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

Ilan Saban∗

INTRODUCTION .......................................................................................................................... 301
I. LAW AND MINORITIES IN DEEPLY DIVIDED SOCIETIES—OUTLINING A STRUCTURE FOR ANALYSIS ................................................................. 302
II. THE CONTROL FRAMEWORK: THE SOCIO-POLITICAL STATUS OF THE ARAB-PALESTINIAN MINORITY IN THE FIRST THIRTY YEARS OF ISRAEL’S STATEHOOD ........................................................................................................... 308
   A. Background on the Minority’s Socio-political Status .................................................... 308
   B. The Control Framework ................................................................................................. 316
III. LAW AND THE COMMON RIGHTS OF CITIZENSHIP AND THE WAYS IN WHICH THEY WERE WEAKENED ................................................................................................................................. 318
   A. Common Rights of Citizenship ..................................................................................... 318
   B. How did the Potential Inherent in the Common Rights of Citizenship Lose its Potency? ................................................................................................................................. 321
      1. Allocation of Sweeping State Powers Accompanied by Extensive Discretion ................................................................. 321
         a. The Role of Majoritarianism ..................................................................................... 322
         b. The Difficulties of Battling Discrimination Under Israeli Law During Military Rule ......................................................... 326
         c. Military Rule and the Appropriation of Land ......................................................... 329
      2. The Weakness of Supervisory Bodies, such as the Courts, in Protecting the Minority ................................................................................................................................. 332
         a. The Ambivalent Role of the Israeli Supreme Court ................................................ 334
         b. The al-Ard Movement as a Case Study ...................................................................... 339

∗ Assistant Professor of Law, Haifa University, Mt. Carmel, Israel. I am deeply grateful to Moussa Abou Ramadan, Ceren Belge, Gidon Cohen, Eitan Fluger, Tammy Harel-Ben-Shachar, David Kretzmer, Amir Meltzer, Liav Orgad, Emily Schaeffer, Revital Sella, Gilat Visel-Saban, Oren Yiftachel, and Raef Zreik. Many thanks also to the staff of the Emory International Law Review, who contributed greatly to the final version of this Article. An earlier version of this Article was published in Hebrew in Bar-Ilan Law Studies.
IV. LAW AND THE POVERTY OF GROUP-DIFFERENTIATED RIGHTS OF
THE ARAB-PALESTINIAN MINORITY MEMBERS IN THE FIRST
THIRTY YEARS OF STATEHOOD ........................................................... 343
A. The Group-Differentiated Rights of the Arab-Palestinian
Minority—What Was Granted and What Was Withheld? .......... 346
   1. The Predominance of the Accommodation Type of Group-
      Differentiated Rights ................................................................. 346
   2. Centralism and the Depletion of the Minority’s Self-
      Government Rights ............................................................... 351
   3. The Non-existence of Special Representation and
      Allocation Rights ................................................................. 353
B. The Role of the Law in Perpetuating the Social Separateness
   of the Ethno-National Communities in Israel ..................... 357
V. LAW AND THE STABILITY OF THE CONTROL FRAMEWORK ............ 359
A. Involvement of the Law in Mechanisms to Fend off Minority
   Motivation to Change the Existing Order .............................. 360
   1. Disguise and the Law ............................................................ 361
      a. Preferring the Circuitous to the Explicit ....................... 361
      b. The Course of Divergent Paths ..................................... 364
      c. Constricting the Information Market and Diverting It .. 365
   2. Law and the Production of Legitimacy ............................... 367
B. Involvement of the Law in Mechanisms to Curb the
   Translation of a Motivation into Action Aimed at Changing
   the Existing Order ................................................................. 368
   Dependence, Deterrence, and Cooptation, Mixed with
   Legitimization—Arab-Palestinian Teachers as an
   Illustration ................................................................. 369
C. Involvement of the Law in Mechanisms to Render Actions
   Ineffective to Promote Change ........................................... 372
   Law and the Internal Division of the Minority ..................... 372
CONCLUSION ............................................................................... 375
INTRODUCTION

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

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

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

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

---

1 IAN LUSTICK, ARABS IN THE JEWISH STATE: ISRAEL’S CONTROL OF A NATIONAL MINORITY (1980); see also Ian Lustick, Stability in Deeply Divided Societies: Consociationalism Versus Control, 31 WORLD POL. 325 (1979) [hereinafter Lustick, Stability in Deeply Divided Societies].
the scope of this Article, are Northern Ireland and its Irish-Catholic minority from 1921 to 1968,\(^2\) Sri Lanka and its Tamil minority from the 1970s forward,\(^3\) and possibly also the Kurdish minority in Turkey.\(^4\)

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

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

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

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

\(^3\) Ilan Peleg, Democratizing the Hegemonic State 183–87 (2007); Maya Chadda, Between Consociationalism and Control: Sri Lanka, in MANAGING AND SETTLING ETHNIC CONFLICTS: PERSPECTIVES ON SUCCESSES AND FAILURES IN EUROPE, AFRICA, AND ASIA 94, 94–95 (Ulrich Schneeknecht & Stefan Wolff eds., 2004).


\(^6\) Id.
and balances. In addition, the impact of the norms that these institutions generate is often unforeseen because these norms are employed by different social players in an attempt to bring about social change. The legal analysis aspires, therefore, to expose simultaneously how the law is involved in the mechanisms that conserve the existing order, as well as how it may become a lever for those wishing to modify the order of things.

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

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

---

8 Hart, supra note 5, at 91–95.
especially true with respect to the decisions of courts,\textsuperscript{10} but it also often applies to legislation. For instance, it is not easy to devise an electoral system that protects Favored Minority A while simultaneously working to the disadvantage of Marginalized Minority B. As a result, although the state may want to protect a certain minority, oftentimes another minority will inevitably receive protection as well.

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

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

\textsuperscript{10} Mark Tushnet referred to this point when he discussed “the inevitable openness of reasoning by analogy.” \textsc{Mark Tushnet, The American Law of Slavery 1810–1860: Considerations of Humanity and Interest} 40 (1981).
encouraging an overarching and superseding common identity, and whether the weaker community is coerced or pressured to accept this dimension of the framework. The third question concerns how the relational framework attempts to remain stable in the face of its sources of antagonism.

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

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

---

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


13 Id.


16 See id.

17 Id.

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

The third paradigm, the ethnic paradigm, resembles consociationalism in that it maintains the separateness of the communities comprising a society, but differs essentially from consociationalism in that it is a distinctly hierarchical framework. This is the paradigm that Israel maintains toward its Arab-Palestinian minority. As mentioned above, it also characterizes Northern Ireland’s approach toward its Catholic minority, at least until the early 1970s, and that of Sri Lanka vis-à-vis the Tamil minority in recent decades. Another example of this paradigm can be found in Macedonia’s treatment of its Albanian minority, certainly until the Ohrid Agreement in 2001. This paradigm is divided into three sub-types. Israel oscillates between two and does not seem likely to attain the third in the foreseeable future.

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

---

19 Id.; see generally AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984) (comparing consociational democracy—which Lijphart here calls consensus democracy—to majoritarian democracies).
20 LIJPHART, supra note 18, at 121–27.
22 LIJPHART, supra note 18, at 130.
24 Id.
25 Id.
26 Id.
27 Id.
29 Saban, Minority Rights, supra note 7, at 922, 987.
30 See Smooha, Minority Status in an Ethnic Democracy, supra note 12, at 391 (depicting the application of ethnic democracy “by focusing on Israel as a democratic ethnic state and on the discord as to the status of the Arab minority in it”).
fundamentally. Although it would not have become a full partner in the state, it
would have ascended to a notch above the status of a “protected” minority. 31
The Arab-Palestinian minority would then have enjoyed the power to self-
administrate important internal spheres of its communal life.32

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

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

---
31 See Saban, Minority Rights, supra note 7, at 979–82.
32 See id.
33 For an expanded review, see id. at 919–24.
35 See id.
36 See, e.g., Saban, Minority Rights, supra note 7, at 994–97 (describing the potential effect of changes in
the legal status of Arabic on its “sociolinguistic status,” and describing the absence of systemic support for this
change in Israel).
37 See Saban, Appropriate Representation of Minorities, supra note 15, at 565–66 (describing the
potential nature and effect of affirmative action).
II. THE CONTROL FRAMEWORK: THE SOCIO-POLITICAL STATUS OF THE ARAB-
PALESTINIAN MINORITY IN THE FIRST THIRTY YEARS OF ISRAEL’S STATEHOOD

A. Background on the Minority’s Socio-political Status

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

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

38 Id. at 572–74.
39 BENNY MORRIS, BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947–1948 1 (1987); see also U.N.
Conciliation Comm’n for Palestine, General Progress Rep. and Supplementary Rep., Dec. 11, 1949–Oct. 23,
approximately 711,000).
41 MORRIS, supra note 39, at 27–29.
42 Ardi Imseis, On the Fourth Geneva Convention and the Occupied Palestinian Territory, 44 HARV.
43 MORRIS, supra note 39, at 29.
44 Kathleen A. Cavanaugh, Selective Justice: The Case of Israel and the Occupied Territories, 26
At the end of the war, about 160,000 Arab-Palestinians were left within Israel’s cease-fire borders and became Israeli citizens. The war left the Palestinian people devastated. They became at once a stateless and a trans-state people (spread between Israel and all its neighboring countries: Jordan, Lebanon, Syria, and Egypt). The *nakba*, the 1948–1949 disaster of the Palestinians, had personal repercussions as well. The dispossession and expulsion of many Palestinian communities left a great part of the refugees with a strong sense of injustice and grief. Those who remained in Israel became an indigenous, vanquished minority. They were dominated by newcomers (who conceived of themselves as returnees). Some of the Arab-Palestinians who remained in what became Israel were internal refugees, uprooted from their birthplaces that had been destroyed. Those who stayed were mainly a traditional, rural, farming population. They were internally segmented further into three communities—the Muslim community and the two other, smaller, communities—Christian-Arabs and Druze. In short, the


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


51 MORRIS, supra note 39, at 8–9.

52 See id. at 199–201.
minority was fragmented, elite-less, and economically deprived, comprising about 12.5% of the overall population of Israel at the time.53

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

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

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

53 Gershon Shafir & Yoav Peled, Being Israeli: The Dynamics of Multiple Citizenship 111 (2002).
54 Sabri Jiryis, The Arabs in Israel 138–40 (1976); see also Khalidi, supra note 47, at 177–209 (describing the Palestinians’ state of mind following the 1948 War); Michael B. Oren, Six Days of War 4–12 (2002).
56 Id. This complex, multilateral relationship is the reason the minority in Israel experienced and continues to experience fluctuations in this relationship. See, e.g., id., at 140–53. The harshest example of this in the period under review was the Kfar Qassem Massacre, on the eve of the 1956 Suez Operation. See id. For further discussion of the multilateral relationship, see generally Alan Dowty, The Jewish State: A Century Later 211–12 (1998); Lustick, supra note 1, at 84–86; Shafir & Peled, supra note 53, at 134; Dan Rabinowitz, The Palestinians Citizens of Israel, the Concept of Trapped Minority and the Discourse of Transnationalism in Anthropology, 24 Ethnic & Racial Stud. 64 (2001); Smooha, Control of Minorities, supra note 2, at 259, 262; Oren Yiftachel, Debate, The Concept of “Ethnic Democracy” and Its Applicability to the Case of Israel, 15 Ethnic & Racial Stud. 125 (1992).
58 Id.
59 Rabinowitz, supra note 56, at 73–74.
Additionally, the self-image of the minority and its image in the eyes of the majority community differ in several ways. The minority possesses a hybrid identity: it shares Palestinian national affiliation and sense of nationhood but carries Israeli citizenship; and, it has specific cultural and political features—bilingualism is one example, an idiosyncratic political agenda another. Moreover, by and large, the Arab-Palestinian minority has never joined the armed conflict. However, the Jewish majority community tends to ignore these intricacies, most noticeably in times of severe external strife.

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

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


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


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

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

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

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

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

---


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

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

70 See id.

71 See id.

72 See Horowitz & Lissak, supra note 67, at 70, 244.

73 See id. at 69–73.


75 See id. at 16–17.

76 See id. at 16.
two and entailed geographical dispersion of Jewish settlements across the country and particularly along its borders.\textsuperscript{77}

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

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

\textsuperscript{77} See id. at 24.


\textsuperscript{80} See David Kretzmer, The Legal Status of the Arabs in Israel 49–69 (1990).

\textsuperscript{81} Saban, Minority Rights, supra note 7, at 891–93.

\textsuperscript{82} Saban, Minority Rights, supra note 7, at 914, 961–63.


\textsuperscript{84} Some of the implications of this war have yet to unfold. At this juncture, suffice it to say the following: the Israeli occupation in 1967 has rendered a large portion of the Palestinian people an occupied people in their own land—the West Bank and the Gaza Strip are under Israeli military occupation and without Israeli democratic civic protection. That is, the Palestinians are without civil and political rights to participate in
the wake of this war is multidimensional and ongoing; however, it will not be discussed here.

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

The changes in the 1970s also impacted Israeli society in general. Enormous control efforts were transferred to new arenas—especially to the West Bank and the Gaza Strip, and the Israeli settlement project in those territories began its fateful march. At the same time, and somewhat paradoxically, concurrent with the 1967 occupation, democratization was afoot within Israel proper. Jewish social movements had appeared before the 1973 war, and political movements emerged in the wake of this war. Some of these political movements led to the protests and demonstrations that accompanied the first war with Lebanon in 1982–1983. Israeli media came to be somewhat

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

85 Shany Payes, Palestinian NGOs in Israel: A Campaign for Civic Equality in a Non-Civic State, 8 ISR. STUD. 60, 70 (2003).
87 Id.
88 The Land Day events and the thoughts they provoked led to a real slowdown in the appropriation of private land in the Galilee and the Triangle region (ha-Meshulash). However, in the south (the Negev) the State continued its efforts to consolidate its hold over the Bedouin areas, and generally the Judatization Project there continued apace. See SHAFIR & PELED, supra note 53, at 112–17; OREN YIFTACHEL, ETHNICOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE 188–210 (2006).
89 CLEVELAND, supra note 46, at 354–57.
90 Saban, The Legal Status of Minorities, supra note 78, at 335–38.
91 Id.
more independent and critical. Finally, supervisory mechanisms appeared busier and more assertive—including the Supreme Court, the Attorney General, and the State Comptroller—and beginning in the second half of the 1970s, Israeli jurisprudence underwent important overall changes. Moreover, following the 1977 elections, the Mapai Party, which in 1968 became the "Israeli Labor Party," lost its hegemony and two blocs came to compete on the Israeli political arena—the Labor and Likud Parties. All of these changes may be linked to cultural developments of the time, including a rise in the acknowledgement of human rights standards within Israel proper and a more impetuous individualism.

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

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

---

92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
98 Id. This term, “ethnic democracy,” unlike the actual argument regarding the moderation of the relational pattern in Israel, is very controversial. Oren Yiftachel & As’ad Ghanem, Towards a Theory of Ethnocratic Regimes: Learning from the Judaization of Israel/Palestine, in RETHINKING ETHNICITY: MAJORITY GROUPS AND DOMINANT MINORITIES 179, 188–94 (Eric P. Kaufmann ed., 2004). I have attempted to grapple with the question before. I believe the term is pertinent because it underscores the preference for the majority (Jewish) community and at the same time contains part of the secret of its stability—the threshold of human rights that it preserves. However, in view of the past forty-three years of occupation and colonization of the West Bank, it becomes indeed truly difficult to utilize this term to characterize Israel as a whole. See Saban, The Legal Status of Minorities, supra note 78, at 336–37.
99 Lustick, supra note 1; Lustick, Stability in Deeply Divided Societies, supra note 1, at 325–44; Smooha, Control of Minorities, supra note 2.
to a brief presentation of this pattern before proceeding to the core of the Article—analyzing the pattern’s legal dimensions.

B. The Control Framework

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

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

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

---

100 See, e.g., ELIA ZUREIK, THE PALESTINIANS IN ISRAEL: A STUDY IN INTERNAL COLONIALISM (1979).
101 See, e.g., id. at 5, 13. Oren Yiftachel developed a model using this perspective and called it the “ethnocratic” model. See YIFTACHEL, supra note 88.
102 LUSTICK, supra note 1; Lustick, Stability in Deeply Divided Societies, supra note 1, at 325–44. See generally Smooha, Control of Minorities, supra note 2.
103 See, e.g., Smooha, Control of Minorities, supra note 2 (applying the control framework to both Northern Ireland and Israel).
105 Kedar, supra note 79; KRETZMER, supra note 81.
community and a minority community. Aspiring to a malleable minority is a mark of such a relationship. It is an almost pseudo-democratic system, just a hairbreadth away from forfeiting the right to be considered democratic. As examples of the control framework, Lustick and other writers named Northern Ireland from 1921 to 1968, the southern states of the United States between the end of the American Civil War and the 1960s, Israel in the first thirty years of its existence, and other instances of “formal Democracy."

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

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

106 Lustick, Stability in Deeply Divided Societies, supra note 1, at 325–44.
107 Lustick, supra note 1, at 69–81.
108 Id.
110 Lustick, Stability in Deeply Divided Societies, supra note 1, at 325; Smooha, Control of Minorities, supra note 2, at 257.
111 Lustick, Stability in Deeply Divided Societies, supra note 1, at 326–27; Smooha, Control of Minorities, supra note 2, at 256.
112 Lustick, Stability in Deeply Divided Societies, supra note 1, at 326–27; Smooha, Control of Minorities, supra note 2, at 264, 266.
113 Lustick, Stability in Deeply Divided Societies, supra note 1, at 325–27; Smooha, Control of Minorities, supra note 2, at 266.
114 Lustick, Stability in Deeply Divided Societies, supra note 1, at 339.
115 See id.; Smooha, Control of Minorities, supra note 2, at 273.
restricted minority members’ ability to consolidate a joint political action, barred access of individuals from the minority to independent sources of economic support, and carved out an effective invasion route for the ruling group into the subordinated one for the purpose of supervision and expropriation of assets.\footnote{Lustick, supra note 1, at 78–81.} Three main mechanisms were employed: (1) separateness—insulating the minority from the majority and from external forces and dividing it from within; (2) cultivating dependency of the minority on the majority; and (3) cooptation—bribing or otherwise tempting the elite or potential leaderships and captiving them.\footnote{Id. at 82–231.}

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

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

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

A. The Common Rights of Citizenship

Human rights—the common rights of citizenship and personhood—are the rights granted to every person by virtue of his humanity or on the basis of his citizenship. One would expect that conferring these rights and upholding them would provide meaningful protection to individuals of the national minority group.\footnote{Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 26 (1995).} However, if this is the potential of the common rights of citizenship, we may both contemplate and check the following assumptions related to the way these rights are expected to appear and be applied within the control framework in Israel. The scope and exercise of these rights are expected to be restricted, such that they would not seriously impede the achievement of the
control framework’s aims vis-à-vis the minority’s weakness; at the same time, stability (and the self-perception of the majority as holding democratic values) demands that a threshold of minimal civil and political rights be preserved and that discrimination be, as much as possible, “reasonable.”\textsuperscript{119} Put differently, it is expected that there be a delicate balance: on the one hand, rights cannot be taken too seriously, otherwise land appropriation and other major tasks may be blocked, and dependency, deterrence, division, and cooptation will not crystallize\textsuperscript{120}—dependency cannot survive an assertive and well-protected norm prohibiting discrimination based on group affiliation. On the other hand, stability is served when the restriction of rights is not too obvious or is not conducted in an openly biased manner.\textsuperscript{121} Israeli law of the time confirms these expectations.

Israeli law has maintained an almost full \textit{formal equality} in the common rights of citizenship\textsuperscript{122}—that is, it has been characterized by a serious effort to avoid formal discrimination on ethnic grounds relating to the articulation of individual rights and obligations, immunities and subjugations.\textsuperscript{123} Hence, official discriminatory norms have not appeared in the context of political rights, such as the rights to vote and be elected, freely express oneself, demonstrate and associate, and not even in relation to the rights to own property and move about freely.\textsuperscript{124} The extensive appropriation of Arab-Palestinian land and imposition of military rule on the Arab-Palestinian citizens were exercised on the strength of norms of a \textit{general nature}, purportedly without the Arab-Palestinian minority as their object.\textsuperscript{125} Moreover, from the outset the State has been careful to uphold minimum safeguards of the minority’s civil and political rights.\textsuperscript{126}

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

\textsuperscript{119} \textit{Kretzmer, supra} note 81, at 77.
\textsuperscript{120} See \textit{id.} at 52.
\textsuperscript{121} See \textit{id.} at 127–29.
\textsuperscript{122} \textit{Id.} at 77.
\textsuperscript{123} \textit{Id.} at 77–78.
\textsuperscript{124} See \textit{id.} at 83–84; see also \textit{Hofnung, supra} note 83, at 75–76.
\textsuperscript{125} \textit{Dowty, supra} note 56, at 197–200.
affiliation, group-differentiated rights are conferred upon certain persons specifically for their group affiliation.127 These rights are the prerogative of cultural minorities and they have two aims.128 They strive first to allow minority members to protect their cultural identity, values, and major customs in the face of the dominant culture, and second to enable them to participate in the society’s wider institutions that are supposed to safeguard them against divestment and discrimination.129

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

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

127 See KYMLICKA, supra note 118, at 26–33.
129 See id.
130 See, e.g., Saban, Minority Rights, supra note 7, at 900–01.
131 See infra Part IV.
132 See, e.g., id.
133 See id.
135 Id. at 15.
In other words, group-differentiated rights have been administered beyond the reach of the courts’ power to enforce the principle of equality. Israeli law’s candor on this issue derives mainly from the fact that even the multicultural version of liberalism does not make a clear-cut case for obligatory equality in group-differentiated rights.137

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

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

1. Allocation of Sweeping State Powers Accompanied by Extensive Discretion

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

---

136 Id. at 16–17.

137 KYMLICKA, supra note 118, at 152; KYMLICKA, POLITICS IN THE VERNACULAR, supra note 128, at 53–55, 152–76.
legislature, and especially in the executive, under Israeli law during this period.  

a. The Role of Majoritarianism

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

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

---

139 Id. at 77.
140 The exception was the Israeli proportional representation system of elections (party-list), as opposed to a single-member plurality system (first past the post). The Electoral System in Israel, KNESSET.GOV.IL (2002), http://www.knesset.gov.il/elections16/eng/about/electoral_system_eng.htm.
141 CA 228/63 Azuz v. Azar 17(1) PD 2541, 2547 [1963] (Isr.).
142 Kretzmer, supra note 81, at 89–108.
143 Id. at 11.
144 Id. at 8.
145 See Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3, 4 (1948) (Isr.).
continue to this date), the government enjoyed comprehensive powers and dominance. This state of affairs was manifested in several ways—first in the formal interplay of power between the executive and the legislature.\(^{147}\) For example, some of the authority vested in the executive included emergency regulations that could temporarily override legislation.\(^{148}\) The norm upon which this power rested was mainly Section 9 of the Law and Government Ordinance 1948.\(^{149}\) Second, the allocation of powers between central and local governments possessed a very centralist structure.\(^{150}\)

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

The second example is the Supreme Court’s decision in the Aslan case.\(^{154}\) The Court endorsed the Arab-Palestinian petitioners’ claim that the enclosure order of Rabsayeh village, which had been issued under the authority of Regulation 125\(^{155}\) of the Mandatory-period Defence Regulations (State of Emergency) 1945, must be officially published to be valid.\(^{156}\) As the enclosure order had not been properly published, the Court annulled it.\(^{157}\) The Prime

---

\(^{147}\) See, e.g., HOFNUNG, supra note 83, at 52.
\(^{148}\) KREITZMER, supra note 81, at 45.
\(^{149}\) For an extended discussion, see HOFNUNG, supra note 83, at 51–67.
\(^{151}\) Land Acquisition (Validation of Acts and Compensation) Law, 5713–1953, 7 LSI 43 (Isr.).
\(^{152}\) See HOFNUNG, supra note 83, at 117–20.
\(^{154}\) HCJ 220/51 Aslan v. Military Governor of Galilee 5 PD 1480, 1482 [1951] (Isr.).
\(^{155}\) HOFNUNG, supra note 83, at 66.
\(^{156}\) Id.
\(^{157}\) Id.
Minister and the Minister of Defense promptly issued emergency regulations under the above-mentioned Section 9 of the Law and Government Ordinance and so validated, retroactively, the order that the Court had annulled.158 Later, the Knesset amended Section 10(c) of the Law and Government Ordinance so that the obligation to publish no longer applied to orders issued per the Mandatory Defence Regulations.159

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

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

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

---

159 For a full description, see HOFNUNG, supra note 83, at 66–67; RUBINSTEIN & MEDINA, supra note 146, at 259–60.
160 HCJ 69/55 Bulus v. Minister of Development 7 PD 147, 151 [1955] (Isr.).
161 Id.
162 See Absentees’ Property Law (Amendment No. 3) Release and Use of Endowment Property, 5725–1964, SH No. 445 p. 58 (Isr.).
163 Id.
165 Saban, The Legal Status of Minorities, supra note 78, at 259–60.
land—both the legislature and the judiciary showed special leniency toward the executive.166

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

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

---

166 See, e.g., infra text accompanying notes 250–667.
167 See infra notes 171–74 and accompanying text.
168 See infra Part IV A.2.
169 HOROWITZ & LISSAK, supra note 67, at 151–56.
171 The certification regime rested mainly on the following: (1) the Defence (Emergency) Regulations 1945 promulgated following the Palestine Order-in-Council 1937; (2) the Emergency Regulations on the authority of Section 9 of the Law and Administration Law 1948; and (3) orders emanating from the Commodities and Services (Control) Law 1957 (and the legislation that preceded it). For a more detailed discussion, see HOFNUNG, supra note 83, at 47–67 (describing emergency legislation in Israel); RUBINSTEIN & MEDINA, supra note 146, at 46, 814–16, 1165; Saban, The Legal Status of Minorities, supra note 78, at 259.
172 See infra text accompanying notes 199–223.
173 See infra text accompanying note 200.
providing for sweeping governmental authority. On the basis of the Defence Regulations (State of Emergency) promulgated in 1945, military commanders sealed off certain areas—those in which the Arab-Palestinian minority resided.\textsuperscript{174} Moreover, as will be expanded upon \textit{infra}, it was not the legislature that imposed this invasive, all-encompassing, long and oppressive regime, and indeed it was the executive that abolished it almost twenty years later.\textsuperscript{175} This example serves as a lucid vindication of the claim regarding the near limitlessness of executive power at that time.

\textit{b. The Difficulties of Battling Discrimination Under Israeli Law During Military Rule}

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

Moreover, Israeli legal doctrine considers it the political authorities’ unhindered prerogative to set the priorities for material and especially financial allocations. Not wishing to tie themselves down, the authorities avoided setting criteria for funding, and there had been no detailed standards defined for even the most basic public services, such as education, health, religious services, public transport, and housing.\textsuperscript{177} This flexibility also applied to state financial allocation to private bodies engaging in public activities\textsuperscript{178} and was consolidated through the government’s residual authority.\textsuperscript{179}

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

\textsuperscript{174} Id. at 14–15.
\textsuperscript{177} Krizemer, \textit{supra} note 81, at 123, 128–29; Saban, \textit{The Legal Status of Minorities}, \textit{supra} note 7, at 267–68.
\textsuperscript{178} See \textit{infra} notes 192–98 and accompanying text.
\textsuperscript{179} This state of affairs only changed in the 1980s after several cases that led to the enactment of the Budgetary Principles Law 1985, which provided a statutory obligatory procedure in regard to many state financial allocations. Budgetary Principles Law, 5745–1985, 25 SH 61 (Isr.).
minority faced a series of hurdles. First, at least until the 1960s, the Supreme Court ruled in several cases that discrimination is not itself sufficient cause to warrant remedy.\textsuperscript{180} The norm was that granting a remedy depends on the existence of an “essential right.”\textsuperscript{181} An essential right was a right acknowledged by law, or an interest that Israeli court precedent recognized as protected.\textsuperscript{182} Hence, “discrimination cannot serve as cause for [the Court’s] interference if the petitioner has not shown [the Court] that such act adversely affects some right he possesses.”\textsuperscript{183}

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

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

Needless to say, proving such motivation is very demanding.\textsuperscript{188}

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

\textsuperscript{181} Cohen, supra note 180, at 162–63.

\textsuperscript{182} \textit{Id.} at 163–65.

\textsuperscript{183} \textit{Id.} at 163.

\textsuperscript{184} KREITZMER, supra note 81, at 78–79.

\textsuperscript{185} \textit{Id.} at 78.

\textsuperscript{186} HCJ 30/55 Nazareth Lands Defence Committee v. Minister of Finance 9 PD 1261 [1955] (Isr.).

\textsuperscript{187} \textit{Id.} at 1266.

\textsuperscript{188} The obligation to prove motivation was not even moderated by the United States’s protection of “insular minorities.” United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938). American law exercises strict scrutiny, substantial and evidential, in cases where discrimination could be suspected. Eyal Benvenisti &
Third, differential allocation is not considered discriminatory in the presence of relevant differentiation. Thus, procedures reserved exclusively for the Jewish community could be classified as affirmative action rather than selective preference.189 A case in point is Bourkhan,190 from the late 1970s, in which the Court endorsed barring Arabs from buying an apartment in the Jewish quarter of the old city of Jerusalem, pointing to “special historical reasons.”193 Another relevant differentiation is invoked in the title “discharged soldiers” (veterans), who enjoy preference in a wide range of public allocations, including in spheres unrelated to military service.192

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

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

189 KRETZMER, supra note 81, at 80–81.
190 HCJ 114/78 Bourkan v. Minister of Finance 32(2) PD 800 [1978] (Isr.).
191 The Supreme Court held that “reconstruction of the traditional Jewish Quarter, as a Jewish quarter, alongside the Moslem, Christian, and Armenian quarters, was a legitimate governmental objective which was not flawed because of its exclusive Jewish nature.” Id. at 806; KRETZMER, supra note 81, at 80.
192 KRETZMER, supra note 81, at 98–107.
193 Id. at 83–84.
194 For the relevant law, see KRETZMER, supra note 81, at 63, 94–98. Explicit legislation dictated appointing National Institutions officials as counselors and participants in various decision-making capacities. Id. at 63. But even without this formality, the officials were very influential in decision-making: setting agriculture production quotas, deciding which poor neighborhoods would receive rehabilitation budgets, dictating public land use, overseeing urban building plans and certification, and setting broadcasting policy. Id. at 94–98. Regarding use of the National Institutions as a discrimination tool against the Arab-Palestinians, see DOWTY, supra note 56, at 197–98; JIRYIS, supra note 54, at 215–16; KRETZMER, supra note 81, at 64, 93–98; LUSTICK, supra note 1, at 97–109; Bauml, supra note 83, at 83–86.
195 See LUSTICK, supra note 1, at 97.
Jewish people.196 By contrast, the major workers’ union (the Histadrut)197 and the cooperative for agricultural marketing (Tnuva) were seemingly society-wide private agents; however, in practice they acted fully at the majority’s service.198 The state aided this discriminatory arrangement by creating monopoly conditions for those agents.199

c. Military Rule and the Appropriation of Land

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

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

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

196 KRETZMER, supra note 81, at 63–66.
198 JIRYIS, supra note 54, at 215; KRETZMER, supra note 81, at 94–98; LUSTICK, supra note 1, at 154. To take the Tnuva example, agricultural production and marketing boards’ directives authorized its monopoly—for example, Section 44 of the Poultry Board (Production and Marketing) Law 1963. See KRETZMER, supra note 81, at 94–98. The monopoly of the National Institutions in planning and developing new settlements was the result of administrative de facto practice. Id. For Tnuva’s use of its monopoly on the supply of milk and other agricultural products, see JIRYIS, supra note 54, at 215; LUSTICK, supra note 1, at 154.
199 See supra note 197.
200 KRETZMER, supra note 81, at 54; LUSTICK, supra note 1, at 177–78.
201 See Emergency Regulations (Security Zones), 5709–1949, 3 LSI 5079 (Isr.).
202 For a legal and political discussion of the military rule period, see Alina Korn, Military Government, Political Control and Crime: The Case of Israeli Arabs, 34 CRIME L. & SOC. CHANGE 159 (2000). See also JIRYIS, supra note 54, at 15–22; KRETZMER, supra note 81, at 136–41. For a socio-political discussion, see BENZIMAN & MANSOUR, supra note 197, at 175; Bauml, supra note 83, at 161–96; Ozatski-Lazar, supra note 126, at 6, 11, 70–78, 114–15.
rights, for which movement is often a prerequisite (especially during a period that contained many fewer transmission and coordinating technologies). \(^{203}\) Hence, movement restriction significantly withered effective speech and freedom of association, among other liberties. \(^{204}\) Moreover, appropriation of land was facilitated, as restriction of movement was used to uproot people from their land and impede their possession and cultivation of thereof, rendering the land “vacant/abandoned.” \(^{205}\)

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

Nevertheless, military rule did become less harsh over the years, notably from the late 1950s and especially after 1963, until its abolishment in 1966. \(^{211}\) In many cases, travel permits were issued on an annual rather than daily or weekly basis, and in daytime, movement from the enclosed areas into the main cities was allowed. \(^{212}\)

\(^{203}\) See JIRYIS, supra note 54, at 15–31.

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

\(^{205}\) See Korn, supra note 202, at 165; JIRYIS, supra note 54, at 27.

\(^{206}\) JIRYIS, supra note 54, at 16.


\(^{208}\) JIRYIS, supra note 54, at 27–28. These control mechanisms will be discussed in detail infra. For a further discussion of their actual use, see generally Hillel Cohen, Good Arabs: The Israeli Security Agencies and the Israeli Arabs (Ivrit 2006). See also HCJ 89/71 Al-Asmar v. Officer Commanding Central Region 25(2) PD 197 [1971] (Isr.); Lustick, supra note 1, at 202–09.

\(^{209}\) See Hofnung, supra note 83, at 91, 154–55; Lustick, supra note 1, at 123–29; Ozatski-Lazar, supra note 126, at 5–51, 75–76.

\(^{210}\) See Lustick, supra note 1, at 123–29; Ozatski-Lazar, supra note 126, at 166.


\(^{212}\) Hofnung, supra note 83, at 92–93.
On the legal plane, there is one point that I have already mentioned above, but it is worth repeating. Laying down military rule, modifying it over time, and finally abolishing it did not at any point involve the Israeli legislature, the Knesset. Military rule was legally established by executive discretion, and so it was modified and finally abolished. A Knesset majority, had one been found for the purpose, could have ended military rule by legislation, but the point remains that such a majority had not been forthcoming. Even more importantly, Israeli law allowed the subjugation of a whole population of citizens to a military regime without the need for approval, even periodically, by the Knesset.

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

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

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

213 Prime Minister Announcement in the Knesset, supra note 174.
214 Id.
215 See JIRYIS, supra note 54, at 75–136; KRETZMER, supra note 81, at 51–69.
216 See KRETZMER, supra note 81, at 51–69.
217 See JIRYIS, supra note 54, at 75–136; KRETZMER, supra note 81, at 49–76; LUSTICK, supra note 1, at 170–82.
218 KRETZMER, supra note 81, at 62; LUSTICK, supra note 1, at 173.
219 See Kedar, supra note 79, at 945.
public land was terminated.220 Arab-Palestinian land use was closely monitored, especially concerning house building.221 At the same time, large parcels of land were leased for long periods of time to Jewish settlement movements, while very little land was granted to Arab citizens, and on short-term leases.222 Moreover, the jurisdiction of local Arab authorities was strictly limited.223 Hence, the biased use of the State’s allocating power existed alongside the misuse of its taking power toward the minority.

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

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

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

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

220 Id. at 953.
222 See Kedar, supra note 79, at 946–47.
223 ROSEN-ZVI, supra note 170, at 132.
224 This state of affairs could have also been restrained by minority group rights, such as by way of Arab-Palestinian representation in decision-making bodies dealing with planning or administration of land in Israel. Id. at 131–32; YIFTACHEL, supra note 221, chs. 5, 10; Yishai Blank, The Location of the Local: Local Government Law, Decentralization and Territorial Inequality in Israel, 34 HEBREW U. L. REV. 197, 267–68 (2004) (Isr.). See generally Part IV infra for a description of the poverty of minority group-differentiated rights.
These checks on governmental powers were the result of the activity of supervisory bodies or arbitral agents, whose function is, *inter alia*, to protect the minority.\(^{225}\) Supervisory mechanisms protect the minority from without, and, as such, they differ from mechanisms or procedures in which the minority is actively involved in protecting itself, or in which it shares in decision-making powers. The supervisory or arbitral bodies can be domestic or international organs, but in either case they are distanced from each of the communities and mandated to settle disputes and safeguard human rights. The courts are intra-state supervisory agents, as are the State Comptroller, the Ombudsman, and the Central Bank.\(^{226}\) Experts in these institutions who make official decisions enjoy long-term appointments and an ethos of professionalism and independence, and are not directly accountable to an electorate.\(^{227}\) These aspects render them more natural “majoritarian checks,” endowed with a fair amount of institutional autonomy, which both frees them to a certain extent from seeking consensus and partially insulates them against pressures from the majority.\(^{228}\) People expect some of these bodies, the courts being a prime example, to govern themselves with rules of argumentation, open debate, neutrality, and coherence.\(^{229}\)

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


\(^{226}\) Lijphart et al., supra note 225, at 302, 306, 313.

\(^{227}\) Id.

\(^{228}\) See id. at 320–21.

\(^{229}\) See supra text accompanying note 10.
governmental activity contributes to the efficacy of control because it provides a modicum of legitimacy.²³⁰ And indeed, this is exactly what happened in the Israeli context—arbitral agents existed and the executive could not ignore them, but the agents did not threaten the control structure in any real sense. They were not powerful enough to constitute such a threat, even had they so chosen, and in any case they pursued a path that did not diverge radically from that of the political branches of the State.

a. The Ambivalent Role of the Israeli Supreme Court

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

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

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

²³⁰ Compare Ilan Saban, Hashpaa’t Bayt-Ha’Mishpat Ha’Aliyone Al-Ma’ámed Ha’Aravim Bi’Yisrael [The Impact of the Supreme Court on the Status of the Arabs in Israel], 3 LAW & GOV’T ISR. 541, 553–54 (1996) [hereinafter Saban, The Impact of the Supreme Court] (Isr.), with Ronen Shamir, “Landmark Cases” and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice, 24 LAW & SOC’Y REV. 781, 784–85 (1990) (addressing the role and impact of the law, particularly of the Supreme Court, with regard to the status of the Palestinians under occupation). A comparison between the status of Arab-Palestinians within the Green Line in the first thirty years of statehood (1948–1978) and that of the Palestinians in the occupied territories during the long years of occupation (since 1967) remains to be carried out. Should it be conducted, it is bound to yield interesting theoretical insights.
²³¹ See supra text accompanying notes 139–55.
²³² Saban, The Legal Status of Minorities, supra note 78, at 369.
upon human rights. The reference here is to either explicit restrictions on the empowering law or to the principle of legality—in other words, conditioning the validity of state actions upon statutory authorization. Thus, for example, in the heat of battle during 1949, the Court invalidated two administrative detentions because the detentions violated expressed restrictions in the Defence Regulation (State of Emergency) 1945. In one of the most important cases of the first days of statehood, the Court emphasized the legality principle and it was decided that the government could not impinge a basic right—freedom of employment, in this case—absent statutory authorization, express or at least implied. Another like instance is the sensitive issue of the internal refugees, the uprooted villagers of Iqrit. The Court decreed that the government should allow the villagers to return to their village because the State had not proven that it had exercised its authority legally in expelling them.

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

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

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

---

234 See HCJ 1/49 Bejerano v. Minister of Police 2(1) PD 80, 84 [1949] (Isr.); see also Ron Harris, Ha-Mishpat Ha-Yisraeli: 5708–5718 [Israeli Law, the Formative Years 1948-1958], in THE FIRST DECADE OF INDEPENDENCE 243, 258–57 (Hanna Yablonka & Zvi Zamereth eds., 1997).
235 See HCJ 64/51 Daoud v. Minister of Defence (Daoud I) 5(2) PD 1117, 1122 [1951] (Isr.).
236 See id.
237 HCJ 239/51 Daoud v. Security Zones Appeals Committee (Daoud II) 6(1) PD 229, 230 [1955] (Isr.). Shortly after, the village was razed. See Ozatski-Lazar, supra note 126, at 28.
them.238 The utter disregard of the executive for the judiciary, here and in a few other cases,239 was a warning signal that the Court could not have missed.

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

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

---

238 HCJ 239/51 Daoud v. Security Zones Appeals Committee (Daoud II) 6(1) PD 229, 230–31 [1955] (Isr.).
239 See Rubinstein & Medina, supra note 146, at 236 (discussing HCJ 288/51 Aslan v. Military Commander of the Galilee 9(1) PD 689 [1955] (Isr.)).
241 See infra notes 259–61.
242 See infra notes 243–47.
243 See HCJ 262/62 Peretz v. Chairman of Kfar Shmaryahu 16(3) PD 2010 [1962] (Is.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 191, 201 (Asher Felix Landau & Peter Elman eds., 1975) (using the term “public trustee” for one of the first times). This case detailed and implemented the prohibition of discrimination by an administrative authority. Id. at 192–93, 202–03.
244 It is the Kardosh ruling that stands out here, concerning annulment of the registrar’s decision to reject the request of an Arab political movement called al-Ard to register a publishing house company. FH 16/61 Registrar of Companies v. Kardosh 16(2) PD 1209 [1962] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 32, 54 (Asher Felix Landau & Peter Elman eds., 1975); HCJ 241/60 Kardosh v. Registrar of Companies 15(2) PD 1151 [1960] (Isr.), reprinted and translated in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 7, 31 (Asher Felix Landau & Peter Elman eds., 1975). For a discussion of al-Ard, see infra text accompanying notes 268–90.
upon basic rights; the certain independence of the authority bearer (the bureaucrat) vis-à-vis the upper (political) echelons of government, and more.

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

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

---

248 See supra text accompanying note 10.
252 HCJ 73/53 Kol Ha’am Co. v. Minister of Interior 7(2) PD 871 [1953] (Isr.), reprinted and translated in 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 94–97 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962) (annulling the Minister of Interior’s decision to shut down the Communist Party’s Hebrew- and Arabic-language journals, Kol Ha’am and Al-Ithad, for several days); see also PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY* 112 (1997) (analyzing the Court’s decision and the use of purposive interpretation of Section 19 of the Press Ordinance 1933).
the basis of Section 19 of the Press Ordinance 1933, a Mandatory-period legislative provision that was adopted into Israeli law as most other legal norms of the Mandatory regime. The section authorized closing down a paper “if any matter appearing in a newspaper is, in the opinion of the [Minister of Interior], likely to endanger the public peace.” The decision comprises two far-reaching formulations. First, the Court averred that all legal norms, including (and even more pronouncedly) the legacy of the Mandatory legislator, must be read and interpreted in light of Israel’s democratic nature:

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

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

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

---

254 Id.
257 See id.
258 See id. at 105–09.
259 LAHAV, supra note 252, at 112.
260 HCJ 73/53 Kol Ha’am Co. v. Minister of Interior 7(2) PD 871 [1953] (Isr.), reprinted and translated in 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90, 103–09 (E. David Goitein, Asher Felix Landau & Jacob Henry Lazarus eds., 1962) (“[T]he Kol Ha’am decision is set upon a broad conceptual base.”).
261 Saban, The Legal Status of Minorities, supra note 78, 379–83.
These developments—peripheral radiation, purposive interpretation, and an exacting balancing test—carried a promise; but how effectively did these developments translate the promise into the practical protection of human rights, and especially those of the Arab-Palestinian minority? The potential was circumscribed for two reasons. First, the consolidation of judicial review of administrative actions following these path-breaking steps was slow, partial, and inconsistent. Second, the inconsistency appeared especially in the sensitive and minority-related areas: security, immigration, and land. Thus, simultaneously with such revolutionary cases as *Kol Ha’am*, the everyday jurisprudence quite rarely benefited the minority. The Supreme Court in this period did not often venture beyond the bounds of a formalistic type of judicial review: insisting on the doctrine of legality (statutory authorization for governmental power that restrict basic rights) and on the explicit boundaries of the powers demarcated by the statute. It took thirty years for the *Kol Ha’am* decision to resurface and for the Court to seriously implement it. Moreover, the Court opted not to tread on certain “protected spheres of activity” of the government. The legal biography of *al-Ard* (“the Land”) is a prime illustration of this disinclination. *Al-Ard* was a local Arab-Palestinian national movement with a pan-Arab (Nasserite) orientation that enjoyed only a short life span—from the late 1950s until it was disbanded by the Minister of Defense in 1965.

**b. The Al-Ard Movement as a Case Study**

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

262 See infra note 265 and accompanying text.

263 See infra note 266 and accompanying text.

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

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


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

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

271 Id. at 40–41.
272 Id.
273 Id.
274 Id. at 42.
275 HCJ 39/64 Al-Ard Ltd. v. District Commissioner of the Northern Region 18(2) PD 340, 344 [1964] (Isr.).
276 Supra notes 253–56 and accompanying text.
277 See HCJ 39/64 Al-Ard Ltd. v. District Commissioner of the Northern Region 18(2) PD 340, 345 [1964] (Isr.) (rejecting the petition). “Had the commissioner provided his reasons, though not legally compelled to do so, we could have of course examined their viability and reasonableness,” but since he did not, it was decreed that “discretion is indeed absolute” and the plea was rejected. Id. at 344–45. Some scholars believe that this is a case of divergent paths in the realm of the press, open to flexible manipulation by the
the Court left the State an alternative route of exercising its authority to close down a newspaper, a route almost empty of legal hurdles.

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

The Yardor case\(^ {281}\) completed the legal saga of al-Ard. The Court decided in a majority opinion not to overrule the decision of the Central Elections Committee denying the Socialist List (with al-Ard as its backbone) standing in Knesset elections.\(^ {282}\) This was a surprising and troubling decision because the legislation of the time, the Knesset Elections Law 1959,\(^ {283}\) did not bestow upon the Central Elections Committee the authority to disqualify a list on the basis of its program or deeds but only on technical grounds.\(^ {284}\) The majority in this case (Justices Agranat and Zusman) crossed doctrinal lines, previously shaped by the Court in cases considered less threatening.\(^ {285}\) Justice Zusman reasoned that it was an exceptional case, justifying his decision to disregard the legality doctrine (the requisite of legal authority to justify restricting basic rights).\(^ {286}\) Moreover, the majority Justices waived the obligation to prove the “probable
danger test” of serious harm to public peace that would have occurred if the list were allowed to stand for elections—thus, they disregarded the balancing test laid down in the Kol Ha’am precedent.287

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

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

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

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

289 See supra notes 275–78 and accompanying text.

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

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

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

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

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


293 See supra text accompanying notes 276–86.

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

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

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

“Accommodation rights” are the least demanding category. They impose obligations on the state to help protect the language, culture, and society of designated minorities. A primary illustration is public funding of minority education—a duty that extends beyond protecting the freedom to establish private minority schools. Other examples include exemptions for minority members from norms that are prejudicial to their religious or cultural practices,
such as Sabbath laws, mandatory dress codes, and occupational restrictions, such as on hunting or grazing. 299

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

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

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

299 Id.
300 Id. at 909–10.
301 Id.
302 Id.
adopt the dominant language and replace its own, unless special means of protection are established. These special means are the group-differentiated rights, such as minority entitlement to full public funding of a comprehensive education system in the minority language, or the entitlement to use and find this language in the public (society-wide) sphere.

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

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

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

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

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

304 See KYMLICKA, POLITICS IN THE VERNACULAR, supra note 148, at 111, 158.
305 See id.
Arabic language; (3) the group exemption from the obligation of military service; (4) the preservation of the Ottoman Millet system, in which each person is subject—in the field of family law—to the religious law of her or his religious community, and in certain matters even to the exclusive jurisdiction of the religious courts of her or his community; and (5) the right of workers and business owners to observe their days of rest and holidays. I will briefly discuss each of these five group-differentiated rights below.

Among these rights, the legal status of Arabic is puzzling. The other four rights are typical accommodation rights, but the status of Arabic more closely resembles a kind of partnership—a right of special allocation and representation in the sphere of language. Article 82 of the Palestine Order in Council, 1922, forms the basis for the status of Arabic in Israel. This is Mandatory-era legislation that Israel adopted (with almost all other pieces of Mandatory legislation) into law with the establishment of the State in 1948. Under the subtitle “Official Languages” Article 82 states as follows:

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

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

---

306 See Saban, Minority Rights, supra note 7, at 908–09; Saban & Amara, supra note 303, at 15.
309 Saban & Amara, supra note 303, at 15.
importantly, the impressive legal status of Arabic was never enforced in practice.313 In other words, there was always an enormous disparity between the de jure and the de facto status of Arabic. In reality, Arabic carries virtually no weight in the common public sphere in Israel, whereas Hebrew was and more or less continues to be the exclusive language of our public sphere.314 It is the language of governmental bureaucracy, of higher education, and most importantly, of most segments of the Israeli labor market.315 In fact, the practical status of Arabic in the period under review was therefore commensurate with the expectations of the ethnic paradigm: a state deeply identified with the majority community.316 Israel basically consigned the status of Arabic to the protection of the right to education in the minority’s mother tongue, and as such it was commensurate with accommodation rights.317

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

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

313 Saban & Amara, supra note 303, at 22–33.
314 Id.
315 Id. at 22–27; see also Tabory, supra note 311, at 283–301.
316 Saban, Minority Rights, supra note 7, at 938.
317 See Tabory, supra note 311, at 294–97.
318 Saban, Minority Rights, supra note 7, at 950–51.
319 Id. at 939, 953–54.
320 Id. at 938–40, 950–54; see also Al-Haj, supra note 207, at 94–101.
321 Saban, Minority Rights, supra note 7, at 900, 943.
religious law—the set of norms created by the religious community to which the individual belongs. Second, these matters . . . are partially subjected to the exclusive jurisdiction of the religious courts of the individual’s religious community. The upshot of this legacy was, “a religious endogamy, as most of the religious communities recognize only intra-religious marriage.”

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

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

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

---

322 Id. at 943.
323 Id. Article 83 of the Palestine Order in Council, 1922 provides as follows: “Each religious community recognized by the government will enjoy autonomy for the internal affairs of the community subject to the provisions of any Ordinance or Order issued by the High Commissioner.” Palestine Order in Council, 1922, art. 83, reprinted in 3 THE LAWS OF PALESTINE 2588 (Robert Harry Drayton ed., rev. ed. 1934). See Abou Ramadan, supra note 164, at 98–99; KRETZMER, supra note 81, at 166–68.
324 Saban, Minority Rights, supra note 7, at 944.
325 Id. at 944–45.
326 Id. at 945 n.220.
327 Id. at 945.
329 Saban, Minority Rights, supra note 7, at 948.
330 Id.
to the executive in pivotal issues. However, this time it worked to the
advantage of the Arab-Palestinian minority. The law authorized the Minister of
Defense to exempt a person from universal conscription. 331 In the case of the
Jewish ultra-orthodox minority, the Minister applied it as a matter of course. 332
With regard to the Arab-Palestinian minority, the personal exemption system
was not applied; 333 their mechanism for exemption from military service was
the non-enforcement of the general conscription order that applies to them
along with all others of the same age. Twenty-four months after this general
order is issued it becomes ineffective toward them. 334

This exemption may be classified as a group-differentiated right because it
is granted on the basis of group membership. 335 Its moral justification
concerned the national distinctness of the Arab-Palestinian minority and the
conflict between its people and the state of its citizenship. 336 While it must be
acknowledged that humane consideration for the special situation of the Arab-
Palestinians was not the only reason for their exemption from military
service—as the security interests of the majority community favored this
arrangement in any case 337 —this does not detract from the importance of the
exemption. It constitutes a major element of protection regarding the culture,
language, and national identity of the Arab-Palestinians in Israel, and it also
has implications for the internal unity of the minority community. This point
regarding the internal unity of the minority comes to light in the case of the
distinct cultural community sociologically adjacent to the Arab-Palestinian
minority, namely, the Israeli Druze. The young men of this community serve in
the army. 338 What we encounter here is a complex cause-and-effect relation.
On the one hand, the willingness to engage in military service among Druze
men stems, most likely, from a special collective identity (Druze-Arab, as
distinct from the Arab-Palestinian identity); 339 on the other hand, military
service has helped greatly in sustaining and structuring this differentiated
identity. 340

331 Defence Service Law, 5746-1986, SH No. 1170 § 36 (Isr.).
332 See Saban, Minority Rights, supra note 7, at 948.
333 See id. at 949 (describing a court decision overruling a collective exemption for Orthodox Jews).
334 Defence Service Law § 20.
335 Saban, Minority Rights, supra note 7, at 948.
336 See id.
337 Id.
338 Id. at 948 n.235.
339 Id.
(1999); Oren Yiftachel & Michaly D. Segal, Jews and Druze in Israel: State Control and Ethnic Resistance,
The Supreme Court declined to intervene in the communal nature of the conscription exemption. This case was decided in the early years of statehood in *Hassunah v. Prime Minister*. The Supreme Court explained:

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

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

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

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

---

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

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

342 Id. at 710 (emphasis added).

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

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

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

346 See Razin, supra note 150, at 22–23. Demarcation of municipal jurisdictions created common situations whereby Arab-Palestinian owners of land resided in an Arab local authority while their land was located in a Jewish local authority’s jurisdiction, and they had to pay their property taxes to the locality in which they did not in fact reside. See JIRYIS, supra note 54, at 226–27; Blank, supra note 224, at 224.
jurisdiction, municipal status, indeed in the very right to come into being and hold elections. Certain Arab-Palestinian communities were incorporated in and subordinated to a dominantly Jewish municipality, as for example Ma’alot-Tarshiha and Tel Aviv-Jaffa. Moreover, local Arab authorities run by the Communist Party suffered more severe discrimination in funding and services, and, during that period, were under constant threat of being replaced by an appointed committee.

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

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

---

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

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

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

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


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

353 See supra text accompanying notes 147–50.

354 See supra text accompanying notes 151–64.

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

356 See KRETZMER, supra note 81, at 166–70.
appointments to these courts. The system’s qadis (the judges of the Shari’a courts) are appointed by a nine-member committee according to the Qadis Law 1961. A certain degree of self-government is guaranteed by the requirement that at least five members of the committee must be Muslims. Nevertheless, the choice of the Muslim and non-Muslim members is not made by the minority community itself. Apart from the two qadis who are members of the appointing committee, two other members are government ministers; three are Members of the Knesset elected by a majority of the Knesset; and the two remaining members are chosen by the Israel Bar. Apart from the qadis, all others are members of Jewish-controlled bodies.

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

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

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

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

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

---

365 Saban, Minority Rights, supra note 7, at 960–70.
366 See supra text accompanying notes 134–36 for a discussion of the el-Saruji v. Minister of Religious Affairs case; see also Saban, Appropriate Representation of Minorities, supra note 15, at 591–92. In the Declaration of Independence of Israel appears a paragraph that was not translated into anything legally meaningful:

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

---

367 See Hofnung, supra note 83, at 201–02. The known-but-unofficial practice of the period regarding participation in important Knesset committees was the one applied in the case of the Knesset’s Foreign Affairs and Security Committee—entitlement to representation in the committee only to parties having at least one MK more than Maki in the relevant Knesset. Id.; see also HCJ 115/55 Zilber v. Minister of Internal Affairs 9(2) IsrSC 1244 (1955) (Isr.) (denying a petition by Maki (the Communist Party), which was complaining of its exclusion from the Central Elections Committee of the Municipal Elections among soldiers). The Court averred that “no party has a natural right to representation in this committee.” Zilber, supra, at 1245.
368 Saban, Minority Rights, supra note 7, at 972.
their representation in the civil service, nor was there even a norm to consult with members of the minority before making governmental decisions even if they had special bearing on the minority.\textsuperscript{369}

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

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

\textsuperscript{369} Id. at 972, 975.
\textsuperscript{370} SHAFLER & PELLED, supra note 53, at 17–19.
\textsuperscript{371} Id.; KIMMERLING, supra note 67, at 65–67.
\textsuperscript{372} See LUSTICK, supra note 1, at 80–81.
\textsuperscript{373} See SHAFLER & PELLED, supra note 53, at 17–23 (describing the evolution of Israel’s incorporation regime).
\textsuperscript{375} See supra text accompanying note 164; see also infra notes 424–25 for the concept of \textit{habitus} and further thoughts on the mechanisms of this selectivity in a purportedly neutral realm.
the above-mentioned regulation of the state religious education system and the independent ultra-orthodox education system.376

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

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

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

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

376 See supra text accompanying notes 300–302.
378 Id.
379 Saban, Minority Rights, supra note 7, at 975 n.337.
382 See JIRYIS, supra note 54, at 231 (describing how the Israeli authorities were reluctant to set up local councils in the Arab sector and neglected them once they were formed).
other, worthier, counselors . . . the impression one obtains . . . is of conflict between contending groups of political activists.\textsuperscript{384}

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

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

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

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

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

\textsuperscript{384} Id.
\textsuperscript{385} Id.
\textsuperscript{386} See Kretzmer, \textit{supra} note 81, at 118–22, 125–27 (discussing welfare services, public housing, budgeting of local councils, of education, of religious services, quotas of water and of agricultural production, and marketing allocation of public land); see also Yiftachel, \textit{supra} note 221, at 149–57, 303–04 (discussing planning and building); Yiftachel, \textit{Ethnocracy: Land and Identity Politics in Israeli/Palestinian, supra} note 88, at 140–42 (discussing land allocation); Alexandre Kedar & Oren Yiftachel, \textit{Land Regime and Social Relations in Israel, in 1 Swiss Human Rights Book: Realizing Property Rights} 129, 140–44 (Hernando de Soto & Francis Cheneval eds., 2006).
\textsuperscript{387} See supra text accompanying notes 23–28.
\textsuperscript{388} Smooha, \textit{Control of Minorities, supra} note 2, at 260–61.
Israeli conflict constantly nurtured the intercommunal separation. Other contributing factors were the structure of the labor market and the spatial relations.\textsuperscript{389} As to the latter, the land regime (norms and practices concerning land ownership, expropriation, allocation, development, and usage), and other practices created geographical proximity between Arab-Palestinian and Jewish localities, but not shared residential areas.\textsuperscript{390} Only about one tenth of the Arab-Palestinians in Israel have lived in mixed towns (predominantly Jewish), and in most of those towns the neighborhoods are quite often ethnically segregated; Jews in general have not lived in Arab-Palestinian localities.\textsuperscript{391}

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

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

\textsuperscript{390} RASSEM KHAMAISI, \textit{PLANNING AND HOUSING AMONG THE ARABS IN ISRAEL} 148–49 (1990); YIFTACHEL, \textit{supra} note 221, at 63–64.
\textsuperscript{391} YIFTACHEL, \textit{supra} note 221, at 63–64; Smooha, \textit{Control of Minorities}, \textit{supra} note 2, at 261.
\textsuperscript{392} Yiftachel & Yacobi, \textit{supra} note 350, at 324–25.
\textsuperscript{393} Saban, \textit{Minority Rights}, \textit{supra} note 9, at 943; Smooha, \textit{Control of Minorities}, \textit{supra} note 2, at 261.
\textsuperscript{394} See CA 630/70 Tamarin v. Israel 26(1) IsrSC 197, 225 [1970] (Isr.).
\textsuperscript{395} Id.
\textsuperscript{396} Id.
\textsuperscript{397} Id.
the term, there is no Israeli nationality; there is only Israeli citizenship. The nationality of the Israeli citizen population is divided mainly between Arab-Palestinian and Jewish national affiliations. Israeli law directed that the distinction be registered as stipulated in Section 2 of the Population Registry Law 1965 (Obligation to Register Religion and Nationality in the Population Registry) and Regulation 2 of the Population Registry Regulations (Entries in Identity Card) 1990.

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

V. LAW AND THE STABILITY OF THE CONTROL FRAMEWORK

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

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

---

398 See id.
400 See supra text accompanying notes 63–65, 102–03.
401 See, e.g., supra text accompanying notes 38–58.
402 See id.
in the twentieth century.” How did this come about? The primary answer lies in the complex set of stabilizing mechanisms that were at work and that fulfilled their function in the period under review.

Stability and docility can be partially attributed to the slight but consistent improvement of the order of things over time—the easing of control, especially through moderating the military rule from the end of the 1950s until its abolition in 1966. However, gradual improvement does not suffice to ensure stability; it often achieves the opposite when perceived as too little too late. But in Israel it worked. At any rate, the equilibrium in Israel at that time rested on more factors: mechanisms typical of the control framework. They were mentioned by their names above, but this Part will analyze them in detail and describe how the law was integrated in them.

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

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

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

---


404 See supra text accompanying notes 211–12.


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

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

1. Disguise and the Law

a. Preferring the Circuitous to the Explicit

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

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

\(^{407}\) KRETZMER, supra note 81, at 89–108.
\(^{408}\) See supra text accompanying notes 248–50, 262–66.
\(^{409}\) See supra Part III.B.1.
\(^{410}\) See supra Part III.B.2.
(temporarily) shut down a newspaper on the basis of the Press Ordinance, this shutdown was allowed, even permanently, on the basis of the Defence Regulations.\footnote{See supra text accompanying notes 268–74 (discussing the al-Ard case).} In the sphere of state allocations, likewise, the law did not limit the scope of executive discretion by obliging it to set standards.\footnote{See supra note 177 and accompanying text.}

The second practice that aided disguise was opting to threaten, rather than actually cause, harm and preferring the use of state power to allocate selectively, rather than its authority to coerce. An illustration of this practice is how the State chose to prevent the minority from forming associations. Any number of direct restrictions could have been imposed: the Ottoman Law on Associations of 1909;\footnote{Cf. Marc Makary, Notification or Registration? Guarantees of Freedom of Association in Non-Democratic Environments: Case Studies of Lebanon and Jordan, 10 INT’L J. NOT-FOR-PROFIT L. 77, 78 (2007).} the Defence Regulations 1945 (Regulation 74 allowed confiscation of assets);\footnote{Defence (Emergency) Regulations, B’TSELEM, http://www.btselem.org/english/Legal_Documents/Emergency_Regulations.asp (last visited Apr. 4, 2011).} and the Ordinance Extending the Emergency Regulations (Departure for Abroad) 1949, which could prevent associations from fundraising.\footnote{Emergency Regulations (Foreign Travel) Law, 5709–1948, 2 LSI 17 (1948–1949) (Isr.).} All of these legal instruments could have put any association out of business, but they were carefully used.\footnote{See, e.g., JIRYIS, supra note 54, at 194–95, 220 (describing how direct pressure on Arab labor unions and their members in the first years of statehood resulted in their “voluntary” dissolution, and how like treatment of Arab sport clubs in the 1960s had the same result). Only organizations that failed to take the hint and “self-dissolve” were at times declared illegal. See, e.g., id. at 194–95; HOFNUNG, supra note 83, at 165–68; LUSTICK, supra note 1, at 128, 247–52. For a more comprehensive discussion, see COHEN, supra note 208, at 33–45.} The authorities opted for indirect methods. For example, members of such associations would not be appointed to positions controlled or influenced by the State (such as teachers, in both the public and private education systems, as will soon be elaborated);\footnote{See, e.g., id. at 194–95; HOFNUNG, supra note 83, at 165–68; LUSTICK, supra note 1, at 128, 247–52. For a more comprehensive discussion, see COHEN, supra note 208, at 33–45.} or the association would not be accorded recognition by the establishment in which it was embedded, as happened to Arab-Palestinian student organizations in universities.\footnote{DOWTY, supra note 56, at 197; JIRYIS, supra note 54, at 196–97.} The converse of this was also employed—endowing Jewish-controlled bodies, such as the Histadrut (the major labor union),\footnote{See LUSTICK, supra note 1, at 211–13; see also Collective Agreements, 5717–1957, SH No. 221 p. 63, §§ 3–4 (Isr.) (discussing the definition and status of labor union organizations).} with the kind of status that made it worthwhile to join
them and not others—thus inducing members of the minority to “choose” or lose.  

It was a working assumption, often verified by reality, that weakness tends to become self-perpetuating. Therefore, in congruence with this line of thought, it was considered vital to keep the potential foci of minority self-empowerment weak.  

Weakness rendered minority organizations impotent in the eyes of potential activists and sympathizers, and thus not worthy of their efforts or of the risk that at times may be involved.  The absence of strong anti-discrimination norms protected by assertive courts, and the lack of a norm demanding involvement of the minority at least in societal decisions concerning it, were important contributions of the law to perpetuating this organizational impotence.  

Another fact that made frequent use of explicit discrimination expendable was the same mechanism that distinguished de facto between the Jewish national-religious minority and the Arab-Palestinian minority when the formal legal arrangements regarding them were similar.  Pierre Bourdieu provided a theoretical explication for such phenomenon, in the concept of *habitus*.  

*Habitus* is a set of mind; a product of social norms; a backdrop of unquestioned attitudes which “define the social expectations that shape the contours of our comfort zones, molding what we expect from one another.”  

Concretely, majority members in Israel (including, of course, its bureaucratic elites) knew, without explicit directive or guidance, what and who is “preferred” and how to serve them.  

---

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

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

422 See Cohen, supra note 208, at 126–27.  

423 Id.  

424 Id.  


Bourdieu sensed correctly the atmosphere of non-reflective, intuitive, almost automatic, understandings on the part of the majority that simply clones the existing order without the need for explicit verbal directives or declared legal norms. See id. at 100–05.  

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

b. The Course of Divergent Paths

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

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

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

430 Id.
431 Coursen-Neff, supra note 428, at 751.
432 HOFNUNG, supra note 83, at 132–42.
Defence (Emergency) Regulations 1945, and ostensibly covered all press; however, a separate, “voluntary” path existed in that period, covering newspapers party to the “Editors Committee Agreement.” This latter path imposed a more lenient censorship regime, and it is no coincidence that only (mainstream) Jewish newspapers enjoyed it.

c. Constraining the Information Market and Diverting It

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

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

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

433 Id.
435 See supra text accompanying notes 254–55.
437 See JIRYIS, supra note 54, at 140–53 (describing the way information was exposed to the Arab-Palestinian minority after the 1956 Kfar Qassem Massacre); Israel Koenig, Top Secret: Memorandum—Proposal—Handling The Arabs of Israel, Al ha-MISHMAR DAILY, Sept. 7, 1976, reprinted in Israel Koenig, The Koenig Report, 6 J. PALESTINE STUD., Autumn 1976, at 190 (providing a blatant memorandum of the Ministry of Interior Northern District Commissioner which was leaked and published in the Al ha-Mishmar Daily of September 7, 1976).
438 See supra text accompanying notes 320, 354–55; see also Saban, Minority Rights, supra note 7, at 939–40.
439 JIRYIS, supra note 54, at 170–71.
selectively supported journals in Arabic (through Histadrut and governmental funding), and it could block accessibility to state-controlled media or to media influenced by it. For example, the state broadcasting station Kol Israel refused to broadcast a call to attend an Arab-Jewish assembly propounding abolition of the military rule over the Arab citizens. One of the declared reasons offered for the refusal, found in the al-Khazen court ruling of the early 1960s, was that the broadcasting station’s internal directives were ostensibly neutral and stipulated that only messages from “municipalities, local authorities and public, education, culture and art institutions” were to be aired. The state representative added in Court that political parties’ announcements may be aired as well; however, he provided no explanation as to why civil society organizations of a political nature are barred from accessing public media resources monopolized at the time by the State.

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

---

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

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

442 Id.

443 Id.


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

446 Id. A state obligation to publish directives was imposed by the Court only at the beginning of the 1990s. See HCJ 5537/91 Efrati v. Ostfeld 46(3) PD 501, 514–15 [1992] (Isr.). In this context, the laxity on the part of the authorities to inform the Arab-Palestinian population of the social benefits programs to which it was entitled, or of mitigating conditions on the restrictions to which it was subject, is very clear. See, e.g., ZE’EV ROSENHEK, THE HOUSING POLICY TOWARD THE ARABS IN ISRAEL IN THE 1950s–1970s, 36 (1996) (describing the minority’s meager use of housing assistance to which they were entitled).
narrower access to governmental information. Finally, private bodies were even better “protected” from having to divulge information. Hence, the Jewish National Fund, for example, did not divulge information about its transactions. 447

2. Law and the Production of Legitimacy

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

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

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

447 Saban, The Legal Status of Minorities, supra note 78, at 325.
448 See supra text accompanying notes 138–45.
449 Id.
450 See JIRYIS, supra note 54, at 60–61.
surprisingly courageous decisions, thereby encouraging a belief in the potential for improvement of the lot of the minority. During the period under discussion, this belief was wishful thinking, a stabilizing factor, and a product of a mainly hollow hope. Indeed, Jiryis, one of al-Ard’s leaders, retrospectively lamented the faith his movement had placed in the Israeli judiciary for such a long time. "One of [al-Ard’s] obvious mistakes was to trust in Israeli justice and democracy," he later wrote. Hence, law, and especially the courts, added a shade of grey to the image of the Israeli regime of the time.

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

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

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

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

452 JIRYS, supra note 54, at 195.
453 Compare id., with Shamir, supra note 230, at 784–79 (arguing that Supreme Court procedures in the occupied territories—as opposed to those in Israel—in the 1970s and 80s actually added legitimacy to the Court’s perceived impartiality).
454 LUSTICK, supra note 1, at 169.
455 See supra text accompanying notes 267–72.
of their community. In addition, a system of favors and bribes ensured collaboration of the “representatives.” The following is an illustration.

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

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

Political activity within a state educational institution was forbidden on the basis of Section 19 of the State Education Law 1953, and it was restricted in private educational institutions, too, under Section 8 of the Education Ordinance (new version) 1978, Sections 16, 18, and 32 of the Supervision of...
Schools Law 1969, Teachers in public education institutions were also barred from certain kinds of political activity outside the school, and this prohibition was imposed in the disciplinary regulations of the civil service and the local authorities. A main norm in this context was the Civil Service (Restriction on Party Activity and Fund Raising) Law 1959, which, notwithstanding its title, restricted involvement in political activity in the wider sense, such as in demonstrations or marches with “a political character” (especially Sections 1, 4, and 5 of this Law). The Civil Service (Discipline) Law 1963 and the Local Authorities (Discipline) Law 1978 formulated a vague framework offense of “improper behavior,” or an action that “transgressed against the civil service disciplinary code.” An important ruling at this time is Katz-Shmoueli in which the Court confirmed the layoff of a teacher due to Communist activity, though it was not “carried out among pupils.”

As mentioned, in the case of Arab-Palestinian teachers, even those who were not part of the state system were subordinated to strict restrictions regarding political activity outside the school. These restrictions were partly self-imposed by the Arab church-run private schools out of caution and due to two other mechanisms. One we can call state (partial) funding for state supervision; and the other is the Minister of Education’s authority with regard to approving appointment of teachers, even in private schools, according to the Mandatory Education Ordinance—now the Education Ordinance (new version) 1978 and Article 16 of the Inspection of Schools

---

463 Supervision of Schools Law, 5729–1969, SH No. 180 §§ 16, 18, 32 (Isr.).
464 State Education (Recognized Institutions) Regulations, 1953, KT 5714, 104. Teachers in teacher seminaries were subject to basically the same restrictions as appeared in Section 19 of State Education Law. They also appeared in State Education Order (Teachers and Kindergarten Teachers Seminaries), 1958, KT 763, 586 (Isr.).
465 See Public Service Law (Discipline) 5723–1963, SH No. 390 p. 50 (Isr.). In the same context, see the Special Declaration of the government published in the Official Gazette in 1972 (Public Service Law (Discipline) 5723–1963, SH No. 390 p. 50 (Isr.); Special Declaration of the Government, Reshumot No. 1882, p. 678 (Isr.), especially Section 4(2), stipulating that a teacher “who advocated disloyalty to the State of Israel or behaved in a way to suggest such disloyalty on his own part, whether in or outside his work, will be brought before a disciplinary tribunal.”
466 Civil Service (Restriction on Party Activity and Fund Raising) Law, 5719–1959, SH 289 p. 190 (Isr.).
467 Public Service Law (Discipline), 5723–1963, SH No. 390 p. 50 (Isr.).
469 See HCJ 76/55 Katz-Shmoueli v. Minister of Education and Culture 9(3) PD 1839, 1844 [1964] (Isr.).
470 See Saban, Minority Rights, supra note 7, at 938–42, 950–54.
471 Id.
472 The Education Ordinance (New Version), 5738–1978, 31 LSI 607 (Isr.).
Law 1969. Legally, the Minister’s right to intervene was relatively limited, but in practice, his or her control over the education employees of private Arab schools was not significantly different from his or her control in the state system.

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

However, political activity was not only curtailed in the case of employed teachers. Applications for a teaching position could be turned down on the basis of the politics of the applicant prior to submission. In an official report Israel submitted to the UN Committee for the Elimination of Racial Discrimination, it admitted to having applied a general security screening system as a matter of course in the case of Arab-Palestinian candidates for teaching until 1994. The collective nature of the modus operandi here reflected the general attitude toward the Arab-Palestinian minority as a suspicious group. This was indeed the attitude during military rule, and in certain areas it persisted long after military rule was abolished.

---

474 Kretzmer, supra note 81, at 152–54.
475 Al-Haj, supra note 207, at 164–65.
476 Id.
477 Id.
478 Supra note 366 and accompanying text.
479 Cohen, supra note 208, at 172.
481 See Al-Haj, supra note 207, at 170.
To shortly cup up: the story of the Arab teachers shows how a mixture of occupational dependency, flexibility in the State’s appointing and discharging power, and legitimacy excuses facilitated the cooptation of minority elites.

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

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

The Law and the Internal Division of the Minority

The mechanisms of dividing the minority rested mainly on social reality rather than legal endeavors. In other words, these mechanisms rested upon the deep heterogeneity of the Arab-Palestinian minority itself—geographical, tribal, familial, and religious—and upon other differences, such as between the traditional and the modern, the urban and the rural.\footnote{Id. at 15–18 (describing the divisions during the Ottoman and British Mandate periods).} Public policy was, then, a “rider” of existing segmentation; however, it sought to perpetuate and, when possible, deepen it.\footnote{LUSTICK, supra note 1, at 128–29.} So, for example, the long period of military rule strengthened localism and hindered nation-wide ties.\footnote{AL-HAJ, supra note 207, at 25–27; Baum, supra note 137, at 72.} Moreover, the law can be shown to have taken part in at least two other axes of internal division—the religious-communal split between Muslims, Christians, and Druze, and the demarcations of extended families (\textit{hamula}). Let us begin with the latter.

The survival of familial affiliation in Arab society, despite partial urbanization and modernization, is attributed with great justice to the sharp dependence of the minority on the majority in Israel.\footnote{LUSTICK, supra note 1, at 202–03.} The extended family was perceived by many minority members as deeply needed in the face of the state policy of exclusion.\footnote{ROSENHEK, supra note 746, at 38.} The shortage in white-collar positions created...
tough competition for the few posts offered by local authorities, and the local leading extended families, for their part, wished to improve their own chances of enjoying the scarce public assets available, and so they were engaged in an effort to perpetuate their advantage in local Arab politics.487

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

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

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

487 Lustick, supra note 1, at 207–09; see also Al-Hai, supra note 207, at 162–64, 188–90; Ghanem, supra note 351, at 139.
488 HCJ 628/76 Tarrif v. Head of Council of Joulis 31(2) PD 544, 548 [1977] (Isr.).
490 Religious Communities Regulations (Organization) (The Druze Community), 1996, K.T. 127 (Isr.).
492 Jiryis, supra note 54, at 200; see also Kretzmer, supra note 81, at 42.
Executive discretion, based on the law and the courts’ interpretation thereof, is at the basis of another dividing procedure—enforcing conscription on Druze men while not on Muslims or Christian Arabs, and allowing Bedouins to volunteer for service on a personal basis. As explained above, military service has helped greatly in sustaining and structuring a Druze distinctive identity. Moreover, economics—specifically, employment needs—were at play here as well. Military service became a favorable, and at times necessary, prerequisite for many employment opportunities: police, prison guards, security personnel in airports or sea-ports, and, of course, for a professional soldier or officer career. These positions became a major part of the Druze citizens’ employment horizon, and this state of affairs locked them into a strong dependency upon the State, for the jobs that are the most disruptive to their relations with other fellow Arabs.

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

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

---

493 See supra text accompanying notes 401–16.
494 Saban, Minority Rights, supra note 7, at 948 n.235.
495 See FRBO, supra note 340, at 128; LUSTICK, supra note 1, at 93–94, 209–11.
496 See Yiftachel & Segal, supra note 340, at 486.
497 LUSTICK, supra note 1, at 93–94, 209–11.
498 See Yiftachel & Segal, supra note 340, at 486–87.
500 LUSTICK, supra note 1, at 136–38, 202–09.
paved the way to the electoral success of these parties. The government basically paid in material gain for political support.

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

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

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

CONCLUSION

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

501 Id.
502 Id.
503 Koenig, supra note 437, at 190.
504 Id.
505 Id.
506 Id. at 192–93.
I will summarize the way I advanced on front (3)—the concrete front regarding the Arab-Palestinian minority—based upon the understandings and insights gained on fronts (1) and (2).

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

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

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

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

---

507 See supra text accompanying note 110.
Second, the law assisted in generating the minority’s great dependence upon the state through four main means. First, the law conferred sweeping authority and discretion upon the executive in a wide range of spheres of life. Second, at times the Court indeed intervened and somewhat narrowed these sweeping powers; thus, it provided the system with a certain legitimizing facade; but at the same time both the law and the judiciary maintained an expedient path to “amend” or bypass the “problematic” court rulings—via the Knesset’s power to legislate. The Knesset had the last word in the Israeli legal system at the time since there were almost no constitutional limitations upon it. Third, the Knesset often saw no urgent need to resort to altering court rulings by legislation, because if the court limited an administrative authority, the law (and the Supreme Court) usually left a diversion in the form of an alternative state authority that could achieve the same on another legal basis. This technique of diversions existed most notably in the sensitive spheres of security, immigration, and land. Fourth, at times, the Court exercised heightened self-restraint by adhering to doctrines concerning its own discretion, such as the “standing” doctrine.

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

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

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

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

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