

Adalah's Review

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Introduction: In the Name of Security

Samera Esmeir

Probing Legal Doctrine

It is difficult to devote an issue of a critical journal published by a human rights organization to the theme of “security.” For in such a case, the work of critique is expected to juxtapose security considerations with human rights, and to reveal the violations of the latter carried out “in the name of security.” The attempt to challenge the legality of rights violations based on security considerations often relies on several main arguments: exposing the fallacy of security-centered reasoning in a given situation, asserting the superiority of other important democratic values, or alerting against the disproportionate restriction on rights. Human rights lawyers are expected to master these legal doctrinal arguments and to vigorously employ them in the juridical field.

Each of these doctrinal arguments conceives of security as an objective state: in the first argument, as a matter of empirical proof, and in the second and third arguments, as a matter to be exposed or balanced against other rights or values. Notwithstanding their critical pretension, these arguments fail to escape the meta-narrative of security-centric reasoning that takes security to be “the condition of being protected from or not exposed to danger.”¹ Consequently, “security” continues to carry one shared meaning between both human rights and security advocates: an objective and natural state of safety.²

This objectivist and naturalist definition of security is prevalent in Israeli Supreme Court rulings. It is constitutive of the balancing formula through which the Supreme Court responds to legal challenges against state security practices endangering peoples’ rights.³ Through this formula, the court weighs the rights of an

individual or a group against the need for public order and/or national security. In a recent academic article, Supreme Court Chief Justice Aharon Barak summarizes the position of the Supreme Court on this matter.⁴ In the section in which he discusses the question of national security and individual liberties, he writes:⁵

On the one hand we must consider the values and principles relating to the security of the state and its citizens. Human rights are not a stage for national destruction; they cannot justify undermining national security in every case in all circumstances... But, on the other hand, we must consider the values and principles relating to human dignity. National security cannot justify undermining human rights in every case and under all circumstances. National security does not grant an unlimited license to harm individuals. Democratic nations must find a balance between these conflicting values and principles. Neither side can rule alone...

Chief Justice Barak probes the question of the balancing formula in the context of discussing terrorism. In his text, security gains meaning through a discussion of war and violence, death and pain. The text operates to disregard other meanings of security and leaves us with a singular meaning: a state of peace, safety, protection, and well-being. The balancing formula is, therefore, unthinkable without this objectivist and naturalist definition of security. Thus defined, the heavy toll of restricting human rights and balancing them against security considerations emerges, at times, as a necessity.

Most legal scholars writing on the subject of security have also adopted the balancing formula in their (critical) analysis of questions of security and human rights. Despite the various

approaches represented in this legal doctrinal scholarship, it is possible to generally argue that an objectivist naturalist definition underlines their analyses.⁶

Scholars writing from outside the juridical field approach questions of security in a different fashion. Hanna Herzog and Ronen Shamir, for example, argue that “the concept [of security] not only relates to basic notions of ‘law and order,’ to personal protection against harm, or to concrete threats of violence and war. In its deepest sense ‘security’ is associated with the ability of the Jewish state to remain sovereign...”⁷ Despite the attempt to transcend the limited definition of security, it remains, in their analysis, closely related to notions of threat. These, however, are not specific threats, as the conventional understanding of security would have it. Rather, these are threats jeopardizing the very existence of the state as Jewish.

Are there other ways to conceive of Israeli state security practices that do not reproduce the legal argumentation used before the courts to challenge these practices? Whereas these doctrinal legal arguments are instrumental for human rights lawyers working “before the law,” they only offer one perspective on the workings of security. Is it, therefore, possible to discuss other logics of security without adopting the commonsensical logic that security is achieved by the elimination of threat? Can we talk about the suppressed rights of the oppressed without being forced into a discussion about the empirical existence or non-existence of a threat? More specifically, in the case of Israel, how is it possible to critically address the practices carried out “in the name of security” against Palestinian citizens of Israel without recasting these citizens, or some of their practices, as a threat?

A Black Hole

Demography, Arab-owned lands, Arab Palestinians moving and crossing borders, political dissent, certain forms of knowledge, speech, memory and the relationship to the past – all of these, as the articles in this issue elaborate, have been realized as security concerns. All of these non-security issues have become part of the state security problematic.

To understand the transformation of these non-security issues into security issues, one needs to historicize and contextualize the use of the term security and its socio-linguistic operations. The term security in the current Israeli context is linguistically employable at any given moment without a need to reference the reasons for any of its particular operations. Take for example a recent article in the daily Hebrew newspaper *Ma'ariv* which reported that Israel's Prime Minister was presented with a report about a specific security threat: polygamy among Arabs in Israel, resulting in a higher birth rate.⁸ What is of importance in this example is the newspaper's unquestioned acceptance of the categorization of polygamy as a security threat. The term security contains the reasons, the means and the ends, and as such, it justifies its own deployment. It is a magical term able to absorb any and all content. It is like the Black Hole in outer space into which energy, stars and other heavenly matter collapse and disappear.

The recent criminal indictment of Sheikh Ra'ed Salah, the head of the Islamic Movement in Israel, is another case in point. In June 2003, the state prosecutor submitted an indictment against Sheikh Ra'ed Salah and four other members of the Islamic Movement, as well as two Arab humanitarian organizations for allegedly “supporting terror” by transferring

funds to charity organizations associated with Hamas in the 1967 Occupied Territories. While this case goes beyond our discussion, pointing out the operation of the emergency law against “supporting terror” on which the main charges in the indictment are based, is central for illuminating the workings of security. This doctrine, similar to the doctrine of “material support” in the United States, constitutes a legal mechanism through which the black hole of security operates. These doctrines, as David Cole convincingly argues in the context of criminal “terrorism” cases brought against individuals in the United States since 11 September,⁹ do not necessitate proof that the support was intended to further “terrorist” actions, or in fact furthered any terrorist actions. In fact, in Sheikh Ra’ed Salah’s case, the police and the state prosecutor have publicly stated on several occasions that there is no evidence that the Islamic Movement transferred funds for terror acts against Israeli civilians. The vagueness of the term “supporting terror,” however, under both Israeli and US law, could turn any act of charity into a security threat that need not be tolerated and should be punished. Such are potentially the contributions of thousands of individuals to different orphanages in the Occupied Territories associated with any politically-selected “terror” organizations.

The security hole can absorb many non-security realities. It sucks in all that is beyond it and exterior to it, and these in turn disappear into it. It follows that security is simultaneously vacant of meaning and all encompassing. When all issues become potential matters of security, security loses any distinct socio-linguistic meaning. This is the strength and weakness of the term security – it captures everything at the risk of losing itself in itself.

Security and Securing

Security can be defined as the negation of fear. It can also be defined as “freedom from doubt; confidence, assurance... well-founded confidence, certainty,” and as “a means of securing or fixing in position.” “To secure,” therefore, is not only an act aimed at the protection from danger. It also an act aimed at fixing a certain position, solidifying and objectifying it. To seek to secure is to seek to transform a tentative reality into an objective, finalized one. “To take security,” in the field of law, means in some cases to secure “a person’s ‘good behavior,’ his appearance in court at a specified time, or his performance of some undertaking.” Accordingly, to secure is to compel a certain behavior, to insure its realization.¹⁰

Instead of considering security in opposition to other rights and interests, and therefore, overlooking the act of making secure and the various definitions of what is secure, articles in this issue of *Adalah’s Review* probe the politics of securing as efforts to impose a specific reality, to fix it, and to attempt to bring it to a close. The articles interrogate security as a discourse of suppressing dissent, of exclusion and of preventing oppositional change.¹¹ The articles approach security-related practices as central to the governance of actions and reality, to their regulation and determination. They also attend to the work of securing as a work of elimination, erasure and wiping out. Together the articles consider both the methods of governance and the means of elimination that secure certain forms of knowledge, memories, practices, language, geography, demography, movement, political action, dissent, etc. as dominant discourses.

Hillel Cohen, for instance, discusses security legislation and the production of knowledge in his examination of laws that limit access to information about the security apparatus of the state. He suggests that such laws can play a crucial role as a mechanism of suppressing the production of alternative streams of discourse. The mainstreaming of an official historical narrative reinforced by legal restrictions on information, argues Cohen, dramatically hinders attempts to bring about oppositional changes, secures the reproduction of official memory as collective memories, and stabilizes the status quo.

Performative

As an empty category that is simultaneously all encompassing, security has become impossible to distinguish from non-security. Yet, in the search for stability and finality, security-aimed rituals need instability as their *raison d'être*. Security is needed as a reminder that insecurity is avoidable. Insecurity is required as a mobilizing engine for rituals of security. For security rituals to continue to fulfill their governance objective, insecurity must persist; conversely, security-rituals must not bring about absolute security, or alternatively must always engage in redefining what security means.

Rhoda Kannaneh's exploration of Arab soldiers in the Israeli military analyzes this complex relationship between security and insecurity. Whereas these soldiers are entrusted with the enforcement of security, they are themselves forever considered a source of insecurity. This double construction is far from a simple case of schizophrenia. It is rather a ritual of governance through which the subject is simultaneously monitored and perpetually

“improved” without ever being able to attain recognition as “perfect” or to escape exclusion or “otherness.” It is thus a ritual that has no specific end (as Arab soldiers will always constitute a security threat), the importance of which is symbolic. This theoretical insight is developed by Allen Feldman, who probes the performative role of wars of public safety carried out by the United States, both internally against groups such as illegal immigrants and criminals, and abroad in places such as Afghanistan and Iraq. These wars, he argues, refuse to yield satisfaction and reconciliation with social existence, and as such, they are open-ended.

A Matter of History

The objectives that the state wishes to secure are not fixed. They change historically and they adapt to new circumstances. The process of securing is both transforming and transformative, always imbued with accommodation and resistance. To look at the dynamic process of making secure, and to abandon an objective definition of security, is therefore to adopt an historical perspective and to unpack the changes in the process of securing. As such, the articles in this issue cover a period spanning the establishment of the state of Israel in 1948 until the present.

Following the establishment of the state of Israel, military rule was imposed on the areas in which Arab citizens were concentrated. The military regime was justified on the grounds of security and it resisted attempts at abolition until 1966 for these very reasons. As Alina Korn explains in her article, these security considerations did not correspond to an actual danger that Arab citizens of Israel presented.

Rather, security discourses were linked to expanded Israeli Jewish settlement and hegemony. Security practices were directed at preventing Arabs from returning to their lands, as well as developing a structure of dependency and control in which Arab citizens of Israel became reliant on the security apparatus.

The lifting of the military regime, some might argue, brought about the end of an era in which the very existence of the Arab citizens in Israel came to be constituted both through a security lens and by the state security apparatus. It might, however, be more appropriate to ask what has replaced the “old” regime and how the “new” era has substituted old forms of repression with new ones. A historical comparison might not reveal a repudiation as much as a reconfiguration of political repression and of definitions of security.¹²

As Farid Ghanem elaborates in his reflections on Emile Habiby’s, *The Pessimist*, the military regime’s treatment of the Arabs in Israel as forever moving in a security sphere has only escalated over the years. Ghanem’s article, together with that of Areen Hawari, clarify that the Palestinian citizens of Israel continue to be burdened by the inheritance of the military regime; its specters continue to haunt them. Whether one purports to reject or deplore this inheritance, or if one remains unconsciously in its hold, the specters of that past continue to haunt the present, thus narrowing the passage between past and present. In Hawari’s article, it is the specter of the military regime’s governors and their networks of informers that continue to haunt the masculinity of Palestinian men citizens of Israel. Ghanem’s essay locates security threats, during the military regime and its aftermath, in the very presence of Arabs in the Jewish state.

The Rule of (Security) Law

It is commonly argued that security-related practices are employed during times of emergency or when an exceptional situation necessitates the deployment of a security-based legality. Security legalities function as exceptional measures that temporarily suspend liberal norms and substitute them with anti-liberal legalities directed at eliminating threats and restoring order. In effect, the balancing formula that is employed in the juridical field is one that is grounded in such an understanding. The limiting of rights and freedoms takes place *only* when security considerations require this limitation. The word “only” signifies the limited restriction of rights for security reasons. It signifies an exceptional situation that is external to the general rule.

There is hardly any modern constitution that does not recognize the right of the executive branch to suspend the normal rules of government, including the rights and freedoms of citizens, during periods of crisis. This right is not a product of the modern era, but has roots in a long tradition of emergency rule. What is distinct about the modern right, however, is that it accompanies a universal theory of law, which, subsequently, constitutes exceptional emergency powers as a violation of the general rule, and, therefore, as endangering the legitimate order. Rethinking the modern exceptionality of emergency powers, therefore, entails a simultaneous rethinking of the structure of modern universal law and the belief in a singular legality applied to all citizens without exception. This in turn invites a different theorization of the relationship between exceptional security powers and the general rule of law.

Examining this relationship is vital to any

understanding of the relationship between the state of Israel and its Arab citizens.¹³ Ever since they *came to be* the “Arab citizens of Israel,” their lives have been regulated, even constituted, by the exceptional legalities of emergency powers. They lived under a military regime imposed only on them wherein emergency regulations were the major mechanisms of governance.¹⁴ Even when the military regime was finally lifted, emergency regulations continued to be enforced on the Palestinian population both in Israel and the West Bank and Gaza. In 1998, during its first review of Israel as a state party to the International Covenant on Civil and Political Rights, the UN Human Rights Committee raised concerns with Israel regarding both the fifty-year officially proclaimed state of emergency as well as the continued use of emergency regulations. In 2001, in response to these concerns, Israel stated that while the government did not favor the continued use of these regulations, “the actual termination of the state of emergency could not be executed immediately, as certain fundamental laws, orders and regulations legally depend upon the existence of the state of emergency.”¹⁵ This statement implies that if emergency regulations are to be abolished, security legislation will persist as part of the general law. It is worth noting here that in the mid-1980s, Apartheid South Africa abolished all emergency regulations, but it re-enacted them in the general law.¹⁶

The special dossier of this volume of *Adalah's Review* is devoted to exceptional powers and their relation to the general structure of Israeli law. We include four reprints of primary documents that together speak to the difficulty in distinguishing exceptional security law from the general non-security law as these are applied

to the Arab citizens of Israel.

We choose to reproduce three of these four documents in particular because they shed light on and challenge three different forms of security-oriented legislative activities. The first legislative activity is one that is aimed at amending a basic law, which is a “constitution-like” law. Here, the reference is made to the 2002 amendment to the Basic Law: The Knesset, which prevents political party lists or candidates from participating in the parliamentary elections on the grounds that they “support terror,” and thus endanger state security. The second legislative activity is an intervention in a regular statute, passed as a temporary order or a security exception. Here, we are referring to the 2003 temporary order/statute that prohibits Palestinians from the 1967 Occupied Territories from obtaining citizenship, permanent residency, and/or temporary residency status in Israel by marriage to an Israeli citizen. The governmental justification for the temporary order/statute is that Palestinians from the Occupied Territories who were unified with their spouses, citizens of Israel, were involved in attacks against the security of the state. The third legislative activity is a series of state of emergency laws and regulations that are understood to be generating purely exceptional legalities, the sole purpose of which is to protect state security. Some of these legalities are grounded in the continuous declaration of a state of emergency, and are not passed by the parliament.

Instead of reprinting the three actual laws/orders/regulations, and thus, contributing to their uncritical reproduction, we choose to present the readers of this volume with various legal challenges to them. One objective is to shed light on the ways in which human rights lawyers

attempt, in practice, to challenge security law. Another purpose is to point out the various forms that security-oriented legalities can embody, and to re-situate emergency regulations, supposed exceptional security legalities, as part of the general law. No longer appearing to be confined to that which is called the exception, security laws begin to make an appearance everywhere in Israeli law.

The fourth and final document reprinted in the special dossier is the text of the 2003 UN Human Rights Committee's Concluding Observations on Israel. While the UN HRC welcomes some positive reforms that Israel has introduced in other areas, and recognizes at the outset the security concerns of Israel, it takes issue with the many practices and policies, most of which are enshrined in law, that the state carried out "in the name of security" both in Israel and in the Occupied Territories.

The myriad of issues that impact security considerations – issues such as the extent to which emergency powers were central to the very making of the "Arabs in Israel" – cannot be fully explored in a single volume. Considered together, however, the articles and the special dossier in this issue reveal the pervasiveness of exceptional legalities "in the name of security" in the lives of Palestinian citizens of Israel. In many spheres of their lives, Arab citizens of Israel experience the general law of the state as inseparable from these exceptional security legalities. For them, the exceptional legalities have become an integral part of the working of the Law – a general law rooted, for some citizens, in a perpetual state of emergency.

End Notes

1 Quoted from *Oxford English Dictionary* (online version).

2 For an example of such an approach by human rights advocates, see "Special Report: Justice on Trial: State Security, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey: Report of the Joseph P. Crowley Program/Lawyers Committee for Human Rights: Joint 1998 Mission to Turkey," 22 *Fordham International Law Journal* 2129 (1999).

See also Venkat Iyer, "States of Emergency: Moderating their Affects on Human Rights," 22 *Dalhousie Law Journal* 125 (1999) at 128: "This article will examine the legal and practical justification for emergency powers, and trace the history of their evolution in international law. It will describe recent and ongoing efforts by intergovernmental and non-governmental organizations to moderate the effects of emergency regimes on human rights. An attempt will also be made to analyze the effectiveness of provisions in the major international human rights instruments designed to control the abuse of emergency powers. The discussion will also encompass suggestions for improvement of the existing system of controls of the exercise of such powers, at both international and domestic levels."

See also Derek P. Jinks, "The Anatomy of Institutionalized Emergency: Preventive Detention and Personal Liberty in India," 22 *Michigan Journal of International Law* 311 (2001). Jinks looks for ways to accommodate the structural tension between the ideal of an international legal order and the demands of effective domestic governance: "Finding a 'third way' will require fine-grained comparative legal work that takes seriously both the proffered rationales for state practices and the deficiencies of international standards (at 368)."

3 See H.C. 5100/94, *The Public Committee Against Torture in Israel v. State of Israel*, 53(4) P.D. 817. The Court considered the use of "moderate physical pressure" by the General Security Services (GSS) in their interrogation of Palestinians, and recognized that in order to accurately resolve this issue, an acknowledgment of the collision of values was involved. This resulted in the Court's condemnation of "moderate physical pressure" as a mode of interrogation. In "ticking time bomb" situations, however, the defense of necessity is applicable but this would be need to be prescribed by statute authorizing the administration of this effect.

For a critical review of this decision, see Ardi Imseis, "'Moderate' Torture on Trial: Critical Reflection on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods," 19 *Berkeley Journal of International Law* 328 (2001). Imseis

- evaluates the decision as an “overly simplistic contextualization of the case before it as merely requiring the balance between respecting the liberty rights of ‘the hostile terrorists’ and protecting the ‘security’ of the state” (at 349).
- 4 Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy,” 116 *Harvard Law Review* 16 (2002).
 - 5 *Id.* at 153.
 - 6 See e.g., Pnina Lahav, “The Right to Know, Freedom to Publish and Official Secrets,” 6 *Mishpatim* 562 (1975) (Hebrew); Itzhak Zamir, “Human Rights and National Security,” 19(1) *Mishpatim* 17 (1989) (Hebrew); Shimon Shetreet, “Emergency Legislation in Israel,” 1(2) *Law and Government in Israel* 433 (1993) (Hebrew); David Kretzmer, “Fifty Years of Public Law in the Supreme Court of Israel,” 5(1) *Law and Government in Israel* 297 (2000) (Hebrew).

There are a few exceptions to this approach. See e.g., Daniel Statman, “The Absoluteness of the Prohibition Against Torture,” 4(1) *Law and Government in Israel* 161 (1979) (Hebrew); and Ariel Bendor, “Against the Relativity of Basic Rights,” 4(2) *Law and Government in Israel* 343 (1998) (Hebrew). Both Statman and Bendor defend the absoluteness of human rights.
 - 7 Hanna Herzog and Ronen Shamir, “Negotiated Society? Media Discourse on Israeli Jewish/Arab Relations,” 9(1&2) *Israel Social Science Research* 55 (1994).
 - 8 Eitan Rabin, “Special Report: Polygamy and the Arab Sector – Security Risk,” *Ma’ariv*, 4 February 2003.
 - 9 David Cole, “The New McCarthyism: Repeating History in the War on Terrorism,” 38(1) *Harvard Civil Rights-Civil Liberties Law Review* 1 (2003).
 - 10 Quoted from *Oxford English Dictionary* (online version).
 - 11 Note that there exist additional meanings for the term security. In its World Report for the years 2002-2003, Amnesty International states that governments have spent billions to strengthen national security and the “war on terror.” Yet, for millions of people, the real sources of insecurity are corruption, repression, discrimination, extreme poverty and preventable diseases. Security is thus understood to be economic prosperity for all, equality and dignity. Report available on Amnesty’s website: <http://www.amnesty.org>.
 - 12 See e.g., James Ron, “Varying Methods of State Violence,” 51(2) *International Organization* 275 (1997). Ron looks at changes in the interrogation and torture practices carried out against Palestinian detainees by Israeli security personnel in the Occupied Palestinian Territories. He argues that torture had not ceased but its nature has fundamentally changed from unregulated violence toward a more calibrated rule-bound regime.
 - 13 In his essay on the exception and emergency powers, Tel Aviv University legal scholar Oren Gross draws on the Schmittian theorization of the relationship between normalcy and emergency. He demonstrates that the distinction between national security and non-security issues follows the same pattern. Gross argues that Schmitt’s theory, understood as descriptive and not normative, is still relevant today. Gross fails, however, throughout his text, to mention the relevance of his article to the legal regime in Israel. One would have hoped for such a reference because Gross concludes his essay with a personal note about academic accountability. There are times, he writes, that academics cannot enjoy the privilege of not taking sides and not expressing positions. See Oren Gross, “Exception and Emergency Powers: The Normless and the Exceptionless Exception: Carl Schmidt’s Theory of Emergency Powers and the ‘Non-Exception’ Dichotomy,” 21 *Cardozo Law Review* 1825 (2000) at 1867.
 - 14 See Alina Korn, *Crime, Political Status and Law Enforcement: The Israeli Arab Population During the Military Government (1948-1966)* (Thesis Submitted for the Doctor of Philosophy Degree, Hebrew University, 1997) (Hebrew). See also Nur Masalha, *The Land Without a People: Israel, Transfer and Palestinians, 1949-1996* (London: Faber and Faber Ltd., 1997).
 - 15 Addendum to Israel’s Second Periodic Report on the International Covenant on Civil and Political Rights (CCPR/C/ISR/2001/2), 4 December 2001.
 - 16 Venkat Iyer, *supra* note 2, at 173: “In the mid-1980s the white minority government decided to end the formal emergency proclaimed under the *Public Safety Act* 1953, but only after it had replicated most of the emergency powers in its ordinary law.”

Temporary Exit/Entry Permit issued by the Israeli police pursuant to the Defense (Emergency) Regulations - 1945 for Palestinian poet Mahmoud Darwish on 16 February 1968. Permit allows Darwish to enter Jedaide (a "closed area"), his home village, for one day to visit his parents.

הגנת ישראל

№ 28179

מסגרת ההגנה ושיטת חירום 1945
בחוקף שבכוחי לפי תקנה 125 הנבי כותב

רשיון יציאה/כניסה זמני

משרת ישראל
16. 2. 68
מטה נפת חיפה

שם מנור: מר - 73134

ציר התנועה: ג'א'ל

סרטי בעל הרכב: -

שם המספר או המזלג <u>31111</u>	שם המב <u>אילן</u>	שם האב <u>א/א</u>	שם האם <u>אמא</u>
מספר החות <u>3151417171214</u>			מספר היקבוצ <u>415</u>

מטרה הנסיעה: מפגש

תוקף הרשיון מ:
הגלוח יום: 17.2.68 עד: 18.2.68

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סרטי מטלמ המוסמ
המספר: 3116 הדרגה: ק"א החמישה: 311 השם: אילן

לתשומת לבו של בעל הרשיון

הרשיון נתקף רק כשהוא מצורף לתעודת הזהות. התנאים שבכפופות להם ניתן הרשיון, מפורטים להלן: -

1. אינך רשאי לעשות כל פעולה אחרת מרש לזו הרשומה במקיף. המטרה אשר ברשיון זה.
2. בתום תוקפו של רשיון זה עליך להתוויר מיד ליחידה שהוציאה אותו.
3. במקרה של אכזר הרשיון עליך להודיע מיד לתחנת המשטרה הקרובה.
4. עליך לשאת את הרשיון אצלך, כל זמן שהחוק כחוזמי השטח המגור.
5. רשיון זה אינו ספקה לך רשות כניסה לשטחי אימונים של צה"ל.
6. אסור לך להיסעא בשטח המגור בתום תוקפו של הרשיון.
7. אינך רשאי להטותיק את מקום מגוריך שמרש ברשיון.
8. לשהיה * מחוק לאיזור המגור/בשטח המגור בין השעות 2000-0600.
9. אילן
10. למחוק את המיזר

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Al-Mutafaqim

The Pessoptimist, State Security, and the Exception-Rule in Legal Practice

Farid Ghanem

A Field of Thorns

What follows offers little more than the telling of a tale. Strictly speaking, it is not an academic article. Nor is it a work of literary criticism in the fullest sense of the term. What follows, if one were to look for a clear definition, is but an attempt at the delineation of a condition. While a number of critical measures and clear-headed judgments may have informed my attempt, I have also allowed myself a fair measure of creative and syntactic indulgence, the better to attain a vision of the world that is larger and more daring than that of the legalistic approach. Perhaps it is true that the real world is richer and more mysterious, in many unfathomable ways, than any imaginary one. If this is indeed the truth, then it is no truer than when it applies to the subject of our tale, the measures and dictates of security in the state of Israel as they encroach upon the basic everyday, personal, and national rights of “the remaining handful of Palestinian Arabs.”

She replied, “The village chief informed us how they had told him: ‘You fought and were defeated; therefore both you and all your property have legally become ours. By what law do the defeated claim their rights from the conqueror?’”¹

Literature is capable of undoing bitter reality, completely dismantling it, if only on paper. It is able to do so by appealing to metaphor, symbolism and ambiguity. It is able to suspend belief and all pressing questions, using irony and all sorts of incongruities. The creative writer is free to do that which the lawyer can only despair of doing: force onto the stage a completely deranged person, one who, on the strength of his stupidity and dimwittedness alone, is able to

dispossess generals and officers of their stiffness and roughness, like the soldier in *The Good Soldier Svejk*.² The creative writer is able to discern that which the legally minded cannot because he or she is free to recreate the hypertext beneath the legal text, the transcendent reality that grounds the realities of the legislator, the executive, and the judge. The lawyer who breathes in the atmosphere of positive laws, on the other hand, can only adhere to the letter of the law, the surface text. All the lawyer can do is deliberate or at best argue over the interpretation or the application of an already written text.

In the world of the imagination, the last word, the final authority dispensing with sentences, so to speak, is the author. No investigative committee, no legal or judicial body has to be involved; to the impressions of such official bodies, to their scrutiny and their decisions, every lawyer must heed.³ That is, of course, not to belittle the potential for personal influence in the process. For these and other reasons, one cannot help but feel put off by the field of legal studies, or, for that matter, other similar fields of specialized human activity. Such fields can afford very little room for maneuvering and we end up with only a narrow view of the world. Consequently, the scene is blurred, the form supersedes the content, and the detail replaces the whole. The lawyer cannot force facts or advance claims unless they are legally admissible, otherwise they are considered irrelevant or of no legal substance. Where the lawyer can be free only to play the role prescribed for him or her, the writer is free to write or rewrite the script, to decide how it begins and where it ends; he or she can determine the roles and choose the cast, the make-up, the stage, and the sound track. Unlike the writer, the man of law has no such privilege.

There is a crucial problem inherent in every legal or juridical deliberation: It is the necessary prior determination of the boundaries of such a deliberation, the predetermination of how freely the debate can proceed, and hence, the circumscription of the field of play. The lawyer can only move within the letter of the law, with barely enough room for interpretation. The text of the law is a sacred given; it is not to be altered. Were the lawyer to transgress and engage in general intellectual debate - a rare happening, indeed - the debate would have to turn on the sanctity of the law, questioning its origins and the ethical, historical, and philosophical assumptions that lend it the force of legitimacy. The lawyer, however, remains, as do most academics, subjugated to all forms of restrictions and prohibitions. This is especially the case when the lawyer stands before the court defending a case. The supremacy of the rule of the law becomes an absolute given, not to be undermined at any cost, as that which signifies the final authority among the people as represented in the parliament or other bodies, and as the condition of possibility for the lawyer's professional practice. On another plane altogether, the creative writer draws his or her characters from outside of the Population Registry, and with them, is able to break the covenant of the law. In the face of all norms and normative practices, the creative writer can transgress the boundaries of the law, thus refusing to succumb to law's authority. This situation is not unlike that of aggrieved victims who understandably flaunt all rules when the law sanctions the shedding of their blood, after stripping them of their dignity and their natural rights.

Between the well-defined article of the law and its immutable letter and the expansive, creative vision of literature and its limitless horizons of

imaginative creation and style, there yawns a bottomless pit. To attempt to straddle both worlds and bridge the abyss is not unlike walking in a field of thorns, and I shall not go as far as saying a field of mines! For the lawyer who speaks or writes in a literary fashion is by definition a bad lawyer. Likewise, the writer who creates only within the boundaries of an already set legal text dims all creative horizons. Is it then possible to attempt in my tale to bridge the gap and straddle both worlds?

I am not so sure. But one thing is clear. Amid the increasingly suffocating measures of security, it is no longer tenable to barricade oneself behind discourses of legality in the hope of understanding and thus, articulating the nature of our condition. As an all encompassing art and a means of crossing boundaries and transcending forms, literature can express that which the law cannot articulate. Literary vision can reach beyond legal vision and be canny where the latter is unsuspecting, and can do this without the cumbersome task of providing material evidence. This is true of the vision of literature even when it is most fallible. *The Secret Life of Saeed The Pessoptimist*, or simply *The Pessoptimist* as it is well known, is an excellent case in point.

For There is Nothing New under the Sun

There is a metaphysical view of the world that is extreme and purist, which goes as far as to deny the materiality of all existence and relegates it to pure illusion. There is also the counter materialist view that sees matter as the essence of all existence, and even as that which determines the process of any change. Between the two, there is the possibility of a vision that

is grounded in the real but has its flights of imagination. It soars up high, only to return with the stuff of myth and legend and a freshly conceived mode of discourse.

The first metaphysical stance, which denies everything, even the existence of its perpetrators, goes so far as to claim that all that transpires, all that is said or done, is in fact but the echo of what has already been said and done in the past. What was said will be said again and what will be said has already been said. According to this view, the possibility for change, and for changing the world, is not even postulated; the reality of existence is of no more substance than a vague concept or a repeatable illusion. How is it possible to change that which does not even exist? In T. S. Eliot's words:⁴

Time present and time past
Are both present in time future,
And time future contained in time past.

As an epic of the everyday struggle of common people, Maxim Gorky's novel, *Mother*, provides a good illustrative case of the second view, the more material, social realist stance.⁵ It begins with dispersed sparks and significant events and moves toward a heated climax before it reaches the all-encompassing possibility of change: the Revolution.

The third view can be found variously expressed in the diverse body of creative work by writers who possess strong ideological and political tendencies. *The Pessoptimist*, like most of Emile Habiby's other writings, falls within this category. The proponents of this view may put forth purely fictitious accounts and otherworldly creations, but the metaphysical undertones in their writings remain mainly tactical, a means to an end but not the end itself. Such is the case with the creatures from outer

space in *The Pessoptimist*, or the City of Eldorado, the utopian city in Voltaire's *Candide*,⁶ or the city of Makundu in Gabriel Garcia Marquez's *One Hundred Years of Solitude*.⁷ It is also the case with the terrestrial and underground creatures in the work of H.G. Wells, an English socialist and a utopianist.⁸ It is even possible to extend the list to include Dante's *Divine Comedy*⁹ and Abu al-'Ala' al-Ma'arri's *Risalat al-Ghufran (A Treatise on Forgiveness)*.¹⁰

This trend in literature refuses to see the world as nothing but eternal misery, even under the worst of conditions. It does not subscribe to the view that "there is nothing new under the sun" or that humanity has not improved over the course of history. What drives these writers is the desire for change and the firm belief in their ability to change. Their recourse to the fantastic, their blending of the imaginary and the real, and their opting for a more magical-realist mode of narrative, these are all but a means toward expressing a larger truth, without having to produce material evidence, furnish proofs of existence, or cite fieldwork findings. It is all but an attempt to redeem the vision behind the dry detail. For the inspired writer is capable of entering into an otherworldly experience not unlike that of the prophets, qualitative differences notwithstanding. That is, the inspired writer may experience a readiness to receive inspiration, visions and divinations, which keep intensifying until they induce the writer to enter into an epiphany, a moment of sudden revelation.¹¹

Is the Pessoptimist then able to see that which professors of law and practitioners cannot? Or has he gone off the deep end? Does he simply exaggerate when he issues judgments not at all based on carefully considered evidence and authenticated documents?

Necessary Briefing, Necessary Indulgence

Things had so arranged themselves that I found Emile Habiby materializing as my interlocutor in these reflections, eight years after his death. The outcome of this curious incident was my decision to turn *The Pessoptimist* (*Al-Mutasha'il*) on its head, using the very same strategies it employs in effecting linguistic and historical subversion. I have therefore devised a different type of neologism, using the very same terms, pessimist (*mutasha'im*) and optimist (*mutafa'il*), while reversing the order of the syllables. In the same spirit of metalinguistic playfulness, we arrive at the term *al-mutafa'im*, or the *optipessimist*. This reversal is not sheer word play or whimsical linguistic indulgence; while it retains the original binary opposition, it seeks to embody in one word scores of grave developments and serious setbacks over the past thirty years or so, that is, since *Saeed The Pessoptimist* first appeared in print. You may also consider the word, if you so wish, as the fruit of free associations over a free-falling reality. Furthermore, we may consider that sometimes the glottal stop *hamza* (such as the ['] in *al-mutafa'im*), in many Palestinian and Arab dialects, is a transposition of the Arabic letter *qaf*. The word for pen, *qalam*, for example, becomes *'alam*, which also means pain, and the word for law, *qanun*, becomes *'anun*, which also means the one who is writhing with pain. By the same token, and *mutatis mutandi*, the term *al-mutafa'im* (the optipessimist) may, through reverse transposition, re-emerge as *al-mutafaqim*, or that which becomes increasingly serious or aggravated, the ever aggravated. Does this bespeak the reality of our present situation?

One might wonder why I had to appeal to riddles and transpositions before I could arrive

at a title for our tale. Has "Saeed the Ill-Fated's" condition so deteriorated that we are now reduced to accepting the appellation of *Al-Mutafaqim*, or the Ever Aggravated? My excuse in appealing to these riddles of language is that the foundation of our tale, Emile Habiby's inspired work, has to do with the decision to confront calamity and defeat with the powers of the imagination and the creative play of language. Thus, we face hardship with an unflinching, naked eye. Indeed, some critics have seen language itself as the main protagonist in Habiby's novel *Ikhtiyya*. The same is true, in my opinion, of *The Pessoptimist*, as in most of Habiby's writings where language invariably plays a major role. Language is a self-regulating organism; it has its own life, evolving and devolving. It lives and dies following its own inner laws. This is of course not to deny the crucial role of external forces and of language environments. However, language is not merely a means of communication. It has its own powers of creation.

A curious example of the creative interplay between language and its environment is the phenomenon known as "bird language," as our ancestors have called it. Bird language is an instance of the creative use of colloquial registers whereby letters are methodically transposed according to a manner previously agreed upon by two interlocutors. A codified mode of speech is thus produced, one that would leave a third party befuddled. It was no less than Habiby himself who, when addressing the ultra right MK Gh'iola Cohen (whom he liked to call Ghoula Cohen) in the wake of her incitements against the Arabs and her call for forcing more restrictions on them, he asked her: "What more are you asking for? Will it please you if we spoke only in bird language?" Bird language, even if

it is restricted to colloquial registers, is clearly a means of circumventing restrictions placed on the freedom of speech by the powers that be.

The Rule and the Exception to the Rule, or the *Sha'idha*

The State: A means by which to exert political control over a class society.¹²

If we were to accept this basic definition of the state, if only for the sake of argument, the question that would inevitably arise would be: Exactly by what means does the ruling class exercise its control?

Legal and judicial systems are no doubt two such means. At least this should be the case in any state that recognizes the rule of law. But these are not the only means. The modern state does not exercise its prerogatives only through the traditional tripartite division of powers; there is also the fourth power, mass media, which is inextricably intertwined with the vested interests of the upper echelons. There are also other powers in the making, the discussion of which, however, must await separate treatment. Perhaps I could still mention the phenomenon of an “imperialism of virtue,” to which Edward Said refers in one of his articles¹³ and which must represent a fifth power in the making in our age of globalization.

It is perhaps at this point that I must further clarify my use of the terms “law” and “statutes.” I mean simply those laws and statutes enacted by the parliament, as well as secondary legislation, judicial case law, and other sources. In the case of all such laws, regardless of their source, the instance of application inevitably deviates from the written text. Exceptionalism in the practice of law, especially in security-

sensitive cases, ultimately takes on a reality of its own, so much so that exceptions have become a central component of legal reality. Deviance from the law, ranging from the daily conduct of individual state officials to the legal consideration of Arabs’ collective rights, has become so rampant that it is now the rule. What should be exceptional (*al-shadh*) has become the rule (*al-qa'ida*). We may thus, after the example of *The Pessoptimist*, forge a new term: *al-sha'idha* or the exception rule, which could be used to describe how in legal practice what is exceptional and deviant has by far surpassed, in both scope and praxis, the rule of the law.

Baqiyya, the Pessoptimist’s wife, says to him, before she disappears in the waters of Tantura with her only child:¹⁴

And I want to tell you also, husband, that... I also know that those who make the laws will ignore them if it is in their interests to do so.

And so we begin to see how people decide to name things for what they really are, doing so in secret if not openly:¹⁵

The communists soon began to call the Custodian of Abandoned Properties, the Custodian of Looted Properties. We cursed them, the Communists, in public but repeated what they said in private.

The massacre at Kufr Qassem provides us with one of the most glaring cases of deviance in the application of the law. The fact that one of the officers responsible for the massacre was issued a fine of only one *grush* (cent) - what has come to be known as “the Shadmi *grush*” - is an irrefutable example of the chasm between the written text of the law and its application. In one of the issues of *Hadashot*, before it went out of circulation, the journalist and caricaturist Kobi Niev drew a sarcastic cartoon of a seated judge

with the caption saying: “I can see you only killed an Arab. You are therefore sentenced not-guilty!” Discrimination against Arabs is not restricted to the courts of appeal or to occasional reports in the media; they have become our daily bread. What reaches the public is but the tip of the iceberg; the rest becomes a matter of gritting one’s teeth.¹⁶

To attempt to provide evidence of discrimination against Arabs or the radical opposition solely on the basis of legal texts is to overlook the bulk of such discriminatory practices. This is the case first because such practices are verifiable or quantifiable mostly through indirect means such as statistics and the like, which turn the realities of these practices into matters for inference and deduction, and hence, are easily argued against and refuted. Second, some aspects of these practices remain invisible or unverifiable, as in the case of decisions delivered on the basis of the courts’ understanding of witnesses’ testimonies. Third, a good number, if not the majority, of such cases of discriminatory practice remains undocumented, especially so when it is a matter of state security. Discriminatory practices such as personal searches or interrogations at the airport or at permanent or makeshift checkpoints, around street corners, or at the entrances to shopping malls or public institutions are but a fraction of what goes unheeded and undocumented every single day. This is when the creative writer comes in and plays a crucial role by observing that which goes unnoticed by recording the stubborn reality, which refuses to be reduced to mere jottings via dry documentary apparatus.

except on Saturdays, when they let us go about freely and as we please, that we become easy prey

as we stroll by carefree and unsuspecting and fall easily into road ambushes set up by troopers who seem to be there only on Saturdays.¹⁷

“Security”: A Matter of Numbers

The definition of the state of Israel in the so-called “Declaration of Independence” as “Jewish and democratic” was and still remains, and perhaps will always be, one of the most controversial issues, subject to endless political as well as legal debates. The Knesset or Israeli Parliament passed a series of laws, which basically aim to secure the Jewish identity of the state and to guarantee its practical translation into a series of privileges. Among such laws are the Law of Return - 1950, the Law of State Education - 1953, and the Nationality Law - 1952, not to mention a longer series of governmental decisions and policies that sanction discriminatory measures explicitly or implicitly under the pretext of awarding benefits for performing military service or some such expedient. Just for being Jewish, a person enjoys complete and unconditional legal privileges, whether it is the right to immigrate to Israel or the right to full citizenship or immediate eligibility for exemption from certain taxes or for housing aid - all to entice Jewish individuals from the Diaspora to immigrate to the Promised Land.¹⁸ Moreover, lavish privileges are bestowed on the settlers who live in the 1967 Occupied Territories. The converse is true of the Palestinian Arab, who is denied all such privileges and, even more so, denied rights that are his or hers by written law.

Has the Big Man ever stopped to ask why I was born only an Arab and could have only this as my country?¹⁹

In Habiby's *Ikhtiyya*, giving birth among the Arabs becomes a demographic issue and a so-called threat to the Jewish identity of the state. It has become the subject of an endless obsession:²⁰

They have heard about it all the same...those misgivings about suspect motives, what causes the Arabs to procreate so much, what an unspeakable indulgence? We were so beleaguered that it became easy to spot those harboring the misgivings behind their shut windows as they counted every moan and groan and wondered whether we slept with our women on the orders of Abu 'Ammar!

On another occasion, Habiby provides us with a description of the "crimes" discovered by the investigators while interrogating Abu 'Abbas, who then had to lead them to the different sites where he committed his "breach of security crimes." Out of the series of crimes, there emerges the oldest of them: "slipping out of his mother's womb without permission."²¹

To define the state, even on an abstract level, as "Jewish" constitutes a complete negation of its other definition as "democratic." Were we to disregard the most basic definition of democracy, or were we even to ignore the pitfalls of Israeli democratic practices, we would still end up with a democracy-in-suspension. To borrow a term from the Law of Contracts, Israeli democracy is a "condition subsequent," self-nullifying as long as it includes the provision for its own voidability. This provision for voidability is forever lurking like a serpent behind the door; it is the ever-looming threat of the non-Jews, namely the Arabs, becoming, sooner or later, the majority in the state of Israel.²² What security departments and other affiliated institutions have come to term "the demographic threat" basically amounts to the

sanctioning of any measures that would preserve the Jewish majority in the state.

What concerns us here is the fact that the Jewish identity of the state, whether it is a matter of the nature of the state or of numbers, has come to represent the number one security issue. And despite all the debates among Jews themselves over the status of non-Jewish citizens, the presupposition of a Jewish identity of the state already necessitates total rejection of the possibility of their becoming a minority. Saeed the Pessoptimist saw it all:²³

Since I realized that birth control was a proof of loyalty, we had no more children.

Securing the Citizen-Subject

Saeed realizes that those who lay down the law – Members of Parliament as well as all other decision-makers – are capable of amending the very same laws to suit the dictates of national security:²⁴

You know full well, old friend of a lifetime, of my extravagant loyalty to the state, to its security and its laws, whether promulgated or still to be so.

If non-Jewish procreation represents a threat to the security of the state and to its very foundation, excessive loyalty constitutes yet another kind of threat. Saeed, who has become more Catholic than the Pope, as the saying goes, raises a white flag on the rooftop of his house in Haifa. He does so in an immediate, involuntary response to broadcasted appeals on the Voice of Israel, in Arabic. The appeals were directed to the Palestinians of the West Bank, Gaza and Jerusalem and to the inhabitants of the Syrian Golan Heights during the occupation of 1967. The "Big Man" considers what Saeed does

an act of rebellion, tantamount to declaring Haifa an occupied city and therefore “advocating its separation from the state.” Saeed is informed:²⁵

The Big Man has come to believe that the extravagance of your loyalty [to the state] is only a way of concealing your disloyalty.

The issue of the Jewish identity of the state is, in the end, one that extends beyond matters of legal definition; it affects every aspect of the individual’s life. The Palestinian who carries an Israeli ID card moves between carefully demarcated spaces: the inside of prison walls and gates and the outside, itself a larger prison:²⁶

I came, then, to see the jail’s iron gate as a door connecting the two yards of one prison. In the inner yard, I would wander awhile, then rest; in the outer yard I would also wander awhile, then go back to jail.

The Arabs’ condition in the state of Israel is not unlike that of “our great poet al-Mutanabbi in the gardens of Buwan in Persia: ‘In face, hand, and tongue a stranger.’”²⁷

Through Saeed’s misadventures, Habiby presents us with a series of events in which the defeated Palestinian becomes a cynical eyewitness who masters the art of dodging hardships solely through the strength of his sarcasm. Irony plays a crucial role in these events, conceived in a hotbed of conflicting laws and oppressive measures which restrict the freedoms of movement, thought, expression, and association, and stunt any form of ordered, settled life. Even Saeed is issued a compulsory stay order forbidding him from leaving Haifa, which he then displays on the wall of his vegetable stall. His popularity increases even more at this point:²⁸

a couple of days later the police returned and told me that the governor had been kind enough to revoke the order, and that our state was a truly democratic one. They then tore it off the wall and returned me to prison on the grounds that I had shown disrespect for official state papers.

The “Ill-Fated Saeed” also tells many stories involving Arabs who were stripped of their possessions. Thurayya, a Palestinian refugee from al-Wihdat refugee camp in Jordan, in one such sad tale, returns to her house now taken over by our cousins. Confused over the event, she reveals a secret place, where she had hid her wedding jewelry, to the “Custodian of Enemy Property” who simply “gave her a receipt for the gold [*dhahab*], took it himself, and left [*dhahab*].”²⁹ Saeed himself, the ingenious collaborator that he is, is subjected to an incident exemplary for the way it bares for all to see the victorious-defeated dynamic:³⁰

As I was moving my belongings to my new home, a car stopped nearby and evil itself emerged, produced pen and paper, and said, “We (he was in fact alone) are from the Custodian of Enemy Property.”

I produced from my hip pocket my membership card in the Union of Palestine Workers and exclaimed, “Oh, we’re on your side!”

“No, no,” he insisted, “I want proof that this property is yours, that you haven’t stolen it.”

I was at a loss as to what to do. As I slipped the card into my back pocket my trousers fell a little in the process. Since when, I wondered, did people have to carry with them proof that their furniture was not stolen? I hoisted my trousers, afraid I might have to prove ownership of them too.

Such is the case, even when the defeated is someone like Saeed who has had a long history in the service of the state.

Straining for Vision

I quoted earlier one of the basic definitions of the state, which, while very basic indeed, can still afford us with an insight into the socio-political nature of the state. The insight issues fundamentally from a Marxist worldview and understanding of human societies. This insight into the state as a tool for political hegemony in the hands of the ruling class can be useful at least in initiating debates over possibilities for improvement in any state formation, including that of Israel. But history has so far taught us that anti-Marxists know how to block the realization of Marxist visions. Those who hold a materialist view of history, therefore, can no longer afford to succumb to fatalist views or simply wallow in their past glories. They must, indeed as the Islamic edict would have it, “consider matters carefully and thereupon initiate the action trustingly” (*i’qilha wa tawakkal*). It is no longer tenable to follow historical delusions or to await the messiah or the mahdi. The awe-inspiring Creature from Outer Space condemns such attitudes and directs his rebuke at Saeed:³¹

I just wanted to say to you: this is the way you always are. When you can bear the misery of your reality no longer but will not pay the price necessary to change it, only then you come to me.

Let me return to the subject of our tale. Some crucial questions remain unanswered concerning security-related legal practices in Israel, and we may anticipate even graver developments in this regard. The matter by far exceeds blinkered

arguments over which codified laws or deviant practices inform the discriminatory measures that have become so part of the daily bread of Palestinian citizens of Israel, as individuals and as a group.

This excess in security-related practices escapes the rigid categories of law, making any examination of it, with the use of legal tools, a difficult task. This security excess that aims to regulate intimate spaces, such as the bedrooms of Palestinians, escapes the positivist worldview of the lawyer or the jurist who is able to analyze reality only based on the conceptually separate categories, such as citizen and subject, the law and its implementation.

Modern law separates the people of the world into citizens living in sovereign states and subjects living under occupation or in colonial states. State law grants rights to the former, and international humanitarian law offers protections to the latter. Saeed, a character not listed in the Population Registry, defies this distinction. He is neither a citizen nor a subject; he inhabits a zone of hybridity between/across both. He is not a citizen of the state; rather, he is its enemy. He is not living under occupation either, as this would suggest that Haifa is an occupied city. *The Pessoptimist* could then be read as a challenge to distinctions of legal theory, shedding light on zones that have yet to be adequately addressed by law.

In this zone of hybridity, security legalities, which first make their appearance as deviations from the law or as exceptions to it, gradually re-emerge as part of the general law governing the lives of Palestinians in Israel. They do not emerge under the guise of marginality, but as constitutive of the core of legal relations. Whereas the abstract divisions in modern law situate these security practices outside the

normative order of law governing citizens, Habiby's fictional-material depiction of the condition of Palestinians in Israel grounds the normative legal order in the general order of law. In a reverse move, *The Pessoptimist* gives birth to general legal relations from the womb of security legalities.

The statement quoted earlier about the Arab slipping out of his mother's womb without permission as being the first crime committed against the security of the state provides an example of how Habiby, the creative writer, articulated instinctively in literary language the central issue of security, the one behind all the discriminatory codes and practices. If Habiby were still with us, and was asked to write an epilogue to *The Pessoptimist*, he would probably want to refer to the reconfiguration of this security crime in the newly amended Nationality Law. He would want to describe restless Israeli legalities, which in the name of security, constantly move toward occupying more spaces to impose newly invented restrictions. The Nationality and Entry into Israel Law (Temporary Order) - 2003 prevents Palestinians from the West Bank and Gaza from uniting with their spouses, Israeli citizens living in Israel. This law prohibits Palestinians from the Occupied Territories from obtaining any residency or citizenship status in Israel by marriage to an Israeli citizen. The government has justified this law on the basis of security considerations, arguing that some Palestinians, who were united with their families in Israel, were involved in attacks against the state. In the name of security, spouses are torn apart and prevented from living together. If we accept that a condition of giving birth is being together, then many future Palestinian children have been denied permission to slip out of their mothers' wombs.

Those who wish may still repeat after the Big Man:³²

... our occupation has been the most compassionate known on earth ever since Paradise was liberated from its occupation by Adam and Eve.

The reality facing us, were we to look truth in the face and penetrate through all distracting appearance, is that matters have become ever so aggravated, and will continue to do so. As the Big Man explains to Saeed the Ill-Fated Pessoptimist:³³

You defeated the Mongols in the battle of Ain Jalut because they had come only to loot and leave; but we loot and stay, and it is you who will go.

End Notes

* Here and throughout his article, the author follows Emile Habiby's example, in his famous novel, *The Secret Life of Saeed The Pessoptimist*, by coining new terms out of two Arabic words in current usage. The practice in Arabic is commonly accepted and known to grammarians as the case of *naht* (carving), whereby the first syllable of the first word is joined to the last syllable of another word. For example, the two Arabic words *mutafa'il* and *mutasha'im* mean optimist and pessimist, respectively. When these two words are joined together, creating a third word via *naht*, then we have *al-Mutasha'im*, or the Pessoptimist in Habiby's title. Similarly, the term "Exception-Rule" in the title is a translation of *al-Sha'idha*, a term derived by *naht* from *al-shadhdha* (exception) and *al-Qa'ida* (rule). (Translator's Note – Ayman El-Desouky)

1 Emile Habiby, *The Secret Life of Saeed The Pessoptimist*, trans. Salma Khadra Jayyusi and Trevor LeGassick (London: Zed Books Ltd., 1985) at 90-91. All subsequent references are to this edition. A pre-eminent Palestinian author, Emile Habiby was born in Haifa in August 1921. He worked for the petroleum factories in Haifa for two years, while studying petrol engineering in a correspondence course with the University of London. From 1941-1943, he worked in the Arabic department of Palestinian Radio in Jerusalem. He was one of the founders of Usbat al-Taharur al-Watani (Coalition for National Liberation). In 1949, Habiby took part in founding the Israeli Communist Party and he remained one of its leaders until 1989, when

- he was forced to resign from all of his posts. Habiby served as a member of Knesset for 19 years, from 1952-1972. He resigned from his parliamentary post to pursue his literary work and to become the Editor-in-Chief of *Al-Ittihad*, the daily Communist Party newspaper. Habiby authored short stories and thousands of articles, and published six plays and novels, among them *The Pessoptimist* and *Ikhtiyya*. At the age of 75, on the eve of 1 May 1996, Habiby passed away in Nazareth.
- The Pessoptimist* is Emile Habiby's best known and most widely read novel. Similar to Voltaire's *Candide*, it tells the story of a Palestinian who finds himself, overnight, living in the state of Israel, which was established on the ruins of the Palestinian people. He tries with a mixture of pessimism and optimism to co-exist with an almost-impossible reality. He wants to be loyal to the new state, but his exaggerated loyalty constantly backfires, because state institutions cannot but see him as an enemy. The efforts of Saeed, the novel's protagonist, to co-exist with a harsh new reality result in a series of contradictions and ironic situations. The novel's depiction of Saeed's collaboration with the state is accompanied by an embarrassing and negative portrayal of Israel and its character-officials. Saeed's character and behaviour are practically, and ironically, the most effective written testimony challenging the foundations upon which Israel was established and the Israeli-Zionist propaganda.
- 2 Jaroslav Hasek, *The Good Soldier Svejk and His Fortunes in the World War*, trans. Josef Lada (London: Heinemann, 1973).
 - 3 Emile Habiby, *Ikhtiyya*, Kitab al-Karmel I, 1st ed. (Cyprus: Bisan Bars, 1985) (Arabic). *Ikhtiyya* is one of Habiby's novels. Its events are centered in Haifa. Through imagination and fantasy, beginning with a traffic jam in one of Haifa's streets, Habiby narrates the political reality of Israel since its establishment and the security-related practices against Arab citizens of the state. Habiby takes issue with some political groups, including Arab movements, and criticizes the Israeli administration. In this novel, Habiby clearly does not take interrogatory committees seriously and pokes fun at their procedures and the clumsiness of their members (at 33). He does not seem to believe in the different Israeli courts either, viewing them as mere servile arms of the security authorities, especially when it comes to security-sensitive cases (at 42-43).
 - 4 T. S. Eliot, "Burnt Norton" (1935), in *Four Quartets* (London: Faber and Faber, 1974) at 13.
 - 5 Maxim Gorky, *Mother*, trans. Margaret Wettlin (Dallas: Texas Bookman, 1987).
 - 6 Voltaire, *Candide or Optimism*, trans. John Butt (London: Penguin Books, 1947).
 - 7 Gabriel Garcia Marquez, *One Hundred Years of Solitude*, trans. Gregory Rambasa (New York: HarperPerennial, 1991).
 - 8 See John Lawton, ed., *The Time Machine, The Centennial Edition/H. G. Wells* (London: Everyman, 1995).
 - 9 Dante Aligheri, *The Divine Comedy*, trans. Dorothy L. Sayers and Barbara Reynolds (London: Penguin Books, 1962).
 - 10 Abu al'Ala' al-Ma'arri, *Risalat al-Ghufran*, ed. Bint al-Shati' (Cairo: dar al-ma'arif, 1975) (Arabic).
 - 11 The famous Irish writer, James Joyce, has appropriated the Christian concept of the Epiphany and developed it into a narrative principle. The experience of sudden inspiration should call to mind references to the muses of poetry (*shayatin al-shi'r*), which abound in the poetry of pre-Islamic Arabia. These muses, it is perhaps worth mentioning, were associated with *Wadi 'Abqar* (The Valley of 'Abqar), from which the term *'abqari* (genius) is derived.
 - 12 *Al-Mu'jam al-Falsafi al-Mukhtasar*, trans. Tawfiq Sallum (Moscow: Dar al-Taquddum, 1986) at 218.
 - 13 Edward Said, "Al-Dawr al-'Am li al-Kuttab al-Muthaqqafin," in 68 *Al-Karmel* 7 (Summer 2001) (Arabic). In the context of this article, the imperialism of virtue refers to the fact that some NGOs around the world receive funding, at least in part, from multi-national corporations and large foundations. Two researchers, quoted by Said, refer to these organizations as the "human virtue" foundations. The point is that through their financial aid, these foundations may limit the activities of the funded NGOs, thereby preventing deeper and more vital possibilities for change in the societies where these NGOs are active. We should add to this the fact that many of these NGOs, which are mushrooming all over, have begun to vie with political parties over certain spheres of action.
 - 14 *The Secret Life of Saeed The Pessoptimist* at 88.
 - 15 Id. at 45. The Absentees' Property Law - 1950 confers on the Custodian of Absentee Property full powers to seize lands and other properties owned by Arabs, even those who stayed in Israel after 1948. More devious ways were in time invented to seize more Arab lands. These procedures were eventually backed by precedent, in which the courts ruled in favor of the Custodian.

- 16 Statistics show that Arab citizens of Israel who are tried in the same courts and convicted of the same crimes are given much harsher sentences than Jewish citizens of the state. See Arye Rattner and Gideon Fishman, *Justice for All? Jews and Arabs in the Criminal Justice System* (Westport: Praeger, 1998). The courts, however, maintain that statistics do not constitute absolute proof; in practice, they claim that other factors play a role in sentencing. Religious, national or gender factors may thus not show in court records. See also Amnon Rubenstein, *Constitutional Law in the State of Israel*, 3rd edition (Jerusalem: Schocken, 1980) at 175-91 (Hebrew). Despite Rubenstein's overall sympathetic stance when it comes to Israeli laws and the manner of their application, he still provides examples of laws that explicitly discriminate against Arabs. He also cites a series of instances of biased application of seemingly "neutral" laws, where the law itself does not discriminate on its face. One example is the practice of banning all citizens from certain areas, except for Jews who are allowed to pass uninhibited (at 185-186). Another example is the Law of Absentees' Property - 1950.
- 17 *Ikhtiyaa* at 23.
- 18 For a detailed discussion of some of these laws and how they relate to the Jewish identity of the state, see David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder: Westview Press, 1990) at 89-113.
- 19 *The Secret Life of Saeed The Pessoptimist* at 122.
- 20 *Ikhtiyaa* at 21.
- 21 *Id.* at 56.
- 22 In recent years, an increasing number of strategic and academic studies have been published in Israel, which focus on the "demographic threat," i.e., the population increase of the Arabs in Israel (excluding the Occupied Territories) so that they may become the majority in the coming decades. The authors of these studies view this "threat" as constituting a danger to the Jewish identity of the state. In 2002, the Minister of Labor and Social Affairs reconvened the state-funded Demography Council, after years of inactivity. The aim of the Council is to find solutions to this "demographic problem." See also Rhoda Kanaaneh, *Birthing the Nation* (Berkeley: University of California Press, 2002), which analyzes the politics of reproduction and demography and how they affect Palestinians in Israel.
- 23 *The Secret Life of Saeed The Pessoptimist* at 97.
- 24 *Id.* at 121.
- 25 *Id.* at 122.
- 26 *Id.* at 134.
- 27 *Id.* at 76.
- 28 *Id.* at 135-6.
- 29 *Id.* at 95.
- 30 *Id.*
- 31 *Id.* at 159.
- 32 *Id.* at 124-5.
- 33 *Id.* at 126-7.

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Political Control and Crime

The Use of Defense (Emergency) Regulations during the Military Government

Alina Korn

The 1948 war and the establishment of the state of Israel radically altered the status of the Palestinians within the state in comparison with their status in Mandate Palestine. Nearly 80% of the Palestinian residents in the territories conquered by the Israeli military forces during the war were uprooted from their homes, while those who remained became a minority in a Jewish state “overnight.” Prior to the war, between 800,000 - 900,000 Palestinians resided in the areas that became the state of Israel. A mere 160,000 of them remained within the state and later received Israeli citizenship.¹ Thousands of Palestinians who remained within the jurisdiction of the state of Israel discovered that they were defined by the new state as “internal refugees” or “present absentees,” their property was confiscated, and they were denied the opportunity to return to their homes - which were at times only a short walk away from their current place of residence.² Military rule was imposed in all areas conquered by the Israeli forces and inhabited by Arabs. Subsequently, military rule in the Arab areas was replaced by a military government system, which was maintained until its official abolition in December 1966.

These changes had far-reaching consequences on the development and definition of crime as applied to the Arabs in Israel. Standard analyses of crime and delinquency rates show that the percentage of Arab offenders of the total number of convicted offenders in Israel steadily rose from the establishment of the state until the beginning of the 1960s. Between 1951 and 1966, an average of 29% of all convicted offenders for “serious offenses” were Arabs; this percentage was three times higher than the ratio of the Arab population during those same years.³ Yet, the rise in crime rates among the Arab minority, as

reflected in the criminal statistics for these years, derived largely from the extensive use of the Defense (Emergency) Regulations - 1945 (hereafter: Defense Regulations); thousands of Arab citizens of Israel were convicted for violating these regulations during the military government. The establishment of the military government system and the use of the Defense Regulations were justified on the grounds of security, yet their main purpose was to control the movement of Arab residents and to prevent them from accessing their confiscated lands.

An analysis of all criminal records of “Israeli Arabs” in the police database reveals that between the years 1948 and 1967, some 33% of the total convictions of Arab citizens were for violations of the Defense Regulations. From the available data, it is obvious that only a very small portion of these offenses were criminally motivated or committed for the purpose of harming national security, offenses that generally result in being handled by the criminal justice system. Most convictions under the Defense Regulations were specific to Arab residents, and were handed down as a result of the political control imposed on most aspects of their lives and the criminalization of previously accepted behaviors – such as accessing land and employment seeking. During these years, some 95% of all convictions for violations of the Defense Regulations were for administrative offenses, such as the failure of Arab residents to possess the proper permits and licenses, or for exceeding travel restrictions imposed by the military government.

Defense (Emergency) Regulations - 1945

The Defense Regulations were instituted by the British High Commissioner in Palestine.⁴ As of

1937, one year after the outbreak of the Arab revolt, emergency legislation was established within the territories of Mandatory Palestine. Despite the extensive criticism these regulations received - not only from Palestinians, but from Jews as well - they remained in effect until the end of the British mandate. After the establishment of the state of Israel, the regulations were absorbed into internal Israeli legislation, pursuant to Article 11 of the Law and Administration Ordinance - 1948, except for those regulations that stood in direct contradiction with "changes arising from the establishment of the state or its institutions."⁵ Harshly criticized by Jewish leaders prior to the establishment of the state, the Defense Regulations were later used by them when they themselves controlled the state apparatus.

The main reason for keeping the Defense Regulations intact during the 1950s was their wide use by the military government system.⁶ Officially, the military government was established in October 1948. Five military governors were appointed to the areas occupied by the Israeli armed forces during the war and which were populated mainly by Arabs. With the end of the fighting and the establishment of a central civil regime, the military government was neither cancelled nor was it legally regularized.⁷ Only in April 1949, following the inauguration of the first Knesset, were the Emergency Regulations (Security Zones) - 1949 published.⁸ These regulations formed one of two legal resources, which, later, served as a legal infrastructure for the military government system. The regulations delineated "protected areas" consisting of zones 10 kilometers wide at the northern border and 25 kilometers wide at the southern border. The Minister of Defense was authorized to decree that a protected area,

or any part thereof, be declared a security zone. The map of the security zones included as many Arab communities as possible and excluded most of the Jewish ones. These regulations facilitated the control of the Arab population residing within the security zones. Permanent residents of these areas were not authorized to leave the zones without a proper permit, and entrance was denied to people who were not permanent residents. The regulations also enabled land expropriation and relocation of permanent residents of the security zones.⁹

Despite the wide powers they granted, the Emergency Regulations (Security Zones) did not enable the control of movement of permanent residents within the zones, or of Arab residents residing in other areas of the country not defined as security zones. Nevertheless, from its initial stages, the military government system restricted the freedom of movement of most Arab residents within the country and required them to carry identification papers and travel permits. This requirement, similar to other restrictions imposed by the military government, had no legal foundation for 18 months.¹⁰ The solution to the absence of a legal foundation was provided only in January 1950, when the military governors in the security zones were appointed as military commanders in accordance with the Defense Regulations from which they drew their authority. From then on, the Defense Regulations became the main legal means employed by the military government system, alongside the Emergency Regulations (Security Zones).

During the first months of the activation of the military government system, it was unclear how to legally base the restrictions imposed on the movement of Arab residents. The regional military government in Jerusalem deliberated the

most appropriate policy framework, until it was decided to employ Regulation 125 of the Defense Regulations. Later, other regional military governments adopted the Jerusalem model. With this development, Regulation 125 became the main legal instrument used by the military government system to restrict the movement of and to control Arab citizens of the state. Indeed, the military government system was subdivided into secondary regions, and a large part of the areas under its control were declared closed military zones under Regulation 125. The regulation empowered the military commander to declare any area or location a closed area, with entrance or exit thereof forbidden for the entire term of the order, unless the military commander issued a written entrance or exit permit. In fact, in order to leave their area of residence for any reason, most Arab residents were obligated to obtain a travel permit, which entailed a lengthy waiting period and numerous bureaucratic encumbrances.

The Rattner Commission and the Alleviation of Travel Restrictions

At the beginning of December 1955, following public criticism of the military government system, the government appointed a special Commission of Inquiry (popularly known as the Rattner Commission). The Commission was directed to assess the “possibility and need for limiting the military government system and the scope of its activity,” and to examine whether military government rule in Nazareth was necessary.¹¹ In February 1956, the Commission submitted its report to the Prime Minister. The report unequivocally determined that the military government system should not be terminated and that its status and authorities

should not be diminished in any way. The report further determined that until a time of true peace between Israel and its neighbors, maintaining the military government system in designated areas was necessary for reasons of national security. The authors of the report recognized that the military government system subjected the Arab population to a certain degree of suffering, and noted that the system’s existence entailed a large degree of discrimination in that it essentially bequeathed a feeling of second-class citizenship to a certain portion of the Arab population in Israel. Bearing in mind these issues, the Commission recommended consideration of the possibility of introducing relief measures, and insuring implementation of the restrictions in a manner that would not emotionally harm or humiliate residents under military government rule.

The Rattner Commission considered many grievances that had been raised regarding the permit regime and the procedures for issuing permits. At a general level, Commission members decided that suspending the permit regime would undermine the entire military government system, and in light of their recommendation not to terminate or diminish military government rule, they did not deem it appropriate to cancel the permit regime. This decision was based on their view that the amount of suffering incurred in relation to the need to be issued a travel permit did not cause serious difficulties “to the law abiding citizen who is not suspected of activities which might be of harm to state security.”¹² The Commission members were convinced that the large number of travel permits issued by the military government provided evidence that the needs of the residents within military government areas were being accommodated. As stated in the report:

“realizing that most of the residents in the affected areas are farmers, that it is not in the nature of the Arab woman, in light of her responsibilities at home, to travel from place to place, and the relatively large number of children and youth who are in no legal or practical need of a permit, it seems to us that (military) government personnel issue the maximum number of permits necessary for the said population throughout its normal day-to-day life.”¹³

The Commission addressed two types of travel restriction complaints: the restriction of access to particular locations and the time restrictions placed upon permit-holders in these same areas. Travel permits detailed the places the permit holder was authorized to visit and the length of time for which the permit was valid. The Commission determined that considering the limited needs of the majority agrarian-sector residents under military rule, “the restrictions on travel destinations are not problematic on a practical level, except for the psychological impact resulting from the actual existence of restrictions.”¹⁴ Concerning complaints pertaining to movement restrictions on Arab laborers requesting travel outside of the military government areas in order to seek employment, the Commission recommended that the military government should retain a certain amount of discretion in decisions to deny such applications, because it was not always easily determined that freedom of movement does not entail some risk to security. It was further concluded that travel restriction complaints were exaggerated, as restrictions were enforced only in specific areas. Yet, the Commission recommended various measures to expedite the permit-issuing process and to be of assistance to the Arab public. Such recommendations included increasing the staff

of military government offices and the number of permit-issuing offices; authorizing the police, the head of the regional municipality or the *mukhtar* (local village leader) to issue permits in urgent cases when an army representative was unavailable; and increasing the length of time for which permits were valid.

Despite the recommendations of the Rattner Commission, no fundamental changes in the control of the movement of Arab residents took place. The requirement to carry a travel permit remained in effect, and issuing permits, which detailed the locations authorized and the length of time allowed for travel, continued to be practiced. For example, at the end of December 1957, physicians from Nazareth typically received a six-month travel permit, specifically detailing the locations they were authorized to visit.¹⁵ In 1958, only one in three Arabs residing within military government areas held a travel permit, and only half of these permits were issued for “long periods of time.” In 1964, the Arab residents of the northern and eastern Galilee still required a permit to leave their villages, and all Arab residents required permits in order to travel from one district (or from a mixed city) to another within the military government.¹⁶ Nevertheless, a significant alleviation in the restrictions on the freedom of movement had been approved as of August 1959, following the recommendations of a committee of ministers who examined the working procedures of the military government.

The committee of ministers linked the necessity of the military government system to the rate of Jewish settlement in the Galilee and Triangle regions and to a solution for the problems of the refugees, evacuees, present absentees, and Bedouin. In order to limit the areas under military control in the future, the

committee of ministers recommended to expedite the Jewish settlement in the Galilee and along the Eron River road; to accelerate the settlement of Arab refugees and evacuees in either their current or other places of residence; to promote the legislation of the Bedouin Settlement Law and the transfer of Bedouin to permanent settlements in the Negev; and to set up the rehabilitation of present absentees.¹⁷

Pending the achievement of these goals, and with the aim of reducing the pressures consequential to the permit regime, the government accepted the committee's recommendations with regard to the implementation of relief measures for movement restrictions imposed on the Arab population in military government areas. On 13 August 1959, two general exit permits were published - one by the northern military governor and the second by the central region military governor. These general exit permits enabled a majority of the Arab residents in the north and in the Triangle to leave their place of residence within the closed military areas without a permit, and they allowed Arab travelers to remain in the cities in the center of Israel: Hadera, Led, Netanya, Petach Tikva, Ramle, and Tel Aviv-Jaffa from 4:00 to 20:00 on the same day. In addition to these cities, residents of the north were allowed to travel to Haifa and Nahariya, and residents of the Triangle were allowed to travel to Akka.

Furthermore, traveling to an area, a city or a regional municipality detailed in the travel permit was now permitted either by car or foot, so long as travel occurred along a road. The travel permit did not enable entrance to security zones or area number 1 (located along the border with Lebanon, Syria and Jordan). In addition, travel permits did not enable residents to move

their place of residence out of the closed military areas without a permit from the regional military governor.¹⁸ In the Negev, Arab Bedouin were able to travel without a permit and to remain in Be'er Sheva for an entire day, two times per week. This followed a 1957 decision enabling Bedouin to remain in Be'er Sheva one day a week without a permit.

Over time, public criticism of military rule and the Defense Regulations increased. The process of easing travel restrictions had drained the military government of many of its essential functions, and was regarded by many as proof that the government's argument for the necessity of the Defense Regulations and the military government was a pretense to camouflage their political character. Two years of political and public activities surrounding this issue proved successful, and in 1962, a series of additional relief measures were enacted. The validity of permits was extended to one year, instead of limited to one day or one month; exit permits were automatically renewed (except in cases in which the permit-holder was found to pose some risk or if s/he was accused of violating the terms of the permit); the curfew was lifted in the Triangle region; Arabs sentenced by a military court were allowed to appeal before a military appeals court and before at least one judge; and a general exit permit was issued to all Druze and Circassians (Druze and Circassian soldiers were already exempted from carrying exit permits in 1959).

In 1963, draft laws calling for the abolition of the military government system failed, but the policy of providing further relief measures continued. Following the resignation of Ben-Gurion and the appointment of Levi Eshkol as Prime Minister, additional changes were made in the legislation that administered the military

government. A general exit permit was issued to all residents under the northern and central region military government, and the areas authorized for day-time travel were now authorized for night-time travel as well.

The most significant relief measures were introduced in January 1966. Entry to Nazareth and the central Galilee without a permit was then made possible, and freedom of travel was granted to and from the Galilee. Arab Bedouin residents of the Negev were allowed to travel within the Negev, and Arab residents of the Triangle were allowed to travel to the Negev and the Galilee without a permit, although entrance to the Triangle region as well as the cities of Safed and Tiberias continued to require a permit.¹⁹

The military government system was abolished on 1 December 1966 following a stormy public debate and a lengthy deliberation process at the Prime Minister's office. Issar Harel, the security adviser to Prime Minister Levi Eshkol, had recommended ending the military government system in February 1966, but the implementation of his recommendation was postponed until the end of the year. On 8 November 1966, the Knesset approved the decision to end the military government system, effective at the beginning of December, and to transfer its powers to civilian authorities.²⁰ Thus, the areas under military government rule were reassigned to the authority of the northern, central and southern regional military command, and the authority to activate the Defense Regulations, which were still in force, was reassigned to the army's regional commanders.

The military governors were appointed as advisors to the army's regional commanders and were placed in charge of contact with the security services and the police. The police were

also authorized to activate the Defense Regulations, and some of the responsibilities of the military government, including authorizing travel within the closed areas, were reassigned to regional special taskforce offices.²¹ Yet, the position of commander of the military government department at army headquarters was not eliminated, and the Israeli army retained the ultimate authority to activate the Emergency Regulations.²²

Despite the abolition of the military government system and the termination, in principle, of the permit regime, many areas remained closed to the Arab population. Security zones along the borders remained under army jurisdiction and were tightly controlled. Access to destroyed Arab villages in the central region of the country, development areas, and areas declared military or military-training zones were restricted and required a special permit.

Along with the relief measures issued to a majority of the population, harsh restrictions were enforced on individuals considered "security risks." Since the general travel restrictions were lifted, military commanders were authorized to enforce tighter restrictions on individuals, even in locations that were not previously under military government rule.

The termination of the military government system reduced the friction with law enforcement agencies and lowered the involvement of the Arab population in crime. As long as their movements remained under control, Arab residents were continually indicted and convicted for offenses against the Defense Regulations, and as the criminal records in the police database have shown, the rate of convictions for these offenses was high throughout the 1950s. Despite the tendency toward easing the permit regime, which began

in August 1959, the highest conviction rate for offenses against the Defense Regulations was recorded in 1960. During that year, some 98% of the 3,127 convictions for offenses against the Defense Regulations were for entering or exiting closed areas without a permit, or for violating a condition of a travel permit; 1.9% of the convictions were for breaking restrictive orders; and less than 0.1% of the convictions were against regulations that defined offenses of harming state security and various public order offenses. Only from the beginning of the 1960s, was there a marked decrease in the conviction rates for offenses against the Defense Regulations. However, in the years following the end of the military government system, most of the people convicted for these offenses continued to be Arab. In 1955, for example, some 94% of all offenders convicted for offenses against the Defense Regulations were Arab (2,714 out of 2,888). These offenders constituted nearly 60% of the total number of Arab offenders convicted during the same year. In 1968, some 99.6% of all offenders convicted for offenses against the Defense Regulations were Arab (827 of 830) but their part in the total number of Arab offenders had decreased to 20.8%.²³

Summary

From the inception of the state of Israel, the Arab population was constructed as a hostile minority constituting, at least potentially, a threat to national security. Beyond the defined actions of enforcing the emergency regulations and issuing entrance and exit permits, the military government served, along with government ministries and ruling authorities, to implement the government's policies toward the

Arab population. These policies, even if not clearly formulated, were justified by the need to defend state security. Yet, these security justifications were extended far beyond the accepted notion of prevention of actions harmful to national security such as espionage, sabotage and contact with the enemy, or even the prevention of politically seditious activity. Indeed, the security considerations that justified the establishment of the military government system, the restrictions it imposed, and its continued existence for 18 years, stemmed from a concept that equated security with the extension of Jewish settlement. Every few years, when the issue of the military government came up for reconsideration, it was reaffirmed as being vital to promote the security interests of strengthening the Jewish settlement in the country. According to this rationale, the very presence of Arabs, and their possession of land and property were, by definition, a threat to Zionist goals.

Examining the content of the convictions for offenses against the Defense Regulations revealed that only a small number of Arabs were convicted of subversive or hostile activities that endangered state security according to the narrow definition. In contrast to this, according to the expanded concept of security, the entire Arab population was acting, by definition, within the security sphere: their movements were suspect, and the whole domain of their links to the land were portrayed as a threat to national security and were handled by the military government and law enforcement agencies. Thousands of Arab residents and citizens were tried in military courts and convicted for "security" offenses when they entered closed areas or exited their place of residence without a permit issued by the military

commander. Due to the penetration of the criminal justice system into more aspects of the lives of Arabs, the meaning of crime changed significantly for Arabs and Jews. While all citizens and residents of the state of Israel could be charged with “conventional” criminal offenses, Arabs were always under greater jeopardy of arrest and conviction for political offenses against regulations and laws activated exclusively against them.

End Notes

- 1 Oren Yiftachel and Alexander Kedar, “Landed Power: The Making of the Israeli Regime,” 16 *Theory and Criticism* 67 (2000) (Hebrew).
- 2 See Charles Keiman, “Following the Disaster: The Arabs in Israel 1948-1950,” 10 *The Research and Criticism Notebooks* 5 (1984) (Hebrew). See also Ian Lustick, *Arabs in the Jewish State: Israel's Control of a National Minority* (Austin: University of Texas Press, 1980).
- 3 According to the official categories, “serious offenses” included public order, national security, bodily harm, sexual and drug offenses, prostitution, fraud and forgery, and general, administrative and fiscal offenses. This category did not include traffic violations and certain types of administrative offenses.
- 4 Palestine Gazette 1442 (27 September 1945), suppl. II, at 1055.
- 5 For a broader discussion of the Defense (Emergency) Regulations – 1945, see Sabri Jiryis, *The Arabs in Israel*, trans. Inea Bushnaq (New York: Monthly Review Press, 1976). See also Menachem Hofnung, *Democracy, Law and National Security in Israel* (Dartmouth: Aldershot, 1996); and David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder: Westview, 1990).
- 6 See S. Jiryis, id. and I. Lustick, *supra* note 2.
- 7 See S. Jiryis and M. Hofnung, *supra* note 5.
- 8 Laws of the State of Israel, vol. 3, 1949, at 56.
- 9 For example, the Emergency Regulations (Security Zones) were activated to expel the residents of the village of Iqrit on 5 November 1948 and the residents of the villages Khisas, Qeitiya and Ja’una on 5 June 1949. See Knesset Debates Volume 2, 1 August 1949 at 1189 (Hebrew).
- 10 See parliamentary questions regarding travel restrictions and permit requirements (Knesset Debates Volume 2, at 1011), referred to by M. Hofnung, *supra* note 5.
- 11 See Prime Minister David Ben-Gurion, letter of appointment of Daniel Oster, 6 December 1955 (Israel State Archives, Prime Minister’s Office Papers, 43-5434/Gimel-1402) (Hebrew). The members of the Commission were Professor Yohanan Rattner of the Technion (Chairperson); Daniel Oster, the mayor of Jerusalem; and Haifa Attorney Ya’acov Salomon.

- 12 Report of the Commission of Inquiry Regarding the Possibility and Need to Limit the Military Government Rule, 24 February 1956, Givat Haviva Archive (Hebrew).
- 13 Id.
- 14 Id.
- 15 On 23 December 1957, the Minister of Health, Israel Barzilai, forwarded a letter to the Prime Minister that he received from the chairperson of the National Medical Union. The letter requested that negotiations be opened with the Ministry of Defense for the purpose of extending the period of the permits of physicians from Nazareth from six months to one year, and for permits to include districts and not specific places (Israel State Archives, Prime Minister's Office Papers, 43-5593/Gimel-4696) (Hebrew).
- 16 See I. Lustick, *supra* note 2.
- 17 Drawn from government decisions of 4 August 1959 regarding the report of the ministerial committee for military government issues (Israel State Archives, Prime Minister's Office Papers, 43-5592/Gimel-4669II) (Hebrew).
- 18 "General Exit Permit (Northern Region) 1959," published on 13 August 1959 by Lieutenant Colonel Yehushua Verbin, military commander of the Northern Region and "General Exit Permit (Central Region) 1959," published on the same date by Lieutenant Colonel Zalman Mert, military commander of the Central Region (Israel State Archives, Police Ministry Papers, 119-6839/Gimel-16/402) (Hebrew).
- 19 See S. Jiryis, *supra* note 5. According to Government Annual Report-5769, a general exit permit was issued to Bedouin in the Negev and a general entrance permit was already issued to area number nine in the north in 1964.
- 20 Knesset Debates, 1966/67, at 136 (Hebrew).
- 21 Referred to by Ariela Shadmi and Eli Hod, *The History of the Israeli Police 1948-1958, The Founding Phase*, Volume A (Jerusalem: Publication Department, Israeli Police, 1996) (Hebrew).
- 22 A few months after its abolishment, during the preparation phase prior to the 1967 war, the military government was reinstated for a short time. The governors were re-appointed, some during their military reserve service, and the regional offices were reopened and re-staffed by the same people who were previously military government personnel.
- 23 See the Israel Central Bureau of Statistics Annual Criminal Statistics for the noted years (Hebrew).

Letter, dated 12 August 1959, to the Military Governor in Nazareth. Not feeling well and in need of his family's attendance, signatory Dr. Y. Haddad requests a permit to live in Nazareth, where he has a medical practice and where his family resides.

12.8.59

Dr. Y. Haddad,
F.C.B. 79,
Nazareth.

To the Military Governor in Nazareth.

Sir,

I the undersigned, Dr. Y. Haddad, came from Haifa to Nazareth on the 10.8.59 evening after a strong sudden pain in the breast, that happened to me few hours before. A doctor has been called beside me; after examination, he gave me a report in order to enter the British Hospital in Nazareth. I have been admitted in this Hospital on the 11.8.59. Complete Medical Examination has been made; and after twenty-four hours I felt better, but I am still very tired physically and morally, and I am in need of rest in my family in Nazareth.

I am living in Nazareth, with my sister-in-law, my nephew and my nieces, from more than four years, (as my brother died four years ago); and as I have my Medical Clinic here, in Nazareth, from more than three years; and as I have patients in Nazareth who come for treatment by me, and as I must do my human and medical job to win my bread, and the bread of those of whom I am in charge; and as I am an old man who cannot live far from his family, I come by this letter to pray you to give me permit for entering Nazareth, firstly for rest, and also for resuming my work in my clinic, because you know that unjustly and unhumanly, my permit has been taken from me, from more than one month and a half, by your authority, and so I have been obliged to live far from my family and far from my work.

I am sure that nor the human conscience, nor the Laws, nor the human morality, can admit such persecution and such hostile attitude towards my legitime and human right and just demand.

I endured the persecution of the military authority during all this year which ended, in this last one month and a half, by the most inhuman persecution towards a Doctor in Medicine (I myself) whose life from childhood until now, is brilliant and very human. Is it possible, or admissible that such a life of a doctor of about 60 years, meets such hostility and persecution, during more than one month and a half? During all this last period, by your responsibility, you cut my bread, prevented me to treat my patients, and put me far from those that legitimately I shepherd and govern (my nephews); and moreover you exposed me by this hostile attitude to an inhuman moral oppression who can at least destroy my life.

Being sure, deeply sure, that no laws, no morality, no human safe conscience could allow much more such unhuman attitude towards me, I present to you this letter, in order to obtain by this demand a permit to enter in Nazareth to live with my family and to resume my work in my clinic.

A copy is sent to the Medical Association ^{Nazareth} _{Haifa}
A copy is sent to the Municipal Council ^{Nazareth} _{Haifa} Dr. Y. Haddad
A copy is sent to the President of the Knesset

Men Under the Military Regime

Areen Hawari

Our man, our leader was Abu Hamdi (the *mukhtar*). If we wanted something, we would go to him, he never let us down.

This was Abu Isma'il's response when I asked him about his understanding of the ideal man, during an interview about the period of the military regime. Abu Isma'il's response was not exceptional in comparison to others who lived during the first two decades of the establishment of the state of Israel. This is so despite the fact that the interview was held forty years after these events first took place.

Abu Isma'il's response characterizes the *mukhtar* (local village leader – in Arabic, “the chosen”) as the ideal man, the man able to fulfill the daily needs of the people. However, military regime files disclose the various functions of the *mukhtar*. As General Avner describes in a pamphlet that he issued to the military governors on 28 January 1949, the *mukhtar* was to:¹

strive for peace in the village and report to the military governor's representative with information regarding absentee property, infiltrators, armed men, men in the possession of any ammunition or other military equipment, crimes, accidents, or instances of unnatural death.

The *mukhtar* was appointed by the authorities rather than chosen by the population who he administered. As the above citation indicates, the *mukhtar*'s role was to implement Israeli security laws and subjugate the Palestinian minority, a community whose members had become Israeli citizens. By definition, the *mukhtar*'s interests were those of the military regime and principally, its security. In what sense then was this figure “our man, our leader”?

Addressing this or any question on Palestinian masculinity after the 1948 war requires

elaborating on the state's security-related legal practices, as well as the ways in which these practices informed the construction and articulation of masculine identity and conceptions. This discussion will cover the historical period from 1948 until 1966 that witnessed the establishment of the state and the imposition of a military regime on the Palestinian minority. It will attempt to interrogate the affectivity of these practices, as well as the masculinity constructed during this historical epoch, in reshaping family relationships and the role of women.

This article contends that security-related legal practices severed Palestinian conceptions of masculinity. Palestinian masculinity was confined to the man's capacity to provide for his family's subsistence needs (housing, food, drink). This ultimately led to the absence of the public sphere in Palestinian constructions of masculinity, as would be anticipated under a shadow of national oppression. Masculinity was linked to the patient endurance of pain and physical suffering that men withstood during the military regime. Endurance was defined not by the struggle for emancipation as much as by the battle for daily sustenance. Palestinian masculinity was distinguished by avoiding confrontation with the authorities, similar to the euphemism that “the runaway is a third of a man.” Masculine identity did not simply change men's relationship to their families and wives but reformulated them altogether. Conservative traditions regarding a woman's societal role were revived and the figure of the sacrificing woman, especially the widow raising her orphaned children, was reinforced as a social norm.

This article constitutes an initial attempt to research the implications of the military regime on masculine identities. Support for its main

argument is based on interviews with a small group of men from a Palestinian village in Israel. These men are from one social segment and from one age group. They are part of a generation that was in its youth during the military regime. Conclusive evidence of men's lives under the shadow of the military regime is not presented here. Rather, this article attempts to convince the reader, through the analysis of the fervent voices heard in the interviews and in the literature, that the masculinity of Palestinians remaining in their country after 1948 was impacted by the state's security-related legal practices. The aim then is to point out a complex reality without claiming to present sharply delineated results or characteristics.

A cursory presentation of masculine identity and gender studies opens this discussion. Some military regime project objectives are then elucidated, including the subjugation of Arab inhabitants through the control of their movement and the monitoring of them with the help of a network of informants. The article points out the effectiveness of this project in the delineation of the Palestinian man's subjectivity, his understanding of the status that he holds in the state, and his internalization of being a monitored and criminalized subject. The construction of masculinity in other oppressive contexts is then reviewed to integrate a comparative perspective. A few formations of Palestinian masculinity resulting from the military regime's security practices are also analyzed. The article concludes with a brief analysis of marital and familial relations.

The study of male gender identity was set in motion by the feminist movement and feminist studies.² Social science, similar to the natural sciences, had predominantly confined its scholarship to the study of the male, effectively

deeming women as "other." Mainstream social science considered man not as a social construct but rather as a representative of humanity in general.³ Such scholarship has been sorely mistaken in its assumption of arriving at scientific conclusions on humanity in general, while basing its research on one social grouping with specific social and biological characteristics. Such research erased one group to the benefit of the other. The lion's share of scholarship and knowledge was devoted to the man whose body, experience, and specific narrative were considered the normative standard.

Feminist studies initiated the interrogation of masculinity (and femininity) as social constructs. These efforts explored the construction and conceptualization of male subjectivity as well as how social structures and power relations delineated the "essence" of man. This research addressed questions such as: Do patriarchal social structures benefit the man? Or do such structures impose on the male, himself an "other," a discursive set of practices and behaviors, which are reinforced by social structures and apparatuses? Does such discourse and its formulation in praxis delineate "man" as it does "woman"?

When gender identity is dealt with as a social construct, masculinity and femininity are not understood as objects of study but rather as social and cultural processes in which men and women live gendered lives. It is impossible, moreover, to understand this identity without recognizing its intersections with class, race, nationalism, and location in the world order.⁴ Thus, the study of gender identity requires addressing the social context from which it arises. Social contexts are in turn constituted by specific historical, political, juridical, and cultural trajectories.

The Project and Its Personalities

The context of Palestinian masculinity, addressed here, is one of political subjugation and coercion through which Palestinian citizens of Israel experience an internal colonization.⁵ This is particularly true of the period of military regime (1948-1966). Any simple investigation will expose the ways in which state practices, during the first two decades of its establishment, crudely violated the most basic human rights, individually and collectively, of Palestinians in Israel.

The state's security-related legal practices made daily sustenance the main sphere of struggle. The state actualized this transformation through the authoritarian monitoring of every aspect of Palestinian life in Israel. Legal infrastructure facilitated state practice during this period, lending it "legitimacy" on the one hand, and preventing any opposition on the other.

The military regime apparatus operated through the military governor, an official who was the representative of the government before the Palestinian inhabitants. His role was to coordinate the activities of various government offices in the realm of politics, economy, and security. Formally, the role of the military governor ended at the professional specializations that government employees were assigned to administer. However, in practice, there was no separation between professional and security realms. In addition to the military regime apparatus, other security forces operated: the police force and the General Security Services.⁶ Through a set of administrative decisions, the military governor became the sole connection between state offices and Arab inhabitants.

Oral accounts of this period, absent from state

documents, convey the harsh experience of life under the military regime. They demonstrate the extent to which the security apparatus moved beyond the mere regulation of the Palestinian's relationship to the state and well into the structuring of his daily life, the absolute control over his body, and often the determination of his children's futures. Abu Mahmud recounted:⁷

I remember that when we needed a permit to take our sons to the doctor, not even to work to get food or drink, we would go twice, three times, five times to the neighboring village to get a permit. We didn't have any way to get there. Some of us barely had a donkey. The woman used to carry the child with her husband in front or behind her. Everyone would wait next to so-and-so's house, and if we were lucky we would get our turn and if not, we had no hope. Sometimes they would give us one permit for five people. Say for example one of us had to go the north and the other to the south, and if the policeman caught us, what would we say to him?

Even a morsel of bread was at times a source of prolonged suffering. As Abu Salim says:

For a period of time, there was a shortage of bread and we were forced to go to the neighboring Jewish villages or to Haifa to buy bread. We used to send the women, because if women were stopped by the police, they would be let free if they threw the bread away, but the men, they threw the men in jail.

Various security measures and policies were implemented during the military regime. Usually the military regime authorities executed these measures; any other state intervention worked in full coordination with the regime's apparatus. Security policies aimed at maintaining the status quo by prohibiting Palestinians from returning to their lands, refusing them access to refugees'

properties, and restricting their movement and forcing them to carry an identity card at all times or risk the charge of infiltration.⁸

The state legislated new laws enabling it to confiscate lands and properties of both absentees and present residents.⁹ However, the parallel, but no less harsh, confinement of Palestinians' daily movement did not require new legislation. The emergency regulations proclaimed during the Mandate period provided the basis for the military regime apparatus. These legal practices, which determined every aspect of individual life, were decided upon by administrative bodies without previous judicial approval. Occasionally, the military leadership staffed all such administrative bodies, and the military governor himself was appointed by the Chief of Staff and the Minister of Defense.¹⁰

Alina Korn points out that during this period, the state initiated an instrumental use of law and criminalization both to monitor and to politically control the Palestinian minority.¹¹ However, it is possible to further argue that Palestinians withstanding this type of subjugation internalized their criminalization, in some cases believing themselves guilty of infractions and offenses.¹²

Abu Isma'il said: "The judge would ask if we were guilty, and we would say guilty, since they caught us," meaning that the policeman had seen them working in Tel Aviv without a permit. The very term "caught" indicates Abu Isma'il's understanding that his behavior is criminal. For example, when I asked Abu Yusef for an interview, his friends in the elderly home teased him about his words being recorded. He responded that "it doesn't matter, I'm not going to be extreme." Abu Yusef seems to assume that his behavior in the interview could be understood as extremist. Another man

explained: "They didn't forbid giving permits, except to those with prior convictions." When I asked what he meant by "prior convictions," he replied, "Violating the law, like working without a permit." Thus, the very terms "prior conviction," "violating the laws," and "working without a permit" take on an entire lexicon of criminality.

One of the men I interviewed asked not to be recorded. He said: "The texts you write, I can always deny but how can I deny my own voice?" Does this sentence reflect a perception that law does not allow for the narration of history? Does it demonstrate that until today people continue to perceive the law from the perspective of the military regime's coercion? Or does the authority of the military regime continue to persist on one level or another?

The above-mentioned practices of oppressive legislation, Mandate-era emergency regulations, and military regime methods all worked in parallel in semi-authoritarian ways to coercively monitor the smallest detail of Palestinian daily life. The military regime authorities did not act alone in the process of maintaining "security" by denying people their daily sustenance and monitoring their every movement. The formal apparatus employed local agents to implement these policies, and of these figures, the *mukhtar* was the most prominent. As previously mentioned, the *mukhtar's* collaboration with the military regime authorities was an essential element of his job description. The authorities also enlisted other residents as informants, who were sometimes known and at other times unknown. The policy of "the carrot and the stick" was followed with these informants. Abu Hassan told me: "Some people who had *protectzia* [he used the Hebrew word] used to take work permits for a month rather than a

week.” When I asked him who were these people with *protectzia*, he responded: “Those who are connected to the authority, the *mukhtar* and others.” He also said:

When the military governor took my identity card and accused me of going to the Arab areas – that’s what we used to call the West Bank – he said, “Go take it from the Military Regime Center at five o’clock in the afternoon.” Because I didn’t go to the Center, he contacted one of my acquaintances in the village. When I went to him he asked: “Why didn’t you say you were from such and such family?” So I replied to him: “It says on my identity card and you know that,” so he responded that he would return my identity card to me and said that he wanted me to work with them because I was smart. He asked me to arrest five people who smuggled goods from the Arab areas, and he named them.

Abu Hassan’s story is not unique; it is rather representative of the military regime’s methods. An initial analysis demonstrates that the “carrot” promised to most people was not an offer of a leisurely life but rather the giving of basic needs and rights – such as returning an identity card or granting permission to work. Informants were charged with providing information not simply on those opposing the military, but also on who went to work and where, or who went to the West Bank to buy sugar and rice to provide for his family.

Subjugation and Masculinity

The impact of military regime policies on the construction of Palestinian masculinity has not been studied. There are, however, some scholars who have dealt with other cases of masculinity in oppressive contexts. Whether local or international, these contexts are distinguished by

a national or racial group practicing physical and discursive power on an “other.” These studies are useful in situating and conceptualizing the topic at hand.

In the context of the Israeli occupation of the West Bank and Gaza, Julie Peteet demonstrates the occupying state’s role in reformulating Palestinian masculinity after the first Intifada. Peteet contends that the methods of the occupation, in particular, the capturing of defenseless Palestinian youth for torture and beating at the hands of armed soldiers, transformed what was understood as the abasement of masculinity to a rite of passage, or an initiation to manliness.¹³ The scars and marks of torture on the body became symbols of Palestinian steadfastness in the face of the occupier. Peteet points out the parallel phenomenon of the rise in the social standing of youth. Traditional norms privilege elderly men as the representative figures of the community; their age is an attribute of both social status and masculinity. However, after the first Intifada, elderly men lost a measure of their social place to young men. This was due to the elder’s inability to physically confront the occupation forces. The heightened status of young men, especially those tortured in Israeli prisons, was reflected in their participation in contexts such as family reconciliation (*sulha*). It is important to note that other studies have pointed to contradictory results. Ronit Lentin, for example, argues that the humiliation inflicted upon Palestinians at the hands of the occupying powers violates masculinity rather than enriching it.¹⁴ In my opinion, these contradictions do not indicate faulty research. They point rather to the possibility of more than one discourse on masculinity in the same context. That is, masculinity can have a plurality

of coexisting references despite the presence of a singular hegemonic discourse.¹⁵

Daniel Boyarin similarly contends that Zionism for Freud, Herzl, and Nordo was a project that redeemed “the defeated manliness” of the Jews in Germany.¹⁶ Therein, the Aryan ideologues perceived Jews as feminine, Eastern, and debased. For Freud and Nordo, Zionism was a remedy for the gender defective Jew. According to Boyarin, Freud and Nordo internalized the Aryan conception of a mutilated Jewish masculinity in a highly dysfunctional manner. Indeed, he argues that the establishment of a Zionist project was their attempt to reformulate normative masculinity based on the “ideal” Aryan male. Boyarin suggests a similar argument for Herzl, who considered Jews an average class incapable of being accepted into the ranks of the Christian elite.

Literary critic George Tarabishi makes similar claims in his analysis of the contemporary Arabic novel.¹⁷ Tarabishi argues that Western colonialism resulted in the transformation of the Arab intellectual’s self image when he internalized his “inferiority” in the face of the Westerner. The power relations between colonizer/colonized and East/West with their bases in force, control, and scrutiny resulted in a reformulation of masculinity. The Arab intellectual, he argues, began conceptualizing any sort of cultural exchange as a relationship between a man and a woman, that is, a relationship based on submissiveness and suffering. It was in his relationship to and with women that the Arab intellectual compensated for his perceived inferiority in the face of Western culture. That is, the Eastern man who understood himself as suffering from a cultural curse redeemed himself through his sexual prowess. In his relationship to women, the Arab

intellectual mimicked the power relations between colonized and colonizer. This tendency also expressed itself in the Arab male relationship to the white woman, who he perceived as an object upon which to evidence his masculinity.

The Heroics of Our Leader/Our Man

Despite the latter two scholars’ focus on an elite stratum, all four of these scholars do much to demonstrate the deep impact of political, legal, cultural, and social power on constructions and conceptualizations of masculinity. This scholarship provides a useful point of departure. The remainder of this article will attempt to elucidate some aspects of masculine identity among Palestinian citizens in Israel, and the ways in which the military regime’s security-related legal practices impacted its construction.

As discussed above, the battle for daily sustenance became the primary domain of struggle and resistance as opposed to the struggle for freedom, the return of confiscated land, or the demand for political and civic rights.¹⁸ Remaining in the country became in and of itself a measure of steadfastness. The ideal normative man was one who could provide for his family, build a house, and marry off his children. It is in this manner that the public sphere was erased from conceptualizations of masculinity, as was the struggle for national rights. For example, Abu Mazen said:

The best man is the one who preserves his family’s honor, loves people, doesn’t do bad things, helps those in need, and it doesn’t matter what is his position. The important thing is that he is able to build a family from the sweat of his brow, rather than the selling of lands.¹⁹

Abu Salim said:

The ideal man is the one who cares for himself and his family, carries out his obligations to God and His creation, cares for the house and the children, fasts and prays, worships God and pleases his people.

Abu Rabi' said:

Thank God and God's grace, I was independent in all circumstances and never needed anybody.

A limited number of interviews clearly revealed that the models for heroic masculinity were concretely derived from the family or village. There is no mention of a political, historic, or even mythical figure. At the same time, masculinity became defined by physical heroics in the face of a harsh reality and the struggle for daily sustenance. The withstanding of physical exhaustion and painful difficulties became a source of pride. Thus, masculine heroism was derived from the provision of daily sustenance and not from the resistance against humiliation and subjugation. The emergency regulations and the military regime structure succeeded in subjugating the body of the Palestinian man and excluding him from the public sphere. All of his aspirations were thus confined to the private sphere. The military regime's security-related practices rendered the private sphere a refuge from intense scrutiny. Through continuous monitoring and subjugation, these laws erased any sort of individual agency in the public sphere. If at any point the public sphere was a site of masculine heroism, it was only in the sense of maintaining the private sphere and not in challenging any structural inequality.

Some men said:

In the beginning we didn't have work permits, so we used to go to the neighboring Jewish village.

We worked for pennies and slept in orange groves over the land and under the sky. Write that down, under the sky and over the land. It was difficult to get blankets from the Red Cross. Sometimes the mosquitoes would enter our bodies through the blankets. When a policeman came we would run away and "not all pitfalls are easy."

We built this state. We built Tel Aviv on our shoulders. We worked in construction. We would carry the donkey to the third floor, and we were no better than the donkeys. We were little children and we used to work without permits. Swear to God, we built Dizengoff on our shoulders.

We used to use the shoe for a pillow, and the bags of cement for a mattress.

Once I was hauling concrete barefoot and when the Jewish man saw me, he gave me a raise.

These accounts were mentioned by the men who I interviewed in the context of discussing the harsh realities and difficulties of meeting their families' daily needs. However, they also bring to light different dimensions of conceptions of masculinity, that is the suffering, pain, and sacrifice required for basic survival.

When the discussion turns to the man's relationship to the military regime apparatus, masculinity gains additional meanings. Manliness is herein defined by the man's capacity to avoid confrontation with the authorities, and a number of articulations are used to justify this need. Two contradictory discourses function simultaneously – either masculinity is employed to justify the subjugated position, or the same position is justified as "there is no power and no strength save in God."

Abu Rabi' describes the military governor

who walked to his work in 'Ara and forced anyone in his way to stop out of respect; those who did not comply were beaten by him. Abu Rabi' says that he used to flee the military governor's path, explaining that he didn't want to be stopped but that he also wanted to avoid any confrontation with the military governor. Abu Rabi' quoted the saying: "I never tried myself in war, but in fleeing I am as fast as a deer." On land confiscation, Abu Rabi' commented: "To whom would you raise your complaint when your enemy is the judge?" And we also hear: "The man who doesn't see through the sieve is blind." And others said: "That's how everyone was," and "The hand that you can't overcome kiss," as well as "All of us were without power and strength."

We can thus return to the subject with which we began this article, that is, the role of the *mukhtar's* persona in shaping masculine identities during the military regime. The *mukhtar* did not necessarily constitute an ideal role model for all men. At the same time, he was not disparaged but rather he was an accepted figure. The position of the *mukhtar* reflects the crisis of masculinity among Palestinians in Israel. Despite the fact that people understood that the *mukhtar's* role was to serve the military authorities, and despite their awareness of what this authority stood for, the *mukhtar* remained a model of the man who was able to fulfill people's needs. Palestinians thus perceived, and continue to perceive, the *mukhtar* in a contradictory manner. The *mukhtar* represents both the power denied the inhabitants and the mediator that rescues them from direct confrontation with the state. We find the same person simultaneously condemning informants and collaborators and taking pride in his good relationship or familial connection with the *mukhtar*.

Abu Isma'il, who cited the *mukhtar* as the ideal man, also pointed out how the *mukhtar*, based on the informants' reports, would tax anyone who owned more than one cow or goat. The people, therefore, according to Abu Isma'il, considered the informants to be traitors. However, when I asked Abu Isma'il in another context about his relationship to the *mukhtar*, he responded in a proud voice: "Like gold, my aunt, my brother's sister, was married to the *mukhtar's* father."

The *mukhtar* thus simultaneously represents the rule of security legalities and embodies the mediating channel with these very legalities, enabling people, in some cases, to avoid direct confrontation with the law. The *mukhtar* both enforces the law through his surveillance of the population and provides access to the law by facilitating the issuance of work permits. The *mukhtar*, the embodiment of "security" laws, coerces the man in the public sphere and facilitates his confinement to the private sphere, making men's struggle for daily sustenance possible. Of particular use here is the definition of law, especially security law, as a system that produces, constructs, organizes, and administers social relations, rather than one that protects basic freedom and rights.²⁰ Drawing on such a definition of law, the *mukhtar* appears at once as the oppressor of man and a party to his production. In other words, the *mukhtar*/law's oppression of the Palestinian man is the very force that produces him.

Our Leader's Family

The military regime's security practices were not limited to the construction of Palestinian masculinity but also influenced family structure, the social status of women, as well as men's

relationship to women. Nahla 'Abdo argues, for example, that the process of land confiscation led to a shift in reliance on the individual, as opposed to the familial economy.²¹ Therefore, the man was no longer dependent on his family and could live alone. Indeed, his father became dependent on him. One would expect to come to certain conclusions about social transformations to individualism as well as the decreased status of the elderly. Yet the contrary is true. 'Abdo shows that the Palestinian family lost its productive role on the one hand, while reviving its reproductive role on the other. The man's position was transformed from a worker in the family economy to a laborer in the Israeli economy, whereas the woman's economic role as a worker was diminished but her reproductive role was enhanced.

Abu Mazen ascertains the family's social significance despite the man's dispossession as a landowner:

The son wouldn't intrude on his father's conversation, except in a polite and respectful way. Even after we became workers, when we lost our lands, we gave our salaries to our father. In my case, for example, I didn't have a father so I gave my salary to my mother. She was responsible for us until my brothers got married.

A clear consensus emerged from these interviews on the ideal woman. Such a woman would care for her children, maintain her "honor," and protect her reputation. She was typically a widow or a woman with an absent husband. Feminist scholarship has dealt with three characteristics of the ideal woman: maternity, sacrifice and suffering, and the maintenance of "honor." A fourth characteristic, in my opinion, was a product of the military regime. During this period, as mentioned above, the economic

significance of the extended family was atomized. Thus, the widowed woman became the main provider for her nuclear family. Since the majority of women no longer worked in agriculture, as they did before 1948, the widow was forced to work outside the familial context and often with strangers. The woman was ascribed a high social status, despite the fact that this type of labor was traditionally associated with masculinity. This social standing was conferred on women only in cases of a husband's death or absence; otherwise, labor outside the home was disgraceful for the woman and her husband.

Abu Isma'il discusses the ideal woman:

I remember some women in the village who were widows. They raised their children and they did hard work. For example, I know one woman whose husband was killed in 1948. She had two sons and a daughter. With difficulty, she raised them and they became men. She had a good reputation, she preserved her honor; no one could touch her with a bad word.

Whereas Abu Mazen said:

My mother is the ideal woman. Her husband left and she had six boys. She worked in the orange grove and she did not reject any job. She took care of us until we became men.

Additionally, we witness some transformations in social practices under the military regime. The very concept of honor took on an extremely conservative meaning, unknown to peasants before 1948. One man interviewed said:

Women [before 1948] used to work in sowing and harvesting. The harvesting was women's work, and it used to be done at night. Everything was safe; people did not question one another. The plough worker used to go with the women and to sleep

next to them on the same mattress under the same blanket. Can you believe it? No one said a word! Today, if a man and a woman are alone everyone questions them. It was better in the old days.

The economic, political, and security transformations that the Palestinians experienced under the military regime isolated them from their lands and deprived them of work. As ‘Abdo asserts, these transformations led to the revival of “traditional” practices, including the construct of “honor.”²² The focus on and the reinvigoration of the notion of “honor” reflects the fact that women’s behavior became the only site of male control in Palestinian society. Moreover, as Manar Hassan demonstrates in her study of “honor killings” in a more recent period, the state had a direct role in reviving and reformulating traditional practices.²³ By encouraging traditional structures and invigorating the function and power of both the *makhatir* (*mukhtars*) and large families, the state played a significant role in the reformulation of Palestinian social norms.

Conclusion

The modes of Palestinian praxis during the military regime remain a closed file, in need of candid scholarship despite the pain, shame, and fear it may inspire. This historical epoch remains unspoken and un-researched by the people who experienced it. This article is a starting point for further research and a contribution to the analysis of one implication of Israeli legal practices on the construction of Palestinian masculine identity. Understanding this identity requires moving beyond the impact of Israeli legal practices and dealing with the various other aspects that contributed to its construction. For,

the impact of the military regime has certainly outlived the historical epoch itself, as the very category of the “Arab in Israel” was actualized during that period, and this “Arab” continues to accompany us today.

End Notes

- 1 As quoted by Alina Korn, *Crime, Political Status and Law Enforcement: The Israeli Arab Population During the Military Government (1948-1966)* (Thesis Submitted for the Doctor of Philosophy Degree, Hebrew University, 1997) at 56 (Hebrew).
- 2 R.W. Connell, *Masculinities* (Berkeley: University of California Press, 1995) at 24.
- 3 For a discussion from a psychological perspective, see Lynn Hankin Nelson, "Who Knows? What Can They Know? And When?" in *Women, Knowledge, and Reality: Explorations in Feminist Philosophy*, eds. Ann Garry and Marilyn Pearsall (New York and London: Routledge, 1996) at 286-297.
- 4 R.W. Connell, *supra* note 2, at 71, 75.
- 5 Elia Zuriek, *The Palestinians in Israel: A Study in Internal Colonialism* (London: Routledge and Kegan Paul, 1979).
- 6 A. Korn, *supra* note 1, at 54.
- 7 The names of the men interviewed have been changed.
- 8 A. Korn, *supra* note 1, at 64.
- 9 David Kretzmer, *The Legal Status of the Arabs in Israel* (Boulder: Westview Press, 1990) at 49-76.
- 10 *Id.* at 142.
- 11 A. Korn, *supra* note 1, at 194.
- 12 Austin Sarat, "Pain, Powerlessness, and the Promises of Interdisciplinary Legal Scholarship: An Idiosyncratic, Autobiographical Account of Conflict and Continuity," 18 *Windsor Year Book of Access to Justice* 187 (2000).
- 13 Julie Peteet, "Male Gender and Rituals of Resistance in the Palestinian Intifada: A Cultural Politics of Violence," in *Imagined Masculinities*, eds. Mai Ghoussoub and Emma Sinclair-Webb (London: Saqi Books, 2000) at 103-126.
- 14 Ronit Lentin, "Women, War and Peace in a Culture of Violence: The Middle East and Northern Ireland," in *Women and the Politics of Peace*, eds. Rada Boric and Casic Biljana (Zagreb, Serbia, forthcoming), as quoted in Hanna Herzog, "Homefront and Battlefield and the Status of Jewish and Palestinian Women in Israel," 3(1) *Israel Studies* 61 (1998).
- 15 Orna Sason-Levy, *Construction of Gender Identities in the Israeli Army* (Thesis Submitted for the Doctor of Philosophy Degree, Hebrew University, 1997) at 8 (Hebrew).
- 16 Daniel Boyarin, "Colonial Drag: Zionism, Gender and Mimicry," 11 *Theory and Criticism* 123 (Winter 1997) (Hebrew).
- 17 George Tarabishi, *East and West, Masculinity and Femininity: A Study in the Crisis of Sexuality and Culture in the Arabic Novel* (Beirut: Dar al-Tali'a, 1997) (Arabic).
- 18 Some of the people I interviewed mentioned the mood and psychological state of the military governor or official influencing their treatment of individuals.
- 19 The reference here is to the sale of lands to other villagers. Land dispossession and land administration, on the other hand, is not seen as a deprivation of masculinity. There is no shame in having your lands confiscated by the state, but rather in selling lands even to a relative or another resident of the village.
- 20 A. Sarat, *supra* note 12, at 198-199.
- 21 Nahla Abdo, *Family, Women and Social Change in the Middle East: The Palestinian Case* (Toronto: Canadian Scholar Press, 1987) at 29-30.
- 22 *Id.* at 38.
- 23 Manar Hasan, "The Politics of Honor: Patriarchy, the State and Murder of Women in Palestinian Society in Israel in the Name of Family Honor," *Sex, Gender and Politics*, eds. Dafna Izraeli, Ariella Friedman, Henriette Dahan-Kalev, Hanna Herzog, Manar Hasan, Hannah Naveh, and Silvie Fogiel-Bijaoui (Tel Aviv: Kibbutz Hameuchad, 1999) at 267-305 (Hebrew). See also N. Abdo, *supra* note 21, at 35-36.

Statement issued by the preparatory committee for the Arab Jewish Conference for the Abolishment of the Military Regime. The statement includes the names of Arab members of the committee, who met on 12 November 1961, mentions the attendance of some representatives of Jewish organizations, and concludes that other Jewish organizations and individuals should be invited.

(بني يثري) رئيس مجلس كفر ياسيف ، طاهر الناصوم ، رئيس المؤتمر الاسلامي
 العام ، ابراهيم الاحمد (عرايه) ، داوود خوري ، ~~سليم العسيرة~~ ، طلال
 الزعبي ، توفيق سليمان / الناصره / ، عبد الغني السعيد (مختار نحف) محمد
 مشلب (ابوستان) طاهر بطايش (استاذ ثانوية كفر ياسيف) ، الشاعر محمود
 درويش (دير الاسد) ، الشاعر مجسود دسوقي (مدير الحفيد ابو عيطة) /
 (الطيه) والمحامي حنا نقاره / وشكري الخازن (مدير الكلية الحربية الارثوذكسية)
 واميل توما (حيفا) ومثل عن لجنة الطلاب العرب الجامعيين (القدس) .

البيان رقم ٢

اجتمعت اللجنة التنفيذية التي انتقلت عن اجتماع
 المبادرين الى عقد المؤتمر العربي اليهودي للحوار بالقاء
 العلم العربي وتحقيق المهاداة الامة للجهاد
 في هذه البلاد ^{وتدافعة مناهة} في بعض المنظمات اليهودية
 وبينها اتحاد الكوي والعهود المبادرة يوم الاحد
 في ١٤ تشرين الثاني ١٩٦١ في حيفا وبعد التداول
 اجمع القراء على
 (١) دعوة فئات وشخصيات يهودية جديدة

The Archive Law, the GSS Law and Public Discourse in Israel

Hillel Cohen

There is a wealth of academic and popular literature focusing on the state of Israel and its Arab citizens: books which attempt to engulf the entire existence of the Palestinian citizens of Israel alongside monographs of particular historical events; anthologies focusing on inter-Palestinian political issues alongside studies focusing on Jewish-Arab relations; descriptions of various sub-populations alongside analyses and diagnoses of “collective identity problems”; literature which criticizes the institutions of the state of Israel alongside literature praising it; and analyses of contemporary laws and regulations alongside historical research. Yet, in this expansive literature almost no reference is made to an extremely influential agent: the General Security Service (GSS).

The GSS influence on Palestinian society in Israel has been and remains immense, yet, on the basis of available research one might conclude that GSS intervention into the Palestinian sector did not exist. Thus, one can find analyses of the identity-formation process of the Arab population in Israel that has no reference to the activities undertaken by the GSS, along with other state agencies, to strengthen certain sub-identities and weaken others. Historical literature focusing on the Arabs in Israel almost entirely disregards a central theme in their daily lives – the wide network of informants established by the GSS in all Arab neighborhoods and villages in Israel. Academic analysis of Knesset and regional municipality election results are undertaken with a blind spot, since they fail to note the historical practices employed by the GSS - with varying degrees of success - to influence election results. Discussions concerning the transformation of the local and national Arab leadership in Israel include no trace of the “accomplishments” and

“failures” of the GSS in its attempts to “promote” certain public figures at the expense of others.

This omission is in stark contrast to the breadth of literature on security services in other countries around the world, including the Federal Bureau of Investigation (FBI) in the United States, the Stazi in East Germany, and the MI5 in England. For Israel, neither the security services’ activities, nor their actions within the area of political policing (defined as activities undertaken within and against minority groups and political organizations) have been given sufficient attention or analysis by academic researchers. Virtually the only literature concerning the GSS are the written memoirs of former high ranking GSS officials.

Beginning with Issar Harel, through David Ronen, Ya’acov Peri and Carmi Gillon – to mention but a few prominent examples – a tradition of “self-immortalization” of GSS activities and former high ranking officials developed within the organization, channeled through the genre of popular literature and targeted at the Israeli general public. Yet, qualitative research of the GSS, or research regarding the role of the GSS in the control and administration of Arab society in Israel is nowhere to be found.¹

Who actually knows what the GSS coordinators undertake in the Galilee and Triangle regions, or what the staff of the Arab division of the GSS actually does? Do they intercept letters sent to political activists, photocopy them, and file them in their personal files? Do they pressure Arab family leaders to vote for “moderate” political party lists? Have they or do they still enlist inciters? Do they employ extortion methods in order to achieve political goals? Do they intimidate heads of

regional Arab municipalities with threats of “freezing” funds if they admit “unwanted” people to locally organized coalitions? Do they arrange favorable jobs for cooperative or influential people? Do they write and distribute fictitious announcements in the name of different political groups? Have they and do they stage disputes between political organizations and groups, between ethnic and religious communities, similar to the methods undertaken by the FBI during the 1960s and 1970s?

Certified responses to these questions are nowhere to be found. What is primarily available to the Hebrew reader is the information the GSS is interested in distributing. The information gap between Hebrew and Arabic readers is clear in this case. Even today, many Arabs in Israel continue to experience GSS activities directly and personally. They do not necessarily need academic research to enlighten them about GSS presence, even if the information they do possess is limited. By contrast, most Israeli Jews lack even a basic sense of the role and impact of the GSS concerning Arab citizens of the state, and therefore, need an informational channel on this subject to be opened. Yet, the two main modes of information distribution – the academy and the press – have failed to supply the necessary information, and thus have hindered the Jewish citizens of Israel from realizing what is being undertaken in their name.

It is difficult to ascertain how much the lack of publicity regarding the GSS is the result of self-censorship, externally imposed censorship, or the difficulties in accessing information. Yet, the General Security Service Law – 2002 anchored this discouraging lack of publicity within Israeli law. Article 19 of the Law mandates the imposition of criminal penalties on anyone who exposes or publishes classified information about

the GSS. Section (a)(1) provides that: “Rules, Service directives, Service procedures and the identity of past and present service employees and of persons acting on its behalf and other particulars in respect of the Service to be prescribed by regulations are privileged and the disclosure or publication thereof is prohibited.” Section (b)(1) determines that: “A person disclosing or publishing information privileged under this Law without a permit shall be liable to imprisonment for a term of three years; a person negligently bringing about such disclosure or publication shall be liable to imprisonment for a term of one year.” Section (b)(2) adds that: “A past or present Service employee or person acting on behalf of the Service who discloses or publishes confidential information without a permit under this section shall be liable to imprisonment for a term of five years; where such disclosure or publication has been committed negligently, he shall be liable to imprisonment for a term of three years.”

These latter provisions were meant to create a two-fold blockade on the flow of information. Section (b)(2) challenges and/or blocks the direct flow of information from past or present GSS personnel to information mediators such as journalists and researchers. Through Section (b)(1), the flow of information to the wider public is effectively blocked, if any such information reaches outside sources.

The shift from a situation in which there is little available knowledge to an actual legislative restriction impairs the ability to conduct an open and frank discussion on one of the most fundamental areas of life in Israel. It violates one of the basic principles of democracy and prevents a decision-making process by an informed and conscientious public. The reasoning, of course, is based on security

grounds and this must not be taken lightly. Article 19 of the 1966 International Covenant on Civil and Political Rights anchors the right to receive and distribute information in international law. The treaty also recognizes that it is legitimate for a state to limit the availability and publication of information on the grounds of national security or public order. However, total safeguarding, such as that anchored by the GSS Law, is a far-reaching step which raises questions regarding the legislature's intentions, and which invites speculation as to the illegality or immorality of the activities undertaken behind a screen of secrecy.

Naturally, the blanket secrecy thrown over activities of political policing is not unique to Israel. The modern state is inherently busy gathering information on its citizens, while keeping a large portion of its information concealed (both the information gathered and information gathering methods).² A hidden presumption by the state is that the ignorance of its citizens enhances its own power. Yet, there are those who utilize legal means to contend with the state's attempts at secrecy. The most prominent example is the wealth of research published in the United States regarding FBI activities in general, and against minority groups and political organizations in particular.³ Following continuous efforts by journalists, researchers and human rights activists, the wall of secrecy surrounding the FBI collapsed and publications uncovering its illegal activities brought about fundamental changes in its working procedures, as well as contributed to successful damage claims filed by political organizations in which the FBI had illegally planted informants.⁴

Two legal tools assisted in uncovering the illegal activities undertaken by the FBI. The first

is the US Constitution and its emphasis on freedom of expression, and the second is the Freedom of Information Act. On the lack of a constitution in Israel, even following the "constitutional revolution," there is neither room nor perceived need to expand. But even Israel's Freedom of Information Law - 1989, including the amendment that re-instated the law in 2002, is of no assistance to researchers in this area. Article 14(2) of the law explicitly excludes the GSS from the institutions to which the Freedom of Information Law applies. Furthermore, Article 9(a) of the law declares in general terms that: "An institutional authority shall not provide information which constitutes any of the following: (1) information which were it revealed could pose a risk to national security, foreign relations, public safety or an individual's well being..."

Thus, similar to a number of other countries, Israel's Freedom of Information Law is a restrictive and restricted law, and in certain areas completely inapplicable. Only a small window of opportunity exists in Article 14(d) of the law, by which the publication of sensitive information may not constitute an offense. This article states that: "The directives of this law do not include information which was transferred to the State Archives by a public institution in accordance with the Archive Law - 1955." Thus, the examples of GSS activities presented in this article are based on archival materials from the Israel State Archives, which were recently opened to the public.

GSS activities are probably the most classic example of an area in which researchers are working blindfolded – if at times wilfully – yet this is certainly not the only area of limited information. As I will demonstrate, the state's control of information has contributed to more

than a few distortions in research regarding the Zionist-Palestinian conflict, the relationship between Jews and Arabs, and political issues related to the Arabs in Israel.

Partial Information and the Zionist Narrative

The reasons for states to control the information reaching their citizens and the outside world are many and varied. One common argument given for concealing information is state security. Yet, as will be demonstrated, a more essential and less disclosed motive is the state's objective to construct the terms of public discourse. In the case of Israel, this objective is demonstrated by state attempts to perpetuate a simplified and central Zionist narrative (alternative and more complex Zionist narratives certainly exist) regarding the Zionist-Palestinian conflict. This narrative is based on two inter-related foundations. The first is historical, consisting of the traditional Zionist version regarding the 1948 war, the Nakba, and the roots of the refugee problem. The second is a more contemporary narrative, based centrally on the image of Israel as a democratic and enlightened modern state. The legislation preventing access to archival information limits the ability to challenge both levels of this narrative through the use of archival records and dated documentation - a key traditional academic research tool - and thus assists in their perpetuation.

The Nakba, the Archive Law and Public Historical Discourse

It is common knowledge that for many years the State of Israel has nurtured the argument that the Palestinian refugees abandoned their villages

and homes following a call by neighboring Arab states to leave their homes for a short time, until the victory over the "Zionist enemy" was achieved. The lack of access to archives and the perpetuation of this argument by Israeli officials in public forums in Israel and abroad have transformed this claim into a "real" account. An entire generation of Israeli Jews was raised to believe this claim whole-heartedly. The legislation relating to documentary materials played a central role in this achievement. The Archive Law - 1955 provided the State Archivist with wide authorities with regard to archival materials. Article 4 of the law states that: "All archival materials of national institutions dated prior to the establishment of the State of Israel as well as any archival material of any state institution will be deposited in the State Archives [...]." Article 10(c) authorizes the State Archivist to classify archival material as secret and to limit its review. Through these two articles, the state tightened its control of this information.

This was a two-fold legislative maneuver that enabled the state and certain historians to distribute the basic Zionist narrative, and this controlled and impeded the development of an alternative narrative utilizing traditional historiographic tools. Thus, the legislation limiting review - justified by security reasons - was used as a central tool in establishing the main and basic Zionist narrative as a hegemonic one which, at best, can be said to include some accurate details.

A similar phenomenon exists with regard to the "battle morals" of Jewish forces during combat. The atrocities and war crimes performed by Arab forces - and such crimes indeed took place - are an inseparable part of the public discourse among Jewish citizens of Israel. It is difficult to find a student who has

not heard of the 35 Jewish fighters killed on the way to Gush Etzion and the desecration of their bodies, or of the Hadassah convoy which had 78 of its members killed on the way to the hospital on Mount Scopus. Murders committed by Jews, except for the massacre in Deir Yassin, which was carried out by “dissidents” yet backed by the Haganah, were almost completely unknown. A multi-year prohibition on access to documents regarding war crimes performed by the Israeli side (for instance in Dawayima and ‘Ein Zeitun, Safsaf and Lydda, Eilabun and Farradiya to name but a few) facilitated the silencing, concealing and construction of a one-sided discourse, and the promulgation of a dichotomist world view: “We are good and just and they are cruel and cowardly.”

The partial release of many documents related to the 1948 war, available for review by researchers since the beginning of the 1980s, brought about a change within academic discourse in regard to these issues. It would seem that at present, only someone extremely gullible or insistent on ignoring reality would argue that it was indeed the case that the call of Arab states, if such a call was made, was a main cause for the uprooting of Palestinians. It is difficult to find a credible researcher today who would deny the fact that in certain areas of the country, the Israeli army actively and purposely expelled thousands of Arab residents, or someone who would deny that the Arab Palestinian national leadership and the Arab League made an attempt to stop the refugees from exiting the country, at least in the advanced stages of the war. Nor can credible research support claims that the Israeli army did not commit any war crimes at all.

But it is important to realize that new research does not necessarily bring forth a change in public discourse. Following the construction of

a hegemonic discourse that has been embedded within the wider public, even a wealth of opposing research would have difficulties in successfully undermining it. The state managed a great discursive achievement. The years during which documentation was restricted enabled the implantation of a simplistic worldview within the wider public, one anchored by partial and tendentious material. Thus, a deeper debate within the Jewish public in Israel was prevented, not merely with reference to the “right of return,” but also regarding Israel’s moral responsibility, even if partial, for the creation of the refugee problem. In this way, it was also easy to maintain the dichotomy between those who were “good” and those who were “evil.”

Nevertheless, a difference does not always exist between members of the academic community and the general public. A recent example of this was apparent in an interview that took place during the Israel Broadcasting Authority’s Channel 1 nightly news program. Professor Shlomo Avineri of the Hebrew University, who is also a former Director General of the Ministry of Foreign Affairs, was interviewed following the murderous July 2002 attack in the cafeteria at the Hebrew University’s Mount Scopus campus. In the interview, Professor Avineri compared the terror attack undertaken by Hamas in the cafeteria to the killing of the Hadassah convoy’s members in April 1948. By making this connection, he attempted to disconnect any link between the activities undertaken by Israel (or state to be) to the actions undertaken by the Palestinians: “There was no Jewish state then, there was no occupation, there were no refugees, there was no refugee explosion,” he stated while referring to the attack on the convoy in April 1948.⁵ In other words, according to Avineri, the

Palestinians are murdering us for no reason. Yet, anyone willing to contend sincerely with Zionist history knows that such arguments have been totally refuted, since in April 1948, thousands of the Arab residents of the country were already uprooted from their homes and had become refugees. Furthermore, the attack on the Hadassah convoy that Professor Avineri referred to was planned two days following the conquering of Deir Yassin, and according to one of the Arab forces' commanders, was actually in retaliation for the massacre that took place in the village.⁶

This example is not cited solely for argumentative purposes, and it is not intended to justify one crime by another that preceded it. It aims to present the consequences of ignorance (encouraged by the state) on political decisions and on views held by individuals. A more reliable historical account of the events would have put the attack in its context, and might have led to totally different conclusions, namely that there is a link between the policies and practices of the state (and the state to be) on the Palestinians not only in 1948 but also today. The actual political conclusions might have been that there is a link between the targeted assassinations, the settlements, and the occupation on one hand, and the attacks on Israelis on the other, and not necessarily the conclusion drawn by Avineri that the Palestinian national movement conceives of Jews as "Ordained to Die," thus impelling a need for separation between the people.

GSS Activities and the Plan of Denial

It is easy to determine that the legislated control of information, the mass media and the education system helped the state to instill

within its Jewish citizens the historical narrative that it wanted. This is not, however, a simple unilateral and enforced maneuver undertaken by the state. With reference to historical documents, except for those relating to the security services, during the past few years, a relatively open policy toward accessing state documents has been adopted in Israel.

In addition to the strict policy of "classifying" documents that was maintained until the beginning of the 1980s, which epitomizes an "official denial" as defined by Stanley Cohen, there also exists a "cultural denial" in Israel.⁷ In other words, there is an unwritten understanding within Israeli Jewish society with regard to what is worthy of recollection, what can be recognized publicly, and at the same time, what must be suppressed and forgotten. For this reason, exposing historical documents and publications does not necessarily facilitate a change within the public discourse.

Thus, these laws and regulations are utilized merely as a means of assisting with the denial. The decades-long blanket prohibition on accessing archival documents facilitated the denial with regard to the past. The permanent ban on access to security services' documents facilitates the denial of what is undertaken in the present. This legislation saves many people from the need to confront the collective past, as well as from grappling with contemporary policies undertaken in their name. Thus, Jewish-Israeli society preserves its image as democratic and enlightened, based on a grain of truth, and it limits the possibility of self-criticism or of criticism against the regime.

A portion of the academic research in Israel concerning Palestinian society demonstrates well the impact of the legislative limitation on information to the construction of the

enlightened personal image. I will demonstrate this by exploring one field – that of education in the Arab sector – and by relying on Professor Jacob M. Landau’s, *The Arabs in Israel: A Political Study*, the Hebrew version of which was published in 1971. This book was purposely selected because it was published prior to the opening of the archives, and because it was utilized for many years – and continues to be used – as the basic text for academic courses concerning Arab society in Israel.⁸ The following is a quote from a sub-chapter entitled “Arab Education”:⁹

Both the central and local regimes in the State of Israel made a considerable effort to widen and improve the education of Arabs in order to bring its level up to the level of the education of Jews. This was a very difficult mission in light of the slow advances in the education of the Arabs, especially in the villages, during the 30 years of British mandate rule in Israel [...] The Ministry of Education and Culture made a great effort to improve the education plan in both the elementary and high schools [...] The dedication put forth into educating Arab children was equal if not more than the effort which was put forth into educating Jewish children.

The message reflected in these lines is clear and precise. The state of Israel was as active as possible in facilitating the education of the Arab population. It even dedicated more to the education of Arab children. Was this the actual situation? This might have been the impression reflected in the publications of the Ministry of Education and Culture that were open for review. However, classified documents, which were recently released for review and are not yet published, uncover a different situation. Some of these documents are from the committees for

Arab affairs and deserve a short introduction.

In 1954, the Israeli government established the Central Committee for Arab Issues. It was coordinated by the Prime Minister’s advisor for Arab issues and was comprised of the head of the Arab Department at the GSS, the head of the Special Duty Department of the Israeli police, and the head of the Military Government Department of the Ministry of Defense. There were three regional committees subordinate to the Central Committee – one in the Galilee, one in the Triangle region, and one in the Negev – and each was directed by a corresponding regional military governor. The permanent committee members were the various personnel responsible for Arab issues in their respective regions on behalf of the GSS, the police, and representatives of unit 154 – the IDF unit that activated Arab agents in the countries bordered by Israel.

For many years, these committees had the most influence on the daily life of the Arabs in Israel, since it was in these committees that the security forces coordinated the steps they were to employ against the Arab population in general, as well as against specific individuals. The committees lacked statutory authority, yet their recommendations carried heavy weight on many subjects, including the issuing of work, firearms, and building permits, the appointment of *mukhtars* (local village leaders), and the charting of policies with reference to different communities or specific individuals. These committees recommended approval or rejection of particular demonstrations and recommended whether or not to arrest political activists or to expel them. Except for extraordinary cases, all of the government ministries that operated in the “Arab sector” coordinated their activities with these committees, which remained active even

following the end of the military government rule in 1966.

During a meeting conducted by the Triangle regional committee on 18 November 1954, the committee members summarized their attitude towards the granting of university education to Arab youth as follows:¹⁰

Arab students in the university and the Technion: the committee does not approve of higher education for the residents of the region. Since it is not possible to prevent their entrance into these institutions after they are accepted, the committee recommends contacting the administration of these institutions in order to prevent their acceptance [in the first place]. The contact will be made by the central region military governor through the Department of Military Government at the Ministry of Defense.

The wording of the protocol is worthy of review. The paragraph is short, only a few lines, and except for the sentence, “The committee does not approve...,” the statement lacks justification, probably since it is presumed that the reasoning is clear to all: security issues. The committee, comprised of only army, police and GSS officers, also recognizes its limitations. It details that: “There is no possibility to prevent their entrance into these institutions after they are accepted.” Therefore, the committee is not making a decision, but rather a “recommendation.” Its recommendation is to act outside of the institutionalized bureaucracy, utilizing contacts and influence.

This recently revealed material contains no details as to how this policy was actually achieved. There is no way for us to know how the meeting between the representative of the Ministry of Defense and the administrators of these academic institutions was conducted, what

arguments were raised by government officials, and how the administrators of these educational institutions reacted. Yet, we do know that this policy was implemented for three years, preventing the access of several Arab high school graduates. It was abolished in September 1957, when a new policy was instated declaring that: “Local residents would not be faced with difficulties with regard to studies in institutions of higher education.”¹¹

There is no need to add a wealth of further detail with regard to this policy, the goal of which was to prevent Arab citizens of the state from accessing higher education, and which was pursued simultaneously alongside other practices undertaken by the state, including the enactment of the Compulsory Education Law - 1949 and the building of schools. It is difficult to ascertain which authorities, outside of the defense forces, and which of their academic counterparts knew about this policy. It seems that Landau was unaware of it when he wrote the aforementioned paragraph, which reflected an ideal state of affairs with regard to the treatment of the Arab citizens by the state. One could say that his desire to present government policy in a positive light was assisted by a lack of “problematic” documentation. This is how he proceeded to write later in the chapter, in the section dealing with the content and methods of instruction in Arab schools in the country:¹²

The education planners were of a liberal point of view, according to which they did not want to force Arab children to convert their cultural heritage into Jewish civilization. The Israeli planners of the educational policy had no illusion. They took into account the risk that the emphasis on studying Arab culture could promote a national Arab movement in Israel. This was extremely probable, since in Arab schools, the ratio between male and

female teachers was two to one (opposite to that in Jewish schools). It could have been expected that some of these men would preach nationalism to their students.

Ignoring the question of gender (the argument that Arab men are more inclined to “nationalism” than women) which deviates from the topic of this discussion, the impression given from reading this paragraph is that the authorities in charge of Arab issues in the country “accounted for the risk” that Arab teachers would instill nationalist ideas in their students, but also that freedom of instruction was important to them, and therefore they made no attempt to prevent it.

Is this a reflection of reality? The security forces’ tight supervision over the employment of Arab teachers in Arab schools is no secret; nor was it a secret when the book was written at the end of the 1960s. It was widely acknowledged that the Ministry of Education, as directed by the GSS, made concerted efforts to prevent members of the Communist Party from being employed as teachers, even if they were worthy candidates. Non-political candidates or supporters of Mapai and its satellite parties were easily accepted, even if they did not possess the right qualifications for teaching. Landau’s disregard of this information can be interpreted in two ways: either this fact seemed irrelevant to him or he neglected to note it due to lack of documentation.

After nearly 40 years, it is possible to review some of the GSS documents and to complete the partial picture reflected in this type of research. It should be noted that the GSS archive is entirely blocked to researchers, However, GSS correspondence with other institutions such as the Israeli police, the military

government or the Ministry of Education can often be located in the state archives and various government ministry files.

It is apparent from these materials that Unit 490 of the GSS (the Arab Department) typically prepared bi-monthly reports entitled “Nationalist Activities and Statements Made by Teachers and Students.” The unit forwarded these reports to the Ministry of Education. Furthermore, it is apparent that aside from screening teachers prior to their acceptance as employees, the GSS maintained a constant surveillance system of Arab teachers at the schools. Teachers who expressed themselves “negatively” were put under special supervision, and if they continued these activities, they were removed from their position. This is hardly an example of liberal administration as depicted by Landau. Surveillance was not limited to teachers who preached violence, if any actually existed, or to those who, for instance, expressed their support of Gamal Abdel-Nasser or the PLO. Surveillance was also conducted against teachers who called for strikes on 1 May; those who argued that Israel had stolen land belonging to the refugees; those who cursed collaborators; or those who claimed that the Ministry of Education discriminated against Arabs.¹³

Beyond the accumulated influence of screening teachers for their political affiliation and monitoring the ways in which their conformity influenced Arab students and the character of education they were provided, the establishment of informant networks within Arab schools is extremely important. The GSS-issued periodic reports were based on reports forwarded by teachers about their colleagues and students, and by students about their fellow students and teachers.¹⁴ An entire generation of Arab citizens of Israel was raised in this

atmosphere. It seems that this point is no less important when writing about “Arab education” than is the aspiration expressed by the Ministry of Education to preserve Arab cultural heritage. The classification of teachers was undertaken by the GSS on behalf of the state in order to prevent the distribution of the national Palestinian narrative. Backed by the law, those who adopted the simplistic Zionist narrative were able to ignore the protective measures undertaken in order to instill the narrative they had chosen both for themselves and for the Arab population.

Summary

States, societies and nations usually establish themselves and justify their actions utilizing a meta-narrative.¹⁵ It is for this reason that states prevent their public from accessing information, and utilize the media and academia in an attempt to manipulate public discourse to accord with their own narrative. Thus, the ignorance of the individual can be a source of power for the state. This was true in the past and the present, for totalitarian as well as liberal democratic regimes.¹⁶ Academics and journalists, like any citizens, can adopt the meta-narrative or they can reject it. Those who accept it find strength for their position in the restrictions imposed by the law on the freedom of information. These restrictive laws influence, first and foremost, those who are interested in challenging the narrative.

The new GSS Law has transformed writing about the security services to an almost entirely illegal activity, and thus harms the possibility of efficient supervision over the GSS. It also hinders efforts to instill public awareness about GSS activities. The experience of the United States teaches that these restrictions can be

confronted with intensive activities undertaken by human rights organizations, journalists and researchers and with the backing of legislative authority. The Israeli public’s generally negative reaction to the research of the 1948 war based on declassified documents teaches us that even relatively free access to state archives does not necessarily lead to a change in public discourse.

It is reasonable to assume that more access to GSS documentation will not lead to harsh criticism of the GSS by the Israeli Jewish general public, since there are personal and national methods of denial to deal with new, uncomfortable information. Yet, it cannot be denied that providing access to knowledge is a cornerstone of the democratic system.

End Notes

- 1 See Issar Harel, *Security and Democracy* (Tel Aviv: Yediot Ahronot, 1989) (Hebrew); David Ronen, *The GSS Year* (Tel Aviv: Ministry of Defense, 1989) (Hebrew); Ya'acov Peri, *He Who Comes to Kill You* (Tel Aviv: Keshet, 1999) (Hebrew); and Carmi Gillon, *The GSS between the Shreds* (Tel Aviv: Yediot Ahronot, 2000) (Hebrew). Yehiel Gutman's book, *Shakedown in the GSS* (Tel Aviv: Yediot Ahronot, 1995), presents a more external view; the book was written following the "Bus 300 Line Affair." A former Supreme Court justice also wrote an article regarding this affair: see Yitzhak Zamir, "The Government Legal Advisor during Crisis: The GSS Affair," in *The Uri Yadin Book 2*, ed. Aharon Barak (Jerusalem: Bursi, 1990) at 47-55 (Hebrew). For a general overview of the Israeli security services that does not focus on the GSS activities within Israel, see Ian Black and Benny Morris, *Israel's Secret Wars: A History of Israel's Intelligence Services* (New York: Grove Weidenfeld, 1991).
- GSS activities in the Occupied Territories – mostly in the areas of torture, but also within the area of recruiting collaborators – have been covered in B'Tselem reports. For articles discussing the legitimacy of using force during investigations, see Mordechai Kremnitzer, "Exercising Power during General Security Service Investigations - The Lesser of Two Evils?" 4 *Law and Government* 666 (1998) (Hebrew). Kremnitzer also instructed Ariel Zimmerman while writing his book: Ariel Zimmerman, *The GSS Draft Law – Comparative Analysis* (Jerusalem: The Israeli Institute for Democracy, 1997).
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- Due to the Freedom of Information Act – 1966 (FOIA), documents are more accessible in the United States, especially after the enactment of the 1974 amendment to the FOIA, following the Watergate affair. However, the Reagan administration acted to limit accessibility to operational and other documents of the intelligence agencies. On this issue, see Diana M.T.K. Autin, "The Reagan Administration and the Freedom of Information Act," in *Freedom at Risk: Secrecy, Censorship and Repression in the 1980s*, ed. Richard O. Curry (Philadelphia: Temple University Press, 1988) at 69-85.
- 3 For an analysis of the surveillance undertaken by the FBI on United States Supreme Court Justices, see Alexander Charns, *Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court* (Urbana and Chicago: University of Illinois Press, 1992).
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- 4 See Margaret Jayko, *FBI on Trial: The Victory in the Socialist Workers Party: The Suit against Government Spying* (New York: Pathfinder, 2001). The book widely cites the verdict of Judge Thomas Griesa of the US District Court for the Southern District of New York who ruled in favor of restitution to the Socialist Labor Party not merely for the burglarizing of their offices but also for the insertion of informants into the party apparatus.
- 5 Transcript of the interview with Avineri on Channel 1, 31 July 2002.
- 6 Bahjat Abu Gharbiyya, *At the Center of the Arab Palestinian Struggle* (Beirut: The Center of Palestinian Studies, 1993) (Arabic).
- 7 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001) at 10-14.
- 8 Jacob M. Landau, *The Arabs in Israel: A Political Study*, trans. Elyakim Rubenstein (Tel Aviv: Ministry of Defence, 1971) (Hebrew).
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- 10 Central Region Military Governor of the Military Government Department to the Israeli Police and the GSS, summary from regional coordination meeting number seven, 18 November 1954 (Israel State Archives, section 79 file 2314/8) (Hebrew).

- 11 Protocol of the Central Regional Committee meeting number 22, 1 September 1957 (Israel State Archives, section 79 file 287/21) (Hebrew).
- 12 J.M. Landau, *supra* note 8, at 55.
- 13 See “Nationalist Statements and Activities of Teachers and Students,” Unit 490 to the Security Officer of the Ministry of Education, 19 July 1965 (Israel State Archives, section 79 file 236/17) (Hebrew). This section of the archives contains additional examples of these types of statements.
- 14 Yair Boymal discusses the activities of security agents in Palestinian communities based on material released during the 1990s by the Israel State Archives. See Yair Boymal, *The Treatment by the Israeli Establishment of Arabs in Israel: Policies, Principles and Second Decade Activities, 1958-1968* (Thesis Submitted for the Doctor of Philosophy Degree, University of Haifa, 2001), specifically chapter 5 (Hebrew).
- 15 For a wider discussion and theoretical overview, see Homi Bhabha, ed. *Nation and Narration* (London: Routledge, 1990).
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In the Name of Insecurity

Arab Soldiers in the Israeli Military

Rhoda Kanaaneh

Arabs serving in the military are in a very difficult situation. They always mistrust you no matter what you do. “An Arab is an Arab wherever he is.” This is what I hear. It’s like the saying goes, “He trusts you and accuses you of betrayal” (*m’ammnak u-mkhawwnak*).

Jamil, soldier with four years of service.¹

The military conscription of Jews in Israel along with the exemption of most Arab citizens of the state has played a key role in the production of a hierarchal citizenship system. Within the framework of an ethnicized “*military mentalité*,”² “non-Jews” who do not serve in the state security apparatus are denied a host of state benefits and rights as well as the sense of full national membership enjoyed by “the community of warriors.”³ The state actively uses the criterion of military service to exclude Arab citizens, while Jewish citizens who do not serve in the military can access the (lesser) benefits of alternative national service. In addition to exclusion, military enlistment has also served the complimentary function of co-opting small segments of the Palestinian population in Israel by promising to reward their military service with membership, benefits and rights otherwise denied. However, this attempted manipulation has been fraught with conflicts and contradictions.

This article explores the tensions between the state’s conception of Palestinian citizens of Israel as security threats by definition on the one hand, and the attempt to integrate a small number of them into the security apparatus (the military, border guard and police) on the other. Arab soldiers are trusted with the enforcement of state security, and yet signs of mistrust linger within the military – both at the formal and informal

level. I argue that Arab soldiers are forced to continually prove and re-prove their trustworthiness, and in effect, the rewards they receive for their military service are severely circumscribed by the Zionist goals of the state. Their experiences illustrate the ethnic limits that are embedded in other mechanisms of governance in Israel.

The Military and Its Good Arabs

Since the founding of the state of Israel, the military has been seen as “the workshop of the new nation.”⁴ The goal of universal conscription was to create and socialize “new Jews.”⁵ Through participation in the military, Jewish citizens of Israel become incorporated into the security ethos of the state and “the logic of the socio-political order [is]... reproduced.”⁶ The military field has also been used to manage those at the margins of this socio-political order, the remaining Palestinian Arab minority in Israel.

Ian Lustick argues that “there is a highly effective system of control which since 1948 has operated over Israeli Arabs”⁷ that is based on policies “specifically designed to preserve and strengthen... the segmentation of the Arab community, both internally and in its relations with the Jewish sector.”⁸ The military has played a leading role in this segmentation policy. One of the primary means by which Israeli governments have cultivated the ostensible and “endemic animosity” between the Druze and other Arabs,⁹ as well as between Bedouin and other Arabs,¹⁰ was through selective recruitment to the military. Kais Firro argues that this system was intended to produce “good Arabs” (Druze, some Bedouin and a few others who serve in the military) in opposition to “bad Arabs” (the rest).¹¹ The recruitment of Arabs in

the military was not simply to add their strength to the ranks of the “Israeli Defense Forces.” From early on, supporters of the “Minority Unit” in the military argued that “the unit served an important social goal that transcended its military utility.”¹²

But Arabs in Israel are not born structurally “good” from the point of view of the state. After all, they are “a minority group that lives in a political framework - the state of Israel - that was established against its will,” and at its expense and the expense of other Palestinians.¹³ As “non-Jews” in a state that continues to emphasize its Jewish character, they cannot be considered automatically loyal in the way that Zionism assumes of its Jewish citizens. The few “good Arabs” need to be conscripted, trained, tested and remolded in order to subdue their structurally suspicious status as “non-Jews” - a feat which can only have limited success by definition. Indeed, Jewish security requires and depends on the embodiment of Arabs as a source of insecurity in order to justify the continued centrality of the security apparatus. If Arab ethnicity functions as a signifier of insecurity, and membership in the military as a signifier of security, then the Arab soldier in the military is a security enforcer who must fight against the very insecurity he embodies and of which he cannot entirely rid himself.

During his tenure as Minister of Defense, Moshe Arens was a strong advocate of drafting Arabs, particularly Bedouin, into the military to “discourage them from turning into Islamic radicals.”¹⁴ Similar statements to the effect that drafting Arabs can counter their otherwise sure path to political radicalization are commonplace in Israel. Hisham Nafa’ points out that the statement of a high ranking military officer that the recruitment of Druze aims to prevent them

from joining Hamas and from becoming terrorists implies a conception of an Arab as “a terrorist, perhaps currently dormant, but his ‘terrorist-ness’ could be activated at any moment!”¹⁵ Suspect Arabness casts its shadow even on “good Arabs” serving in the military.

Institutional Doubt

According to Alon Peled’s analysis, one of the principal arguments used by Israeli governments “to justify the historical exemption of most Arab citizens from military service” was that their recruitment would “breach security.”¹⁶ Senior military and ministry of defense officials “shared a consensus that [Israel’s] Muslim citizens were simply too unreliable to be enlisted,” and “questioned the loyalty of Muslim and Christian citizens and argued that allowing them in the military would amount to assisting a fifth column to penetrate its ranks.”¹⁷ Indeed Israeli governments have feared that Arab military service or even alternative national service would raise their “expectations for state benefits and equal rights” and “contribute to political irredentism.”¹⁸

Although small numbers of Arab soldiers have volunteered for the military since its formation, the persistent suspicion of these soldiers is manifest at the institutional level through the very process of enlisting, which differentiates between the drafted soldier who has the duty to serve regardless of his personal beliefs or political affiliations, and the Arab or “minority” soldier who volunteers to enlist and must prove his loyalty and trustworthiness by providing two recommendations, usually from military personnel. This contrasts sharply with the difficulty Jewish citizens of Israel face in refusing service on ideological or political grounds: they

are pressured, intimidated and frequently accommodated with clerical or non-combat posts in order to avoid their outright refusal of military service. Within a Jewish nationalist framework, their Jewishness labels them as automatically loyal and soldier material, while Arabness labels a citizen automatically disloyal and not soldier material.

In addition to the added requirement of recommendations, Arab volunteers undergo rigorous ethnicized “security” checks. One Christian man¹⁹ I interviewed was asked to identify himself and his family members in photos of political demonstrations that were legal and peaceful before being turned down by the military as “incompatible.” Indeed, the very definition of compatibility with the military carries ethnic significance. An Arab potential volunteer is routinely disqualified if background security checks reveal he has relatives across Israel “proper’s” border (e.g., in the West Bank and Gaza Strip, Lebanon). A Druze policeman I interviewed who had seven years of service (in addition to the three years of mandatory military service) reiterated what several others told me: “It is my impression that the security check [he used the Hebrew term *tahkir bithoni*]²⁰ for minorities, including Druze, is more intense. This is at the initial stage. Later on, if you try and rise in rank, they dig around more and more. For Jewish soldiers, the check is only a formality on paper.”

Although the Druze and Bedouin have been constructed as relatively more trustworthy than other Arabs, the history of their recruitment in the military shows that this has been a gradual and incomplete project. A gap of distrust and the view of Druze and Bedouin as a potential Arab “Trojan horse”²¹ in the Israeli military has been evident throughout their history of service.

Mandatory conscription of Druze was introduced in 1956, and a policy of encouraging Bedouin recruitment was in place. However, for years to come, Druze and Bedouin – not to mention other Arabs – were placed in segregated units under Jewish officer command, denied participation in Israeli-Arab war combat and limited in rank. Although “minority” soldiers were allowed positions outside the segregated brigade (but not in the air force or in intelligence) starting in the 1970s, and all units were declared open in 1991, the largely segregated units continue to exist and “minority” soldiers continue to be placed in them. In 2001, Sergeant Husam Janam petitioned the Supreme Court because his demand to transfer out of the Druze infantry unit had been denied, suggesting that, in practice, this right to serve in other units continues to be severely curtailed.²²

The continued predominance of “minority units” highlights that these soldiers are not just Israeli soldiers, but “minority” Israeli soldiers, since “Israeli” on its own is used to mean Jewish.²³ Promotions and assignments are also ethnically organized. Samir, a veteran of the Bedouin educational military track told me: “They sent me to an officer’s course and they assigned a psycho-technic exam on the Adha holiday, and I still got a very high score. But because the military is divided, the Bedouin area [used Arabized Hebrew *il-mirhav il-badawi*] did not have a position [used Hebrew word *teken*] that year. The officer in charge tried to help me and told me to wait a year, maybe next year there would be an opening.” Asri Mazariv, the brother of Major Ashraf Mazariv of the Bedouin patrol unit who was killed in January 2002, told *Ha’aretz* that Ashraf was not accepted by Ofek, the “prestigious project aimed at cultivating

company commanders.” He explained, “Even though Ashraf was considered an excellent commander in his unit, as far as the IDF was concerned, he always remained a Bedouin... As a Bedouin you can’t raise your head too high. If you climb too high, they’ll smack you down again right away.”²⁴

This ethnic logic also permeates benefits such as the Bedouin educational military track mentioned above, in which Bedouin teachers are given credit for military service in exchange for teaching at a school in military uniform. Ethnicized memorials such as the memorial to the Fallen Bedouin near the Battouf valley or the Druze military cemetery in Isifya, all point to the ethnic logic of the military.

Indeed, the Arab soldiers I interviewed identified precisely these issues – limited promotions and closed units – as continuing to circumscribe their military service. While some were critical and disillusioned by the ethnic barriers and glass ceilings, many of the soldiers I interviewed rationalized these limitations as either 1) a result of the paucity of qualified Arab soldiers; 2) in a process of gradual change that requires patience; or 3) a result of individual and isolated cases of discrimination rather than a matter of military policy. However, none of the 34 soldiers, policemen and border guards I interviewed between 2000 and 2002 believed there was full equality in this area. Even Hasan al-Hayb, the mayor of Zarazir and a former officer of the Bedouin Trackers in Northern Command, told me: “The military is orderly. Any person who proves his capabilities will advance...There is discrimination among some of them and promotion is not 100%... there isn’t even one Druze air force pilot.”²⁵ When it comes to the absence of Arabs in the highest ranks of the military, the soldiers mostly agreed that the

state in its current situation cannot trust Arabs with sensitive state secrets and decision-making power. For these men, the military seems to hold the promise of a meritocratic system but ethnic considerations mar and distort it.

When Lieutenant Colonel Omar al-Hayb was accused of spying for Hezbollah in 2002, his identity as a Bedouin was a central component of the case. The head of the military general command emphasized that this is “an isolated case, and must not be used to reach conclusions against all Bedouins in the country. The contribution of Bedouin to protect the security of Israel was considerable and ongoing and proven since the establishment of the state until today.”²⁶ The centrality of Hayb’s inescapable Bedouin identity to the military and to the Israeli public becomes clear when compared to a situation in which an Ashkenazi Jew is accused of espionage: It would seem absurd if military spokespersons then urged the public not to generalize the soldier’s betrayal to the entire Ashkenazi Jewish community. Moshe Arens described the trial as “being accompanied by a feeling of anxiety and injury by many in the Bedouin community,” and he added that Israelis should express their support for the Bedouin community in this hour of crisis.²⁷ Al-Hayb’s defense attorney highlighted the years of military service and ranks of the defendant’s clan members and the number of them killed during their military service.²⁸ The accused’s brother, Hasan al-Hayb, stated in an interview that the shock of the accusations were difficult not only for the family and for the people of his village Zarazir, but also for “all Arab Bedouin villages.”²⁹ It is clear for all the involved parties that ethnic affiliation is paramount: Omar al-Hayb is not an Israeli soldier – he is a Bedouin Israeli soldier.

Another soldier I interviewed who had been suspected of breaching security and who was subsequently released, described the significance of ethnicity in his case: “They came and took me in the middle of the night from the house like any other Arab. It didn’t matter to them that I had served in the military or not. Why did they accept me into the security system [used the Hebrew term *marikhit habitahun*] in the first place? Once they even gave me a lie detector test while I was in uniform [used Hebrew *madim*]. To them I was an Arab just like any other Arab.”

Unofficial Policies?

Like many of the men I interviewed, Samih (labeled a “Muslim”, i.e., non-Bedouin soldier) found deep contradictions in the military. At the time of the interview, he had served five years in the army and three years in the border guard. He stated, “There is no Ashkenazi and Russian, and Arab and Jew - in any case, you can’t talk like that in the military. There are rules and it’s not up to you to do as you like. A soldier is a soldier regardless of his background. In the end, we are all in the same ditch.” However, Samih believed that there were individuals within the military who did not follow these egalitarian rules: “I have friends who were highly qualified and went to officer training but they were flunked because the [Jewish] officer in charge was right wing.” He also described the way in which the rule of exclusive use of Hebrew was unequally enforced: “This officer came shouting at me for speaking Arabic with my friends. Right around me were soldiers speaking Russian and Amharic, but it was only Arabic that bothered him.” Moreover, the level of daily discrimination experienced by soldiers once out of uniform or once they have left service seems comparable to

the rest of the Arab population. One Bedouin soldier from an unrecognized village in the south told me: “We say to each other: today you are a combatant, tomorrow you are an Arab [used Hebrew *hayom ata kravi, mahar ata aravi*].”

In addition to stories of “isolated cases” and “individual racists,” many soldiers described discrimination resulting from corruption. Farid, a Christian policeman, told me: “There are people with college degrees [used Hebrew *to’ar rishon*] who don’t get promoted, and men who aren’t worth a shekel but their relatives are so and so and they are the ones who get promoted. The security system [used Arabized Hebrew *ma’rekhet il-bitahon*] is like a mirror of the state – when you are inside it, you can see all of the dirt. If you want to get close to an officer, lie to him. Maybe the Jewish policeman doesn’t have to do this, but we do.” Another soldier described sanctioned ethnic control and corruption in different units: “The Druze control the border guard [used Hebrew *mishmar gvul*], the Tiberias station is in the hands of the Christians, and tracking is for the Bedouin. If someone from a different group tries to come in, they find a way of getting rid of him. Everyone knows from his background what unit he will be successful in.”

Many interviewees also described a more informal and daily level of mistrust in the military. One Druze policeman described the way in which “they look at you differently” if anything happens: “To them you are a mercenary [used Hebrew *sakhir herev*] - I’ve heard this word both in the army and in the police force.” Another Christian policeman said: “When something happens, I start apologizing. Like when that guy from Abu Snan blew himself up at the train station in Nahariya, I said things to the policemen with me, things that I don’t

want to say, so that they don't put me in the same category with him... I would say things like: 'Those Arabs, they don't know anything but violence' [used Hebrew *alimut*]. Or during the demonstrations in October [2000], they would ask me 'What's going on with the Arabs?' [used Hebrew *mah koreh 'im ha'aravim*]. Of course I have to say the things they want to hear." Another border guard told me: "We can't really talk about politics there. You have to be very careful what you say and whom you say it to. There are some good Jews in the army; some of them are better than the Arabs that serve. But not all of them."

While these cases of discrimination or corruption can be seen as individual, isolated, informal and somehow random, they can also be understood as systematic results of the state power structure. Hisham Nafa's analysis of an incident in which two Jewish officers from an elite unit beat a Bedouin soldier is relevant here. Rather than see the case as a random aberration or as an exception to military rules, Nafa' argues that Israeli racist policies against Arabs in the Occupied Territories "will necessarily and directly cause the same behavior in relationship to Arabs here."³⁰ I would add that the overwhelming Zionist strategy of segmentation and the ethnicizing logic of the state and the military underwrite both formal policy and informal patterns of discrimination in the military.

The Promised Land

The cooptation of certain Palestinians for military service has been built on the promise to reward them – or to spare them the punishments other Arabs face – both materially and symbolically. At the economic level,

possible attractions include increased benefits, tax releases, subsidized loans and education, as well as increased job opportunities both within the military and in other security industries. Some soldiers can purchase land plots at subsidized prices in limited locations. However, job opportunities for released "minority" soldiers remain meager. A March 2001 government report identified job placement as a major problem facing released Bedouin soldiers.³¹ According to one Bedouin soldier, "The illusion of opened doors made me decide to enter the military. But as soon as the uniform comes off you turn back into an Arab."

Moreover, the dire economic state of Druze villages is comparable to that of other Arab villages in which the male population is not drafted. Druze lands have not been spared confiscation; the rates of state expropriation of land are comparable to and sometimes exceed that of other Arab villages.³² This was made a central rallying cry for the conference on the cancellation of Druze conscription, held in Yarka in November 2001. It illustrates that the ethnic-based Judaizing goals of the state in the end override any attempts at co-opting non-Jews.

The symbolic opportunity supposedly provided by military service for a fuller sense of membership and belonging to the Israeli collective also seems circumscribed. An activist on behalf of unrecognized villages described to me how he felt his service in the border guard allowed him to speak with "a full mouth" [used Hebrew term *peh maleh*] and helped him win the ear of state officials in fighting for his village's recognition. The sought after symbolic rewards in this case – the potential for gaining legitimacy and voice among the "community of warriors"³³ – could produce material ones. This

man hopes that his ability to state, “I am a veteran and my brother gave his life in Lebanon,” will result in the “listening ear” of state officials. This could potentially mean running water, electricity, health care, schools, etc. He believes his success has been limited: “So far I think my military service helped me to a certain degree. I can clearly see the change in the behavior of officials as soon as I say ‘I just came back from reserve duty [used Hebrew *milu'im*].’ One official heard this and immediately gave me an invitation to a very important meeting. But I can’t say for sure, since they haven’t recognized our village yet!”

It appears that the waving of Israeli flags above homes slated for demolition in unrecognized villages and the tens of years of service of family members are not significant enough to prevent their demolition. The goals of the Jewish state call for the removal of the Arabs living in unrecognized villages, just as they call for the confiscation of Arab lands, including that of Druze. Moshe Arens describes this as a “non-policy” on the part of the state.³⁴ Yet, these contradictions clearly demonstrate the supremacy of one set of goals: “a policy of creating a homogenous nation-state, a state of and for a particular ethnic nation, and acts to promote the language, culture, numerical majority, economic well-being, and political interests of this group.”³⁵ The individual soldier may be able to achieve certain material and symbolic gains as long as they do not conflict with the ethnic goals of the state. In the end, the military, like other state institutions, is a tool “in the hands of the dominant ethnic nation to promote its goals and interests.”³⁶

It is noteworthy that Arab volunteers are often required to make advance commitments to serve in frontal field units,³⁷ usually farther from

home, and in which casualty rates are higher. Moreover, while prior to the 1980s Arab volunteers entered the military as regulars, since then it is expected that they serve the mandatory three years *voluntarily* as recruits with meager stipends. These requirements push Arab soldiers’ service into the frame of sacrifice for the Jewish state, rather than increased opportunity for the Arab citizen. A few soldiers explained to me that they are trying to transcend the limitations that Arab civilians face and upgrade their citizenship status. Their successes and failures reflect the parameters of the ethnic policies of the state.

Hassan Jabareen argues that one of the reasons for rejecting military service is that “national or military service of Arabs in Israel is liable to make them more Israeli, but is certainly liable to make them less Palestinian and Arab.”³⁸ However, my research suggests that rather than being ignored, from the point of view of the state, to date, the ethnic identity and minority status of Arabs in the military remain primary, and they powerfully shape soldiers’ experiences. By constructing Israeli and Arab as perpetually oppositional and by emphasizing the latter in “minority” soldiers, the military system ensures that these Arabs never become full Israelis.

These dynamics are highly visible in the example of Arabs in the military, but are in no way exceptional. The military, like other state institutions, produces subjects it assumes are destined to be the source of threat and insecurity, who are then asked to fight these “inherent” characteristics. “Good Arabs” and “bad Arabs” are perhaps better understood not as two separate categories, but as co-existing in every Arab in Israel. State disciplines – whether carried out by educational, judicial, or health delivery systems – thus attempt to produce

subjects who are self-alarmed by their own existence: Students reading about Arab enemies of the state in their history textbooks, defendants denying that they disliked state actions, and patients using contraceptives that will lower their demographic threat to the state. Said Ighbariyi, who helped me extensively with my fieldwork in the Triangle, told me: “If the state really intended to Israelize us, two-thirds of us would have already been lost among them by now, dissolved into their society. But the state has never been interested in really Israelizing Arabs. It is not possible. It would mean the failure of the principle of a Jewish state.” The experiences of these Arab soldiers illustrate the difficulty of ever being a “good Arab” in Israel and can serve as yet another critique, perhaps from an unexpected group, of the ethnic logic of the state.

End Notes

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- 1 Names have been changed to protect the privacy of the interviewees.
- 2 Edna Lomsky-Feder and Eyal Ben Ari, eds., *The Military and Militarism in Israeli Society* (Albany: State University of New York Press, 1999) at 6.
- 3 Sara Helman, “Militarism and the Construction of the Life-World of Israeli-Males: The Case of the Reserves System,” in E. Lomsky-Feder and E. Ben Ari, id. at 194.
- 4 Ben Gurion, as quoted in Alon Peled, *A Question of*

Loyalty: Military Manpower Policy in Multiethnic States (Ithaca: Cornell University Press, 1998) at 128.

- 5 Meira Weis, *The Chosen Body: The Politics of the Body in Israeli Society* (Stanford: Stanford University Press, 2002) at 44.
- 6 S. Helman, *supra* note 3.
- 7 Ian Lustick, *Arabs in the Jewish State: Israel’s Control of a National Minority* (Austin: University of Texas Press, 1980) at 25.
- 8 Id. at 122.
- 9 Lisa Hajjar, “Israel’s Interventions Among the Druze,” 26 (3) *Middle East Report* 3 (1996) and Lisa Hajjar, “Speaking the conflict, or how the Druze became bilingual: a study of Druze translators in the Israeli military courts in the West Bank and Gaza,” 23(2) *Ethnic and Racial Studies* 307 (March 2000).
- 10 Longina Jakubowska, “Resisting ‘Ethnicity’: The Israeli State and Bedouin Identity,” in *The Paths to Domination, Resistance and Terror*, eds. Carolyn Nordstrom and Jo Ann Martin (Berkeley, Los Angeles and Oxford: University of California Press, 1992) at 85-105.
- 11 Kais Firro, “Reshaping Druze Particularism in Israel,” 30(3) *Journal of Palestine Studies* 40 (2001).
- 12 A. Peled, *supra* note 4, at 147.
- 13 As’ad Ghanem, “The Palestinians in Israel: Political Orientation and Aspirations,” 26(2) *International Journal of Intercultural Relations* 136 (April 2002).
- 14 Amos Harel, “Stemming the Tide: Bedouin No Longer Flock to Join the Army,” *Ha’aretz English Edition*, 14 June 2001, at 1.
- 15 Hisham Nafa’, “The Dirty Military Mirror,” *Al-Ittihad*, 25 August 1997 (Arabic).
- 16 A. Peled, *supra* note 4, at 137.
- 17 Id. at 137-138.
- 18 Id. at 140-141.
- 19 While I recognize the danger of categorizing soldiers according to these state-sanctioned affiliations, for the purpose of this article, I list these affiliations in order to

- demonstrate that my interviewees came from all sections of the Arab community.
- 20 All of my interviews were conducted in Arabic, except for one interview in which I asked questions in Arabic and the interviewee insisted on answering in Hebrew. However, interviewees who spoke in Arabic often used some Hebrew terms. I point to these language choices in my transcripts since they often suggest certain political genealogies of power.
- 21 A. Peled, *supra* note 4.
- 22 Amos Harel, "IDF to End Forced Druze Separation" *Ha'aretz English Edition*, 20 November 2001, at 1.
- 23 Nadim Rouhana, *Palestinian Citizens in an Ethnic Jewish State* (New Haven: Yale University Press, 1997) at 230.
- 24 Avihai Becker, "Unsweet Revenge," *Ha'aretz English Edition Magazine*, 19 January 2002, at 13.
- 25 Interview took place in February 2002. One Druze man has recently graduated from the air force pilot training course.
- 26 "Extension of Arrest of Lieutenant Colonel Omar al-Hayb Accused of Spying for Hezbollah," *Al-Ittihad*, 25 December 2002, at 4 (Arabic).
- 27 Moshe Arens, "Our Brothers, the Bedouin," *Ha'aretz English Edition*, 29 October 2002, at 5.
- 28 Amos Harel, Jalal Bana and Baruch Kra, "Bedouin Officer Says He's Innocent of Spying for Hezbollah, Drug Dealing," *Ha'aretz English Edition*, 25 October 2002, at A5.
- 29 "Israel Gave the Case More Weight than It Deserves and Hezbollah Will Announce Its Position at the Appropriate Time," *Al-Sinnara*, 23 October 2002, at 6 (Arabic).
- 30 H. Nafa', *supra* note 15.
- 31 A. Harel, *supra* note 14.
- 32 Ghalib Seif, "Land and Conscriptation," *Al-Ittihad*, 23 November 2001, at 11 (Arabic).
- 33 S. Helman, *supra* note 3.
- 34 Moshe Arens, "The Wages of a Non Policy," *Jersusalem Post*, 10 April 1998.
- 35 Sami Smootha, 1998 as quoted in Amal Jamal, "Ethnic Nationalism, Native Peoples and Civic Equality: On Collective Rights in Israel," paper presented at the Conference on the Legal and Socio-Economic Status of Arab Citizens in Israel, New York University, 3 April 2003 at 4.
- 36 Id.
- 37 A. Peled, *supra* note 4, at 138.
- 38 Hassan Jabareen, "Towards a Critical Palestinian Minority Approach: Citizenship, Nationalism, and Feminism in Israeli Law," 9 *Plilim* 53 (2000) at 92 (Hebrew).

On 10 November 1961, the Communist party Arabic language newspaper, *Al-Ittihad*, reprints the statements of three Arab public figures, previously published in the Hebrew language newspaper *Yediot Ahranot*, in which they express their preference for a military rather than a civil government.



Wars of Public Safety and the Policing of History

Allen Feldman

De-territorialized Wars of Public Safety

New strategies for the reproduction of American state sovereignty have emerged in the last decade or so that can be characterized as de-territorialized campaigns of public safety. These wars are not exclusively focused on territorial conquest, or on an easily locatable or identifiable enemy with its own respective goals of territorial conquest. Rather, they are focused on countering imputed territorial contamination and transgression - “terrorist,” demographic, and biological infiltration. These campaigns are not structured by time-limited political goals but are temporally open-ended. They are not solely geo-strategic instruments - a means to a political end - but function as cultural imaginaries. De-territorialized wars of public safety are geopolitical cultural forms that can achieve a specific internal hegemony within the American public sphere through the symbiosis of internalized fear and other directed aggression. Indicative of this are, obviously, post September 11th campaigns against terrorism in Afghanistan and Iraq, and the response to recent bio-terrorism and quasi-naturally occurring viral scares such as mad cow disease and SARS. These public safety wars, however, were presaged by earlier campaigns against drugs, economic refugees, asylum seekers, and undocumented immigrants, in addition to police campaigns against quality of life crimes that disproportionately targeted inner city communities of color.

Unlike the classic global and guerrilla wars of the twentieth century, these public safety wars are not wars of utopia, but wars of distopia that assume that “perfected” liberal democracies are threatened by an invisible infiltrating menace. Thus, post 9-11 political fantasy promoted the ahistorical polarities of civilization/barbarism, or

the equally ahistorical liberal rationalist notion of “wars of civilizations.” Indicative of this was the rapid nationalization of the World Trade Center (WTC) dead by the state and by the media. The WTC was eulogized as a violated utopian space of Americanized labor, symbolic capital, and democratized and inclusive production of wealth. This image was belied by the number of previously and still invisible undocumented foreign workers who vanished in the building’s collapse in comparison to the eulogized dead who achieved a supra-American citizenship.

De-territorialized war promotes an ideology of paranoid space and is an aggressive tacit response to the depolarization of the post-Cold War period, and more recently, to the cultural-economic vertigo of globalization. Thus, the new wars of public safety target an iconography of demonized border-crossing figures and forces including drug dealers, terrorists, asylum seekers, undocumented immigrants, and even microbes. Accompanying these new war imaginaries are strategically positioned structures of displacement, projection, and arbitrary object-choice and object substitution. We are now subjected to a new super-structure of war fantasy in which the targets of warfare and the enemies of public safety are as malleable and as arbitrary as a dream image. In this essay, I will outline several characteristics of the emerging forms of warfare and sovereignty: the “police concept of history”; the emerging “treatment state”; the new visual culture of warfare; the sacrificial structure of contemporary political terror; and the actuarial structure of political violence.

Police Concept of History

This new ideological environment promotes a “police concept of history” that is the reframing

of historical process into a dichotomy of ideal safe space and duplicit, distopic, and risk-laden space. In this paradigm, spaces of order are undermined by impinging spaces of disorder. This concept of history advances the normative sociology of the *profile*: who belongs and who is out of place. The police concept of history is also commensurate to the new globalized economy: it promotes a normative notion of the global economy as an orderly space of economic circulation in which bodies and persons fulfill proper functions and occupy proper positions. Improper or transgressive circulation, symbolized in icons of bio-social pollution such as HIV/AIDS, mad cow disease, SARS, the drug trade, and illegal immigrants, is feared and attacked. The infiltrating “terrorist” is thus both an instance of and a catchment concept for the idea of improper circulation, and cognate transgressors from drug misusers to undocumented immigrants partake in the illicit substance of the terrorist.

Policing in this framework of ordered/disordered circulation is about the visible distribution of functions and positions within a society and between societies; it stands opposed to the emergence of new subjecthoods who resist the norms of circulation and/or who practice illicit forms of circulation. This form of policing emerges with the disappearance of enforceable physical national borders, and compensates for the loss of tangible borders by creating new boundary systems that are virtual or mediatized, such as electronic and digital surveillance nets. The virtual border is matched by the virtual or ghostly transgressor. In the last two years, we have accumulated a growing number of such ghosts so one can locate the ever-missing Osama Bin Laden within the same spectrum as the covert carrier of infection,

genetically altered comestibles, demented livestock, and undocumented immigrants.

The stoppage or interruption of the moral economy of circulation is then characterized as a distopic “risk-event,” a disruption of the imputed smooth functioning of the circulation apparatus in which nothing is meant to happen. “Normalcy” is the non-event, which in effect means the proper distribution of functions, the proper occupation of designated positions, and the maintenance of appropriate social profiles. However, circulation is bivalent; it is the structure of social surfaces, the armature of everyday life, the insignia of modernity, and yet, it betrays and harbors dangerous and infecting alterity. The social logic of circulation that exceeds comprehension and explicit control is mimetically handled and secured through the management of image flows. It is through the sympathetic management of image circulation that forces of governance seek to construct the rationality of the total system of material-informational circulation. Hence, wars of public safety take the form of mediatized mechanisms and are ordered as massive intrusions into the sphere of visual culture, which are conflated with and substitute for the public sphere.

The police project, according to Jacques Rancière, is less concerned with repression than with a more basic function: that of constituting what is or is not perceivable, determining what can be or cannot be seen. Policing is a mediatization of society through the symbolic constitution of the politically visible, as made up of groups with specific, identifiable ways of operating or profiles. These ways of operating are themselves organically inscribed into the places where those occupations are performed. Thus, the police concept of history is the spatialization of the historical, an appropriate

post-imperial technology for a globalized economy that is both feared and fantasized as made up of mobile flows – economic, ideological, and microbiological.¹

Ranci re opposes the police enforcement of the continuum of circulation to “politics,” which is the manifestation of subjecthood through the stepping outside of designated positions and functions and spatial habitats (insofar as the occupying of and confinement to a spatial habitus, such as a social function or a pathologized space like the “ghetto,” the Third World, or the periphery is the holding to a proper position, the assumption of a correct profile). Thus, the police concept of history is an ocular centration on managing social surfaces and their possible clandestine subversion, as well as an investment in managing the public visualization of “events” or risk intrusions. Part and parcel of the control of circulation is the strategic regulation of the circulation of images that either refract the normal or the transgressive in terms of the political utilities of the moment. Thus, it is no coincidence that the two governing tropes of recent public safety warfare have been the technological onslaught of “shock and awe” and the excuse rationality of collateral damage. Both forms of violence are invested in regulating the circulation of images. Shock and awe and collateral damage visually distribute death and destruction into domains of the event and the non-event. The sterility of the terrorist response to this ideological apparatus is the counter-dissemination of image events, such as the dramaturgy of suicide bombing. But the terrorist image-event has no deeper purchase on historical transformation than the police enforcement of visual normalcy. The cathexis of the politically visible is an expression of historical paralysis. Both the police concept of history and the

terrorist disruption of circulation structures are incapable of effecting structural transformation. They are modalities of formulaic and ultimately retrospective memorialization: the homeostatic normalcy sacralized by the tomb of 9/11, the revolution as the utopian monument of the martyred and sacrificed dead. Historical consciousness is currently entombed in the monumentalism of formalized public bereavement or fragmented in privatized grief – again, the dichotomy of event and non-event, of shock and awe versus collateral damage and its mourning.

Within and beyond the externally and internally besieged nation-state, campaigns of public safety require both the policization of the military and the militarization of the police. Urban policing, for instance, is increasingly focused on the eradication or management of “quality of life” crimes. These are transgressions that originate in minority economic immiseration zones – the locus of post-industrial downgrading and dis-investment – and the consequent involvement of impoverished communities in informal “black economies.” In this context, policing ceases to focus on apprehending individual transgressors but rather on proactive geographical surveillance, occupation, and the clamping down of entire communities. Policing becomes a variation of counter-insurgency, as crime is increasingly perceived as an economic resistance practice, and as informal modes of clandestine economic circulation, all of which require spatial internment/surveillance of minority enclaves. The “dual city” was originally theorized as an economic consequence of globalization in which entire internal urban peripheries were structurally disconnected from economic growth and development. However, in the police

concept of history, the dual city is transformed into an ideological object enforced by technologies of spatial control.

Campaigns against quality of life crimes contribute to the formation of a new urban “scan-scape” characterized by social control zones.² In order to ensure political stability, the norm of an open-ended civil sphere with experiential coordinates in public space is currently interdicted by new discursive and practical arrangements of policing, public safety, and urban planning. This militarized polarization of the urban scene is bi-directional to the same degree that problematic urban economic peripheries are subjected to police surveillance and infrastructural abandonment, and areas of wealth concentration are marked by defensive militarized office buildings (equipped with surveillance technologies and structural armoring) and gated communities with private security forces that are structurally divorced from their urban surroundings while assuming visual mastery of this terrain.

Much of this political technology of planned geographic bifurcation was pioneered in an apartheid era South Africa in which the state strategically erected its highway system to create bypassed pathologized zones consisting of “surplus populations” of African shanty towns. A similar use of highway systems and tunnels is currently deployed by the Israelis in the West Bank to ensure both settler security and spatial hegemony over indigenous Arab villages. In this combination of arterial planning, Arab communities and surrounding Arab cultivation lands are enclaved by highway overpasses and tunneling that link (frequently hilltop) Israeli settlements. The settlements themselves are militarized, gated communities boasting the most up-to-date electronic surveillance systems.

The Treatment State

Military apparatuses in political emergency zones increasingly function as both surveillance and “peace-keeping” forces committed to regulating circulation in public space by imputed terrorist-ridden populations. Examples of this dual profile can be seen in the Balkans, West Africa, and in the custodial regulation of refugees, asylum seekers, and the “prisoner of war” detention centers in Iraq and Guantanamo Bay. Under public safety regimes, humanitarian interventions are militarized and military interventions exploit the transnational discourse of human rights. The terrorist and the refugee are both the objects and the consequence of military interventions. The juridical personalities of the terrorist as an “unlawful combatant” and of the refugee and asylum-seeker as an unlawful resident and worker are mutually marked by the denial of their citizenship rights in an existing nation-state structure. They are both apolitical entities to the degree that they are classified as existing outside of a recognized political community, and because their context and behaviors have been de-politicized and consequently criminalized.

Related to the militarization of humanitarian aid is the ideological and practical fusion of the concentration camp and the refugee camp, where people who have lost their nation-state citizenship can easily starve to death, or be subjected to military extermination and police and vigilante abuse. Simultaneously, they can be fed, clothed, housed, and receive medical assistance. The treatment state intermingles behavior modification techniques from sensory deprivation to therapeutic intervention. By illustration, the Guantanamo Bay prisoners of war camp, in which inmates are neither subject

to American civil law nor to the Geneva Conventions, accords its detainees comprehensive health care and allows religious and dietary observances, together with a chronic schedule of coercive interrogation bordering on torture and intermittent sensory deprivation. Yet, even this controlled space is not immune to illicit circulation practices or fantasies, as investigations are currently being mounted against Muslim clerics accused of being double agents. Originally commissioned to enact religious humanitarianism, they are now suspected of aiding and abetting terrorists. Object substitution in the public safety regime is endemic. Thus, the first trials to come out of the Guantanamo Bay investigative/interrogation process will be of US army personnel and American citizens suspected of conspiring with the terrorist other.

The militarized state is also the “treatment state,” a specialist apparatus in the psycho-social custodial control/care of anti-societal populations. Foucault’s prophecy about the post-carceral swarming of disciplinary mechanisms into social nervous systems is rapidly being fulfilled. It may be comforting to some that the aforementioned military/disciplinary technologies and media are being applied to so-called discrete populations of terrorists, refugees, substance abusers, and drug dealers, to name a few. But such comfort is illusionary in the face of the massive expansion of the concept of *objective guilt* as the structure of governmentality. The creation of a Homeland Security apparatus and its investment in “total information awareness” type systems points to a structural mutation of the American public sphere and public personhood through the digitization of risk, and therefore, guilt. A new micrology of surveillance is scheduled for debut

which will not only watch and wait, but will also diagnose, pre-empt, and intervene. Structures of everyday life – no longer anonymous behaviors, consumption, communication, and sociality patterns – along with racial and ethnic affiliation are meant to dissect the social persona, abstracting minute behaviors into epidemiologies of potential terrorist threat. Everyone, under the digitized gaze, becomes unknowingly complicit in the promotion of terrorist risk. The body is fragmented into event and non-event, into offending acts and gestures and the inoffensive. This new *objective guilt* is the digital removal of intentionality from the concept of the political or the criminal. For most crucially, objective guilt is archived guilt, its full meaning and significance is reserved for a prospective diagnostic completion. Acts and gestures are spatialized in time in the building of a profile of licit or illicit circulation of the person. The digital public safety biography or profile supplants the life cycle as the measure and portrait of citizenship.

Objective guilt, inscribed into the minute crevices of everyday life, is essential to the new warfare ideologies. For as in all policing ideologies, wars of public safety do not aim at the eradication of “the policed” object, whether it be the terrorist, the undocumented immigrant, or the drug abuser. Rather, these wars require the continued symbiotic presence of the policed object in order to justify the continuation and the new elaborations of state sovereignty. Indeed, the wars against drugs, economic refugees, and undocumented immigrants require the ongoing existence of national and transnational informal economies of scale, which may mutate but are unlikely to be policed or surveilled out of existence. The same can be said of certain transnational “terrorist” networks

dependent on globalized systems of banking, credit, and fiscal accreditation rooted in an oral culture of contract. But beyond the persistence of transgressive informal economies of scale, there is simply the indeterminacy of nomenclature in which the term terrorist can be used to cover a variety of floating objects and scenarios. Thus, at the inception of the invasion of Iraq, the majority of Americans believed that Saddam Hussein was directly responsible for the attack on the World Trade Center, despite the absence of any shred of evidence to that effect.

Visual Culture of War

I have already discussed the emerging visual modalities of the “treatment” state in relation to zones and populations marked by objective guilt. The notion of objective guilt has contributed to the acceptability of the concept of collateral damage in that collateral damage is normal under political conditions in which guilt is de-individualized and proactively assigned. Further, the new visual culture of war enhances the ideology of collateral damage through image filtering. The televised visual sensationalism of “shock and awe,” of smart bombs broadcasting their descent onto a building, filters out the sensations of pain, suffering and grief of the victims and their survivors. It creates spectatorship ideologies of inattention and distraction for the televisual witness. Anonymous victims of collateral damage stand in visual opposition to the sensational violence of shock and awe, to the degree that collateral damage ideology combines with the visual centrality of shock and awe to desensitize the viewing audience to the plight of “marginal,” incidental, and accidental victims such as those in the Iraqi market-place bombing who died

invisibly to the American media. The filtering of images ensured that such persons never achieved the visual urgency or commanded the visual attention of the attempted decapitation of Saddam and the destruction of Iraqi “command and control centers” in the American media. Visualized violence here is a powerful system of naming and un-naming. The sheer act of targeting a topos specifies a zone of objective guilt, and effectively “weaponizes” entire communities, turning them into zones of aggression and consequently de-individualizing the concept of victimage in the destruction of these spaces. The “command and control center” that is the individual immersed in everyday life, who is the building block of democratization, is essentially disposable in the perceptual filters of the inattention that is at the heart of ideologies of collateral damage and excuse. Shock and awe is the theatrical manufacture of technological events as history, and the creation of non-events of invisible violence or collateral damage as the non-historical.

The ruins of the WTC are history at a perceptual degree zero. The broken buildings and bodies have melted into a new cyborgian Frankenstein creation, which now functions as a cultural prosthesis, a device for historical perception, one that required up to 3000 sacrifices to bring into existence. Three thousand sacrifices nationalized by George Bush was the price paid for freedom, and the high price that demanded duplication in Afghanistan, Iraq, and possibly, in the future, the Philippines, Indonesia, and other parts of the world so that the realm of sacrificial freedom could be enlarged. The new American imperial project is the proliferation of ground zeros. For as I learned in Northern Ireland, the replication of ground zeros is the sure consequence of

retributive and retaliatory violence, violence that reenacts and rehearses an original assault and transgression.³

There is resonance here with the saturation bombing of Afghanistan and Iraq in 1991 and in 2003. Mass aerial bombing, as I have asserted in an essay on Desert Storm, is a mode of compulsory visibility.⁴ The military panopticon makes adversaries and others appear during and after the setting off of explosive devices. Saturated aerial bombing in Afghanistan, as in Iraq, is a new Orientalism, the perceptual apparatus by which we make the Eastern Other visible. Afghans and Iraqis were held accountable for the hidden histories and hidden geographies that are presumed to have assaulted America on September 11th. The WTC became so much dust and debris, materials that resist optics. Our bombs seek, rather, to penetrate what Ernst Bloch termed “historical dust,” the metaphorical dust that external American geopolitics and internal popular isolationist ideology has accumulated. Dust is more than a climactic ecological condition. It is an emblem of the impenetrable history that lies at the source of the death of so many people, a history to which American exceptionalism is blind. Afghanistan and Iraq have been made to embody our historical dust, our historical blindness, the obscurity in which we could not see our deaths, and that otherness that becomes the natal site of the “Terrorist Other.” Addicted to, yet dissatisfied with the media realism of the building’s death, we seek in aerial bombing the satisfaction of making the terrorist visible, to subject terrorism to our dust clearing smart bombs. To the same degree that the WTC resists optical penetration and comprehension, we displace our need for a transparent explanation of the WTC attack onto our panoptical bomb

sights/sites that have turned Afghanistan and Iraq into an open-air tomb of collateral damage.

Shock and awe is more than a military tactic; it is simultaneously an exercise in war as visual culture for the consumption of the televisual audience and an ideology of American modernization. As Hegel noted in reference to Bonapartism, the march of an army across a national geography materializes the idea of progress to which that political geography is now coercively subjected. The progress of aerial bombing across a civilian terrain has much the same effect. In 1900, George Simmel identified sensory shock as the price of progressive modernity and urbanism. Perceptual shock was the psychological medium in which the modern announced itself and refashioned new forms of personhood.⁵ Modernity’s shock was a conversion experience creating new social subjects amenable to emerging technological and commodity regimes and work disciplines. The current ideology of shock and awe fuses technological and theological norms, for it too is a form of accelerated conversion: the rapid Americanization of the Oriental Other through technological onslaught and subsequent post war therapeutic treatment and rehabilitation.

The Performance Culture of Terror: Sacrificial Repetition

Below the visual logic of “shock and awe,” whether practiced by the fundamentalism of Bush or Bin Laden, are certain theological subtexts that are indexed by both the religious concept of “awe” and by the demonization of adversaries. Subject populations have to be traumatized and awed through terrorist violence. The wonder of awe is, in actuality, the cultural elaboration of fear through technological feats,

be these visual performances of saturation bombing or of crashing a plane into a high-rise building. The *mise-en-scene* of modern political terror is essentially sacrificial spectacle and shock and awe despite the fact that its counter-terror rationale was fully complicit with the visual logic of terrorism. The ratio between the antiseptic visual management of shock and awe on the one hand and collateral damage on the other is sacrificial. The collateral victim is that which is sacrificed to construct the hegemony of visualized violence. As a ritual process, sacrificial violence selects/creates generic subjects as raw material vulnerable to labile objectification. The process of sacrifice requires symbolic actors who can assume and absorb multiple collective memories and refract diverse and often contradictory collective fantasies. Sacrifice is an organized instrument of political terror through which collective meanings and historical change are mobilized, visualized, and dramatized in the visible selection and dramaturgical elimination of the chosen object by violent agency. Sacrifice involves the symbolic separation of a part from the whole, and in such a manner that the part or the victim stands-in for the societal totality that is meant to be effected by sacrificial intervention. Sacrifice recalls the offense, contamination, pollution, and transgression it attempts to rectify through the totalization of the offending social order, group or institution in the form of the emblematic victim. The victim is recruited from within the targeted social order, and is endowed with semiotic and mnemonic capacities that are switched on with the application of violence. The sacrificial act concentrates unreconciled historical memory and social contradiction in a symbolic persona. The victim of sacrificial actions is made to bear messages and is intended to alter social reality

in the very mutilation of his embodiment. The movement of victims by violence from life to death is frequently envisioned as enabling the movement of society from one historical stage to the next. The sacrificial subject is inherently ambivalent, contaminating and purifying, disordering and ordering, intrinsic to the social order and alien because sacrifice for its agents is the expulsion of contradiction from history in the vehicle of the emissary victim.⁶

At this point, I must partially dissent from the thesis of Giorgio Agamben and his concept of “homo sacer,” the radically disenfranchised “exception” to sovereignty, whose categorical abjection and violent death contributes nothing to the sacrificial reproduction of dominant institutions. The homo sacer is positioned outside society and sacrificial logic because this non-person can be killed with impunity and without ritualization. The homo sacer corresponds to the state of social death.⁷ This category can apply to many political and institutional situations such as the inmate in prisons and asylums, and the body that carries a communicable disease, but only to a certain extent. I do not think, however, that the concept of “homo sacer” describes victims of organized programs of political terror and counter terror (which also terrorize). Radical abjectness may be the ultimate consequence of political terror but the processes that produce the abject bear all the registers of sacrificial ritualization. I am thinking here of practices of torture, political disappearance and abduction, arbitrary arrest and detention, political assassination, and acts of terror that target individuals, groups, and locales based on the criteria of objective guilt. I contend that we should move past a classificatory juridical analysis, such as that of Agamben, and towards a performative analysis

of political terror as sacrificial action. It is then that we can see that political terror's investment in sacrificial expulsion of its object from everyday life, the community, the nation-state, and categories of citizenship can create all sorts of ideological and cathartic value, and is a primary means of the pro-active reproduction of sovereignty. As opposed to being dispensable, the sacrificed other is crucial to the reproduction of sovereignty or to legitimating claims to sovereignty. Further, Agamben's notion of the exception to sovereignty is frequently generated and fashioned through both ideological discourse and performative intervention. The "exception" or the socially abject possesses a social biography that moves this entity from a position of interiority within a community to a position of exteriority. Yet, through the sacrificial action of "movement," that is, through the application of structural or transacted violence and/or disenfranchisement from everyday life, community, nation-state and citizenship, the sacrifice carries with it historical memory that achieves a heightened and intensified semiosis in violence.

Contemporary political terror, particularly that which involves civilians and noncombatants, emerges as a particular form of sacrifice. This form of sacrifice is characterized by a compulsive, repetitive disorder, where initial attempts to banish socio-political contradiction through emblematic sacrifice inevitably fail to reach completion. These attempts, thus, must be endlessly repeated until the social object of these acts can no longer bear the costs of its depredations. In this compulsive repetitive dynamic, the sacrificial act itself is unconsciously subjected to a sacrificial logic for its failure to resolve contradiction and for its inability to achieve historical completion. Sacrifice itself is

punished as a meaning-bearing form through compulsive repetition that highlights its sheer lack of efficacy, its empty yet dramatic functionality. The instrumental logic of the sacrificial act is absorbed back into the short-term immediate dramaturgy of destruction. Caught between instrumentality or means-ends relations on the one hand, and symbolic logic on the other, the sacrificial act becomes a symbolic evocation of an empty political-historical instrumentality. It symbolizes historical memory and political transformation, and yet, obscures the latter in the suffering of the act's arbitrary victims as it fails to further its political goal of moving society to a new historical stage. The inability of the sacrificial act to produce a post-sacrificial satisfaction and reconciliation with social existence is displaced onto the ritual process itself. Sacrifice is repeated as a material intervention and declaration of desire that refuses to yield satisfaction and to sustain the memory of the social values and integrities it was deployed to serve. The sacrificial intervention is intended as a summation of historical experience and yet, the act itself fails to reconcile a community of witness with historical experience. History remains static; there is no acceleration of history, to use the concept of Reinhart Koselleck.⁸

Eventually the social inequities that the act of sacrificial violence was meant to dramatize and redress become supplanted by vicious exchanges of sacrificial acts as the primary and traumatic content of social memory of both perpetrators and victims (turned vengeful perpetrators). Primary social inequities such as racism, economic exploitation, and institutional stigma are supplanted by traumatic memories of the violent acts that were meant to convey the message of protest and redress in the first place.

The relations of political antagonism (the means by which the conditions of political antagonism are expressed and materialized) supplant the original conditions and contexts of antagonism. The enacted relations of antagonism eventually transmute into the primary political context in the consciousness of the belligerents.

To peruse the performative infrastructure and role sets of political terror as components of compulsive repetition is to understand why most contemporary acts of political terror have taken on both a decidedly anti-modern and post-modern shape. In many acts of political terror today, we find a contradictory forensic and visual fixation on mortification, mutilation, and atrocity on the one hand, and an almost unlimited capacity to technically sanitize the violent act on the other.⁹ In both cases, the victim is the result of sacrificial excess, of acts of violence that create victims, and through them, tangible historical memory which then obliterates that product in its aftermath. This alteration between atrocity-centered/vivisectionist violence and sanitizing/erased and/or “smart bomb/collateral damage violence” in itself encapsulates a sacrificial dialogic in modern political violence. This dialogic entails the movement from the victim dismembered and somatically opened to history to that of the victim erased. It is a movement from violent acts of political memory to artificially induced historical amnesia. Populations have to be terrorized into silence and forgetfulness about the violence they may have witnessed and experienced, and the material residue and coordinates of that violence have to be covertly disappeared. Perhaps the crudest representation of this was the practice of Renamo in Mozambique of cutting off the sensory appendages of both witnesses and victims of its

violence. Ears, eyes, tongues, and lips were removed as the perpetrators sought to destroy the social capacity of memory and witnessing in the aftermath of their initial acts of terror. Deniability is built into many acts of sacrificial terror, almost as a tacit admission of the political impotence of these interventions, not to speak of their shame. Yet, despite their technological distance, American ideologies of collateral damage share with Renamo atrocities the need to erase the record of suffering as historical value and fact.

The Actuarial Logic of Retribution

Ideologies of public safety are concerned with the governance of risk and the construction of risk perception, and thus, they are actuarial discourses. Human rights laws speak to the act of violence as the removal or theft of the recipient’s civil dignity. Human rights redress is meant to be a form of restorative justice that recovers this stolen dignity. In this model, political violence inflicts loss and damage to the property of the legal personality. Secure and dignified embodiment is considered to be the property of a legal personality. There is an economic logic to this cultural understanding of the political act of terror. An economy of violence speaks of, measures, and compares acts of violence and damage in actuarial terms of loss, commensuration, value equivalence, and compensation. Actuarial memory organizes the modern representation of violence, particularly since the Holocaust. The Nazis ratcheted up the sociology of horror by introducing modern forms of time/motion efficiency in the administration of death and suffering. The resultant outcomes have marked our own tendency to represent such violence in actuarial

terms of production, and the quantification of suffering and pain, which lends itself to commensuration logics at the root of actuarial tables of suffering and risk.

The enumeration of suffering carries within it a hidden theology. In the cultural logic of quantification, evil is qualified by magnitude.¹⁰ Anthropologist Brackette Williams has theorized, in relation to capital punishment, that in our public culture in order to be considered truly evil, an act of violence must have magnitude.¹¹ This is particularly true in the post-Holocaust era, where genocidal and ethnocidal violence and the threat of nuclear warfare has raised the standard of what constitutes eschatological violence, where millions count and are recalled more than relatively anonymous deaths in the thousands or hundreds. Sometimes magnitude-as-evil rests not in actual numbers but in the site and object of violence. Thus, the tragedy of the WTC attack has not been diminished as the number of the missing dead declined, for it is the magnitude of tall buildings destruction and the surprise assault on the American homeland by outsiders that endows the event with a moral compass, and thus, with absolute evil. Further, the morality of magnitude performs a double function. It both assigns evil to an abstracted plane of existence – uncountable death and unspeakable mass suffering – and at the same time, it retracts this abstraction through enumeration. The pseudo-concreteness of numbers substitutes for the abstraction of multiplied suffering. Thus, our public culture is rife with enumeration debates over collective violence, and hierarchies of horror are established with the rhetoric of quantification in which political discourse is dominated by terms such as risk, loss, indemnification, reparation, restoration, and collateral damage.

These numeric diatribes are in effect debates about relative versus absolute evil.

Such debates can take an interesting course, for in the counting of deaths, there are both morally primary and morally secondary numbers. The ideology of collateral damage holds evil at a distance by subordinating violence to the rationalities of reasonable risk assessment; it assigns certain deaths and injuries to a numerically secondary status. Here, the suppression of enumerated damage through the actuarial notion of incidental violence contains the inherent evilness of violence, or neutralizes it via the rationalities of acceptable risk and embeds it within a means-ends relation. This is a version of double accounting: deaths on the side versus the moral justification of primary targets, Milosevic's mansion versus the Chinese embassy in Belgrade, for example.

Thus, enumeration discussions appear to bring an often-reassuring rationality to the cultural management of the memory of violence. To speak of 20 million African slaves or six million Jews, and collateral bomb damage on the outskirts of Belgrade, permits the establishment of public moralities and/or policies of redress. This can be considered part of the governmentality of violence and the governmentality of evil. It has been a truism of my ethnographic research on political violence that rarely do divided and acrimonious politics debate political violence within the framework of violence/non-violence. Rather, in conflicts where violence is a primary medium of political communication, the debates are over modes and kinds of violence – which forms of violence hold evil in abeyance and thus can be deployed, and which forms unleash evil and thus must be shunned and propagandized to delegitimize the other side. In fact, many violent acts are

committed as sidebars to such debates, insofar as they seek to punish the use of “illegitimate forms of violence” with interventions that claim truth through so-called legitimated forms of violence, for example, recent Israeli army incursions into the West Bank in response to Palestinian suicide bombings. Sometimes, the same act can acquire or lose legitimacy in the shift of time, place and target.

The appearance of rational cultural management promised by actuarial mentality quickly evaporates when we also consider that retributive or revenge code violence, often carried out by the state apparatus or para-state apparatuses, is also part of the governmentality of violence. Any logic of retribution is also pervaded by an actuarial logic that seeks to restore loss, to lower risk, and to ultimately restore social symmetry through compensatory violence. In our actuarial culture, accounting practices use a variety of tools, from the calculator to the laser guided missile to the hijacked jetliner. The numbers game is also the crying game.

Actuarial restoration has always been problematic. In creating measures and commensurations of unique acts of violence and suffering, it tacitly commodifies violence and its victims. In so doing, it contributes to anesthesiology of terror. The recent exhibit of Holocaust inspired art at the Jewish Museum in NYC centers on the commodification of memory, victims, and loss. Several pieces in the exhibit attempted to produce picture shock through the anamorphic fusion of commodity brand names and icons with Holocaust images and themes. Just as modern art has increasingly become a meditation on the threat of its own commodification, this exhibit has linked the commodification of art with the

commodification dynamics that produced victimage in the Holocaust and by which Holocaust victims are depicted and recalled 50 years later. Of note is the video installation that, as the viewer turns the focus knob, shows on screen the mutation of a supermarket-style striped bar code with its number sequences, which gradually fades into an image of concentration camp survivors in their striped uniforms and tattoos. The same artist montaged a photo of himself in striped inmate garb in a camp barracks holding forth a can of diet coke. This gesture takes place in an interior scene of camp inmates sitting around the coke drinker, staring hollowed eyed at the camera. Here, the integration of political terror into everyday life and the commodification of everyday life are posited as twinned axiomatic experiences of modern amnesia. They are also advanced as de-historicizing forces when it comes to remembering and thinking the Holocaust.¹²

We are compelled then to draw several linkages. If much modern political violence, particularly the violence of magnitude, occurs within a commodification logic of exchange and value equivalence, then the social depiction and memory of such violence becomes “infected” and inflected by commodification dynamics – thus the need to identify evil with magnitude and the moralities of enumeration. Actuarial logic as both an anticipatory and retrospective depiction of violence is an extension of this commodification pattern as it draws tables of inherent risk and/or consequent suffering and prescribed redress. And yet, in the critical visual language of many of the artistic works in the Jewish Museum exhibit, the foregrounding of commodification logics leads us into the moral/metaphysical maze of the normalization of violence - its incremental integration with and

infiltration of everyday life structures, the banality of its repetition; the commonsensical domestication of violence through factory-like and bureaucratic techniques; and the consequent indifference and moral-sensory numbing. All of these can be identified as generating forms of evil that can never truly be encompassed by numerical magnitude.

Actuarial logic appears less able to function as a curative for violence and even more irrational and dangerous when actuarial intervention deploys the political technology of violence as a form of retribution, compensation commensuration, or even risk management. In actuarial terms, each act of violence creates a debt that cannot be paid. It produces an asymmetry, but it can never return the social order back to or move the social order forward to a new homeostatic resolution. Social symmetry is the retrospective myth that legitimates actuarial or restorative violence. Do categories of measured loss actually diminish the gap, the rupture that the act of political terror creates, and do they further function as a fictive originating point of rectifying redressive acts of further violence?

Conclusion

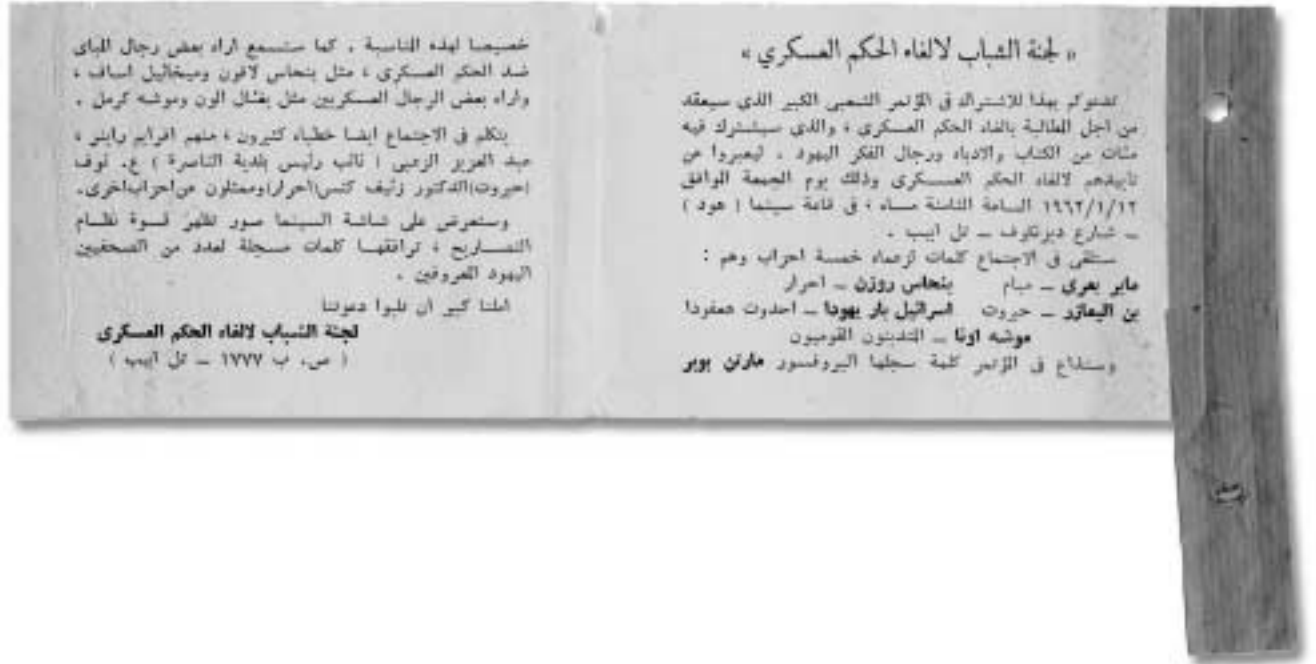
The current warfare ideologies of public safety share with their “terrorist” adversary an epistemological and visual investment in actuarial retribution and the compulsion for sacrificial repetition. In search of a post 9/11 restoration of national and global symmetry, the Bush regime will not find ultimate satisfaction in a post-war Americanized Iraq, but will embark on the hunt for new transitional terrorist objects, perhaps in Syria, Iran, or Indonesia. Thus, we must ask ourselves if the new world

order of public safety is in effect a new visual order of demonic visualization, a ghost-busting regime committed to bringing invisible alterity to the social surface and thereby, engrossed in personifying and theologizing the problematic vertigo of globalization in the form of emblematic evil? This dynamic conflates the policing of social surfaces with effective governance. American political culture now deploys the mass circulation of images of public safety enforcement, often materialized in concrete acts of military intervention abroad and scopic security regimes at home, as a mediatized palliative against the insecurities and dis-ease precipitated by all the uncontrollable circulatory flows and floods that now buffet a besieged American nationhood from all sides and from within. The increasing convergence of the digital visualization of warfare and the wider American media culture indicates the prospective social logic by which wars of public safety will be progressively normalized and rendered culturally acceptable, therefore, no longer requiring the increasingly distant goad of the burnt towers as they eventually fossilize into collateral damage.

End Notes

- 1 Jacques Ranciere, "Politics, Identification, and Subjectivization," 61 *October* 78 (Summer 1992).
- 2 Mike Davis, *The Ecology of Fear: Los Angeles and the Imagination of Disaster* (Los Angeles: Metropolitan Book, 1998).
- 3 Allen Feldman, *Formations of Violence: The Narrative of the Body and Political Terror in Northern Ireland* (Chicago: University of Chicago Press, 1991).
- 4 Allen Feldman, "From Rodney King to Desert Storm via ex-Yugoslavia: On Cultural Anesthesia," in *Senses Still: Perception and Memory as Material Culture in Modernity*, ed. C. Nadia Seremetakis (Chicago: The University of Chicago Press, 1996) at 87-108.
- 5 George Simmel, "The Metropolis and Mental Life," in *On Individuality and Social Forms*, ed. Donald N. Levine (Chicago: The University of Chicago Press, 1971) at 324-339.
- 6 See my discussion of sacrifice and my critique of the work of Rene Girard on the hegemony of sacrificial logic in A. Feldman, supra note 3, at 218-269.
- 7 Giorgio Agamben, *Homo Sacer: On Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998).
- 8 Reinhart Koselleck, *Futures Past: The Semantics of Historical Time*, trans. Keith Tribe (Cambridge: MIT Press, 1985).
- 9 See Allen Feldman, "Violence and Vision: The Prosthetics, Aesthetics of Terror in Northern Ireland," 10(1) *Public Culture* 25 (Fall, 1997).
- 10 See my discussion of amnesty criteria and amnesty hearings in South Africa in Allen Feldman, "Strange Fruit: The South African Truth Commission and the Demonic Economies of Violence," 46(3) *Social Analysis* 235 (Fall, 2002).
- 11 I am grateful for a personal communication with anthropologist and MacArthur Fellow Brackette F. Williams on her groundbreaking theorization of the ideology of magnitude and evil, in her forthcoming magisterial study of capital punishment in America.
- 12 Alan Schechner, "Digital Bar Code," and "Concentration Camp Processing," *Mirroring Evil: Nazi Imagery/Recent Art*, Exhibition shown at the Jewish Museum, New York City, 2002.

Invitation to participate in the general conference for the abolishment of the military government to be held on 12 January 1962 in Tel Aviv. Speakers include members of Mapam, Herut, the Liberals, Ahdut Ha-Avodah, the Religious Nationalists, in addition to the recorded speech of Martin Buber. Signatory: The Youth Committee for the Abolishment of the Military Government.



Special Inquiry: Security Practices and Legal Challenges

Rina Rosenberg

Security rationales have gained more force globally, enabling governments to suppress various forms of political participation and opposition, to single out particular groups based on racial, national or ethnic belonging while realizing them as security threats, and to employ a wide range of other repressive measures to expand the reach of the state and the law into new domains previously not governed by security logics.

The first section of *Adalah's Review* presented interdisciplinary discussions of the workings of law and security. This special inquiry section expounds legal challenges to the workings of security logics in Israel vis-à-vis Arab citizens of the state. The first three entries are challenges to three different forms of security legislation, as practiced in the Israeli juridical field. The fourth entry takes place in the field of international human rights law attending to these forms of national security legislation.

The first form of security legislation is an amendment to a basic law, representing a permanent change to a “constitution-like” law. The Basic Law: The Knesset and its recent amendments, which further restrict the right to run for election, exemplifies such a form. The second form is an amendment to a regular statute, passed as a temporary order or a temporally limited security exception to extant law. Here, we highlight a recent amendment to the legislation regulating citizenship, which introduced a new, ethnically defined ban on family unification. The third form is a series of state of emergency laws and regulations, supposed exceptional legalities, which are usually conceived of as distinct from general laws, but which, in the case of Israel, have become fully integrated into the juridical system.

Restrictions on Arab Participation in the General Elections

A policy of incitement targeting Arab members of Knesset (MKs) (and Arabs generally), citing their opposition to the Israeli occupation and their vocal resistance to oppressive state policies against Arab citizens, has been escalating since the late 1990s. This policy trend has reached new levels of hysteria since the beginning of the second Intifada and the October 2000 protest demonstrations in Israel. Examples of recent attacks on the Arab leadership and the Arabs in Israel in general abound. They include directives given by Attorney General Elyakim Rubenstein to open criminal investigations against almost every Arab MK for incitement to violence based on political statements they made; the lifting of an Arab MK's immunity and the filing of a criminal indictment against him for political speeches; physical attacks by police officers against Arab MKs, as well as other demonstrators, during protests against land confiscation, home demolition, and the occupation; the commando-style arrest

of an Arab public representative and his subsequent indictment; and the submission of numerous anti-Arab and racist bills by extreme right-wing parties in the Knesset.

These practices are carried out under the pretext that Arab loyalties and allegiances clash with their citizenship status. Hence, Arab citizens of Israel, according to this logic, represent and embody a “danger” to security; thus, the need to suppress their activities, to monitor them, to criminalize them, and ultimately to de-legitimize Arab representatives and prevent their participation in the political realm.

Reflective of this attempt to undermine the political participation of Arab citizens of Israel are three new amendments to the elections laws, which govern the registration of new political parties and the right to stand for election, passed by the Knesset on 15 May 2002. The most significant of these amendments relates to Section 7A of the Basic Law: The Knesset. Section 7A, as amended, provides that: (a) “Any candidate list or any single candidate running for the Knesset elections will not participate in the election if the direct or indirect goals or actions of the candidate list or of the candidate is one of the following: (1) denial of the existence of the state of Israel as a Jewish and democratic state; (2) incitement to racism; or (3) support of armed struggle of an enemy state or of a terrorist organization against the State of Israel.”

While the legislation is troubling in itself for the ideological conditions that it places on political participation, its recent particular application reveals the nature and extent of its political roots and implications. In the run-up to the 2003 Knesset elections, pursuant to these amendments, the Attorney General submitted a motion to the Central Elections Committee (CEC) to ban the National Democratic Assembly (NDA) party list, led by MK Dr. Azmi Bishara, from participating in the elections. Numerous other disqualification motions were filed by right-wing parliamentarians and political parties against Arab MKs Dr. Azmi Bishara, ‘Abd al-Malek Dahamshe (United Arab List), and Dr. Ahmad Tibi (Arab Movement for Renewal) (AMR), as individual candidates, and against three political party lists – the NDA, the United Arab List, and the joint Democratic Front for Peace and Equality-AMR list.

The motions to disqualify the Arab MKs and political parties primarily raised two arguments. Based on political speeches and actions, which indicated opposition to the occupation and legitimation for resistance to the occupation in the West Bank and Gaza, the first argument alleged that the named parties and representatives are thus “supporting the armed struggle of terrorist organizations against Israel.” The second argument, raised mainly against the NDA and MK Bishara, claimed that advocating for a secular, non-ethnic “state of all its citizens,” denies the character of the state as Jewish and democratic.

Adalah represented all of the Arab political leaders and political party lists before the CEC,¹ and, following the CEC decisions, represented the NDA party and MK Bishara as well as MK Tibi before the Supreme Court. The CEC, chaired by Supreme Court Justice Mishael Heshin, was comprised of 41 representatives of all political parties based on their representation in the last Knesset. Contrary to CEC Chairman Justice Heshin, who voted against the disqualifications, the majority of CEC members voted to ban the NDA list and MK Bishara and MK Tibi from participating in the elections. The CEC approved the candidacy of MK ‘Abd al-Malek Dahamshe, as well as the participation of the UAL and the Democratic Front for Peace and Equality – AMR list. A Supreme Court panel of 11 justices reviewed the disqualifications of MK Bishara and MK Tibi and heard Adalah’s appeal against the decision to ban the NDA. On 9 January 2003, the Supreme Court overturned the decisions of the CEC, allowing them to participate in the elections.²

The first document included in the special dossier is one set of legal arguments submitted by Adalah to the CEC and the Supreme Court in these elections disqualification cases, specifically on the issue of “support of armed struggle of an enemy state or of a terrorist organization against the State of Israel.” Adalah raised both constitutional challenges to Section 7A(a)(1) and (3) and to the evidence as presented by the applicants. We include the legal arguments challenging the “supporting terror” provision because they scrutinize the executive’s power to decide what constitutes “terror” and what counts as “support,” and subsequently to limit the right to run in the elections. This section in the arguments advances the demand that the “supporting terror” provision must be voided, or alternatively, strictly construed as it imposes severe restrictions on freedom of expression.

The Supreme Court issued a substantive and lengthy written decision on these cases in May 2003.³ The Court did not rule on Adalah’s arguments relating to the violation of separation of powers or the overbreadth and vagueness of the amendment. Nor did the Court provide any interpretation for the new provision of “supporting terror.” Rather, the Court ruled that the disqualification motions presented no factual basis upon which to disqualify the political parties or the candidates.

The “supporting terror” provision thus remains, without a juridical interpretation. Such a lack of definition allows for the executive’s use of this provision in wide-ranging and arbitrary situations. The power of the provision remains obscure, and therefore flexible. Simultaneously, the power of the provision is a product of its obscurity and flexibility.

Ban on Family Unification

At the same time as the Knesset amended the elections laws, the Israeli government unanimously passed a decision entitled, “The Treatment of Those Staying Illegally in Israel and the Family Unification Policy Concerning Residents of the Palestinian Authority and Foreigners of Palestinian Descent.” The decision effectuated an interim policy whereby the Ministry of Interior’s policy regarding the gradual process of the naturalization of spouses of Israeli citizens, in place since 1999, would not apply to spouses who are residents of the Palestinian Authority and/or are of Palestinian descent. According to the terms of this decision, it was passed “in light of the security situation and because of the implications of the processes of immigration and settlement in Israel of foreigners of Palestinian descent, including through family unifications.”⁴ The general policy for residency and citizenship status for all other non-citizen spouses of Israeli citizens remained unchanged. Adalah and the Association for Civil Rights in Israel (ACRI) each filed petitions to the Supreme Court of Israel challenging the legality of this government decision.⁵

One year later, on 4 June 2003, the formalization of this decision through legislation came when the government introduced a similar bill in the Knesset entitled, “Nationality and Entry into Israel Law (Temporary Order) - 2003.” On 31 July 2003, this bill, which amends the Nationality Law - 1952, was enacted into law. This law prohibits Palestinians from the Occupied Territories from obtaining any residency or citizenship status in Israel by marriage to an Israeli citizen. The law almost exclusively affects Arab citizens of Israel, the Israeli citizens married to or wishing to marry Palestinians from the Occupied Territories. The promoters of this law justified the need for it on the grounds of security, claiming that Palestinians from the Occupied Territories, unified with their spouses - citizens of Israel - were increasingly involved in the “course of terror attacks” against the state. “In the name of security,” the law intervenes in matters of love and marriage and does so under the guise of both the general law (as an amendment to an existing statute) and as temporary security legislation (the law is stated as a temporary order applicable for one year that can be annually extended for one year increments).

The second document in this special dossier consists of excerpts from a petition submitted by Adalah to the Supreme Court of Israel in August 2003 challenging the constitutionality of this new amendment.⁶ Adalah filed the petition in its own name and on behalf of two couples ensnared by the law’s retrospective provisions, the High Follow-up Committee for the Arab Citizens in Israel, and eight Arab MKs. Adalah’s General Director Attorney Hassan Jabareen and Adalah Attorney Orna Kohn jointly authored the petition.

As Adalah argued in the petition, this is the first law passed, since the enactment of the basic laws, that directly and explicitly denies rights on the basis of national or ethnic identity. Adalah's main argument, as presented in the petition, is that the law must be struck down as it violates the "constitutional rights" of citizens to family life, dignity, equality, liberty, and privacy. As for the security claims put forward by the state, Adalah emphasized that the data provided to support these sweeping measures is insufficient, inconsistent, and even if reliable, completely disproportionate to "form the basis for the suspicion against an entire population because of its ethnic identity." In its initial response, the state claimed that the purpose of the law is to defend the right to life of Israeli citizens and national security. When balanced against other individual rights that may be violated, the state contended, these considerations must prevail.

Before the Supreme Court, the legal representative of the Attorney General's Office argued that in fact, the prohibition against residency and/or citizenship in Israel is against all Palestinians as such because all Palestinians support violent resistance, and thus, every Palestinian is a potential terrorist. Adalah countered that the law and the Attorney General's position was racist and cannot be defended. It is racist because among the three million Palestinian people, women and men, living in the Occupied Territories, there are human rights activists, workers, intellectuals, and academics, people who support civil disobedience, for example, and people who support violence as a means of struggle. Therefore, to assert that all Palestinians are potential terrorists defames and vilifies the whole Palestinian nation. The new law has generated considerable opposition both locally and internationally.

State of Emergency

As the Knesset was considering the new ban on family unification law, the United Nations Human Rights Committee (UN HRC), which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) by State parties, was reviewing Israel's compliance with the treaty. In October 2002, the UN HRC had prepared a *List of Issues* or specific questions that Israel was called upon to answer during these hearings in Geneva in July 2003.⁷

One area of particular interest to the UN HRC, as noted in its *List of Issues*, was to what extent Israel was derogating from the provisions of the Covenant, based on the 55-year proclaimed state of emergency. In advance of the session, Adalah prepared and submitted a short report to the UN HRC, included as the third document in this special dossier, that delineates the legal structure

and practices resulting from Israel's "normalized" state of emergency, numerous derogations from the ICCPR employed "in the name of security," and Israel's increasing reliance on emergency powers laws to suppress political dissent by Arab leaders and activists, to limit their freedom of movement, and to restrict their right of association.⁸

The main argument advanced by Adalah in the State of Emergency report is that rather than being of a "temporary and exceptional nature," the tens of emergency laws and regulations in place have become an integral part of the daily functioning of the Israeli legal system. Upholding a continuous state of emergency, while at the same time admitting that Israel's civil and government institutions generally operate in a normal fashion, contradicts the exceptional nature of emergency powers and allows the state to legitimize unjustified and unnecessary derogations from its international human rights obligations, including the ICCPR. The use of emergency laws against those who voice opposition to the government, particularly against the legitimacy of the occupation, constitutes a severe and excessive infringement of protected rights, which cannot be justified under the exigencies of the declared state of emergency.

Representatives of Adalah and numerous other NGOs attended the hearings before the UN HRC. In addition to hearing Israel's response to questions concerning legal practices pursuant to the state of emergency, the UN HRC also inquired into the use of prolonged detention without any access to counsel, the vagueness of definitions in Israeli counter-terrorism legislation, the Israeli army's "targeted killings," home demolitions, the use of Palestinian civilians as "human shields," and instances of "ill-treatment and torture," to name a few issues of concern. During the hearings, the official delegation of the state of Israel justified many of the human rights violations "in the name of security." In its Concluding Observations, issued in August 2003, the UN HRC recognized at the very outset the serious security concerns of Israel.⁹ The UN HRC, however, did not reach the conclusion that such violations are therefore tolerable.

Regarding the state of emergency, the UN HRC expressed concern about "the sweeping nature of measures... which appear to derogate from Covenant provisions... these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights" (para. 12). The Committee also raised concerns about "public pronouncements made by several prominent Israeli personalities in relation to Arabs, which may constitute advocacy of racial and religious hatred that constitutes incitement to discrimination, hostility and violence," and called on Israel "to investigate, prosecute and punish such acts" (para. 20). In addition, the UN HRC spoke

out in its Concluding Observations against the new law banning family unification, calling upon Israel to “revoke” the law, which raises serious issues under several articles of the Covenant (para. 21).

The full text of the Concluding Observations closes this volume of *Adalah’s Review*. While a few remarks are not related to violations of human rights carried out “in the name of security,” the document is reproduced in its entirety for purposes of coherence. The reader of the Concluding Observations will quickly realize that most of the UN HRC’s remarks concern human rights violations that Israel justified through a security lens. The pervasiveness of the security logic in managing the Arab minority in Israel is striking.

What is noteworthy about all of the documents included in this special dossier is the degree to which security constructions are very much integral to the legal regime governing Palestinian citizens of Israel. Security legalities, whether enacted as permanent changes to basic laws, as exceptions in the form of temporary amendments to regular statutes, or as supposed special measures strictly required by the exigencies of a state of emergency situation constitute a major means of governance. Only by understanding them do we begin to adequately address the interaction of the Arab minority with Israeli law.

End Notes

- 1 See Reply Brief Regarding Disqualification Request 1/16, *Attorney General, et. al. v. National Democratic Assembly and MK Azmi Bishara*; Reply Brief Regarding Disqualification Request 11/16, *Likud v. MK Ahmad Tibi and the Democratic Front for Peace and Equality-Arab Movement for Renewal*; Reply Brief Regarding Disqualification Request 6/16, *MK Avigdor Lieberman, et. al. v. United Arab List and MK ‘Abd al-Malek Dahamshe*; and Reply Brief Regarding Disqualification Request 3/16, *Herut, et. al. v. The Democratic Front for Peace and Equality-Arab Movement for Renewal*. Adalah’s four reply briefs in Hebrew and a summary of them in English are available on Adalah’s website: <http://www.adalah.org>.
- 2 See Elections Approval 11280/02, *Central Elections Committee for the Sixteenth Knesset, et. al. v. MK Ahmad Tibi*; Elections Approval 50/03, *Central Elections Committee for the Sixteenth Knesset v. MK Azmi Bishara*; and Elections Appeal 131/03, *National Democratic Assembly v. Central Elections Committee for the Sixteenth Knesset*, 57(4) P.D. 1.
- 3 Id. The Supreme Court issued one written judgment on all of these cases on 15 May 2003. The judgment can be accessed at: <http://www.court.gov.il> (Hebrew).
- 4 Government Decision #1813, “The Treatment of Those Staying Illegally in Israel and the Family Unification Policy Concerning Residents of the Palestinian Authority and Foreigners of Palestinian Descent,” 12 May 2002, section B.

- 5 H.C. 4022/02, *The Association for Civil Rights in Israel, et. al. v. Minister of Interior, et. al.* and H.C. 4608/02, *Awad, et. al. v. The Prime Minister of Israel, et. al.* (cases pending). The Supreme Court has joined these cases for hearings and decision.

- 6 H.C. 7052/03, *Adalah, et. al. v. Minister of Interior, et. al.* Numerous petitions have been filed against the new law by individual petitioners as well as the Association for Civil Rights in Israel and the Meretz political party. See H.C. 7102/03, *MK Zahava Gal-On, et. al. v. Attorney General, et. al.* and H.C. 8099/03, *The Association for Civil Rights in Israel v. Minister of Interior, et. al.* The Supreme Court has joined all of these cases, which are still pending, for hearings and decision. For the full text of Adalah's petitions in the family unification cases in Hebrew and English, see <http://www.adalah.org>.

- 7 *List of Issues: Israel*, Human Rights Committee, UN Doc. CCPR/C/77/L/ISR (27 November 2002). Both Adalah and the Arab Association for Human Rights submitted reports to the UN HRC for consideration in developing its List of Issues. See Adalah, "Recent Developments - The Rights of the Palestinian Minority in Israel," October 2002 available at: <http://www.adalah.org> and the Arab Association for Human Rights, "Silencing Dissent: A Report on the Violation of Political Rights of the Arab Parties in Israel," October 2002 available at: <http://www.arabhra.org>.

- 8 Adalah's report on the State of Emergency was submitted to the UN HRC on 22 July 2003 together with three other information sheets – "The Use of Palestinian Civilians as Human Shields by the Israeli Army"; "Family Unification and Citizenship"; and "Discrimination Against Palestinian Citizens of Israel - No Fair Representation on Governmental Bodies." All of these reports are available on Adalah's website at: <http://www.adalah.org>.

- 9 *Concluding Observations: Israel*, Human Rights Committee, UN Doc. CCPR/CO/78/ISR (21 August 2003).

Letter, dated 14 February 1962, addresses Mansur Kardosh, a leader of the al-Ard Movement. The letter attaches copies of the call by the Arab Students Committee in the Hebrew University to abolish the military regime, and requests that Mansour forwards them to all Arab organizations in Nazareth. The letter also assures Mansour as to the progress in the students' consciousness and activities.

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القدس
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عزيزي منصور

تحية

اسلم اليك بعض النسخ من دعاوى وقرارات
التي تمهنتها الى السلطات العربية العربية واليه
الهيئات والمنظمات العربية الاخرى في البلاد
وارشولك ان توضح النسخ على المنظمات والهيئات العربية
في الناصرة ^{على وجه الخصوص} لكي تتمكن من العمل على تحقيق هدفنا
ان اثنى لا اشرح اسما هذه المنظمات ولا عناوينها
ولا شك في ان الله ادره من يدرك
امور الطلاب كالمعتاد واطمئننا انه الوثيق
دانت طرقتنا العام في تسارخ وتقدم آمل استمراره
تحيات لجميع الرفقاء، والسلام
والى اللقاء
باخلاق
ندم

Elections Disqualifications Cases

Excerpts from Legal Arguments Submitted by Adalah to the Central Elections Committee and the Supreme Court

December 2002 – January 2003

Editors' Note

The following are excerpts from the reply briefs submitted by Adalah to the Central Elections Committee and to the Supreme Court of Israel in the 2003 elections disqualification cases. In these cases, Adalah represented MK Dr. Azmi Bishara and the National Democratic Assembly; MK 'Abd al-Malek Dahamshe and the United Arab List; and MK Dr. Ahmad Tibi and the Democratic Front for Peace and Equality-Arab Movement for Renewal List against motions to disqualify them filed by the Attorney General and numerous right-wing MKs and political parties. Adalah argued in these cases that the May 2002 amendment to the Basic Law: The Knesset is unconstitutional, in particular, with regard to the provision that any individual candidate or political party list that "support(s) the armed struggle of an enemy state or of a terrorist organization against the State of Israel" may be disqualified from running in the elections for the Knesset.

Legal Problems Inherent in Section 7A(a)(3)

- 1 The respondents will argue that the applicants' position regarding the application of Section 7A(a)(3) of the Basic Law: The Knesset – which refers to "support(ing) the armed struggle of an enemy state or of a terror organization" – raises two serious legal problems. The first relates to the legal interpretation of this provision, and the second involves its retroactive application. [*Editors' Note: This document does not contain the arguments relating to retroactivity.*]

Invalidity of Section 7A(a)(3)

- 2 This section was enacted in May 2002, subsequent to the enactment of the Basic Law: Human Dignity and Liberty, which was passed in 1992. Therefore, the principles of the limitations clause of the said Basic Law apply. Section 7A(a)(3) relates to a "terror organization." However, the legislature did not define, at the time of enactment of the said section or subsequent thereto, a terror organization, nor did it establish in primary legislation, the rules to be used in defining a terror organization. The Prevention of Terrorism Ordinance - 1948 (hereafter: the Ordinance), authorizes the government [the executive] to determine which entities are terror organizations; however, that Ordinance cannot apply to primary legislation that deals with terror organizations, where the legislation itself does not set forth which entities are terror organizations. The problem with regard to the Prevention of Terrorism Ordinance is that it was enacted

prior to the Basic Law: Human Dignity and Liberty, thus making it difficult to attack the Ordinance directly. It is clear, though, that where subsequent legislation exists, the limitations clause applies. The principle established in *Tsemach*, which applied the limitations clause to an amending law, when the legislation amended was enacted prior to the Basic Law: Human Dignity and Liberty, certainly applies to this case:

The Court may examine whether a statute is compatible with the requirements of the Basic Law: Human Dignity and Liberty, even if the statute is beneficial to the individual, by reducing the infringement of the individual's liberty in comparison with the statute law that preceded it, notwithstanding the original statute being immune from review on constitutional grounds because it was adopted before the Basic Law took effect. As a result, the validity of laws clause, in Section 10 of the Basic Law, applies... Therefore, although in the present case the amending law – which took effect after the enactment of the Basic Law: Human Dignity and Liberty – significantly shortens, in comparison with the statute that preceded the amendment, the maximum period of detention that an officer-judge who is a military policeman is allowed to order from 35 days to 96 hours, and [while] the prior statute itself is immune to the requirements of the Basic Law, the amending statute is subject to the requirements of the Basic Law ... Nevertheless, in examining the legality of a statute in light of the requirements of the Basic Law: Human Dignity and Liberty, the Court will take into account the fact that the statute benefits those to whom it applies.

H.C. 6055/95, *Tsemach v. Minister of Defense, et. al.*, 53(5) P.D. 241, 258-261.

- 3 The respondents will argue that, by its nature, any arrangement regarding terror organizations relates to freedom of speech, a fundamental right reinforced by enactment of the Basic Law. Thus, and in accordance with the limitations clause, any such arrangement must be established in primary legislation, for the common law provides that restrictions on fundamental rights are only allowed when set forth explicitly by statute. This was the holding in the Torture Case, cited below, in which the Supreme Court ruled that constitutional rights, such as bodily freedom, cannot be infringed unless there is explicit legislation permitting it, and in accordance with the limitations clause. In the case involving the conscription of yeshiva students, the Supreme Court held that, since the matter involved the right to equality, the right cannot be restricted except by primary legislation.

H.C. 3267/97, *Rubinstein v. Minister of Defense*, 52(5) P.D. 481.

H.C. 5100/94, *The Public Committee Against Torture, et. al. v. Government of Israel*, 53(4) P.D. 817 (“the Torture Case”).

- 4 The current situation is irrational and violates the principle of separation of powers, in that the executive branch is given the power to determine, as it sees fit, which entity is a terror organization, without clear rules or directives of any kind. Therefore, the executive branch makes this determination rather than the legislature. It is widely known that the decisions as to which entities come within the rubric of terror organizations stem from changing political motives, and the various governments of Israel have not necessarily agreed with each other as to the entities that are terror organizations. The Honorable Justice Heshin raised, in *dicta*, the problem that arises from such definitions given by the various governments:

As to the appellant's argument regarding the PLO's aim to deny the existence of Israel, it would not be wise for the Court to take upon itself to characterize the PLO, to give it distinguishing characteristics and to define its current aims. On the one hand, the Palestinian Covenant calls, in practice, for the denial of the existence of the State of Israel and for its destruction, and the government has issued a statement declaring the PLO a terror organization. On the other hand, there have been changes in PLO-Israel relations, and various agreements have been signed between the State of Israel and the PLO.

H.C. 2316/96, *Isaacson v. Registrar of Political Parties, et. al.*, 50(2) P.D. 529, 544.

- 5 Furthermore, the section under discussion is vague. The term "support" is overly broad. For example, a statement setting forth the position that every people has the right to oppose occupation may be interpreted as support for an armed struggle against the State of Israel. A statement contending that a neighboring country has the right to defend itself against an Israeli military attack may be interpreted as support for an enemy state against the State of Israel. Professor Mordechai Kremnitzer related to this issue in his comments to the Knesset's Constitution, Law and Justice Committee:

I would like to say this as clearly as possible. Democracy is a type of ladder. If this law is enacted, we shall lose some of the democratic character of the state... No one will think that the comments made by MK Bishara, with all due respect, or comments made in the past or that will be made in the future by some other Member of Knesset, truly and drastically endanger the existence of the state ... In my opinion, most of the free, enlightened world, in a situation in which, let's assume, an Israeli government says: we shall not negotiate towards a permanent agreement with the Palestinian Authority under any circumstances, or that we offer the Palestinian Authority an additional one percent of the territories, and a diplomatic [international] effort fails to convince an Israeli government to budge from its position – a large portion of the developed and enlightened world would state under these circumstances that the Palestinians have a right to conduct an

armed struggle against continuation of Israeli control, an armed struggle that is subject to limitations, it is not allowed to harm civilians, certain objectives must be taken into account. A large portion of the world would say that the struggle is just. Then, if someone in Israel takes a similar position, he would be told: you are forbidden to participate in the Israeli political arena. This position seems unreasonable to me, and radically weakens the democratic character of Israel... There is another point I would like to direct your attention to. I have great difficulty with what has been said here about “a terror organization against Israel.” Assume a party list is formed tomorrow and it says that it supports a terror organization whose aim is to harm Palestinians, or Israeli Arabs, or anything else. According to this bill, this party list would be qualified to run.

See Protocol No. 346, Knesset’s Constitution, Law and Justice Committee, 24 July 2001.

- 6 In an article written by Professor Kremnitzer that is relevant to the issue under discussion, he related to the offenses included in the Prevention of Terrorism Ordinance, some of which are identical to Section 7A(a)(3). Kremnitzer noted that a grave problem would arise if it were determined that behavior was being punished and not its causal effects. In his words:

Doesn’t the statement, “Were it not for the intifada, the Oslo Agreement would not have been made,” support a violent act? Does the description of the discrimination against the Arab minority and the difficulty or inability to significantly change this situation encourage violence? Does describing the oppressive measures carried out in the Occupied Territories, while sharply criticizing them, constitute such support? Does historical research pointing to the fact that, in certain situations, the attention of the majority to the plight of the minority could not be attained other than by employing violent means, constitute encouraging violence? Does discussing the connection between Israeli actions and terror activities encourage terror? Such statements lie at the core of the area protected by freedom of speech.

Mordechai Kremnitzer, “The Alba Case: An Investigation into a Racial Incitement Law,” 30(1) *Mishpatim* 105, 142 (1999) (Hebrew).

- 7 The Honorable Justice Or ruled unequivocally that the language of the Prevention of Terrorism Ordinance, which is similar to Section 7A(a)(3), violates the conditions of the limitations clause. Yet, it is clear that, because the Ordinance was enacted prior to the Basic Laws, it was inappropriate to nullify it. The Honorable Justice Or wrote as follows:

The conclusion I have arrived at clarifies and provides a reasonable explanation to the serious criminal prohibition included within Section 4(a), a prohibition that infringes the freedom of speech. When the section is examined outside of its

legislative context and history, it seems as though its infringement on freedom of speech is drastic and broad.

Reh. Crim. 8613/96, *Jabareen v. State of Israel*, 54(5) P.D. 193, paragraph 9 of the judgment (hereafter: *Jabareen*).

- 8 Thus, Section 7A(a)(3) does not meet the conditions of the limitations clause, violates constitutional principles, and is vague. Also, the principal part of the section is not based on primary legislation, and the section infringes freedom of speech to an extent greater than necessary. For all these reasons, the section should be nullified.

See Aharon Barak, “The Constitutionalization of the Legal System following the Basic Laws and their Implication on the Penal Law – The Essential and the Polemic,” 13(1) *Legal Research* 5 (1996) (Hebrew).

In the Alternative: Strict Construction

- 9 Alternatively, the respondents will argue that Section 7A(a)(3) of the Basic Law: The Knesset should be strictly construed, in accordance with fundamental principles of law, primarily that of freedom of speech. Interpretation of the section must begin with a balancing of the principle of the freedom to express one’s views and the real and actual danger to public safety. During the hearings on the proposed bill in the Knesset’s Constitution, Law and Justice Committee, MK Ofir Pines-Paz, chairman of the Committee, commented that:

The [bill’s] intention is to make clear that political support for a terror organization, which is comparatively amorphous, may not be the pretext for disqualification, but, rather, support of an armed struggle of a terror organization against the State of Israel, which is very feasible, tangible, and clear [is grounds for disqualification].

See Protocol No. 461, Knesset’s Constitution, Law and Justice Committee, 30 April 2002.

- 10 Thus, infringement of the right to freedom of speech is permitted where the legislative purpose is to prevent citizens from taking part in the armed activities of terror organizations against [Israeli] citizens and state institutions. That is, it is not enough to find that a person made an analytical study of the political situation which concludes that opposing the occupation is permitted and legitimate, nor is it sufficient to find that a person states that the intifada is legitimate because its aim is to end the occupation, nor is it sufficient to find that an individual made contact with a terror organization— incidentally, the offense of making contact with a terror organization was repealed and deleted from the Prevention of

Terrorism Ordinance because of its overly broad restriction on the freedom of speech. Rather, it must be proven that there *was actual physical support for a specific terror organization which assisted its armed struggle, including an explicit call to join a specific terror organization in order to assist it in its struggle, or an explicit call to a specific terror organization to continue its armed activity. The same is true for an enemy state.* This interpretation adheres to the ruling in *Jabareen*. As Justice Or stated:

Violent acts of the nature described in the said article were performed during the intifada both by individuals and by organizations that come under the rubric “terror organizations.” Stones and Molotov cocktails were thrown in an unorganized fashion by individuals, including children, all of whom acted on their own. Yet, these activities were also performed by groups with an organized infrastructure, which use violent means to accomplish their goals. I explained earlier that to apply Section 4(a) of the Ordinance, it is not enough that the violent activities described in the publication are of the kind that characterize terrorist activity. Rather, they must be actions carried out by such an organization. Does Section 4(a) cover a publication of the type we are dealing with, a publication praising and encouraging violent acts carried out by both individuals and terror organizations, but which includes no indication, explicit or by implication, of the acts of anyone who seeks to praise and encourage, the emphasis being on the violent acts themselves, with no link to the nature of their perpetrators? I am of the opinion that Section 4(a) does not cover such a publication. The reason for this is found in the purpose of Section 4(a), which, as I explained above, is not intended to prevent publications encouraging, praising, or supporting violent acts of the kind characterized by terrorist acts. It is intended to prevent support for terror organizations, which it does in the context of the overall workings of the Ordinance, whose purpose is to destroy the infrastructure of these organizations.

Jabareen, paragraphs 15-16 of the judgment.

This interpretation is consistent with the common law, specifically with the principles as outlined in H.C. 73/53, *Kol Ha'am Ltd. v. Minister of Interior*, 7(2) P.D. 871 and the case law relating to freedom of speech. It is also consistent with the rulings of the European Court of Human Rights (ECHR), the leading judicial body in Europe, which hears cases dealing with terror and freedom of speech.

- 11 In *Castells v. Spain*,¹ the appellant authored a harsh editorial criticizing the government of Spain. In the editorial, he argued that most of the murders in recent times occurred in the Basque-minority region in Spain, that the right-wing government did not investigate [these murders], that

the acts were “fascist murders,” and that many of the murderers were senior government officials. The appellant was sentenced to one year in prison and was prohibited from serving in his post for one year. The Court [ECHR] ruled that because the government’s action did not pass the close-scrutiny test, the appellant’s right to freedom of speech had been violated. The Court emphasized the distinction between criticizing governments and criticizing private individuals. When criticizing governments, wide latitude is granted, and, in any case, the appellant’s statements criticized the government, but did not urge the use of violence.

- 12 In *Surek & Ozdemir v. Turkey*,² two appellants were involved. One was the owner of a newspaper and the other was the leader of the Kurdish organization, the PKK, which had been declared an illegal organization. Both had published interviews in which they criticized the Turkish authorities for their oppressive policies. In his interview, the newspaper owner stated that because of the ongoing oppressive policies, the Kurdish armed struggle against the Turkish authorities was justified, and that the armed struggle resulted from the lack of any other realistic option for the Kurds. In the interview, the leader of the PKK stated, *inter alia*:³

It is a well-known fact that Turkey and imperialism want to divert our people from its national identity... But we are resisting. No one can tell us to leave our own territory...we are in Kurdistan. We are amongst our own people. If they want us to leave our territory, they must know that we will never agree. We are people who have lost everything we had and who are fighting to regain what we have lost. That is the purpose of our action. We have nothing to lose... That is why we act without fear.

The European Court of Human Rights ruled that the factual determination made by the Turkish court, whereby these statements constitute praise and support for Kurdish terrorists, was an irrelevant basis for restricting the appellants’ freedom of expression. Furthermore, the Court ruled that these statements did not constitute a positive call for the use of violence and terror against Turkey, that the interviews related to the position that they [the Kurds] were unwilling to accept the ongoing policy of oppression, were unwilling to compromise on the continuation of this policy, and that despite the harsh criticism [the statements embody], they do not constitute violent incitement because they come within the purview of freedom of speech:⁴

[T]he interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey. While it is clear from the words used in the

interviews that the message was one of the intransigence and refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred.

- 13 In *Erdogdu and Ince v. Turkey*,⁵ the appellant was a newspaper editor. In an editorial, he wrote that the policy employed by Turkey against the Kurds was a fascist policy of genocide. The European Court of Human Rights ruled that, although these statements were extremely harsh, it cannot be said that they called for violence or terror. A similar ruling was given in *Ceylan v. Turkey*,⁶ in which the appellant described Turkey's policy as one of terror and genocide. However, in *Surek No.1 v. Turkey*,⁷ the European Court of Human Rights upheld the conviction of the appellant, who wrote an article in which he stated, "If we aren't given rights, we will take them by force." In this case, he accused certain individuals, mentioning names, of being responsible for murders and killings. In its decision, the Court emphasized that the names of individuals were mentioned, and that the editor had justified the use of force.
- 14 The European Court of Human Rights overturned a case in which a Turkish court convicted a defendant for violating the Turkish Prevention of Terrorism Ordinance by making statements that were much harsher than those attributed to the Arab MKs. In making its decision, the Court found that the Ordinance illegally infringed the right to freedom of speech under Article 10 of the European Convention of Human Rights (1950). In 1999, the European Court of Human Rights gave its decision in *Huseyin Karatas*.⁸ Karatas, a Turkish citizen of Kurdish decent, published a book of poetry that included poems supporting the Kurdish struggle against the Turkish oppression in southeast Turkey. One of these poems urged people to sacrifice their lives on behalf of the Kurdish uprising:⁹

Young Kurds
 I am seventy-five years old
 I die a martyr
 I join the martyrs of Kurdistan
 Dersim has been defeated
 but Kurdism
 and Kurdistan shall live on
 the young Kurd shall take vengeance
 when life leaves this body
 my heart shall not cry out
 What happiness
 to live this day
 to join the martyrs of Kurdistan.

Despite the extremely harsh statements made by Karatas, the European Court of Human Rights ruled that they came within the fundamental right of freedom of speech, in accordance with the close-scrutiny test. In giving its reasons, the Court stated that these statements were directed against the government policy as such:¹⁰

Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system, the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.

- 15 We see, therefore, that the only possible interpretation of Section 7A(a)(3) that comports with the legislative purpose, on the one hand, and applies fundamental principles of law is the interpretation stating that *physical support for a specific terror organization that assists it in its armed struggle, including an explicit call to join a specific terror organization to assist the organization in its struggle, or an explicit call to a specific terror organization to continue its armed activity. The same is true with regard to an enemy state.*

End Notes

- 1 *Castells v. Spain*, App. No. 11798/85 (Eur. Ct. H.R., 23 April 1992).
- 2 *Surek and Ozdemir v. Turkey*, App. No. 23927/94 (Eur. Ct. H.R., 8 July 1999).
- 3 *Id.* at para. 10.
- 4 *Id.* at para. 61.
- 5 *Erdogdu and Ince v. Turkey*, App. No. 25067/94 (Eur. Ct. H.R., 8 July 1999).
- 6 *Ceylan v. Turkey*, App. No. 23556/94 (Eur. Ct. H.R., 8 July 1999).
- 7 *Surek No.1 v. Turkey*, App. No. 26682/95 (Eur. Ct. H.R., 8 July 1999).
- 8 *Karatas v. Turkey*, App. No. 23168/94 (Eur. Ct. H.R., 8 July 1999).
- 9 *Id.* at para. 10.
- 10 *Id.* at para. 50.

The Arab Students Committee in the Hebrew University calls upon Arab local councils and other Arab organizations in Israel to request the abolishment of the military regime.

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لجنة الطلاب العرب في الجامعة العبرية - القدس
نداء الى السلطات المحلية العربية
وجميع الهيئات والمنظمات العربية الاخرى في اسرائيل
ايها الاخوان
في هذه الفترة الحاسمة من تاريخ الحكم العسكري الذي رزقنا
تحت عبئه سنوات لولا ، وناسي منه شعبنا الكثير من الوان الضلال والتمييز
التي لا حاجة بنا الى تعدادها او الاستشهاد عليها فهي مفضوحة للجميع .
وفي هذه الفترة التي استيقظ فيها ضمير الكثير من المنظمات والهيئات
المديدة في الدولة يهودية وعربية ، عارضا محتجا ومثابرا برئ هذا
الحيف اللاحق بشعبنا ، ومناديا بالغاء الحكم العسكري المآء نهائيا ،
في هذه الفترة بالذات يهيبكم ابناؤكم واخوانكم الطلاب العرب في الجامعة
العبرية في القدس ويستصرخونكم ان تهبطوا لتؤدوا تسطكم من الواجب
نحو شعبكم ، ومناشدونكم ان تستنكروا هذا الحكم الجحيف ، وتسمعوا
اصواتكم عاليا الى جانب الاصوات العديدة التي عبت مطالبة بالغاء .
اننا ننشدكم ان تظهروا استنكاركم
بشئى الطرق المشروعة التي ترونها مناسبه .

باخلاق
لجنة الطلاب العرب في الجامعة العبرية
القدس

Ban on Family Unification

Excerpts from Supreme Court Petition: H.C. 7052/03, Adalah, et. al. v.
The Minister of Interior and the Attorney General

4 August 2003

Before the Supreme Court in Jerusalem
Sitting as the High Court of Justice

H.C. 7052/03

The Petitioners

- 1 Adalah – The Legal Center for Arab Minority Rights in Israel
- 2 Attorney Morad El-Sana
- 3 Abeer El-Sana
- 4 Ranit Tbilah
- 5 Hatem Tbilah
- 6 Asala Tbilah, a minor (born 30 May 2001)
- 7 Dima Tbilah, a minor (born 12 March 2003)
- Petitioners 6 and 7 by their parents, Petitioners 4 and 5
- 8 Shawqi Khatib, Chairperson of the High Follow-up Committee for the Arab Citizens in Israel
- 9 MK Taleb El-Sana
- 10 MK Muhammad Barakeh
- 11 MK Azmi Bishara
- 12 MK ‘Abd al-Malek Dahamshe
- 13 MK Jamal Zahalka
- 14 MK Wasel Taha
- 15 MK Ahmad Tibi
- 16 MK Issam Makhoul

represented by attorneys Hassan Jabareen and/or Orna Kohn and/or Abeer Baker and/or Marwan Dalal and/or Suhad Bishara and/or Gadeer Nicola and/or Morad El-Sana, of Adalah – The Legal Center for Arab Minority Rights in Israel, PO Box 510, Shafa’amr 20200. Tel. 04-9501610, Fax. 04-9503140

– v. –

The Respondents

- 1 The Minister of Interior
- 2 The Attorney General

represented by the State Attorney’s Office, 29 Salah a-Din Street, Jerusalem.
Tel. 02-6466590, Fax. 02-6466655

Petition for an Order Nisi and Temporary Injunction

A petition is hereby filed for an order nisi against the Respondents ordering them to show cause:

- A. Why the provisions of the Nationality and Entry into Israel Law (Temporary Order) - 2003, which was enacted on 31 July 2003, should not be declared null and void;
- B. Why the gradual process of naturalization of spouses of Israeli citizens practiced in Israel is not applied to Petitioners 3 and 5 in accordance with Article 7 of the Nationality Law - 1952.

Motion for a Temporary Injunction

The application is hereby filed for a temporary injunction directing the Respondents to refrain from executing and/or implementing the provisions of the Nationality and Entry into Israel (Temporary Order) Law - 2003 (hereinafter: the Law), until a final decision is reached on the petition herein. The grounds for the application are as follows:

- 1 This petition is directed against the Law, which prevents Petitioner 3, a resident of “the region” and who is married to Petitioner 2, an Israeli citizen, to obtain a permit to reside in Israel.
- 2 Prior to enactment of the Law, Petitioners 2 and 3 submitted all the relevant documents to obtain a permit to reside in Israel pursuant to Article 7 of the Nationality Law - 1952. However, as mentioned above, the Law that is the subject of this petition prevents issuance of said permit.
- 3 Also, the Law prevents Petitioner 5 from taking part in the gradual process of naturalization and from his status being upgraded from temporary resident to citizen.
- 4 During the legislation of the Law, the respondents failed to take into account or to set forth before the legislature the extremely grave damage that the petitioners, and thousands of Arab citizens whose applications are pending before Respondent 1, are liable to suffer. The Law retroactively infringes on the rights of many families who relied on the fact that their applications had been lawfully submitted, and it fails to provide a mechanism to hear these persons’ cases, in particular, those who submitted their applications prior to the enactment of the Law. The Law therefore

contains a grave and fundamental constitutional flaw.

A copy of the Law as laid before the Knesset for second and third reading and passed by it, and a copy of the proposed bill passed on first reading are attached hereto as Appendix P/1-A.

- 5 In challenging the constitutionality of the Law, the petition bases its argument on the Law's violation of the Basic Law: Human Dignity and Liberty.
- 6 The failure to issue a temporary injunction will cause Petitioners 2-7, and many other individuals in their situation, extremely grave, irreparable damage.
- 7 On behalf of many families, Petitioner 1 filed a petition on 30 May 2002 against Government Decision 1813 of 12 May 2002, which adopted principles comparable to the provisions of the Law (H.C. 4608/02, *Awad, et. al. v. Prime Minister, et. al.*, pending). In the said petition, this Honorable Court issued an order nisi and temporary injunctions against deporting the petitioners. Indeed, this motion relates to legislation and not to a government decision, as was the case in H.C. 4608/02. But since the damage caused to the petitioners is the essence in both cases, and not the process by which the decision was reached, this motion should be treated in the same manner, and the temporary injunctions requested should be granted.
The said government decision is attached hereto as Appendix P/1-B.
- 8 The appendices to the petition and the factual and legal grounds supporting it constitute an integral part of this motion.
- 9 It is proper and just that this motion be granted.

The grounds for the petitions are as follows:

Then Almitra spoke again and said, "And what of Marriage, master?"

And he answered saying:

You were born together, and together you shall be forevermore.

You shall be together when white wings of death scatter your days.

Aye, you shall be together even in the silent memory of God.

But let there be spaces in your togetherness,

And let the winds of the heavens dance between you.

Love one another but make not a bond of love:

Let it rather be a moving sea between the shores of your souls...

Khalil Gibran, *The Prophet*

Factual Background

Preface

- 1 This petition deals with the constitutionality of the Nationality and Entry into Israel (Temporary Order) Law - 2003 (hereafter: the Law), which the Knesset passed on 31 July 2003. This statute prevents the submission of new applications by Israeli citizens to obtain a status in Israel for their spouses who are residents of the West Bank or Gaza Strip, and prevents the granting of any status in Israel to a person who did not submit an application prior to 12 May 2002.
- 2 The Law also provides that temporary resident status that was granted prior to 12 May 2002 shall not be upgraded to permanent resident status and/or citizenship, even if the application was approved, the applicant met all of the tests in the gradual process for naturalization of spouses of Israeli citizens (hereinafter: the gradual process), and there was no information that raised suspicions against the applicant. The gradual process was established following the judgment in H.C. 3648/97, *Stamka, et. al. v. Minister of Interior, et. al.*, 53(2) P.D. 728; and in the context of H.C. 338/98, *Issa, et. al. v. Minister of Interior*, not yet published.

The statement of the State Attorney's Office is attached hereto as Appendix P/2.
- 3 The Law violates the constitutional right to equality between citizens of the State of Israel. This is the first Law since the basic laws were enacted that denies constitutional rights to citizens on the explicit and direct grounds of ethnic identity. This Law does not grant rights to a specific group because of its ethnic identity, but makes explicit rather than indirect use of ethnic identity to infringe on the unalienable rights of a section of its citizenry on the basis of ethnic origin or national identity. Therefore, it not only discriminates on the basis of ethnic origin or national identity, but is also tainted by explicit racism.
- 4 The extremist nature of the Law is further aggravated by the fact that it relates to the right of citizenship. The Law is flagrantly directed against citizens of the State of Israel who are married to Palestinians from the West Bank or the Gaza Strip, and against their constitutional rights to family life, dignity, equality, and privacy. It expressly excludes Israeli settlers who reside in the same two areas. Thus, the Law directly discriminates against Arab citizens of Israel, for they are the citizens who marry Palestinian residents of the West Bank and the Gaza Strip.

- 5 This petition does not deal with Israel's immigration policy. The Law does not seek to regulate immigration policy, nor is that its purpose. The petition deals with rights granted to citizens of the state who seek to live together with their spouses and/or their minor children in order to carry on family life like other individuals.
- 6 Therefore, any attempt by the Respondents to base their arguments on an analogy with the Law of Return and/or the rights of states in determining their immigration policy and/or on various definitions of the meaning of "Jewish state," is irrelevant in this petition, because the petition does not deal with these matters.
- 7 The petition relates to the gross discrimination based on ethnic origin between citizens of the State of Israel as individuals, i.e., to civic discrimination between individuals within the state. In this context, it should be mentioned that there is broad agreement in Supreme Court judgments on the matter of civic discrimination toward Arab individuals, holding that such discrimination is prohibited on ideological, nationalist grounds. This was the principle set forth in the decision in *Qadan*. It was also the minority view (of the Honorable Justice Heshin) in *Adalah, et. al. v. Tel Aviv – Jaffa Municipality, et. al.*, which discussed the status of the Arab language in mixed-population cities.
H.C. 6698/95, *Qadan, et. al. v. Israel Lands Administration*, 54(1) P.D. 258.
H.C. 4112/99, *Adalah, et. al., v. Tel Aviv - Jaffa Municipality, et. al.*, Takdin Elyon 2002 (2) 603, 635.
- 8 The petition relates directly to the rights of citizens of the State of Israel to exercise their constitutional right to personal liberty, which is granted in Article 5 of the Basic Law: Human Dignity and Liberty. This liberty is the basis of individual autonomy, of an individual's self-determination in establishing family life according to his or her choice.
- 9 This liberty is linked to the most fundamental human need to love: to love and be loved by a spouse, to aspire to establish a home, and to live together without institutional obstacles. The Law seeks to limit the freedom of ordinary citizens to choose as their hearts dictate, by restricting the ethnic identity of their spouses. The public cannot meet the proscriptions of the Law, for love between human beings does not recognize ethnic borders. Quite the opposite, it disdains such borders. Therefore, this attempt by the Law will not succeed, not because the individuals are criminals, but

because the Law seeks to regulate by means of ethnic identity “matters of love” between individuals, something which legislation cannot guarantee. On this point, the comments of the Honorable Justice Heshin in *Stamka* are appropriate:

This response, that love would also prevail over a separation of months, is cynical and improper. Furthermore, it would be improper to make light of the injury to the couple’s dignity and family unity. And the separation of the lovers, how can that be mitigated in our case? Have we forgotten the pain of Desdemona when the Duke ordered Othello to leave and fight in Cyprus?

Desdemona:

*That I did love the Moor to live with him,
My downright violence and storm of fortunes
May trumpet to the world: my heart's subdued
Even to the very quality of my lord:
I saw Othello's visage in his mind,
And to his honor and his valiant parts
Did I my soul and fortunes consecrate.
So that, dear lords, if I be left behind,
A moth of peace, and he go to the war,
The rites for which I love him are bereft me,
And I a heavy interim shall support
By his dear absence...*

(William Shakespeare, *Othello*)

Should our hearts be indifferent to the distress of separation? Justice Elon spoke of the distress of separation in App. Perm. App. 488/77, *John Doe and Jane Doe v. Attorney General*, 32(3) P.D. 421, as follows, at page 432:

The sages said that matching a person is as hard as the parting of the Red Sea...

And if matching and cooperation of couples are such, then even more so is their severance and their “parting” from each other as hard as the parting of the Red Sea.

And we should not disregard the financial problems entailed in the forced separation of the couple ... Indeed, the magnitude of the right and the strong radiation that shines from within it, would dictate, as if from themselves, that the means that the Ministry of Interior chooses would be softer and more moderate

than the harsh and drastic action that it decided to use. And it is hard to refrain from concluding that the respondents completely disregarded – or gave little account to – these basic rights of the individual to marry and to establish a family. If these comments are made about an alien, they apply even more so to an Israeli citizen who is a partner in the marriage... The respondents should have selected other means to achieve their goal – a goal proper in itself – means that minimize harm to the individual. For example, by increasing the monitoring of persons staying illegally in Israel, expanding examination of the authenticity of the marriage, and the like.

H.C. 3648/97, *Stamka, et. al. v. Minister of Interior, et. al.*, 53(2) P.D. 728, 782-786.

- 10 Simply put, we are dealing with human beings. Men and women will continue to fall in love, dream together, commune with each other, become engaged, marry, and build a family. The Law will cause much suffering and will embitter their lives, their days and nights. The Law will turn joy into suffering, or at least, mix in suffering amidst the joy. It will present the couple with harsh alternatives on a daily basis regarding their private lives and the intimacy between them. The Law will control their private sphere. The Law cares nothing about the public sphere; rather, it penetrates, enters, observes, controls, and exists constantly only in the domain of the individual, even though the marriage is lawful, legitimate, and proper according to Israeli law. Therein lies the further harm caused by the Law in separating the lovers: violation of the right to privacy, enshrined in Article 7 of the Basic Law: Human Dignity and Liberty.
- 11 The Petitioners will argue that the Law is unconstitutional because it infringes upon the constitutional right to equality; the constitutional right to personal liberty of the individual to maintain a family life of his choosing; the constitutional right to privacy; and the constitutional right to due process by retroactively infringing on rights granted to individuals and by failing to grant the right to be heard.
- 12 The Petitioners will further argue that substantial flaws characterized the legislative process in enacting the Law and that these flaws go to the very heart of the matter. The Law does not comply with the limitations provision; it was not legislated for a proper purpose; it is sweeping in scope, lacks internal logic, violates constitutional rights in a manner that is greater than necessary; and is disproportionate.

- 13 Parenthetically, on 30 May 2002, Petitioner 1 petitioned this Honorable Court against Government Decision 1813 of 12 May 2002, in its name and on behalf of fourteen families who were harmed by the decision, among them the family of Petitioners 4-7 of the present petition. In the earlier petition, the petitioners attacked the constitutionality of the Government Decision, which revoked, *inter alia*, the relevance of the gradual process for granting a status in Israel as regards to citizens and permanent residents of Israel married to residents of the West Bank, the Gaza Strip, and/or any person who is of Palestinian origin. Shortly after the filing of the petition, the Honorable Court issued interim orders prohibiting the deportation of the Palestinian spouses. On 14 July 2002, the Court issued an order nisi. The petition is still pending (H.C. 4608/02, *Awad, et. al. v. Prime Minister, et. al.*). Following the passage of the Law, which incorporated the main elements of said Government Decision, a hearing on the Government Decision became less relevant, and it became necessary to directly attack the new law due to the constitutional problems it raises. Upon the filing of the present petition, simultaneous notice will be given to the Honorable Court in H.C. 4608/02, whereby Petitioner 1 gives notice of the filing of this petition and requests that the 30 May 2002 petition remain pending until the final disposition of the present petition.

[...]

Defects in the Legislative Process and the Lack of a Factual Basis

- 61 The Knesset enacted the Law although it did not have a reliable factual and informational basis for either the need for the statute or the statute's implications. Also, the promoters of the legislation failed to present any data to support their arguments for the need for the legislation. On the one hand, they argued that there was a security need for the statute in light of the increasing involvement, in the "course of terrorist attacks," of residents of the West Bank and Gaza Strip who received a status in Israel pursuant to family unification. On the other hand, according to their statistics, *twenty* persons were suspected of being directly or indirectly involved, and this number includes persons involved in the weapons trade, out of a total population of many *thousands* of residents in the West Bank and Gaza Strip who received a status in Israel as part of family unification. The response filed on 13 April 2003 on behalf of the respondents in H.C. 4608/02, which dealt with the legality of the government's decision of 12 May 2002, set forth only six examples in which persons who received a

status in Israel were directly or indirectly involved in perpetrating and assisting in the commission of attacks against Israelis. Therefore, even if these statistics are reliable, they represent only a tiny fraction of the total number of persons who obtained a status through family unification. Surely, it is wrong to use these few cases to learn anything about the danger of persons who receive a status, and even more so as regards to all residents of “the region.”

Page 20 of the minutes of the Knesset’s Internal Affairs Committee meeting, held on 14 July 2003, is attached hereto as Appendix P/12.

The respondents’ response in H.C. 4608/02 is attached hereto as Appendix P/13.

- 62 It should be mentioned that, despite explicit requests of members of the Internal Affairs Committee to delay the second and third hearing of the proposed bill before the Knesset, Committee members were not provided with the data they requested regarding the bill. At the Committee’s meeting on 14 July 2003, Attorney Manny Mazuz, deputy attorney general and representative of the Justice Ministry, was asked about the number of adults among the persons who received a status in Israel as part of family unification. His response was, regrettably, “Why is that important?”

See page 16 of Appendix P/12.

- 63 The data that was provided to legislators is unreliable and therefore cannot provide a factual foundation for the legislation. At the meeting of the Internal Affairs Committee on 14 July 2003, attorney Mazuz contended that from 1994 to 2002, 130,000 to 140,000 Palestinians settled in Israel in the framework of the family unification process. In comparison, Mr. Herzl Gedz, director of the Population Administration, contended that from 1993 to 2002, 22,400 applications were filed to grant a status to residents of the West Bank and Gaza Strip, of which 16,007 were approved.

See pages 4 and 15 of Appendix P/12.

- 64 Mr. Gedz admitted during the hearing in the Internal Affairs Committee that he did not have the precise number of child-applicants, nor did he have the breakdown of figures according to the gender of the applicants. Although the Committee’s acting chairperson asked Mr. Gedz to provide the figures to Committee members, the figures were not provided before the members of the Committee approved the bill for second and third reading.

See page 17 of Appendix P/12.

65 Mr. Gedz also did not have statistics on the number of applications to obtain a status that were submitted by citizens and permanent residents of Israel who are married to Jordanian citizens. The Committee's acting chairperson asked him to provide the information. These figures were not provided to the Committee's members before they approved the bill for second and third reading.

See page 19 of Appendix P/12.

66 Mr. Gedz also did not have the annual breakdowns of the number of applications that were approved, and did not provide them to Committee members before they approved the bill for second and third reading.

See page 19 of Appendix P/12.

67 Attorney Danny Guata, legal advisor of the GSS, was asked about the number of cases in which Jordanian citizens married to citizens or residents of Israel were involved in terrorist attacks. He did not respond. The acting chairperson asked attorney Mazuz to inform the members how European countries and the United States cope with the situation of armed conflict. Mr. Mazuz did not provide said information to the Committee.

See pages 20 and 22 of Appendix P/12.

68 Therefore, the data that was provided did not justify the legislation under review. Even if the argument is accepted whereby twenty (or six) individuals were involved in attacks, these cases (notwithstanding their severity, which cannot be belittled), cannot form the basis for the suspicion against an entire population because of its ethnic identity. Certainly, definite assumptions cannot be derived and proven beyond doubt from these cases. In this context, the comments of the Honorable Justice Heshin in *Stamka* are appropriate:

If, for example, the percentage of fictitious marriages is only a (relatively) small percentage of all marriages in this category, is it justifiable to harass hundreds of innocent couples because of the few transgressors? Is it proper to maltreat the many because of the few? ... The established rule is that, until an authority makes a decision that affects the rights of the individual – whether an individual decision or decisions on general policy – it must collect the relevant data, separate the wheat from the chaff, analyze the data, consider it, determine the significance of the proposed decision and its anticipated consequences, and only then act... Let us assume that one out of every ten marriages is fictitious. Is there a rational connection between the means and the purpose? Is it a proper rational connection where the nine suffer because of the one? It is hard not to get the impression that chance

will be decisive as to whether the policy leads to the uprooting of fictitious marriages or harm to authentic marriages. The damage – the damage to authentic marriages – is real and proven; the benefit – the harm to fictitious marriages – is speculative and unproven. Furthermore, lacking statistics, it is hard to disregard the real possibility that many – those individuals in authentic marriages – will suffer because of the few – those persons in fictitious marriages.

H.C. 3648/97, *Stamka v. Minister of Interior. et. al.*, 53(2) P.D. 728, 777-786.

[...]

- 75 Furthermore, GSS officials at various levels of the agency interfered in the legislative process of the bill, even though the legislation was civil in nature. GSS officials even appeared before the Internal Affairs Committee in a closed session.
- 76 Therefore, the legislature did not have adequate or convincing information that justified the need for the legislation. This testifies to the improper purpose of the legislation and of substantive flaws in its adoption. Also, the legislature did not comply with the statutory requirements of the Notification on the Effect of Legislation on the Rights of the Child Law - 2002.

[...]

For all the above reasons, the Honorable Court is requested to grant the remedies set forth in this petition, and to order the Respondents to pay the costs herein.

[signed]

Hassan Jabareen, Advocate
Counsel for Petitioners

[signed]

Orna Kohn, Advocate
Counsel for Petitioners

State of Emergency

Information Sheet No. 1 – Submitted by Adalah to the United Nations
Human Rights Committee

22 July 2003

ICCPR, Article 4 - State of Emergency and Derogation from International Standards

List of Issues, Question 2:

To what extent is Israel derogating from the provisions of the Covenant, basing itself on a state of emergency notified upon ratification of the Covenant? In light of the Concluding Observations by the Committee (CCPR/C/79/Add.93) and General comment No. 29 (HRI/GEN/1/Rev.5/Add.1), please provide detailed information on restrictions or derogations made by Israel in practice in respect of all the articles of the Covenant, explaining their compatibility with the Covenant.

Israel's Reservation to the ICCPR, 3 October 1991 - "Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens. These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defense of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

List of Issues, Question 3:

What is the status of the petition challenging the state of emergency, currently pending before the Israeli courts (par. 74)?

List of Issues, Question 4:

How is compliance with the Covenant secured when taking counter-terrorism measures, pursuant to Security Council resolution 1373?

Officially-Proclaimed 55-Year State of Emergency (1948 to the Present)

Article 4 of the ICCPR¹ provides that a state of emergency is a situation “which threatens the life of the nation.” General Comment No. 29 (paras. 1 and 2) explains that a state may “derogate temporarily from part of its obligations” by using specific measures which “must be of an exceptional and temporary nature.” The Committee has further underlined in the General Comment that “[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant.”

In May 1948, the Provisional Council of State declared a state of emergency in accordance with Section 9 of the Law and Administration Ordinance - 1948. Israel’s state of emergency remained in force unexamined until 1996, when the Knesset passed the Basic Law: The Government under which the state of emergency must be reviewed and approved annually.

Under Article 38(b) of the amended Basic Law: The Government - 2001, a state of emergency can be declared for a period of one year after which it must be reviewed, and if the situation demands it, it can be extended. The Knesset has routinely extended the state of emergency, without seriously considering whether Israel’s situation warrants such an extension. Thus, Israel has remained under a continuous state of emergency for the past 55 years.

Rather than being of a “temporary and exceptional nature,” the tens of emergency laws and regulations still in use have become an integral part of the legal system in Israel.² The State has incorporated emergency measures into its daily functioning. Upholding a continuous state of emergency, while admitting that “Israel’s civil and government institutions generally function uninterruptedly in normal fashion,”³ contradicts the exceptional nature of emergency powers and allows the state to legitimize unjustified and unnecessary derogations from its international obligations, including the ICCPR. Moreover, as the Committee has stressed repeatedly both in its 1998 concluding observations to Israel (para. 11) and in General Comment No. 29, permitted derogations must be “limited to the extent strictly required by the exigencies of the situation.” In direct contravention of General Comment No. 29 (para. 11), Israel has repeatedly used its declared state of emergency to justify actions in violation of peremptory norms of international law, including the imposition of collective punishment, arbitrary deprivations of liberty, and deviations from fundamental principles of fair trial.

Structure and Scope of Emergency Powers of the State

Three different sources of law authorize the use of emergency powers and the enactment of emergency legislation in Israel.

Defense (Emergency) Regulations - 1945

During the British Mandate, several emergency or defense regulations were enacted and finally consolidated in the Defense (Emergency) Regulations - 1945. These regulations granted the authorities extremely broad powers for the purpose of maintaining public order, and suppressing protests or riots. Among other things, the regulations enabled the destruction and sealing of houses, administrative detention, trial of civilians for security-related offenses in military courts, prohibitions on freedom of movement, deportation, censorship, expropriation of private property, the outlawing and prosecution of “hostile” organizations, restrictions on the use of telecommunications, and so on. The Defense (Emergency) Regulations - 1945 remained in force upon the establishment of the State and were adopted by Israel in 1948 under section 11 of the Law and Administration Ordinance. They formed the main source of law for the military regime, which governed Arab citizens of Israel from 1948 to 1966. With few exceptions and amendments, these regulations remain in force today and are a part of the state’s ordinary legislation. Most disturbingly, they are not dependent on an officially declared state of emergency.⁴

Government Enacted Emergency Legislation Under Section 9 of Law and Administration Ordinance - 1948

During a declared state of emergency, the government, and in urgent cases the Prime Minister alone, is authorized to enact emergency regulations for the defense of the state, public security, and the maintenance of supplies and essential services. Emergency regulations enacted under this authority can and do override ordinary Knesset legislation. These authorities violate the principles of the rule of law and the separation of powers.

The declared state of emergency authorizes the government to invoke extraordinary powers, including a host of special security measures that severely limit and infringe basic rights in various aspects of life. If the declared state of emergency is repealed, this legislation automatically becomes invalid.

Knesset Laws in Response to an Emergency Situation

Several laws have effect during an officially declared state of emergency, although they are enacted and amended by the Knesset, like ordinary statutes.

Supreme Court Petition Challenging the Declared State of Emergency

In May 1999, the Association for Civil Rights in Israel (ACRI) submitted a petition to the Supreme Court of Israel requesting that the Court abolish the state of emergency declared by the government and approved by the Knesset on 1 February 1999.⁵ The petitioner argued that emergency powers vested in the government with a declared state of emergency can only be justified in a genuine emergency that prevents Members of Knesset (MKs) from physically accessing the Knesset building, and thereby prevents them from passing legislation in the ordinary way. ACRI also argued that the state of emergency grants the government unjustifiably broad powers to restrict rights, even where these measures are completely unrelated to any genuine security need, such as the imposition of certain price controls.

In October 1999, the Supreme Court issued an *order nisi* (order to show cause) requesting the state to provide reasons why the state of emergency declaration should not be cancelled. During the Supreme Court hearings, the state declared that measures were being taken to limit the government's reliance on emergency legislation. Based on this announcement, the Court asked the state to provide information as to the specific legislative steps being taken in this regard. At hearings in June 2001, the Supreme Court urged the Justice Ministry to prepare legislation that would abolish the state of emergency, or at least some of the laws that derive force from this state.

From October 1999 to March 2003, the state failed to respond to the Court's request. However, during the most recent Supreme Court hearing in March 2003, the state announced that in light of the current security situation in Israel, it was necessary to uphold the declaration of the state of emergency. The Supreme Court agreed with the state that there had been a significant change in the security situation since the petition was filed, and suggested that ACRI amend the petition to take this into account.⁶ As of this writing, ACRI has not filed an amended petition.

Recent Examples of Emergency Regulations Used against Arab Leaders and Political Activists

We wish to call the Committee's attention to Israel's increasing reliance on emergency laws to suppress political dissent by Arab political leaders and activists in Israel. The use of such powers by the government, targeting members of the Palestinian minority – elected leaders and political activists – amounts to attempted control of freedom of movement, and freedom of

expression and association. The use of these emergency laws against those who voice opposition to the government, particularly against the legitimacy of the occupation, constitutes a severe and excessive infringement of protected rights, which cannot be justified under the exigencies of the declared state of emergency. Such suppression of internal dissent through the application of colonial era legislation in the context of Israel’s “normalized” state of emergency is a threat not only to the rights of the Palestinian minority, but also mainly to the possibility of a democratic regime for all citizens.

Order for the Extension of the Validity of Emergency Regulations (Foreign Travel) - 1948

This Order authorizes the Minister of Interior to prohibit “as he sees fit”⁷ an Israeli citizen from leaving the country, if there is fear that his departure can harm national security. Article 6 states: “[t]he Minister of the Interior may prohibit the departure of any person from Israel if there is reason to apprehend that his departure may impair the security of the State.” The orders are usually based on undisclosed “secret evidence,” and there is no right to a hearing prior to the issuance of the order.

The Order violates the principles of legality and rule of law inherent in the Covenant as a whole, and as provided in General Comment No. 29 (para. 16), which requires that these fundamental principles, including the right to a fair trial, be respected during a state of emergency. Moreover, the use of secret evidence in court to justify a travel ban, effectively denying an individual the ability to challenge or answer the order, severely violates Israel’s fundamental obligations under Article 2(3) of the Covenant to provide an effective remedy. The use of this Order exemplifies Israel’s unnecessary and gross violations of the right to liberty and security of the person (ICCPR Article 9), as well as the right of freedom of movement (ICCPR Article 12).

Mohammed Kannaneh, General Secretary, Abna al-Balad

In March 2002, the Director of the Ministry of Interior’s Population Bureau issued an order prohibiting Mohammed Kannaneh from traveling to Egypt for one year for “security reasons.” After numerous letters were sent challenging the restriction order, it was cancelled in August 2002, six-months after it was issued.

Sheikh Ra’ed Salah, Head of the Islamic Movement in Israel

Sheik Ra’ed Salah was the elected mayor of Umm al-Fahem from 1989 to mid-2001 and remains a prominent Arab leader. As the head of the Islamic Movement in Israel, he is a political, social and religious leader supported by tens of thousands of Palestinian citizens of Israel. In February 2002, then-

Minister of Interior Eli Yishai issued an order under the Emergency Regulations (Foreign Travel) - 1948 prohibiting Sheikh Ra'ed Salah from leaving the country for six months, thus preventing him from completing al-Umra pilgrimage. In July 2002, the Supreme Court dismissed a petition filed by Adalah on behalf of Sheikh Ra'ed Salah, challenging the order on the grounds that it violates due process, and his rights to freedom of movement and freedom of religion.⁸ The Court concluded that despite the entrenchment of freedom of movement in the Basic Law: Human Dignity and Liberty, the state could still prohibit foreign travel based on a "frank and earnest fear" that the applicant's leaving is liable to harm state security. Despite the lack of a prior hearing, and despite the use of secret evidence to justify the restriction order, the Court ruled that Sheikh Ra'ed Salah's right to a fair hearing had been "thoroughly exercised."

The Court further noted that preventing an individual from leaving the country in order to perform a religious pilgrimage is an extremely grave violation of the freedom of religion. Nevertheless, the Court stated that since it is not necessary to perform al-Umra pilgrimage at a particular time of year, Sheikh Ra'ed Salah would be able to perform the pilgrimage following the expiration of the movement restriction against him. The Minister has renewed the travel ban on Sheikh Ra'ed Salah every six months since the first order was issued, and it remains valid to date, one and a half years after it was issued.

MK Dr. Azmi Bishara, Leader of the National Democratic Assembly Party

MK Azmi Bishara and his two parliamentary aides were indicted under Regulation 18(d) of the Emergency Regulations (Foreign Travel) - 1948 for assisting Palestinian citizens of Israel to visit their refugee relatives in Syria, from whom they have been separated for over fifty years. Regulation 18(d) prohibits any Israeli citizen from assisting others in traveling to states listed in Article 2A of The Prevention of Infiltration (Offences and Jurisdiction) Law - 1954, another emergency law, without first obtaining a permit from the Minister of Interior. Only Arab countries are included in the definition of "enemy states." The trips were a humanitarian effort undertaken by MK Bishara. Most of the participants were elderly people whose family members had been forced to flee Palestine for Syria as refugees during the 1948 war, and were subsequently barred by the Israeli authorities from returning to their homes.

Despite the fact that Regulation 17(c) of the Emergency Regulations (Foreign Travel) exempts an individual holding a diplomatic or service passport from criminal prosecution, at the request of the Attorney General, the Knesset lifted the immunity of MK Bishara for the purpose of initiating this criminal prosecution against him.

On 13 March 2002, while the criminal case was pending against MK Bishara, the Knesset passed Amendment 7 to the Emergency Regulations (Foreign Travel). Amendment 7 removes the exemption for MKs to lawfully travel to “enemy states.” Pursuant to the new amendment, MKs may no longer rely on their diplomatic passports to travel to these countries without prior permission, but must now obtain a permit from the Minister of Interior or the Prime Minister.

The Magistrate Court dismissed the indictment against MK Bishara in April 2003 for the sole reason that on the date of the alleged offenses, Regulation 17(c) exempted members of Knesset as holders of service passports from prosecution under the Emergency Regulations (Foreign Travel).⁹

The Emergency Powers (Detention) Law – 1979

The Emergency Powers (Detention) Law - 1979 replaced Regulations 108 and 111 of the Defense (Emergency) Regulations - 1945. The current law grants the Minister of Defense broad discretionary power to issue an administrative detention order against an individual who is a citizen of the state, and allows an individual to be held without charge or trial. Under Article 2(a), the Minister of Defense may order a person detained if he “has reasonable cause to believe that reasons of state security or public security require that a particular person be detained.” Such an order permits detention for an initial period of six months and may be renewed indefinitely. The administrative detention procedure permits an individual to be held without charge or trial. The Detention Law is not an emergency law at all but effectively functions as a regular law.

The Detention Law infringes several non-derogable rights listed under Article 4 of the ICCPR, including Article 7 (freedom from torture or cruel, inhumane or degrading treatment or punishment) and Article 16 (recognition as a person before the law). Further, General Comment No. 29 obligates state parties to provide an effective remedy (ICCPR Article 2(3)) based on principles of rule of law, legality and the right to a fair trial – all non-derogable rights.

As Israel has been in a declared state of emergency since 1948, the Minister of Defense has had the power to administratively detain individuals at all times, even if there is no genuine state of emergency that warrants such an extraordinary act. Despite Israel’s stated derogation from Article 9 (right to liberty and security of person), a declared state of emergency cannot be used to justify measures not strictly required by the exigencies of the situation.

While such an order is subject to judicial review,¹⁰ Article 9 of the Detention Law provides that the initial proceedings to approve the administrative detention order will take place *in camera*, thus violating the principle of a public hearing and the individual’s right to due process as set out in Article 9 of the Convention.

Mr. Ghassan Athamleh, Central Committee Member, National Democratic Assembly Party

In November 2000, the General Security Service (GSS) detained Mr. Ghassan Athamleh, a Palestinian citizen of Israel, and a member of the Central Committee of the National Democratic Assembly party. Following a 10-day investigation by the GSS, during which he was held in detention *incommunicado* and prohibited from meeting with a lawyer,¹¹ he was placed under administrative detention for six months. He was not indicted or convicted of any crime. Adalah represented Mr. Athamleh. Both the District Court and the Supreme Court approved the administrative detention order, signed by then-Minister of Defense and Prime Minister Ehud Barak.¹² Amnesty International recognized Mr. Athamleh as a possible prisoner of conscience.

Part of the proceedings in both the District Court and the Supreme Court were held without the presence of Mr. Athamleh's lawyer. During these hearings, "secret evidence" was discussed. Mr. Athamleh's lawyer was refused permission to inspect the evidence, and refused access to several key witnesses, who were available only to the prosecutor and the judge. The judges chose to exclude Mr. Athamleh and his counsel from both the presentation of the evidence, and from hearing the arguments made by the GSS and the state prosecutor in favor of Mr. Athamleh's detention under Article 6(c) of the law. Article 6(c) of the Detention Law states that "... the District Court is allowed to receive evidence, even without the presence of the detainee or his counsel, or without revealing it to them, if after he [the President of the District Court] has reviewed the evidence or heard arguments, even without the presence of the detainee and his counsel, he is convinced that disclosing the evidence to the detainee or to his counsel might endanger state security or public security."

The Prevention of Terrorism Ordinance - 1948

This Ordinance was passed by the Provisional Council of State in 1948 and is still in use today. It outlines numerous offenses that permit conviction of an accused even where no consequences result from the prohibited conduct. The validity of this Ordinance depends upon a declared state of emergency.

Provision 3 of the Ordinance states that membership in a terrorist organization is an offense punishable by up to five years imprisonment. Mere membership is sufficient to indict and convict someone under this provision, and does not require direct or indirect involvement in any violent activities.

Provision 4(g) prohibits any act which identifies or sympathizes with a terrorist organization in a public place or a place in public view, and includes "flying a flag or displaying a symbol or slogan or by causing an anthem or slogan to be heard, or any other similar overt act clearly manifesting such

identification or sympathy as aforesaid.” An individual indicted under provision 4(g) “shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine up to NIS 22,500.” In order to convict, it is not necessary to prove identification with an activity undertaken by a terrorist organization, or to prove that the result of the act led to violence, or public disorder, or clearly endangered public safety.

The Ordinance contains several provisions that severely and unnecessarily violate basic rights including Article 18 (freedom of thought, conscience and religion), a non-derogable right; Article 19 (freedom of opinion and expression); Article 22 (freedom of association); and Article 27 (rights of minorities to culture, religion and language), as well as the principles of legality, rule of law and the right to a fair trial which the Committee has stressed must be respected even in times of emergency. The State’s use of the Ordinance against Arab leaders shows that it is abusing its extraordinary emergency powers against citizens, and is well outside the scope of the ICCPR, which provides that emergency regulations be such as are “strictly required by the exigencies of the situation.”

MK Dr. Azmi Bishara, Leader of the National Democratic Assembly Party

In 2001, MK Dr. Azmi Bishara was indicted for supporting a terrorist organization under provisions 4 (a), (b), and (g) of the Prevention of Terrorism Ordinance - 1948 based on statements he made in two political speeches in Syria and Umm al-Fahem. In these speeches, he expressed support for the right to resist the Israeli occupation of the Palestinian territories and South Lebanon.¹³ The case is still pending before the Magistrate Court.

At the request of the Attorney General, the Knesset voted to lift the immunity of MK Bishara for the purposes of filing this criminal charge against him. The removal of MK Bishara’s immunity is an unprecedented event in the history of Israeli politics. It is the first time that a member of Knesset has been stripped of his immunity for voicing political dissent in the course of performing his duties as a public representative. There was no legal basis for lifting MK Bishara’s immunity. His statements, addressing the political situation in the Middle East and the dangers behind Prime Minister Ariel Sharon’s government, are classic cases of political speech and must enjoy full legal protection. He should not have been criminally prosecuted for expressing opinions in accordance with his political platform.

While the criminal case against MK Bishara was pending, on 22 July 2002, the Knesset passed Amendment 29 to the Law of Immunity of Members of Knesset: Their Rights and Their Duties (1951). The new amendment provides that any statement or action, which “supports an armed struggle against the

state of Israel,” is deemed not to be an official part of an MK’s duties. Statements or acts that fall outside of an MK’s official duties are not protected by his/her parliamentary immunity, and thus may be criminally prosecuted.

Sheikh Ra’ed Salah, Head of the Islamic Movement in Israel

On 13 May 2003, approximately 1,000 police and security forces raided the homes of Islamic Movement members in Umm al-Fahem, and placed 15 members under arrest including Sheikh Ra’ed Salah. Scores of documents and computers were also confiscated from the offices of various charity organizations associated with the Islamic Movement. The arrests, undertaken like a military operation against citizens of the state, marked a further escalation in the government’s policy against Arab leaders, as well as social and political activists from among the Palestinian minority in Israel.

On 24 June 2003, the state prosecutor submitted an indictment against Sheikh Ra’ed Salah and four other members of the Islamic Movement, including the mayor of Umm al-Fahem; as well as two Arab humanitarian organizations. The indictment alleges that the Islamic Movement members are “supporting terror” by transferring funds to charity organizations associated with Hamas in the 1967 Occupied Territories. Sheikh Ra’ed Salah faces charges under the Prevention of Terrorism Ordinance -1948, Article 3 (membership in a terrorist organization), as well as numerous charges under the Defense (Emergency) Regulations - 1945, in particular Regulation 85.1.a (membership in an illegal association), b (holding a position in an unauthorized association), and g (holding funds belonging to an illegal organization); as well as Regulation 73 (providing a service to an illegal association). All of the men have been detained without bond for over two months.

Basel Amara, Political Protestor

On 20 March 2003, the Nazareth Magistrate Court convicted Basel Amara, a 23-year-old Palestinian citizen of Israel, of supporting and identifying with a terrorist organization under provision 4(g) of the Ordinance for raising the picture of the Hezbollah General Secretary, Hassan Nasrallah.¹⁴ Mr. Amara raised the photograph during a Land Day demonstration in 2002. Land Day marks the date of 30 March 1976, when Israeli forces killed six Palestinian citizens of Israel and wounded hundreds more, during demonstrations against a wave of land expropriation in the Galilee. Land Day commemorates the collective struggle of Palestinians against land confiscation and dispossession. Despite the fact that raising the photograph caused no harm or public disorder, and there was no imminent danger of a resulting violent act, the Court convicted Mr. Amara. An appeal is pending before the Haifa District Court.¹⁵

The Press Ordinance - 1933

Dating back to the British Mandate, the Press Ordinance - 1933 requires that all newspapers must obtain a permit from the State before they are allowed to publish. Under Article 4.2, no newspaper can be printed without obtaining a permit from the district supervisor. The prerequisite of obtaining a permit gives power to the state to determine who is and who is not allowed to have their opinion heard. Under Article 19, the Minister of Interior may suspend or entirely stop the publication of a newspaper for a period of time he deems appropriate if the newspaper “poses a danger to the public order.” The wide discretion of government officials to grant, refuse or place conditions on the necessary permit was further broadened by Article 94 of the Defense (Emergency) Regulations - 1945 which states: “The regional supervisor is authorized *as he sees fit, and without providing any reasons, to refuse to grant such a permit.*” [Emphasis added]

The Ordinance contains several provisions that severely and unnecessarily violate basic rights, including Article 18 (freedom of thought, conscience and religion), a non-derogable right; Article 19 (freedom of opinion and expression); Article 22 (freedom of association); Article 27 (rights of minorities to culture, religion and language); as well as the principles of legality, rule of law and the right to a fair trial which the Committee has stressed must be respected even in times of emergency.

In March 2002, ACRI submitted a petition to the Supreme Court demanding that the Court nullify the Press Ordinance, as well as Article 94 of the Defense (Emergency) Regulations, both of which grant wide discretionary powers to ban the publication of newspapers that fail to get official government approval.¹⁶ In its petition, ACRI argued that the legislation authorizing such gross violations of freedom of expression, occupation (employment), and the right to liberty is entirely out of place in a democratic state.

According to a press release issued by ACRI regarding this case, on 30 April 2003, the Minister of Interior Avraham Poraz announced that the obligation to register in order to publish newspapers will be cancelled and the authority to close newspapers will be transferred from the Minister of Interior to the courts, which will rule on each government request to close a newspaper. The Minister argued that due to Israel’s difficult security situation, the government, subject to judicial review, needs the power to close down newspapers. However, it is Adalah’s position that legislation, which grants authority to government officials to prevent publication as they see fit, is a gross infringement of freedom of expression, freedom of the press, and freedom of information.

Closure of Arabic Language Newspapers

The authority granted under both the Press Ordinance and Article 94 of the Defense (Emergency) Regulations has been actively exercised in the past few years. In December 1991, the Jerusalem newspaper *Ma' An-Nas* had its permit revoked by the Jerusalem regional supervisor without being given any facts or evidence to explain the basis of the revocation. Only after a hearing at the Supreme Court did the supervisor reverse his decision. In September 1994, the Haifa district officer wrote to the editor of *Al-Sinnara* stating that he would revoke the newspaper's permit based on Article 11 of the Press Ordinance, on the grounds of the intended change of editors. After the editors' lawyers intervened, and after approving the appointment of a new editor, the district officer agreed not to revoke the permit.

In December 2002, then-Minister of Interior Eli Yishai issued a two-year closure order against the Arabic language weekly newspaper *Sawt Al-Haqq Wal-Hurriya* under Article 19(2)(a) of the Press Ordinance. The newspaper is affiliated with the extra-parliamentary branch of the Islamic Movement in Israel, led by Sheikh Ra'ed Salah, and was closed for three months in June 1990 during the first Intifada. In 2002, the Minister of Interior alleged that the newspaper, "justifies the use of violence and terror against Israelis, while extolling militancy and preaching continuously for people to die as saints." The closure order failed to provide any specific references to articles that could pose "a danger to the public order."

Additional Examples of Emergency Laws Still in Use

The Emergency State Search Authorities Law (Temporary Order) - 1969

This emergency law allows state authorities to conduct searches of persons and their property, without a judicially approved search warrant. The powers granted under this emergency law deviate from the legal norms set out in the Penal Law (Enforcement Authorities – Searching the Body of a Suspect) – 1996, that constrain the power to search a person or his property by listing specific conditions and circumstances under which such authority can be used. This emergency law grants any police officer or soldier the power to search a person and his or her property when the search is necessary to uphold national security. This power can lead to severe and unjustified violations of the right to privacy and to property. [ICCPR Article 17] Further, such wide authority, based entirely on the discretion of government officials, does not adhere to the principles of rule of law or legality.

The State of Emergency Land Appropriation Administration Law - 1949

This law enables the state to expropriate private lands for a wide variety of intended uses, including maintaining public services, Jewish immigrant absorption, and soldier rehabilitation. Combined with Israel's perpetual state of emergency, which grants legitimacy to this law, this emergency law results in a gross infringement of the right to property and contravenes Article 17 of the ICCPR.

The Control of Products and Services Law - 1957

This law grants government ministers wide discretion during a state of emergency to interfere in the state's economic affairs, as well as the production and distribution of products and services. This law enables a wide infringement of the freedom of occupation (employment) and property that contradicts Article 1 of the ICCPR.

The Prevention of Infiltration (Offences and Jurisdiction) Law - 1954

Anyone who knowingly and unlawfully enters Israel, as a citizen of Lebanon, Syria, Egypt, Trans-Jordan, Saudi Arabia, Iraq or Yemen, will be sentenced to five years imprisonment. Furthermore, the law imposes a penalty of four years imprisonment or a fine on any "person who knowingly and unlawfully leaves Israel for Lebanon, Syria, Egypt, Trans-Jordan, Saudi Arabia, Iraq, Yemen or any part of Eretz Israel outside Israel." The law is valid so long as the declared state of emergency remains in place.

Proposed Questions for Israel

- 1 Please provide data on the frequency of the state's use of emergency laws and a breakdown, by law, on their use against Jewish and Palestinian citizens of Israel?
- 2 Given the extensive use of emergency regulations against Arab political leaders and activists in Israel, what measures, if any, are being taken to ensure that emergency legislation is not used to silence valid criticism and dissent in a "democratic state"?
- 3 Where the state wishes to prosecute an individual based on his/her speech, how does it decide whether to invoke emergency regulations or to proceed under the Penal Law? What criteria are used to decide upon this issue?

- 4 In recent Supreme Court litigation concerning the declared state of emergency, the state's position was that the security situation had changed and thus, no actions could be taken to repeal or amend the numerous emergency regulations as well as the declaration. What is the state's position today?
- 5 Defense (Emergency) Regulations – 1945 confer sweeping, extraordinary powers on the government that infringe on individual rights and are not dependent on a declared state of emergency. What is the state's justification for not repealing these regulations?
- 6 How will the state ensure that the emergency regulations are used only as needed in the exigencies of the situation?
- 7 Please clarify the state's position regarding the Press Ordinance, following the Minister of Interior's public statement that he intends to amend it?
- 8 Given that the state's practice of administrative detention grossly infringes several non-derogable provisions of ICCPR Article 4 even in a state of emergency, how will the state bring itself within the strict guidelines of the Covenant and General Comment No. 29 to ensure that the principles of effective judicial review, due process, and fair trial are respected?

End Notes:

- 1 Paragraph 7 of the General Comment No. 29 explains: Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhumane or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfill a contractual obligations), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that were in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion).
- 2 Emergency legislation still in use includes:
 Press Ordinance - 1933
 Defense (Emergency) Regulations - 1945
 Order for the Extension of the Validity of Emergency Regulations (Foreign Travel) – 1948
 Prevention of Terrorism Ordinance – 1948
 Ship Order (Limitation of Transfer and Mortgaging) – 1948
 Fire Arms Law – 1949
 State of Emergency Land Appropriation Administration Law – 1949
 Prevention of Infiltration (Offences and Jurisdiction) Law – 1954
 The Control of Products and Services Law – 1957
 Emergency State Search Authorities Law (Temporary Order) - 1969
 Extension of Emergency Regulation Law (Legal Administration and Additional Regulations) -1969
 Extension of Emergency Regulations Law – 1973
 Emergency Powers (Detention) Law – 1979
 Security Service (Combined Version) – 1986
 Registration of Equipment and its Enlistment to the IDF Law – 1987
- 3 Israel's Combined Report to the UNHRC (1998), para. 123.
- 4 That the validity of the regulations does not depend on a declared state of emergency, see Amnon Rubinstein & Barak Medina, *The Constitutional Law of the State of Israel* (5th ed.) (Tel - Aviv: Shoken Publishing House Ltd., 1996) at 810. See also Shimon Shetreet, "A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law," 14 *Israel Yearbook on Human Rights* 182 (1984) at 183-184 (the Courts held that neither the provisions of the Mandate nor the language of, nor the qualifications contained in Section 11 excluded the reception of the Defense Regulations, including Regulation 11 dealing with administrative detention. The application of the Defense Regulations does not depend upon a proclamation of a state of emergency under Section 9 of the Law and Administration Ordinance - 1948).
- 5 (High Court) H.C. 3091/99, *The Association for Civil Rights in Israel v. The Knesset of Israel* (case pending).
- 6 Moshe Reinfeld, "Court Tells ACRI to Revise Petition against Emergency Regulations," *Ha'aretz English Edition*, 24 March 2003.
- 7 Article 7 of the Emergency Regulations (Foreign Travel) Law – 1948 states: "Where the

Minister of Interior is authorized to grant permission, or impose a prohibition, under regulations 4 to 6, he may grant the permission, or revoke the prohibition, subject to such conditions, restrictions and limitations as he sees fit." [Emphasis added]

- 8 H.C. 4706/02, *Sheikh Ra'ed Salah, et. al. v. Minister of Interior*, unpublished decision delivered on 17 July 2002.
- 9 Criminal Case 5196/01, *The State of Israel v. Azmi Bishara, et. al.* (case pending).
- 10 The standard of review is that the judge "shall set aside the detention order if it has been proven to him that the reasons for which [the order] was made were not objective reasons of state security or public security or that it was made in bad faith or from irrelevant consideration."(art.4) The detained person has the burden of proof for meeting this standard (art.6).
- 11 The GSS banned Mr. Athamleh from meeting with a lawyer, pursuant to Article 35 of the Criminal Procedure (Enforcement Powers) Arrest Law – 1996.
- 12 (Administrative Detention) A.D. 1/00, *The State of Israel v. Ghassan Athamleh* (Dist. Ct. Nazareth, 14 January 2001); (Appeal) A.A.D. 1232/01, *Ghassan Athamleh v. The Minister of Defense* (unpublished decision, Sup. Ct., 12 March 2001).
- 13 Criminal Case 1087/02, *The State of Israel v. Azmi Bishara* (case pending).
- 14 Criminal Case 2212/02, *The State of Israel v. Basel Amara* (Mag. Ct., Nazareth, decision delivered on 20 March 2003).
- 15 Criminal Appeal 1181/03, *Basel Amara v. The State of Israel* (case pending).
- 16 H.C. 2459/02, *The Association for Civil Rights in Israel v. Ministry of Interior* (case pending).

Concluding Observations: UN Human Rights Committee – Israel, 2003

International Covenant on Civil and Political Rights

CCPR/CO/78/ISR

21 August 2003

Seventy-eighth session

CONSIDERATION OF REPORTS SUBMITTED BY STATE PARTIES UNDER ARTICLE 40 OF THE COVENANT

- 1 The Committee considered the second periodic report of Israel (CCPR/C/ISR/2001/2) at its 2116th, 2117th and 2118th meetings (see CCPR/C/SR.2116-2118), held on 24 and 25 July 2003, and adopted the following concluding observations at its 2128-2130th meetings (CCPR/C/SR.2128-2130), held on 4 and 5 August 2003.

A. Introduction

- 2 The Committee welcomes the second periodic report submitted by Israel and expresses its appreciation for the frank and constructive dialogue with a competent delegation. It welcomes the detailed answers, both oral and written, that were provided to its written questions.

B. Factors and Difficulties Affecting the Implementation of the Covenant

- 3 The Committee has noted and recognizes the serious security concerns of Israel in the context of the present conflict, as well as the difficult human rights issues relating to the resurgence of suicide bombings which have targeted Israel's civilian population since the beginning of the second intifada in September 2000.

C. Positive Factors

- 4 The Committee welcomes the positive measures and legislation adopted by the State party to improve the status of women in Israeli society, with a view to promoting gender equality. In this context, it welcomes in particular the amendment to the Equal Rights for Women Law (2000), the Employment of Women Law (Amendment 19), the adoption of the Sexual Harassment Law (1998), the Prevention of Stalking Law (2001), the Rights of Victims of an Offence Law (2001), and other legislative measures designed to combat domestic violence. It further welcomes the establishment of the Authority for the Advancement of the Status of

Women but would appreciate further, up-to-date information on its responsibilities and functioning in practice.

- 5 The Committee welcomes the measures taken by the State party to combat trafficking in women for the purpose of prostitution, in particular the Prohibition on Trafficking Law enacted in July 2000 and the prosecution of traffickers since that date.
- 6 The Committee notes the efforts to increase the level of education for the Arab, Druze and Bedouin communities in Israel. In particular, it notes the implementation of the Special Education Law and the Compulsory Education Law Amendment (2000).
- 7 The Committee also notes the State party's information about the significant measures taken for the development of the Arab sector, in particular through the 2001-2004 Development Plan.
- 8 The Committee welcomes legislation adopted by the State party in respect of persons with disabilities, in particular the enactment of the Equal Rights for People with Disabilities Law (1998). It expresses the hope that those areas where the rights of disabled people, acknowledged by the delegation as not being respected and requiring further improvements, will be addressed as soon as possible.
- 9 The Committee notes the efforts by the State party to provide better conditions for migrant workers. It welcomes the amendment to the Foreign Workers Law and the increase in penalties imposed on employers for non-compliance with the law. It also welcomes free access to labour courts for migrant workers and the provision of information to them about their rights in several foreign languages.
- 10 The Committee welcomes the Supreme Court's judgment of September 1999 which invalidated the former governmental guidelines governing the use of "moderate physical pressure" during interrogations and held that the Israeli Security Agency (ISA) has no authority under Israeli law to use physical force during interrogations.

D. Principal Subjects of Concern and Recommendations

- 11 The Committee has noted the State party's position that the Covenant

does not apply beyond its own territory, notably in the West Bank and in Gaza, especially as long as there is a situation of armed conflict in these areas. The Committee reiterates the view, previously spelled out in paragraph 10 of its concluding observations on Israel's initial report (CCPR/C/79/Add.93 of 18 August 1998), that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.

The State party should reconsider its position and to include in its third periodic report all relevant information regarding the application of the Covenant in the Occupied Territories resulting from its activities therein.

- 12 While welcoming the State party's decision to review the need to maintain the declared state of emergency and to prolong it on a yearly rather than an indefinite basis, the Committee remains concerned about the sweeping nature of measures during the state of emergency, that appear to derogate from Covenant provisions other than article 9, derogation from which was notified by the State party upon ratification. In the Committee's opinion, these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights (e.g. articles 12, paragraph 3; 19, paragraph 3 and; 21, paragraph 3). As to measures derogating from article 9 itself, the Committee is concerned about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclosure of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what

in the Committee's view is permissible pursuant to article 4. In this regard, the Committee refers to its earlier concluding observations on Israel and to its general comment No. 29.

The State party should complete as soon as possible the review initiated by the Ministry of Justice of legislation governing states of emergency. In this regard and pending the adoption of appropriate legislation, the State party should review the modalities governing the renewal of the state of emergency and specify the provisions of the Covenant it seeks to derogate from, to the extent strictly required by the exigencies of the situation (art. 4).

- 13 The Committee is concerned that the use of prolonged detention without any access to a lawyer or other persons of the outside world violates articles of the Covenant (arts. 7, 9, 10 and 14, para. 3 (b)).

The State party should ensure that no one is held for more than 48 hours without access to a lawyer.

- 14 The Committee is concerned about the vagueness of definitions in Israeli counter-terrorism legislation and regulations which, although their application is subject to judicial review, appear to run counter to the principle of legality in several aspects owing to the ambiguous wording of the provisions and the use of several evidentiary presumptions to the detriment of the defendant. This has adverse consequences on the rights protected under article 15 of the Covenant, which is non-derogable under article 4, paragraph 2, of the Covenant.

The State party should ensure that measures designed to counter acts of terrorism, whether adopted in connection with Security Council resolution 1373 (2001) or in the context of the ongoing armed conflict, are in full conformity with the Covenant.

- 15 The Committee is concerned by what the State party calls "targeted killings" of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6. While noting the delegation's observations about respect for the principle of proportionality in any response to terrorist activities against civilians and its affirmation that only persons taking direct part in hostilities have

been targeted, the Committee remains concerned about the nature and extent of the responses by the Israeli Defence Force (IDF) to Palestinian terrorist attacks.

The State party should not use “targeted killings” as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body. Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.

- 16 While fully acknowledging the threat posed by terrorist activities in the Occupied Territories, the Committee deplores what it considers to be the partly punitive nature of the demolition of property and homes in the Occupied Territories. In the Committee’s opinion, the demolition of property and houses of families some of whose members were or are suspected of involvement in terrorist activities or suicide bombings contravenes the obligation of the State party to ensure without discrimination the right not to be subjected to arbitrary interference with one’s home (art. 17), freedom to choose one’s residence (art. 12), equality of all persons before the law and equal protection of the law (art. 26), and not to be subject to torture or cruel and inhuman treatment (art 7).

The State party should cease forthwith the above practice.

- 17 The Committee is concerned about the IDF practice, in the Occupied Territories of using local residents as “volunteers” or shields during military operations, especially in order to search houses and to help secure the surrender of those identified by the State party as terrorist suspects.

The State party should discontinue this practice, which often results in the arbitrary deprivation of life (art. 6).

- 18 The Committee is concerned that interrogation techniques incompatible with article 7 of the Covenant are still reported to be frequently resorted to and the “necessity defence” argument, which is not recognized under

the Covenant, is often invoked and retained as a justification for ISA actions in the course of investigations.

The State party should review its recourse to the “necessity defence” argument and provide detailed information to the Committee in its next periodic report, including detailed statistics covering the period since the examination of the initial report. It should ensure that alleged instances of ill-treatment and torture are vigorously investigated by genuinely independent mechanisms, and that those responsible for such actions are prosecuted. The State party should provide statistics from 2000 to the present day on how many complaints have been made to the Attorney-General, how many have been turned down as unsubstantiated, how many have been turned down because the defence of necessity has been applied and how many have been upheld, and with what consequences for the perpetrators.

- 19 While again acknowledging the seriousness of the State party’s security concerns that have prompted recent restrictions on the right to freedom of movement, for example through imposition of curfews or establishment of an inordinate number of roadblocks, the Committee is concerned that the construction of the “Seam Zone,” by means of a fence and, in part, of a wall, beyond the Green Line, imposes additional and unjustifiably severe restrictions on the right to freedom of movement of, in particular, Palestinians within the Occupied Territories. The “Seam Zone” has adverse repercussions on nearly all walks of Palestinian life; in particular, the wide-ranging restrictions on freedom of movement disrupt access to health care, including emergency medical services, and access to water. The Committee considers that these restrictions are incompatible with article 12 of the Covenant.

The State party should respect the right to freedom of movement guaranteed under article 12. The construction of a “Seam Zone” within the Occupied Territories should be stopped.

- 20 The Committee is concerned by public pronouncements made by several prominent Israeli personalities in relation to Arabs, which may constitute advocacy of racial and religious hatred that constitutes incitement to discrimination, hostility and violence.

The State party should take necessary action to investigate, prosecute

and punish such acts in order to ensure respect for article 20, paragraph 2, of the Covenant.

- 21 The Committee is concerned about Israel's temporary suspension order of May 2002, enacted into law as the Nationality and Entry into Israel Law (Temporary Order) on 31 July 2003, which suspends for a renewable one-year period, the possibility of family reunification, subject to limited and subjective exceptions especially in the cases of marriages between an Israeli citizen and a person residing in the West Bank and in Gaza. The Committee notes with concern that the suspension order of May 2002 has already adversely affected thousands of families and marriages.

The State party should revoke the Nationality and Entry into Israel Law (Temporary Order) of 31 July 2003, which raises serious issues under articles 17, 23 and 26 of the Covenant. The State party should reconsider its policy with a view to facilitating family reunification of all citizens and permanent residents. It should provide detailed statistics on this issue, covering the period since the examination of the initial report.

- 22 The Committee is concerned about the criteria in the 1952 Law on Citizenship enabling the revocation of Israeli citizenship, especially in its application to Arab Israelis. The Committee is concerned about the compatibility with the Covenant, in particular article 24 of the Covenant, of the revocation of citizenship of Israeli citizens.

The State party should ensure that any changes to citizenship legislation are in conformity with article 24 of the Covenant.

- 23 Notwithstanding the observations in paragraphs 4 and 7 above, the Committee notes with concern that the percentage of Arab Israelis in the civil service and public sector remains very low and that progress towards improving their participation, especially that of Arab Israeli women, has been slow (arts. 3, 25 and 26).

The State party should adopt targeted measures with a view to improving the participation of Arab Israeli women in the public sector and accelerating progress towards equality.

- 24 While noting the Supreme Court's judgment of 30 December 2002 in the

case of eight IDF reservists (judgement HC 7622/02), the Committee remains concerned about the law and criteria applied and generally adverse determinations in practice by military judicial officers in individual cases of conscientious objection (art. 18).

The State party should review the law, criteria and practice governing the determination of conscientious objection, in order to ensure compliance with article 18 of the Covenant.

- 25 The State party is invited to disseminate widely the text of its second periodic report, the replies provided to the Committee's list of issues and the present concluding observations.
- 26 In accordance with article 70, paragraph 5, of the Committee's rules of procedure, the State party is invited to provide, within one year, relevant information on the implementation of the Committee's recommendations in paragraphs 13, 15, 16, 18 and 21 above. The State party's third periodic report should be submitted by 1 August 2007.

