

Yvonne Schmidt

Foundations of civil and political rights in Israel and the occupied territories

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**FOUNDATIONS
OF CIVIL AND POLITICAL RIGHTS
IN ISRAEL AND THE OCCUPIED TERRITORIES**

DISSERTATION

zur Erlangung des akademischen Grades

Dr.iur. (Doctor iuris)

der Rechtswissenschaftlichen Fakultät der Universität Wien

vorgelegt von

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ABBREVIATIONS

AAD	Appeal of Administrative Detention
ACRI	Association for Civil Rights in Israel
Add.	Addendum
AHC	Arab Higher Committee
A.J.C.L.	American Journal of Comparative Law
ALA	Arab Liberation Army; 5000 volunteers from Iraq, Syria and Lebanon reached by March 1948 Palestine and were organized as the ALA under Fawzi al Qawuqji.
A.L.R.	Annotated Law Reports; published in Palestine 1943-1947
BLccc/No.	Military Court of Bethlehem
B'Tselem	The Israeli Information Center for Human Rights in the Occupied Territories
C.A.	Civil Appeal
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
C.O.J.	Collection of Judgements
C.P.O.A.	Collection of Proclamations, Orders and Appointments; it constitutes the body of legislation made by the Israeli military commander
Cr.A.	Criminal Appeal
DIP	Department for the Investigation of Police
D.M.I.	Dinei Medinat Israel (Nusach Hadash); revised, updated and binding Hebrew text of pre-State legislation promulgated by the Knesset in a New Version; published in two volumes. See L.S.I. (N.V.)
D.K.	Divrei Ha Knesset; are the Protocols of Knesset Proceedings and Knesset Speeches
D.P.	Deputy President
D.R.	Divorce Reports of the Rabbinical Courts
GA	General Assembly
GH/No.	Military Court of the Golan Heights
GSS	General Security Service; Hebrew terms are Shin Bet or Shabag; Israeli Secret Service operating inside the State of Israel and the Occupied Territories
Harv.L.Rev.	Harvard Law Review
H.C.	High Court
H.H.	Hatza'ot Hok; Section of Reshumot containing the

III

	Legislative Bills (including the Explanatory Notes) presented to the Knesset
HTA	Hostile Terrorist Activities
IAF	Israel Air Force
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDF	Israel Defense Force
ILA	Israel Lands Administration
I.L.M.	International Legal Materials
I.R. (Iton Rishmi)	Official Gazette during the term of the Provisional Council of State
Isr.L.Rev.	Israel Law Review; published by the Hebrew University
I.Y.H.R.	Israel Yearbook on Human Rights
IZL (Etzel)	Irgun Zva'i Leumi (National Military Organization)
J.	Justice
JA	Jewish Agency;
JNF	Jewish National Fund; see KKL
K.A.	Kitvei Amana; Israeli Treaty Documents
KKL	Keren Kayemet Le'Israel
K.T.	Kovetz HaTakanot; Section of Reshumot containing the Subsidiary Legislation (i.e. Regulations) issued by Ministries of the Israeli Government -
LHI (Lehi)	Lohamei Herut Yisrael (Freedom Fighters of Israel)
L.P.	Laws of Palestine
L.S.I.	Laws of the State of Israel; authorized English translation of Israeli legislation (S.H.); published by the Ministry of Justice
L.S.I. (N.V.)	Laws of the State of Israel (New Version); authorized English translation of the revised text of pre-state legislation
L. & Soc'y Rev.	Law & Society Review
MK	Member of the Knesset
Misc. App.	Miscellaneous Application
O.G.	Official Gazette; see the explanations given to I.R. (Iton Rishmi)
P.	President
para.	Paragraph
P.D.	Piskei Din (Judgements); official publication of the

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	judgements of the Israeli Supreme Court since 1948
P.E.	Pesakim Elyon; is an unofficial publication of judgements of the Supreme Court and of the District Courts ("Pesakim Mehoziim").
PFLP	Popular Front for the Liberation of Palestine
P.G.	Palestine Gazette; the Official Gazette of the British Mandatory Government in Palestine
PICA	Palestine Jewish Colonisation Association
PLO	Palestinian Liberation Organization
PLP	Progressive List for Peace
P.L.R.	Palestine Law Reports; published in Palestine 1920-1947
P.M.	Pesakim Mehoziim; Law Reports of the District Courts since 1949
R/No.	Military Court of Ramallah
SAO	State Attorney's Office
SC	Security Council
S.C.D.C.	Selected Cases of the District Court
S.C.J.	Supreme Court Judgements
S.H.	Sefer Ha Hukim; is a Section of Reshumot containing the Principal Legislation promulgated by the Knesset
Sh/No.	Military Court of Shechem (Nablus)
S.J.	Selected Judgements of the Supreme Court of Israel; official English translation of the judgments of the Supreme Court
S.J.M.C.	Selected Judgements of Military Courts
SLA	South Lebanese Army; Lebanese armed militia allied to Israel
SMC	Supreme Muslim Council
S.T.	Special Tribunal
T.A.Univ.Stud.i.L.	Tel Aviv University Studies in Law
UN	United Nations
UNCC	United Nations Compensation Commission
UNCCP	United Nations Conciliation Commission for Palestine
UNCP	United Nations Commission on Palestine
UNDRP	United Nations Disaster Relief Project
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon
UNRPR	United Nations Relief for Palestine Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Middle East
UNSCOP	United Nations Special Committee on Palestine
WZO	World Zionist Organization

Y.P. Yalkut Ha Pirsumim; is a Section of Reshumot containing the Government Notices

GLOSSARY

Aliyah	Literally "Ascent"; aliyah means the return of an individual or an organized group to the Land of Israel; considered as a major Zionist virtue.
Amal	Shi'a militia fighting against Israel's occupation in South Lebanon.
Ashkenazim	Jews of north European and western origins; usually contrasted with "Oriental" Jews, or Sephardim.
dunam	1 dunam = 1/4 of an acre. 1000 dunams is 1 sq.km.
Eretz Israel	Literally "the land of Israel".
Etzel	See IZL
Gahal	"The Herut-Liberal Bloc"; a political alliance formed between the two parties before the elections to the Knesset in 1965.
Haganah	Literally "Defense", the Haganah was a defense organization founded in 1920; after the establishment of the state of Israel the Haganah became the Tzahal, the Israel Defense Force (IDF).
Halakha	Jewish religious law
Harem esh Sherif (Noble Sanctuary)	Arab term for the Temple Mount and the site of the Al-Aksa Mosque, and the Dome of the Rock.
HaPraklit	Law Journal published by the Israel Bar Association.
Herut	"Freedom"; a right-wing political party established in 1948 by Menachem Begin; key party in Gahal and Likud.
Hizbullah	Armed Lebanese Shia militia fighting against Israel's occupation in South Lebanon.
Intifada	Arab term for the Palestinian uprising in the West Bank and Gaza, which started in December 1987.
Iyunei Mishpat	Tel Aviv University Law Review
IZL	Jewish underground military organization which is also known as the Irgun or Etzel; Menachem Begin, Prime Minister of the State of Israel from 1977-1983, had commanded IZL.
Jewish Agency	The Mandate for Palestine given to Britain in 1920 provided for the establishment of a Jewish Agency that would represent the Jewish people before the mandatory

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	government; Article 4 of the Mandate for Palestine (adopted in 1922) gave the World Zionist Organization the status of a Jewish Agency; was the main political body of the "Yishuv".
Jewish National Fund	see Keren Kayemet Le'Israel
Kach	Literally "Thus! or This is the Way!" Rabbi Meir Kahane's racist and anti-Arab political movement which called for the use of violence against Arabs; is the Israeli successor of the American Jewish Defense League (JDL) which is classed by the FBI as terrorist organization; was outlawed as terrorist organization by Israel's government only in February 1994.
Keren Hayesod	Literally "Basic Fund". Main financial institution of the World Zionist Organization and later of the Jewish Agency; was founded in 1920.
Keren Kayemet Le'Israel	A fund, based on contributions, was established in 1901 by the World Zionist Organization (WZO).
Knesset	Israeli Parliament.
LHI (Lehi)	Jewish underground military organization; is also known as Lehi or Stern Gang; Yitzhak Shamir, Prime Minister of the State of Israel from 1983 to 1984 and from 1986 to 1992, was one of the leading figures of this organization.
Likud (Unity)	Right-wing political bloc; formed in 1973 of Gahal and smaller groups; dominated by Herut; in control of the Israeli government from 1977 to 1992 and 1996 to 1999.
Mapai	"Mifleget Poalei Eretz Yisrael"; a Zionist socialist party established in 1930 and led by David Ben-Gurion; it dominated Israeli politics for over forty years; changed its name to "the Labor Party" after its unification with Achdut Haavodah and Rafi.
Minhelet Ha'Am	Literally "People's Administration"; has been constituted under the Declaration of the Establishment of the State of Israel; functioned as the government in the period after the state of Israel has been declared.
Mishpatim	Student Law Review of the Hebrew University of Jerusalem.
Mishpat Umimshal	Law and Government Review in Israel, published by the University of Haifa, Faculty of Law.
Mizrahi	See National Religious Party.
Mo'etzet Ha'Am	Literally "People's Council"; has been constituted under the Declaration of the Establishment of the State of Israel; functioned as a legislature in the period after the

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	state of Israel has been declared.
Moledet	Radical right political party; established in 1987 by General (res.) Rehavam Ze'evi (nickname Gandhi); main proponent of the idea of a "transfer" (i.e. the eviction) of all native Palestinian Arab inhabitants from the Occupied Territories.
Mossad	Israeli Secret Service responsible for espionage, intelligence gathering and political undercover operations in foreign countries.
National Religious Party	(NRP); Israel's most influential Zionist religious party and a coalition partner in almost all the nation's governments; known earlier as Mizrahi.
Ploni (m)	Literally "Unnamed".
Reshumot	Official Gazette since the inception of the Knesset; it contains the following Sections: Yalkut Ha Pirsumim (Government Notices) Sefer Ha Hukim (Principal Legislation) Kovetz Ha Takkanot (Subsidiary Legislation) Hatza'ot Hok (Bills).
Sephardim	Jews whose ancestors lived in Spain and Portugal; this term is usually applied to the Jewish Oriental population in Israel, in contradistinction to the Ashkenazim.
Shas	An ultraorthodox party of Sephardi Jews established in 1984 by former Chief Rabbi, Ovadia Yosef; very influential and active in national politics.
Shin Bet/Shabag	General Security Service (GSS); the Israeli Secret Service responsible for undercover operations inside the state of Israel and the Occupied Territories.
Supreme Muslim Council	The institutional power base from which the Grand Mufti of Jerusalem, Hajj Amin al Husayni, won the supreme leadership of the Palestine Arab community; it managed the wakf (the Muslim trusts responsible for holy sites and properties) and the Islamic courts (Shari'a Courts).
Takdin Elyon	Official computerized publication of the judgements of the Israeli Supreme Court.
Tehiya	Literally "Renaissance". A radical right political party that was established in 1979; it tries to bring together secular and religious Jews; most known leaders are: Professor Yuval Ne'eman and Geula Cohen.
Torah	The Pentateuch; broadly the Jewish religious law.
Tzahal	Literally "Tzva Haganah Le'Israel", the Israel Defense Force (IDF); it was set up by order of the provisional

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	government a few days after the establishment of the state of Israel in Palestine.
World Zionist Organization	Main instrument in order to carry out the objectives of Zionism as defined in the Basle Program, 1897.
Yishuv	Literally, "settling", "inhabited area"; organized Jewish community of Palestine before the establishment of the state of Israel (1882-1948).

PREFACE

This work intends to show how civil and political rights in Israel and the Occupied Territories are regulated, which normative standards and spiritual sources nourish them, and how written and unwritten principles are applied and interpreted by the Supreme Court of Israel in pursuance of its self-imposed duty to safeguard the individual's rights and freedoms.

The background and starting point for my examination will be Israel's domestic laws and constitutional framework, Israel's Supreme Court jurisprudence as well as international human rights and humanitarian law.

In a comprehensive Introduction I will first of all outline the most important normative and jurisprudential concepts, aspects and problems which exist within Israel's legal system concerning civil and political rights and freedoms, and which will be discussed in the course of this work. In this Introduction I will also give a short overview of the historical and sociopolitical background of Israel's legal system, constitutional framework and approach towards judicial review in order to prepare the reader for these and other important related issues that will be analyzed in the course of this work.

In Chapter A, I will discuss the most important historical aspects and facts regarding the right to self-determination of the Jewish and the Palestinian Arab people, including the events that lead to the establishment of the state of Israel in Palestine in May 1948. I will analyze in short the history, the basic ideology and the sources of the concept of political Zionism emerging at the end of the 19th century, forming the background for the idea of self-determination of the Jewish people and the decision to establish a "national home" for the Jewish people in Palestine and culminating in the establishment of the state of Israel in 1948. Such an analysis of the concept of political Zionism is necessary since it is this political concept that lays at the very foundations of Israel's legal system and jurisprudence regarding civil and political rights.

In Chapter B then I will deal at great length with the above mentioned conceptional issues regarding Israel's constitutional framework and approach towards judicial review - as far as these issues are relevant for the discussion of civil and political rights. I will cover the period since the establishment of the state of Israel in 1948 up until the recent developments that took place with the enactment of two basic laws on human rights and freedoms in 1992, including some subsequent jurisprudence relating to these laws.

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In the next Chapter C, I shall give an overview over the concept of the state of Israel as a "Jewish state" and its impact on the normative sources and jurisprudential concepts regarding the right to equality, the right to property, the right to citizenship, the right to form associations, and the right to vote and to be voted.

In Chapter D then I will analyze one of the most significant aspects regarding civil and political rights and freedoms in Israel, namely the existence of a permanent state of emergency which is in force since Israel's inception in 1948 and whose compatibility with the idea of a liberal democracy based on human rights and freedoms is highly questionable.

The purpose of Chapter E is to describe in short the legal, judicial and administrative system that emerged in the territories occupied by Israel in the course of the war in June 1967 as well as the legal changes that took place in the context of the signment of the Oslo Agreements.

The whole Chapter F is devoted to the right to freedom of expression, speech and the press, since a vast number of important and still relevant Supreme Court jurisprudence has been developed in the context of this right.

Chapter G deals exclusively with the normative standards and jurisprudential concepts of the right to property - especially the rights to land - since it is mainly the violation of this fundamental right by the Israeli government towards the Palestinian Arab people that lays at the very foundation of the conflict between the Palestinian/Arab and the Israeli/Jewish people.

This work ends with a summary and final conclusions.

INTRODUCTION

(1) The purpose of this work is to provide an insight into the basic jurisprudential concepts, normative sources, institutions and processes upon which civil and political rights in Israel and the Occupied Territories are founded.

1. Nature and Sources of Israel's Legal System

(2) In order to understand the very complex and highly problematic situation concerning the subject under review it is appropriate to make a short analysis of the historical and sociopolitical background of the state of Israel, the nature and the sources of the legal system as well as Israel's constitutional policy towards civil and political rights and freedoms.

(a) The legal system of a state always displays cultural and religious traditions, economic, social and political credos, tendencies to abstract or concrete thinking as well as the community's approach and commitment towards concepts like individual human rights and freedoms, social welfare, the rule of law, separation of powers, administrative legality and the democratic nature of the whole regime.

(b) The legal system of Israel reflects also unresolved communal conflicts and ambiguities of the state, difficulties connected with the process of nation-building,¹ dilemmas concerning the ethnic and cultural identity of the population, uncertainties in regard to the protection of minorities, ideological contradictions resulting from the relationship between religion and state and from issues like national security and individual physical survival.

1.1. Ottoman Law - British Colonial and Common Law - Israeli Law

(3) Due to the fact that so many different historical, cultural and systemic factors and influences contributed to the development of Israel's legal system, it is not easy to say to which family or tradition this legal order belongs and which jurisprudential philosophy really has been laid down.

¹ The process of nation-building has not yet ended in Israel due to the facts of a lack of geographical borders, the absence of a clear national consensus about the nature of the state and the constitution. These facts have far-reaching consequences for the protection of human rights and freedoms.

(a) From 1517 until 1917 Palestine was ruled by the Turks as part of the Ottoman Empire. In 1917 British troops conquered the territory and in 1922 the League of Nations granted to Great Britain the Mandate over Palestine.²

(b) After initial links to the Ottoman law, there are long-lasting, deep roots to British common law. During the Mandate in Palestine the law was "Anglicized" through legislation enacted in Palestine.³

(c) Following the establishment of the state of Israel in Palestine on 14 May 1948 - an event which lives on in the Palestinian memory as al-Nakba (the Catastrophe) - a large number of British mandatory legislation was absorbed⁴ into Israel's legal system. This had - and still has - far-reaching, restrictive implications for the areas of administrative law and the field of human rights and freedoms.

The British mandatory legislation includes security legislation - such as the Defence (Emergency) Regulations, 1945⁵ - which empowers military commanders as well as the entirely executive branch of the government to impose severe restrictions on fundamental rights and freedoms.

As I will show in the course of this work, many areas, such as personal freedom, freedom of speech and the right of association and assembly are - despite the enactment of two basic laws on human rights in 1992 - still regulated mainly by British colonial legislation that was never revoked after the establishment of the state of Israel.

² Mandate for Palestine, 24 July 1922, entered in force on 29 September 1922, British White Paper, Cmd. 1785, published in *The Middle East and North Africa 1980/1981* (28th Edition, Europa Publications Limited 1981) at 66, 67; Daniel Friedmann, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 *Isr.L.Rev.* (1975) 192, at 193, 194, 196

³ Daniel Friedmann, *Infusion of the Common law into the Legal System of Israel*, 10 *Isr.L.Rev.* (1975) 324. The process of Anglicization took place by means of statutes based on English legislation or original codifications of the common law. Another important way to implement Common law was by virtue of Article 46 of the Palestine Order-in-Council, 1922, *Official Gazette of the Government of Palestine*, 1 September 1922. Article 46 provided for the adoption of the substance of the common law and the doctrines of equity in force in England insofar as there were lacunae in the local law, and as the circumstances of Palestine permit. Due to the fact that many leading judges in Palestine were British (the Chief Justice of the Supreme Court was always a British jurist), the courts gave broad interpretation to Article 46 of the Palestine Order-in-Council, leading to a clear distance from the relevant Ottoman legislation. See Yoram Shachar, *History and Sources of Israeli Law*, published in *Introduction to the Law of Israel* (edited by A. Shapira and c. De-Witt, 1995) 1, at 6; Allen Zysblat, *The System of Government*, published in *Public Law in Israel* (edited by I. Zamir and A. Zysblat, 1996) 1, at 2

⁴ By virtue of Section 11 of the Law and Administration Ordinance, 1948, 1 *L.S.I.* (1948) 7

⁵ Defence (Emergency) Regulations, 1945, P.G. No.1442 (27 September 1945) Suppl. II, at 1055

(d) Additionally, the Knesset (the Israeli parliament) enacted its own security legislation which is often by itself undemocratic and certainly constitutes severe restrictions upon the freedoms and rights of minorities and the individual.⁶

(e) Alongside this formal British and Israeli security legislation, in 1987 a Commission of Inquiry headed by former Supreme Court President Justice Moshe Landau (hereinafter: Landau Commission) was set up and officially granted to the General Security Service (GSS)⁷ "special security powers", i.e. the license "to use a moderate measure of physical pressure" in interrogations of suspects in order to obtain information "needed to protect the security of the state and its citizens."⁸

(4) Due to the fact that - since the establishment of the state of Israel in Palestine in 1948 - a permanent state of emergency is in force, the Israeli government is always formally entitled to apply the inherited British mandatory security legislation as well as the own, by the Israeli parliament enacted emergency regulations.

The most important aspects to be discussed in that context is the general definition of the term "state or public security", the scope of persons who benefit from this security and the manner in which a state applies this concept in order to justify the suspension of other values.

It must be stressed at this point that what constitutes for one group of persons "security" (i.e. the Jewish/Israeli population) often means for another group of persons (i.e. the Palestinian Arab population) severe transgressions of their rights and fundamental freedoms.

Numerous Supreme Court judgments discussed in the course of this work will show that such severe transgressions excused in the name of "state or public security reasons" mainly concern the Palestinian Arab people living in Israel and the Occupied Territories.

⁶ See for example: Emergency Regulations (Foreign Travel), 1948, 2 L.S.I. (1948) 179; Emergency Regulations (Security Zones), 1949, 3 L.S.I. (1949) 57; Emergency Land Requisition (Regulation) Law, 1949, 4 L.S.I. (1950/51) 3; Emergency Powers (Detention) (Amendment) Law, 1980, 34 L.S.I. (1980) 157

⁷ The Hebrew term for the General Security Service (GSS) is "Shin Bet", which is the secret service operating within the state of Israel and the Occupied Territories. The "Mossad" in contrast is the secret service responsible for espionage, intelligence gathering and political covert operations in foreign countries. See Menachem Hofnung, *Democracy, Law and National Security in Israel* (Dartmouth Publishing Company Limited, 1996) at 193

⁸ Landau Commission Report, Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Excerpts from the English translation published by the Government Press Office in October, 1987 of Part I of the Commission Report), 23 *Isr.L.Rev.* (1989) 146

1.2. American Law - Canadian Law - Continental European Law

(5) Returning now to the issue of sources of Israel's legal order concerning human rights and freedoms, it can be observed that despite strong roots to English common law, Israel's legal system as a whole has been moving towards American law and since several years even more and more towards continental European law.

(a) In many decisions concerning civil and political rights and liberties, one can find the big influence of American case law and American legal literature and despite the fact that American cases do not serve as a formal source of law in Israel, one may say that "liberation" from English case-law was achieved with American support. However, with regard to the transplantation of American legal sources concerning human rights and freedoms to the Israeli legal system it must be said that Israel sometimes forgets that the American legal order completely differs from that in Israel. First of all America has a constitution and a constitutional court, but Israel has not. Second America is a federal state while Israel is not.

(b) An interesting aspect concerning the above mentioned influence of continental European law is the fact that it is not French law - like during the Ottoman period - that mainly serves as normative and spiritual source but rather German law. In many decisions concerning human rights and freedoms several judges - especially the former Supreme Court President, Meir Shamgar, but also the current President of this Court, Aharon Barak, as well as the Justices Haim Cohn and Yoel Sussman - base their arguments on the German Constitution and on decisions of the German Constitutional Court.

(c) To mention among the influences upon Israel's legal system regarding human rights and freedoms is also the adoption of principles of the 1982 Canadian Charter of Rights and Freedoms as model for the interpretation of two new basic laws relating to fundamental freedoms, enacted in Israel in 1992.⁹

⁹ Basic Law: Human Dignity and Freedom, S.H. No. 1391 (25 March 1992) amended by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994); Basic Law: Freedom of Occupation, S.H. No. 1387 (12 December 1992) repealed by Basic Law: Freedom of Occupation S.H. No. 1454 (10 March 1994). The English version of these two basic laws appears in Public Law in Israel (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press, Oxford, 1996) at 154-157

1.3. Religious Law

(6) An important structural element of Israel's legal order is the fact that there is no system of separation between state and religion in the sense practiced in the USA, France and other western countries.

(a) Israel's legal system has been built upon the duality of secular and religious law - a concept that was inherited from the Ottoman Millet tradition, first by the British Mandatory government and then by the state of Israel.

This duality means that in matters of personal status - such as birth, marriage, divorce, custody of children, adoption, burial and inheritance - the law of the various religious-ethnic-national communities - Jewish, Moslem, Druze and Christian - is applied by the different religious courts. There is also no civil marriage in Israel, and people with different religions have great difficulties to get married or divorced within the state of Israel.¹⁰

(b) Among the different religious laws, Jewish law has an outstanding significant position in Israel's legal system since it serves as a source of inspiration and interpretation to the legislature and the courts. When the court is faced with a problem that has no answer in statutory or case law and cannot be solved by way of analogy, the courts must resolve that problem by reference to the principles of Jewish heritage.¹¹

Important to mention in that context is the fact that - since the establishment of the state of Israel and especially in the last 20 years - the influence of Jewish law and heritage upon Israel's legal order has gradually grown.

(c) The duality of secular and religious law contributes to severe tensions between the different Western ideas, aspects and traditions, such as liberalism, secularism, democracy and human rights, and the special status of religious law within the whole regime. It leads to a permanent legal, political and social conflict about fundamental principles and values of the state.

(d) The specific influence of Jewish law and heritage upon Israel's legal order as a whole has especially discriminatory effect for the non-Jewish population, i.e. mainly the Palestinian Arab people.

(7) The nature of Israel's legal order has been described as part of the Western legal culture - similar to the common law system and influenced by the Romano-German families - but with an independent and unique system due to the particular status of religious law. Supreme Court President Aharon Barak has

¹⁰ Ariel Rosen-Zvi, Family and Inheritance Law, published in Introduction to the Law of Israel (edited by Amos Shapira and Keren C. DeWitt-Arar, Kluwer Law International, 1995) 75-79

¹¹ Foundations of Law Act, 1980, 34 L.S.I. (1979/80) 181

characterized Israel's legal system as mixed jurisdiction similar to that of South Africa, Sri Lanka or Cyprus.¹²

1.4. The Occupied Territories

(8) As I indicated in the title of this work, this study will also include important laws and Supreme Court judgments concerning civil and political rights that relate directly or indirectly to the territories occupied by Israel in the course of the war in June 1967.¹³

(a) In order to place the jurisprudence of the Supreme Court cases related to the Occupied Territories in a legal framework I will therefore briefly delineate the legal regimes which emerged in the Occupied Territories since the June 1967 war. Important to mention at this point is the fact that in the context of the signment of the Declaration of Principles on Interim Self-Governing Arrangements of 13 September 1993,¹⁴ the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 25 September 1995¹⁵ and other documents several important legal changes took place in the Occupied Territories. A detailed discussion of these more recent developments lays, however, outside the scope of this work.

¹² Aharon Barak, *The Israeli Legal System is as Solid as a Rock*, 17 *Justice* (1998) 3, at 4. Barak, *The Tradition and Culture of the Israeli Legal System*, published in *European Legal Traditions and Israel, Essays on Legal History, Civil Law and Codification*, European Law, Israeli Law (edited by Professor Alfredo Mordechai Rabello, Hebrew University, 1994) 473, at 489-491

¹³ The term "Occupied Territories" refers to the Sinai Peninsula, the Gaza Strip, the Golan Heights, the West Bank of the Jordan River including the area of East Jerusalem. The term "Occupied Territories" is not the recognized legal usage, used by the Israeli government. The Israeli official terms for these territories are "Areas Administered by Israel" or "Administered Territories." The West Bank is officially called in Israel also "Judea and Samaria" corresponding to the biblical terms for this area. These Israeli official terms will be used in this work as appearing in quoted texts or in formal titles. This work will also use the terms "Occupied Territories," "Military Government," "Occupying Power," and "Occupant" as they are normally used in international law. For more details about the official Israeli position regarding the legal status of the Occupied Territories, see David Yahav (ed.), *Israel, The "Intifada" And The Rule Of Law* (Israel Ministry Of Defence Publications, Israel 1993) at 21-25

¹⁴ Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993 (The DOP), reprinted in Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (published by CIMEL and Kluwer Law International) 1997, Appendix 6 [also referred to as Oslo I Agreement]

¹⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 25 September 1995, reprinted in Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (published by CIMEL and Kluwer Law International) 1997, Appendix 7 [also referred to as Oslo II Agreement]

(b) Despite the fact that according to international law the legal status of the Occupied Territories¹⁶ is different from that in Israel within the Green Line, the laws and Supreme Court judgments regarding human rights and freedoms in these territories should - according to my opinion - not be considered as disconnected from Israel itself.

(c) The reason which supports this approach is that over the years the legal borders separating Israel proper from the Occupied Territories have gradually been blurred as a consequence of the policy carried out by the Israeli government.¹⁷

This policy - which at the time being has indeed achieved its goal¹⁸ - always was - and - in spite of the peace process started in October 1991 in Madrid - still is¹⁹ directed at creating "facts" on the ground and at changing the demographic realities in the region through the establishment of civilian settlements and the transfer of population from Israel into the Occupied Territories.

(d) The result of this process was a fundamental legal change in the Occupied Territories with the emergence of two different legal and judicial systems applied on two distinct ethnic and religious groups - the Jewish and Palestinian Arab people - which are actually living on the same territory. This state of affairs -

¹⁶ The West Bank and the Gaza Strip were since 1967 ruled under a regime of belligerent occupation. The Sinai Peninsula was also subjected to a regime of belligerent occupation - until Israel withdrew from this area in 1979 following the peace with Egypt. East Jerusalem and the Golan Heights were since 1967 de facto annexed by Israel. With the signment of the Oslo Agreements in 1993 and 1995, three categories of Areas - namely A, B, C - with different jurisdictions have been established in the West Bank and the Gaza Strip. Only Area A is under the full control of the Palestinian authority, but the Areas B and C are still subject to the law of belligerent occupation.

¹⁷ Amnon Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 T.A.Univ.Stud.i.L. (1988) 59

¹⁸ See David Kretzmer, *Domestic Politics, Law and the Peace Process: A View from Israel*, published in *The Arab-Israeli Accords: Legal Perspectives* (1996) 81, at 86

¹⁹ B'Tselem, *The Israeli Information Center for Human Rights in the Occupied Territories, A Policy of Discrimination, Land Expropriation, Planning and Building in East Jerusalem* (Jerusalem, January 1997); B'Tselem, *Israeli Settlement in the Occupied Territories as a Violation of Human Rights: Legal and Conceptual Aspects* (Jerusalem, March 1997); B'Tselem, *On the Way to Annexation, Human Rights Violations Resulting from the Establishment and Expansion of the Ma'aleh Adumim Settlement* (Jerusalem, July 1999); LAW, *House Demolition and the Control of Jerusalem. Case Study of al Issawiya Village*, Jerusalem, June 1995; LAW, *Fraud, Intimidation, Oppression: The Continued Theft of Palestinian Land. Case Study of Jeensafut Village: One Man's Struggle to Defend His Land*, Jerusalem, October 1995; LAW, *Bulldozed into Cantons: Israel's House Demolition Policy in the West Bank Since the Signing of the Oslo Agreements. September 1993 to February 1999. First Edition: Parastou Hassouri, February 1999 Revision: Richard Clark; LAW, Netanyahu's Legacy*, June 1999; LAW, *Land & Settlement Policy in Jerusalem* (First Printed June 1999, Reprinted January 2000)

which affected in the past every aspect of life - definitely constitutes an infringement of the internationally recognized right of equality before the law.

(e) According to my point of view any discussion about the foundations of civil and political rights in Israel's legal system may not disregard the very fact of occupation which took place more than 33 years ago and which was kept alive by nothing and nobody else than the political, judicial and administrative apparatus of the state of Israel itself.

1.5. Israel's Constitutional Framework

(9) Very important for the whole discussion about the foundations of civil and political rights is the fact that Israel lacks a formal written constitution with normative supremacy in relation to ordinary legislation.²⁰

(a) A promise to establish a bi-national state and to enact a democratic constitution was the first time expressed in the UN-General Assembly Resolution 181 (II) of 29 November 1947²¹ and also appears in the Declaration of the Establishment of the State of Israel of 14 May 1948.²²

(b) However, instead of the adoption of such a formal document, Israel has decided to take the way of gradual development through the enactment of specific topics in a series of basic laws which at the end of the process shall become a full written constitution. Such basic laws, covering the institutional aspects of Israel's constitutional system have indeed been enacted, but - with the exception of a few entrenched provisions - these laws do not have the force of a superior law which was to control ordinary legislation.²³

²⁰ Moshe Landau, I do not believe in Judicial Activism, 16 Justice (1998) 3, at 4; Haim Cohn, The Time Has Come to Write a Constitution, 16 Justice (1998) 10, at 11, 12; Meir Shamgar, The High Court of Justice is Important for all the People in the Country, 16 Justice (1998) 17, at 20; Yaffa Zilbershatz, Highlighting Constitutional Changes in the Israeli Legal System, 7 Justice (1995) 28. Regarding the question whether Israel has a rigid Constitution on the American model the present Supreme Court President Aharon Barak has a different view than the above cited writers. See C.A. 6821/93, 1908/94, 3363/94 *United Mizrahi Bank v. Migdal Cooperative Village*, for a summary and extracts in English from the judgment see 31 Isr.L.Rev. (1997) 764. For more details on Israel's obligations since the establishment of the state to enact a constitution, see infra Chapter B. (Israel's Initial Obligations to Enact a Constitution including a Bill of Human Rights and the Issue of Judicial Review)

²¹ United Nations General Assembly Resolution 181 (II) on the Future Government of Palestine, 29 November 1947 [Partition Resolution] UN document A/Res/181 (II) (A+B). The Jewish community of Palestine accepted the Partition Resolution. For more details on this issue see infra Chapter A. (Historical Perspectives regarding the Right to Self-Determination of the Jewish and Palestinian Arab People)

²² Declaration of the Establishment of the State of Israel, 14 May 1948, 1 L.S.I. (1948) 3

²³ Landau, supra note 20, at 4; Cohn, supra note 20, at 11; Zilbershatz, supra note 20

(c) Until the enactment of two - partly entrenched - basic laws on civil rights in 1992, there was also no bill of rights in Israel.²⁴

Prior to the enactment of these two basic laws on human rights, the task of protection of human rights and freedoms was mainly entrusted to the Supreme Court of Israel, sitting as a High Court of Justice. This fact involves the crucial question if the principle of separation of powers, as requested for democracies, really exists in Israel.

1.6. Israel's Approach towards Judicial Review

(10) The significance of Israel's constitutional framework was - with a few exceptional cases - the long time well-accepted and dominant principle that primary legislation of the Knesset is not subject to judicial review.

Only in limited way there existed judicial review of quasi-judicial and administrative decisions of the Knesset.

(a) With the enactment of the above mentioned new basic laws on human rights the Supreme Court is now given additional power to review the constitutionality of primary legislation.²⁵

(b) A further step towards recognition of judicial review of primary legislation repugnant to the two basic laws on human rights was made by a decision of the Supreme Court in 1995.²⁶

(c) However, despite the existence of the new basic laws on human rights and the subsequently developed jurisprudence, the main issue now still centers around the way of interpretation and application of these laws in reality.

(d) The crucial question to be answered in the future is, if the said new basic laws on human rights only exist of empty words or if they are applied by the courts in a way to really accomplish their aim - namely to protect human rights and freedoms in a substantive way.

(11) In contrast to the long time practiced reluctance of the Supreme Court to review primary legislation, the Supreme Court of Israel has - on the other hand - elaborated a system of judicial review in regard to many - but not all - activities of the executive branch of government.

²⁴ David Kretzmer, *The New Basic Laws on Human Rights: A Mini-revolution in Israeli Constitutional Law?*, published in *Public Law in Israel* (edited by Itzhak Zamir and Allen Zysblat, Clarendon Press, Oxford, 1996) 141

²⁵ Meir Shamgar, *Judicial Review of Knesset Decisions by the High Court of Justice*, 28 *Isr.L.Rev.* (1994) 43, at 49-56

²⁶ *The Mizrahi Bank case*, supra note 20

(a) Until the beginning of 1980 the Supreme Court strictly followed the judicial policy of separation between "security" authorities and other "regular" administrative authorities, and exercised strict self-restraint in reviewing the substantive grounds of security related cases, despite the legal and moral considerations often arising in connection with these cases.²⁷

Thus the Supreme Court was quite active in reviewing violation of fundamental rights and freedoms by the "regular" administrative authorities, but exercised only minimal judicial review over the executive power of the so called "security" authorities.²⁸

(b) An indication for the adoption of a new judicial policy of judicial review might be seen in the - since 1988 - shown readiness of the Supreme Court to examine not only procedural and formal requirements, such as bad faith or irrelevant considerations but also the merits and the reasonableness of every administrative decision, even when the authority in question is a "security" authority acting out of security considerations.²⁹

(c) Nevertheless, it must be stressed at this point that the Supreme Court of Israel has been overly protective of the military government's position in the Occupied Territories.

This is revealed by the fact that the majority of over 500 petitions that were submitted to the Supreme Court by Palestinian Arab petitioners from the Occupied Territories were decided in favor of the considerations of the military government,³⁰ with the result of denying and violating mainly the basic rights and freedoms of the Palestinian Arab people living in these areas.

²⁷ For a discussion of the approach of the Supreme Court towards the executive power of security authorities see Baruch Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defence (Emergency) Regulations, 1945*, 8 I.Y.H.R. (1978) 296, at 309-317; Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, *Stanford Journal of International Law* (1991) 39, at 40-41

²⁸ The term "security authorities" includes the two Israeli secret services, i.e. the General Security Service (GSS) (Hebrew "Shin Bet") and the "Mossad"; the Police, the Minister of Defence; the Chief of Staff and the military authorities of the Israel Defence Force (IDF). For details on this issue see Hofnung, *Democracy, Law and National Security in Israel*, supra note 7, at 188-197; Bracha, *Judicial Review of Security Powers in Israel*, supra note 27, at 45-47

²⁹ H.C. 680/88, *Schnitzer v. Chief Military Censor*, translated into English in 9 S.J. (1977-1990) 77

³⁰ From 1967 until 1994 only about 20 cases relating to the Occupied Territories were decided in favor of the petitioners.

1.7. The Declaration of the Establishment of the State of Israel of 1948

(12) One of the most important documents of Israel's constitutional framework is the Declaration of the Establishment of the State of Israel of 14 May 1948 - commonly referred to as Declaration of Independence.³¹

(a) Until 1992, this Declaration was never recognized as the formal constitution of the state of Israel but rather served as an interpretative instrument that expresses the accepted fundamental values of the whole legal system in Israel.

In the past the Supreme Court held that the principles set down in the Declaration shall guide the legislature and the executive branch as well.³²

(b) However, with the enactment of the two new basic laws on human rights in 1992, the Declaration of the Establishment of the State of Israel was given special - and according to my opinion even constitutional - status.

(c) The Declaration contains three statements that are central in analyzing the human rights situation in Israel:

First, the state was - "by virtue of the natural and historical right of the Jewish people and the Resolution of the United Nations General Assembly - declared to be a Jewish state in Eretz Israel" that would open its doors to every Jew and grant the Jewish people the status of a nation with equal rights among the family of nations.³³

At the same time, Israel was established on the basis of a democratic concept, since the state committed itself "to foster the development of the country for the benefit of all its inhabitants, that it will be based on freedom, justice and peace as envisaged by the prophets of Israel and that it will ensure complete equality of social and political rights to all its inhabitants, irrespective of race, religion and sex."³⁴

And finally the Declaration "appeals to the Arab inhabitants of the state of Israel to preserve peace and to participate in the building of the state on the basis

³¹ The formal title of the "Declaration of Independence" is Declaration of the Establishment of the State of Israel, *supra* note 22, at 4

³² H.C. 10/48, *Zeev v. Gubernik*, translated into English in 1 S.J. (1948-1953) 68, at 71-72; H.C. 87/53, *Kol Ha'am Company Ltd. v. Minister of Interior*, translated into English in 1 S.J. (1948-1953) 90; E.A. 2/84, 3/84, *Neiman v. Chairman of the Central Elections Committee for the 11th Knesset*, translated into English in 8 S.J. (1969-1988) 83, at 150, 164

³³ Declaration of the Establishment of the State of Israel, 1948, *supra* note 22, at 4

³⁴ However, it must be said that the word "Democracy" has not been explicitly used in the Declaration of the Establishment of the State of Israel.

of full and equal citizenship and due representation in all its provisional and permanent institutions."³⁵

(d) These three above mentioned statements form the background and starting point for the crucial question, if the concept of Israel as a Jewish state and a democracy can be considered to be truthful or fictional, and if in spite of the commitment made in the Declaration to maintain equality, Israel really adequately managed to cope with the implications of minority rights.

(13) In the course of this work I will show that the strong pronouncement of the Jewish character of the state of Israel has in many fields discriminatory effect to the non-Jewish population, i.e. mainly the Palestinian Arab people, which is not recognized as a minority by the government.

(a) I will demonstrate that the Palestinian Arab citizens of the state of Israel are not full citizens, since the state defines itself as the state of the Jewish people - rather than the state of all its citizens - and since the Palestinian Arab citizens are not authorized to decide in matters relating to the security-concept of the state and its ideological direction.

(b) I will also show that - although the Jewish and Palestinian Arab population is formally equal before the law - different normative and interpretative standards are applied on both groups.

This basic approach underlies Israel's legal, judicial and socio-political system as a whole and must therefore be considered as systematically applied policy of discrimination.

1.8. The Enactment of Two Basic Laws on Human Rights in 1992

(14) Furthermore, I will show that - despite the enactment of the two mentioned basic laws on human rights in 1992 - the discriminatory situation and its underlying conditions did not really change.

I will demonstrate that these two basic laws resulted until now in an almost empty attempt towards a real democratization of Israel's legal order as a whole.

(a) One main reason for this state of affairs is the fact that the object of the two basic laws on human rights is "to entrench the values of the state of Israel as a Jewish and democratic state in a Basic Law."

With this clause not only the democratic values of the state of Israel were given constitutional status but also the Jewish values, which include not only Jewish heritage and Jewish law but also Zionist values.

³⁵ Supra note 22, at 5

As I will show in the course of this work, in employing the Jewish values which also include the Zionist values, the democratic values of the state may easily and always be suspended.

(b) Another essential reason lays in the fact that the Basic Law: Human Dignity and Freedom explicitly determines that any law which existed prior to the enactment of the Basic Law shall not be affected.

That means, all the legal instruments that were enacted before the Basic Law: Human Dignity and Freedom and that were never declared invalid remain automatically and totally unchanged in force, despite the fact that they often constitute unjustified and severe infringements of human rights, a breach of international law and universally recognized principles of law.³⁶

Important to mention is the fact that, according to Israel's rules of interpretation, Israel's inherited and enacted legislation must be "interpreted in harmony with the new legal environment and normative umbrella which has been developed since the establishment of the state of Israel, and which consists not only of the immediate legal context, but also of accepted principles, basic aims and fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."³⁷ That means in other words:

All the laws and regulations, that have been enacted over the decades and that were never declared invalid, but express the above mentioned "principles, basic aims and fundamental criteria" which are accepted by the Israeli society and which derive from the sources of Israel's social consciousness - form "the new legal environment or normative umbrella over all legislation" - in spite of the fact that such legal instruments are often illegal, immoral, even a gross violation of international law and universally recognized principles of law and therefore unacceptable.

In accordance with this line of interpretation many totally illegal, undemocratic, immoral and therefore unacceptable legal instruments are still in

³⁶ There is no room here to mention all the legislative instruments that are still in force and applied by the Israeli executive apparatus, despite the fact that they are highly discriminatory for all non-Jews, i.e. mainly the Palestinian Arab people, and constitute severe infringements of human rights and freedoms and a breach of international law. But see for example the following - still valid and routinely applied - legal instruments: Defence (Emergency) Regulations, 1945, supra note 5; Law of Return, 1950, 4 L.S.I. (1949/50) 114; Absentees' Property Law, 1950, 4 L.S.I. (1949/50) 68; World Zionist Organization (WZO) and Jewish Agency (Status) Law, 1952, 7 L.S.I. (1952/53) 3; Keren Kayemet Le-Israel Law, 1953, 8 L.S.I. (1953) 35; Basic Law: Israel's Land, 14 L.S.I. (1959/60) 48; Israel Lands Law, 1960, 14 L.S.I. (1960/61) 49; Agricultural Settlement (Limitations on Use of Agricultural Land and Water) Law, 1967, 21 L.S.I. (1966/67) 105

³⁷ *Schnitzer v. Chief Military Censor*, supra note 29, at 81, 87-88. (This case will be discussed in detail in Chapter F.4.4. of this work)

force and are - as the reality shows - even regularly applied by the executive apparatus.

(c) A third reason for the empty attempt of the two basic laws on human rights to really enhance the democratic level of Israel's legal system lays in the fact that most of the illegal, immoral and therefore unacceptable jurisprudence, that was developed by Israel's Supreme Court over the decades, has never been overruled or declared as illegal and, therefore, is still in force.³⁸

Although it is true that especially during the year 1999, the Israeli Supreme Court has overruled some of its earlier illegal decisions - such as the decisions relating to the Supreme Court's legitimating of torture,³⁹ which is a gross violation of international human rights law and universally recognized principles of law - most of the illegal, immoral and unacceptable jurisprudence still lays at the very foundations of the Israeli legal system itself, and forms its legal environment.

This is revealed by the following two facts:

1. Israeli judges - as the reality shows - still rely explicitly on such jurisprudence.⁴⁰
2. As already mentioned above Israel's inherited and enacted legislation must be "interpreted in harmony with the new legal environment and normative umbrella which has been developed since the establishment of the state of Israel, and which consists - according to the Israeli Supreme Court - not only of the immediate legal context, but also of accepted principles, basic aims and

³⁸ Concerning the following issues the jurisprudence has never been overruled or declared as illegal: Expropriations of land owned by Palestinian Arab citizens of Israel or inhabitants of the Occupied Territories, see Chapter G. (The Right to Property); extrajudicial killings and executions of Palestinian Arabs, see *infra* note 55; deportations and mass deportations of Palestinian Arab civilians in the Occupied Territories, see *infra* notes 58, 59; demolitions, sealings, forfeitures and seizures of houses belonging to Palestinian Arab civilians in the Occupied Territories, see *infra* notes 60-63; jurisprudence concerning anti-Arab racism, see *supra* note 20

³⁹ E.g., H.C. 5100/94, *The Public Committee Against Torture in Israel et al. v. The State of Israel*, discussed in B'Tselem, POSITION PAPER, Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Services (Jerusalem, January 2000)

⁴⁰ See for example the present Supreme Court President Aharon Barak who relies in paragraph 79 of the *Mizrahi Bank case*, *supra* note 20, on the decision in the matter of H.C. 73/85, *Kach Faction v. Knesset Speaker*, 39(iii) P.D. 141. (In the Kach Faction case the Supreme Court overturned the decision of the Israeli Broadcast Authority (IBA) and ordered the IBA to broadcast the political opinions of Rabbi Meir Kahane, who was elected to the Knesset on the extremely anti-Arab and racist Kach platform, calling for the exclusion and expulsion of all Palestinian Arab citizens from the state of Israel and the Occupied Territories, for discrimination between Jews and non-Jews, and for outlawing sexual relations between Jews and non-Jews. This case will be discussed in detail in Chapter F.5.2. of this work.)

fundamental criteria which derive from the sources of social consciousness of the nation within which the judges live."⁴¹ That means in other words:

All the jurisprudence that has been developed over the decades and that was never explicitly overruled or declared illegal, but that reflects "the principles, basic aims and fundamental criteria which are accepted by the Israeli society and which derive from the sources of Israel's social consciousness" forms "the legal environment or normative umbrella over all legislation" - in spite of the fact that such jurisprudence is often illegal, immoral, sometimes even a gross violation of international law and universally recognized principles of law and therefore totally unacceptable.

To sum up the situation one may say that - in accordance with the above described line of interpretation - a large part of illegal, immoral and totally unacceptable jurisprudence still enters directly or indirectly, but on a regular and daily basis, Israel's normative system and jurisprudence in all court instances.

1.9. International Law

(15) In addition to the mentioned subjects, this work intends to show which kind of importance has been attached by the Israeli government and the legal apparatus towards international law.

Although in 1991 Israel has ratified all major international conventions, I will nevertheless show in the course of this work, that the mentioned ratification had little impact on the situation of human rights as a whole, due to the fact that - at least until now - most of the provisions of the various covenants were not incorporated into Israel's domestic law.

2. Basic Approaches of Israel's Supreme Court

(16) In the course of this work I will demonstrate that the judgments of the Supreme Court influenced the Israeli Jewish society and the governmental policy in regard to values, standards of morality, and opinions about justice and fairness.

(17) The presented cases delineate political and legal realities, prescribe power allocations and also echo the debate between the members of the Supreme Court concerning judicial techniques and the role of the judiciary within the society.

(18) I will argue that the legal approach of the Supreme Court is predominantly technical, occupied with the application of existing statutes through interpretation of their provisions.

⁴¹ *Schnitzer v. Chief Military Censor*, supra note 29, at 81, 87-88

The principal question is "what the law is," rather than "what the law should be" if its constitutionality and compatibility with international law and universally recognized values is to be upheld.

(19) There is also a big tendency of the judges to turn to comparative law sources for assistance in the interpretation of new laws and for justifying their decisions.

(20) But to a large extent the Supreme Court judges also rely on their own, over the decades developed - often illegal, immoral and therefore unacceptable - jurisprudence.

(21) An important aspect of many decisions concerning civil and political rights and freedoms is the big influence of American realism as represented by former U.S. Supreme Court Justice O. W. Holmes and others.

(22) On the other hand one may also find principles based on natural law. Especially in the early years after the state of Israel has been established the Supreme Court founded its decisions on natural law as the famous leading case in the matter *Bejerano v. Minister of Police*, concerning freedom of occupation, shows.⁴²

(23) Another feature is the fact that in some decisions the spiritual foundations and sources upon which judges base their arguments are not secular law and secular thinkers but ancient Jewish sources, such as the Talmud and commentaries on that work.⁴³

(24) The judgments reflect various philosophical ideas - naturalist approaches as well as realist and positivist conceptions - and different methods of legal reasoning employed by the judges in order to found their opinions.

(a) Supreme Court President Aharon Barak for example, favors the flexible test based on balancing of the competing interests and values involved. In this work I will argue that the balancing test is a vague, not exact and sometimes even unhelpful test.

I will demonstrate that everything depends on the question of which interests are involved and how much weight is assigned to them in a specific situation. Sometimes the balancing test serves to rationalize judicial restraint,⁴⁴ while in other cases the same test serves as a rationale for judicial activism.⁴⁵

⁴² H.C. 1/49, *Bejerano v. Minister of Police*, for a summary in English see 8 I.Y.H.R. (1978) 373

⁴³ H.C. 72/62, *Rufeisen v. Minister of the Interior*, translated into English in a Special Volume of S.J. (1962-69) 1; H.C. 58/68, *Shalit v. Minister of the Interior*, translated into English in a Special Volume of S.J. (1962- 69) 35

⁴⁴ H.C. 652/81, *Sarid v. Chairman of the Knesset*, translated into English in 8 S.J. (1969-1988) 52

⁴⁵ H.C. 742/84, *Kahane v. Knesset Speaker*, for a summary in English see 22 Isr.L.Rev. (1987) 219, at 222-223

The discretion placed by the balancing test in the hands of the Court is sometimes too wide and enables the judge any answer he feeds into it. It is therefore almost impossible of assuring impartiality of results.

Furthermore, an important aspect of President Barak's judgments is the fact that he occasionally bases his reasoning on intellectual sources with contrasting conceptions, and consequently develops an own theory of law.⁴⁶

(b) Former Supreme Court President Justice S. Agranat on the other hand preferred to rely on American doctrines, as in the opinion that he wrote for the Supreme Court in the early and well known *Kol Ha'am case*⁴⁷ concerning freedom of speech - a fundamental right which, until today, is not incorporated in any written law or statute. In this case Justice Agranat resorted to the Declaration of the Establishment of the State of Israel, 1948 as an instrument for interpretation in order to incorporate freedom of speech into Israel's legal order.

In contrast to the Supreme Court jurisprudence that preceded the *Kol Ha'am case* - in which the Court based its reasoning only on sources that were explicitly recognized in form of legislative acts - Justice Agranat introduced with the *Kol Ha'am case* the concept of extra-statutory rights into Israel's legal order. With the *Kol Ha'am case* Justice Agranat also adopted the "near certainty" or "probable danger" test as general test for resolving situations of conflict between freedom of expression and public order or security. He outlined judicial guidelines that the decision making administrative authorities were expected to follow in imposing restrictions.

(c) Former Supreme Court President Meir Shamgar displays to a great extent Grand Style⁴⁸ judicial reasoning. In his decisions he articulates - as it is typical for this style of judicial reasoning - both legal and non-legal arguments in order to explain and to justify his opinions.

His opinions are also characterized by a policy-oriented activism, and in order to shape Israeli law in the area of fundamental rights and freedoms he borrows in many decisions American doctrines.

(d) Deputy President Miriam Ben-Porath's decisions, on the other hand, are characterized by a Formal Style of judicial reasoning. As it is typical for this style of judicial reasoning, she presents the outcome of opinions as following inevitably or mechanically from preexisting rules.

Justice Miriam Ben-Porath demonstrates strong loyalty to English law.

⁴⁶ See for instance the decision in the *Mizrachi Bank case*, supra note 20. In this decision President Barak bases his reasoning concerning the Constituent Authority of the Knesset on the positivistic doctrines of Hans Kelsen (Grundnorm-model) and H.L.A. Hart (rule of recognition) as well as on Ronald Dworkin's interpretative concept of law.

⁴⁷ *Kol Ha'am*, supra note 32

⁴⁸ For a discussion of the term "Grand Style" see Karl Llewellyn, *Jurisprudence, Realism in Theory and Practice* (The University of Chicago Press, 1962) 217

(e) Justice Moshe Landau uses in his decisions a mixture of styles of judicial reasoning, namely a Formal Style and a Grand Style.

(f) And the Justices Haim Cohn, Kister, Menachem Elon and Moshe Silberg often base their arguments on Jewish religious sources.

(25) In analyzing the various leading judicial decisions dealing with the subject of civil and political rights not only the majority opinion of the Court will be presented, but also in some cases selective minority opinions worth being portrayed.

(a) To mention for example in this context is the recent change in the jurisprudence of Justice Mishael Cheshin regarding the demolition of houses of Palestinian Arabs which have been convicted of the murder of Jews. In the past the Supreme Court has consequently rejected the view that demolition and sealing of houses constitutes collective punishment. In two minority opinions in 1992 Justice Cheshin deviated from previous rulings on this issue and held that the security forces should "only destroy those rooms which were actually used by the murderers", but not the whole house "in order to avoid collective punishment."⁴⁹ However, this jurisprudence continues to be undemocratic and illegal since in principle it still permits the demolition of houses.

(b) Another example of an important minority opinion worth being mentioned is that of Justice Daliah Dorner, who - in a 2-1 decision handed down in November 1997 - voted against the continued administrative detention of ten Lebanese citizens without charge or trial, solely for the purpose of using them as "human bargaining chips in negotiations with various organizations for advancing the release of prisoners of war."

Nevertheless, her minority opinion is deplorable as well, since she did not reject the legitimacy of holding hostages to attain the release of POWs and MIAs, but rather ruled that the legal basis upon which the state relies - i.e. the Emergency Powers (Detention) Law, 1979 - is inappropriate for this purpose.

Justice Daliah Dorner stated: "I would postpone the release of the appellants for a reasonable period of time, in order to enable the state to examine its authority and interest in holding the appellants by power of another law."⁵⁰

⁴⁹ H.C. 4772/91, *Khizran v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 349; H.C. 2722/92, *Al-Amrin v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 337

⁵⁰ AAD 10/94, *Plonim (i.e. Unnamed) v. Minister of Defence*, para. 5 of Justice Dorner's decision. Translated into English by Amnesty International, <http://www.btselem.org/Files/site/english/data/lebanon/detainees.htm>. For a summary in English of this case see B'Tselem, *The B'Tselem Human Rights Report*, Volume 6, Summer 1998, at 9, 14. See also on this issue the detailed report of B'Tselem, *Israeli Violations of Human Rights of Lebanese Civilians* (Jerusalem, January 2000) at 41-46

Justice Y. Kedmi and the present Supreme Court President A. Barak wrote absolutely illegal, immoral and intolerable opinions in favor of holding the ten Lebanese civilians as

These are only a few examples of legal techniques and aspects of judicial reasoning of some judges. Of course I will present in the course of this work also arguments of other members of the Supreme Court.

(26) In this analysis I will show that the Supreme Court in his task of protecting the individual's civil and political rights and freedoms has mainly adopted a positivistic, formalistic, dogmatic, authoritarian jurisprudential conception often citing the famous legal philosopher Hans Kelsen as well as other representatives of legal positivism, such as H.L.A. Hart.

This conception is characterized (1) by the belief that the only source of the individual's subjective right is the positive law; (2) by the distinction between "law as it is" and "law as it ought to be"; (3) by the literal application of law within self-imposed limits of a rigid scheme of deductions; and (4) by a complete indifference towards individual human affairs and justice.⁵¹

(27) I will demonstrate that especially in so called "security matters" involving the Palestinian Arab people living in Israel and the Occupied Territories, the Supreme Court has based its decisions on a strong formalistic and legalistic conception, and thus succeeded - and still succeeds - to escape from dealing with the reality and the substantive issues at stake.

As a result of this conception the Supreme Court approved - and still approves - acts performed by the executive branch of the government⁵² in the name of "security reasons" which actually constitute unjustified and severe infringements of human rights, a breach of international law⁵³ and universally recognized principles of law.⁵⁴

hostages for the release of POWs. In doing so these High Court judges Kedmi and Barak legitimate war crimes and become themselves part of them.

President A. Barak using again his favored test of "balancing human rights against Israel's interests" wrote as follows: "The point is, that there is no doubt in my mind that returning the POWs and MIAs in and of itself is a goal and interest that falls within the scope of state security..." Ibid., para. 10 of President Barak's opinion.

"However, after thoroughly studying the material before me and the arguments of the sides, I am satisfied that this violation [to human dignity and liberty] - as harsh and painful as it is - is necessitated by the security and political reality, and reflects the proper balance point in the circumstances of the case, between individual freedom and the necessity to protect state security." Ibid., para. 12 of President Barak's opinion.

⁵¹ Mieczyslaw Maneli, *Juridical Positivism and Human Rights* (Hippocrene Books, New York, 1981) at 284-286

⁵² The executive branch of the government consists of ordinary and military authorities as well as of the security apparatus.

⁵³ Violated are norms of the Hague Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949; the Convention on the Elimination of All Forms of Racial Discrimination, 1966; the International Covenant on Civil and Political Rights, 1966; the International Covenant

(a) Such severe infringements mainly concern the Palestinian Arab people, living in Israel and the Occupied Territories and are caused by measures, such as extrajudicial killings and executions,⁵⁵ administrative detention of civilians without fair trial⁵⁶ - sometimes even over years,⁵⁷ deportation of civilians⁵⁸ - even

on Economic, Social, and Cultural Rights, 1966; the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984

⁵⁴ Universally recognized principles of law are binding on all states in accordance with Article 38(1)(c) of the Statute of the International Court of Justice.

⁵⁵ See the following cases concerning extrajudicial killings and executions:

H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477; H.C. 428/86, *Barzilai v. Government of the State of Israel*, translated into English in 6 S.J. (1986) 1; H.C. 2888/99, *Hollander v. 1. Attorney General, 2. Chief Commander of the Military, 3. Uri Shoham, Attorney General of the IDF, 4. Lieutenant Colonel, Erez*, translated into English by Adalah: <http://www.adalah.org/supreme.html>

Regarding extrajudicial killings and executions see also B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, Activity of the Undercover Units in the Occupied Territories (Jerusalem, May 1992); B'Tselem, Law Enforcement vis-à-vis Israeli Civilians in the Occupied Territories (Jerusalem, March 1994); B'Tselem, Lethal Training, The Killing of Muhammad Al-Hilu by Undercover Soldiers in Hizmeh Village, Case Study (Jerusalem, March 1997)

⁵⁶ See the following cases concerning administrative detention:

H.C. 253/88, *Sagdia et al v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 288; H.C. 576/88, *Husseini v. 1) Deputy President of the District Court of Jerusalem, Judge Eliyahu Noam and 2) Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 299; H.C. 769/88, *Oubeid v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 315; H.C. 670/89, *Ouda v. Military Commanders of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 326

⁵⁷ See the following cases concerning administrative detention over years without fair trial of Palestinian Arab civilians living in the Occupied Territories:

H.C. 6843/93, *Qattamseh v. Military Commander of IDF in the West Bank*, Takdin Elyon 94(2) 2084; *Plonim (i.e. Unnamed) v. Minister of Defence*, supra note 50

⁵⁸ See the following cases concerning deportation of Palestinian Arab civilians living in the Occupied Territories:

H.C. 97/79, *Abu Awad v. Military Commander of IDF in the West Bank*, for a summary in English see 9 I.Y.H.R. (1979) 343; H.C. 320/80, *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 344; H.C. 698/80, *Kawasme v. Minister of Defence*, for a summary in English see 11 I.Y.H.R. (1981) 349; H.C. 629/82, *Mustafa v. Military Commander of IDF in the West Bank*, for a summary in English see 14 I.Y.H.R. (1984) 313; H.C. 513/85, 514/85, *Nazal v. Military Commander of IDF in the West Bank*, for a summary in English see 16 I.Y.H.R. (1986) 329; H.C. 672/88, *Lavdi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 309; H.C. 765/88, *Shakhshir v. Military Commander of IDF in the West Bank (First and Second Phase)*, for a summary in English see 23 I.Y.H.R. (1993) 311-314; H.C. 792/88, *Matur v. Military Commander of IDF in the West Bank (First and Second Phase)*, for a summary in English see 23 I.Y.H.R. (1993) 316-320; H.C. 814/88, *Nassaralla et al. v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 321

mass deportation,⁵⁹ demolition of houses,⁶⁰ sealing off houses,⁶¹ forfeitures of houses,⁶² seizure of houses⁶³ and land,⁶⁴ restrictions on residence and the right to

⁵⁹ See the following cases concerning mass deportation of Palestinian Arab civilians living in the Occupied Territories:

H.C. 785/87, *Abd al Nasser al Aziz Abd al Aziz al Affo. 2. The Association for Civil Rights in Israel v. Military Commander of IDF in the West Bank*; H.C. 845/87, *1. Abd al Aziz Abd Alrachman Ude Rafia. 2. The Association for Civil Rights in Israel v. 1. Military Commander of IDF in the Gaza Strip. 2. Minister of Defence*; H.C. 27/88, *1. J'Mal Shaati Hindi v. Military Commander of IDF in the West Bank*, translated into English in 29 International Legal Materials (1990) 139 [The Afu case]; H.C. 5973/92, *Association for Civil Rights in Israel v. Minister of Defence*, translated into English in 10 S.J. (1988-1993) 168, for a summary in English see 23 I.Y.H.R. (1993) 353

⁶⁰ See the following cases concerning demolitions of houses belonging to Palestinian Arab civilians living in the Occupied Territories:

H.C. 361/82, *Khamri v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 314; H.C. 698/85, *Dagalis v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 315; H.C. 897/86, *Jab'r v. Military Commander of IDF Central Command*, for a summary in English see 18 I.Y.H.R. (1988) 252; H.C. 779/88, *Alfasfus v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 316; H.C. 796/88, *Ahlil v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 320; H.C. 45/89, *Abu Daka v. Minister of Defence*, for a summary in English see 23 I.Y.H.R. (1993) 322; H.C. 610/89, *Bakhari v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 325; H.C. 658/89, *Sanuar v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 25 I.Y.H.R. (1995) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 329; H.C. 1005/89, *Aga v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 330; H.C. 2209/90, *Shuahin v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 325; H.C. 4112/90, *Association for Civil Rights in Israel v. Military Commander of IDF in the Southern District*, for a summary in English see 23 I.Y.H.R. (1993) 333; H.C. 5740/90, *Hagba v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 336; H.C. 42/91, *Timraz v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 337; H.C. 2977/91, *Tag v. Minister of Defence*, for a summary in English see 25 I.Y.H.R. (1995) 330; *Khizran v. Military Commander of IDF in the West Bank*, supra note 47; H.C. 5139/91, *Zakik v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 334; *Al-Amrin v. Military Commander of IDF in the Gaza Strip*, supra note 49

⁶¹ See the following cases concerning sealing off houses belonging to Palestinian Arab civilians living in the Occupied Territories:

H.C. 434/79, *Sakhawil v. Military Commander of IDF in the West Bank*, for a summary in English see 10 I.Y.H.R. (1980) 345; H.C. 22/81, *Khamed v. Military Commander of IDF in the West Bank*, for a summary in English see 11 I.Y.H.R. (1981) 365; *Jab'r v. Military Commander of IDF Central Command*, *ibid.*; H.C. 387/89, *Ragabi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 324; H.C. 987/89, *Kahavagi v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 329; *Aga v. Military Commander of IDF in the Gaza Strip*, *ibid.*; H.C. 948/91, *Hodli v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R. (1995) 327; H.C. 5667/91, *Gabrin v. Military Commander of IDF in the West Bank*, for a summary in English see 25 I.Y.H.R.

family unification,⁶⁵ restrictions on travel and movement,⁶⁶ police supervision,⁶⁷ curfews,⁶⁸ closures of areas,⁶⁹ closures of institutions,⁷⁰ control of speech rights,⁷¹

(1995) 335; H.C. 5510/92, *Turkeman v. Minister of Defence*, for a summary in English see 25 I.Y.H.R. (1995) 347

⁶² See the following case concerning forfeitures of houses belonging to Palestinian Arab civilians living in the Occupied Territories:

Zakik v. Military Commander of IDF in the West Bank, supra note 60

⁶³ See the following case concerning seizure of houses belonging to Palestinian Arab civilians living in the Occupied Territories:

H.C. 401/88, *Abu Ryan v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 296

⁶⁴ See the following case concerning seizure of land privately owned by Palestinian Arab civilians living in the Occupied Territories:

H.C. 290/89, *Goha v. Military Commander of IDF in the West Bank*, for a summary in English see 23 I.Y.H.R. (1993) 323

⁶⁵ See the following cases concerning restrictions of residence and family unification of Palestinian Arab civilians living in the Occupied Territories:

H.C. 13+58/86, *Shaine v. Military Commander of IDF in the West Bank, Head of the Gaza Strip Civil Administration*, for a summary in English see 18 I.Y.H.R. (1988) 241

See also on this issue B'Tselem, *Families Torn Apart, Separation of Palestinian Families in the Occupied Territories* (Jerusalem, July 1999) at 125

⁶⁶ See the following cases concerning restrictions of travel and movement of Palestinian Arab civilians living in Israel:

H.C. 269/60, *Watad v. Military Court (accelerated judicial procedure), Central Region*, 14 P.D. 2418

See also Adalah News, <http://www.adalah.org/news.htm> (The Supreme Court of Israel Dismisses Adalah's Petition against the IDF for Prohibiting Palestinian Arab Citizen of Israel from Entering the West Bank - 4/26/00)

See the following cases concerning restrictions of travel and movement of Palestinian Arab civilians living in the Occupied Territories:

H.C. 658, 660-62/80, *Taha v. Minister of Interior*, for a summary in English see 11 I.Y.H.R. (1981) 361; H.C. 448/85, *Dahaar Adv. v. Minister of Interior*, for a summary in English see 17 I.Y.H.R. (1987) 301

⁶⁷ See the following cases concerning police supervision of Palestinian Arab civilians living in Israel and the Occupied Territories:

H.C. 46/50, *Al-Ayubi v. Minister of Defence*, 4 P.D. 222; H.C. 56/65, *Sabri Jiryis v. Military Commander of District A*, 19(i) P.D. 260; H.C. 771/80, *Al-Sayad v. Military Commander of IDF in the West Bank*, for a summary in English see 11 I.Y.H.R. (1981) 364; H.C. 554/81, *Baransa v. Chief of Staff*, for a summary in English see 17 I.Y.H.R. (1987) 300

⁶⁸ See the following case concerning curfew in Israel:

Appeal 279-283, *Ofer, Malinki, Dahan, Mahluf, Eliahu, Gabriel, Albert, Edmund, v. Chief Military Prosecutor*, 44 Psakim (Judgments of the District Court of Israel) 362; translated into English in 2 Palestine Yearbook of International Law (1985) 71, at 94, 104 [The *Kafr Qassem case*]

See the following cases concerning curfews in the Occupied Territories:

H.C. 1113/90, *Shav v. Military Commander of IDF in the Gaza Strip*, for a summary in English see 23 I.Y.H.R. (1993) 332; H.C. 477/91, *Association of Israeli-Palestinian Physicians for Human Rights v. Minister of Defence*, for a summary in English see 23

declaration of associations as unlawful,⁷² discrimination in law enforcement⁷³ and even the use of "methods of psychological and physical pressure" during the interrogations of detained and imprisoned "security" persons.⁷⁴

I.Y.H.R. (1993) 341; H.C. 1358/91, *Arshid v. Minister of Police*, for a summary in English see 23 I.Y.H.R. (1993) 342

See also on this issue B'Tselem, Annual Report 1989: Violations of Human Rights in the Occupied Territories (Jerusalem, December 1989) at 77-83; B'Tselem, Human Rights in the Occupied Territories During the War in the Persian Gulf (Jerusalem, January - February 1991) at 3-4, 15-16; B'Tselem, Human Rights Violations in the Occupied Territories 1992/93 (Jerusalem, 1994) at 93-97

⁶⁹ See the following cases concerning closures of areas in Israel:

H.C. 220/51, *Asslan v. Military Commander of the Galilee*, 5 P.D. 1480; H.C. 33/52; 288/51, *Asslan v. Military Commander*, 9 P.D. 689

Adalah, The Legal Center for Arab Minority Rights in Israel, Brief: Umm al-Fahm, Focusing on events of 27-29 September 1998; HA'ARETZ, English Edition, 2 October 1998, at B1 (Uzi Benziman, Corridors of Power - A festering sore)

⁷⁰ See the following case concerning closures of Palestinian institutions located in the Occupied Territories:

H.C. 198/85, *Khamdan v. Military Commander of IDF in the West Bank*, for a summary in English see 17 I.Y.H.R. (1987) 316

See also on this issue B'Tselem, Annual Report 1989, supra note 68, at 93-100; B'Tselem, Closure of Schools and Other Setbacks to the Education System in the Occupied Territories (Jerusalem, September-October 1990); B'Tselem, Human Rights Violations in the Occupied Territories 1992/93, supra note 68, at 99-103

⁷¹ See the following cases concerning the control of speech rights in connection with the Palestinian Arab people:

H.C. 29/62, *Cohen v. Minister of Defence*, translated into English in 4 S.J.(1961-1962) 160; H.C. 39/64, *El-Ard v. District Commissioner*, 18(ii) P.D. 340; H.C. 415/81, *Ayoub v. District Commissioner*, 38(i) P.D. 750; H.C. 322/81, *Makhoul v. District Commissioner*, 37(i) P.D. 789; Cr.A. 696/81, *Azulai v. State of Israel*, for a summary in English see 19 Isr.L.Rev. (1984) 586; H.C. 541/83, *Asli v. District Commissioner*, 37(iv) P.D. 837; H.C. 234/84, *Hadashot v. Minister of Defence*, 38(ii) P.D. 477; H.C. 562/86, *Al-Khatib v. Minister of Interior*, for a summary in English see 17 I.Y.H.R. (1987) 317; H.C. 648/87, *Kassem v. Minister of Interior*, for a summary in English see 18 I.Y.H.R. (1988) 254

⁷² See the following cases concerning the declaration of associations as unlawful involving the Palestinian Arab people:

H.C. 241/60, *Kardosh v. Registrar of Companies*, translated into English in 4 S.J. (1961-1962) 7; F.H. 16/61, *Registrar of Companies v. Kardosh*, translated into English in 4 S.J. (1961-1962) 7; H.C. 253/64, *Sabri Jiryis v. Commissioner of the Northern District*, 18(iv) P.D. 673

⁷³ See the following report concerning the discrimination in law enforcement of Palestinian Arab civilians living in the Occupied Territories:

B'Tselem, Law Enforcement vis-à-vis Israeli Civilians in the Occupied Territories (Jerusalem, March 1994)

See the following report concerning the discrimination in law enforcement of Palestinian Arab civilians living in Israel:

Adalah, News, <http://www.adalah.org/news.htm>, pages 10-12 [(Attorney General Endorses Police Review of Violence at Umm El Fahm; Forced to Re-Open Investigation after Public Outcry - 2/25/00); Adalah, Annual Report 1999, at 22]

(b) As already mentioned above, in 1987 the Landau Commission - a Commission of Inquiry which was named after its head Justice Moshe Landau - was set up and confirmed in a Final Report that acts of violence, such as pulling the hair, shaking, throwing to the ground, kicks, slaps and insults, prevention of sleeping for hours had indeed been used in many interrogations of detained and imprisoned persons.⁷⁵

The Report of the Landau Commission discussed at great length the so called "dilemma between the vital need to preserve the very existence of the state and its citizens, and [the need] to maintain its character as a law-abiding state which believes in basic moral principles,"⁷⁶ and finally concluded that the only solution to the above mentioned "dilemma" is "the truthful road of the rule of law, i.e. the law itself must ensure a proper framework for the activity of the General Security Service (GSS) regarding Hostile Terrorist Activity."

The Report furthermore stated that in cases in which it is essential to extract information from persons in order to protect the security of the state, the interrogators could use "forms of non-violent psychological pressure" and "when these do not attain their purpose, moderate physical pressure" is legitimate.⁷⁷

The kind of methods that may be regarded as "moderate measure of physical pressure" has been laid down and defined in detail in secret governmental guidelines. The Israeli government has never published these guidelines, claiming that suspects will be able to prepare themselves to withstand interrogations. The Landau Commission justified the use of physical force in interrogations by the criminal "defence of necessity" embodied in Section 34 of the Penal Law, 1977.⁷⁸

Since September 1994, following a wave of terrorist attacks committed by Palestinian Arabs,⁷⁹ an inter-ministerial committee furnished the GSS even with

⁷⁴ See the following cases concerning torture of Palestinian Arab civilians living in the Occupied Territories:

H.C.-V.R. 336//96 (H.C. 7964/95), *Bilbeisi 'Abd al-Halim v. General Security Service*; H.C. 8049/96, *Hamdan Muhammad 'Abdas-'Aziz v. General Security Service*; H.C. 3124/96, *Mubarak v. General Security Service*; all three cases are translated in B'Tselem, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases*, An Annotated Sourcebook (Jerusalem, January 1997) at 5; H.C. 532/91, *X v. The State of Israel*, *ibid.*, at 12

⁷⁵ *Landau Commission Report*, *supra* note 8, at 150

⁷⁶ *Ibid.*, at 182

⁷⁷ *Id.*, at 184, 185

⁷⁸ *Id.*, at 186. The *Landau Commission Report*, *supra* note 8, still mentions the old relevant statute for the "Defence of necessity," namely Section 22 of the Penal Law, 1977. After an Amendment of the Penal Law in 1994, Section 22 became Section 34.

⁷⁹ On 25 February 1994 an Israeli Jewish settler murdered 29 Palestinian Arab Muslim worshippers in the Cave of the Patriarchs in Hebron and was killed during the course of his attack. See B'Tselem, *Captive Corps* (Jerusalem, March 1999) at 9. Following this event a wave of terrorist attacks was committed by Palestinian Arab suicide killers, in which dozens of Israelis and Arab civilians were killed and severely

additional "special permissions" to use "enhanced physical pressure" against members of Hamas and the Islamic Jihad.⁸⁰

Additionally to the mentioned legal justification of criminal law (Section 34 of the Penal Law, 1977), the Israeli government attempted several times to have get approved by the Knesset a Draft Law on the General Security Service (GSS)⁸¹ in order to legally sanction the present methods of interrogation, which constitute torture. Only due to immense pressure by the international community⁸² and by Israeli human rights organizations⁸³ these draft laws were withdrawn or postponed.

But torture was - until the recent highly important decision⁸⁴ handed down by the Supreme Court on 6 September 1999 - also effectively legalized by the Israeli Supreme Court, who - in dozens of cases involving individuals (mostly Palestinian Arabs) who had been tortured or ill-treated - accepted the arguments of the state's representative that "moderate physical pressure" used by the GSS does not constitute torture, but that in the case of a "ticking bomb" even torture would be justified by the "defence of necessity" (Section 34 of the Penal Law, 1977).

However, in September 1999, the Supreme Court ruled for the first time that the interrogation methods used by the GSS are illegal, and that these prohibitions are absolute.

(28) I want to stress at this point that even before the above mentioned decision declaring torture as illegal, the use of any physical violence and psychological means of pressure, amounting to torture and ill-treatment, was not only absolutely prohibited by international law, but also constituted a severe

injured: The first attack of this series occurred on 6 April 1994 in the town Afula, where a Palestinian Arab refugee from the Qabatiyeh refugee camp committed a suicide-bombing attack. In this attack 7 people (6 Israeli Jews and 1 Israeli Arab woman) were killed and 40 people severely injured. Ibid., at 13. The second suicide-bombing attack committed by a Palestinian Arab took place in the same month of April 1994 - this time in the town Hadera. Id. In October 1994, a third suicide-bombing attack was committed by a Palestinian on the Bus No. 5 in Tel Aviv. See B'Tselem, Cooperating against Justice: Human Rights Violations by Israel and the Palestinian National Authority following the Murders in Wadi Qelt (joint report issued by LAW) (Jerusalem, June 1999) at 18

⁸⁰ B'Tselem, Legitimizing Torture, supra note 74, at 67

⁸¹ Draft Law on the General Security Service (GSS) (Hebrew)

⁸² Amnesty International - News Release, New Draft Law - A Green Light to Torture (MDE 15/12/98, 10 February 1998); Amnesty International - News Release, Israel Should Observe UN Committee Against Torture Call for Immediate Halt to Torture (MDE 15/32/98, 19 May 1998)

⁸³ B'Tselem - Press Release, B'Tselem's Response to the Proposed GSS Law (25 January 1996)

⁸⁴ H.C. 5100/94, *The Public Committee Against Torture in Israel et al. v. The State of Israel*, supra note 39. In this decision six petitions, which were filed by various human rights organizations challenging the interrogations methods by the GSS, were grouped together.

breach of Israeli law, namely Section 2 and Section 4 of the Basic Law: Human Dignity and Freedom, and Section 277 of the Penal Law, 1977.

(29) In this context it should also be said that torture falls within the category of those crimes for which according to international law responsibility is imposed not only upon the state, but also upon the individual in a personal capacity for the commission of the act (individual responsibility).

(30) Furthermore, it should be stressed that torture has no place in a democratic and enlightened society, built on the moral belief that the end, not important how good it might be, does not justify the use of any means in order to achieve it.

(31) From my point of view, situations of ethnic or national conflict cannot and may not be resolved by employing repressive and totalitarian measures but rather must be settled through negotiations, with the outcome of agreements - based on universally recognized principles, justice,⁸⁵ equity and respect for human rights for all sides of the conflict - that have durability without enforcement through force.

To reach such agreements is - of course - the most difficult task.

3. Questions of the Legitimacy of Israel's Legal Order

(32) In the above mentioned context, the general question arises to what extent the law shall be combined with the deployment of coercive force, i.e. a sanction.

(a) For representatives of classical positivism, such as Jeremy Bentham and John Austin, law depends on the imposition of sanctions. According to this concept of law, the coercive element, along with that of political sovereign command, is the ultimately definitive characteristic of law.

(b) However, Professor H.L.A. Hart, who is another representative of the positivist school, has stressed that law that only depends on sanctions, i.e. coercive force, is unstable.

He has therefore emphasized, that law⁸⁶ - as distinguished from regimes of terror - presupposes acceptance of the legitimacy of its underlying authority by most of the people.

⁸⁵ In that context the question arises "What is justice?" Justice is - specifically in situations of a conflict - by different groups in different situations perceived differently. Justice depends, inter alia, on the historical experience of a people involved in a conflict.

⁸⁶ H.L.A. Hart equates "law" with "legal systems". H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961)

The central thesis of Hart's concept of law is that the foundations of a legal system consist in an ultimate rule of recognition providing the authoritative criteria for the identification of valid rules of the system.⁸⁷

Professor Hart emphasized that stable legal systems depend on the beliefs and attitudes among the people, which is subjected to it.

(c) In applying Professor Hart's thesis on the case of the state of Israel I may only observe that the policies and practices - such as extrajudicial killings and executions, torture, administrative detention, deportations, demolition/sealing off/forfeitures/seizures of houses, confiscations of land, restrictions on residence and family unification, restrictions on travel and movement, police supervision, curfews, closures of areas and institutions, control of speech rights, declaration of associations as unlawful and discrimination in law enforcement - that were systematically employed by the Israeli government and which were oppressive and unjust for the main part of the Palestinian Arab people have precisely produced the opposite than a stable legal and governmental system.

Although the said policies and practices were always strictly based on laws and regulations, of course they could neither lead to a real identification of the Palestinian Arab people with the values and rules of Israel's governmental system⁸⁸ nor produce much respect for the rule of law, but naturally could only lead to a strengthening of their national feelings.

This is specifically true with regard to the Palestinian Arab people living in the Occupied Territories which opposed at all times since the occupation in 1967 - up until today - the imposition of Israel's rule on them.

The above mentioned issues are the most important and central ones to be mentioned in this work.

(33) However, before dealing in more detail with the foundations of civil and political rights and freedoms in Israel and the Occupied Territories, it seems necessary to me to provide in the following Chapter A some essential information regarding the history, ideology and philosophy of political Zionism, forming the background for the idea and decision towards a "national home" for the Jewish people in Palestine and culminating in the establishment of the state of Israel in Palestine in May 1948.

This background information is highly important for a deeper understanding of Israel's concept of civil and political rights and freedoms in general, and the implications - deriving from the establishment of the state of Israel in Palestine - for the native Arab Palestinians in particular.

⁸⁷ Ibid., at 97-98

⁸⁸ In a small size even the Jewish/Israeli population does not identify with these values.

At the same time this background information gives an insight into the very beginnings of the conflict between the Israeli/Jewish/Zionist and the Palestinian/Arab people.

A. HISTORICAL PERSPECTIVES REGARDING THE RIGHT TO SELF-DETERMINATION OF THE JEWISH AND THE PALESTINIAN ARAB PEOPLE

1. Introduction

On 29 November 1947 the United Nations General Assembly adopted Resolution 181 (II) which, *inter alia*, provided:

1. That the British Mandate for Palestine shall terminate no later than 1 August 1948.¹
2. That Palestine should be partitioned and that two independent states - an Arab and a Jewish state - which should enter into an Economic Union and Transit - as well as a Special International Regime for the City of Jerusalem shall come into existence in Palestine two months after the end of the Mandate but in any case not later than 1 October 1948.²
3. That no later than two months after the end of the Mandate, each state should elect its own Constituent Assembly, which by itself should enact a democratic constitution, guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters, the enforcement of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association.³
4. That each state should be established on the conceptual basis of a bi-national state, where Palestinian citizens as well as Arabs and Jews who are not Palestinian citizens, but residing in Palestine outside the city of Jerusalem, shall become citizens of the state in which they are resident and enjoy full civil and political rights.⁴
5. That a declaration shall be made to the United Nations by the provisional government of each proposed state before independence which shall contain clauses regarding the protection of Holy Places, the protection of religious and minority rights and for the "equal protection of the laws" of all persons.⁵

¹ United Nations General Assembly Resolution 181 (II) on the Future Government of Palestine of 29 November 1947 [Partition Resolution] UN document A/Res/181 (II) (A+B), Part I, Section A, para. 1

² Ibid., Part I, Section A, para. 3 and Section B, para. 11 and Section D

³ Id., Part I, Section B, paras. 9, 10, 10(d) and Section C. The issue of a constitution for each state will be discussed in detail in the following Chapter B. (Israel's Initial Obligation to Enact a Constitution Including a Bill of Rights and the Issue of Judicial Review)

⁴ Id., Part I, Section C, para. 1

⁵ Id., Part I, Section C, Chapter 2 (Religious and Minority Rights)

6. That the admission of each state to membership in the United Nations is conditional upon the signment of the declaration and its undertaking, as envisaged in this plan.⁶

The provisions of the UN Partition Resolution 181 (II), *inter alia*, provide for the establishment of an Arab and a Jewish state, and constitute the first direct recognition of the indigenous Arab population of Palestine to be entitled to self-determination.⁷

However, the Palestinian Arab community - headed by the exiled Arab Higher Committee (AHC) chief and Grand Mufti of Jerusalem, Hajj Amin al Husayni⁸ - as well as the surrounding Arab countries rejected the Partition Plan.⁹

Some of the Jewish Zionist parties of the organized Jewish community in Palestine pre-1948 (i.e. the "Yishuv") also rejected the Partition Plan and based their arguments on the fact that the proposed territory would not encompass "the whole original homeland of the Jewish people."

However, the leaders of the Jewish Agency - which was the main political body of the organized Jewish community in Palestine pre-1948 (i.e. the "Yishuv") - regarded the establishment of a Jewish state in Palestine and Jewish sovereignty over the land and the people of Palestine as the primary interest of the Jewish people.¹⁰

And due to the fact that the organized Jewish community of Palestine pre-1948 (i.e. the "Yishuv") had already prepared itself for statehood by creating two

⁶ Id., Part I, Section F

⁷ UN Resolution 181 (II) also confirms the right to self-determination of the Jewish population of Palestine by providing authority for the establishment of "the Jewish State". There has not been an explicit recognition of the "Jewish people" by the United Nations because of its discriminatory features. The authors W.T. Mallison and S.V. Mallison argued as follows: "The Zionist 'Jewish people' concept was developed by the Zionist Organization/Jewish Agency prior to the establishment of the state of Israel. (...) The 'Jewish people' concept within the state of Israel accords its members certain privileges and rights on a discriminatory basis which are denied to other [non-Jewish] Israelis. (...) Because of the discriminatory characteristics of the 'Jewish people' concept it would constitute a violation of articles 55 and 56 of the Charter of the United Nations if the General Assembly recognized it." W.T. Mallison and S.V. Mallison, *An International Law Analysis of Major United Nations Resolutions Concerning the Palestine Question*, New York, United States [study prepared and published at the request of the Committee on the Exercise of the Inalienable Right of the Palestinian People; UN doc. ST/SG/SER.F/4] 1979, quoted in Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon Press - Oxford, 1998) at 257, note 141

⁸ Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (Cambridge University Press, 1987) at 6

⁹ David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder Westview Press, 1990) at 2; Musa Budeiri, *The Victory of Zionism and Its Failure to Solve the Jewish Problem*, News from Within, published by the Alternative Information Center vol. XIII no. 10, Nov. 1998, at 15

¹⁰ Kretzmer, *ibid.*, at 2

governing bodies - namely the People's Council,¹¹ functioning as a legislature, and the People's Administration,¹² functioning as the government¹³ - the UN Partition Resolution 181 (II) was accepted "even for the price of loss of a part of the historic homeland."¹⁴

So far the position of the Jewish community.

An interesting and frequently discussed question, however, is:

"Why did the Palestinian Arab community reject the UN Partition Resolution 181 (II) despite the fact that it contained a formal statement to establish two bi-national states, where all persons should be treated equally, and where the rights and liberties of minorities residing in each state should be protected?"

In order to give a correct answer to this issue, it seems very necessary for me to provide a brief survey of the history, the institutions and the activities of the Zionist movement in Palestine since its inception in the last decade of the 19th century up until the establishment of the state of Israel in Palestine on 14 May 1948 - an event that lives on in the Palestinian narrative as *al-Nakba (the Catastrophe)* and means the deprivation of a large part of the native Palestinian Arab inhabitants (which then constituted the majority of all inhabitants of Palestine) of their right to self-determination.

An analysis of the conceptual-ideological and institutional framework of the Zionist movement before and during the British Mandate period, its underlying philosophy, aspirations and policy regarding the land of Palestine as well as the indigenous Arab inhabitants and their legal status, clearly reveals the reasons for the rejectionist position of the Palestinian Arab people in those days.¹⁵

Moreover, an analysis of the basic concept of the Zionist movement - whose unchanging political aims are to advance and protect first of all "Jewish national interests" - is also essential for an understanding of all subsequent developments in the highly conflict-loaded relationship between the Jewish and Palestinian Arab people.

¹¹ The Hebrew term for "People's Council" is "Mo'etzet Ha'Am". This body has been described in the ISRAEL GOVERNMENT YEARBOOK 5729, at 21 as "representing all existing public bodies, and a faithful expression of national unity in an hour of national crisis." Cited in Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 *Columbia Law Review* (1970) 1217, at 1219, NOTE 12

¹² The Hebrew term for "People's Administration" is "Minhelet Ha'Am"

¹³ Ruth Gavison, *The Controversy over Israel's Bill of Rights*, 15 *I.Y.H.R.* (1985) 113, at 116

¹⁴ Kretzmer, *supra* note 9, at 2

¹⁵ At this point it should be mentioned that the Palestinian Arab attitude towards the UN Resolution 181 (II) of 29 November 1947 changed over the years. The Declaration of Independence of the State of Palestine of 15 November 1988 explicitly bases the Palestinian right to an independent state on UN Resolution 181 (II) -- which was previously rejected. See the Palestinian Declaration of Independence, 15 November 1988. Text courtesy of PA Ministry of Information, <http://www.palestine-net.com/politics/indep.html>

As I will show in more detail in the course of this work, the said conflict-loaded relationship between these two peoples is the result of a translation and implementation of political Zionist objectives into the whole fabric of Israel's legal and social order, leading to the situation of a permanently favored treatment of the whole - i.e. the present and the potential (future) - Jewish population at the expense of the indigenous Palestinian Arab people and their fundamental rights and freedoms.

Since the establishment of the state of Israel on 14 May 1948 - up until the very present day of writing this work - the concept of political Zionism is specifically reflected in laws, regulations and court decisions dealing with the right to property¹⁶ (especially land rights), the right to citizenship and nationality,¹⁷ the right to equality,¹⁸ the right to freedom of movement and residence.¹⁹

It should be stressed at this point that the violations of these rights which occur mainly with regard to the native Palestinian Arab inhabitants - specifically the issue of ownership and sovereignty of land as well as the connected issue of the demographic composition of the whole population living within the same territory - lay at the very foundations of the whole conflict between the Israeli/Zionist and the Palestinian/Arab people.

2. Ideology and Doctrines of the Concept of Political Zionism

The modern concept of political Zionism²⁰ emerged at the turn of the 19th century²¹ in response to the growing anti-Semitism²² - in the sense of anti-Jewish

¹⁶ See Chapter G. (The Right to Property)

¹⁷ See Chapter C.4. (The Concept of the State of Israel as a "Jewish State" and its Impact on Legislation and Jurisprudence concerning the Right to Citizenship and Nationality)

¹⁸ See Chapter C.3. (The Concept of the State of Israel as a "Jewish State" and its Impact on Legislation and Jurisprudence concerning the Right to Equality)

¹⁹ See Chapter D. (Israel's Permanent State of Emergency and the Question of its Compatibility with the Concept of a Liberal Democracy based on Human Rights and Freedoms)

²⁰ Walter Laqueur, *A History of Zionism* (London: Weidenfeld and Nicholson, 1972) at 590

²¹ The idea of political Zionism was - for the first time - established in the Basle Program of 1897. For more details see the following sub-chapter 3.3.1.

²² Literally the term anti-Semitism means persecution of or discrimination against Jews. The term came into being in the 1870's, and its first use is variously attributed to the German Wilhelm Marr and the Frenchman Ernest Renan. In one aspect the term was from the very beginning a misnomer since, in the jargon of the racial theory of that period, "Semites" were a broad group of non-European ethnic groups including the Arabs, whereas the term anti-Semitism was and is used to mean anti-Jewish racism. See *Concise Oxford Dictionary of Politics* (Oxford University Press 1996) at 13-14

racism - in Europe and Russia, where in 1881 a series of pogroms directly led to the formation of plans to establish an own state in Palestine.²³

Political Zionism as a movement intended to offer a solution to the problem of anti-Semitism through Jewish immigration into and colonization of Palestine,²⁴ accompanied by a change in the legal status of Jewish immigrants in Palestine under public law.²⁵

The concept of political Zionism is a special form of the idea of nationalism, which, broadly speaking, turns devotion to the nation into principles or programs and thus contains a different dimension to mere patriotism which is devoid of any project for political action.²⁶

Like many types of nationalism²⁷ also the concept of political Zionism tolerates considerable ideological diversity, and the existence of various doctrines of Zionism, such as left-wing, labor, socialist, capitalist, right-wing, revisionist, synthetical, cultural, religious, secular Zionism actually points to this fact.

A detailed discussion of these different doctrines of political Zionism lays, however, definitely outside the range of the present study.²⁸

²³ At the very beginnings of its intentions to establish a Jewish national home, the Zionist movement considered different places in South America and East Africa (Uganda) for the practical implementation. But these suggestions were all dropped in favor of Palestine, which was claimed by the Zionist movement as being "...not only the place with a spiritual bond between God and the Jewish people, but also as an essentially unused, unappreciated territory which was inhabited not by an advanced population but by a backward, dishonest, uneducated and ignorant Arab people."

See the letter of 30 May 1918 from Chaim Weizmann to Lord Balfour, quoted in Edward Said, *The Question of Palestine* (Vintage Books Edition, 1992. Originally published: New York: Times Books, © 1979) Chapter 1 (The Question of Palestine) at 26-28. See also Laqueur, *supra* note 20; Zeev Sternhell, *The Founding Myths of Israel* (Princeton: 1998)

²⁴ Avraham Granovsky, *Land and the Jewish Reconstruction in Palestine* ("Palestine and Near East" Publications, Jerusalem, 1930) at 119, 120

²⁵ Laqueur, *supra* note 20; E. Said, *supra* note 23, Chapter 1 (The Question of Palestine) and Chapter 2 (Zionism from the Standpoint of its Victims); Sternhell, *supra* note 23; Walid Khalidi and Jill Khadduri (editors), *Palestine and The Arab-Israeli Conflict* (Institute For Palestine Studies, Beirut, 1974) 59-67 (Chapter II. Historical Background- Origins of Zionism) at 27, 59-67

²⁶ Concise Oxford Dictionary of Politics, *supra* note 22, at 334-335, 538

²⁷ The definite objectives and strategies of particular nationalisms vary considerably and may range from the aim of maintenance of cultural identity and language, over the aim of preservation of political autonomy, to the aim of establishment of a political unity and independence, and even the aim of territorial expansion or protection of the interests of extraterritorial nationals.

²⁸ For details on the different streams of Zionism see Laqueur, *supra* note 20, Chapter 6 (dealing with left-wing, socialist Zionism), Chapter 7 (dealing with Jabotinsky and revisionism), Chapter 9, at 481-484 (dealing, inter alia, with religious Zionism), Chapter 8 (dealing with basic anti-Zionist positions and critics to Zionism, namely: 1. the liberal-assimilationist critique; 2. the Jewish religious, ultra-orthodox critique; 3. the critique exercised by the