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Legal Dimensions of a Control Framework: Law and the Arab-Palestinian Minority in Israel's First Three Decades (1948-1978)

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

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Introduction

The article sets out to analyze the main ways in which Israeli Law was involved in the lives of Israel's Arab-Palestinian minority in the first thirty years of Israeli statehood – from its establishment in 1948 until the period circa the first Land Day, 1976. This is a detailed and complex story, which needs a theoretical key that will explain and sort out the abundance of data by relevancy and importance.

The potential theoretical contributions of the article derive from the effort to develop such a theoretical/analytical key, and from the effort to gain more understanding of the ways in which law is involved in the intriguing stability of certain exploitive inter-communal relationships.

First, I claim that the study of law's involvement in the minority's life should be conducted through the understanding of its function in the socio-political framework of the inter-communal relationship in society. Once we recognize this framework and understand its aims and needs, we are provided with a map that helps us understand and sort out the various legal norms by their relevancy and social impact. We can thus answer the question of whether the legal system was a servant or a subversive element of this framework (or something in between, and what was the balance between these two different social functions)?

Subsequently, I proceed to the core of the article which is an application of this line of analysis to Israel. Lustick's pioneering work recognized, theorized and detailed the Control Framework, as the one operating in the first thirty years of
Israel's existence; and I discover that the legal system in this period was the efficient servant of this framework. Hence this article hopefully contributes to the understanding of the Control model by tracing and discussing its legal dimensions.

As part of this project, I make an effort to deepen the analysis of the role law played in the stabilizing mechanisms of the Control. I try to answer, in what ways did law help deepen minority dependence, co-opting its elites and dividing its community, and how did it help disguise and partly legitimize this state of affairs?

Finally, this line of analysis may be insightful for other law and society analyses of divided societies in which the "control framework" is or was exercised upon the minority. Some obvious examples are Northern Ireland and its Irish-Catholic minority, 1921-1968, Sri Lanka and its Tamil minority from the 1970s on and the Kurd minority in Turkey.

The first two chapters of the article develop the theoretical/analytical key to help trace and unfold the legal norms which were the most pertinent to the minority status in Israel's first three decades. The next two chapters (C and D) are a detailed discussion of the major legal norms and institutional practices that helped shape the minority vulnerability and exploitation. Chapter C discusses the ways in which the common citizenship rights – the classic basic rights – lost

1Ian Lustick, Arabs in the Jewish State: Israel's Control of a National Minority (1980) [hereinafter Lustick, Arabs in the Jewish State]; Ian Lustick, Stability in Deeply Divided Societies: Consociationalism vs Control, 31 WORLD POL. 325, 325-44 (1979) [hereinafter Lustick 1979].

2Sammy Smooha, Control of Minorities in Israel and Northern Ireland, 22 COMP. STUD. SOCY & HIST. 256 (1980) [hereinafter Smooha 1980].


much of their potency to protect the minority; chapter D unfolds the poverty of the minority group-differentiated rights, which carried the same impact. The last substantive part (chapter E) 'takes on' the issue of how law was integrated in the stabilizing mechanisms of the Control framework, thus helping its prolongation.

A. Law and Minority in Deeply-Divided Societies – Outlining a Structure for Analysis

Analysis of the involvement of Law in the lives of its subjects, and here concretely, Israel’s Arab-Palestinian citizens, is more demanding than may seem at first glance. A standard approach would focus on the legal arrangements addressing the minority citizens directly – conferring rights and imposing obligations – but that is not all that the Law does. It also shapes a set of second level norms – the meta-norms – which establish the powers and procedures by which the primary norms are enacted, and establish state institutions which adopt policy, regulate restrictions, freedoms and allocations and apply and enforce the norms. These institutions interrelate in a complex web of cooperation, competition and mutual checks and balances. In addition, the impact of the norms that these institutions generate is often unforeseen because the norms are utilized by other social players in an attempt to bring about social change. The legal analysis aspires, therefore, to expose simultaneously how the Law is involved in the mechanisms that conserve the existing order and how it may become a lever for those wishing to modify the existing order.

The reciprocal relationship between law and society as it pertains to a minority is further compounded by issues of which I shall enumerate a few.

First, the law is but one of various social, political, economic and cultural mechanisms shaping social reality. As such its power should not be overestimated. The law may indeed at times render another mechanism superfluous but likewise it may be replaced by it, as the case may be.

Secondly and from a different angle – a society is not just an arena of social players competing to shape its direction by means, inter alia, of the law, nor just a
framework of vying mechanisms of influence and guidance, of which law is one; it also has its exigencies. The legal system is the servant of several masters, several social needs, which the inter-communal relationship pattern concerning a specific minority is just one of them. In addition, a state may be divided along more than one communal rift and contain more than one inter-communal relationship pattern. In such a case a variety of social demands are met through one normative framework and that often carries with it important and sometimes unpredicted results, a phenomenon that I shall call *Peripheral Radiation*. By peripheral radiation I mean that due to the generic nature of legal norms it is more difficult to design or apply them selectively. This is especially true with respect to court decisions, but it also often applies to legislation. For instance, it is not easy to create an electoral system that protects Favored Minority A and simultaneously works to the disadvantage of Marginalized Minority B. As a result, although the state may want to protect a certain minority, another minority will sometimes inevitably also receive protection.

This complexity (the different legal norms, the various state authorities, the various social players, the many needs that the Law addresses and the peripheral radiation) tends to obscure the relevant legal norms having the greatest impact and relevancy to the minority. We therefore need an analytical key which may penetrate and help clarify this complexity. My suggestion contains of three steps. First (a) I suggest beginning with the sociopolitical set-up and then proceeding to the Law rather than the other way around; we start with an effort to understand the public policy towards the minority - its purposes, requirements and main methods of achievement. Secondly, (b) we identify the minority’s response to this policy. Finally, (c) we seek to discover which of the legal norms - general or particular and whether targeted directly at the minority or not - participate in and serve the public policies pertaining to the minority and which are counteractive and weaken or transform these policies.

The first two steps of the proposed analysis – the State policy towards the Minority and the Minority’s response to it – are encapsulated in a vital variable: the pattern or the framework of inter-communal relationship in the given deeply divided society. There are three main patterns – three paradigms – of inter-
communal relationship: The integrative-civil paradigm, the consociational, and the ethnic. They diverge along the lines of three questions. The first question pertains to the power differences between the involved communities and asks whether or not the purpose is to preserve and use the power disparities to the detriment of the minority (i.e., is the relational framework hierarchic and abusive or one of partnership, and to what extent?). The second question asks whether policy is to keep the communities distinct or to bridge them by an overarching and superseding common identity (i.e., is this an integrative or a distinguishing relational framework, and is the weaker community coerced or pressured to accept it). The third question concerns itself with how does the relationship framework aim to remain stable in face of its sources of tension?

The integrative-civil paradigm, sometimes called "the nation-building paradigm", aspires to shape a bridging identity within society and so it veers away from hierarchies at least in statement of intent. It strives to make common citizenship the overarching identity superseding the identities of origin. This paradigm has at least two sub-divisions. One is more intensive and rigid and aims to enforce a melting pot reality. It is often referred to as the Republican Framework and is applied, among other places, in France and Turkey. The second sub-division of the integrative-civil paradigm entertains the same purpose but strives to attain it with less coercion and with less direct involvement of the state. By means of a dominant language (used in the educational system, the labor market and by the mass media) and culture and by projecting social expectations the state allows assimilation or integration to take its gradual but consistent course. Well-known cases in point are the large immigration states such as the USA, Canada and Australia.

By contrast, the consociational paradigm reconciles itself with the centrality of the original identities in the lives of the members of each community and moreover treats them with a fair measure of equality. This is a horizontal framework of basic partnership (albeit often a tense one) between the
communities that make up a society. Classical examples include Switzerland, Belgium and Canada (as relating to the French-speaking minority), and one recent attempt in this direction is Northern Ireland after the 1998 Belfast agreement. Relationship between secular and religious Jewish communities in Israel is another such example.

The ethnic paradigm resembles consociationalism in that it choose to live with the continued separateness of the communities comprising the society, but it differs from it essentially in that it is a distinctly hierarchic framework. This is the paradigm Israel maintains towards its Arab-Palestinian minority. As mentioned above, it also characterizes Northern Ireland towards its Catholic minority at least until the early 1970s and Sri Lanka towards the Tamil minority in recent decades. This paradigm divides into three sub-types. Israel oscillates between two and does not seem likely to attain the third in the foreseeable future.

The two sub-types within which the status of the Arab-Palestinian minority should be viewed are the Control framework to which I will devote much attention and the Ethnic-Democracy framework. The third and last sub-division lies between the ethnic and the consociational – this is the Autonomy framework. Had the minority in Israel enjoyed autonomy it would have improved its sociopolitical status fundamentally. Indeed it would not have become a full partner in the State, but it would have ascended a notch above a "protected" minority. It would then have enjoyed the power to self administrate important internal spheres of its communal life. Are Macedonia and its Albanian minority after the 2001 Ohrid agreement heading that way? Spain, with the comprehensive minority rights granted especially to the Basques and Catalans, is a prime example of the autonomy framework (albeit one which appears in a country which belongs to the liberal-integrative paradigm but encounters minorities that do not wish to assimilate).

\footnote{Arend Lijphart, Democracies in Plural Societies: A Comparative Exploration (1977).}
These three paradigms and their sub-divisions together comprise the variables in the sociopolitical status of a minority in deeply divided democracies. They provide the spectrum of the possible patterns of inter-communal relationship in deeply-divided democratic societies. Each pattern describes a possible strategic frame within which the majority and minority could interact in a given time-span. By this spectrum of frames we acquire several theoretical tools, among them: (a) the spectrum helps us conduct a comparative political analysis; (b) the difference between different paradigms on the one hand and different sub-divisions within a paradigm on the other hand helps us foresee which social change is more likely to occur – a paradigmatic change is of course much more radical; (c) and more important for us here, the pattern of inter-communal relationship is a kind of map showing the main purposes of public policy towards the minority and what must be addressed on the way to realizing them, among other things as a result of the minority response to these purposes. Such a map helps to discern the function and effect of the Law and allows exploring its participation in the purposes and needs of the pattern - does it serve them or open the way to undermine them or both but unequally?

One, more concrete, preliminary question remains - why have I chosen to analyze only the first three decades in Israel's statehood? It would have been too presumptuous, and certainly too long, if I tried in one article to cover two major periods of relationship between the State and its Arab-Palestinian minority. Change has gradually taken place since the mid-seventies in the inter-community relationship vis-à-vis the Arab minority, and Law had its role in it.


correct time spans for analyses of the interaction between the Law and the sociopolitical status of this minority are both the period in which Law served as an obedient and effective servant of the socio-political pattern of relationship of the time and the period in which Law has taken part in modifying it. However this cannot be done in one article.

A long process of weakening the minority, controlling it and dispossessing it of land characterized the first thirty years of Israel’s existence. Two events, that took place in the latter years of this period, are worthy of special note. The first is the abolishment of military rule to which the minority was subordinated until 1966, and the second is the 1967 war - the second most crucial of Israel’s wars after that of 1948-49. In this war, Israel conquered, among other areas, the remaining parts of the Land of Israel/ Mandatory Palestine. The deep change in the wake of this war is multi-dimensional and ongoing; it will not be discussed here at length.\(^8\)

Abolishing the military rule over the Arab-Palestinian citizens of Israel (the Palestinians within Israel) a year earlier, in 1966, contributed to the gradual appearance of a budding civil society within this minority. Ten years later the minority for the first time gave vent to some of its sentiments with respect to the continuing land seizure, in the form of the 1976 Land Day. It was a day in which stormy demonstrations erupted against another wave of land seizure, and in the lethal response of the state six Arab-Palestinian citizens were killed.\(^9\)

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\(^8\)Arabs in Israel (1995) [hereinafter Al-Haj 1995], (the mid 1970s as the time of redefining purposes and curriculums of the Arab schools).

\(^9\)Some of these implications have still to unfold and this is not the place to discuss them. At this junction suffice to say the following: the Israeli occupation has made a large portion of the Palestinian people an occupied people in its own land - the West Bank and the Gaza Strip, under Israeli military control and without Israeli democratic civic protection, i.e., without right to participate in shaping their own destiny. Secondly, Israel initiated an extensive settling project in the territories it has occupied, thereby adding expropriation to occupation. Moreover, this massive settlement project is interpreted by the Palestinians as demonstrating an intention to make the occupation permanent. Thirdly, for the first time since 1948 major parts of the Palestinian People were rejoined politically and physically (but in a different civic status) under the rule of one political entity, the State of Israel.

\(^9\)The Land Day events and the thoughts they provoked led to a real slowdown in confiscation of private land in the Galilee and the Triangle region (ha-Meshulash).
The changes in the 70s also encompassed the Israeli society in general. Enormous control efforts were transferred to new arenas – especially to the West Bank and the Gaza Strip, and the Israeli settlements project began its fateful march. Somewhat paradoxically, concurrently with the 1967 occupation, within the 1949 armistice borders of Israel (the Green Line), democratization was afoot. Jewish social protest movements appeared before the 1973 war and political ones in its wake, demonstrations accompanied the first Lebanese war 1982-1983 and Israeli media came into its own. Finally, supervisory mechanisms looked busier and more assertive - the Supreme Court, the Attorney General and the State Comptroller, and from the second half of the 70s Israeli jurisprudence underwent important general changes. Moreover, following the 1977 elections, Mapai (the Israel Labor party) lost its hegemony and two blocs came to compete on the Israeli political arena - the Labor and the Likkud Parties. All these processes are tied to cultural developments of the time - a rise in the standing of human rights within Israel 'proper' (the green line) and a more impetuous individualism.

All these led to an ongoing empowerment of the Arab-Palestinian minority. The minority joined the Israeli political scene, albeit as a light weight competitor, and shed the image of helplessness. The relational pattern was shifting, so much so indeed, that Sammy Smooha argues that Israel has moved from the control model to become an Ethnic Democracy. I agree with him regarding the relations vis-à-vis the minority. And if so, the above-mentioned question remains: why

However, in the south (the Negev) the State continued its effort to consolidate its hold over the Bedouin areas and generally the Judaizing project there continued apace, see OREN YIFTACHEL, ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE ch.8 (2006) [hereinafter Yiftachel 2006]; Shafir & Peled, supra note 7, at 112-17.

10Sammy Smooha, Minority Status in an Ethnic Democracy: the Status of the Arab Minority in Israel, 13 ETHNIC & RACIAL STUD. 389 (1990). This term, ethnic democracy, unlike the actual argument regarding the moderation of the relational pattern in Israel, is very controversial. I have tried to grapple with the question before, see Ilan Saban, The Legal Status of Minorities in Democratic Deeply-Divided Countries: The Arab Minority in Israel and the Francophone Minority in Canada Ch.7, at 335-38 (2000) (Ph.D. Thesis, the Hebrew University, Jerusalem) (Hebrew) [hereinafter Saban 2000]. I believe the term is pertinent because it underscores the preference for the majority (Jewish) community and at the same time contains part of the secret of its stability – the minimal threshold of human rights that it preserves. However, in view of the past forty three years of occupation and colonization of the West Bank it becomes indeed truly difficult to utilize this term to characterize Israel as a whole.
not review the interaction of law and the minority throughout the State's existence, including the changes that took place after the mid seventies? As explained above, due to length limitations the analysis of these changes cannot be incorporated in the framework of this article.\textsuperscript{11} I shall focus, therefore, on the first thirty years.

It is time to proceed to the heart of the matter at hand - the connection between Israeli Law and the sociopolitical status of the Arab-Palestinian minority in that formative period.

\textbf{B. The Sociopolitical Status of the Arab-Palestinian Minority in the First Thirty Years of Israel's Statehood – The Control Framework}

\textbf{B1. The Sociopolitical Status of the Arab-Palestinian Minority: Background}

An inter-communal relationship pattern, which delineates the minority sociopolitical status, is a result of both the basic facts and features pertaining to a society and the way in which it opts to deal with them. Following are some fundamental data concerning the Arab minority in the period under review.

The war that accompanied the establishment of the State of Israel (1948-9) resulted in many casualties and about 600-760 thousand Palestinian refugees.\textsuperscript{12} Preceding the establishment of the state was quite a wide international support expressed in UN General Assembly Resolution 181, of 29 November 1947 - to partition Mandatory Palestine into a Jewish and an Arab state and grant Jerusalem special status. In the background hang the Jewish holocaust in WW II, an unprecedented horror in human history. The Palestinians and the Arab

\textsuperscript{11}I made an effort to discuss these changes elsewhere. It is in Hebrew as part of a Ph.D. thesis, see Ilan Saban, \textit{id.} Ch.7.

\textsuperscript{12}\textit{Benny Morris, Birth of the Palestinian Refugee Problem, 1947-1948} 297-98 (1987) [hereinafter \textit{Morris 1987}].
states rejected the partition resolution and fought it. After the war an Arab State was not established, not even on narrower ground than was allocated to it by the partition resolution, and Jerusalem was physically divided between two sovereign entities - Israel and Jordan.

At the end of the war about 160 thousand Arab-Palestinians were left within the cease-fire borders of the State of Israel and became Israeli citizens. The war left the Palestinian People without a state and torn to shreds. It became at once a trans-state and a stateless people. The *Nakba*, the 1948-9 disaster of the Palestinians, had personal repercussions as well. The dispossession and expulsion left a great part of the refugees with a strong sense of injustice as well as grief. Those who remained in Israel became an indigenous vanquished minority. They were being occupied and marginalized by newcomers (who conceive themselves as returnees). Some of the Arab-Palestinians who remained in what became Israel were internal refugees, uprooted from their birthplaces that were destroyed, they stayed in Israel in refuge settlements. The minority community was in this period mainly a traditional, rural farming or semi-nomad (*Bedouin*) population. It was further internally segmented into three communities – the Muslim community and the two other, much smaller, communities – Christian-Arabs and Druze. We speak then of a fragmented, elite-less, economically deprived and resentful minority comprising about 15%-16% of the overall population of Israel of the time.

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

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13 *Id.*


15 Lustick, Arabs in the Jewish State, *supra* note 1, at 84-86; Shafir & Peled, *supra* note 7, at ch. 5; Dan Rabinowitz, *The Palestinians Citizens of Israel, the Concept of Trapped*
A double minority syndrome evolved - each side of the national divide in Israel felt itself at once a minority and a majority. The Arab-Palestinian community is a minority in Israel but part of a regional majority. The Jewish majority community is a small minority in the Middle East. Thus a permanent element of instability surfaced - a sort of inherent manic-depressive factor in the psychology of each side of the divide. In 1967, with the occupation of the West Bank and Gaza strip, the Arab-Palestinian minority within the Green Line reunited in a physical-political tie with its People by way of their joint subordination to one power - the State of Israel - and the minority experienced the sheer fluctuations in the relationship between its State and its People.\(^\text{16}\)

Additionally, the self-image of the minority and the image it has in the eyes of the majority community are discrepant in more ways. The minority possesses a hybrid identity. It shares Palestinian national affiliation and sense of nationhood but carries Israeli citizenship; it has specific cultural and political features - bilingualism is one example, an idiosyncratic agenda another. Moreover, by and large, the Arab-Palestinian minority has never joined the conflict of arms. However, the Jewish majority community tends to ignore these intricacies, most noticeably in times of severe strife between Israel and the Palestinian People or its neighboring Arab states.

The Jewish majority nationalism is of the "ethnic" type. This means a rather exclusionist notion of belongingness, based upon particular conceptions of shared history, ethnic affinity, cultural foundations and more.\(^\text{17}\) The majority

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\(^\text{16}\)The harshest example of this in the period under review was the Kfar Qassem massacre, on the eve of the 1956 Suez Operation, see Sabri Jiryis, The Arabs in Israel 140-53 (1976) [hereinafter Jiryis].

\(^\text{17}\)By contrast, civic nationality is based upon consent attended by an important factor of choice. It is more open to absorb others and does not set such demanding conditions to belonging. Basically it is joint occupation of the civic territory, common language and shared primary values. Important to remember, however, that the type of national affiliation within a given society may change over time, for example, there might be a
community has no wish to assimilate the Arab-Palestinian minority, and the feeling is reciprocated - with the minority wishing to uphold its own nationality and religion. So we find a non-absorbing majority with a non-assimilating minority.

Another important fact is that the Jewish community in Israel is further divided within itself - between a majority of secular and minority of religious Jews, and between Ashkenazi Jews (immigrants from Europe and from North and Latin America) and Mizrahi Jews (immigrants from North Africa and the Middle East). These myriad rifts, differences and tensions (together with the cleavage vis-à-vis the Arab-Palestinian minority) are all administered by one legal system. Therefore the peripheral radiation of Law's impact mentioned above is to be expected.

A major fact to bear in mind regarding the status of the Arab minority is that the purposes of Israel, at least at the period under review, were both all encompassing and immensely exacting. The majority Jewish community was then fully committed to a gigantic project perceived as moral in the highest degree. It was bent upon the resurrection of the Jewish nation after its colossal destruction in the holocaust, providing a safe-haven for a persecuted people, and ensuring the national and cultural revival of the Jewish nation and the ingathering of its dispersions in its historic patrimony. Moreover, post 1948 war Israeli society had to handle at once recuperation from a war that cost 6,000 casualties (out of a population of only 600,000 peoples), hostile neighbors along lengthy borders and a quadrupling of its population in the span of twenty

shift from ethnic nationality to a civic one. For elaboration, see ANTHONY D. SMITH, NATIONAL IDENTITY 11 (1991); Raymond Breton, From Ethnic to Civic Nationalism: English Canada and Quebec, 11 ETHNIC & RACIAL STUD. 85 (1988).

18For an extensive discussion of the composite cleavages in Israeli society from a sociopolitical and historical standpoint, see, for example, BARUCH KIMMERLING, THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY esp. at 110-11 (2001) [hereinafter Kimmerling]; Sammy Smooha, Class, Ethnic, and National Cleavages and Democracy in Israel, in ISRAELI DEMOCRACY UNDER STRESS 309, 316-25 (Ehud Sprinzak & Larry Diamond eds., 1993); Shafir & Peled, supra note 7, at 30-32.

years. The exigencies called for prioritization and special preference was given to security, ingathering of the Jews and settlement. The first meant building up military might and minimizing security threats. The second was the fulfillment of the *raison d’etre* of the State and required enormous financial resources to ensure housing, food, education and health care for the rapidly growing population. The third was perceived as serving the first two and entailed geographical dispersion of Jewish settlements across the country and along its borders.

This state of affairs elucidate an important understanding: it is impossible to comprehend the status of the Arab-Palestinian minority in the first thirty years of Israel’s existence without grasping that this was the peak of the Jewish settlement project in Israel proper. The minority was exposed not merely to a hierarchic status quo in which the state strove to prolong and exploit power disparities. It was subject to the dynamics of the take-over itself. Indeed one of the prominent marks of the relationship with the Arab-Palestinians in Israel at that time was the extensive dispossession of their lands. Land that was until then the property or possession of Palestinian citizens (some of them now internally displaced persons) was nationalized in various ways and later allocated almost exclusively to Jews. A parallel marked feature of Israel at that period was an immigration policy that encouraged the incoming of Jews and barred Palestinian refugees’ return.

These are the main basic facts, needs and conceptions in light of which the sociopolitical status of the minority in the period under review should be understood. The relational pattern is, however, concerned in addition with how the state proceeded to tackle these fundamental conceptions and needs. This issue has been dealt with and I shall therefore limit myself to a brief presentation and short commentary.

**B2. The Control Framework**

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Indeed some of the research into the status of the Arab-Palestinian minority took the centrality of the Jewish settlement project carried out in Israel in the period under review as its point of departure. Elia Zureik for example examined the status of the Arab-Palestinian minority from the theoretical starting point of a "settlers society" and "internal colonialism".\textsuperscript{21} Another angle emerged, however, when Lustick in his path breaking work proposed a different concept as a theoretical framework - the Control Structure - and applied it extensively to the Arab-Palestinian minority in Israel.\textsuperscript{22}

I shall not compare the control structure concept to the internal colonialism theory as explicators of the question at hand. I believe they are to a large extent complementary. The control structure explains mainly political stability of hierarchic and exploitive systems. This may be of course insufficient. By way of illustration, both the Catholic minority of Northern Ireland in 1921-1968 and the Arab-Palestinian minority in Israel in the period under review were under "control". However, in Ireland colonization and land dispossession happened in the 17th-19th centuries whereas in Israel they are a vital and consuming project throughout the period we are reviewing. This difference - between control as such and control as part of colonization - obviously has far-reaching significance in terms of political and legal arrangements that the minority is subject to.

Having said this, one must add that Lustick was careful enough to describe the control model as colonial or colonial-like pattern, in which a hierarchic exploitative relationship pertains between a ruling community and a minority community. Aspiring to and attaining a malleable minority is a mark of such relationships.\textsuperscript{23} It is an almost pseudo-democratic system, just a hairbreadth away from forfeiting the right to be considered democratic. As examples of the


\textsuperscript{22}Lustick 1979, supra note 1, at 325-44; Lustick, Arabs in the Jewish State, supra note 1; Smooha 1980, supra note 2.

\textsuperscript{23}Lustick, Arabs in the Jewish State, id. at 69-81.
control structure Lustick and other writers named Northern Ireland 1921-1968, the southern states of the US between the end of the American Civil War and the 1960s, Israel in the first thirty years of its existence and other instances of Formal Democracy.  

Self-perpetuation is the control structure's prime concern. A manifest communal rift maintained within a rigid all-encompassing hierarchical regime is difficult to legitimize and its stability is inherently fragile. Violent disruption is a constant possibility. The minority in such a system is naturally inclined to affect change and the control structure protects itself by blunting the wish to act towards change and clogging the effectiveness of such actions where they occur. There are complex mechanisms comprising deterrence, division of the minority and infiltration of it as well as ensuring its dependence. They are all aimed at maintaining stability without open and harsh suppression; indeed all out aggressive suppression is rare in this structure and is usually a mark of its failure.

The following are two concrete contributions Lustick's control structure has made to the understanding of the status of the Arab-Palestinian minority in Israel. The first elucidates the mechanisms by which this community was kept docile, and the second shows how procedures not focused upon the minority at all combined with public policy aimed at the minority. The first impacted the minority on three planes. It restricted minority members' ability to consolidate a joint political action, barred access of individuals from the minority to independent sources of economic support and carved out an effective invasion route for the ruling group into the subordinated one for the purpose of supervision and expropriation of assets. Three main mechanisms were employed - a. separateness - insulating the minority from the majority and from

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24 Id. at 338-42. See also Smooha 1980, supra note 2; RONALD WEITZER, TRANSFORMING SETTLER STATES COMMUNAL CONFLICT AND INTERNAL SECURITY IN NORTHERN IRELAND AND ZIMBABWE (1990); John McGarry & Brendan O'Leary, The Macro-Political Regulation of Ethnic Conflict, in THE POLITICS OF ETHNIC CONFLICT REGULATION 1, 23-25 (John McGarry & Brendan O'Leary eds., 1993).

25 See Lustick 1979, supra note 1, at 339; Smooha 1980, supra note 2, at 273.

26 See Lustick, Arabs in the Jewish State, supra note 1, at 78-81.
external forces and dividing it from within, b. cultivating dependency of the
minority on the majority, c. cooptation - bribing or otherwise tempting the elite
or potential leaderships and captivating them.\textsuperscript{27}

In Lustick’s second contribution he singled out three levels of the Israeli reality
that are involved in the control model - a. the public policy dealing with the
minority, b. the public policy regarding general society, c. the structural
circumstances of Israeli society and economy.\textsuperscript{28} I shall present one example of
how the interplay between the three affected the sociopolitical status of the
minority. Dependency is one of the control techniques used against the Arab-
Palestinian citizens but it came about not only by means of a state policy geared
to achieve it, but also through the influence of the other two levels. On the level
of structural circumstances, until 1948 the Jewish and the Arab-Palestinian
communities manifestly differed in pace of economic development, with the
latter severely short on independent employment options except agriculture.
This was compounded on the institutional level by the deeply centralized State
economy and bureaucracy in the first three decades of Israel’s existence, and with
sweeping (society-wide) certification requirements, which in their turn deepened
the minority dependence on the State.\textsuperscript{29}

I shall now proceed to the heart of the matter - how the Law enters into all
this. As proposed, the answer should be sought in the role the Law played with
respect to the aims, the needs and the means of the inter-communal relationship
pattern of those days. I argue that in the said period Israeli Law was the loyal,
able and quiet servant of the Control Structure. Loyal because it did not bring
pressure to bear upon the Control framework that could erode or derail it. It was
a quite servant because it was careful not to make open proclamations of bias and
exploitation, helping to play down the abuse of the power differences to the
detriment of the weaker community. Lastly, it was an able agent of control

\textsuperscript{27}Id. ch. 4-6.
\textsuperscript{28}Id. at 78-81.
\textsuperscript{29}Id. ch. 5.
because it served well the complex needs of the control, needs which pull in somewhat different directions.

One final preliminary comment is in order. The context of my discussion is law and society. The question whether or not the purposes of the Jewish majority community were justified (and to what extent) on the background of the so tragic and demanding circumstances that accompanied the creation of Israel, or the question of whether the means of realizing these purposes were proportionate in the period under review, only very partially enter into my discussion.

C. Law and the Common Rights of Citizenship and the Ways in which they were Weakened

C1. The Common Rights of Citizenship

Human rights, the common right of citizenship and personhood, are the rights granted every person by dint of his humanity or on the basis of his citizenship. This essentially involves two kinds of rights: rights of the freedom type and rights of the claim type. Rights of freedom – of expression, association, religion and conscience, movement, etc. – derive from the value we attach to human autonomy. Rights of claim are directed primarily at the state and stem from the basic equality we assume to exist between us, by virtue of our essence as free intelligent beings, and the understanding that human freedom depends upon fulfillment of certain basic needs: minimum standards of nourishment, health, education, housing and employment. The principal right of claim is the obligation to avoid discrimination on the basis of irrelevant or prohibited bases: national, ethnic, racial, religious, gender, sexual orientation, age, disability and more. Conferring human rights then and upholding them would be expected to shield individuals of the national minority group. Protected from discrimination and allowed freedom of expression, demonstration and association they can form and maintain subgroups and organizations that protect different aspects of the
minority culture, and allow the minority flexibility in adjusting its culture to changing social conditions.\(^3\)

We may hazard the following assumptions related to the way common rights of citizenship are expected to be applied within the control structure in Israel. The scope and exercise of these rights are expected to be restricted, so that they would not seriously impede the achievement of the control system's aims vis-à-vis the minority's weakness and the expropriation or use of its resources; at the same time, stability (and also the self perception of the majority as holding democratic values) demands that a threshold of minimal civil and political rights be preserved and discrimination be, as much as possible, 'reasonable'/ necessary and concealed. Put differently, there is expected to be a delicate balance: one the one hand rights cannot be taken seriously, otherwise land seizure and other major tasks maybe blocked and dependency, deterrence, division and cooptation will not crystallize – i.e., dependency cannot survive an assertive and well-protected norm prohibiting discrimination based on group affiliation; one the other hand, stability is served when the restriction of rights is not too obvious or not conducted in an openly biased manner. Israeli Law of the time confirms these expectations.

Israeli Law maintains a *formal equality* in the common rights of citizenship.\(^3\) It is characterized by careful avoidance of formal discrimination on ethnic grounds when applying individual rights and obligations, immunities and subjugations. Official discrimination almost does not appear in the context of political rights such as the right to vote and to be elected, freedom of expression, of demonstration and association and not even in relation to the right to own property and freedom of movement. The extensive expropriation of Arab lands and imposition of military rule were exercised on the strength of norms of a general nature, purportedly without the Arab-Palestinian minority as their object. Moreover, the State has been careful from the outset to uphold a


\(^{31}\)David Kretzmer, *The Legal Status of the Arabs in Israel* (1990) [hereinafter Kretzmer].
minimum of civil and political rights of the minority. So, for example, contrary to the counsel of the advisor on Arab affairs at the time, it chose to grant the Arab-Palestinians citizens voting rights since the first general Knesset elections and to hold municipal elections in the Arab local councils.

Official deviations from the principle of equality are few and appear almost only in the context of Arab minority rights (or group-differentiated rights, see below in section 4 for elaboration). Group-differentiated rights define the extent of partnership granted a minority group in allocation of various assets by the state, and the scope of self-administration this community enjoys in areas such as education, religion, regional development and the like. This kind of rights is enjoyed in Israel mainly by the majority group who exclusively share the state's symbolic order - signs and emblems, heroes, collective narratives, educational goals, as well as immigration quotas and other public goods. As we shall see, some form of group-differentiated rights is accorded to minority members of other groups in Israel, e.g., they are accorded to the religious minority within the Jewish community and they are accorded to the Arab-Palestinian minority but not equally. For example, the first enjoy autonomy in the sphere of education and the latter do not. The state is not committed to equality in group-differentiated rights either between minorities or between the minority and majority community. The Supreme Court affirmed this normative position in the first years of the existence of the state and has never swerved from it. Justice Landau's decision in the al-Sroujy case is a telling example.


The decision of the Minister of Religion to appoint a committee to act on his behalf in the spheres of religion and personal status of the Muslims of Acre was challenged, and the following was Justice Landau's ruling on behalf of the Court:

They [the petitioners] would prefer autonomy of the Muslim community in all matters mentioned in their petition. But that is of course a national public problem, and not for this court to deal with, but rather, according to the democratic regime that exists in our state the Knesset is the decision-maker on such issues, and with it rests the power to change the existing situation, by promulgating new laws, should it deem it correct to do so... I have found no basis for the unfounded argument brought up by the plaintiffs' lawyer in his words of conclusion, that the right to control the income of these waqfs [Muslim endowments] is in any case in the hands of the Muslims residing in the state at this time. No legal authority has been offered to substantiate this opinion.\(^{35}\)

We find then that the group-differentiated rights are administered beyond the reach of the principle of equality. Israeli Law's candor on this issue derives mainly from the fact that even the multi-cultural version of liberalism does not make a clear-cut case for obligatory equality in group-differentiated rights.\(^{36}\)

However, that is not the case where individual (common citizenship) rights are concerned - there the principle of equality is, formally, fully applied. So, a structure aiming to preserve a hierarchy used for exploiting the subordinated minority, without losing its stability, must be quite sophisticated in its discriminatory practices in regard to the common citizenship rights (i.e., the traditional human rights). One of the main ways of achieving this in the period under review was to strictly adhere to formal equality and at the same time to weaken individual rights and then bypass the thin shield they provide. The most

\(^{35}\) Id. at 191-92.

obvious example is the "military rule". For seventeen years (1949-1966) the state applied 'left-over' British Mandatory emergency regulations to constitute military-ruled zones. This is an 'abnormal' society-wide norm which was selectively used to cover only Arab populated regions.

C2. How did the Potential Inherent in the Common Rights of Citizenship lose its Potency?

C2a. Allocation of Sweeping State Powers Accompanied by Extensive Discretion

The general weakness of individual (common citizenship) rights in Israel in the period under review and the fact that it could so easily be abused to the detriment of the minority is due to the extensive and almost unfettered authority vested in the legislature and especially in the executive in Israeli law of this period.

The Role of Majoritarianism

The Israeli regime at the time fits almost completely the majoritarian paradigm (the Westminster model) that attributes supremacy to the principle of majority rule. The first major embodiment of it was that the sovereignty of the Knesset reigned supreme. The Knesset was virtually unrestricted constitutionally (by Constitution, Judicial Review of legislation and powerful Judiciary). Human rights stood lower in the pyramid of norms than Knesset legislation; in a clash they would have to give way.

By Knesset the reference is to an ordinary simple majority and therefore, given the principle of Knesset sovereignty, any achievement in the realm of minority

37The exception was the Israeli proportional representation system of elections (Party List), as opposed the single member plurality system (First Past the Post).
protection was subordinated to it and could easily be annulled by subsequent legislation; and the Knesset amendment or annulment was not subject to judicial review. It was with good reason that David Kretzmer dubbed Soft Principles the basic norms of human rights recognized and promoted through Supreme Court decisions at the time. Differently put - constitutional restrictions upon legislation almost did not enter at that time into Israeli law. Indeed the declaration of independence mentions a constitution which was supposed to be constituted quite promptly, and few steps in this direction had indeed been taken but for various reasons the process was deferred and a breakthrough has occurred only in the 1990s.

The second embodiment of the majoritarian paradigm is the power invested in the government - the political body that in Israel at any rate is the representative par excellence of the majority community. In the emergency circumstances of Israel the government enjoyed a very comprehensive authority and dominance. This was manifested in several ways - first in the formal interplay of power between the executive and the legislature. For example, some of the authority vested in the executive included emergency regulations that could temporarily override legislation. The norm this rested upon was mainly section 9 of the Law and Government Ordinance 1948. Secondly, the allocation of powers between central government and local government was of a very centralist structure.


42For an extended discussion, see MENACHEM HOFNUNG, DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL 51-67 (1996) [hereinafter Hofnung].

43See Eran Razin, The Impact of Decentralization on Fiscal Disparities among Local Authorities in Israel, 2 SPACE & POLITY 49-69 (1998) [hereinafter Razin]. For a more detailed discussion see chapter D1(b) below.
I shall illustrate the majoritarian impact upon the minority protection by three examples. All three prove that the supremacy of the majoritarian principle allowed the government to evade being blocked by the court even when its actions constituted serious violations of human rights. The first is promulgation of the Land Acquisition (Validation of Acts and Compensation) Law, 1953, passed in response to judicial pressure, after uprooted persons (internal refugees) from the village of Al-Jalame petitioned the Supreme Court regarding seizure of their land. Wary of this petition, and of possible similar subsequent recourse to the court, the Land Acquisition Law was legislated and it sanctioned earlier land expropriation, even such as was exercised with no legal basis - as indeed happened in Al-Jalame and other villages.44

The second example is the Supreme Court decision in the case of Aslan. The Court endorsed the claim of the Arab petitioners that the enclosure order of Rabbsia village which was issued by the authority vested in regulation 125 of the mandatory-period Defense Regulations (State of Emergency) 1945, must be officially published to be binding. Thus the Court annulled the enclosure order as this was not done. The Prime Minister and Minister of Defense promptly issued emergency regulations on the strength of the abovementioned section 9 of the Law and Government Ordinance and so validated the order that the Court had annulled (Emergency Regulations [validation of orders] 1951). Later the Knesset amended section 10(c) of the Law and Government Ordinance so that the obligation to publish ceased to be applicable to orders promulgated on the basis of the mandatory Defense Regulations.45

The third example is the Supreme Court decision in Bullus. In the Bullus case the Court challenged the proclamation of the State to the effect that a certain waqf land is to be treated as absentee's property. The State rose to the challenge and proposed a Bill to amend the applicable legislation: Absentee Property

(amendment no. 3) Release and Use of Endowment (Waqf) Property Law 1964. This Bill was soon legislated. The reasoning that accompanied the Bill did not beat around the bush: "The proposed law is intended to dispel doubts to which Supreme Court ruling 69/55 (Boulos v. Minister of Development) gave rise, and to put the legislature's original intention in place, according to which the custodian has full rights over waqf property whose mutawali [trustee] is an absentee".46

With no constitutional restrictions on the authority to legislate in violation of human rights, the State could easily undo liberal rulings of the Courts. But there existed an even more immediate path than an amending legislation. From the outset the legislation had conferred sweeping jurisdiction upon the executive, sweeping both in the range of matters and in the extent of administrative discretion it could apply to the issues it addressed. Moreover, in regard to the supreme priorities of the Israeli control structure - security, immigration and land - both the legislature and the judiciary showed special leniency towards the executive.

For the sake of fairness let it be added that at the time of which we speak sweeping governmental powers were the rule and not the exception in Israeli Law anyway. In part this was the centralized legacy of British Mandatory rule. After the establishment of the State this centralism served not only the ethnic pattern vis-à-vis the Arab minority but also the nation-building integrative pattern towards some of the sub-groups within the Jewish majority. Moreover, centralism was conceived to serve the exigencies of the young state that was facing such incredible dangers and challenges so shortly after the holocaust. The same statist centralism was behind disbanding of the Jewish underground militias and establishing the Israeli army (IDF), instituting state education and state printed press and state monopoly over the electronic media (for a long

period of time). It also partially explains the clear hierarchy among the planning and building authorities (national, regional and local committees of planning and building), subordinating local authority to the government, to governmental budgeting and to a strident all-encompassing budgetary supervision by the State. One of the marked manifestations of this general centralist trend was the institution of a comprehensive certification regime. Thus, many human activities were transferred from the realm of liberties to become subject to governmental permission.47

The Arab-Palestinian minority was further subject to a special version of the regime of certification – military rule, the heart of the control structure until 1966. This will be elaborated soon; at this juncture suffice to say that in terms of the Law military rule was a particular instance of selective use of the general legal norm providing for a sweeping governmental authority. Military rule rested mainly on a Mandatory security legislation – the Defense Regulations (State of Emergency) 1945 - of a general nature, and on its strength military commanders sealed off certain areas - those where the Arab minority resided. Moreover, it was not the legislature that imposed this invasive, all encompassing, long and oppressive regime but the executive, and it was indeed the executive that abolished it almost twenty years later. This is a lucid vindication of the claim regarding the nearly limitlessness of executive power at that time.

The wish to hand over to the government as wide a berth as possible in matters of security, immigration and land is manifest as well in the formal formulations of certain powers vested in it. The Defense Regulations (State of Emergency) 1945 often use sweeping formulations; see for example regulation 94, concerning the obligation to obtain the District Commissioner's certification before publishing a newspaper:

47The certification regime rested mainly on (a) the Defense (Emergency) Regulations 1945 promulgated following the Palestine Order-in-Council 1937, (b) the Emergency Regulations on the strength of article 9 of the Law and Administration Law 1948 and (c) orders emanating from the Commodities and Services (Control) Law 1957 (and the legislation that preceded it). For a more detailed discussion see especially Rubinstein & Medina 1996, supra note 41, at 46, 814-16, 1165; Hofnung, supra note 42, at 47-67.
The District Commissioner may grant or withhold such certification - as he sees fit and without need to explain - and may attach conditions to it, and may suspend or revoke any such certification, change or erase any of the conditions that were appended to it or append new ones.

Similarly section 9 of the Administrative Procedure Amendment Law (decisions and Reasons) 1958, exempts the authorities from having to reason and substantiate "decisions of the Minister of Interior or anyone authorized by him to act according to the Entry into Israel Law, 1952" (except a decision to revoke a stay permit to a person lawfully in Israel). Entry into Israel is one of the most pertinent laws to immigration.

A further example is the Land (Acquisition for Public Purposes) Ordinance 1943. Section 5(2) stipulates that an announcement in the public records by the Minister of Finance of intent to purchase (i.e., appropriate) land for public use constitutes "decisive proof that he confirmed that the purpose for which the land is to be purchased is a public one".48

The Weakness of Prohibiting Discrimination under Israeli Law at this Period

The breadth of governmental powers did not have to result in deep discrimination of the minority had a comprehensive norm prohibiting discrimination existed and been upheld by the powers' bearers or enforced by an assertive supervisory body. But this was not the case. Unlike most other political

48Moreover, when things were not expressed explicitly, in these sensitive areas, the Court was quick to assume them. So, for example, it directed that certification issued by the Minister of Finance on the strength of section 2 of the Land Acquisition (Validation of Acts and Compensations) Law 1952 is "sure proof of the facts stated in it" and "though the legislature failed to use the precise term, the purpose is evident from the result therein". HCJ 5/54 Younis v. Minister of Finance [1954] IsrSC 8(1) 314, 317. See too al-Naddaf v. Minister of Finance [1957] IsrSC 11(1) 785; CA 816/81 Gharra v. Development Authority [1985] IsrSC 39(1) 542.
and civil rights, the principle of equality was not then recognized as a protected basic right.\textsuperscript{49}

Moreover, it has been considered the prerogative of the political authorities to set the priorities for material and especially financial allocations: "the decision what is and what is not worthy of financial support lies with the administration, not with us [the Court]".\textsuperscript{50} Not wishing to tie themselves down, the political authorities avoided setting criteria for funding, and there had been no detailed standards even for the most basic public services such as education, health, religious services, communication, public transport, land and housing.

This flexibility applies as well to state financial allocation to private bodies engaged in public activities. This was consolidated mainly through the special mechanism of "residual authority". Section 29 of Basic Law: The Government states: "the government is authorized to perform on behalf of the state, in subordination to all legal norms, any action that is not legally relegated to another authority". In other words, most governmental allocations were not even arranged statutorily and certainly not in any detail, and the court did not formulate an obligation to set criteria for allocation. In this respect then the executive enjoyed an unbridled power.\textsuperscript{51}

In the absence of criteria of eligibility for state funding, complaints of discrimination could only be of the following kind: state allocation to A in itself obliges allocation to B as well (without having to prove an a-priori obligation towards either) who is similar to A. Unfortunately, here the minority faced a series of hurdles. First, at least until the 1960s, the Supreme Court argued in a few cases that discrimination is not itself sufficient cause to warrant remedy. The norm was that remedy depends on the existence of an "essential right". An essential right was taken to mean a right acknowledged by law or an interest that


\textsuperscript{51}This state of affairs only changed in the 1980s after a few Court cases which led to the enactment of the Budgetary Principles Law 1985. This law provided a statutory obligation in regard to most State financial allocations.
a precedent recognized as protected by the Israeli legal system. However, discrimination by itself, in the context of state allocation, did not substantiate an essential right for the person who did not enjoy the allocation.\textsuperscript{52}

Secondly, the burden of proof that discrimination occurred lay entirely with the petitioners. This was made all the more difficult because the Supreme Court demanded among other things to prove discriminatory motivation on the part of the authority. In his ruling regarding \textit{the committee for the protection of the lands of Nazareth} Justice Vitkon decreed: "it has to be shown that the discrimination was intentional and malicious... They had to show that the fact they are Arabs, this – and no other fact – was what motivated the defendants [the authorities] to acquire their land rather than another's. This has not been proved".\textsuperscript{53} Needless to say, a request to prove such motivation is very demanding.\textsuperscript{54}

Thirdly, information regarding allocation reserved exclusively for Jews was not 'forthcoming' as information on criteria for allocation, if it existed. Hence the minority members were hard put to prove even the \textit{physical} aspect of the discriminatory practice towards them.

\footnotesize
52HCJ 29/62 Cohen v. Minister of Defense [1962] IsrSC 16(2) 1023. The Supreme Court upheld the annulment of a correspondent's military press card. The army acted that way, claiming it is its prerogative to distinguish "ordinary" from anti-institutional press such as the correspondent’s journal: Ha- Olam ha-Ze weekly. \textit{See also} HCJ 130/62 Stamps Traders' Union of Israel v. Minister of Postal Services [1962] IsrSC 16(2) 1101; HCJ 73/159 Yitzchaki v. The Minister of Justice [1974] IsrSC 28(2) 692. But compare with HCJ 262/62 Peretz v. Kfar Shmaryahu [1962] IsrSC 16(3) 2101. A moderation and alteration of the Cohen ruling occurred after the period we are here concerned with, see HCJ 509/80 Yunes v. The Director of the Prime Minister’s Office [1981] IsrSC 35(3) 589.


Fourthly, differential allocation is not considered discriminatory in the presence of "relevant differentiation" between he/she who enjoyed the allocation and he/she who did not. Procedures reserved exclusively for the Jewish community were sometimes considered affirmative action rather than selective preference, for example, "special historical reasons" to allow the Jews a right of return. The Bourkhan case, from the late 1970s, in which the court endorsed barring Arabs from buying a flat in the Jewish quarter of the old city of Jerusalem, is a case in point. Another "relevant differentiation" is invoked in the title "discharged soldiers" who often enjoy preference in a wide range and not always relevant public allocations.

Lastly, the norm of impartiality was not applicable at that time, in any meaningful way, to non-governmental bodies in Israel. Social players in the private sector were not bound to avoid discrimination, unless otherwise explicitly directed by law, and such instances were few and far between. This made grappling by means of the law with discrimination against Arabs that was carried out in a myriad of ways by non-governmental bodies extremely difficult. A few of the non-governmental bodies are especially worthy of note in this context - The National Institutions, the Histadrut (Histadrut ha-Ovdim ha-Iirim – the major

55 See the reasoning of the Supreme Court: "However, the issue before us is not equal right of residence, as claimed by the plaintiff, but the right of the authorities and the public associations aiding them, to rebuild the ruined Jewish Quarter of the Old City of Jerusalem. Since the set of facts are of a particular kind, i.e., to do with restoration of a national and historical site, in name as well as substance, in character and identity, no wonder the respondent saw no reason to sell a property in the Quarter, and it is entitled to so decide". HCJ 114/78 Bourkan v. Minister of Finance [1978] IsrSC 32(2) 800, 807-8.

56 This type of discrimination was dealt with at length in Kretzmer, supra note 31, at 98-107, and see Adalah the Legal Center for Arab Minority Rights in Israel, Legal Violations of Arab Minority Rights in Israel: A Report on Israel's Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination 66-70 (1998) [hereinafter Adalah 1998].

57 Except an obscure norm in the sphere of employment and one to do with qualifications for entry to academic institutions, Israeli law did not forbid at that period the non-governmental agents to practice discrimination on ethnic-national basis. Kretzmer, supra note 31, at 83-84.
Workers Union)\textsuperscript{58} and \textit{Tnuva} (the cooperative for agricultural marketing).\textsuperscript{59} The first comprises the Jewish Agency, the Jewish National Fund and \textit{Keren ha-Yesod} - established before the state and still not dismantled and their \textit{declared} affiliation is with the purposes of the Jewish people.\textsuperscript{60} The second type are seemingly non-partisan private agents that were in practice completely at the service of the majority, such as the major Workers Union (the \textit{Histadrut}) and the cooperative for agricultural marketing (\textit{Tnuva}). The state directly aided this discriminatory set-up by creating monopoly conditions for those purportedly private agents, in three stages. First (a) a de-jure or de-facto monopoly in a given sphere of activity (i.e., settlement planning and development, marketing agricultural produce) was created.\textsuperscript{61} Then (b) this monopoly was handed over or stayed with Jewish controlled organizations. The third stage (c) occurred

\textsuperscript{58}Explicit legislation dictated appointing National Institutions officials as counselors to the executive or delegating to them decision-making authority on the basis of their position. But even without this formality they were very influential in a myriad of spheres, from deciding agriculture production quotas, deciding which poor neighborhoods would get rehabilitation budgets, deciding land use of public land, urban building plans and certification, broadcasting policy and even standardization policy. For the relevant law see Kretzmer, \textit{supra} note 31, at 94-98; Adalah 1998, \textit{supra} note 56, at 51-54; ACRI (The Association for Civil Rights in Israel); Comments on the Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights (ICCPR) (1998). Regarding use of the National Institutions as a tool of discrimination against the Arab-Palestinians see Lustick, Arabs in the Jewish State, \textit{supra} note 1, at 97-109; Jiryis, \textit{supra} note 16, at 215-16; Kretzmer, \textit{supra} note 31, at 64, 93-98; Dowty, \textit{supra} note 15, at 197-98; Bauml, \textit{supra} note 32, ch.2 esp. at 83-86.

\textsuperscript{59}For use of the \textit{Histadrut} as means for discrimination see Lustick, Arabs in the Jewish State, \textit{supra} note 1, at 95-97, 164-65; Benziman & Mansour, \textit{supra} note 33, at 175, 181; Elia Zureik, \textit{Prospects of the Palestinians in Israel II, 22(4) J. OF PALESTINE STUD. 73, 84-6} (1993). In addition see HCJ 380/74 Salaman v. the National Labour Court [1975] IsrSC 30(1) 495 for the story of an employee in the Arab department of the \textit{Histadrut} and his dismissal for alleged intention of forming a coalition in his village between his own party and \textit{Rakah} (the communist party).

\textsuperscript{60}The monopoly was given to \textit{Tnuva} on the strength of directives of agricultural production and marketing boards, as for example section 44 of the Poultry Board (production and marketing) Law 1963. The monopoly of the National Institutions in planning and developing new settlements was the result of administrative \textit{de-facto} practice: see Kretzmer, \textit{supra} note 31, at 94-98.

\textsuperscript{61}For the part played by marketing bodies such as \textit{Tnuva} using its monopole on the supply of milk and other agricultural products, see Jiryis, \textit{supra} note 16, at 215; Lustick, Arabs in the Jewish State, \textit{supra} note 1, at 154.
'naturally' when these organizations consistently, as a matter of course, preferred Jewish interests.

**The Military Rule and Expropriation of Land - Two Vital Areas of Weakened Rights used Against the Minority**

The weakness of the common citizenship rights, described above, paved the way to some complicated mechanisms plainly directed at the minority and crucial to its welfare in those years: the military rule and the expropriation of land. Exploring the legal basis of the two reveals the pattern described above - a seemingly egalitarian legislation enforced and applied by authorities that were allowed almost limitless flexibility and that were rarely subjected to meaningful monitoring by supervisory bodies.

Military rule was seemingly defined in terms of territory and purportedly applied to whoever lived in the designated territory, irrespective of ethnicity. However, there was a selective enforcement of movement restrictions in these designated areas, between Arabs and Jews, and moreover, the regions themselves were demarcated so as to subject only the Arabs to the military rule. The military rule was legally based mainly on the enclosure orders issued on the strength of section 15 of the Defence Regulations (State of Emergency) 1945. In areas close to the borders another authority was used: Emergency Regulations (Security Zones) 1949. On the strength of these two normative sources enclosure orders were issued and they controlled movement by means of permits - issued by military commanders - to leave the enclosed area and sometimes to move about within it too. This legislation and the use to which it was put is well-trodden ground,62 I shall therefore add just three short comments.

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Military rule was a major tool for weakening the rights of the Arab citizens. Officially it only dramatically restricted the freedom of movement but effectively it constrained the exercise of many civil and political rights, to which movement is often a prerequisite (especially at a period with much less technologies than we are accustomed to at present). Hence the movement restriction significantly withered effective speech, freedom of association, etc.\(^63\); and expropriation of land was facilitated, since restriction of movement was used sometimes to uproot people from their land and sometimes it had stopped possession and cultivation of lands and made them 'vacant'.\(^64\)

The Arab citizens were put under a regime of "enclosed areas", which were divided under three separate army commands: north, south and centre. Each enclosed area was isolated from the other, and most Arab citizens were of course isolated from the majority Jewish population as well. This division rendered political organization extremely exacting, certainly nation-wide.\(^65\) Employment, since most workplaces were outside the enclosed areas, depended upon travel permits and those were allocated in a manner which served the needs for dependency, deterrence, cooptation and distancing of 'radical' leadership.\(^66\) The enclosures enabled the government to distract electoral campaigns of opposition

\(^{63}\)See Bauml, supra note 32, at 165. The certification regime crystallized a "restriction the public cannot comply with" see Korn, id., and this resulted in inevitable transgressions and therefore criminalization of the Arab community and a lever for consolidation of deterrence, dependence and selective implementation.

\(^{64}\)See the sources in note 70 below.

\(^{65}\)See Lustick, Arabs in the Jewish State, supra note 1, at 122-29; Hofnung, supra note 42, at 86-97; Al-Haj 1995, supra note 7, at 25-57; Bauml, supra note 32, at 165.

\(^{66}\)For a comprehensive discussion see Hillel Cohen, Good Arabs: The Israeli Security Services and the Israeli Arabs (2006) (Hebrew) [hereinafter Cohen 2006]. See as well, Lustick, Arabs in the Jewish State, id. at 202-9; and HCJ 89/71 al-Asmar v. Officer Commanding Central Region [1971] IsrSC 25(2) 197.
parties such as the Communist party and *Mapam*.\(^{67}\) Demonstrations could easily be aborted by proclaiming a place a "closed military zone".\(^{68}\)

Having said all this, it should be added that military rule did become less harsh over the years, notably from the late 1950s and especially after 1963,\(^{69}\) until its abolition in 1966. For example, in many cases travel permits were issued on an annual rather than daily or weekly basis. Instead of treating all Arabs collectively as suspects, black lists were compiled of "problematic" political activists. Some of the power was transferred from the military to the civil authority, i.e. the police. In daytime movement from the enclosed areas into the main cities was allowed.

On the plane of the law there is one point that we have already mentioned above but is worth repeating. Laying down military rule, modifying it over time and finally abolishing it did not at any point involve the Israeli legislature, the Knesset. Military rule was legally established by executive discretion and so it was modified and finally abolished. A Knesset majority, had one been found for the purpose, could end it by legislation, but that is not the point. The point remains that Israeli law allowed to subject hundreds of thousands of citizens to a military regime without a need to have a concrete approval, even not a periodical one, of the legislature. Such was then the power of the executive.

The second convoluted procedure was oriented to the expropriation of land from Arab citizens. From the legal point of view two things are striking. First, the enormous arsenal of legal tools used to nationalize the land. Secondly, the recurring pattern whereby a governmental power is applied selectively, with no hindrance. The legal arsenal was achieved through a whole rigmarole of legal arrangements and administrative procedures regarding ownership, possession

\(^{67}\)See Hofnung, *supra* note 42, at 91, 154-55; Lustick, Arabs in the Jewish State, *id.* at 123-29; Ozacky-Lazar *supra* note 32, at 50-51, 75-76.

\(^{68}\)See Lustick, Arabs in the Jewish State, *id*; Ozacky-Lazar *supra* note 32, at 166.

and use of land. As these have been quite exhaustively discussed elsewhere\textsuperscript{70} I shall only enumerate a few of the arrangements that were involved.

Expropriation was carried out in various ways. One major way was by declaring lands to be "absentees' lands", and then controlling and transferring them to a governmental body called "the development authority", which then allocated many of them to Jewish new settlements in the new state. Note that not only Palestinian refugees' lands were dispossessed in this way, but also lands of uprooted Arab-Palestinian citizens. This is why the latter are often 'Orwellianly' labeled "Present Absentees".\textsuperscript{71}

The other side of dispossession was to divest Arab citizens of land rights and to deeply discriminate in land allocation. More concretely, the possibility to gain land rights through long possession and cultivation of public land was terminated.\textsuperscript{72} Arab land uses were closely monitored, especially concerning house building. At the same time, expansive land was handed over on long lease to Jewish settling movements and very little, and on short leasing terms, to Arab citizens. The jurisdiction of local Arab authorities was kept strictly constrained.

Hence, the biased use of the state's "allocating power" came in addition to its misuse of its "taking power" toward the minority. Moreover, all this was carried out and facilitated by a context of virtually no group-differentiating rights granted to the minority in the spheres of land use and state allocation of land, such as by way of Arab-Palestinian representation in decision making bodies dealing with planning or with administration of land in Israel.\textsuperscript{73}


\textsuperscript{71}See esp. Kedar, id.

\textsuperscript{72}Id, id.

The discussion until now unfolded the various ways in which law curtailed the common citizenship rights (individual rights) from much of their meaning rendering them quite ineffective: majoritarianism; sweeping state powers accompanied by extensive discretion; a very week non-discrimination norm; a special regime of "military rule" and a myriad of state powers providing for the dispossession of Arab lands.

This state of affairs could have been restrained if the courts and other protecting and monitoring bodies played an assertive role. Here the picture is indeed more nuanced but the control structure still functioned 'well'.

**C2b. The Weakness of Supervisory Bodies such as the Courts in Protecting the Minority**

Over the period under review some of the extensive governmental powers that were often used selectively against the minority were gradually checked. These checks were important then and became much more important in the 80s and 90s. The picture outlined so far is nevertheless true in that those checks which operated in the period under review did not erode the control framework; on the contrary, in an important way they served it in a manner I shall soon explain.

These checks were the result of activity of supervisory bodies or 'arbitral' agents, whose function it is, *inter alia*, to protect the minority. Supervisory mechanisms protect the minority from without and as such they differ from mechanisms or procedures in which the minority is actively involved in protecting itself, or shares in the decision-making of state allocations and services. The supervisory or arbitrage bodies can be domestic or international organs but in either case distanced from each of the communities, and mandated to settle disputes and safeguard human rights. The law courts are intra-state supervisory agents, as are the State Comptroller, the Ombudsman and the Central Bank. Official decisions are made in these institutions by experts enjoying long term appointments and an ethos of professionalism and independence, and not directly accountable to an electorate. All these make them
more natural "majoritarian checks", that is endows them with a fair amount of institutional autonomy, partly frees them from seeking consensus and partially insulates them against pressures from the majority. Some of these bodies, and the courts are a prime example, are expected to be governed by rules of argumentation, open debate, neutrality and coherence, all of which contribute to the integrity of their actions.

Human rights (the common rights of citizenship) and minority rights (group-differentiated rights) are profoundly affected by the supervisory or arbitral mechanisms - their existence and more so their power and integrity. The courts for example are the interpreters of the norms that govern these rights and consequently they demarcate their theoretical and practical dimensions. The other arbitral agents (State Attorney, State Comptroller) influence the way in which the norms are enforced and so bear upon their actual effectiveness.

What expectations do we entertain of these bodies in the first thirty years of Israel’s statehood? What is favorable (and what is detrimental) to a "control model"? On the one hand, we expect that these bodies would not impede the majority from making use of the power disparities or be protected by the stabilizing mechanisms of the control structure. But, on the other hand, that this power imbalance should not be too repressive, because blatant exploitation of the minority would deepen the legitimacy crisis always hovering over the control structure and threatening to destabilize it. There is hence a vital need for agents that can curb arbitrariness and exploitation and thus moderate the legitimacy crisis among the minority. However we face here a fragile equilibrium. The control structure cannot function when supervision and arbitrage are powerful and if their purposes differ substantially from those of the majority community. On the other hand, a correct dosage of checks on governmental activity contributes to the efficacy of control because it provides a modicum of

legitimacy.\textsuperscript{75} And indeed, as I shall now show this is what happened - arbitral agents existed and could not be ignored but neither did they threaten the control structure in a real sense. They were not powerful enough to do so had they chosen to, but anyway they pursued a path that did not diverge much from that of the political branches of government.

\textbf{The Ambivalent Role of the Israeli Supreme Court}

What influence did the Supreme Court had on the inter-communal relationship pattern in the first thirty years of statehood? Its influence was the fruit of its labors – i.e., more than only its direct decisions re the Arab citizens; some of its labors radiated in many directions, some were unintended but still relevant and even important to the minority. Overall its influence on the minority status was markedly ambivalent. On the one hand, the Supreme Court, especially when acting as the High Court of Justice, exercised judicial review upon the executive actions (regulations, orders, allocations, etc.,) and gradually narrowed the margin of maneuver allowed the executive. On the other hand, in the sensitive areas most relevant to the minority - security, immigration and land, the executive was left, by a variety of ways, barely curtailed by the Court.

To elaborate - in the absence of a constitution or constitutional foundations to Israeli law at that time, the Supreme Court did not view itself as authorized to invalidate Knesset legislation. Moreover, until the early 1990s it opted not to intervene in the validity of emergency legislation (emergency regulations) of the executive either. Nonetheless it did pave ways to defend the common rights of citizenship and narrow down the freedom of action of the government. I shall

\textsuperscript{75}Ilan Saban, \textit{The Impact of the Supreme Court on the Status of the Arabs in Israel}, 3 LAW AND GOVERNMENT IN ISRAEL 541, 553-54 (1996) (Hebrew) [hereinafter Saban 1996]. Compare Ronen Shamir, \textit{“Landmark Cases” and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice}, 24(3) L. & SOC. REV. 781 (1990) [hereinafter Shamir]. Shamir addresses the role and impact of the law (particularly of the Supreme Court) with regard to the status of the Palestinians under occupation. A comparison between the status of Arab-Palestinians within the Green Line in the first thirty years of Statehood and this of the Palestinians in the Occupied territories during the long years of Occupation is still to be carried out, and if it is, complex as it may seem, it is bound to yield very interesting theoretical insights.
look now at a few of these ways. First, by strict observance of the explicit or formal restrictions of power vested in the governmental authority that impinges upon human rights. Reference is either to explicit restrictions in the empowering law or restriction on the basis of the Principle of Legality, i.e., that a state action that infringe upon a basic liberty, without statutory authorization, is invalid. So, for example, in the heat of battle in 1949, two administrative detentions were invalidated. The first because the defence regulation (state of emergency) 1945 stipulated that an advisory committee will review the detention order and give its advice and such committee did not exist, and the second because contrary to the stipulation of the same regulation the location of the detention place was not noted in the detention order. In two other cases, due to flaws in the applied authority, expulsion orders were invalidated against allegedly illegal residents in Israel. In one of the most important cases of the first days of statehood the legality principle was emphasized and it was decided that a basic right - freedom of employment in this case - could not be impinged without statutory basis. Another like instance is the sensitive issue of the internal refugees, the uprooted villagers of Iqrit. The court decreed they should be allowed to return to their village, because the state did not prove it had exercised authority legally in expelling them nor issued "evacuation orders" as stipulated by the emergency regulation.

The case of Iqrit, however, testifies rather to the limited ability to defend the minority by adhering to formal legality alone (i.e., the formal explicit limits that accompany any concrete authority or the demand for a statutory basis for such authority) and to the frailty of the Court at the time. When the petitioners of

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*Iqrit* requested the court to enforce the judicial remedy granted to them at the previous hearing but disregarded by the authorities, the court made the following unusual reply:

As stated, a decisive order was issued, that the plaintiffs were permitted to return to their village on the 31st July 1951. However, despite this order, issued by the High Court of Justice of Israel, in the aforementioned case, the defendants [the military authorities] did not comply. The plaintiffs [*Iqrit’s* expellees], instead of resorting to the legal relief the law provides in instances such as this, waited and apparently put their faith in all manner of promises made them, until, on 10th September 1951, they were sent expulsion orders according to regulation 8 of the said regulations.80

Simply put - the highest judicial instance decreed against the executive. The executive then ignored the legal relief provided by the judiciary and soon legalized the expulsion by retroactively issuing evacuation orders. The court saw no way of not condoning them. The utter disregard of the executive for the judiciary, here and in a few other cases,81 was a warning signal aimed at the Court that it could not have failed to notice.

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80 See HCJ 239/51 Daoud v. the Security Zones Appeals Committee [1955] IsrSC 6(1) 229, 230. Shortly later the village was razed to the ground. For the full story of *Iqrit* and Bir’em until the early 1990s see Sara Ozacky-Lazar, *Iqrit and Bir’em: The Full Story* (1993) (Hebrew).

81 See also HCJ 288/51 Aslan v. Military Commander of the Galilee [1955] IsrSC 9(1) 689. Rubinstein & Medina said about this: "In this hearing a directive was issued to the military commander of the Galilee to furnish the villagers with entrance and exit permits to their village (*Ghabsiah*), according to regulation 125 of Defense (Emergency) Regulations 1945. The Court even applied to the authorities to 'implement extraordinary measures' to settle the predicament of the villagers. The Court expressed its doubts with regard to the secret security issues raised by way of justifying the respondent, but forbidden to be told, as 'no reasons at all', and went so far as to question the veracity of the military commanders sworn statement. Despite all this and notwithstanding the decisive directive issued the village was bombed and entirely destroyed. Thus a decisive order of the Court was frustrated". See Rubinstein & Medina 1996, *supra* note 41, at 236.
A second and far more important and positive process took shape at this time - a gradual parting with formalism.\textsuperscript{82} The Supreme Court began to develop a kind of "common law", judge-made-law – important doctrines of Public Law – which carried very significant bearing on law and judicial review of administrative actions. First, these doctrines placed the basic rights of individuals as an indivisible part of Israeli law and on a higher normative status than secondary legislation (regulations, by-laws, administrative orders) and administrative action (though still below legislation). Secondly, the court deduced from the basic rights and some other basic principles a set of obligations binding each administrative authority.

These developments emerged as the result of two steps - a gradual change in the interpretive theory applied by the court, and a budding conceptualization of the administrative authority - the executive - as "the public's trustee".\textsuperscript{83} Once grasped, this concept gave rise to a series of obligations formulated through court rulings that apply to the executive restricting its authority and its discretion in using it. There appeared, for example, a prohibition of "Non-Relevant Purposes";\textsuperscript{84} obligations emanating from natural justice including the "right to be heard"; a demand for a high threshold of evidence as a basis for administrative actions impinging upon basic rights; the independence of the authority bearer vis-à-vis the upper echelons of government\textsuperscript{85} and more.

These doctrines emanating from court rulings is what I referred to earlier as "peripheral radiation" - the way in which the Court bears upon the status of the


\textsuperscript{83}The term "Public Trustee" first appears in Peretz v. Kfar Shmaryahu IsrSC 16(3) 2101 [1962]. This is the case that detailed and implemented the prohibition of discrimination by an administrative authority.

\textsuperscript{84}It is the \textit{Kardoush} ruling that stands out here, annulment of the registrar's decision to reject the request of an Arab political movement called \textit{al-Ard} to register a publishing house company - HCJ 241/60 Kardoush v. Registrar of Companies [1960] IsrSC 15 1151; FH 16/61 Registrar of Companies v. Kardoush [1962] IsrSC 16(2) 1209. We will return to deal with \textit{al-Ard} soon.

Arab-Palestinian minority on the strength of general norms that it shaped in contexts usually unconnected to the minority. These contexts were for the most part a form of interaction between the authority and an individual, corporation or group, between political, factional, economic and ideological interests within the majority group. Because legal norms are of a general nature their impact is wide-range; hence the limitation of governmental power that they generated was applicable to the Arab minority as well. The peripheral radiation type of influence on the minority should not come as a surprise. Just as the general state of affairs of the period (centralism, unbridled authority vested in the executive) rendered the human rights of the minority weak, so also the converse is true. The gradual rise in regard towards human rights coupled with curbing of executive power benefited the minority.

Discussing developments with profound cross section implications, the gradual transition of the court to jurisprudence directed by a theory of interpretation labeled "purposive interpretation" must be mentioned too. Let me illustrate this gradual transition with its signifier: what is one of the most important rulings the Supreme Court ever formulated – the Kol Ha'am case.

The case was litigated and decided in the early 1950s, and dealt with the operation of censoring power and with the ability of the state to close down a newspaper. Legally it mainly dealt with an interpretation of governmental discretion when it clashes with freedom of expression: its power to close down a newspaper on the strength of section 19 of the Press Ordinance, 1933, a Mandatory period legislation that was left intact. The section authorized closing down a paper "if something is published in the paper that might, in the opinion of


87 HCJ 73/53 Kol Ha'am v. Minister of Interior [1953] IsrSC 7(2) 871, in which the Supreme Court annulled the Minister of Interior’s decision to shut down for several days the Communist party Hebrew-speaking and Arabic-speaking journals, Kol Ha’am and Al-Itihad. For analysis of the Court decision and the use of purposive interpretation of section 19 of the Press Ordinance 1933, see Pnina Lahav, Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat’s Legacy, 24 ISR. L. REV. 211, 251 (1990); PNINA LAHAV, JUDGEMENT IN JERUSALEM: CHIEF JUSTICE AGRANAT AND THE ZIONIST CENTURY ch.5 (1997) [hereinafter Lahav 1997].
the Minister of Interior, threaten public peace”. The decision comprises two far-reaching formulations. First, the Court averred that all legal norms, including (and even more pronouncedly) the legacy of the Mandatory legislator, must be read and interpreted in light of the essence of Israel as a democratic state:

It is incumbent upon us to bear in mind the things that it [the declaration of independence] proclaimed when we come to interpret and imbue with meaning the laws of the state, including legislative provisions that were promulgated during the Mandate and adopted by the state after its establishment... It is after all a well known axiom that the law of a people must be studied through the prism of its national life order.\textsuperscript{88}

From this point on, this interpretation theory was supposed to accompany all legal norms and hence all governmental powers, especially those that limit human rights. The power-bearers have to be aware of the right they restrict and the magnitude of the restriction and to weigh them against the protected public interest with which the liberty would seem to clash. Secondly, this interpretation formulates a general balancing test for conflicts between the basic right and the threat to a protected public interest – this is "The probable danger test". It is an exacting test demanding high probability for a serious harm to a protected public interest (here, in \textit{Kol Ha'am}, public peace) before permitting restriction of the freedom of expression.\textsuperscript{89} Later on this balancing test expanded to cover other important basic rights.

These developments - peripheral radiation, purposive interpretation and an exacting balancing test - carried a promise, but how effectively was it translated into practical protection of human rights and especially those of the Arab-Palestinian minority? The potential was circumscribed in the time under review

\textsuperscript{88}See \textit{Kol Ha'am}, \textit{id.} at 884.

\textsuperscript{89}\textit{Id.} at 882-87. See Justice Landau's pronouncement: "The \textit{Kol Ha'am} decision is founded upon an extensive ideational basis", HCJ 243/62 Israel Film Studios v. Geri [1962] IsrSC 16(4) 2407, 2418.
for two reasons. First, the consolidation of judicial review of administrative actions following these path-breaking steps was slow, partial and inconsistent. Secondly, the inconsistency appeared especially in the sensitive and minority-related areas: security, immigration and land. Thus concurrently with such revolutionary cases as Kol Ha'am, the everyday jurisprudence quite rarely benefited the minority. The Supreme Court in this period did not often venture beyond the bounds of formalistic-type of judicial review: insisting on the doctrine of legality (a statutory authorization for governmental powers that restrict basic rights) and on the explicit boundaries of the powers demarcated by the statute.\textsuperscript{90} It took thirty years for the Kol Ha'am decision to resurface and be seriously implemented.\textsuperscript{91} Moreover, the Court opted not to tread on certain "protected spheres of activity" of the government. Al-Ard's legal biography is a prime illustration of this disinclination. Al-Ard was a local Arab-Palestinian national movement with a pan-Arabic (Nasserite) orientation that enjoyed a decade of activity - from the late 1950s until it was disbanded in 1965.\textsuperscript{92}

\textbf{Al-Ard as case study.} Its first encounter with the Supreme Court was surprisingly promising. Section 14 of the Companies Ordinance stipulated at the time that the Registrar of Companies, relegated with authority by the Minister of Justice, "may exercise his own absolute discretion to permit or forbid the formation of a company". The Supreme Court set down important rules in regard to administrative authority, circumscribing to a large extent the interpretation of "absolute discretion". It ruled that though wide the discretion is still limited to the purposes for relegating the authority, and that those purposes are subject to interpretation. The Court's interpretation in the Kardoush (an al-Ard leader petitioning on its behalf) case was that the purposes for granting the Company

\textsuperscript{90}Kretzmer, \textit{supra} note 31, at 146-48; Hofnung, \textit{supra} note 42, 205-8.

\textsuperscript{91}Pnina Lahav, \textit{Rights and Democracy: The Court's Performance, in ISRAELI DEMOCRACY UNDER STRESS} 125, 137 (1992); Harris 1998, \textit{supra} note 78, at 259-60.

Registrar authority did not include supervision of freedom of expression in the name of State Security. State security, decreed the Court, is in the hands of other organs on the strength of different authorizations. Hence the Registrar was pursuing "irrelevant ('foreign') purposes" and this invalidates his decision. Al-Ard was decreed free to form a printing and press company.93

However, the Kardoush case was the exception, and the future of al-Ard was to illustrate the more usual attitude of judicial review in matters that purportedly concern state security. A few years after the Kardoush case, when the Ministry of Interior Northern District Commissioner closed down a newspaper published by al-Ard, it soon transpired that the Kol Ha'am ruling would not be a relevant precedent. In the Kol Ha'am case the court interpreted the authority to limit freedom of expression - stemming from the Press Ordinance - reductively. However, it declined to apply the same yardstick to a like authority when it rested on regulation 94 of the Defence Regulations (State of Emergency) 1945 – explaining that its narrow review is dictated by the privileged evidence of the state.94 In other words the law and the court left the state an alternative route of exercising its authority to close down a newspaper, a route almost empty of legal hurdles.

Later, when al-Ard wished to become an Ottoman Society (a non-profit organization) the Ministry of Interior's District Commissioner of the Northern Region turned down the request and the Supreme Court sustained his decision (the Jiryis ruling).95 Shortly later the al-Ard movement was disbanded by

93See Justice Agranat's words in FH Kardoush v. Registrar of Companies IsrSC 15 1151 [discussed above, supra note (84)]; Lahav 1997, supra note 87, at 183.

94For rejection of the petition see HCJ 39/64 al-Ard Ltd. v. District Commissioner of the Northern Region [1964] IsrSC 18(2) 340: "Had the commissioner provided his reasons, though not legally compelled to do so, we could have of course examined their viability and reasonableness", since he did not, it was decreed that "discretion is indeed absolute" and the plea was rejected (al-Ard, id. at 344-45). For the claim of this being a case of divergent paths in the realm of the press, open to flexible manipulation by the executive, see Ronen Shamir, Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity the Case of Israel, 19 Int'l J. Soc. L. 45 (1991). See also Harris 2001, supra note 92, at 139.

95HCJ 253/64 Jiryis v. the District Commissioner of the Northern Region [1964] IsrSC 18(4) 673.
proclamation of Minister for Defence on the strength of regulation 86 of the Defence Regulations (State of Emergency) 1945, its main activists were put under administrative detention or restriction orders. The Defence Minister's decision was never challenged.

Court case Yardor completes the legal saga of al-Ard. The Court ruled by majority opinion to ratify the decision of the Central Elections Committee preventing the Socialist List, with al-Ard as its backbone, from standing for Knesset elections. This was a surprising and worrying decision of the Court because the legislation of the time, the Knesset Elections Law 1959, did not bestow on the Central Elections Committee authority to disqualify a list on the basis of its program or deeds but only on technical ground. The majority in this case (Justices Agranat and Zusman) crossed doctrinaire lines, which the Court itself shaped in cases that were considered less threatening. Justice Zusman reason that it is an exceptional case, justifying ignoring the legality doctrine, the requisite of explicit legal authority to justify restricting basic rights. Moreover, the majority Justices waived the obligation to prove the "probable danger test" of serious disruption of public peace, if the list is allowed to stand for elections, thus disregarded the Kol Ha'am precedent.

At least two lessons may be drawn from the way the Court conducted itself in the al-Ard example. One, as is to be expected in the control structure, the executive consistently obstructed minority attempts to organize as an

96 For a fuller story see Jiryis, supra note 16, at 188-94; Harris 2001, supra note 92; Hofnung, supra note 42, at 165-68. For the unsuccessful attempts to challenge restriction orders against al-Ard's members see for example, HCJ 56/65 Jiryis v. Military Commander [1965] IsrSC 19(1) 260; al-Asmar v. Officer Commanding Central Region IsrSC 25(2) 197.


98 See Justice Haim Cohen's minority opinion ibid. Compare Claude Klein, The Defense of the State and the Democratic Regime in the Supreme Court, 20 ISR. L. REV. 397, 410 (1985). The Yardor ruling left uncertain the question what constitutes sufficient reason for disqualifying a list from standing for election. Must it threaten the existence of the State or is it enough to attempt to change its Jewish character? Do the tactics advocated by a list standing for elections matter – is it a necessary condition for disqualification that violence be advocated?
independent social player with a non-apologizing Arab national agenda. The big fear was of a radical party. The boundaries of tolerance were marked by Maki and Rakah, dissenting factions from the Communist sector of Israeli politics, who in no way questioned the existence of the state. Second, the Court did not upset the control structure in any meaningful way. It left the executive free to pursue aims it deemed vital by leaving bypasses wherever it restricted certain governmental powers (i.e., restricting section 19 of the Press Ordinance, while leaving unscathed the Defence Regulations that allowed imposing even harsher restrictions upon newspapers). This is one example of the "course of divergent paths" to be further discussed below.

The following three issues will complete the description of the role of the Court in the period under discussion. First, the judicial review of the SC sitting as the High Court of Justice in security cases was more limited than in others because the Ministers of Defence and of the Police had authority to issue a secrecy order regarding the body of evidence upon which their decisions rested. This authority was often used in petitions regarding security related decisions. The Supreme Court, while often voicing a reprimand and skepticism, stated time and again: "issuing the certificate [the secrecy order]... stultifies once again any possibility of pertinent examination". This procedure originated in the Mandatory legislation and was finally altered into its current somewhat softer version through the 1965

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99 Hofnung, supra note 42, at 174-80; Baruch Kimmerling & Joel S. Migdal, Palestinians: The Making of a People 177-80 (1993); Lustick, Arabs in the Jewish State, supra note 1, at 113-14, 237-52; Jiryis, supra note 16, at 180-85; Baum, supra note 32, at 244-49; Harris 2001, supra note 92, at 122-27; Elie Rekhess, The Arab Minority in Israel: Between Communism and Arab Nationalism (1993) (Herbrew). In later years Bnei ha-Kfar, a small political movement, was tolerated though in certain respects it is al-Ard's successor, but it never stood for elections.

100 See below, text accompanying notes 148-151. Moreover, where an administrative authority did not or could not opt for a divergent path vis-à-vis a minority cause, the differentiation appeared in the administrative body's implementation of its authority and in the Court's judicial review of it. Thus when the Films and Plays Censorship Board claimed to apply the demanding "probability" test and based on it a ban on the screening of a documentary pro-Palestinian film, the Court was inexplicably lenient in review of the application of the test: HCJ 807/78 Ein-Gal v. Film and Play Censorship Board [1978] IsrSC 33(1) 274. In this I join Kretzmer, see Kretzmer, supra note 31, at 137-39.

101 See Aslan v. Military Commander of the Galilee IsrSC 9(1) at 695.

Secondly, the direct and indirect impact of the Court depends on how much it may be expected to intervene in matters pertaining to the ethnic-national divide in Israel. Among the factors affecting potential intervention of the Court are the obstacles of accessibility to it, obstacles of formal and non-formal nature.102 Judicially one of the most relevant doctrines was "standing". Justice Vitkon's opinion in Supreme Court case Becker reflects an opinion that was common until the late 70s: "the more public the object of the grievance... so stricter should be the demand that the petitioner be someone who suffered real damage in his private domain".103 Thus, "public petitioners" were rejected. This impacted civil society by dint of the fact that the court was quite inaccessible to them.

Third and last (to be expanded below), the influence of the court on the minority's status should be assessed also in terms of its legitimizing function of the existing order. In view of the above we may shortly say the following: the Court did not erode the control framework because even its few decisions in favor of the minority did not force the control framework to undergo a meaningful change. These court decisions could easily be overturned or, better yet, bypassed. Moreover, since they were favorable to the minority they contributed to the control framework's stability by lending it a modicum of legitimacy.

102 Accessibility is of course the product of non-formal barriers as well. I refer to factors such as the cost of petitioning the Supreme Court in its function as the High Court of Justice; availability of information regarding the detrimental governmental action; wariness of the state's reaction to the petitioner because of the legal action taken against it, etc.

103 HCJ 40/70 Becker v. Minister of Defense [1970] IsrSC 24(1) 238, 247. In the 1980s, in the period beyond the one covered here, the "standing doctrine" has went through dramatic changes, see Ariel L. Bendor, Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience, 7 Ind. Int'l & Comp. L. Rev. 311, 313 (1997) [Bendor touches upon the "standing" doctrine and its dynamics, but he concentrates on another doctrine that directly influence the issue of accessibility, the one of "Justiciability"]; see also John T. Parry, Judicial Restraints on Illegal State Violence: Israel and the United States, 35 Vand. J. Transnat'l L. 73 (2002). The precedent re the standing doctrine is HCJ 910/86 Ressler v. Minister of Defence [1988] IsrSC 42(2) 441.
The Law and External Arbitrage Bodies

External supervision/monitoring institutions can also function as protection of the minority. Sometimes they can foster change in the relationship pattern between the minority and majority. In the period under review such external institutions were functional to some extent in ensuring a minimum threshold of political and civil rights for the Arab-Palestinians in Israel but did not generate transformation in the relationship pattern.

The arbitrage provided earlier by the British Mandatory Government ended in 1948, but the UN and its organizations still had a certain weight in Israeli reality. First, the partition resolution contained obligations to safeguard minority rights in each of the future states. UN observers were put in place on the strength of another international convention - the armistice agreements. Their presence and reports stopped some of the expulsions of the first few years of statehood and helped several refugees to return.\textsuperscript{104}

The signatory states of the armistice agreements could play a certain role in the protection of the Arab-Palestinian minority. Jordan is especially relevant because following the 1949 armistice agreement Israel annexed villages that were under Jordanian rule and sections of the agreement are devoted to protection of their residents. Section 6(6), for example, guaranteed protection of the property rights of the villagers annexed to Israel.\textsuperscript{105} In actual fact, however, when Israel expropriated their lands and they tried to challenge the decision in the Supreme Court on the strength of section 6(6) the Court rejected the petition. It cited the common law doctrine that (constitutive) norms of public international law (such as the norms laid down in the armistice agreement) are binding only on the plane of international law. They have not become part of domestic Israeli law, and thus

\textsuperscript{104}See Morris 1987, supra note 12, at 248-51; Jiryis, supra note 16, at 82.

\textsuperscript{105}See Article VI, clause 6 of the Armistice Agreements between Israel and Jordan - UN Doc S/1302/Rev.13 (April. 1949).
they do not generate an authority to the Court to adjudicate cases on their basis.\textsuperscript{106}

Lastly, the military rule and dependence upon travel permits made (at the period) external arbitrage, including the Red Cross, virtually inaccessible to the minority.\textsuperscript{107}

\textbf{D. Law and the Group-differentiated rights of the Arab-Palestinian Minority and its Members in the First Thirty Years of Statehood}

This article suggests an analytical key to penetrate the complexity of law's involvement in the status of a minority community. I claimed that this complexity is the product of the compounded intricacies of law, of society and of their intersection, and I suggested starting with society's main dimensions. Understanding the major policy purposes of the majority/ the state towards the minority and the basic minority reaction to it, helps us trace the concrete ways law served or obstructed the existing order. Following Lustick I demarcated the constituting elements structuring the life of the Arab minority in Israel's first three decades – the control framework – and pointed at its needs. I noted that these needs imbed inner tensions – between exploitation and state's stability, between minority exclusion and the promise (and self-perception) of a democratic society. Then I moved to analysis of the ways in which the law and the courts operated within this structure. I made certain assumptions as to how law can well accommodate the control system – and then I moved to check if in


reality law was accommodative, facilitating or the opposite – subversive. Until this point in the analysis I have met law that acted as a good, able servant of the control. I analyzed some of the ways in which law helped constitute the vertical and the exploitive features of the control. I detailed the very broad powers law allocated to the executive; the non-existence of constitutional checks on legislation; the limited assertiveness of the courts; the lee-ways left to the executive once it chose to stand its ground. In other words, I showed the ways in which the modest promise of the common citizenship rights, the classical basic rights, remained more a promise than a comprehensive element of the Arab citizens’ reality in this period of time.

More legal analysis is needed. We have to verify whether weakness characterizes also the other type of rights that minorities sometimes enjoy – group-differentiated rights; and we need to find out the ways in which law interacted with the stabilization mechanisms of the control framework.

What are group-differentiated rights, and which of them, if any, were granted to the Arab-Palestinian minority in Israeli law of that period? While common citizenship rights are granted due to the very humanity of a person or her/his citizenship, irrespective of group affiliation, group-differentiated rights (including exemptions and immunities) are conferred upon certain persons specifically for their group affiliation. These rights are particularly the prerogative of cultural minorities and they have two aims. Their first purpose is to allow minority members to protect their cultural identity, values, major customs in face of the dominant culture, and secondly to participate in the institutions of the wider society to safeguard themselves against divestment and discrimination.108 Kymlicka, in his ground-breaking work, describes three categories of group-differentiated rights: (1) “accommodation rights,” (2) “self-government rights,” and (3) “special allocation and representation rights.”

108 For a more elaborate discussion of group-differentiated rights see Kymlicka, supra note 30; Jacob Levy, Classifying Cultural Rights, in ETHNICITY AND GROUP RIGHTS 22 (Ian Shapiro & Will Kymlicka eds., 1997); see also Saban 2004, supra note 6.
"Accommodation rights" impose broad, positive obligations on the state, to help protect the language, culture and society of designated minorities. A major illustration of this is public funding of minority education – a duty that goes much beyond protecting the freedom to establish private minority schools. Other examples include exemptions for minority members from norms that are prejudicial to their religious or cultural practices, such as Sabbath laws, mandatory dress codes, and/or occupational restrictions, such as hunting or grazing.

Like accommodation rights, the second category of minority rights, "self-government rights", seek to protect the minority culture and its capacity to self-develop. The two kinds of rights, however, operate on different levels. Self-government rights decentralize state power and endow minority communities with autonomy in areas critical to their survival, including education, culture, and religion. Hence, in the context of education, the right of self-government moves beyond a publicly-funded education system for the minority (an accommodation right) to whether the education system is administered by the minority community itself.

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

Group-differentiated or minority rights affect the power imbalance between the relevant communities because self-government and special allocation and representation rights free the minority from dependency upon the monitoring institutions of the state and involve its members in implementation of their various rights. Moreover, group-differentiated rights have a function that common rights of citizenship alone cannot fulfill, as can be exemplified by the issue of the vitality of the minority language. Dictating non-discrimination
towards speakers of the minority language and providing state protection of their liberty to express themselves in it usually would not suffice to keep that language and the culture surrounding it alive. The economic and cultural pressures brought to bear by the majority urge the minority to adopt the dominant language and replace their own unless special means of protection are established. These special means are the group-differentiated rights, such as minority entitlement for full public funding of education in the minority language, which help conserve a "lingual environment".

In view of their nature and potency, group-differentiated rights and the control framework are almost an anathema. I say "almost" because the picture is complex. On the one hand, these rights indeed threaten the power disparity between the majority and minority and so disturb the exploitation of the power differences to the majority's benefit, and may disrupt the stabilizing mechanisms. On the other hand, the group-differentiated rights provide for something else which the control model (when part of the Ethnic Paradigm) is aiming at: they provide the Arab minority with tools for preserving its particularity and thus help maintain the separateness between the two communities. Again we see a certain conflict within the control system's purposes. How is it handled? What could be expected from a "good", well functioning control is that this certain tension be mitigated by choosing to recognize only the weaker type of group-differentiated rights, the accommodation rights.

Indeed what we encounter in Israel in the period under review meets this expectation. The Arab-Palestinian minority members enjoyed only few group-differentiated rights and these rights were predominantly of the accommodation kind. They moderated lingual assimilation and fostered cultural and social separateness, whereas the more potent group-differentiated rights granting self administration and special allocation and representation were almost absent.

**D1. The Group-differentiated rights of the Arab-Palestinian Minority - What was granted and what was withheld**
D1a. The Predominance of Accommodation Type Group-differentiated rights

There were five group-differentiated rights granted to the minority in the period under discussion: (1) the status of Arabic as an official language; (2) the division of public education such that it contains an elementary and high school system that is conducted in the Arabic language; (3) the group exemption from the obligation of military service; (4) the preservation of the Ottoman millet system, in which each person is subject – in the field of personal status (i.e., family law) – to the religious law of her or his religious community, and in certain matters even to the exclusive judicial authority of the religious courts of her or his community; (5) the right of workers and business owners to observe their days of rest and holidays.

Among these rights the legal status of Arabic is quite striking. The other four are typical accommodation rights, but the status of Arabic resembles more a kind of partnership, a right of special allocation and representation in the sphere of language. The status of Arabic in Israel is contained in Article 82 of the Palestine Order-in-Council, 1922. This is Mandatory legislation that was adopted into Israeli law with the establishment of the state in 1948. Under the subtitle 'Official Languages' Article 82 states as follows:

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

Such a far reaching communal right is unexpected within the control model, especially in light of the fact that the obligation to use English was soon annulled
(in section 15(b) of the Law and Administration Ordinance 1948). I propose two explanations for this seeming incongruity - first, Israeli law did not formulate a structure of official bilingualism, as in Canada for example. Second and more important - the impressive legal status of Arabic was never enforced in practice. In other words, there was always an enormous disparity between the de-jure and de-facto status of Arabic. In reality Arabic carries virtually no weight in the common public sphere, where Hebrew was and more or less continues to be the exclusive language. It is the language of governmental bureaucracy, of higher education and most important - of most segments of the Israel labor market. In fact therefore the practical status of Arabic in the period under review was commensurate with expectations of an ethnic state deeply identified with the majority community. The status of Arabic was being consigned to protecting the right to education in the minority's mother tongue, and so commensurate with accommodation rights.

The right to education in Arabic is consigned to the restricted category of accommodation rights because it is not accompanied by a more general right of self-government in the sphere of education, such as is granted to certain minority groups within the Jewish majority, i.e., the various Jewish religious schools – either the state-run ones or the ultra-orthodox community-run ones. Indeed there are a few private Arabic schools (which are church-run but that integrate also many Muslims pupils), but they fare only slightly better in independence from the state schools. As I have tried to explain elsewhere, for all intents and purposes the potential for an education of its choice has been blocked for the Arab-Palestinian minority of Israel; nor is the minority granted leeway to present its culture, worldview or history in the wider-society curriculum.\footnote{For a detailed analysis, see Ilan Saban & Muhammad Amara, The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change, 36 ISR. L. REV. 5 (2002); Kretzmer, supra note 31; Mala Tabory, Language Rights in Israel, 11 ISR. Y. B. HUM. RTS. 272 (1981).}

In the realm of religion and personal status important group-differentiated rights were conferred by the decision to preserve the Ottoman \textit{Millet} legacy as the

\footnote{Saban 2004, supra note 6, at 938-40, 950-54. See also Al-Haj 1995, supra note 7, at 94-101.}
Mandatory government had. The main significance of this legacy was twofold. First, personal law for the individual (the family law that pertains to the establishment and dissolution of a family and to parent-child relations) is to a large extent religious law, i.e., the set of norms created by the religious community to which the individual belongs. Second, these matters (i.e., matters of personal status) are partially subjected to the exclusive jurisdiction of the religious courts of the individual’s religious community. The upshot of this legacy was, from many standpoints, a religious endogamy involving the lack of a domestic legal option for mixed marriages, as most of the religious communities recognize only intra-religious marriage.

The Millet structure accorded well with the Ethnic paradigm to which Israel belonged and continue to belong. It acted in accordance with the wish of majority community, which has been seeking to maintain a relative social segregation from the other communities in the state. Furthermore it provided another advantage for the control model: Religious identities – as sub-groups’ identifications within the Arab minority – detracted from the minority ability to construct a single, powerful national identity. What made the Millet less problematic is that it was not pursued unilaterally by the dominant community; instead, it reflected a common desire among the majority of individuals who compose all the relevant religious communities.

In addition, in the realms of employment and of religion, accommodation rights regarding days of rest were preserved, and in like manner the Christian-

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111 Article 83 of the Palestine Order-in-Council, 1922 provides as follows: "each religious community will enjoy independence in its internal management in accordance with any edict or order issued by the government". For a comprehensive discussion of the legal status of the Arab minority’s religious communities in Israel see MOUSSA ABOU RAMADAN, LES MINORITES EN ISRAEL ET LE DROIT INTERNATIONAL (THESE DE DROIT, UNIVERSITE D’AIX-MARSEILLE III, 2001); and see also, Abou Ramadan, supra note 46; Kretzmer, supra note 31, at 166-68.

112 Article 7 of the Hours of Work and Rest Law, 1951, stipulates a right to weekly rest for every worker; and for a non-Jew, this right pertains to the day he regards as his weekly rest day. Article 9(c)(a) of this law forbids discriminating against a worker because of his unwillingness to work on the weekly rest days during which his religion prohibits labor. Article 18A of the Law and Administration Ordinance, 1948, extended the provision on weekly rest to Jewish holidays as well; thus, for a non-Jew, the provision pertains either to Jewish holidays or to holidays of his own community, "according to his practice."
Arab sub-group was exempted from some legal restrictions placed in the name of religion – such as pig farming.\textsuperscript{113}

The minority also had certain group power at the level of local government in the form of Arab local authorities. This power, however, is primarily based on the geographical-communal separation of Jews and Arabs in Israel and the right every individual has to vote and be elected in local elections, and therefore to analytically classify this state of affairs in terms of group-differentiated rights is a bit dubious.

The last important group-differentiated right enjoyed by the minority in the period under review was exemption from the draft.\textsuperscript{114} This right was not explicitly stipulated in the law, either due to its sensitivity or in order to allow flexibility. It is in fact another example of the legislative technique of granting extensive discretion, seemingly unrestricted, to the executive in pivotal issues. This time it worked to the advantage of the minority. The law authorized the Minister of Defence to exempt a person from universal conscription\textsuperscript{115} and in the case of the Jewish ultra-orthodox minority the Minister applied it as a matter of course. In regard to the Arab-Palestinian minority the personal exemption system was not applied. The mechanism of their practical exemption from military service is the non-enforcement of the general conscription order that apply to them as to all others of their age. 24 months later this general order became basically outdated towards them (section 20 of the Defence Service Law).

I classify this exemption as a group-differentiated right because it is granted on the basis of group membership. Its moral justification concerned the national distinctness of the Arab-Palestinian minority and the conflict between its people and the state of its citizenship. While I recognize that humane consideration for the special situation of the Arab-Palestinians was not the only reason for their

\textsuperscript{113}Pig-Raising Prohibition Law, 1962, art. 2(1) & Schedule 16 L.S.I. 93. For a comprehensive analysis, see DAPHNE BARAK-EREZ, OUTLAWED PIGS (2007).

\textsuperscript{114}For a more detailed discussion of exemption from military conscription see Saban 2004, \textit{supra} note 6, at 948-49; Kretzmer, \textit{supra} note 31, at 125; Dowty, \textit{supra} note 15, at 213.

\textsuperscript{115}At present this appears as article 36 of Defence Service Law [Consolidated Version] 1986, which replaced The Defence Service Law 1949.
exemption from military service – the security interest of the majority community favored it in any case – this does not detract from the importance of the exemption. It constitutes a major element of protection in regard to the culture, language, and national identity of the Arab-Palestinians in Israel; and it also has implications for the internal unity of the minority community. This latter point regarding internal unity of the minority comes to light in the case of a distinct cultural community that is sociologically adjacent to the Arab-Palestinian minority, namely, the Israeli Druze who serve in the army. Here, complex cause-and-effect relations are involved. On the one hand, the willingness to engage in military service among Druze men stems, probably, from a special collective identity (Druze-Arab, as distinct from the Arab-Palestinian identity). On the other hand, military service has helped greatly in sustaining and structuring this differentiated identity.\(^{116}\)

The Supreme Court declined to intervene in the communal nature of the conscription exemption. This was in a case decided in the early years of statehood - *Hassunah v. the Prime Minister*.\(^{117}\) It explained:

\[\text{His [the Druze petitioner's] argument is that because he belongs to one of the minority communities he must not be coerced to enlist. We cannot trace this argument to any valid basis. The Defence Service Law 1949 applies to all citizens of the State answering specified particulars. It is not for us to explore and decide what motivated the authorities not to apply the law until now to one group of people or another.}\(^{118}\)


\(^{117}\)HCJ 53/56 Hassunah v. Prime Minister [1956] IsrSC 10(1) 710.

\(^{118}\)See id. (emphasis added).
D1b. Depleting the Minority's Self-Government Rights and Upholding Centralism

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

The geographical separation of Jews and Arabs seemed to offer real opportunities for minority self administration through Arab local councils. However, the legal and practical dependency upon the central government, of all local councils, Jewish and Arab, made this potential impossible to utilize. Firstly, the Ministry of Interior controlled the financial welfare of the local councils, their status (local council or municipality; elected or appointed)\(^\text{119}\) and their jurisdiction. Secondly, the Arab local authorities were and are poorer and hence more dependent. Thirdly, they were discriminated against on all relevant levels of government’s discretion - in budgets,\(^\text{120}\) size of territorial jurisdiction,\(^\text{121}\) municipal status,\(^\text{122}\) indeed in the very right to come into being and hold elections.\(^\text{123}\) Certain Arab communities were not-accidently subordinated to a

\(^{119}\) See Rosen-Zvi, supra note 73, at 162; MAJID AL-HAJ & HENRY ROSENFELD, ARAB LOCAL GOVERNMENT IN ISRAEL ch.2 (1990) [hereinafter Al-Haj & Rosenfeld].

\(^{120}\) Razin, supra note 43. Demarcation of municipal jurisdictions created common situations whereby Arab owners of land resided in an Arab local authority while their land was in a Jewish local authority’s jurisdiction and they had to pay their property taxes to the locality in which they did not in fact reside. See Blank, supra note 73, at 224.

\(^{121}\) Until the 1960s many Arab-Palestinian localities had no local authority, see Jiryis, supra note 16, at 227-28; Benziman & Mansour, supra note 33, at 183-84; Al-Haj 1995, supra note 7, at 30-34; Al-Haj & Rosenfeld, supra note 119, at 30-34, 120-22; Ozacky-Lazar, supra note 32, at 114-15, 122.

\(^{122}\) See Rosen-zvi, supra note 73, at 60-61; Oren Yiftachel, State Polices, Land Control and an Ethnic Minorities: Arabs and Jews in the Galilee Region, Israel, 9 SOC’Y & SPACE 329, 335-36, 345-49 (1991). Except Nazareth and Shefa’am (Shefar’am) Arab-Palestinian towns were only accredited as such in the 1980-90s.

\(^{123}\) See the first amendment to Municipalities Ordinance (new version).
dominantly Jewish municipality, as for example *Ma'alot-Tarshiha* and *Tel Aviv-Jaffa*. Moreover, local authorities run by the Communist party suffered more severe discrimination in funding and services and at that period were under constant threat of being replaced by an appointed committee.\(^{124}\)

Self administration was depleted of content in the case of education too. The State education system functioned almost without any Arab representation among the higher echelons of its bureaucracy and was not obliged in any way to act otherwise. This was due to: a. the minority having no rights of allocation and representation in societal institutions (Ministry of Education in this case) and only a few self administration rights through the its private schools (church-run schools). b. Israeli law did not (and does not) provide the courts with authority to remedy selective allocation of group-differentiated rights, as oppose to 'regular' discrimination.\(^{125}\) c. The education legislation did not restrict the authority of the Ministry of Education in regard to Arabic state education, and this is striking by comparison to the Jewish religious state education.\(^{126}\)

As regards religion and personal status, the *Millet* system could have allowed substantial self-administration, since it founded a comprehensive family courts system along the lines of religious affiliation. However, the self-government potential of the *Millet* has diminished in several ways. It was diluted both via state control over the budgets of the religious courts, and via its influence over appointments to these courts. The sole source of budgeting for the *Shari'a* court system is the state budget. As for the appointment of *qadis* (the judges of the *Shari'a* courts), this was done according to The Qadis Law, 1961.\(^{127}\) A nine-member committee appoints the *qadis*. A certain degree of self-government is guaranteed by the requirement that at least five members of the committee must be Muslims. Nevertheless, the choice of the Muslim and non-Muslim members is

\(^{124}\)Lustick, Arabs in the Jewish State, *supra* note 1, at 140-43; Ghanem, *supra* note 7, at 137-53.

\(^{125}\)See the explanation unfolded above when discussing the *al-Sroujy* ruling, *supra* note 34.

\(^{126}\)For more details see Saban 2004, *supra* note 6, at 940, 950-51.

\(^{127}\)Qadis Law, 1961, 15 L.S.I. 123.
not made by the minority community itself.\textsuperscript{128} Apart from the two \textit{qadis} who are members of the appointing committee, two other members are government Ministers, three are Members of the Knesset elected by a majority of the Knesset, and the two remaining members are chosen by the Israeli Bar. All three bodies are Jewish-controlled.\textsuperscript{129}

\textbf{D1c. Non-existence of Minority Rights of Special Allocation and Representation}

The third and final category of group-differentiated rights concerns the degree to which the minority participates in the allocation of political, material, and symbolic power in the state. First, does it have rights to a fair allocation of public goods, both material (e.g., jobs, budgets, public services, tax easements, immigration quotas and land) and symbolic (signs and emblems, heroes, collective narratives, educational goals etc.). Secondly, does it share the political goods, i.e., does it have a right to be represented in the allocating institutions themselves?

The assumption must be that this type of group-differentiated rights, maybe the most demanding, would not be granted to a minority in the control system. These oblige making the minority partner to societal institutions, and such a partnership would contradict the hierarchical and exploiting nature of the ethnic paradigm of which the control model is the most radical sub-type. Again, Israeli law in the period under review verifies this assumption.

\textsuperscript{128}On the difference between two types of minority representation – a "classic" one which choose members of minority communities to certain posts without directly involving the community to which the targeted individuals belong, and another type of representation in which the minority community determines (or is a partner in the determination of) who will be chosen: who will represent and how – see Ilan Saban, \textit{Appropriate Representation of Minorities: Canada's Two Types Structure and the Arab-Palestinian Minority in Israel}, 24 Penn St. Int'l L. Rev. 563 (2006).

\textsuperscript{129}\textit{Cf.} JIRYIS, supra note 16, at 198.
Elsewhere I have dealt in detail with the poverty of legal norms demanding a fair share for the minority in Israel's material and symbolic public goods. Here I will deal only with the political goods. The law of the period had no group-differentiated right that necessitates Arab participation in decision making on matters pertaining to general society, not even of the narrowest nature. In the period under review Arab members of Knesset (from Arab factions or bi-national ones) could not be members of important Knesset committees, and a political taboo barred them from a share in Government. There was no obligation or mechanism to ensure Arab representation in the civil service or in governmental companies, and not even a norm to consult with members of the minority before making governmental decisions even if they affect the minority exclusively.

It should, however, be admitted that this state of affairs corresponded with a general feature of the Israeli regime of the time – a very strong centralism: including an absence of a general legal obligation to involve any community or sector in governmental procedures or even to consult with them, be they Jewish or Arab. The nation-building paradigm that directed the inter-communal relationship within the Jewish community negated sectarian or factional

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\(^{130}\) Saban 2004, *supra* note 6, at 960–70.

\(^{131}\) In the Declaration of Independence appears a paragraph that was not translated into anything legally meaningful: "We call upon the Arab residents of Israel, even as the bloody attack against us is raging, to keep the peace and participate in the building of the State on the basis of full and equal citizenship and due representation in all its institutions, temporary and permanent". It sounds like a call for an extensive coalition. The Law and Administration Ordinance 1948 seemed to give it even added weight. In article 2 it stipulated that "Representatives of the Arabs residents of Israel who recognize the State of Israel will participate in the temporary government". However, the end of the sentence water down the promise by adding "their lack of participation will not diminish the authority of the temporary government".

\(^{132}\) See HCJ 115/55 Zilber v. Minister of Internal Affairs [1955] 9(2) 1244, in which the Supreme Court turned down a petition of *Maki* (the Communist Party) complaining against its exclusion from the Central Elections Committee of the Municipal Elections among soldiers: "no party has a natural right to representation in this committee" (*id.* at 1245). The known but unofficial practice of the period regarding participation in important Knesset committees was the one applied in the case of the Knesset's Foreign Affairs and Security Committee, i.e., entitlement to representation in the committee only to parties having at least one MK more than Maki (!) at the relevant Knesset, *see* Hofnung, *supra* note 42, at 201-2.

\(^{133}\) Saban 2004, *supra* note 6, at 972, 975.
representation in public policy making (except for religious sub-groups). On
the other hand, the fact that the control over the Arab minority was not the prime
reason for this state of affairs does not mean that once in place this order of
things did not serve it. This last point takes us back to Lustick’s analysis of the
control mechanisms. They do not evolve only from minority oriented public or
legal endeavor but also from the general modus operandi of authority in addition
to the structural and historical circumstances of the society.

Indeed, if one compares the fate of the Jewish minority sub-groups to that of
the Arab minority, it is obvious that selectivity in application and implementation
was practiced. Put differently, the Jewish religious sub-groups gained
representation through political practices unhindered by legal norms. The law, in
general, did not oblige to involve a community in decisions pertaining to itself but
nor did it forbid it. The rule in Israeli law of the time was that administrative
authority can exercise its discretion in consulting whomsoever it sees fit, so long
as the purpose of consultation is relevant to the issue at hand. This discretion
opened the door to selectivity and the religious Jewish sub-groups squeezed
through the door while the Arab minority did not. On certain other issues the
Jewish religious sub-groups enjoyed norms that granted them representation or
self-administration. The most notable example is the state religious and the
independent ultra-orthodox education.

Here and there, certain legal requirements of consultation appeared that are
relevant to the Arab minority. See for example Protection of Holy Places Law,
1967, which states: “The Minister of Religious Affairs is charged with the
implementation of this Law, and he may, after consultation with, or upon the
proposal of, representatives of the religions concerned and with the consent of

\[134\] Compare Kimmerling, supra note 18, at 65-70; Nir Kedar, The Republicanism of the Ben-
(Hebrew); Nir Kedar, Ben-Gurion and the Sephardi Judge 19 B.I.U. L. Rev. (2002), 515-
540 (Hebrew).

\[135\] See YITZHAK ZAMIR, THE ADMINISTRATIVE AUTHORITY 857-63 (1996) (Hebrew)
[hereinafter Zamir]. For further thoughts on the mechanisms of this selectivity in a
purportedly neutral realm see the concept of habitus discussed below next to notes 148-
149.

the Minister of Justice make regulations as to any matter relating to such implementation.” However, no regulations have been formulated in regard to Christian and Muslim holy places. By contrast regulations were enacted for Jewish holy sites – the Preservation of Places Holy to Jews Regulations, 1981. This differentiation was made (legally) possible because the statute leaves discretion to the Minister whether to regulate or not, and it appears also to be due to the lack of clearly defined representatives of the Muslim religion in Israel. One should add that this state of affairs stems largely from the state’s own desire to avoid creating or recognizing such official representatives.

Indeed the vagueness surrounding the issue of minority representation – who should it be, how is it to be recognized, by whom – is not incidental. It is an important asset for the control structure. See the telling example that appeared in the al-Sroujy case mentioned above. This is what the Court had to say:

In so far as the committee is charged with allocating money for communal needs, it does so as an emissary of the Ministry of Religion. It is the business of the Minister of Religion to select his own counselors in this area, which he thinks worthy of the duty of community representatives, nor will this court direct him to choose for himself other, worthier, counselors. ...the impression... formed is that this is no more than a squabble between competing groups of political activists.\(137\)

In other words, the absence of an internal democratic procedure, by which the minority can decide upon its representatives, enables the state – with Court's approval – to waive real conflict between co-opted and opposition elites, as "a squabble between competing groups of political activists". The Court never mentioned a need to find out, by acceptable procedure, who genuinely represent the minority; thus it paved the way for government control over co-opted elites.

In short, the minority was divested of representation rights in decision making junctions, with the inevitable result that discrimination in allocation became the practice almost across the board.\textsuperscript{138} To my mind this harmed the discriminating majority as well, by isolating it in an ideational ghetto of interests and viewpoints that tended to be uniform. Without external contribution to generate second thoughts or raise doubts the majority community was deficient in its ability to fine tune, review and amend its decisions.

**D2. The Role of the Law in Perpetuating the Social Separateness of the Ethno-National Communities in Israel**

As explained above, beside hierarchical order and stability, the Ethnic paradigm is comfortable (and often content) with prolonging its diversity, i.e., its bi-communal or multi-communal structure (sociologically speaking). How did the legal arrangements discussed above correspond with this structure? How did they affect the social separation between the communities in Israel?

First, it should be noted that social separation in Israel did not require much legal assistance; it was (and continues to be) voluntary, forceful, consistent and mutual. The fact that the national divide coincided with a religious, cultural and linguistic divide and the persistent external Arab-Israeli conflict constantly nurture the internal separation. Another two contributing circumstances were the structure of the labor market and the spatial relations. As regards the latter - the settlement policy, the land regime (norms and practices concerning land ownership, expropriation, allocation, development and usage) and other practices created geographical proximity between Arab and Jewish localities but

\textsuperscript{138}For example welfare services (Kretzmer, \textit{supra} note 31, at 123); public housing; budgeting of local councils, of education, of religious services, quotas of water and of agricultural production and marketing (Kretzmer, \textit{id.} at 125-27); allocation of public land (Sandy Kedar, \textit{On the Legal Geography of Ethnocratic Settler States: Notes toward a Research, Agenda, 5 CURRENT LEGAL ISSUES} 401, 422-24 (2003); Yiftachel 2006, \textit{supra} note 9, at 140-42; Sandy Kedar & Oren Yiftachel, \textit{Land Regime and Social Relations in Israel}, in \textit{1 SWISS HUMAN RIGHTS BOOK}, 127, 140-44 (2006) [hereinafter Kedar & Yiftachel]; Bauml, \textit{supra} note 32); planning and building (Yiftachel, \textit{supra} note 73; Blank, \textit{supra} note 73).
not shared residential areas. Only about a tenth of the Arabs live in mixed towns (dominantly Jewish) and in most of those the residential quarters are ethnically segregated; Jews in general do not live in Arab localities. 139

However, certain factors emerged that did erode this segregation - the bilingual and bicultural pressures bearing on the minority, scarcity of independent employment opportunities and shortage of housing and land that forced young Arab couples to seek further afield. Still, the factors perpetuating separation are stronger by far than those counteracting it, especially with regard to the most comprehensive and profound demarcation line – family bond. The incidence of inter-marriages in Israel is remarkably low and the Millet system discussed above both reflected it and reified it. 140 Two other important factors, discussed above, contributed to prolonging the inter-communal separation – these are the entitlement to public education in Arabic and the non-enforcement of universal conscription.

I shall mention one last legal involvement in segregation - the distinction in Israel between nationality and citizenship. It was the Supreme Court itself that unequivocally affirmed the position that "Israeli Nationhood" does not exist. 141 In its ruling in the case of Tamarin, it rejected a petitioner demand to recognize his right to register his nationality as Israeli. The court reasoned that the petitioner: "was very far from proving the existence of an Israeli nation".

In other words, contrary to popular use of the term there is no Israeli nationality only citizenship. The nationality of Israeli citizen body is divided mainly between Arab and Jewish nationals. Israeli law directed that the distinction be registered as stipulated in section 2 of the Population Registry Law 1965 (obligation to register religion and nationality in the population registry) and regulation 2 of the Population Registry Regulations (Entries in Identity Card) 1970.

139 Kedar & Yiftachel, id.; Yiftachel, supra note 73, at 63-64; Rassem Khamaisi, Planning and Housing Among the Arabs in Israel 148-49 (1990) (Hebrew).
140 Smooha 1980, supra note 2, at 261.
So far we have dealt with the involvement of legal norms in shaping the power gaps between the majority and minority in Israel in its 'formative years' and maintaining inter-communal separation. We met weak common rights of citizenship, which supervisory institutions such as the courts largely failed to buttress, and we met only few minority (group-differentiated) rights that helped the minority to maintain certain important elements of its culture and identity but were not potent enough to allow the minority to empower itself and moderate power disparities and their exploitation to its detriment. It is now time to turn to the involvement of the law in the stabilizing mechanisms that perpetuated this state of affairs and distanced it from a violent breakdown.

E. Law and the Stability of the Control Framework

The Control framework manifestly wronged the minority. True, it did not pressurize the minority to assimilate, but the years 1948-1978 held for the minority fresh memories of occupation, expulsion beyond the borders of a significant part of its people, uprootedness of many amongst it, massive expropriation of land, grave limitations on freedom of movement and other liberties, as well as deep discrimination and marginality. All this was contained under the shadow of an all-encompassing violent external national conflict. What kept such a buffeted structure stable? The Israeli Arabs "are among the quietest national minorities in the twentieth century". How did this come about? As already explained, a primary component of the control structure is a complex set of stabilizing mechanisms, and in the period under review they fulfilled their function.

Stability and docility can be partially attributed to the slight but consistent improvement of the order of things over time - easing of control, especially

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through moderating the military rule from the end of the 1950s until its abolishment in 1966. However, gradual improvement does not suffice to ensure stability, indeed it often achieves the opposite, when, perceived as too little too late. But in Israel it worked. At any rate, the equilibrium in Israel at that time rested on more stabilizing factors: mechanisms typical of the control structure. I have mentioned them above, but will now analyze them in greater detail and describe how the law was involved in them.

These stabilizing mechanisms fall into three main patterns. (a) Mechanisms that aim to stave off or hold at bay minority motivation to change the existing order. (b) Mechanisms that aim to stop or deter the minority from reverting to action, especially violent action. (c) Mechanisms that blunt the efficacy of such actions if and when taken. To the first type belong mechanisms that disguise the wrongs of the existing order or attempt to mitigate or even justify them. The mechanisms of the second type are usually means of intimidation or other deterrents or else procedures that ensure the dependency of the minority upon the state. The third type uses tools that isolate the minority from the majority and from the international community, dividing it internally and purchasing the collaboration of part of its elites. Co-optation of minority elites was greatly supported by the minority dependency upon the state, which the control structure so helped creating, and by the flexibility it allowed the government in selective exercise of its immense powers – favoring only certain elites.

E1. Involvement of the Law in Mechanisms to Stave off Minority Motivation to Change the Existing Order

The distinction between disguise and providing justification in the control context is slight, as justification often takes the form of masking an abuse. Together they are connected to a de-politization effect because they serve to marginalize issues that without them may have headed the list of grievances. For

\[\text{See Northern Ireland for example, Claire Palley, The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution, 1 ANGLO AMERICAN L. R. 368, 410-11 (1972).}\]
the sake of clarity, however, I shall try to draw a distinction. I shall denote as disguise the mechanisms that cover up the very process of abuse, the physical fact of its taking place, and legitimacy or justification as the mechanisms that help whitewash or put in doubt the negative character of the state practice.

Of all the goals of the control structure these two are least likely to be attained. The true state of affairs is usually too clear to hide and too difficult to justify to its victims. Moreover, in a multiple divided society such as the Israeli, legitimization and disguise are more difficult because along each of the rifts a comparison may take place and the differences cannot be easily veiled from the deprived minority. In short, a legitimacy crisis is a common eventuality or at least a reasonable possibility under control conditions. Disguise and justification are therefore used more to separate the minority from potential allies (within the majority community and the international community), who are distant enough or dissociated enough from the abuse to make do with the kind of effect these mechanisms are able to produce. But for the main part stabilization in the control model is focused on aborting transition from motivation to actual action and upon effectiveness of the action itself, when undertaken by the minority.

**E1a. Disguise and the Law**

**Preferring the Circuitous to the Explicit**

Preferring the circuitous to the explicit is manifested in the state's discriminatory practices. Kretzmer has written about it at length, in his discussion of the enormous disparity between the extent of open discrimination and the institutional and the concealed types of discrimination.\(^{144}\) I will summarize and add few points.

First, as already elaborated above, there was a clear preference that legal norms be neutral and discrimination will appear in implementation alone. It made good the choice mainly by endowing the administrative bodies with general

\(^{144}\)Kretzmer, *supra* note 31, ch.5-7.
and extensive authority. Judicial review failed to curb this authority, and if it did in some minor manner it always left alternative routes, which allowed these policies or practices to be continued. In one of the examples I gave, when the court interpreted reductively the authority to shut down a newspaper on the basis of the Press Ordinance it allowed it on the strength of the Defence Regulations. In the sphere of state allocations, likewise, the law did not limit the scope of executive discretion by obliging it to set standards, or to publish them in the rare cases where they existed.

The second practice that aided disguise was opting to threaten with harm rather than actually causing harm and preferring the use of state’s power to allocate selectively rather than its authority to coerce. An illustration of this practice is how the state chose to stop the Arab-Palestinian minority from forming associations. There were any number of direct restrictions that could have been imposed: the Ottoman Law on Associations of 1909; the 1945 Defence Regulations145 (Regulation 74 allowed confiscation of assets); and the Ordinance extending Emergency Regulation (Departure for Abroad) 1949 (which could prevent associations from fund-raising). All these legal instruments could have put any association out of business, but they were carefully used. The authorities opted for the indirect methods. So, for example, members of such association would not be appointed to positions controlled or influenced by the state (such as teachers, in both the public and private education systems, as I will soon elaborate); or the association would not be accorded recognition by the establishment in which they are embedded, as happened to Arab students organizations in universities. The converse of this was also used - endowing mainly Jewish controlled bodies with the kind of status that makes it worth to

145See for example the direct pressure brought to bear upon Arab labor unions and their members in the first years of statehood that resulted in their "voluntary" dissolution (Jiryis, supra note 16, at 220) and the like treatment of Arab sport clubs in the 1960s. Only organizations that failed to take the hint were at times declared illegal, see Jiryis, id. at 194-95; Hofnung, supra note 42, at 165-68; Lustick, Arabs in the Jewish State, supra note 1, at 128, 247-52. For a more comprehensive discussion with illustrations of selective allocation see Cohen 2006, supra note 66, esp. at 33-45.
join them and not others - like the Histadrut,\textsuperscript{146} and thus coercing members of the minority to "choose" or lose.\textsuperscript{147}

It was a working assumption, often verified by reality, that weakness tends to become fixed and is self-perpetuating. Therefore, in congruence with this line of thought, it was considered vital to keep potential foci of minority self-empowerment weak. Weakness rendered minority organizations impotent in the eyes of potential activists and sympathizers. The absence of strong norms of non-discrimination and disqualification of "non-relevant considerations" – norms to be protected by assertive supervisory bodies such as courts – and the lack of a legal norm demanding involvement of the minority at least in decisions concerning it, were important contribution of the law to perpetuating this organizational impotence.

Another fact that made frequent use of explicit discrimination expendable was the same mechanism that distinguished de facto between the Jewish national-religious minority and the Arab-Palestinian minority, even though the formal legal arrangements regarding them were very often similar. Pierre Bourdieu provided the theoretical explication in the concept of \textit{habitus} that he developed.\textsuperscript{148} By \textit{habitus} we refer to social norms, a backdrop of unquestioned expectations which "define the social expectations that shape the contours of our comfort zones, molding what we expect from one another".\textsuperscript{149} Majority members in Israel (including of course its bureaucratic elites) knew, without explicit

\textsuperscript{146}See sections 3 and 4 of Collective Agreements Law 1957.

\textsuperscript{147}Al-Haj 1995, \textit{supra} note 7, at 171-72 illustrates this in his presentation of the professional organization of Arab teachers. See also the relationship between the Arab Student Councils and their Universities in Jiryis, \textit{supra} note 16, at 196-97; Dowty, \textit{supra} note 15, at 197. See too the establishment of competing organizations by the Histadrut in Lustick, Arabs in the Jewish State, \textit{supra} note 1, at 144-45, 193, 211-13.

\textsuperscript{148}Bourdieu sensed correctly the atmosphere of non-reflective almost automatic understandings on the part of the majority that simply clones the existing order without need of explicit verbal directives or declared legal norms, see DAVID SWARTZ, \textit{CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU} 95-116 (1997); RICHARD HARKER, \textit{AN INTRODUCTION TO THE WORK OF PIERRE BOURDIEU: THE PRACTICE OF THEORY} 10-12 (Cheleen Mahar & Chris Wilkes eds., 1990).

\textsuperscript{149}Joan C. Williams, \textit{Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA}, 21 Yale J.L. & Feminism 79, 83 (2009).
directive or guidance, sometimes in a preconscious way, what and who is the 'preferable' and how to serve it.

**The Course of Divergent Paths**

Another important disguise mechanism that we have already met a few times is the course of divergent paths. In short, it is hard-to-trace discrimination that is built upon the existence of parallel societal and state bodies constructed around real differences – language, religion, place of residence – such as public schools in Arabic, separated from Hebrew-speaking schools, separate electronic media in Arabic, religious services and most of the local authorities. Why is this discrimination more disguised? These divergences seemed non-artificial and agreed-upon, however they were operated, supervised or financed differently, and this was concealed because their (natural or artificial) complexity made the comparison and exposure of underlying policy difficult to detect. Take for example the complexity of the separate educational systems – the public one, with Hebrew-speaking, Arabic-speaking and the national-religious (Jewish) systems, and the private education systems (of the ultra-orthodox and the church-run Arab education). These five (!) systems are funded in such a complex manner that only by examining a large body of data can the sum total of funding in each case be assessed. The following are just a few of the factors that enter the calculation: the number of pupils per class, the ratio between pupils' number and number of staff, length of school day, distance from school, the school's infrastructure, learning support, incentives for staff to work in less popular vicinities, teacher training, supplementary funding from local authorities. Not accidently attempt at comparison is often futile. Add to this the legal dimension - absence of an obligation to set explicit and fair standards for allocation, and a norm ordering that they be published, and the stage is set for subterfuge.

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Another example is the military censorship of the press, which at the time was divided between statutory and 'voluntary' mechanisms. The statutory path was based on the Defence Regulations 1945 and ostensibly covered all press; however, a separate 'voluntary' path existed at that period, covering certain newspapers party to the "Editors Committee Agreement". This latter path imposed a more lenient normative censorship regime, and it is no coincidence that only (certain, middle of the road) Jewish newspapers enjoyed it.  

**Constricting the Information Market and Diverting it**

In the context of involvement of the law in disguise mechanisms there is of course another issue: the norms to do with the marketplace of ideas and information.

It should be confessed that general positive developments, mentioned above, in freedom of expression had a gradual eroding effect on the efficacy of disguise. The interest in and empathy for the Arab-Palestinian minority of the Hebrew press was small from the outset, it's true. However, social tensions within the majority, a vibrant and diverse Hebrew press, competition within it and access to governmental and other sources of information led to exposures regarding state policies, among others in areas specific to the minority. It should be added though that Court defense for freedom of expression in the period under review

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153 For the ways information in regard to the Arab-Palestinian minority was exposed see the case of the 1956 *Kfar Qassem* massacre (Jiryis, *supra* note 16, at 140-153), and the publishing of the *Koenig* Report (a very blatant memorandum of the Ministry of Interior Northern District Commissioner that will be referred to again next to note 186), which was leaked and published in *Al ha-Mishmar Daily* of 7th September 1976.
was not consistent enough either generally or with regard to the Arab-Palestinian minority.\textsuperscript{154}

Here too, in the case of state intervention in the marketplace of ideas, indirect means of influence were preferred to direct restrictions upon speech. The state advanced its ideas, perceptions, agenda, interpretation, etc. – both directly as society’s most powerful speaker and less directly by its power to allocate accessibility to speech sites and mediums. The state had exclusive control over the curriculum of state schools\textsuperscript{155} and over the electronic media of the time (media originating in Israel). It also selectively supported journals in Arabic\textsuperscript{156} (through Histadrut and governmental funding); and it could block accessibility to State controlled media or to media influenced by it. So, for example, we find the state broadcasting station \textit{Kol Israel} refusing to broadcast a call to attend an Arab-Jewish assembly propounding abolition of the military rule over the Arab citizens. One of the declared reasons offered for the refusal, found in the \textit{al-Khazen} court ruling\textsuperscript{157} of the early 1960s, was that the broadcasting station's internal directives are ostensibly neutral and they stipulated that only messages

\textsuperscript{154}Inconsistency becomes apparent when we compare the principal rulings in this context in that period: \textit{cf.}, Kol Ha’am v. Minister of Interior IsrSC 7(2) 871 [1953]; Israel Film Studios v. Geri IsrSC 16(4) 2407 [discussed above, supra note (87)]; with al-Ard Ltd. v. District Commissioner of the Northern Region [1964] IsrSC 18(2) 340 [discussed above, supra note (94)]; FH 9/77 Electricity Company v. Haaretz [1978] IsrSC 32(3) 337 [defamation of public officials]; and Ein-Gal v. Film and Play Censorship Board [1978] IsrSC 33(1) 274 [discussed above, supra note (100)].

\textsuperscript{155}See discussion above and also Saban 2004, supra note 6, at 939-40.

\textsuperscript{156}The legal basis for state monopoly over the electronic media in Israel was discussed above next to note 47 (\textit{and see too} Adalah 1998, supra note 56, at 69). The law made an additional contribution to the weakness of the group-differentiated rights of the self-administration type, by divesting the minority of all rights of participation in management of the Arabic state broadcasts. As regards State intervention in the Arabic press it supported two dailies \textit{al-Yum} and \textit{al-Anba}. The first was published by a purportedly independent association. In addition the main visual news of the day - \textit{Yomanei Carmel} - were translated into Arabic, \textit{see} Ozacky-Lazar, supra note 32, at 61-62; \textit{JACOB LANDAU, THE ARAB MINORITY IN ISRAEL, 1967-1991: POLITICAL ASPECTS} 92-97 (1993); Jiryis, supra note 16, at 170-71. Legal involvement in this as in many other cases was basically a case of failing to intervene, i.e., absence of a clear norm of impartiality, and here no restriction upon the state on subverting the market of ideas by selective allocation.

\textsuperscript{157}HCJ 345/61 al-Khazen v. The Director of the National Broadcasting Service [1961] IsrSC 15 2364.
from "municipalities, local authorities and public, education, culture and art institutions" were to be aired. In other words, being controversial, as opposition activity is doomed to be, leads you away from accessibility to public media resources.

Moreover, freedom of information was not then a legal norm in Israeli law, and even after the Court acknowledged in the mid 60s a limited version of the right to information - in so far as it concerned a request by an individual for information gathered on her/him\textsuperscript{158} - it was not extended to general information from a public authority.\textsuperscript{159} This clear refrain meant, for example, that administrative authorities were not legally obliged to publish their internal directives.\textsuperscript{160} Because public service and certainly its upper echelons were exclusively Jewish the Arab-Palestinian minority had only very narrow access to governmental information (mainly through the Jewish press). Private bodies were of course even better 'protected' from having to divulge information. Hence, the JNF (the Jewish National Fund) did not see itself under obligation to divulge information about its real-estate transactions or the transactions of subsidiary companies, such as Himnutah.


\textsuperscript{159}See Yitzchaki v. The Minister of Justice [1974] IsrSC 28(2) at 700: "the public authority holds secret information collected in one of its departments... reference is to property the State may use (or not) as it sees fit for its own purposes and needs. It is entitled to publish this information or allow it to be published by people it deems fit to do so. It is not obliged to allow this to any citizen". Therefore the claim that the executive may not deprive the plaintiff of what it has granted another was rejected. The court was ruling on the basis of Cohen v. Minister of Defense IsrSC 16(2) 1023 aforementioned, supra note 52.

\textsuperscript{160}In this context the laxity on the part of the authorities to inform the Arab population of the social benefits programs to which it is entitled or of mitigating conditions on the restrictions to which it is subject is very clear, see for example Zeev Rosenhek, \textit{The Housing Policy Toward the Arabs in Israel in the 1950s - 1970s}, Papers in the Research Project on Arabs in Israel No. 17,. in The Floersheimer Institute for Policy Studies, 1996 (in Hebrew), at 36 (Hereinafter \textit{Rosenhek}) (with regard to the very little use made of assistance towards housing to which the minority was also entitled); and Ozacky-Lazar, supra note 32, at 22-23 (withholding information on ability of reclaiming absentee property).
E1b. The Law and Legitimacy

Comments about involvement of the law in legitimizing the control model were already mentioned, but a few others are in order. I will limit myself to the mechanisms in which the law clearly played a direct part.

First, it is vital to distinguish between two distinct audiences - the majority and the minority. In the public discourse of the time there were explicit arguments and underlying messages that are entirely unconvincing for the minority. However, certain arguments of the majority community had a potential to influence the minority and whether they did or not depended to a large extent on the intermediary - who furnished the minority with part of the information and who interpreted it; i.e., some of the information reached the minority through its own elite. If those intermediaries were cooptated they would at least partly legitimize the information they pass on. Moreover, the ability of the minority to push for change depended upon coalition with partners from within the majority community, while the legitimizing efforts of the state diminished the chances for creating such a coalition, because these efforts nourished majority self-righteousness.

Second and most important, Law supported the legitimizing efforts by being instrumental in maintaining a minimal threshold of formal democracy. It avoided explicit distinction on the basis of ethno-nationality and gradually improved the status of human rights in Israel. Thus Law inculcated a hope for change. There was ambivalence, a seeming inconsistency in the policy towards the minority, which cultivated hope. There were at least two sources for the apparent inconsistency; a. On the level of the executive two agents were at work at once - the "bad" which was the military rule and the "good" who was the advisor on Arab affairs.161 On the wider governmental plane the Supreme Court sometimes acted as the "good guy" and emerged with surprisingly courageous decisions, and so encouraged a belief in the potential of institutional improvement of the lot of the minority. During the period we are discussing it

was a wishful thinking, a stabilizing factor, product of a mainly hollow hope. Indeed, Jiryis, one of al-Ard's leaders, was sorry retrospectively for the faith his movement had put upon the Israeli judiciary for such a long time. "One of its [al-Ard's] obvious errors was its faith in the Israeli court and democracy", he later wrote.\textsuperscript{162} Hence, law and especially the courts, added grey colors to the image of the Israeli regime of the time. They introduced ambivalence to its image, even in the eyes of the minority, and thus kept the control regime less illegitimate.

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

\textbf{E2. Involvement of the Law in Mechanisms to Curb Minority Readiness to Actively Mobilize for Change of the Existing Order}

Even after a member of the minority becomes motivated to act for change, the system may still deter her/him from active involvement either by intimidation or by replacing this motivation by another.

The pivotal axis was the dependence of the minority both on dispensations of the State and on its power to restrict and sanction. This dependence was augmented by the flexibility allowed to the government in implementation of allocation and restriction, which gave it almost a full-sway to deter and bribe, reward and punish. These were all used to divide the minority and cooptate its elites. Flexibility lent itself to granting of privileges or lifting restrictions in

\textsuperscript{162}Jiryis, \textit{id.} at 195. Compare to Shamir's argument with regard to Supreme Court procedures in the occupied territories (as opposed to those in Israel) in the 1970s and 80s and the part that landmark cases played there, \textit{see} Shamir, \textit{supra} note 75.
response to requests of certain representatives of the minority, thus making them indispensable in the eyes of their community. In addition a system of bribes ensured collaboration of the "representatives". Following is an illustration.

**E2a. Dependence, Deterrence and Cooptation, mixed with Legitimation – the Arab Teachers as an Illustration**

Analysis of the labor market in the period under review reveals that an enormous portion of white-collar employment open in theory to the minority was in the civil service. It was not so in practice. The not-so-many Arab citizens with higher education competed for the few positions in the Arab local authorities among these as teachers and headmasters of the Arabic speaking schools. The catch was that these positions entailed giving up political activity - it was a choice between earning a living and political involvement. It is hard to contest this dichotomy because there is certain commonsense in barring teachers from active political involvement. The problematics in the Israeli situation then becomes more obvious - it has to do with coercing part of the potential elite of the minority to an employment course that seemingly legitimately neutralizes them from political activity towards social change. In addition we should remember that the option of Arab teachers to generate social change through their profession was much curtailed, as they have no meaningful control over the curriculum.

Political activity within a state educational institution was forbidden on the strength of section 19 of the State Education Law 1953; and restricted in private educational institutions too, this on the strength of section 8 of the Education Ordinance (new version) 1978, sections 16, 18 and 32 of the Supervision of Schools Law 1969 and the State Education (Recognized Institutions) Regulations

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163 For a detailed analysis see Al-Haj 1995, supra note 7, at 61-68, 203-13; Lustick, Arabs in the Jewish State, supra note 1, ch.5; Cohen 2006, supra note 66, ch.5.

164 See the discussion above next to supra notes 125-126, 155.
Teachers in public educational institutions were also barred from certain kinds of political activity outside the school, and this prohibition was imposed in the disciplinary regulations of the civil service and the local authorities. A main norm in this context was the Civil Service (Restriction on Party Activity and Fund Raising) Law 1959, which notwithstanding its title restricted involvement in political activity in the wider sense, such as any demonstrations or marches with "a political character" (see especially sections 1, 4 and 5 of this Law). The Civil Service (Discipline) Law 1963 and Local Authorities (Discipline) Law 1978 formulated a vague "framework offence" of "Improper behavior" or an action that "transgressed against the civil service disciplinary code", and authorized a set of steps that may lead to dismissal and loss of severance rights. An important ruling at this time is Katz-Shmoueli in which the court confirmed laying off a teacher due to Communist activity, though it was not "carried out among pupils".

As mentioned, in the case of Arab teachers even those who were not part of the state system were subordinated to strict restrictions regarding political activity outside the school. These restrictions were partly self-imposed out of caution and due to the mechanism of "state (partial) funding for state supervision", and partly due to the Minister of Education's authority with regard to approving appointment of teachers, even in independent schools, on the strength of the Mandatory Education Ordinance (and now the Education Ordinance [new version] 1978) and article 16 of the Inspection of Schools Law 1969. Legally the Minister's right to intervene was relatively limited, but in practice its control over

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165 Teachers in teacher seminaries were subject basically to the same restrictions as appeared in section 19 of State Education Law. They appeared in State Education Order (Teachers and Kindergarten Teachers Seminaries) 1958.

166 See section 17 of Public Service Law (Discipline). In the same context see Special Declaration of the government published in the official gazette in 1972 (1882, at page 678) especially section 4(2), stipulating that a teacher "who advocated disloyalty to the state of Israel or behaved in a way to suggest such disloyalty on his own part, whether in or outside his work" will be brought before a disciplinary tribunal.


168 See Saban 2004, supra note 6, at 938-42, 950-54.
the education employees was not significantly different from its control in the state system.\textsuperscript{169}

Arab teachers would not have been quite so vulnerable had they enjoyed backing of a strong labor union. Teachers' unions had a voice by dint of collective agreements and sent representatives to parity committees (joint meetings of government and unions' representatives) that discussed dismissal of teachers. But in fact these committees provided Arab educators with no real protection. A case in point is the joint committee of the Ministry of Education and the Teachers Union that in 1957 discussed the dismissal of three leaders in the Teachers Union accused of political sympathy with the \textit{Nasserite} nationalist line. Not one Arab representative was on that committee, and no protection was handed.\textsuperscript{170}

But political activity was curtailed not only in the case of employed teachers. Applications for a teaching position could be turned down on the basis of the politics of the applicant prior to submitting it. In an official report Israel submitted to the UN Committee for Eradication of Racial Discrimination it admitted to having applied a general security screening system as a matter of course in the case of every Arab candidate for teaching until 1994.\textsuperscript{171} The collective nature of the \textit{modus operandi} here reflected the general attitude towards the Arab-Palestinian minority as a "suspect group". This was indeed the attitude during military rule, and in certain areas it persisted long after military rule was abolished in 1966.

\textbf{E3. Involvement of the Law in Mechanisms to Render Ineffective Activity Taken to Promote Change}

When an action is undertaken that runs counter to the purposes of the control structure, the state can still neutralize or weaken it. The courses opened were

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\textsuperscript{169}Id. at 939, 952-54; Kretzmer, \textit{supra} note 31, at 152-54.
\textsuperscript{170}Al-Haj 1995, \textit{supra} note 7, at 164-65.
\end{flushright}
mainly insulating the minority from the majority community (physically or emotionally), internally dividing the minority, blocking mobilization resources (money, communication and other means of organization and networking), and coopting an elite to substitute the one that opposes the system. Most of these courses have been discussed above. There remains the involvement of the law in dividing the minority, which I would like to discuss in some concluding remarks.

E3a. The Law and the Internal Division of the Minority

The mechanisms of dividing the minority rested mainly on social reality rather than legal endeavors: i.e., upon the deep heterogeneity of the Arab-Palestinian minority itself - geographical, tribal, familial, religious and upon differences such as between the traditional and the modern, the urban and the rural.\textsuperscript{172} Public policy was, then, a 'rider' of existing segmentation; however, it sought to perpetuate it and, when possible, to deepen it. So, for example, the long period of the military rule strengthened localism and hindered nation-wide ties.\textsuperscript{173} Moreover, the law can be shown to have taken part in at least two other axes of internal division - the religious-communal between Muslims, Christians and Druze, and the demarcations of extended families (\textit{hamula}). I will begin with the latter.

The survival of familial affiliation in the Arab society, despite partial urbanization and modernization is attributed with great justice to the sharp dependence of the minority on the majority in Israel and the deprivation of the minority members. a. The extended family was perceived as deeply needed in face of state policy of exclusion;\textsuperscript{174} b. the shortage in white-collar positions created tough competition for the few posts offered by local authorities; c. The local leading extended families, for their part, wished to improve their own

\textsuperscript{172}Al-haj, \textit{id.} at 15-18.

\textsuperscript{173}Id. 25-27; Bauml, \textit{supra} note 32, at 72.

\textsuperscript{174}Rosenhek, \textit{supra} note 160, at 38.
chances of enjoying the scarce public assets and so they were engaged in an effort to perpetuate the familial basis of local Arab politics.175

By applying obligations of administrative law that bind every administrative authority (governmental or local), here and there the courts reduced familial allocations in the municipalities, and somewhat deterred local officials from treating their authorities as their private domain. However, in the absence of comprehensive efforts to erode the staunch social-economic-cultural basis of hamula politics – including the deep dependency and the strong sense of vulnerability of the minority members vis-à-vis the wider society, the courts were fighting an uphill battle.176

In the communal religious division the part played by the law is difficult to pin down. It can be said to be connected to two main areas - the general influence of the law on cultural change in Israel (modernization and secularization), and law's part in the responsibility for the absence of meaningful self-administration for the minority. Since the establishment of Israel, the Arab-Palestinian minority has no public sphere wide and free enough to encourage communal moves leading to "community building".177

But there were legal norms that affected the religious divide directly, such as the Religious Communities (Organization) Ordinance 1926 (that the Mandatory government did not apply) that made it possible to recognize the Druze as a separate religious community. This took the form of the Religious Communities Regulations (Organization) (the Druze Community) 1957 and the Druze Religious Courts law 1962.

175 Lustick, Arabs in the Jewish State, supra note 1, at 202-9 and in a wider context Al-Haj 1995, supra note 7, at 162-64, 188-90.
177 I owe this insight to my friend Hassan Jabareen, compare also with Bishara, supra note 142.
Moreover the state recognized the Druze as a separate national group registered differently in the ID card and in the population census.\textsuperscript{178}

Executive discretion, based on the law and the courts interpretation, is at the basis of another dividing procedure - enforcing conscription on Druze men while not on Muslims or Christians Arabs and allowing Bedouins to volunteer for service on a personal basis.\textsuperscript{179} As explained above, complex cause-and-effect relations are involved. On the one hand, the willingness to engage in military service among Druze men stemmed, probably, from a special collective identity (Druze-Arab, as distinct from the Arab-Palestinian identity). On the other hand, military service has helped greatly in sustaining and structuring this idiosyncratic identity.\textsuperscript{180} Moreover, economics – employment needs – were at play here.\textsuperscript{181} Military service became a favorable, and at times necessary, prerequisite for many employment opportunities: police, prison guards, security personnel in airports/sea-ports, and of course for a professional soldier/officer career. These positions became a major part of the Druze citizens' employment horizon, and this state of affairs locked them in a strong dependency upon the state, and this for jobs that are the most disruptive to their relations with other fellow Arabs.

The army service and the differentiating policy regulating conscription thus served the stabilizing mechanisms of the Control system in several ways. (a) The army service provided economic incentives on a prolonged basis to an economically weak group, the Druze citizens, and 'in return' they were co-opted as a group.\textsuperscript{182} (b) Serving or not serving in the Israeli army was a major group identity factor and a major disruptive element for inner relations among Arab citizens. (c) The differentiating conscription policy aided in legitimizing


\textsuperscript{179}See the discussion above, next to supra notes 114-118.

\textsuperscript{180}See the sources referred to in supra note 116.

\textsuperscript{181}See Lustick, Arabs in the Jewish State, supra note 1, at 93-94, 209-11; Firro, supra note 116, at ch.4 & 45-47.

\textsuperscript{182}Lustick, id.
discrimination, since the state could claim that distinctions based on army service are non-ethnic in nature as they cover both Jews and non-Jews.

Expansive executive authority and the absence of the norm of impartiality also enabled the State to sharpen another internal divide, by favoring the Christian over the Muslim citizens. A salient but by no means solitary example\textsuperscript{183} is how church property fared in comparison to the *waqfs* – the latter declared after the 1948 war to be absentee property.\textsuperscript{184}

The last divide I will mention relates to both the religious communal and the familial rift but transcends both – this is the political division. It is a clear example of the cooptation mechanism. The hegemonic party of the time, *Mapai*, exerted great effort in creating puppet factions. These were its satellite parties that functioned until the 1970s. Dependence of minority members upon the powers that be and the freedom of allocation with which both law and the judiciary furnished the executive paved the way to electoral success of these parties. The government simply paid in material gain for political support.\textsuperscript{185}

This is tellingly reflected in the thinking of one of the most influential officials in the context of the welfare of the minority at the time - Israel Koening, the northern district commissioner on behalf of the Ministry of Interior. The following is an excerpt from a memorandum he wrote when the control system was beginning to show difficulties in the mid 1970s. The memo was leaked and was dubbed the Koening Document. There he propounds the following analysis and political parry:

\textit{Rakah's [the Communist party] takeover of 'quasi-governmental' institutions such as local authorities creates a legal infrastructure for

\textsuperscript{183}See for example the different reaction to the return of small number of refugees: Christian as opposed to Muslim "infiltrators" - Morris 1987, \textit{supra} note 12, at 143-44, 193.

\textsuperscript{184}See Abou Ramadan, \textit{Supra} note 46.

\textsuperscript{185}Lustick, Arabs in the Jewish State, \textit{supra} note 1, at 136-38, 202-9; Shafir & Peled, \textit{supra} note 7, at 136-38, 202-9.
nationalistic political activity both open and clandestine, by adopting methods used by the Jewish pre-state settlers and Communist methods common around the world... In order to counteract the 'seniority' Rakah is enjoying in shouldering the national struggle and representing the Arabs of Israel, and to channel the feelings of the hesitant 'by-standers' there should be a sister party to the labor party [Mapai] with a platform emphasizing ideas of equality, humanism, culture and language, social struggle and raising the banner of peace in the region. The authorities should prepare to maintain secret presence and control over this party.\textsuperscript{186}

\section*{F. Conclusion}

Four lines of thought served as a basis for my attempt to understand in what way Israeli law was involved in the daily lives of the Arab-Palestinian minority in the first thirty years of statehood. The first assumption (a) was that if we understand the socio-political relational pattern of the time, the control structure, we might expect certain legal arrangements to serve it and others to obstruct it. Secondly (b) these expectations unfold a map in which the norms that most affected the status of the minority can be traced. Third (c) I assumed that analysis of the law in view of those expectations would reveal many cases in which reality confirmed the assumptions but that I may find incongruous cases too. Four, (d) various insights can help interpret the latter instances. The main finding of the analysis presented here is that Israeli law served the control structure well. In other words, the high rate of compatibility between expectations and reality on the legal plane is manifest.

The law was found to be massively involved in shaping the disparity in power between the two national communities that comprised Israeli society and in

\textsuperscript{186}Israel Kenning, "On Handling the Arabs in the Galilee", paragraphs A3 and A4(d). The document leaked after a while and was published in the \textit{Al ha-Mishmar Daily} on 7th September 1976.
manipulating power to further the purposes of the stronger. It helped shape a Law of Return for the Jews and confirm none for the Palestinians refugees. It was instrumental in Jewish state building after the holocaust and enhancing security for the Jews in a hostile environment. It was party to the exercise of a massive expropriation of the land of the minority, in selective allocation of material public goods and finally it helped maintain the minority in its weakness and docility while (and by) preserving a minimal democratic threshold. We saw too how instrumental law was in removing the edge of potential violent disruption inherent in the control order. Its assistance to do this came about by its function within the stabilizing mechanisms of the control structure. At the core of these mechanisms we found the deep dependence of the minority upon the state and the comprehensive flexibility of the state in exploiting this dependency to deter, cooptate and divide the minority. However, there is another factor in the equilibrium: the state policies and practices should not be too repressive, as blatant exploitation of the minority would deepen the legitimacy crisis always hovering over the control structure and threatens to destabilize it. There is hence a vital need for agents that can curb arbitrariness and the magnitude of exploitation and thus moderate the legitimacy crisis among the minority. Law played this arbitrariness check role to certain, but important, extent. Following, by way of conclusion, is a summary of how all these were achieved legally.

We must, first, bear in mind that legal norms regarding the minority or relevant to it, taken each at a time, looked more innocent than they actually were, because most often they were not explicitly directed at the minority. Discrimination appeared not on the norms' face but through their implementation. The exception was the plane of group-differentiated rights in which even liberalism is not a priori committed to equality between a minority and a majority.

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

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

Fourth, the law and especially the Supreme Court kept an 'appropriate' balance: it handed down a few surprisingly courageous decisions, but at the same time they guaranteed that the government will eventually win the day whenever it insisted.

Lastly, with regard to the mechanism of disguise - the control structure also benefited from the absence of a legal norm obliging transparency in the exercise of authority. Only toward the end of the period under review the right to information was (narrowly) recognized. Inaccessibility of the minority to
information was aggravated by the absence of group-differentiated rights oriented towards involving members of the minority in decision making, even in the lower echelons of the public service.

The conclusion that Israeli law served the control structure well in the period under review is not such a major revelation. If law, which is basically a powerful social engine, would have operated differently, the control system would have probably ended earlier. Still, I find the idea of looking closely at the inter-relationship between the control system and the legal system to be fruitful. This is because it provided a theoretical prism, an analytical key, which helped us trace the more relevant legal interventions and to understand their socio-political impact. We knew where to look, because we understood what kind of legal interventions serve, or in contrast disrupt, the framework of the inter-communal relations. Moreover, but beyond the scope of this article, this analytical key can seriously help explain dynamics in the inter-communal pattern and trace law's involvement in it. Had we looked further than the mid-1970s we would have noticed sociopolitical changes in Arab-Jewish relations in Israel proper attended by developments in Israeli law and in Court jurisprudence. I refer to the shift from the control structure to a more moderate relationship toward the Arab-Palestinian minority, which for good reason coincided with important transitions in Israeli law and jurisprudence. These transitions were of the kind that the control structure could not accommodate and so they accelerated its demise.187

I have two last concluding remarks. First, the fact that the inter-communal relationship in Israel went through a moderation process is not in any sense assuring that moderation be sustained. Such moderation, and even mere maintenance, depends on a multitude of factors, both internal and external (especially the rise and fall in the tides of the Israeli-Palestinian conflict), the

unfolding of which only time will divulge. Recently indeed, political initiatives in regard to the national rift are rather worrying.\textsuperscript{188}

Second and closely connected, over the recent years the inter-communal relationship in Israel unfolds in the shadow of three important factors that have to be taken into consideration. One is that Israel is still liable to episodes of grave emergency. The second is the harsh, long and harmful occupation of the West Bank, accompanied by a colonization project (the settlements), which keeps contributing to the vicious circle of violence, terror, self-righteousness and sense of emergency. Thirdly, within Israel proper the state is still engaged in an effort to takeover land in 'frontier' region - in the 'old' periphery of the Bedouins in the Negev; and the same goes to a 'new' 'frontier' area, East Jerusalem. In our context this state of affairs means that Israel feels in need to preserve and occasionally apply these exceptional and fateful legal measures that may be claimed to fit states of emergency. The Italian philosopher Giorgio Agamben called them "State of Exception" mechanisms – i.e., measures the core of which is the suspension of law and of the rule of law as we know them.\textsuperscript{189} The important point regarding the first thirty years of Israel's statehood (as opposed to the present), is that these early years were (metaphorically speaking) a jurisprudentially pre-historic era, in which the rule of law as we know it today \textit{was yet to be established}. So, to expand Agamben's concept and cut it to measure - the period analyzed in this article was less a case of suspension of the rule of law and more a partial void in which substantive rule of law was yet to appear.


\textsuperscript{189}GIORGIO AGAMBEN, \textit{STATE OF EXCEPTION} (2005).