. 327, emphasis in the original.

39. *Nazal et al.* v. *IDF Commander in Judea and Samaria.* High Court 85[513]P.D. 39(1), 1985.

40. *Baransa* v. *Commander of the Central Region.* High Court 81[554]P.D. 36 (4), 1982.

41. *Nazal* v. *IDF Commander,* see note 39, p. 646.

42. Z. Segal, "The Authority of the IDF Commander to Order Deportation for Security Reasons," *Haaretz,* February 18, 1986 (Hebrew).

43. *Samara et al.* v. *Commander of Judea and Samaria.* High Court 79[802]P.D. 34 (4), 1980.

44. Ibid., p. 4.

45. Ibid. See also *Tamimi* v. *Minister of Defense* 85[507]P.D.41 (4), p. 57, in which the High Court accepted the petition and held that the military commander's refusal to permit the creation of a Bar Association in the area was unlawful.

46. Zamir, "Human Rights and State Security," pp. 38–39; also *Kuasma* v. *Minister of Defense.* High Court 80[320]P.D. 35 (3), 1980, p. 113.

47. *Dr. Azmi Al Shuaibi et al.* v. *Military Commander of Judea and Samaria.* High Court 85[634]P.D.40 (1), 1986, pp. 219–220.

48. *Muhammed Matour* v. *IDF Commander in Judea and Samaria.* High Court 22[89], Miscellaneous Motion 792/88 P.D.43[2] 1989, pp. 221–225.

49. *The Israel Association for Civil Rights in Israel* v. *Chief Commander of the Southern District and the Chief Commander of the Central District.* High Court 88[358]P.D.43 (2), 1989, pp. 529–531.

50. *Al Taliya* v. *Minister of Defense et al.* High Court 78[619]P.D.33 (3), 1979.

51. Negbi, *Justice under Occupation,* pp. 155–157.

52. *Mamon Al Said et al.* v. *Military Commander of Judea and Samaria,* 80[771]P.D. 35 (3), 1981.

53. *Najua Mahul* v. *Jerusalem District Commissioner.* High Court 81 [322] Motion 81 [672]P.D.37 (1).

54. Ibid., p. 789.

55. *Ayub* v. *Jerusalem District Commissioner.* High Court 81[415]P.D. 38 (1), 1984 (deliberated between 1981 and 1984).

56. Ibid., p. 753.

57. *Asli* v. *Jerusalem District Commissioner.* High Court 83[541]P.D. 37 (4), p. 837.

5 Freedom of the Press

This chapter and those that follow will deal with freedoms basic to modem democracy: freedom of the press, freedom to demonstrate or assemble, and freedom of association. The analysis will present the legal situation, its practical implementation, and the positions taken by the High Court of Justice, which, in the absence of a written constitution, define the parameters of civil rights in Israel. The emphasis will be on the contribution of these factors to the status of civil rights in the Israeli political culture.

The analysis will indicate lines of historical development; it will also show the effects of Israel's ongoing security problems, as well as the operation of what are obviously power considerations—factors examined in the first part of the book. It will show the central role played by the High Court of Justice, stressing the changes that have occurred in its position and its influence on the legal and practical situation of civil rights in Israel.

The Legal Situation of the Press

Israel is the only Western state in which a citizen who wishes to publish a newspaper must first obtain permission from the government. The law confers on the district commissioner the authority to refuse a permit or to cancel an existing one without having to explain the reasons for the refusal or to prove that the newspaper or the editor violated the law.[1]

The relationship between the press and the government is based on a number of laws that grant the latter control over the former. The Press Ordinance was created in 1933 by the British Mandate government after the bloody events of 1929.[2] Viewing the existing Turkish legislation as insufficient, the Mandate government wished to increase its authority to impose sanctions on newspapers.[3] This statute was later adopted by the state of Israel; it authorizes the minister of internal affairs to grant permits to newspapers and exercise control over them. The Emergency Defense Regulations mentioned in the previous chapters give the government authority to censor information or to prevent its publication in the media for reasons of state security, public safety, or the maintenance of public order. These two laws have a restraining and suppressive influence on freedom of the press. The reactions of the press to the promulgation of the Press Ordinance were less vociferous than anticipated by the British Mandate government; the Arabic press protested more strongly than the Hebrew press, perhaps because it viewed itself as the primary target.[4]

The Press Ordinance consists of three parts. The first concerns permits for written publications. In order to receive such a permit, the editor and publisher must fulfill a number of conditions: they have to possess at least a high school education, demonstrate that they have no criminal record, and post bond for the payment of fines due to possible infractions of the law. The second part of the Ordinance requires newspapers to publish official announcements and denials without charge. The Mandate government utilized this prerogative to force newspapers to publish communications that reflected its own version of events and to present underground organizations in a negative light. When the limitations of the Press Ordinance proved inadequate,

Emergency Defense Regulations were promulgated (1936) stipulating censorship for newspapers (Regulation 11). These steps were of limited effect, however, due to the existence of a flourishing underground press.

The third part of the Press Ordinance involved sanctions. The British did not operate through the courts but rather utilized administrative measures, mainly closing down a newspaper for a specific period of time (Article 19). Even material that received the censor's approval could be defined as constituting a threat to public safety and thus serve as a cause for suspending publication of a newspaper.

After the establishment of the state, it was decided to adopt most of the British laws, among them the Press Ordinance. An examination of the attitude of the Israeli government to the Ordinance reveals that in the first period of statehood there was greater fear of deviance from political conventions and thus a greater tendency to exercise the powers conferred by the Ordinance. The hearings on the petitions submitted by the newspaper *Kol Haam* (in Hebrew, "The People's Voice") and the Al Ard Company provided the basis of judication in matters concerning freedom of the press, and for this reason they will be presented here in some detail.

The first *Kol Haam* case concerned a petition brought by the newspaper, the Hebrew organ of the Israel Communist party, against the minister of internal affairs for suspending its publication for ten days after it published, on January 23, 1953, a declaration on the subject of "Israeli cannon fodder in Korea."[5] The petitioner claimed that a proclamation calling on Israeli youth to enlist in order to help the American army fight in Korea had been distributed in Israel. The news item had already appeared in other newspapers, and there was no doubt regarding its reliability. However, publication of the newspaper was suspended under the contention that the communication was liable to sow panic and jeopardize public safety. The Court rejected the editors' plea, confirming the authority of the government to shut down the newspaper at its discretion; it stated that the expression of any opinion that might cause negative emotional response was liable to lead to the exercise of censorship for political reasons.[6]

The second *Kol Haam* plea was heard a short time later,[7] after the newspaper published, on March 18, 1953, an article attacking the policy of the Ben Gurion government. It contended that Abba Eban, Israeli ambassador to the United States, had agreed that Israel would send 200,000 troops to fight alongside the Americans in Korea, should the United States so request. The Arabic newspaper *Al Itihad* published an article along the same lines two days later. On March 22, 1953, the minister of internal affairs ordered a ten-day suspension of *Kol Haam* and a fifteen-day suspension of *Al Itihad.*

The editors of both newspapers petitioned the High Court, and the verdict was handed down in October of the same year.[8] It stated that Article 19 of the Press Ordinance required proof that the communication in question was injurious to the public safety. Since the minister had not proved this before shutting down the newspaper, the Court canceled the suspension orders. The judgment dealt with several critical questions: the theoretical importance of the principle of freedom of speech, the guidelines for its application in the judicial system, and the specific tests to be used in limiting freedom of speech.[9] The Court stressed the importance of freedom of speech in a democracy but also took into consideration other interests that had to be balanced against it. Here the Court deliberated the meaning of Article 19 of the Press Ordinance, which authorized the minister of internal affairs to cease publication of a newspaper if its contents included anything that was liable, in his opinion, to jeopardize public safety.[10] The search for a definition of "liable to" was carried out with the aid of two judicial tests developed by the American Supreme Court: the test of "bad intention" and the test of "proximate certainty"

(developed through the criterion of "the clear and imminent danger") in cases involving freedom of speech, among them the Dennis petition.[11]

The Court opined that the difference between "clear and imminent danger" and "proximate certainty" was that the latter did not require that the danger be imminent in order to limit freedom of speech. Moreover, the application of the test of "clear and imminent danger" was not in keeping with the Press Ordinance, which defined the danger as one that was "liable to" occur, not one that actually occurred.[12]

The "bad intention" test, which allowed censorship of an expression that might lead to future harm, was rejected by the Israel High Court as constituting an obstacle to the discovery of the truth, a process integral to democracy. (This opinion contradicts the directive in Article 23 of the Press Ordinance and Article 60 of the Criminal Law, which employ the test of "bad intention."[13])

The High Court of Justice held that the test of "proximate certainty" meant that only an utterance that encouraged and approached real action could be limited; it implied that one should not consider the intention of the speaker but rather the connection between his words and the anticipated danger, taking into account the timing and seriousness of the danger. The Court thus considered whether the danger that the minister of internal affairs foresaw as a result of the news item in question was so great that it outweighed the harm to the public interest of freedom of speech that would be done by shutting down the newspaper.[14]

In its deliberations on the first petition brought by *Kol Haam*, the Court limited its judgment to the question of whether the minister of the interior had acted in accordance with the powers conferred upon him. It did not deliberate the case as a test of freedom of speech, even if it expressed doubts about its own method:

> ... the question is whether the publication of a translation of the article in *Kol Haam* endangered public safety, after the same translation had already appeared in a high-circulation newspaper (*Davar*) and in another (*Al Hamishmar*) the same day, where it was not considered injurious to public safety.
>
> If it were not for our conclusion concerning the legality of the suspension order ... we would be of the opinion that *in view of the above question, there is room for an order nisi,* so as to obtain an explanation from the minister of internal affairs. However, in view of our final decision, there would be no point in this.[15]

In its deliberations on the second petition, which utilized the test of "proximate certainty" as a principle for limiting freedom of speech, the Court laid down guidelines for the minister of the interior. The first was that the minister was to determine whether publication resulted in a danger to public safety that constituted a "proximate certainty." The second was that the minister was to estimate the influence of publication on public safety under the circumstances, among them the time that might pass between such publication and the event that was liable to be caused by the publication—although this was not to be the deciding factor. The third directive was that even if the minister was convinced that the danger caused by the publication was a "proximate certainty," he was to weigh carefully whether it justified the use of a measure as drastic as suspending publication of the newspaper, and whether it might not be preferable to counter the negative influence by initiating an inquiry, publishing a denial, or supplying information to the contrary. In the fourth guideline, the Court stated that it would not interfere with the discretion of the minister unless he deviated in his estimation of the influence of the publication on public safety from the test of "proximate certainty," in light of the meaning of the term "endangering public safety," or failed to give enough weight to the principle of freedom of the press.[16]

It appears that the Court was skeptical about the defendant's argument, as its judgment stated that the news item in question did not constitute a danger to public safety, but rather an

expression of opposition to government policy. It described the distinction as "a cornerstone of our judicial system and its accepted principles."[17]

The judgments handed down by the High Court of Justice in later years were of three types. In the first, the Court unequivocally upheld the right to freedom of speech.[18] In the case of *The Israel Communist Party* v. *The Mayor of Jerusalem*,[19] the Court stated that the party had the right to publish items criticizing the rapprochement between Israel and West Germany. In a 1962 judgment in the case of *Filming Studios* v. *Levi Gari*[20] concerning the authority of the Council for the Review of Films and Plays to prohibit the showing of a cinema news clip (before the advent of Israeli television, news clips were shown at movie houses) depicting the violent conduct of the police toward residents evacuated from the Someil neighborhood, the Court decided in favor of the plaintiff. It rejected the Council's contention that the film clip presented police actions in an unbalanced manner, and stated that if the conduct of the police had been inappropriate, there was no legal basis for concealing it.

In another petition, *The State of Israel* v. *Abraham Ben Moshe*[21] in which the defendant was found guilty of assaulting and injuring Member of Knesset Meir Vilner (Israel Communist party), the petitioner argued that the penalty should be reduced due to the fact that Vilner's speeches had infuriated Ben Moshe, as well as a number of legislators, who considered them incitatory. The Court declared that a member of Parliament had the right to express his opinions without fearing that his opponents might view him as dangerous:

> This right is but a tangible example of the close connection between the principle of freedom of speech and the debate over the proper functioning of the democratic process.[22]

In yet another case, the 1979 petition of *Assad Al Assad* v. *Minister of Internal Affairs et al.*,[23] concerning the prohibition against publishing the newspaper *Al Kitab*, the Court stated that the district commissioner, who had specified his reasons for acting as he did, should also have included the facts on which these reasons were based. Since he did not, publication was to be permitted in accordance with the principle of freedom of speech.[24] It should be pointed out that in stating the reasons for the prohibition, the district commissioner had gone beyond the requirements of the law and enabled the Court to weigh his considerations. If he had not done so, the judgment might have been different.

In the second type of judgment, the Court put the case to various tests. In the 1960—61 petition of *Kardosh* v. *Registrar of Companies*,[25] the Court decided in favor of the plaintiff, rejecting the registrar's contention that he had refused to register the company because it might be utilized to disseminate opinions dangerous to state security.[26] The Court directed the registrar to duly register the company and stated that the intent of Article 14 of the Companies Ordinance was that the registrar weigh the matter in light of commercial law, not state security, which was not within his purview.[27]

In the third type of judgment handed down in petitions concerning freedom of speech, the Court permitted curtailment of this civil right. The cases that fall into this category include pleas concerning cinema and theater censorship,[28] as well as a number of petitions on the subject of freedom of the press. In the 1964 petition of *Al Ard Company, Ltd.* v. *Northern District Commissioner*,[29] the Court did not deliberate the case within the larger framework of freedom of speech. The petition was submitted because the commissioner had refused to issue the plaintiff a permit to publish a newspaper. The Court rejected the petition, stating that it did not consider itself qualified to examine the considerations of the district commissioner in matters in which the

latter has been granted exclusive authority by Regulation 94 of Article 2 of the Defense Regulations of 1945. At the same time, the Court expressed indirect reservations concerning the decision of the commissioner:

> .., in the petition of the plaintiff... it was claimed that the refusal to grant a permit to publish a newspaper that would serve as a sounding board for its opinions constituted a violation of the freedom of the citizen and of the press and the like. To the extent that the problem is socio-political and is also connected with the special situation of the state, it cannot constitute the subject of debate and judgment here, but rather belongs to another venue. Whatever our opinion may be in the matter, we are obliged to act and to direct others to act in accordance with the law.[30]

In another type of plea, *Ehud Ein Gil* v. *Council for Review of Films and Plays*,[31] a 1978 petition dealing an order not to screen a film expressing controversial opinions, the Court stated that prohibiting the screening did not contradict the principle of freedom of speech because the film distorted proven historical facts; the judgment also emphasized the element of incitement. Thus, the Court accepted the Council's position that the film in question was a means of seeking legitimization for acts of terror and murder. The Court stressed the difference between its position with regard to this film and its judgment in the *Film Studios* case, in which the subject of controversy had been a news clip, and the producers were thus not required to limit themselves to favorable depictions.

After the *Kol Haam* petitions, the government did not exercise its powers to suspend publication of a newspaper again until 1984, when the newspaper *Hadashot* was shut down for a few days by order of the defense minister. This occurred after the newspaper printed a censored news item about the appointment of a commission of inquiry to investigate the circumstances of the death of two terrorists who had been captured alive after attacking an Israeli bus. The Court held that the government had not gone beyond its authority and ruled in its favor.[32]

Professor Yitzhak Zamir, who then served as attorney general, complained that the censor's prohibition of the publication of important details concerning the bus affair and the inquiry being made into the functioning of the security services had no real justification. He stated that in this case, the broad powers of the censor contradicted basic judicial principles: the office of the censor not only decided whether a certain news item constituted an infraction of the censorship laws, but it also had the authority to pass sentence on a newspaper it found guilty of committing such an infraction. It could impose a fine, suspend the paper for an indefinite period of time, or impound its printing press.[33]

Relations between the Press and the Government

In Israel, there is no freedom of the press as it is understood in most democracies, due to a continuing state of emergency.[34] In addition to the laws mentioned above, there are a number of other statutes that deal with limiting freedom of information, A 1957 amendment to the Criminal Law authorizes the government, with the approval of the Knesset Security and Foreign Affairs Committee, to keep any matter whatsoever secret through the issuance of an order. The directives that prohibit civil service employees from passing on to reporters information that became known to them in the line of duty are based on this law.

The Government Law of 1968, a basic law, states in Article 28 that deliberations and decisions of the government, of Cabinet committees, and especially those concerning matters of security

and foreign policy may not be promulgated except by bodies authorized by the government.[35]

The Criminal Law of 1977 states that a newspaper can be sued and even shut down for infractions like publishing false reports that sow fear and panic (Article 159), as well as for printing incitatory material about friendly states (Article 166).[36]

Beyond the legal situation, there is a continuing tendency to institutionalize relations between the government and the press through agreements that prevent the former from taking full advantage of the various powers delegated to it by law. These arrangements came into being with the establishment of the state and involved the consensus that the mandatory laws opposed by the Hebrew press prior to statehood were not to be enforced. The most important institution is the Editors' Committee, whose members are in constant contact with important representatives of the government, and which constitutes an influential factor in decisions not to print a given item at the request of the government. The first agreement between the Editors' Committee and the representatives of the Israel Defense Forces was signed in 1951. An amended version was signed in 1966. The main terms of the agreement are that, (1) the purpose of censorship is to prevent the publication of security information liable to aid the enemy or impair state security, and (2) there is to be no censorship of political matters, opinions, interpretations, or any other material aside from information germane to security, as stated in Article 1 (Section 4).[37]

However, after serving for some time as chief censor, Avner Bar On came to the conclusion that there were instances in which the purpose of censorship was not to protect state secrets but to serve the political interests of the government. His increasing suspicion that censorship was being utilized by the government for unlawful purposes led him to oppose a number of decisions, and his position was usually accepted.[38] In a book entitled *The Stories That Were Never Told: The Diary of a Chief Censor,* Bar On emphasized that the press itself refused to comply with the censor when security was not at stake:

> When we could contend that a certain subject was a matter of security, we had justification for "closing it off' by means of censorship, hoping that journalists would be obedient for at least a few days . . . this was not the case when political matters were involved, and even if they were of great importance to Israel's interests, we could not even hope for a few days of respite; the battle broke out at once.[39]

The picture that emerges of the Israeli press from Bar On's book is that it stood up for its rights and was fully aware of its public mission. Nevertheless, when the idea of lifting censorship was suggested to the editors, some of them openly admitted that they did not want the responsibility; they preferred the status quo, even if it sometimes involved arbitrary decisions.[40]

The status quo between the defense authorities and the press was challenged in the early 1970s, when the justice of Israel's position in the Arab–Israeli conflict began to be questioned. Issues that had been pushed aside for fear of impairing state security—the attitude toward the Arabs, the future of the territories, and the future demography of the Jewish state—became the focus of stormy debate. The Yom Kippur War sparked further debate as, for its duration, defense authorities controlled the information about the war released to the press.[41]

In his book on the Yom Kippur War, Brigadier General Haim Herzog, president of Israel from 1983 to 1993, alluded to the contention that military censorship had removed hints concerning preparations for attack along the border because of the prevailing IDF assumption that war was not imminent. He also alluded to the argument that one of the purposes of censorship during the war was to keep morale high, a matter that could not be subjected to objective evaluation.[42]

Jurist Moshe Negbi, who accused the press of conceding to the authorities and failing to fight for legislation that would ensure its rights, contended that even before the outbreak of the Yom

Kippur War, the press had in its hands information indicating that the Arab states were planning for war, but that it suppressed this information due to government pressure. Thus, the Israeli public was not alerted to the possibility of war. In Negbi's opinion, by refraining from publication, the press was in large measure responsible for the fact that the war took the Israeli public by surprise.[43]

Scholars point out that in the period immediately following the Yom Kippur War there was a sharp increase in the prohibitions imposed by the office of the censor on news items that did not appear to have clear security implications. At the same time, journalists were less ready to comply with censorship demands. They especially opposed censorship for reasons of morale.[44]

Haim Zadok, past minister of justice (1974–77), analyzed what he viewed as the main elements of the mutual relations between the press and the government: Both considered the principle of freedom of the press fundamental to society, but both agreed that censorship was necessary in security matters to prevent secrets from leaking out. Both were opposed to political censorship of opinions or criticism of the government.[45]

It appears that the consensus was based on dialogue and mutual pressures rather than on legal authority. An example of this can be seen in the reaction to an amendment to the Criminal Law proposed by Minister of Justice Zadok, the purpose of which was to counter a series of leaks to the press on sensitive political issues. Newspaper editors united to fight what they viewed as the government's intention to present them with a *fait accompli.* They applied pressure on members of the Security and Foreign Affairs Committee to prevent approval of the amendment, and indeed, the Committee could not muster a majority. In the end, the Committee came to the conclusion that it had to recur to dialogue rather than legislation.[46]

However, it should be borne in mind that there is no legal basis for the agreement between the Editors' Committee and the government, and that the censor's office has repeatedly violated this agreement by censoring news items for political reasons. It should also be pointed out that Moshe Negbi has accused members of the Editors' Committee of lending legitimization to the operation of what he called the "apartheid regime" in the Israel press, under which a number of newspapers benefit from the agreement and the others are subjected to the mandatory legislation.[47]

Negbi has also contended that the newspapers represented on the Editors' Committee exhibit absolute indifference to the phenomenon of political censorship when it is applied to other newspapers. When the newspaper *Hadashot* was suspended for four days under the order of the censor, other newspapers failed to rally to its defense, and there was some suspicion that the afternoon papers in competition with *Hadashot* had applied pressure on the censor to impose the mandatory regulations in full force.[48]

At the end of 1977, the government attempted to institutionalize its broad powers of censorship in a new press law. This statute was to constitute an additional confirmation of the original Press Ordinance, without necessitating a real debate on its meaning and on the need for change.[49] This maneuver was evidence of the government's desire to continue to exercise the far-reaching powers of censorship granted it by the original Press Ordinance. However, in light of the opposition of the press and of other sectors of the public, the government relinquished the idea.

The Protection of Privacy Law passed by the Knesset in February 1981 appeared to many as a further limitation on freedom of the press. The chairman of the Press Council opposed the law, accusing the government of attacking the press and the public's right to be informed:

> We have not always succeeded in repulsing ail the attacks, but undoubtedly, the position of the Press Council, the Committee of Editors of daily newspapers and the Israel Press Association has made a difference and resulted in most of the attacks being repulsed. *But the battles have not been won but merely put off.* The Press Council serves as a clear and unequivocal sign that the public does not want anarchy when it comes to freedom of speech and that it aspires to responsible and fair journalism alongside freedom of speech.[50]

The media should not be viewed as monolithic. Radio and television, which are national and under government–public supervision (by means of a Directorate composed of representatives of the political parties, in which those of the parties in the coalition government have a majority), come under constant pressure to present information that is "balanced" from a political point of view.

Testimony to the power of the press can be found in the continuing attempts to delegitimize it on the part of political figures, among them high government officials. The denunciations of the press, which are usually presented as "leftist," as opposed to "patriotic," are of course connected with the political background of the detractors. One type of criticism often leveled deals with injury done to accused persons before they are brought to trial, especially public figures suspected of corruption.

The current introduction of cable T.V. in Israel will change the now central role of public television, and the press will continue to be the major source of in-depth information and criticism, thus playing an ever-important democratic role.

Notes

1. M. Negfai, "Freedom of the Press Cannot Be Divided Up," *Politica* 9, August–September 1986, p. 24 (Hebrew)
2. P. Lahav, "Governmental Regulations of the Press: A Study of Israel Press Ordinance," *Israel Law Review* 13, no. 2,1978, p. 230.
3. Ibid., pp. 242–244.
4. Ibid., pp. 245–248.
5. *Kol Haarn Company, Ltd.* v. *Minister of Internal Affairs.* High Court 73[53]P.D. 7, 1953.
6. A. Shapira, "The Self-Restraint of the High Court of Justice and the Preservation of Civil Rights," *Legal Studies* 3, no. 2,1973, p. 644 (Hebrew).
7. *Kol Haam Company, Ltd.* v. *Minister of Internal Affairs.* High Court 53[87]P.D. 7,1953.
8. Ibid.
9. P. Lahav, "On Freedom of Speech in High Court Judgments," *Law* 7, 1976, p. 388.
10. Ibid., p. 389.
11. Lahav, "On Freedom of Speech," pp. 393–394. The case concerned a leader of the American Communist party accused of printing material that constituted incitement to violence.
12. Ibid., p. 394.
13. Ibid., pp. 396–398.
14. Ibid., pp. 398–402; see also P. Lahav and D. Kretzmer, "The Bill of Rights and the Israeli Citizen: Constitutional Achievement or Deception?" *Law* 7, no. 1, June 1976, p. 164 (Hebrew).
15. High Court 53[73], p. 167, author's emphasis.
16. High Court 53 [87], pp. 892–894.
17. *The Temple Mount Faithful et al.* v. *Jerusalem District Commander.* High Court 83[282]P.D. 38 (2), 1983, p. 456.
18. Lahav, "On Freedom of Speech," p. 406.
19. High Court 61[206]P.D. 15,1961, p. 1723.

20. High Court 62[243]P.D. 16,1962, p. 2407.

21. Criminal Appeal 68[255]P.D. 22(427), 1968, p. 2.

22. Ibid., p. 435.

23. *Assad Al Assad* v. *Minister of Internal Affairs.* High Court 79[2]P.D. 34 (4), 1980.

24. Negbi, *Justice under Occupation* (Jerusalem: Kane, 1983), pp. 157–160.

25. High Court 60[241]P.D. 15 1151; also *Kardosh* v. *Registrar of Companies.* High Court 61[16]P.D. 16 1209.

26. Ibid., p. 411.

27. High Court 60[241], p. 1152.

28. Ibid., p. 411.

29. *Al Ard Company Ltd.* v. *Northern District Commissioner.* High Court 64[39]P.D. 18(2), 1965.

30. Ibid., p. 343.

31. *Ehud Ein Gal* v. *Council for Review of Films and Plays.* High Court 78[807]P.D. 33(1), 1979.

32. *Hadashot Ltd. et al.* v. *The Minister of Defense.* High Court 84[234)P.D.38 (2), 1984.

33. Negbi, "Freedom of the Press Cannot Be Divided Up," p. 24.

34. D. Goren, *Secrecy, Security and Freedom of the Press* (Jerusalem: Magnes, The Hebrew University, 1976), pp. 255–261.

35. A. Vitkon, "Some Thoughts and Youthful Memories Concerning Freedom of the Press," *Civil Rights in Israel* (Jerusalem: The Association for Civil Rightsin Israel, 1982), p. 153 (notes) (Hebrew).

36. M. Harpaz, "Freedom of the Press in Israel in Light of Israeli Law," *The Journalists' Yearbook,* 1957, pp. 22–30 (Hebrew).

37. A. Bar On, *The Stories That Were Never Told: Diary of the Chief Censor* (Jerusalem: Edanim, 1981), p. 39 (Hebrew).

38. Ibid., p. 40.

39. Ibid., p. 224.

40. Ibid., p. 104.

41. *Report of the Agranat Commission,* April 1, 1974, Articles 22 and 23 (Hebrew).

42. H. Herzog, *The Terrible Days* (Jerusalem: Widenfeld and Nicholson, 1973), pp. 110–113 (Hebrew).

43. M. Negbi, *Paper Tiger* (Tel Aviv: Hakibbutz Haartzi, 1985), pp. 37–38 (Hebrew).

44. Goren, *Secrecy, Security and Freedom of the Press*, pp. 219–220.

45. H. Zadok, "Freedom of the Press and Civil Rights," *State, Government and International Relations*, no. 10, Spring 1977 (Jerusalem: The Hebrew University, Department of Political Science), pp. 5–11 (Hebrew).

46. Ibid., p. 292.

47. Negbi, "Freedom of the Press Cannot Be Divided Up," p. 27.

48. Ibid.

49. The Laws of the State of Israel, Proposal for a new version 38, Newspaper and Book Ordinance (new version) 1977.

50. *Haaretz,* May 17,1981, p. 6, author's emphasis,

6 Freedom to Demonstrate

The legal situation with regard to the right to demonstrate can be described as the combination of two different approaches. The first says that a permit must be obtained before a demonstration can be held. The second says that a person found guilty of committing an illegal act is to be punished. The first approach is the strictest, as it grants the authorities the power to decide whether a demonstration can be held. Even if such a decision is subject to judicial review, the process involves limitations and often takes time. In contrast, the second approach gives the court rather than an administrative authority the power to determine the legality of a demonstration.[1]

Legislation

The new version of the Police Ordinance (Articles 83 and 84) defines a demonstration requiring a permit from the police as fifty persons or more who proceed together or assemble in order to proceed from one location to another,[2] and an open-air assembly of fifty persons or more who gather to hear a speech or a lecture on a political issue or to discuss such an issue.[3] It follows that if there are fewer than fifty persons participating, if the event does not take place in the open air, and if it does not involve a speech or lecture, the gathering does not constitute an assembly and there is no need for a permit, even (as in the last two cases) if the number of participants surpasses fifty. A protest rally in which there are no speeches or debates does not require a police permit, regardless of the number of participants.[4] Requests for processions or assemblies need to be filed at least five days in advance. The local police commander has the authority to refuse to issue a permit or to make it conditional. If a request is denied, or if the conditions are unacceptable, the citizen has the right to petition the High Court of Justice.[5]

The statutes also refer to situations in which demonstrators break the law. Article 151 of the Criminal Law of 1977 defines an illegal assembly as a gathering of at least three persons intent on breaking the law, whose conduct gives those around them cause to fear that they will commit an act that will lead to a disturbance of the peace, or whose conduct may incite other persons to disturb the peace without need or sufficient cause. The penalty for illegal assembly is one year's imprisonment.[6]

Disturbing the peace is usually described as the use of violence against an individual or forceful trespass. Shouting or crying out slogans does not in itself constitute a disturbance of the peace. Moreover, the suspicion that a person may disturb the peace is not to be based on the evaluation of one police officer. Rather, the suspicion is viable only if it can be proven that the conduct of the person in question aroused a reasonable suspicion that he or she would disturb the peace.

When infractions of the law are committed by persons opposed to a demonstration and the police are unable to protect the demonstrators, they have the right to disperse the demonstration. The demonstrators are then obliged to follow police orders and disperse; if they refuse, they can be prosecuted for unlawful assembly.[7]

Article 152 of the Criminal Law, which deals with rioting, authorizes police officers to order demonstrators to disperse and empowers them to do whatever is needed to carry out the order.

Article 216 (A4) of the Criminal Law deals with conduct that is liable to lead to a disturbance of the peace. It has been used to prosecute persons handing out leaflets, under the contention that their action caused a large assembly. However, this violation is not defined, the result being that if a person handing out leaflets does not cause a commotion, he or she cannot be accused of committing an offense.[8]

In addition to the above infractions of the law, there are also general violations like disrupting traffic, trespassing, injuring religious feelings and tradition, making noise, and breaking municipal ordinances.[9]

The obligations and powers of the police are defined in the Police Ordinance, which states that one of the jobs of the police is to prevent disturbances that will lead to unlawful assemblies or processions, which they have the authority to disperse. This task is not connected to the subject of demonstrations. *The order to disperse a lawful demonstration does not in itself make the demonstration unlawful.* However, demonstrators are obliged to obey the orders of the police or risk breaking the law if the Court subsequently decides that the police action was justified.[10]

A memorandum composed by members of the Israel Association for Civil Rights points out what they consider flaws in the present law:

1. The realization of the right of the citizen to assemble and demonstrate is subject to the discretion of the district police commander, and causes for refusing to grant a permit are not specified in the law.
2. The police force constitutes an arm of the executive branch of government, and, as such, even if it does not employ considerations that have nothing to do with the law, it should not be entrusted with what is at present almost exclusive authority over this important civil right.[11]
3. One of the tasks of the police force is to maintain public order, and, as such, it is not capable of considering requests for permits objectively. Due to its very essence, the police is not qualified to weigh the conflicting interests of freedom to demonstrate and maintenance of public order.
4. The district police commander is not obliged to reply to a permit request within a specified period of time, while the persons submitting the request are obliged to do so at least five days before the demonstration, a fact that obstructs the right to petition the High Court, for denial can be made at the last minute.
5. The process of police decision making is obscure, and there is no official information regarding the number of requests denied.[12]

In December 1982, Member of Knesset Moshe Shahal from the Labor Party proposed a new law concerning freedom of assembly.[13] In his Knesset speech, he argued that the time had come to replace the Police Ordinance, a heritage of the British Mandate period, with new Israeli legislation. He enumerated the flaws in the existing legal situation, especially the fact that the police force was in constant conflict between its duty to maintain public order and its obligation to protect civil rights. He argued that new legislation was needed so that the police would have directives regarding how to interpret the power of discretion granted them, as well as with regard to the amount of force they might reasonably apply in dispersing demonstrations. It is worth noting that this debate took place in a period in which demonstrations were being held against

the Lebanon war. Some of them were dispersed by the police with considerable force, leading to accusations regarding the use of unreasonable force against demonstrators. Shahal mentioned two of these demonstrations in his speech. The first was the Peace Now demonstration held near the house of Prime Minister Menachem Begin, and the second was a demonstration conducted by employees of El Al, both of which were dispersed by force. Shahal's proposed law included the right to appeal the police's denial of a permit in lower courts, so that a quick judgment could be obtained.

At the time of the Knesset debate on the law, then Minister of Internal Affairs Joseph Burg opposed Shahal's proposal but suggested moving the debate to the Constitution, Law, and Courts Committee. In his argument, the minister cited the High Court judgment on a petition submitted by the Israel Communist party after it had been denied a permit to demonstrate in Nazareth. The Court decided in favor of the police, stating that the police was responsible for public order and that it was fully qualified to make decisions that would guarantee the maintenance of public order.[14]

In April 1981, the Israel Association for Civil Rights sent a document to Attorney General Yitzhak Zamir entitled "The Freedom to Demonstrate," in which it described instances in which the police had unlawfully dispersed protest vigils:

> Despite the fact that protest vigils do not require permits, the police disperses demonstrations of this type, under the contention that the participants lack a permit. Also, it often arrests the demonstrators and prosecutes them for "unlawful assembly," in accordance with Article 151 of the 1977 Criminal Law.
>
> *The fact that the courts exonerate the accused has not deterred the police from continuing this unlawful practice.*[15]

The Association was often asked to intervene on behalf of persons arrested for participating in illegal demonstrations. In the end, a number of the participants, who were prosecuted over the objections of the Association, were cleared of all blame.[16]

Judgments of the High Court of Justice

Recent years have witnessed a turning point in the policy of the High Court of Justice, which in the past had been criticized for equivocating. It was said that despite the fact that the Court had ample opportunity to define the parameters of public safety and public order as causes for the denial of permits to demonstrate, it had failed to deal with these concepts and thus had contributed to a situation in which the police had unlimited authority when it came to approving demonstrations.

An example of this is the judgment in the petition of *Rakah* v. *Police Commander of the Northern District,* submitted after the police had refused to grant a permit for a May Day demonstration. The Court held that there was no doubt that the police had legitimate reasons for the denial. In another petition, *Kahana* v. *Commander of the Jerusalem Police,* the Court also decided in favor of the police, stating that the right to assemble did not mean the right to invade the privacy of public figures. And in its deliberations on the petition *Eddie Malka* v. *Israeli Police,* submitted by the "Black Panthers" after they had been denied a permit to demonstrate, the Court once again supported the position of the police, stating that they had been justified in considering the possibility of the disruption of public order in their denial, since maintaining public order was one of the tasks of the police.[17]

The turning point came in 1979 in the petition of *Saar* v. *Minister of Internal Affairs and the Police.* For the first time, the Court was critical of the decision of the police not to allow a demonstration.[18] It deliberated the police's refusal to grant a permit to a procession of young couples lacking housing.[19] The denial was based on the argument that the fact that the procession was to pass through the main streets of Jerusalem meant that it would cause a disruption of public order and a disturbance of the peace, as had occurred during a similar demonstration held in Tel Aviv.

The Court held that the police were obliged to grant the petitioners the permit they had requested. Justice Aharon Barak stated that the directives in Article 85 of the Police Ordinance did not mention the reasons that the district commander should take into account in his decision to grant or deny a permit. At the same time, it was clear that the commander was not free to use any reason he liked, and his discretion had to be taken in the framework of the object for which it had been authorized. If he came to the conclusion that it would have an adverse effect on public safety or public order, he should refuse to grant the permit. However, Justice Barak concluded that the arguments of the police did not justify such a refusal: the very fact that the assembly or procession disrupted traffic to a certain extent did not constitute reasonable cause to deny it. At the same time, Barak instructed the police to take the necessary precautions to minimize traffic disturbance. He rejected the police argument that they had limited personnel, and that this personnel was to be utilized in accordance with the priorities set by commanding officers. In the opinion of the justice, police priorities could not be arbitrary, discriminatory, or unreasonable, and they could not take the place of the right to demonstrate.[20]

It has been said that Justice Barak failed to issue guidelines for balancing "traffic disruption" with "the freedom to demonstrate." The only directive he gave was that of the "minimal limitation," meaning that a permit to demonstrate was not to be denied because of an expected traffic disturbance when such a disturbance could be reduced to a minimum by limitations on the time and place of the demonstration.[21]

The *Saar* judgment leaves the question of "competing utilization" mute, giving decision makers wide leeway and allowing for the possibility of unequal application of the law, although judicial review reduces this danger. The body that rejects an application for a permit to demonstrate has to prove that a solution cannot be found that will allow the demonstration to take place, in accordance with the principles laid down in *Saar.*

Another important judgment was handed down in 1983 in the petition of *Levy* v. *Southern District Commander of the Israel Police.*[22] The plea was submitted after the refusal of the police commander to allow a demonstration of The Committee Against the Lebanon War to hold a demonstration thirty days after the death of Emile Greenzweig, who was killed during a Peace Now demonstration. The refusal was based on the possibility that spectators would riot and on the inability of the police to protect the demonstrators. The High Court deliberated the principles of the right to assemble and demonstrate. It held that the need to balance this right with other rights obliged the Court to take a position with regard to the relative importance of the various interests. It stated that the police were obliged to take reasonable steps to prevent dangers and riots from occurring during a procession or demonstration, even if this involved more work. The Court held that the test in weighing freedom of speech against public safety was to be the same principle of "proximate certainty" utilized in the *Kol Haam* case. Justice Barak stated that the test of "proximate certainty" meant that there was no need for absolute or imminent certainty, but that a theoretical possibility was not sufficient. The requirement was for "real evidence": the evaluation had to be based on known facts, including past experience. While Justice Barak was

aware of the events of the day and of the delicacy of the political situation, he held that hypotheses, speculation, suspicions, and the ideology that the demonstration or procession wished to express were not to be a matter of concern to the authorities.

> The police is not responsible for ideology, but the circumstances of the transmission of a message, the possibility of its influencing the spectators and the amount of hostility it may arouse in the audience should be taken into account, for they have a direct effect on the proximity of the certainty of harm to the public safety....[23]

The Court stated that in this case, the police commander had refused to allow a demonstration to take place because of events that had occurred in the past, but that these did not constitute "proximate certainty" and did not go beyond speculation. Referring to the murder and its influence on the political culture, the judgment stated that it was the duty of the police to take steps to counter possible threats to the demonstrators:

> Since the threat of the opponents is not just a personal threat against the demonstrators as individuals, but a threat against "freedom of speech," which is central to a democracy, the resources employed to defend the demonstrators should be viewed as resources employed to defend democracy.[24]

In its 1983 judgment in the petition of *The Temple Mount Faithful* v. *Police Commander of Jerusalem*,[25] the Court deliberated the police's refusal to allow the petitioners to pray near the west gate to the Temple Mount on Jerusalem Day, for fear that it would lead to a disruption of public order. The Court decided in favor of the petitioners, but stated that a time limit should be placed on the prayer, that it should be held at some distance from the gate, and that the number of prayers should be determined by the police, unless new developments led to the probability of violent outbursts. This judgment was based in part on the *Levy* and *Kol Haam* cases, in which the test of "proximate certainty" had been applied. In the opinion of the Court, the defendants had not presented evidence of a certainty that would justify denying the freedom to assemble and demonstrate.[26]

These judgments reinforced the position taken by scholars that in Israel the High Court of Justice views the decision of the police to prohibit a demonstration as subject to broad judicial review. The importance of the *Saar* judgment was that it placed the burden of proof that a given demonstration or procession was liable to have an adverse effect on public order on the police.[27]

There have been two recent judgments in which the Court accepted the arguments of the police over those of the plaintiff. The first was that of *Marziano et al.* v. *Southern District Commander of the Israel Police* (1987),[28] in which the petitioners asked to hold a demonstration against religious coercion on Saturday night at the entrance to the ultra-Orthodox quarter of Mea Shaarim. Fearing a violent reaction on the part of quarter residents, the police suggested that the organizers move the demonstration some distance from Mea Shaarim. The organizers rejected the suggestion and petitioned the High Court of Justice. The Court held that the police were obliged to help citizens realize the right to demonstrate, but stated that this right was to be limited or prevented in cases in which there was a "proximate certainty" that in spite of all efforts taken to prevent it, a real danger to public safety was liable to develop. In the opinion of the Court, in such circumstances, the balance between the two rights was not upset by the police's suggestion that the venue of the demonstration be changed.

In the second judgment, on the 1989 petition of *The Temple Mount Faithful et. al,* v. *Commander of the Jerusalem District*,[29] the Court gave special attention to the sensitive security situation in the city after the violent demonstrations and other events that had occurred in connection with "Jerusalem Day." Accepting the police argument concerning the decision to

reject the request to hold a procession from East Jerusalem through the Old City to the Temple Mount, the Court held that there was a strong enough basis to believe that there was a "proximate certainty" that such a demonstration would lead to a disturbance of the peace since effective control of the area was difficult.

In my opinion, the above judgments are not indicative of a policy reversal but rather stem from the High Court's recognition of the high tensions and low threshold of violence prevailing in the city of Jerusalem between Arabs and Jews and between Orthodox and secular Jews.

Appendix: Directives to the Police

In the wake of a request by the Israel Association for Civil Rights, in April 1983 Attorney General Yitzhak Zamir issued directives to the police concerning the right to demonstrate. In this document, Zamir[30] stated that the law did not define the considerations that were to guide the police district commander in his decision to grant, deny, or condition a permit to demonstrate. Nevertheless, the commander was subject to the existing limitations placed on administrative authorities in the exercise of their powers: the obligation to act in accordance with relevant considerations, reasonably, and without discrimination, as well as the obligation to act to maintain security and public order. The following considerations were to guide the commander in making his decision:

A. In granting a permit to demonstrate, the police commander is not doing a favor to the citizen but rather enabling him to realize a fundamental right. Thus the permit should be granted unless considerations like a threat to the public safety or public order warrant denying it or granting it conditionally.

B. The subject of the demonstration and the ideological background of the organizers and participants are not matters that should concern the police and do not constitute a cause for refusing to grant a permit. This is because the freedom to demonstrate exists in order to enable minorities to express opinions that are not acceptable to the police or to the public, including criticism of decisions taken by government authorities.

C. The police can deny or condition a permit if they have a reasonable basis to believe that the demonstration will include the commission of criminal acts like riots, incitement to rebellion, incitement of persons serving in the armed forces to refuse to follow lawful orders, or incitement to commit any illegal act.

D. The freedom to demonstrate does not include the right to injure the rights of an individual by trespassing or causing a nuisance. Therefore in most cases a permit is not to be granted for a demonstration held on private property unless the owners or overseers of the property give their consent.

E. It is possible to deny a permit to demonstrate against a public figure in front of his home, in contrast to in front of his office, because of the disturbance it may create for him and his family in their private lives.

F. The mere suspicion that the demonstration will lead to rioting or injury to the public safety or public order is not cause for denying a permit. Only information or circumstances that belie a real danger can justify such a denial.

G. Disturbing traffic is a relevant consideration, but the police should aspire to create a balance between the right of the individual to demonstrate and the public interest served by not allowing a disruption of traffic. Therefore, the police may limit a demonstration or specify

special conditions connected with the time or route of the demonstration. In general, the idea of a balanced decision does not mean that the police should ask to hold the demonstration when the streets are deserted, in which case the main purpose of calling public attention to a matter will not be served.

H. The police must deploy manpower in such a way so as to allow demonstrations to take place, and the fact that a demonstration may cause difficulties in this area cannot be used to justify the denial of a permit to demonstrate. Only in very special circumstances may the police demand a change in the time of the demonstration or any other change that the circumstances may warrant.

I. The police should refrain from basing their decision on one consideration alone, but should take into account all the relevant arguments, among which the right to demonstrate should take precedence, the aspiration being to create a balance between this right and the need to maintain public order and safety. For example, the fact that possible spectator outbursts against demonstrators may constitute a real threat to public order does not justify refusing to grant a permit, if the police are capable of deploying the manpower needed to prevent such a situation from occurring. In so doing, the police will be carrying out one of their duties: enabling citizens to realize their civil rights.

Notes

1. D. Kretzmer, "The Right to Demonstrate," pamphlet (Jerusalem: Israel Association for Civil Rights, 1984) (Hebrew).
2. Ibid., p. 9.
3. Ibid.
4. Ibid.
5. Ibid., p. 10.
6. Ibid., p. 14.
7. Ibid., p. 15.
8. Ibid., pp. 17–18.
9. Ibid., pp. 19–20,
10. Ibid., pp. 20–21.
11. A. Fogelman, "The Right to Demonstrate and Assemble in Public Places in the State of Israel" (Tel Aviv: Israel Association for Civil Rights, April 1980), pp. 4–5,
12. Ibid.
13. *Knesset Protocols*, Tenth Knesset, Third Session, pp. 62–65 (Hebrew).
14. *Knesset Protocols*, vol. 95, p. 604 (Hebrew).
15. Document sent by the Israel Association for Civil Rights to Attorney General Yitzhak Zamir, on April 5, 1981, signed by Dr. D. Kretzmer; author's emphasis.
16. Kretzmer, "The Right to Demonstrate," p. 13.
17. M. Raffel, "The Right to Demonstrate: A Comparative Study of Israel and the United States," *Israel Law Review* 11, 1976, pp. 348–366. See also D. Kretzmer, "Demonstrations and the Law," *Israel Law Review* 19, no. 1, Winter 1984, pp. 107–108.
18. Kretzmer, ibid., p. 66.
19. *Soar* v. *Police Minister*. High Court 79[148]P.D. 34 (2), 1980, p. 169.
20. Ibid., pp. 172–179.
21. Kretzmer, "Demonstrations and the Law," p. 93.

22. *Levy* v. *Southern District Commander of the Israel Police,* High Court 83[153]P.D, 38 (2) 1984, p. 393.

23. Ibid., p. 411.

24. Kretzmer, "Demonstrations and the Law," p. 95.

25. *The Temple Mount Faithful* v. *Commander of the Jerusalem Police.* High Court 83[292]P.D. 38 (2), 1984.

26. Ibid., p. 454.

27. Kretzmer, "Demonstrations and the Law," pp. 107–108.

28. *Marziano et al. v.Southern District Commander of the Israeli Police.* High Court 87[606]P.D. 41 (4), 1987, p. 449.

29. *The Temple Mount Faithful Movement et al.* v. *Commander of the Jerusalem Police.* High Court 89[411]P.D. 43 (2), 1989, pp. 17–18.

30. "The Freedom to Demonstrate," Directives of the Attorney General of Israel, *Israel Law Review,* 1983, pp. 511–524.

7 Freedom of Association

In the period following the establishment of the state, voluntary organizations were perceived as having criminal or dangerous political potential, and the tendency was to exercise tight control over them. However, when these associations no longer appeared to present much danger to state security, control was slackened until it became little more than bureaucratic routine.

The Law of Ottoman Societies

In Israel, noncommercial associations are governed by the Law of Ottoman Societies and the Law of Voluntary Associations that superseded it in 1980. Most of the important cases cited in the present chapter are based on Ottoman law, adopted first by the British mandatory government, and later by Israel under Article 11 of the Government and Courts Ordinance of 1948.[1] With a few minor exceptions, this law is what determines the contemporary approach to freedom of association.

The law prohibits organizations created on the basis of nationality or race (Article 4) and secret associations; the founders of new organizations are obliged to register them with the Israel Ministry of Internal Affairs (Article 6). Associations failing to give notification of their founding are outlawed (Article 12). The Ottoman law also authorizes the police to keep watch over associations and their clubhouses, if so directed by the district commissioner (Article 18).[2]

The attorney general's directives to the Registrar of Associations were indicative of the way in which the state of Israel interpreted Ottoman law: the district commissioner's approval was to be given to an association after the fact (Article 2B). However, in one of its judgments, the High Court of Justice held that the commissioner had the power to refuse to accept a notification if the association in question did not conform to the requirements of the law.[3] Another directive stated that in reviewing a notification in accordance with Article 6, the district commissioner was to examine the actual operation of the association and not just its stated aims (Article 2D).[4]

The cases in which an association is prohibited by Ottoman law are also enumerated (Article 2E) in the directives, which include a statement that the instructions are not meant to preclude the parallel application of Regulation 84 of the Emergency Defense Regulations of 1945, which authorize the defense minister to declare an organization unlawful.[5] As will be seen in the following pages, the defense minister used this authority in connection with the Arab association "Al Ard."

Over the years, extensive criticism has been leveled against the Ottoman law, mainly because it was seen as inappropriate to Israel. The main criticism has been connected with the financial activities of voluntary associations and their ability to collect monies without supervision.[6] In the initial period of statehood, the criticisms focused primarily on security matters.

A memorandum circulated by the Administration Department of the Ministry of Internal Affairs in June 1951 stated that the Registrar of Associations could refuse to register an organization if its aims were found to run counter to the law or to state security, or if the

Registrar was convinced that its employees were not of sound character.[7] In a letter, District Commissioner Kuperman of Tel Aviv rejected the position of the police, saying that the Ottoman law did not permit the police to undertake investigations of voluntary associations. He also warned that opposition could be expected on the part of attorneys representing the associations.[8]

It appears that over the years the attitude of the police changed, and they lost interest in overseeing associations or looking into the past of their organizers. This change also stemmed from the fact that restraints were placed on the police's ability to pass on information to other parties.[9]

Associations organized by Arab citizens were subjected to closer scrutiny, against the background of the fear of nationalistic organizing;[10] their notifications of new organizations were also submitted to the attorney general for approval.[11] There are very few cases in which the freedom to organize was curtailed for security reasons. Most of them occurred during the 1950s and 1960s. The reference is mainly to limited efforts to organize in various Arab villages, some of which were approved and others rejected.[12]

The most important legal and public debate regarding the freedom to organize occurred in connection with the Al Ard affair. In June 1964, an Arab organization calling itself Al Ard (in Arabic, the land) notified the district commissioner that its organizers wished to register it as an Ottoman society. In enumerating the aims of the association, the founders mentioned the desire to find a just solution to the problem of Palestine, one that would involve maintaining it as a single, undivided entity, in keeping with the desire of the Arab nation, and respecting its interests and aspirations. They called for a return of the independent status of the Palestinian nation, which would ensure its legal right to self-determination.[13]

At the end of June 1964, the Haifa district commissioner wrote to Sabri Jiryis, one of the founders of the association, that since one of its aims endangered the existence of the state of Israel and its integrity, the organization calling itself "Al Ard" was outlawed by Article 3 of the Law of Ottoman Societies, and if the organization was to function despite the prohibition, steps would be taken against its members in accordance with the law.[14]

In his reply to the deputy district commissioner, Jiryis wrote that part 13 of the notification stated a list of general principles according to which the association intended to act to find a solution to the problem of Palestine. In his opinion, this list did not include any declaration or proclamation from which one could deduce that it intended to pose a threat to the existence of the state of Israel or its integrity, and that the founders had no such intentions. The purpose of the statement in question was to find a general solution to the problems between Israel and the Arab world. The founders had not gone into any detail, knowing that the specifics would be determined by the parties involved.[15]

The letter was followed by a petition to the High Court for an *order nisi* against the Haifa district commissioner.[16] The Court rejected the petition. It held that the decision regarding the legality of the aims of the association depended on what was written its charter, and not on explanations and interpretations later offered by the founders. In its judgment, the Court stated that if the government was of the opinion that the lofty language of the Al Ard charter served to conceal subversive aims, it should bring evidence of such aims. Finally, it held that while the freedom to organize was one of the fundamental principles of democracy, no government could provide a remedy to a movement that intended to subvert it. Shortly after the verdict was handed down, the association was declared unlawful by an order of the defense minister. Membership in it was prohibited, and anyone found belonging to it was to be punished.[17]

A few months after the Al Ard judgment, a party calling itself "The Socialist List" attempted to register for the elections to the Sixth Knesset. Of the ten candidates on the list, five had been members of Al Ard. The Elections Commission refused to approve the list. In his explanation, the chairman, Justice Landau, made the following statement:

> I have no difficulty drawing the line between this list, whose aims were defined in its charter, parts of which were cited in the High Court judgment, and other parties that wish to change the internal workings of constitutional government in the state.
>
> I see an enormous difference between the two, like the distance between East and West, between a group of persons wishing to subvert the very existence of the state, or at any rate its territorial integrity, and a party recognizing the political integrity of the state but wishing to make internal changes.[18]

The list petitioned the High Court of Justice, but once again, the judgment went against the petitioners. Justices Zussman and Agranat concurred with the decision of the chairman of the Central Elections Commission, and Justice Cohen dissented. The majority opinion stated that it was incumbent on the Knesset to safeguard the existence and integrity of the state of Israel, and that a list of candidates opposing it had no right to take part in Knesset elections. Candidates on the list or its supporters had the right to be elected to the Knesset as individuals, but not as members of a subversive list. The Court could not give a remedy to those who sought the demise of the state.

In a dissenting opinion, Justice Cohen held that the Elections Commission should have approved the list, since it had been submitted in accordance with all the regulations (Article 23 of the Elections to the Knesset Law). Since the Elections Commission was composed of representatives of the existing parties, a situation could arise in which, given a free hand, they might refuse to approve any party that desired a change in the government or the abolition of certain laws. Furthermore, Justice Cohen objected to the application of Article 3 of the Law of Ottoman Societies to the Knesset Elections Law, since the initiators of the list did not constitute an association according to Ottoman law, and the unlawfulness of another association to which the initiators of the list or its candidates had belonged did not give the Commission the authority to reject the list.

Justice Cohen added that the fundamental law of the land offered no directives: the Knesset permitted discrimination of every kind, and there were also Jews who denied the right of the state to exist. In his opinion, it was not likely that the members of Al Ard were acting on the instructions of the enemy. Examining the petition in light of the test of "clear and imminent danger," Justice Cohen was unable to discern any clear or imminent danger to the state or its institutions that might derive from the participation of the list in elections to the Knesset. If there were such a danger, it was obvious only to the security services. The evidence presented to the Court did not justify the assumption that any real danger was involved.[19]

Looking through thousands of files on voluntary associations, one gets the distinct impression that there were very few cases of attempts to organize that appeared to the authorities as problematic from a political point of view. The aims of the great majority of associations appear to be cultural or charitable.

The Law of Voluntary Associations

The Law of Voluntary Associations differs from its predecessor, the Law of Ottoman Societies, mainly with regard to founding procedures. Under the Ottoman law, an association came into

being by virtue of agreement, and no permit was required in order to organize. A new association received legal status when its founders notified the district commissioner of its existence. In contrast, the newer law states that an association is not recognized unless it is registered; it becomes a legal entity only if it receives a certificate of registration.[20] At the same time, the law does not prohibit the functioning of associations that have not been duly registered, as the Ottoman law did. Voluntary associations that are not registered with the Ministry of Internal Affairs have no legal status, but their members may appear in court on their behalf, and they may acquire property through the agency of their trustees.[21]

The new law also provides that the Registrar of Voluntary Associations has, under certain conditions, the authority to refuse to register an association (Article 5). Associations must follow certain rules with regard to the administration of their financial affairs.[22]

It should be noted that the desire to retain a free hand when it came to the internal functioning of political parties and labor and employees' unions led legislators to refrain from passing a Political Parties Law that would govern party institutions. Thus party organizations fall under the jurisdiction of the Law of Voluntary Associations.[23] During the Knesset debate on the Law of Voluntary Associations, the large parties joined forces in supporting it, while representatives of the smaller parties opposed the law or parts of it, fearing that it could be utilized to restrict their freedom to organize.

David Glass, former chairman of the Knesset Constitution, Law, and Courts Committee, described the debate that had ensued in committee regarding Article 3 of the proposed law. Some of the members feared that the wording might lead to restraints on the freedom to organize. In order to allay such fears, Minister of Justice Shmuel Tamir suggested changing the wording. The original version read: "A voluntary association shall not be registered if one of its *explicit or implied* aims opposes the basis of the existence of the state of Israel, its security or its democratic nature, or if there is reasonable cause to suspect that the association will serve as a subterfuge for unlawful actions." The proposed version was: "A voluntary association shall not be registered if one of its aims opposes the existence of the state of Israel, or if there is a reasonable basis from which it can be concluded that the association will serve as a subterfuge for unlawful actions or aims."[24]

In a personal interview, Glass stated that the members of the committee had entertained the suspicion that the term "democratic nature" might allow associations to be ruled out for reasons not intended by the legislators. His own position with regard to two organizations whose legality had been challenged in 1984—Meir Kahane's "Kach" on the Right, and the Progressive Peace List on the Left—was unequivocal: both had the right to run:

> Kahane makes my blood boil. In my view, he is the incarnation of all the evil to be found among the Jewish people, a distortion. But at the same time, as long as he does not go beyond expressing opinions and stays within the limits of the law, one has to grit his teeth and bare with him. I am not in favor of placing restrictions on the "Kach" movement, because if you start with Kahane, tomorrow it's someone else for another reason . . . you start with Kahane and the Progressive List, and tomorrow it will be the Communist party, and day after tomorrow, the Tchia party. It depends on the situation, and then why not Neturei Karta, which openly denies the existence of the state. There's an association that opposes the very existence of the state of Israel.[25]

Dov Shilansky, a member of the Likkud, opposed the new version of the law, suggesting that the words "explicit or implicit" be retained. During the Knesset debate, he argued that no state could afford to register an association that even indirectly opposed its own existence.[26]

In contrast, Mordechai Virshuvsky of the Citizens' Rights party agreed with Glass:

> The administration of a democracy cannot X-ray the heart and kidneys. I say that an association that makes an explicit declaration can be outlawed. If it does not make such a declaration, but rather commits unlawful actions under the guise of the law, there are ways of countering it, if one succeeds in proving the case. Of course, this can cause certain difficulties for the state police and security services, but I believe that the greater these difficulties are, the stronger the democracy.[27]

Minister of Justice Shmuel Tamir, who was strongly opposed to the activities of radical parties, stated in an interview with the writer that in his opinion, such activities should be restricted by a Political Parties Law, but he did not succeed in getting such a law passed.[28]

The Elections Commission refused to allow Kach and the Progressive List for Peace to run in the elections to the Eleventh Knesset in 1984, and the two parties petitioned the High Court of Justice. The Court handed down a judgment in favor of the petitioners, stating that unless a list declared it wished to destroy the state or harm the integrity of its borders, the Court could not reject its pleas on the basis of the test of "bad intent." During the hearing, the Court stated that the decision to reject the lists had been taken by a political body. If that body was to be granted the authority to determine which list was subversive, without legislation to guide it, future lists might be rejected because they represented different interests.[29] (This situation changed when the Knesset passed Amendment 12 to the Knesset Law [Article 7A], which stipulated that a list could not take part in Knesset elections if it denied that Israel was the state of the Jewish people, negated the democratic nature of its regime, incited to racism, or was liable to serve as a subterfuge for unlawful actions.[30])

The question of the freedom of association of Rabbi Kahane's Kach movement changed the situation with regard to this civil right. Prior to the Kach case, restriction efforts had been limited to leftist organizations, mostly those of Arab citizens.

In April 1981, the minister of defense, using the authority invested in him by the Emergency Regulations, outlawed the National Coordinating Committee, an umbrella organization for nine Arab groups. One of the founders was Mansour Kardosh, who had been a member of Al Ard. The nine organizations themselves were not outlawed.[31] In the 1984 elections, the Progressive List for Peace was supported by some of the same elements that had organized the National Coordinating Committee, as was the Arab Democratic Movement of Abed Alwahab Darawshe in 1988.

It is my opinion that the present liberal stance taken toward organizing efforts on the part of Arab citizens is mainly the result of the fact that the issue has come to be viewed as a political and ideological one rather than as a security matter.

Notes

1. G. Shapira, "Freedom of Association and the Law of Voluntary Associations—1980," *The Attorney* 33, 3, June 1981, pp. 558–559 (Hebrew).
2. *Collection on the Subject of Ottoman Societies*, Ministry of Internal Affairs, Department for Emergency Services and Special Functions, March 1978, pp. 1–4.
3. Ibid., pp. 14–15.
4. Ibid., p. 15.
5. Ibid., p. 16.
6. Shapira, "Freedom of Association," p. 569.
7. Ministry of Internal Affairs, Tel Aviv District, Memorandum dated June 15, 1951.
8. Ibid., May 21, 1952.

9. Ministry of Internal Affairs, Haifa District, File 61/1, September 8, 1978.

10. Ibid., September 13, 1976.

11. Ibid., February 26, 1978.

12. Ministry of Internal Affairs, Haifa District, File 61/434, January 6, 1955, and File 61/585, July 28, 1958.

13. Ministry of Internal Affairs, Haifa District, File 820, Association Charter.

14. Ibid., July 24, 1964.

15. Ibid., August 6, 1964.

16. *Jiryis* v. *Haifa District Commissioner*. High Court 253/64, P.D. 4[18].

17. *Haaretz*, November 25, 1964.

18. *Yardor* v. *Chairman of the Central Elections Commission to the Sixth Knesset.* High Court Appeal 1/65, P.D.19[3], p. 372.

19. Ibid.

20. Proposed Law of Voluntary Associations, 1979, Proposed Laws 126, pp. 1–8.

21. Shapira, "Freedom of Association," p. 569.

22. Ibid., p. 569.

23. Ibid., p. 570.

24. *Knesset Protocols*, vol. 89, p. 4117 (Hebrew), author's emphasis.

25. David Glass, Interview with the author, March 14, 1985.

26. *Knesset Protocols*, vol. 89, p. 4128.

27. Mordechai Virshuvsky, Interview with the author, April 2, 1985.

28. Shmuel Tamir, Interview with the author, March 3, 1985.

29. *Neiman* v. *Chairman of the Central Elections Commission to the Eleventh Knesset.* 2/84 P.D. 39[2], 1985; *Avneri* v. *Chairman of the Elections Commission.* High Court 3/84 P.D. 39[2], 1985.

30. Proposed Law 1728, April 1985.

31. "The National Coordinating Committee of Nine Arab Groups is Unlawful," *Haaretz*, April 17, 1981, pp. 1–2.

8 Security Laws: One Step Forward and Two Steps Back

The Law of Special Powers in Time of Emergency (Detentions), 1979

The debate over the Emergency Defense Regulations was quiescent for a number of years. In 1966, Minister of Justice Y.S. Shapira issued a directive according to which some of the regulations remained in force, others were to be applied only during wartime, and yet others were to be abolished entirely. In a Knesset speech, Shapira, whose ambivalent attitude toward the subject has already been demonstrated, declared that the regulations were not fit to become part of Israeli law, and that therefore it was not sufficient to abolish those that were no longer relevant. Not long afterward, in June 1967, the Six-Day War broke out. After it was over, Shapira announced to the Knesset that the work of the committee of specialists charged with proposing a reform in the Emergency Regulations had ceased temporarily but would reconvene within a short time. About a year later, in August 1968, the minister of justice told the Knesset that he did not believe the committee could take up the task effectively until the situation of emergency had passed.[1]

Thus, the proposed change was delayed for ten years. During this time, the territories occupied in the Six-Day War were ruled by a military government based on, among others, the Emergency Regulations, which had also been in effect in Jordan, the state ruling the territories prior to 1967. The political upheaval that brought the Likkud into power in May 1977 was accompanied by the appointment of a new minister of justice, Shmuel Tamir. Tamir decided that the time had come to initiate a number of legislative reforms, among them changes in the Emergency Regulations. Thus in August 1978 the Knesset held a debate in connection with the first reading of the Law of Emergency Powers (Detentions). Tamir discussed this reform in an interview with the author. He pointed to the obstacles placed in his way by Intelligence elements, the Police, and his own ministry, all of which opposed the reform. But Tamir was not to be deterred. In his opinion, the main importance of the reform was that it allowed more substantive and frequent judicial review of the decisions made by the authorities. After passage of the reform, he had planned gradually to abolish the emergency regulations or replace them with ordinary legislation.[2]

Tamir explained his determination to change the Emergency Regulations as the result of his experience as an attorney. He emphasized the inability of the previous administrations to institute changes in this area. In his opinion, the Labor governments had not viewed themselves as capable of passing liberal laws. Although Y.S. Shapira, his predecessor, had condemned administrative detentions, he had also gone on record as saying that there was no other choice. Tamir went on to describe his own experience defending an individual placed under administrative detention:

> I remember very well that I represented the detainee Menkes a few years after the establishment of the state. ... He was

suspected of unlawful actions. At the time, the British method was still in force, and he was brought before a committee that was to make a recommendation to the chief of staff; the recommendation, however, was not binding. The committee was chaired by a High Court justice.

I remember the feeling I had when I entered the hall of the High Court of Justice. At the head sat Hashin, and at his right, Daniel Oster, the mayor of Jerusalem. There was also a representative of the Labor party and a representative of the attorney general's office, Meir Shamgar, who had been with me in Kenya [a British detention camp for members of the Jewish Underground during the British Mandate period].

I entered the room. Menkes sat behind me, and Justice Hashin, the Chair, said to me: "Plead your case."

I said, "How can I plead the case if I don't know what the accusations are?"

With a gesture of helplessness, he said, That's it. Plead however you wish."

I said, "I know he's been interrogated on several subjects, which he told me about, and I'll have to arrive at the truth through the process of elimination."

They told me there was no indictment, and I should say whatever I wanted.

It infuriated me that a justice was serving as the Chair of a committee whose decision was not binding but merely a recommendation, and that I was not allowed to see the accusations against my client. I pleaded my case. After that it was Sham gar's turn, but I wasn't allowed to remain in the room while he pleaded, and I wasn't given the opportunity to reply.

Despite this, they recommended that my client be released, and the chief of staff accepted the recommendation, but as long as I live, I will never forget that situation.[3]

During the Knesset debate, the law was supported by the opposition from the left. Representatives of the Democratic Front for Peace and Equality, a communist party, stressed their opposition to the Emergency Regulations. Tawfiq Toubi stated that in his opinion the regulations had been exploited by Mapai to fight its political opponents;[4] Meir Vilner, a fellow party member, took a more pragmatic approach. He stated that in his opinion Israel had been in a state of continuous emergency ever since its establishment. Thus his party proposed as the first amendment to the first article of the law that rather than being in effect during emergencies, since the official situation was always an emergency, the law should come into effect only when Israel was involved in actual war and only after the Knesset had decided to put it into operation.[5]

David Glass (National Religious Party), chairman of the Knesset Constitution, Law, and Justice Committee, tried to weigh the advantages and disadvantages of the existing law. He admitted that administrative detention constituted a deviation from the principle of the rule of law, but believed that such measures were necessary, as they often served as the last resort in preventing terrorist attacks. He spoke of the important differences between existing regulations and the proposed law:

A. The authority to order detention without an immediate trial was transferred from the chief of staff to the minister of defense, except for urgent cases, in which the detention was to be for a limited time only.

B. The Minister of Defense would have to obtain approval from the president of the district court for any detention order he issued, and the decision could be appealed before the High Court.

C. The Minister of Defense would no longer be authorized to order detentions exceeding a period of six months. While this period could be extended, such extension required approval by a judicial body, in contrast with the previous situation in which the period of detention appeared to be unlimited.

D. The law abolished Regulation 112, which permitted the issuance of expulsion orders for Israeli citizens, as well as orders preventing them from entering the country.

Despite these advantages, Glass feared that the broad powers delegated by the new law would be abused, and he opposed the idea that administrative detention could be resorted to for the purpose of preserving "public safety." Although he believed the contention of the security

services that the mandatory regulations had never been misused, and he accepted the fact that they could not remember one instance of the use of "danger to public safety" in order to issue an order of administrative detention, he still had qualms about its inclusion in the new law.

> *... the law must anticipate other conditions under which the caution presently exercised in the use of this instrument might have lower thresholds.* In my opinion, if we retain the phrase "public safety" along with the term "state security," the law will not constitute a reform, in which case it might be said: "Better it had never come into being."[6]

In an interview with the author, Glass expressed fear of discrimination and inappropriate use of the regulations, and he went into those fears at length. He stated that since the law was almost always applied against Arabs, it left him with an uncomfortable feeling. He viewed administrative detention as an attempt to forestall future actions, which was a clear deviation from the rule of law. He did not hesitate to question the process of decision making, in which security people would come before the Knesset with examples the credibility of which legislators had no possibility of checking. Like other representatives of the executive branch of government, they depended on the fact that members of Knesset who did not deal with the matter would not be able to look into all the complexities.[7]

Glass' words were reinforced by Uri Avneri, then a member of Knesset from the Left. In his speech against the law, Avneri described hearings in a security trial, stressing the injustice caused, in his opinion, to the accused. Every security trial involved an impossible situation for the defense: the security service presented the Court with its position, and there was no possibility of bringing experts to question it, because there were no such experts. Thus from the outset the scales were tipped against the accused. Often no proof was offered, because the accused confessed.[8]

All the Labor governments feared changes in or abolition of the Emergency Regulations. Haim Zadok, past minister of justice, discussed these fears in an interview with the author. In his opinion, even if many of the regulations were superfluous, the time had not yet come to abolish them entirely. He preferred them to remain in force and to be applied judiciously until they could be superseded by new legislation. An example of the correct use of the Emergency Regulations was to be found in the case of the censorship regulations. The government had been entrusted with broad powers, but an agreement limited their actual use.[9] In Zadok's position, one can find a number of elements that are representative of the attitude of the government up to 1977, and, to a great extent, afterward as well:

1. A fear of abolishing the regulations, even if the government was no longer certain such regulations were needed. At the same time, the government was not interested in replacing them with new legislation. Rather, it preferred to present the regulations as a legacy of the Mandate period, and to speak of a future in which conditions would render them superfluous.
2. In general, the situation in which the regulations were not enforced in full was convenient to the government. Press censorship was a good example of a situation that was convenient to both parties: the government preferred to maintain the option of censorship and the press preferred to be free of the burden of responsibility.

Moshe Nissim, who served as minister of justice between 1984 and 1987, supported the idea of replacing the regulations with new legislation, but he did not succeed in implementing this idea In an interview, he discussed the obstacles that had stood in his way, the main one being

obtaining the agreement of the defense authorities. It was natural for them to fear that if certain options were closed to them, their ability to carry out the mission with which they had been charged would be diminished. Thus they were in no hurry to give their approval to a process of change.[10]

In contrast with the fears of the ministers from the major parties, Shulamit Aloni of the Citizens' Rights party had a clear position regarding the Emergency Regulations:

> There should be regulations that come into operation only in wartime, and all the colonial regulations made by a foreign ruler should be abolished. I am in favor of doing away with press censorship, even in time of war . . . administrative detentions should be made only in wartime, and only for forty-eight hours, until the detainee can be brought before a judge. I am in favor of utilizing special powers that have to do with defense and security, but only for three months and only with the approval of the Knesset.[11]

It appears that a combination of the government's fear of taking responsibility for the enactment of liberal legislation, on the one hand, and the strong pressure brought to bear by defense authorities to maintain the status quo, on the other, prevented any change from being made after 1979.

Former Attorney General Yitzhak Zamir contended in an article that there was no longer any reason to keep the regulations, besides routine and the convenience of the government, and that the government and the Knesset were aware of this.[12] In his opinion, the enactment of the 1979 law could serve as a perfect example of a successful attempt to balance the needs of defense and freedom. He described how a short time after the law had passed, a new law was drafted by the Ministry of Justice to regulate the issuance of orders restricting freedom of movement, one that was to supersede Emergency Defense Regulations 108110. Defense authorities opposed this law, and the political system followed suit, because the government preferred the convenience of broad powers and rejected the idea of judicial review of those powers. Thus, after one reform had passed, the political influence of the Right increased, resulting in amendments to the Anti-Terrorism Act designed to restrict identification or dialogue with the PLO and other Palestinian organizations.

The Amendments to the Anti-Terrorism Act

The impotence and conservatism of the political system in enacting liberal civil rights reforms indicate a fear of loss of power, combined with political uncertainties and the contention that "the time isn't ripe" for reform. The desire for reform in the Mandatory Emergency Regulations of certain elements of the Labor governments never came to fruition. In 1979 the Likkud government presented the Knesset with a proposed reform, "The Law of Special Powers in Time of Emergency (Detentions)," to which there has been no sequel.

In contrast, amendments were enacted to the Anti-Terrorism Act. These amendments, which are basically symbolic and declarative, can be viewed as the encroachment of political considerations into the area of freedom of speech. Both amendments, and the second one in particular, renewed public debate. Some view the amendment as a legal, artificial impediment to public activity, which, even if it is politically controversial, constitutes an integral part of the weave of Arab-Jewish relations in the Middle East.

On July 30,1980, the Knesset passed the first amendment to Article 4D of the 1948 Anti-

Terrorism Act. This amendment stipulates that

> a person who commits an act involving revelation of identification or sympathy with a terrorist organization by waving a flag, displaying a symbol or slogan, playing an anthem or slogan, or any similar overt act revealing clear identification or sympathy as stated above, in any public place or in such a way that persons who are in a public place can see or hear this revelation of identification or sympathy, will be prosecuted for commission of a criminal offense, and if he is found guilty, is to be punished by 3 years imprisonment or a fine of 250,000 Israeli shekels, or both.[13]

Shmuel Tamir, who was minister of justice at the time, presented the amendment as part of an attempt to transfer the authority in such matters from the hands of the military courts and the defense minister to those of the civil courts and the minister of justice. The amendment was to include an addition to a list of offenses already enumerated in Article 4 of the Act, which deals with support for terrorist organizations. He explained that the purpose of the addition was to provide a remedy for a phenomenon that had not existed at the time of the enactment of the original law. The law had been passed to prevent underground organizations from operating within the borders of the state. Since that time, conditions had changed; instead of joining underground organizations, terrorist sympathizers waved flags, shouted slogans and the like, and the law needed to be changed to cover these possibilities. Stating that a democracy had to guard against those who would destroy it, as defined in the *Al Ard* judgment, he stated that it would be unwise and irresponsible to allow subversive acts against the state.[14]

In an interview several years later, Tamir discussed his attitude toward anti-terrorism legislation, against the background of his involvement in the passage of the Special Powers (Detentions) Act of 1979. He stated that a humane, liberal approach should guide the state, as long as it did not deteriorate to the situation of the Weimar Republic before Hitler's rise to power. The advantage of the Anti-Terrorism amendment was that it directed that a citizen should be judged in a civil rather than a military court. At the same time, he viewed the legislation as a means of preventing the PLO from using indirect means of increasing its power outside the borders of the state. He emphasized that this was a criminal statute, and that the prosecution had to prove that the accused had in fact expressed identification with the PLO.[15]

In contrast with Tamir, Uri Avneri, a representative of the left, was absolutely opposed to the Anti-Terrorism amendment:

> This law, which pretends to fight terrorism, has nothing whatsoever to do with the war against terrorism ... it is a law whose purpose is to suppress the freedom of speech of persons whose opinions are opposed by the government
>
> Gentlemen, the PLO does not have a flag. It doesn't exist.... There is the national flag of the Palestinian people, which has been in existence for at least three generations ... it is their national flag just as the blue and white flag is ours.[16]

Moshe Amar of Mapam warned that the amendment might back-fire—it might increase misunderstanding between the two peoples and result in increased sympathy for terrorist organizations. He added that viewing political thought as a criminal offense would end in the state's punishing a person for freely expressing an opinion or for a political thought that did not involve actual identification with the enemy.[17]

A few days after the amendment had passed, the Israel Association for Civil Rights issued a statement in which it welcomed the transfer of the power of judicial review from military to civilian courts. However, it stated reservations concerning the addition of "revelations of identification or sympathy for terrorist organizations" to the offenses defined in the previous Anti-Terrorism Act. It also recommended abolishing the directive of the amendment authorizing the government to declare a group of persons a terrorist organization, because this meant they had to prove their innocence. The Association stated that the desirable procedure was that the

government prosecute persons for criminal offenses mentioned in the Act but that the burden of proof rest with the prosecution, as required by due process in criminal law.[18]

Professor Ruth Gavison, one of the leaders of the Association, contended in a 1983 article in the Association organ that wearing the emblem of the Israel-Palestine Council, in which the flags of Israel and Palestine appeared, did not constitute a violation of the law, and that neither did waving a Palestinian flag or waving signs containing the colors of the Palestinian flag. In her opinion, the Israel-Palestine Council was an Israeli organization whose goal was to find a political solution to the conflict, and as such it did not fit the definition of a terrorist body as set down in Article 8 of the Anti-Terrorism Act. Thus, the expression of identification with the Council was not a legal offense. Gavison went on to say that when it came to waving the Palestinian flag, each case needed to be examined on its own merits. In cases in which waving the flag constituted an expression of support for the Palestinian struggle for self-determination, a position not in conflict with Israeli law, the deed would not constitute an offense. In cases in which the flag was waved in support of a terrorist organization, it would constitute an offense.[19]

In August 1986, the Knesset passed a second Anti-Terrorism amendment, one that added the following deed to the offenses enumerated in the original Anti-Terrorism Act as criminal: knowingly making contacts with persons serving in official capacities in the administration, council, or any other body of a terrorist organization. The maximum penalty for such an offense was fixed at three years' imprisonment. The law also included a list of exceptions, like cases in which the person contacted is a relative, or in which the person making the contact is a representative of the media who takes part in a press conference, on the condition that members of the international media are present, or in which contact is made at an international scientific-academic conference.[20]

The statement prepared by the Association argued that the assumption behind the amendment was apparently that all contact between an Israeli and a representative of a terrorist organization was harmful to the state; thus there was no need to prove either intent to injure the state or that actual injury had been done. The position of the Association was that any harm issuing from such contacts had to be proven, and that existing criminal law already provided for such exigencies (Articles 111,112, and 113 of the Criminal Law).[21]

The anti-democratic aspects of the amendment were analyzed by law professor Mordechai Krernnitzer, who stated that the contention that the amendment stemmed from the desire to present a uniform opposition to contacts with the PLO was unacceptable. The legal structure of a free state made it imperative to defend the freedom to disagree with government policy and to express such disagreement. If there were a criminal prohibition on every deed that caused harm to Israeli foreign policy, Israel would become a totalitarian state. He stated that criminal law had to remain apolitical, so that it could serve as a common denominator, and so as to ensure respectful observance of the law.[22]

At the end of 1989, peace activist Abie Nathan was convicted of violating the Anti-Terrorism law and sentenced to six months imprisonment; in 1991, he received an additional sentence of a year and a half. The sentences were denounced by leftist circles but did not lead to a change in the law itself. In the public debate aroused by the case of Abie Nathan, it was argued that the law restricted the actions of the opposition in that it granted the prerogative of contacts with the PLO to the government and its representatives only, and that it exploited criminal law to force its political position on the general public. Amnon Rubinstein of the Shinui party, who served as minister of communications, criticized the Labor and Likkud parties for collaborating on the law.[23] David Libay, then a legislator of the Labor party and chairman of the Knesset Comptroller

Committee and now minister of justice in the Labor government, argued that most of the Labor legislators who had supported the law had not been fully aware of its legal and political implications. For this reason, he said, it would not be possible to change it under existing circumstances.[24]

As we have seen, the two amendments discussed in this chapter were the subjects of bitter political controversy, especially the Anti-Terrorism amendment. Their passage is evidence of increasing political intolerance and the exploitation of criminal law for uses for which it was not intended. The Jewish-Arab conflict once again led to a blurring of the dividing line between values and legal process. Neither amendment ever became part of the broad consensus with regard to the supremacy of security needs over human rights.

Notes

1. Amnon Rubinstein, *Israeli Constitutional Law* (Jerusalem and Tel Aviv: Schochen, 1980), p. 220 (Hebrew).
2. Shmuel Tamir, Interview with the author, March 3, 1985.
3. Ibid.
4. *Knesset Protocols*, vol.. 83, p. 3958 (Hebrew).
5. *Knesset Protocols*, vol. 85, p. 1738 (Hebrew).
6. Ibid., p. 1735, author's emphasis.
7. David Glass, Interview with the author, March 14, 1985.
8. *Knesset Protocols*, vol. 85, p. 1744 (Hebrew).
9. Haim Zadok, Interview with the author, March 3,1985.
10. Moshe Nissim, Interview with the author, March 18,1985.
11. Shulamit Aloni, Interview with the author, April 3,1985.
12. Yitzhak Zamir, "Human Rights and State Security," *Law* 19, 1989, p. 27 (Hebrew).
13. Ruth Gavison, "Wearing the Emblem of the Israel-Palestine Council, Waving the Palestinian Flag or Symbols of the Same Colors—Do They Constitute Violations of the Law?" *Civil Rights*, no. 5, March 1983 (Jerusalem: Israel Association for Civil Rights, March 1983), p. 5 (Hebrew).
14. *Knesset Protocols*, vol. 85, pp. 3997–3998.
15. Shmuel Tamir, Interview with the author, March 3,1985.
16. *Knesset Protocols*, vol. 85, pp. 4327–4328.
17. Ibid., p. 4330.
18. Israel Association for Civil Rights, "Statement with Regard to the Antiterrorism Amendment," 1980, Open File, August 6,1980 (Hebrew).
19. Gavison, "Wearing the Emblem," p. 5.
20. *Civil Rights*, no. 15, March 1987 (Jerusalem: Israel Association for Civil Rights), p. 3 (Hebrew).
21. Excerpts from memorandum submitted by the Israel Association for Civil Rights to the Knesset Constitution, Law, and Justice Committee.
22. M. Kremnitzer, "The Prohibition on Contacts—Unwarranted Violation of Freedom of Speech," *Civil Rights*, no. 15, pp. 6–9.
23. "The Anatomy of an Unfortunate Law," *Spectrum* 8, no. 1, pp. 16–17.
24. Ibid.

9 Was the Failure to Enact a Basic Human Rights Law Inevitable?

The story of the ongoing struggle to legislate a basic human rights law—one that would eventually be part of a Constitution—is crucial to the analysis of civil rights in Israel. From the very beginning, major political forces were ambivalent about the statute, and its advocates were unable to mobilize the political power and public support needed for passage. As a result, various versions of a human rights law have made their appearance from time to time in committee and even gone as far as the Knesset floor without having been written into law—sad testimony to the attitude of the Israeli political system toward the important issue of civil and human rights.

The first version of a basic human and civil rights law was drawn up in 1964 by Professor Hans Klinghofer of the Liberal party. It was presented to the Fifth Knesset (1961–65) in the name of the Gahal party, the former Likkud, then tabled. On September 17, 1973, a special meeting of the Seventh Knesset (1969–73) was called to discuss a new version of the law, put forward by the Knesset Constitution, Law, and Justice Committee. It included a statement that the new law did not affect the validity of statutes preceding it (Article 20G); the reference was to the Emergency Defense Regulations, although these were not explicitly named.[1]

During the debate, Benjamin Halevy of Gahal, one of the people who had called the meeting, proposed that the Seventh Knesset, which was nearing the end of its term of office, introduce the law and see it through the first reading, so that the next Knesset would be obliged to proceed to the second and third readings.[2]

Opposing Halevy's proposal, Haim Zadok of the Alignment stated that he was under the distinct impression that calling a meeting to discuss the first reading of a human rights law was a ploy designed to achieve an electoral advantage; Gahal wished to claim the law as its own achievement. He proposed that the law be tabled to committee, declaring that his party would be prepared to support it after the elections. He added that the Alignment's platform would include a basic human rights law.[3] In the end, Zadok had his way, and the law was tabled to committee.[4]

Another version of the law was introduced to the Tenth Knesset (1981–84) by Amnon Rubinstein of Shinui. Rubinstein's law included the statements, "no other statute is to contradict this one" and "the provisions of other laws notwithstanding, the Emergency Regulations do not have the power to alter this law, to suspend it temporarily or to set conditions for its observance."[5] The Tenth Knesset turned the proposed law over to the Constitution, Law, and Justice Committee, which passed it on to a subcommittee headed by Shulamit Aloni of the Citizens' Rights Party.

During the Twelfth Knesset (1988–92), a new proposal was drafted by Minister of Justice Dan Meridor. Submitted by Amnon Rubinstein as a private law proposal in an attempt to circumvent some government opposition, the law passed a preliminary reading, to be described later, after which debate was discontinued due to pressures brought to bear by the religious parties.

The various versions of the human rights law deal with important civil rights like personal freedom, freedom of conscience and belief, prevention of religious coercion, freedom of thought and speech, freedom of assembly, and the freedom to organize and demonstrate, as well as including a prohibition on capital punishment. On the other hand, they lack a clear defense of

social and economic rights, minority rights, and women's rights in matters of personal status. They also fail to extend freedom of worship to all religions and all forms of Judaism.

The fact that a basic human and civil rights law has not been passed to this day, despite the numerous declarations in its favor, calls for an examination of the positions taken by decision makers. This will shed light on the ideological and other types of controversies that have hindered its enactment.

In an interview with the author, Haim Zadok stated that he had supported the law both as a member of Knesset and as minister of justice. In his opinion, the main point of contention was the question of how the law would affect the authority of the religious courts. Zadok felt that if the Knesset wished to alter the powers of these courts, it should do so directly and not through other legislation. He added that if his position had been accepted, the law would have been changed long before.[6]

Another past minister of justice, Moshe Nissim, took a different view. Nissim expressed in an interview with the author the prevailing opinion among the religious parties, whose primary objective is to maintain the status quo in religious matters. He stated that whoever wished to pass a human rights law that would also supersede the personal status laws and eliminate the possibility of issuing emergency regulations, might as well keep his vision to himself; if these two changes were included in a basic human rights law, it would never pass.[7]

David Glass, a member of the National Religious party at the time of his interview, said he had opposed the law for fear of diminishing the authority of the Rabbinic Courts and their jurisdiction in matters of personal status. He stated that by voting the law back to committee, he had succeeded in persuading his party to be more receptive to the idea of a human rights law. The condition, of course, was that the status quo be preserved in religious matters.[8]

Describing the subcommittee hearings, Glass contended that Shulamit Aloni and others had at first insisted that there was no point to a law that did not relate to the issue of personal status. However, in the end they had had to conclude that there would be no chance of a law passing as long as it retained the section on personal status matters since no government wished to alienate the religious sector of the population, and they had gone on to draft a new version of the law.[9]

The conflicts that arose in connection with the law were also described by Shulamit Aloni. She stated that the finished product, completed during the Seventh and Eighth Knessets (1974–77), would have been detrimental to human rights had it passed. It began with a statement that a citizen was a free person unless the law stated otherwise. She continued:

> They wished to prevent existing statutes from being affected by the law. . . . I readily admit that I killed it. They also wanted the law to include a statement about Israel being a Jewish state, so that Jewish law would remain in effect, to the detriment of women's rights and equality for minorities.
>
> It was not easy for them to oppose me because the religious freedoms I included in the law were couched in universalistic principles. They had a problem with that because their objections would be too transparent; they would appear as anti-democratic.[10]

Mordechai Virshuvsky also attributed the failure to pass a human rights law to conflict over religious law. In his opinion, a human rights law might have been passed in the Tenth Knesset if legislators had been able to agree that it would not affect existing legislation. Legislators from the religious parties, as well as those from the Liberal faction of Herut, expressed readiness to support such a law. However, they refused to accept a law whose provisions would result in the annulment of prior legislation that discriminated on the basis of religion, race, or gender.[11]

Shortly after the Twelfth Knesset had taken office, Minister of Justice Dan Meridor presented

it with yet another human rights law. His proposal was adopted by Amnon Rubinstein of the Shinui party and submitted to a vote in November 1989 (see Appendix 2), together with another version presented by Shulamit Aloni (see Appendix 1). One difference between the two proposals had to do with freedom of conscience and religion. Aloni's version,[12] backed by a group of legislators who had supported the law debated in the Tenth Knesset, stated, "There shall be no coercion regarding religion or opposition to religion," (Article 18), and that any statute that was contradictory to the human rights law would be annulled three years after the new law came into effect (Article 36). At the same time, it did not affect the status quo with regard to the jurisdiction of the religious courts, which discriminate against women.

Rubinstein's proposal[13] stated that religious prohibitions and permissions regarding marriage and divorce were not to be affected by the law (Article 20), and that the law was not to alter existing statutes, which were, nevertheless, to be interpreted in the spirit of the new law (Article 22). In effect, Rubinstein's version meant preserving the status quo with regard to religious law, for, as a basic law, the human rights law would require a two-thirds majority to amend. At the time of the debate, Rubinstein went on record as saying that although he ought to oppose his own proposal because it preserved existing personal status laws, for the sake of achieving a national consensus on the issue of human rights, he was willing to make a concession.[14]

The position of Minister of Justice Dan Meridor was similar to that of Haim Zadok, one of his predecessors.

> If someone wishes to abolish, for example, the Emergency Defense Regulations, let him mobilize a majority and pass a law to that effect. If he wants to introduce free marriage and divorce in this country, which is entirely unacceptable to me, let him mobilize a majority in the Knesset and pass a new law. But such changes should not come about as riders on other laws.[15]

Abraham Verdiger of the Agudat Yisrael party denounced the proposed law, in accordance with the stance of the religious parties:

> The proposed law is totally anti-religious. Article 1 speaks of recognition of human worth and human freedom, but for some reason . . . it ignores the fact that we are talking about Jews living in the only Jewish state in the world. . . this law is racist, a racist fundamental law.[16]

Verdiger's words aroused shouts of opposition both from members of the Likkud and from members of the Alignment. Permitted freedom of choice on this vote, many legislators from the Likkud joined representatives from the Alignment and the left-wing parties to vote in favor of the law at its preliminary reading, over strong protests from the religious parties.[17] However, further debate on the issue was tabled, and there is no way of knowing when it will be taken up once again.

The fact that the Likkud government backed the latest attempt to legislate a human rights law, at least in its initial stages, shows that it has come to recognize its importance. However, there is no avoiding the conclusion that as long as the major parties feel they have a greater obligation to coalition interests than to human rights interests, the absence of a human rights law will remain silent testimony to the priorities of the political establishment. Problems having to do with long-standing political norms prevent most of the parties from supporting real changes in the legal status of human rights in Israel.

The political and ideological changes that Israeli society is undergoing are evidenced in the ambivalent position taken by Haim Zadok, who supported the idea of a human rights law but preferred that it not relate to religious matters, in contrast with the unequivocal position taken by Moshe Nissim, who absolutely refused to support any law that would affect the status of the

religious courts. The statement made by former Minister of Justice Dan Meridor echoes the position of Zadok and demonstrates the pragmatic approach to the issue of human rights taken by the two largest parties.

It should be noted that the security issue appears to be much less of an obstacle than the religious one, due to the general agreement among legislators that whatever changes are made must not impair state security. The author agrees with the statement of Yitzhak Zamir:

> The conclusion is that the Israeli legislature has failed . . . first of all, in forty years of independence, it has failed to integrate into mandatory law those changes necessitated by democracy. Our law books are still filled with colonialist mandatory regulations that place far more restrictions on human rights than are acceptable in other democracies.
>
> Secondly, it has failed to pass a human rights law. When it comes to law and human rights, the state of Israel is among the most backward countries in the world.[18]

The increasing desire among the major parties for a human rights law that might serve as an educational tool without being politically binding points to an awareness of the importance of the status of human rights on the part of portions of the Israeli political elite. Yet Israel is still a long way from enacting a basic human rights law.

Appendix 1. Proposed Basic Law: Human Rights

1. Human Worth and Dignity

The state of Israel is based on recognition of human worth: human worth and dignity are not to be violated.

2. Development of Personality

Every person is entitled to the freedom to develop his own personality, as long as he does not violate the rights of others.

3. Personal Safety and Freedom

Every person is entitled to life, safety, and personal freedom.

4. Equality before the Law and the Prohibition of Discrimination

All persons are equal before the law. There is to be no discrimination on the basis of race, gender, nationality, ethnicity, country of origin, religion, religious stream, outlook, personal or social status, political identity, or any other.

5. Prohibition of Capital Punishment

(A) There is to be no capital punishment.

(B) Regarding this prohibition, the law may fix capital punishment for a deed that constitutes genocide or a crime against humanity.

6. Protection of Human Life and Human Dignity

Every person is entitled to legal protection of his life, the integrity of body and soul, and his dignity as a human being. He is not to be tortured or humiliated.

7. Personal Freedom

(A) There shall be no restricting a person's freedom by imprisonment, arrest, exile, expulsion, detention, or any other method, except through the power of the law and its due process, in a democracy.

(B) A person shall not be removed from the jurisdiction of the state**,** except by court order, or after he has had the opportunity to petition the court.

8. A person who is arrested shall be immediately informed of the reason for his arrest.
He has the right to have a person close to him notified of the arrest without delay; and he is entitled to meet with an attorney without delay, unless this right is postponed in accordance with the law by means of a court order for reasons of state security or protection of human life or in order to prevent a crime from being committed.

9. Due Process

(A) Every person, in determining his civil rights and duties, and in the event of a criminal indictment against him, is entitled to a fair and public trial without delay before an independent, unbiased court of law established in accordance with the law; he also has the right of appeal.

(B) The trial shall be public. However, the court has the right to decide to hold a hearing on a certain matter, in whole or in part, behind closed doors, for the sake of the security of the state or the public, or in order to protect a minor or die privacy of one of the litigants or any other person whose name is mentioned in the hearing.

10. Assumed Innocence
Every person is assumed innocent unless proven guilty.

11. Preventing Self-incrimination
Every person is entitled to refrain from incriminating himself, whether in speech, in writing, or in deed.

12. Rights of the Accused
Whoever receives a court indictment shall have that indictment delivered to him, and he shall be given the time and the conditions necessary for a lawyer to prepare his defense.

13. Preventing Retroactive Incrimination

(A) A person shall not be incriminated for a deed or shortcoming that was not a crime at the time of its commission.

(B) This directive shall not be applied to laws designed to bring Nazis and their accomplices to justice or to punish for genocide or a crime against humanity.

14. Privacy
Every person is entitled to privacy in his personal life and life style as long as he does not injure the rights of others.

15. Private Property

(A) Every person is entitled to protection of his private property.

(B) A person's private property may not be trespassed without his permission, and a search may not be carried out except under one of the following conditions:

(1) If a search warrant has been issued by a court of law.
(2) If it is in accordance with processes defined by law:

a. If its purpose is to save a life or prevent the commission of a crime.
b. If there is an immediate danger to state security.
c. If there is an immediate danger to the public health.
d. If its purpose is to enforce the law.

16. Body Search

There shall be no search on the body of a person or his possessions, unless it is permitted by law or unless there is a warrant issued by a court.

17. Privacy of Communications

The privacy **of** communications in writing or other means shall not be violated except by law.

18. Freedom of Conscience, Belief, Religion, and Worship

(A) Every person is entitled to freedom of conscience, belief, religion, and worship.

(B) The law shall not restrict freedom of worship and shall not be allowed to restrict it unless there is need for it, in a democracy, for the public safety, or for the protection of the public health or the rights of others.

There shall be no coercion with regard to religion or opposition to religion.

19. Religious Sects Directives regarding the organization of religious sects, their rights and duties will be determined by new or existing laws.

20. Freedom of Thought

Every person has the right to freedom of thought.

21. Freedom of Speech

(A) Every person has the right to freedom of speech and artistic expression.

(B) The law shall not restrict this right except to the extent that it is required in a democracy in order to protect the democratic regime, or to safeguard state security, the public safety, the rights or good name of others, or to ensure due process of law.

(C) Despite the wording of (B), the publication and distribution of newspapers, books or other publications shall not require a permit from the authorities and shall not be subject to censorship.

22. Freedom of Science and Research

(A) Every person has the right to freedom of science and research.

(B) The law shall not restrict this right unless it is necessary, in a democracy, to safeguard state security, public health, human life, or in order to protect the rights of others, or the accepted cultural values of an enlightened society.

23. Freedom of Assembly, Procession, and Demonstration

(A) All persons are entitled to hold peaceful assemblies, processions and demonstrations.

(B) This right is not to be restricted except in accordance with law the purpose of which is to safeguard public safety and democratic government.

24. Freedom of Association

(A) Every person has the freedom of association.

(B) This right shall not be restricted unless in accordance with law the purpose of which is to safeguard democracy, public safety, and state security.

(C) A person shall not be forced to join an organization or union, unless it is in accordance with law the purpose of which is to safeguard a profession.

25. The Right to Strike

(A) Every person has the right to strike.
(B) This right shall not be restricted unless in accordance with a law the purpose of which is to safeguard democracy or state security, in the framework of labor law.

26. Freedom of Occupation

Every person has the right to engage in any work, business, profession, or occupation. This right shall not be restricted except by law or in accordance with it.

27. The Protection of Property

(A) Every person has the right to acquire property, to hold it, and to use it as he wills.
(B) This right shall not be restricted except by law the purpose of which is to safeguard the public good.
(C) No property shall be confiscated, nor shall the right to a property be restricted, except if it is necessary for the public good and if proper compensation is given in return.

28. Freedom of Movement

(A) Every person has the right to freedom of movement.
(B) Every person has the right to move around the country, to choose his place of residence, and to leave it.
(C) The law shall not restrict this right or allow restriction of this right unless it is necessary, in a democracy, for state security or public safety or health, or in order to protect the rights of others.
(D) A person's right to leave the country shall not be restricted except by court order.

29. Entering the Country

Every Israeli citizen has the right to enter Israel.

30. Preventing Expulsion

A citizen of Israel shall not be expelled from Israel.

31. The Strength of the Law

Despite what is written in other laws, the Emergency Defense Regulations do not have the power to change this law, to suspend it temporarily, or to state conditions for its observance.

32. The Validity of the Emergency Laws

No article of this law shall be construed so as to impair the validity of laws whose purpose is to preserve the emergency powers that were in effect when this law was passed in time of emergency—in accordance with what is acceptable in a democracy.

33. Reservation Regarding the Authority of Services Like the Israel Defense Forces, the Police, and the Prison Authority

No article in the present law shall be construed so as to impair the authority of the Israel Defense Forces, the Police Force, and the Prison Authority to operate in accordance with a special disciplinary and judicial system—in accordance with what is acceptable in a democracy.

34. The Durability of the Law

No law shall be enacted which contradicts the present one, and it may not be amended, except in accordance with explicit directives of a law accepted by a majority of 70 members of

Knesset.

35. Existing Laws

A law that was in force when the present fundamental law came into force and that contradicts any of its directives, will remain in force for three years from the day the present fundamental law came into effect.

Explanations

This proposed law is the fruit of the considerable efforts of the Basic Laws Committee of the Tenth Knesset. This version was prepared for the second and third readings. For reasons that are not clear, its completion was postponed at the last minute by the minister of justice, who promised to call a special meeting of the Tenth Knesset in order to complete the process of enacting the statute into law. The meeting has not been called, and the government has yet to begin to apply the law of continuity to the present law.

Since more than ever before, all are aware of the vital need for a basic law of human rights, this proposal is the best that can be offered under present conditions. Its passage during the present term of office should be hastened.

Appendix 2. Proposed Basic Law: Fundamental Human Rights (Proposal by Member of Knesset Amnon Rubinstein)

1. **Basic Principles**
   In Israel, fundamental human rights are based on the recognition of the worth of man, the sanctity of human life and of human freedom. These rights shall be respected in the spirit of the principles stated in the declaration of the establishment of the state of Israel.
2. **Equality before the Law and Prohibition of Discrimination**
   All are equal before the law; there shall be no discrimination between man and woman and between one person and another on the basis of religion, nationality, race, ethnicity, country of origin, or any other, all this when the basis is not relevant to the matter.
3. **Integrity of Body and Human Dignity**
   The body of a person and his dignity as a human being shall not be violated.
4. **Personal Freedom**
   The freedom of a person shall not be taken away or restricted, whether by imprisonment, arrest, detention, or any other measure.
5. **Freedom of Movement**

   (A) Every resident has the right to move around the country at will, to choose his place of residence, and to leave it.
   (B) Every Israeli citizen who is abroad has the right to enter Israel.

6. **Freedom of Belief and Religion**
   Every person has freedom of religious belief as well as the right to follow the dictates of his

belief and the commandments of his religion.

7. **Freedom of Speech**
   Every person has freedom of speech as well as the freedom to publish opinions and information publicly, by any means.
8. **Freedom of Expression and Scientific Research**
   Every person has freedom of expression and freedom of scientific research.
9. **Privacy**
   Private property is not to be trespassed, and no search is to be made in a person's home, on his body, in his body, or among his personal effects. There shall be no violating the communications of a person in writing or drawing,
10. **Legal Fitness**
    Every person is fit for duties, rights, and legal proceedings.
11. **Protection of Private Property**
    The private property of a person shall not be violated.
12. **Freedom of Occupation**
    Every resident has the right to engage in any work and in every occupation.
13. **Freedom of Assembly**
    Every resident has the right to hold peaceful assemblies, processions, and demonstrations for lawful aims.
14. **Freedom of Association**
    Every resident has the freedom of association for lawful aims by lawful means.
15. **The Right to Go to Court** Every person has the right to petition the court in order to protect his rights.
16. **A Person Is Assumed Innocent**
    Every person is assumed innocent as long as he is not found guilty in a court of law.
17. **No Punishment without Warning**
    A person shall not be punished for a criminal act or a deed or shortcoming not defined by law as a crime at the time of the commission of the deed or the shortcoming.
18. **The Force of the Law**
    Every governmental authority is obliged to respect fundamental human rights.
19. **Violating Fundamental Rights**
    The fundamental human rights are not to be violated unless by law befitting of a democracy, and to the extent that it is necessary.
20. **Reservations**

    (A) This law does not pertain to laws concerning prohibitions and permissions with regard to marriage and divorce.
    (B) It is permitted to violate fundamental rights as stated in this basic law for those serving in the Israel Defense Forces, the Israel Police, and the Prison Authority and in other state security services, as long as the violation is determined by law and made for reasons of organization, order, rule, or discipline.
    (C) Human rights may not be used to endanger the existence of the state or the democratic regime, or to suppress human rights.

21. **The Strength of the Law**
    The Emergency Defense Regulations do not have the power to change this basic law, to suspend it temporarily, or to stipulate conditions for its observance; however, while the state

is in a situation of emergency according to the definition of Article 9 of the Government and Courts Ordinance of 1948, it is permissible to enact emergency regulations which may violate fundamental human rights, in accordance with Articles 5(A), 7, 9, and 11–14, as long as the violation is for no longer than required and no more than to the extent required.

22. **The Force of Existing Laws**
    This basic law shall not invalidate laws that are in force when it comes into effect; however, the directives of those laws shall be interpreted in the spirit of this fundamental law.
23. **The Durability of the Law** This basic law cannot be changed except by a two-thirds majority of members of Knesset.
24. **Amendment of the Basic Law: Judgments**
    Article 15(D) of the Basic Law: Judgments, will be marked (J) and preceded by the following:
    (D) The High Court of Justice will serve as a Constitutional Court, and seven or more judges, whose total is to be an odd number, are to sit in judgment, in accordance with the directive of the president of the High Court of Justice.
    (E) Every person has the right to petition the Constitutional Court regarding the validity of a law or of its directives, under the contention that the law did not pass with the required majority or that not all the directives of Article 19 of the Basic Law, Fundamental Human Rights, have been fulfilled. A person shall not challenge the validity of the law unless he has been directly injured by it.
    (F) If in the process of adjudication, a doubt arises concerning the validity of the law for reasons mentioned in subarticle (E), and the court finds that it is unable to come to a judgment in the matter without pronouncing on the validity of the law, and it is unable to remove the foregoing doubt and to confirm the validity of the law, it will submit the question to the Constitutional Court.
    (G) The Constitutional Court will not sit in judgment on a matter brought before it in accordance with subarticles (E) and (F), until after the High Court of Justice holds that the conditions stipulated in subarticles (E) and (F) have been fulfilled, and that the matter should be brought before the Constitutional Court, unless the matter is brought before it by the High Court of Justice itself.
    (H) If the Constitutional Court hands down a judgment that a law or its directives are invalid, this judgment will be in force from the day of the judgment, unless the Constitutional Court directs otherwise in the same matter.
    (I) There is to be no petition on the validity of the law or its directives, or the question of its force, except for the reasons and in the ways stipulated in this article.

Explanations

The proposal "Basic Law: Fundamental Human Rights" is another chapter in the story of constitutional legislation in Israel. The purpose of the law is to safeguard basic individual freedoms, like equality before the law, freedom of movement, freedom of belief and religion, freedom of speech, the freedom to organize, and others; these important values are not presently anchored in legislation, and their durability and immunity over time lack the proper safeguards.

One of the great contributions of Judaism to world culture is the belief that man was created in

the image of God. It is this conception that forms the basis for the principle of equality among human beings and the recognition of the value of the human being and his dignity.

This version of the proposed law is an exact copy of the proposal of the minister of justice as it was published. The enactment of this law has been delayed for years because of a coalitional controversy. Due to its great importance, we suggest that the process of legislation begin without further delay.

Notes

1. The law is referred to as "Proposed Fundamental Law: Human Rights." Proposed Laws 1973, pp. 448–449.
2. *Knesset Protocols*, vol. 68, p. 4488 (Hebrew).
3. Ibid., pp. 4440–4441.
4. Ibid., p. 4444.
5. Proposed Laws 1983, pp. 111–116.
6. Haim Zadok, Interview with the author, March 3,1985.
7. Moshe Nissim, Interview with the author, March 18,1985.
8. David Glass, Interview with the author, March 14, 1985.
9. Ibid.
10. Shulamit Aloni, Interview with the author, April 3,1985.
11. Mordechai Virshuvsky, Interview with the author, April 2, 1985.
12. *Knesset Protocols*, Hearings 111–113, Twelfth Knesset, Second Session, vol. 4, p. 441 (Hebrew).
13. ibid., p. 443.
14. *Knesset Protocols*, November 15,1989, pp. 402–403 (Hebrew).
15. Ibid., p. 406.
16. Ibid., p. 409.
17. *Haaretz*, November 22,1989, p. 3.
18. Yitzhak Zamir, "Human Rights and State Security," *Law* 19, 1989, pp. 28–29 (Hebrew).

10 Conclusions and Recommendations

Conclusions

During the prestate period, the world view of the political elite of the Jewish community in Palestine placed collective needs above individual ones. This view, together with that elite's desire to reinforce its own ruling powers once the Israeli state came into being, resulted in a policy that tended to minimize the importance of civil rights. It was against this background that the decisions were made not to legislate a written constitution and not to abolish emergency laws inherited from the British Mandate. The desire of the political elite to put its rule on a firm basis coincided with security problems, the problem of an Arab minority within the borders of the new state, and far-reaching demographic changes brought about by the mass immigration of Jews from Arab lands. Under these conditions, the tendency to strengthen the government at the expense of civil rights grew even stronger.

After the initial period of tension ended, the persistence of the Military Government and the rejection of proposals to abolish it apparently stemmed from a desire to continue to dominate Arab citizens.

The absorption policy of the 1950s was formulated and implemented in the face of the need to find a solution to severe economic and social problems, but also against the background of a desire to hold on to the ruling power. Thus, processes of absorption took on a distinct political character, the purpose of which was to perpetuate existing power divisions. Great pressure was brought to bear on the new immigrants, who were entirely dependent on the absorption agencies, to demonstrate political allegiance to the major parties, allegiance that began and ended with the ballot box.

The process of absorption involved viewing the new immigrants primarily as passive elements. Concern for their rights was expressed in decisions handed down from on high. During this period, centralist bureaucratic tendencies were institutionalized, increasing the dependence of citizens as clients of the public service.

These processes had a far-reaching effect on the power of the bureaucracy, on which all citizens became dependent for a wide range of services, permissions, licenses, and discounts. Before long, this dependence led to feelings of anger and alienation from the government.

Recently, Justice Meir Shamgar, president of the High Court of Justice, expressed sharp criticism of this phenomenon:

> The courts are witness to the fact that we have not yet succeeded in breaking loose from the suffocating bureaucracy, with its attempts to put off the citizen by sending him hither and thither, with the alienating and humiliating attitude of the public servants, and with the endless burden of paperwork and requests for permissions.[1]

A public commission charged with investigating the public service and headed by Haim Kovarsky, past director-general of the Ministry of Internal Affairs, devoted a special chapter of its report to the relations between the citizenry and the public service. Describing the existing situation, the commission stated, among other things, that improving the public service held low

priority in the Israeli legislative and executive arms of government. It went on to say that the government, its employees, and its decision makers were not sufficiently aware of the connection between the output of the system and its personnel and effective service to the public. Some of the public servants who came into daily contact with the public lacked the requisite qualifications, and the high degree of centralization at the national level deprived local personnel close to the field from exercising the authority they needed.[2]

In 1971, the Public Complaint Department was established, headed by the state comptroller. Similar departments were later set up in local governments and in various other public institutions. As a result, the citizen had an address to which he or she could direct complaints. However, these departments did not succeed in effecting basic changes in the functioning of the public service bureaucracy. Thirty-seven percent of the complaints lodged in 1990 were found to be justified, in comparison with 40 percent in previous years.[3]

Another major obstacle to increased civil rights is connected with the political relations between the secular and religious parties. Immediately preceding the establishment of the state and during the first years of statehood, a political alliance was formed between the Labor movement and the religious parties, especially the Zionist ones. In return for the latters' support, the Labor movement agreed to preserve the status quo with regard to religious matters. This meant increasing the influence of religion over the citizenry.

The world view of the Labor movement included the principle of pluralism; its leaders wished to enable religiously observant persons to preserve their way of life. However, David Ben Gurion and his followers did not understand the intent of the religious organizations, which was to impose their way of life on secular citizens. The decision not to adopt a constitution reflected the beginning of a political alliance based on the convergence of the power interests of the Labor movement and the conservatism of the religious parties.

The long-standing conflict between the religious and secular sectors of the population points to the fact that the decisions taken by politicians do not represent the prevailing norms of the secular public, a good part of which views the existing situation as religious coercion. The increasing polarization between secular and religiously observant citizens in recent years is evidence of the political elite's failure to reduce conflicts and persuade the public of the need for further compromise; secular citizens fear that concessions will be made at the expense of their own rights.

Another conclusion to be drawn has to do with the absence of a real political struggle over civil rights issues, one that extends beyond the activities of the smaller parties. This can be explained by the fact that Herut, the major opposition party, never presented an ideology or policy that differed in conception from that of the Labor government. While at the time of the constitutional debate Herut supported the adoption of a constitution that would limit the powers of government and guarantee civil rights, it did not continue to press for these changes. Apparently, its strong position on security prevented it from challenging government policy, which included the maintenance of the Military Government in the Arab sector. Moreover, with the strengthening of pragmatic elements within the movement, Herut came to prefer political arrangements that allowed it to become a part of the Establishment and to bolster its political-organizational power rather than opposition to government policies. This was the case until the 1970s.

Turning to the High Court of Justice and its special status: despite the popular myth with regard to the power of the Court and the fact that it does indeed play a crucial role in the defense of civil rights, it should be pointed out that in Israel the High Court of Justice is subject to

considerable restraint. The Knesset and the Cabinet put constraints on the Court's attempts to increase its power by reserving for themselves almost unlimited legislative and executive powers, including the power to enact retroactive legislation. As a result, the High Court of Justice has had no choice but to act within the framework of its legal options, even if in certain areas, like the right to demonstrate, it made efforts to promote civil rights through a liberal interpretation of the law.

It should be emphasized that in security matters, the Court itself opted for self-restraint. This restraint was prompted by its faith in the integrity of the defense authorities as well as the justices' own fear of taking on too much responsibility in areas in which they had limited knowledge. At the same time, in some of the judgments handed down in the past decade, the Court has questioned its long-standing faith in security arguments. It should be stressed that since the Six-Day War, when the attorney general extended the authority of the High Court to the territories, it has had to deal with the question of the status and rights of Arabs living in the territories under military government. This necessitated the Court's taking new stands with regard to both security and the civil administration. In the absence of other guarantees, the High Court of Justice is the sole body in the state of Israel charged with defending the rights of Arab residents of the territories, and its very existence can be viewed as a restraining factor. This is true despite two major types of restrictions on the High Court of Justice:

1. Legal restrictions: The High Court of Justice cannot review the legislative process. It is limited to testing existing laws, and its judgments can always be overturned by new legislation.
2. Normative restrictions: The High Court of Justice is not interested in going much beyond the prevailing values and conceptions. If it does, it will be in danger of becoming the target of political attack and of having its authority reduced, in which case it would lose a good deal of its power and influence. This consideration results in the Court's actually lending legitimization to governmental decisions. Moreover, it limits the Court's possibilities for promoting new conceptions in the area of civil rights, ones that go beyond the general consensus.

This book has examined civil rights issues mainly from the standpoint of the Israeli social and political systems, but the problem of human rights in the territories is undoubtedly relevant to the matter. Due to lack of space and the complexity of the problem, the present analysis has focused on the aspects of human rights in the territories that are indicative of the functioning of the High Court of Justice. Beyond these, even if the government and judicial system of Israel are separate from those in the territories, the problem of human rights in the territories poses moral and political problems for the state. Among these is the spread of negative norms connected with occupation rule, such as the use of force, inequality before the law, arbitrariness, and contempt for human rights. Other influences include the frustration of legislative and other initiatives designed to improve civil rights—for example, the abolition of some of the Emergency Defense Regulations or their replacement with more liberal legislation.

Recommendations

One of the main conclusions of the book is that the Israeli political leadership's refusal to relinquish some of its powers and authority for the sake of civil rights, and its willingness to satisfy the demands of the religious parties in return for their partnership in coalition governments, are at the root of the problem of civil rights in Israel. These factors are more significant than security considerations.

This being the case, change must begin from above and must involve readiness on the part of the political elite to respond to public demands and to recognize the negative effects of the present policy. Although some of the decision makers interviewed indicated that they were aware of the problems that had developed as a result of the many years of neglect, they did not show any determination to act to change the situation. It appears that the political system has to come under much stronger pressure from the press, civil rights organizations, women's movements, academia, the Bar Association, and other progressive elements in Israeli society. These organizations should be guided by an awareness of the fact that the Israeli democracy has reached a stage beyond its initial establishment, and that it is now incumbent upon it to guarantee civil rights at the legislative level and to achieve a greater openness of the political system.

At the same time, one cannot ignore the conservatism of the powers that be, which formulated the existing rules to work to their advantage and are in no hurry to change them. Moreover, the present electoral system, which necessitates a coalition government, may doom to failure every effort at broad legislative reform in the near future, such as the adoption of a basic human rights law. A number of attempts have been made to change the electoral system, but the various proposals—election districts or direct elections for the head of state—will not result in a significant change in the division of political power as long as the religious parties tip the political power scales with 16 to 18 out of the 120 Knesset seats.

International political developments will also affect the situation with regard to civil rights. While the present analysis has shown that the emergency security laws have limited influence within the Green Line, the dangers and tensions to which Israelis are subject undoubtedly encourage tendencies toward seclusion, intolerance, and often even racism and hostility toward the Arab minority within the state. The threat and the feeling that the Jews are alone in the world make it difficult for certain sectors of Israeli society to accept the universality of human and civil rights. As for the political system, it prefers to postpone dealing with the matter of civil rights in order to avoid accusations and attacks from the Right. Thus, any significant change in the situation of human rights in Israel depends on finding a solution to the Middle East conflict.

Keeping these points in mind, I would like to offer a few recommendations about possible courses of action, most of which do not involve party controversies and thus are not doomed to failure from the very start, as were many attempts made in the past.

1. In view of the general consensus—one that traverses the political lines of Right and Left—that the level and functioning of the bureaucracy needs to be improved, and due to the great popularity of the offices of the state comptroller, the public complaints commissioner and the High Court of Justice, I see great potential in the focus on bureaucracy. There is increasing awareness in Israel of the necessity of reducing the bureaucracy in order to improve the national economy. The Kovarsky Commission concluded that the adoption of a constitution or of basic laws was vital to guaranteeing the rights of the citizen and his or her relations with the government. The Commission also stressed the importance of enabling citizens to obtain redress for injustices caused by the system, the right to receive information, the right to participate in local decision making, and the right to receive a speedy reply to permit requests and queries regarding payments or rebates due.[4] In my opinion, the Kovarsky Commission's

recommendations can and should be implemented gradually, accompanied by public pressure wherever necessary.

2. Increasing awareness of environmental hazards, which have a direct influence on the quality of life and on life expectancy, has lead to greater public involvement in environmental issues. Environmental matters are viewed as "nonideological" and are not subject to the traditional spoils system. The coalitions that form over such issues—among scientists, the Society for the Protection of Nature, and local groups—constitute a positive model that reinforces the civil society and its reformist elements. Their activities, which often involve court petitions, receive considerable media attention and often lead to public debate due to an awareness of the scarcity of the natural resources in a state the size of Israel. This positive trend should be encouraged through both legislative and budgetary means.

3. The recent exacerbation of the conflict between the religious and secular sectors, accompanied by outbursts of violence and arrests, has led to a slow process of rethinking with regard to the advantages and disadvantages of the present system. As this analysis has shown, these tendencies cannot at this stage be translated into political expression, but should be viewed as the beginning of a process of separation of religion and politics. The alienation and mutual hostilities, severe in themselves, may in the end lead to dialogue as die only alternative to escalation of the conflict between the secular majority and the religious minority.

The first step should be an agreement between the Likkud and the Labor parties—both competitors for the allegiance of the religious parties—to act to gradually remove religious legislation from the arena of political bargaining. This should be done amid attempts to legislate a "Human Rights Accord" in which the parties promise not to include compromises on certain subjects, like abortions, conscription of yeshiva students, and the question of "who is a Jew?" in coalition bargaining. An agreement of this nature, which would undoubtedly receive the support of many Jewish communities around the world, could serve as a basis for the future legislation of an extensive basic human rights law.

4. The educational system is expected to prepare its young charges for citizenship. However, the present Citizenship classes cannot deal with the full gamut of issues. There is an urgent need to broaden the schools' curriculum in this subject. The expansion of cable television, which is soon to take place on the local level, presents an unprecedented opportunity to inculcate the values of democracy, tolerance, and civil rights into young people, all the more so because the content of the broadcasts can reflect local situations and needs.

Since the establishment of the state, Israeli society has remained democratic under the most trying conditions and under a constant threat to its very survival. Together with the negative phenomena of rightist-racist groups, intolerance, and religious extremism, one can point to civil rights organizations, the media, the judicial system, and individual women and men who work to promote civil rights.

The conflicts in which Israeli society is embroiled at home and abroad have an inhibiting effect on processes of reform in the area of civil rights and often obscure their importance. My hope is that the progressive socio-cultural foundation, the feeling of solidarity, and the desire to advance in all areas of life will prevail, assuring victory to those who wish to realize the heritage of modern Israel as a state based on the foundations of freedom, justice, and peace.

Notes

1. *Haaretz,* September 16, 1991.

2. *Report of the Public Commission for a General Examination of the Public Service and Bodies Supported by the National Budget*, vol. 2 (Jerusalem, August 1989), pp. 55–57.

3. Public Complaint Commissioner, *Annual Report*, Pamphlet 19, 1990.

4. *Report of the Public Commission*, pp. 39–40.

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