



Position Paper

The Legality of the Palestinian Flag in Israeli Law

March 2023

Introduction

The Palestinian flag is a primary national symbol of the Palestinian people. It expresses their sense of collective belonging and national identity and, throughout the history of the State of Israel, the Palestinian flag has been used to repress and persecute Palestinians. Recently, this phenomenon has grown and we are witnessing recurring calls to ban it in public spaces in Israel.

During negotiations for the formation of the newly-inaugurated government of Israel, headed by Benjamin Netanyahu, a coalition agreement was signed between the Otzma Yehudit [Jewish Power] political party and the Likud party which states, inter alia, that “within six months, the government will advance a law prohibiting the raising and/or display of PLO [Palestine Liberation Organization] flags in institutions supported by the state or local authorities.”¹ Immediately upon his appointment as Minister of National Security, MK Itamar Ben-Gvir declared that he had issued a directive authorizing “every police officer of any rank... to remove PLO flags from public spaces”, under the pretext that “flying the PLO flag is an act of support for a terrorist organization.”²

Immediately afterwards, there was an increase in the number of reports on attempts by police to prevent the hoisting of the Palestinian flag and of arrests during demonstrations for merely waving it. For example, on 27 January 2023, during a protest rally in Haifa against an Israeli army raid that took place in Jenin that week, five demonstrators were detained after a police officer present at the scene demanded the removal of the flags on the pretext that the flag “may cause unrest, it causes unrest, it supports terrorism”.³

On 5 March 2023, the Ministerial Committee for Legislation decided to support a proposed bill, in its preliminary reading at the Knesset, which goes even further than the commitments of the government as stipulated in the coalition agreements. According to this proposed law, which was

¹ Government of Israel, “Coalition agreement for the establishment of a national government between the Likud Party in the 25th Knesset and the Otzma Yehudit Party in the 25th Knesset”, Knesset website: Basic guidelines and coalition agreements (drawn up and signed on 28 December 2022). Available (in Hebrew) at: <https://main.knesset.gov.il/mk/government/Documents/CA37-Otzma.pdf>.

² Alon Hachmon, “Minister Ben-Gvir Instructed the Police Commissioner to remove PLO flags from public spaces”, *Maariv Online* (8 January 2023). Available (in Hebrew) at: <https://www.maariv.co.il/news/law/Article-971076>.

³ From a video clip was distributed by the police on the protest demonstration in Haifa of 27 January 2023. Available (in Hebrew) at: https://www.adalah.org/uploads/uploads/Haifa_demonstration_27_01_2023.mp4.

submitted by MK Almog Cohen of the Jewish Power party,⁴ an assembly of three or more people displaying flags of “hostile entities” or of a body that “does not recognize Israel as a Jewish and democratic state”, will be deemed an illegal assembly, and the penalty for participation in such an assembly will be one year in prison. The bill additionally seeks to grant the police the authority to classify such gatherings as “riots” and disperse them.

This position paper addresses the legal status of displaying the Palestinian flag in the public sphere in Israel. It also describes the hostile and inciting discourse and governmental practices over the years regarding the hoisting of the Palestinian flag, and challenges the basic assumptions underlying the current legal situation, inter alia, through a historical account of the evolution of the flag into the flag of the Palestinian people.

It must be noted at the outset that there is no explicit prohibition within Israeli law on displaying the Palestinian flag; a directive issued by the Attorney General after the Oslo Accords confirms that the act of waving this flag is not prohibited, and there has been no known criminal conviction for displaying the flag since that time. Therefore, attempts by police officers to remove the flag during demonstrations, and the detention of individuals for waving it, are unlawful and constitute a clear transgression of legal authority.

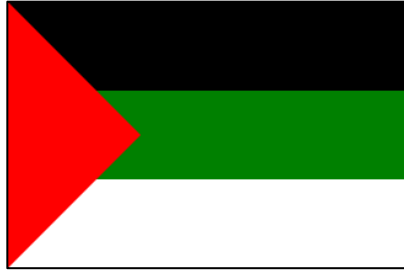
As we explain in the section on historical background, the flag is the flag of the Palestinian people; in the Attorney General's directive, however, it is erroneously identified as the flag of the Palestine Liberation Organization (PLO). As a result, a duality was created regarding its designation as both the flag of the Palestinian people and the flag of the PLO, for the purpose of portraying displays of the flag as potential “support and identification with a terrorist organization”. We suggest that this duality is contrary to the principle of legality in criminal law below.

A. The historical evolution of the Palestinian flag

The most comprehensive study on the history of the Palestinian flag was conducted in 1970 by the historian Dr. Khairiya Qasmia.⁵ According to this study, the origin of the flag is the Pan-Arab flag that was adopted by the Arab National Movement a year after the outbreak of the Arab Revolt against the Ottoman Empire (1916-1918) during the First World War. The Pan-Arab flag itself was based on the flag adopted in March 1914 by *al-Fatat* (جمعية العربية الفتاة/The Young Arab Association), and consisted of three horizontal stripes in green, white, and black, representing three dynasties of the Islamic Caliphate: the Fatimid (green), the Umayyad (white) and Abbasid (black). The red triangle was added to the flag in 1917 to represent the Hashemite dynasty. The flag was soon recognized as the flag of the Arab revolution and of the prospective Arab state to be established on land liberated from Ottoman rule.

⁴ The proposed Penal Law (Amendment - Prohibition of Displaying Flag of Hostile Entity) Bill, 2022 (P/617/25), is available (in Hebrew) at: https://fs.knesset.gov.il/25/law/25_lst_1384615.docx.

⁵ Khiriya Qasmia, *The Palestinian Flag* (Palestinian Studies – No. 21, Research Center, the Palestine Liberation Organization, 1970).



Pan-Arab flag 1917



Al-Fatat flag 1914

However, the vision of an Arab state was never realized due to the active opposition of Great Britain and France, who had divided the territories of the Levant between them. Nevertheless, in the ensuing years, the Pan-Arab flag, whether in its original form or subsequent designs, continued to be used by Arab nations in the region. For example, with the declaration of the independence of the short-lived Arab kingdom in Syria, the borders of which extended to all parts of the Levant (Syria, Lebanon, Iraq, Jordan, and Palestine), the pan-Arab flag was adopted with the addition of a seven-point star placed in the red triangle. As early as 1919, the Palestinians demanded the establishment of an independent Palestinian government that would form part of a federal union with the greater Syrian state. The declaration of independence by the Arab kingdom in Syria around a year later was, therefore, celebrated by Palestinians who, however, continued to display the original pan-Arab flag. This flag evolved over the years into a local Palestinian symbol, while modified versions of it were adopted in Jordan and Iraq.

Despite the attempts of the British authorities to limit the flying of this flag, from the 1920s onwards it became a symbol of local Palestinian nationalism and of the Palestinian struggle for the right to self-determination both against the British Mandatory authorities and against the threat posed by the Zionist movement. According to Dr. Qasmia:

“The Palestinian people refused to adopt a unique flag for themselves and unlike other Arab entities maintained the original Arab flag without modifications, and the only change that was made was the change of the order of the colors of the horizontal stripes which placed the white stripe between the black and the green.”⁶

After 1948, until the entry of the Egyptian military forces, the Palestinian flag continued to be used by the authorities that governed the Gaza Strip. In October of the same year, a decision was taken at a national conference to declare the independence of Palestine within the borders of the Mandatory Palestine and to adopt the pan-Arab flag as the flag of Palestine. After the 1952 Egyptian revolution, the Palestinian flag was displayed alongside the Egyptian flag in educational institutions and at festive events, and in 1958 the flag was raised alongside the Egyptian flag on all government buildings in Gaza.

⁶ Ibid, p. 27.



The All-Palestine flag in Gaza 1948

With the establishment of the PLO, it was decided at a conference held in Jerusalem in May 1964 that the PLO would adopt the Palestinian flag as the organization's flag. In December of that year, a change was made in the order of colors: the upper stripe would be black, the middle one white, and the lower one green. The choice of this order, according to Dr. Qasmia's research, was made after examining the original design of the Pan-Arab flag and the flag that was used by the indigenous inhabitants of Mandatory Palestine and in the Gaza Strip after 1948, and also as an attempt to distinguish the Palestinian flag from the one adopted by the Syrian Ba'ath Party, which had a similar design.



The Palestinian flag 1964-2006 (the size of the triangle was changed by law in 2006)

In 1988, during the Palestinian declaration of independence at the 19th conference of the Palestinian National Council in Algiers, the status of the Palestinian national flag as the flag of the newly-declared state was confirmed. After the signing of the Oslo Accords, the flag was adopted by the Palestinian Authority, and in 2006 its format was set by law. In 2012, the State of Palestine was granted the status of a non-member observer state of the United Nations and, as of 30 September 2015, the flag has been flown at the UN headquarters in New York.



The Palestinian flag after 2006

The history of the flag demonstrates that its symbolic and national significance developed in an organic and gradual manner. It was transformed from the flag of the Arab National Movement into the flag of the Palestinian people before the establishment of the PLO, and it symbolized the aspirations of the Palestinian people for freedom, self-determination, and independence prior to the establishment of the State of Israel. Today it is a national symbol and the basic manifestation of the collective identity of the Palestinian people wherever they may be – in Gaza, the West Bank, including East Jerusalem, the areas within the Green Line, and in the diaspora.

Despite its long history, the Palestinian flag is reduced in Israeli discourse into an organizational flag associated with the PLO, which was established only in 1964. As demonstrated below, this discourse is intended deny the legitimacy of the Palestinian collective national identity and preserve ethno-Jewish supremacy within the existing constitutional order.

B. Prohibition, incitement and repression

B.1. Practices of prohibition

As early as the first year of the 1967 occupation, attempts were made by the Israeli security establishment to impose prohibitions relating to the Palestinian flag. Thus, for example, one of the first injunctions applied in the West Bank was the Military Order Relevant to the Prohibition on Acts of Incitement and Hostile Propaganda, still in effect, that was intended to impose a sweeping ban on political activity in the occupied area. In regard to the flag, the decree states that, "It is forbidden to possess, wave, display or affix flags or political symbols, without the permission of the military commander."⁷ In addition to this order, other directives authorize any soldier to order anyone to "remove, erase, or cover, as ordered, any symbol displayed on or found on an edifice or on any article within it", and for this purpose, a symbol includes "a placard, a flag, a sign, a color, an inscription, and a slogan".⁸

The ban was also implemented in the Gaza Strip. It is evident that, at that time, the security authorities regarded the flag as "the Palestinian flag" and not "the PLO flag", as it is presently labelled. Hence, for example, in a letter sent by the General Security Service (GSS or Shabak) to the Israeli police on 14 November 1968, the police were asked to report on the results of an investigation into a case in which a student in the Yaffa School in the Gaza Strip hung "the Palestinian flag on a school wall".⁹

⁷ Section 5 of the Military Order Relevant to the Prohibition on Acts of Incitement and Hostile Propaganda (West Bank region) (No. 101), 5727-1967. Until 1983, Article 5 prohibited the waving, display or placement of flags or political symbols. In 1983, a prohibition regarding possession was added.

⁸ Section 91a of the Decree Regarding Security Provisions (Judea and Samaria) (No. 378), 5730-1970; this order was canceled and replaced in 2009 by the Order Regarding Security Provisions [consolidated version] (Judea and Samaria) (No. 1651), 5769-2009 which includes an identical instruction in section 320.

⁹ The document was sent to Adalah by Akevot – The Institute for Israeli-Palestinian Conflict Research (emphasis in the original).

מדינת ישראל
שירות בסחון כללי
ש.פ.ר
מטעם ישראל/נפת עזה/רל"ח
קמ"ן המרחב
8540/711/ [redacted]
14 נוב' 68

הנדון: הנפת דגל פלסטין בבי"ס "יסו" בעזה.

1. ב - 3 נוב' בטעה 0800 בבי"ס יסו הלה התלמיד מאיז [redacted] ע/6639(ה) כבן 18 מ.מ.כ' הוטאח את דגל פלסטין על קיר יבה"ס ומיד לאחר מכן ברח פאיז ליבתו.
 2. לאחר תליה הדגל יצאו כ - 60 התלמידים להתבין מווצ לביה הספר וצעדו לכיוון רח"אל והידי ומשהופיע הצבא מאוחו כיוון ברחו התלמידים והצבא הצליח להפוס מספר התלמידים שהתבינו.
 3. לאחר ההמגנה לא למרו התלמידים שהתחפפו בהמגנה.
- הערות:
א. פאיז הינו תלמיד ברוע.
ב. הדגל נחלה מאיז על הקיר הינו מחוצרת עצמית.
ג. לא ידוע באח מיטחו טלה את פאיז להלות את הרגל.
מכותב א' מתבקש לרווח מוצאות חקירתו בנושא.

יחידה [redacted]
ש.פ.ר
י.ק/רי

Letter from the GSS to the Police 14.11.1968 (courtesy of the Akevot Institute)

Over the past decade, the Palestinian flag has attracted increased attention in the public and political spheres in Israel. In a petition submitted in 2022 to the High Court of Justice by the Association for Civil Rights in Israel (ACRI), were included in the factual basis of support presented to the court multiple testimonies and videos that establish a pattern of police harassment of protesters in the Jerusalem neighborhood of Sheikh Jarrah for flying the flag.¹⁰ Such harassment includes the arrest of demonstrators, the confiscation of the flag in the course of a demonstration, the confiscation of flags in advance of a demonstration, and the use of violence against anyone holding the flag in order to prevent its display and to confiscate it.

At times, the police place preconditions on protests in the form of instructing demonstrators to refrain from waving the Palestinian flag. For example, in a letter sent on 14 December 2022 by the office of the commander of the Haifa police station to the organizers of a demonstration in the city, the police informed the organizers that it did not intend to allow the demonstration due, inter alia, to the expectation that "PLO flags" would be raised. The letter concluded with the following words: "I again emphasize that should you still choose to hold the demonstration in the format you published and to wave PLO flags, we will act in accordance with the law and police

¹⁰ HCJ 1386/22 *Diab v. Israel Police commissioner* (Petition, filed 22 February 2022), available (in Hebrew) at: https://01368b10-57e4-4138-acc3-01373134d221.usfiles.com/ugd/01368b_a54922e33dd94c7eaba0f7d53958ed98.pdf

regulations and prevent it".¹¹ On 21 January 2023, during a demonstration held in Haifa against the current government's judicial reform plans, the police prohibited the waving of Palestinian flags and made this ban a condition for the continuation of the demonstration.¹² The hostility of the law enforcement authorities towards the flag was unmistakably demonstrated during the funeral of the late journalist Shirin Abu Akleh, when they attempted to remove the flag from the coffin, employing excessive violence against the pallbearers carrying her on her final journey.¹³

From the information provided by the police to the Freedom of Information Movement, it appears that between the years 2011-2015, the police arrested a total of 96 citizens for waving the Palestinian flag.¹⁴ In response to a request for information relating to recent years, the police refused to provide specific information regarding the flag, and only provided data classified according to the offenses of identifying with a terrorist organization; publishing words of praise, sympathy, or encouragement for acts of terrorism; and similar offenses listed under Article 24 of the Counter-Terrorism Law.¹⁵

B.2. Use of the flag to repress Palestinians

Recently, elected Israeli officials have made particularly harsh statements condemning the flying of the Palestinian flag. These statements are often based on the designation of the flag as a "PLO flag" and a "terrorist flag". For example, in May 2022, MK Israel Katz (Likud) threatened Palestinian students from the Knesset podium with a second *nakba* for raising the Palestinian flag on campuses during events commemorating the Nakba:

"Remember 1948, remember our War of Independence and your Nakba. Ask your elders, your grandfathers and grandmothers, and they will explain to you that in the end the Jews wake up and know how to

¹¹ Paragraph 9 of the letter dated 14 December 2022 sent by Chief Superintendent Ezard Haim, commander of the Haifa station, to representatives of the "Hirak" movement. Available (in Hebrew) at:

https://www.adalah.org/uploads/uploads/Police_letter_protest_Haifa_Hirak_14_December_2023.pdf.

¹² Based on the testimony of an Adalah attorney who was present at the demonstration and notified that "a decision was made to permit the demonstration upon the condition that Palestinian flags will not be waved, and that the waving of the flag could constitute harm to the feelings of the public", a letter was sent on 24 January 2023 by Adalah Attorney Salam Irsheid to Mr. Tzachi Ben Haim, commander of the Nesher Station – Coastal District, Mr. Yosef Sofer, commander of the Coastal Station, and Attorney Smadar Klein, the legal advisor to the Haifa Police Center, available at (in Hebrew): https://www.adalah.org/uploads/uploads/Flag_letter_240123.pdf.

¹³ See: Orli Noy, "Israel wants a white flag and receives Palestinian flags, and it drives her mad", *Local Call* (25 May 2022), available (in Hebrew) at:

<https://www.mekomit.co.il/%D7%99%D7%A9%D7%A8%D7%90%D7%9C-%D7%A8%D7%95%D7%A6%D7%94-%D7%93%D7%92%D7%9C-%D7%9C%D7%91%D7%9F-%D7%95%D7%9E%D7%A7%D7%91%D7%9C%D7%AA-%D7%93%D7%92%D7%9C%D7%99-%D7%A4%D7%9C%D7%A1%D7%98%D7%99%D7%9F-%D7%95>.

¹⁴ See Adalah's appeal to the Attorney General, "Arrests and filing of indictments on waving the Palestinian flag" dated 26 September 2016, available (in Hebrew) at:

<https://www.odata.org.il/dataset/a3d571fc-526f-40d0-bc52-1d74da7ebc2a/resource/7990ed95-d293-48ad-b0e3-e44b5b223aa3/download/21f32059-a3b8-4918-a8c0-968b35e16482.pdf>.

¹⁵ See response to Freedom of Information request 755/21: Information regarding enforcement for flying the Palestinian flag (20 July 2021), available (in Hebrew) at:

https://www.gov.il/BlobFolder/dynamiccollectorresultitem/police_134/he/police_info.pdf.

defend themselves and the idea of the Jewish state. Don't stretch the rope too much... If you do not calm down, we will teach you a lesson that you will never forget".¹⁶

MK Yoav Gallant (Likud) described the raising of the flag as an act of violence and terrorism and issued a threat to those who wave it:

"What happened in the past day in the universities, in Tel Aviv, in Be'er Sheva, the waving of Palestinian flags, confrontations with IDF soldiers and police officers, Arab members of the Knesset beating policemen, a minister in the Israeli government calling for a commission of inquiry against the State of Israel... if you bring us to the point where we are forced to take our hands out of our pockets or take off our gloves – the price will be heavy."¹⁷

During the debate, MK Shlomo Karhi (Likud) shouted out during MK Aida Touma-Suleiman's speech that, "The PLO flag is a terrorist flag and we will wipe it off the face of the earth".¹⁸ MK Ofir Akunis (Likud) continued, "The expression 'Palestinian flags', [...] did not exist, will not exist. There is no such fiction. Palestine is in your imagination, in your imaginations. [...] Therefore, the flag is the PLO flag and not the flag of Palestine".¹⁹ MK Ketzi Katrin Shitrit (Likud) referred to the Palestinian flag as "this flag of terror",²⁰ and MK Simcha Rothman (Religious Zionist party) claimed that the very act of flying the Palestinian flag constituted support for the destruction of the state:

"PLO flags are not Palestinian flags, and there is no difference between them for a very simple reason. There is no Palestinian nation. The vision of the Palestinian people means that there will be no State of Israel. It is a flag whose meaning is the destruction of the State of Israel. Whoever allows it to be flown on campuses is collaborating with the vision of the destruction of the State of Israel".²¹

In 2022, three law proposals were submitted with the objective of criminalizing the flying of the flag and determining prison sentences for this act.²² The fact that these bills were submitted

¹⁶ Knesset Protocols 25 May 2022-23, 141-143. A video of the speech is available (in Hebrew) at: https://www.adalah.org/uploads/uploads/Israel_Katz_Knesset_25_5_2022.mp4.

¹⁷ Ibid, pp. 295-296. A video of the speech is available (in Hebrew) at: https://www.adalah.org/uploads/uploads/Knesset_Yoav_Gallant_25_5_2022.mp4.

¹⁸ Ibid, p. 66.

¹⁹ Ibid, p. 155.

²⁰ Ibid, p. 163.

²¹ Ibid, p. 279.

²² See for example: Penal Law proposal (amendment – prohibition of using the flag or symbol of an enemy entity), 5782-2022 (P/3824/24); Penal Law proposal (amendment – prohibition of flying a flag of a hostile entity), 5782-2022 (P/3867/24); Penal Law proposal (amendment – prohibition of flying a flag of an enemy state or of the Palestinian Authority by bodies financed or supported by the state), 5782-2022 (P/3040/24). Although the latter proposal was submitted as a private member's bill on behalf of an MK from the opposition, the coalition allowed its members the freedom to vote on it, a move that significantly increased its likelihood of passing into law, and it did pass a

demonstrates that even their drafters are aware that there is no pre-existing prohibition in Israeli law on the display of the Palestinian flag. The lack of such a prohibition has not, however, prevented various actors from demanding restrictions on the flying of the flag. For example, after the flag was waved by Arab students on the Ben-Gurion University campus during events commemorating Nakba Day, the mayor of Be'er Sheva, Ruvik Danilovich, sent a letter to the university's administration protesting its being flown on the university's premises.²³

This incitement by elected officials is based on the desire to deny the legitimacy of the Palestinian collective identity. It forms part of a whole web of actions and legislation designed to suppress the Palestinian national identity and to entrench Jewish supremacy in the existing constitutional order. Two examples are the Nakba Law²⁴ and the Nation-State Basic Law²⁵. The Nakba Law, enacted in 2011, denies the legitimacy of the commemoration of the Palestinian Nakba, and the Nation-State Basic Law, enacted in 2018, states that the right to self-determination in Israel is granted exclusively to the Jewish people, thus denying the indigenous population its collective rights.²⁶ The current government went even further when it declared in the first section of its basic guidelines that: "The Jewish people have an exclusive and inalienable right over all areas of the Land of Israel [Mandatory Palestine]. The government will promote and develop settlement in all parts of the Land of Israel, in the Galilee, the Negev, the Golan, Judea, and Samaria".²⁷

C. The legal status of the Palestinian flag

Israeli law does not explicitly prohibit the public display of the Palestinian flag and, as will be explained below, the Attorney General's directive affirms that there is no such ban. Nevertheless, the police attempts to rely on several sources of legal authority in order to prevent Palestinians from displaying and waving the flag, especially in the course of protests and demonstrations.

The principal authority the police rely on in areas within the Green Line and Jerusalem is Article 82 of the Police Ordinance [new version], 5731-1971. Subsection (a) of this article stipulates that the Police Commissioner "may prohibit the flying, exhibition, or display of any flag or emblem likely to incite a disturbance of the peace". Subsection (c) further states that, "Any police officer may remove any flag or emblem if exhibited or displayed in contravention of said order, or in

preliminary reading in the Knesset. See: Moran Azoulai and Tamar Trabalsi Haddad, "Ministers approved: Freedom of vote on the law that prohibits flying Palestinian flags in universities", *Ynet News* (29 May 2022), available (in Hebrew) at: <https://www.ynet.co.il/news/article/rk81dtloc>.

²³ Nati Yafet and Shira Kadri-Ovadia, "The mayor of Be'er Sheva protests the flying of Palestinian flags at Ben-Gurion University: proud of the students", *Haaretz News - Education and Society* (23 May 2022), available (in Hebrew) at: <https://www.haaretz.co.il/news/education/2022-05-23/ty-article/.premium/00000180-f6c5-d469-a5b4-f6fd3f740000>.

²⁴ Article 3b(4) of the Budgetary Principles Law 5745-1985.

²⁵ Basic Law: Israel- the Nation State of the Jewish People. See also Adalah's Position Paper: Proposed Basic Law: Israel - The Nation State of the Jewish People UPDATE 2018), available at: <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf>.

²⁶ See Article 1 of the Basic Law: Israel - the Nation State of the Jewish People.

²⁷ See Adalah, "Adalah's Analysis of the New Israeli Government's Guiding Principles and Coalition Agreements and their Implications on Palestinians' Rights" (January 2023), available at: https://www.adalah.org/uploads/uploads/Adalah_Position_Paper_New_Government_10_01_2023.pdf.

such circumstances as this is likely to cause a disturbance of the peace". No specific directive was issued by the Police Commissioner regarding the Palestinian flag.²⁸ From the wording of article 82 of the Ordinance it is clear that there is no prohibition on hoisting the Palestinian flag *per se*, and that, in the absence of a directive on behalf of the Commissioner, as required in article 82(a), a police officer does not have the authority to personally determine on the ground if the circumstances justify the removal of a flag.²⁹ Furthermore, even if the Police Commissioner issues a directive in the future, he will not, in our view, be entitled to prohibit the actual act of flying the Palestinian flag. The directive will have to distinctly specify the circumstances in which raising the flag may tangibly and concretely breach public peace. It is important to emphasize that if the concern for the disruption of public order is based on a fear of the reaction of persons who are hostile to the Palestinian flag, the police must act to stop them, and not to suppress the right of demonstrators to fly the flag.³⁰

Despite the text of the law, the police often interpret their authority broadly and in contravention of its provisions. In practice, each police officer 'grants' him or herself the authority to decide to prohibit the waving of the Palestinian flag if he or she concludes that, in the circumstances, it may potentially "provoke a disturbance of the peace". This unlawful authority is wielded by the police to repress the right to freedom of demonstration, and to restrict freedom of expression on the ground, by means of an order to remove the flag that often involves physical violence and arrests.

The Palestinian flag has a unique status in Israeli law due to its identification with the PLO, which was designated as a terrorist organization in 1986 under the Prevention of Terrorism Ordinance.

²⁸ Regarding this matter, see, for example, the words of the registrar Avigail Van-Kerfeld in Fast Track Civil Case [TA"M] (Jerusalem Magistrates Court) 15567-07-18 *Bitan v. The State of Israel* 6 (published in Nevo, 17 September 2019): "I was not presented with the order of the Inspector General relating to the matter, nor was it claimed that such a provision exists. The plaintiff argued that an illegal directive was issued on behalf of the station commander (p. 2, line 7), and when the station commander was asked whether he had requested permission as required to restrict the waving of a flag in the area, he replied that approval was only required when it a permit request is submitted to hold a protest (p. 12, line 6et seq.). There is no evidence that the approval of the Commissioner is required only for demonstrations for which a permit request is submitted, as claimed in the hearing."

²⁹ This interpretation is necessary given the status of the right to freedom of demonstration and freedom of expression, which justifies a narrow interpretation of police powers. On this matter, see and compare, for example: HCJ 6536/17 *The Movement for the Quality of Government in Israel v. Israel Police* (published in Nevo, 8 October 2017). There, the court rejected the broad interpretation presented by the police and adopted a narrow interpretation of the powers granted to them under articles 83 and 84 of the Police Ordinance, which set forth conditions regarding the obligation to obtain a permit for a demonstration, while stating that, "the blanket requirement to obtain a license in advance for any demonstration in which 50 people or more shall participate relating to any issue that is of interest to the public imposes a disproportionate burden on the freedom of demonstration" (*ibid.*, para. 39 of the ruling of (then) Justice Hayut).

³⁰ In this context, it has already been established that, "The fact that a demonstration may lead to a disruption of public order does not negate the freedom to demonstrate. A certain degree of harm to public order is a price we must be willing to pay to realize the right to demonstrate. This is all the more so when the danger is not expected to arise from the demonstrators themselves but from the reaction of those who oppose the demonstration. Giving a hostile group the power to thwart the exercise of the fundamental right to demonstrate will constitute serious harm to it and reward and encourage violence. The security forces must do everything in their power to prevent this dire outcome." HCJ 4712/96 *Meretz Party v. Jerusalem District Commander, Israel Police*, PD 50(2) 822, 833 (1996).

As a result, article 4(g) of the ordinance, which established a ban on any act manifesting identification with or sympathy for a terrorist organization, including by waving its flag in the public sphere, was used as legal grounds to arrest and prosecute anyone for raising the Palestinian flag. When the ordinance was canceled following the enactment of the Counter-Terrorism Law, 5726-2016, Article 24 of the law was used in its place concerning this matter. Though, as detailed above, the authorities took action against the Palestinian flag before the PLO was classified as a terrorist organization, and even prior to its establishment in 1964, the above designation provided them with grounds for justifying the criminalization of the possession, display, and waving of the flag. This legal construction, however, rests exclusively on the erroneous designation of the Palestinian flag as the flag of the PLO. As explained in the first part of this paper, the status of the flag as the national flag of the Palestinian people was established in the first half of the twentieth century, prior to the establishment of the PLO.

After the Oslo Accords, the Attorney General adopted a policy of non-prosecution for flying the Palestinian flag, with two exceptions: if the purpose of raising the flag is to "identify with a terrorist organization or show sympathy for it, or if it is highly likely this act will lead to a grave disruption of public peace".³¹ This policy grants police officers in the field a wide scope of discretion, which renders the question of the flag's criminality extremely problematic from a legal perspective, given that it is contingent on circumstances to be determined by individual officers. Moreover, it demonstrates an ambiguity regarding the nature of the flag, stemming from the duality of meaning attached to it: the understanding that it is the national flag of the Palestinian people, and the implicit awareness of the need to allow Palestinian citizens to display it, together with the identification of the flag with the PLO, which persists along with the erroneous assumption that flying it is comparable to "identifying with a terrorist organization". Still, notwithstanding the above, we know of no criminal convictions for flying the flag since the publication of the Attorney General's directive.

The aforementioned duality has also appeared in court rulings. In one such example, the Supreme Court was asked to address the issue of the flag in the course of a case that examined the legality of a decision made by the Chairman of the Election Committee (CEC) in 2003 to disqualify the election campaign television ads of Arab political parties Ra'am—the United Arab List and Balad—The National Democratic Assembly, in which the images of the Palestinian flag appeared.³² Although the court unanimously overturned the CEC's decision, it clarified that, despite the identification of the flag with "hostile groups", it is "indeed a symbol of the national identity of the Palestinian people".³³ Furthermore, it determined that in order to disqualify an election campaign television ad in which the Palestinian flag appears, "the contents of the display must have the potential to cause substantial, deep, and severe injury to the sentiments of the

³¹ Paragraph 5 of the Attorney General's letter to MK Miri Regev, "The legal situation regarding the flying of flags of the PLO and terrorist organizations in the State of Israel" dated 1 September 2014, available (in Hebrew) at: <https://www.odata.org.il/dataset/a3d571fc-526f-40d0-bc52-1d74da7ebc2a/resource/79bc45f3-1f09-469f-8074-15ace44336a6/download/-1.9.14.pdf>.

³² HCJ 651/03 *The Association for Civil Rights v. the Chairman of the Central Elections Committee for the Sixteenth Knesset*, PD 57(2) 62 (2003).

³³ *Ibid*, p. 74.

Israeli public...". The court's judgment confirmed the dual significance of the flag and devised a censorship test that is comparable to the test used in similar matters involving "public sentiments" where the potential harm which may be sustained must be "substantial, deep, and extremely severe". The problem with this test arises from the fact that the legitimacy of displaying the Palestinian flag depends on the sentiments of the Jewish majority. Furthermore, although this test is not relevant to demonstrations which are regulated by separate legislation, police officers recently used the argument of "public sentiment" unlawfully in order to take down the flag.³⁴

The vast majority of cases in which the police forbid the hoisting of the flag do not end in an indictment that is solely based on the act of waving the flag itself; yet, police officers on the ground continue to exercise their authority arbitrarily and contrary to the instructions of the Attorney General. For example, in the framework of a civil lawsuit filed in 2018 by the social activist Amir Bitan against the Israel Police (in which he demanded compensation for the violence used against him by police officers who tried to confiscate the Palestinian flag he was holding during a protest rally in the Sheikh Jarrah neighborhood of Jerusalem), the Magistrates' Court's registrar was persuaded that, in the circumstances of the case, "the stricter test established in court rulings relating to imminent and substantial harm [which refers to severe and serious harm to public order or peace] has not been met".³⁵ The registrar further remarked that "it was not argued, and it was not proven, that the flag was flown by the plaintiff in order to identify with a terrorist organization or show sympathy towards it and, as stated above, in the opinion of the court, it was also not proven that there was a tangible fear that the waving of the flag would lead to a serious breach of public peace".³⁶ The more concerning aspect of this case is that one of the police officers claimed to have come to the protest with an order stating "If you see a flag, confiscate it". The registrar rejected the claim that the police have the authority to order the removal of the flag on grounds that it is a flag of a "terrorist organization" and that flying it is itself a crime.³⁷

Although the Attorney General's directive does not prohibit the mere act of flying the flag, its underlying legal reasoning is highly problematic. The concept of the Palestinian flag as a symbol that has any meaning whatsoever beyond that which is attributed to it by those who wave it and view it as an expression of their national affiliation, or as an expression of solidarity with the Palestinian people, is baseless. Moreover, the fear of disruption to the public order as a result of the waving of the flag is a fabrication: we are not aware of a single legal case in which it was proven that the waving of the flag itself caused a breach of public order. If the claim is that

³⁴ In the aforementioned demonstration held in Haifa on 21 January 2023, the police officer on the ground justified the ban on flying the Palestinian flag to an Adalah lawyer present on the scene by means of the argument of harming the public's sentiments. See p. 7 above.

³⁵ TA"M (fast track civil case) 15567-07-18 *Bitan v. the State of Israel* 5 (unpublished, delivered on 17 September 2019).

³⁶ *Ibid*, p. 6.

³⁷ *Ibid*, p. 5.

extremist elements will attack the demonstrators for waving the Palestinian flag, then the police must act against them, and not against the protesters.³⁸

In practice, sustaining the narrative of the Palestinian flag as a symbol that may in certain circumstances lead to violence, or as a symbol of "terrorism", increases hostility towards demonstrators, as evidenced by the conduct of police officers on the ground, conduct that is informed not only by the text of the AG's guidelines, but also, and perhaps mainly, by hostile political rhetoric and discourse. Hence, the preservation of the misrepresentation surrounding the duality of the flag has a direct impact on the way the directive is implemented and its results on the ground.³⁹

Summary

1. There is no law prohibiting the flying of the Palestinian flag in Israel, and the Israeli police have no authority to prevent a person from waving it. Therefore, the practices of detaining, arresting, or questioning people for waving the Palestinian flag are unlawful and contrary to the directive of the Attorney General, which clarifies that there is no ban on flying this flag.

2. The exceptions in the Attorney General's directive that hinge on a dual meaning of the flag – a concept that lacks any factual-historical basis – lead to its misuse by police officers on the ground when, in practice, there has not been a single case in which the police were able to demonstrate that the act of waving the flag in itself constituted a breach of public order or "support for terrorism". The ambiguity underlying the directive, which stems from the existence of the exceptions therein, violates the principle of legality, which requires that prohibitions and restrictions of freedoms be set out clearly and explicitly in the law.

3. If a law is enacted prohibiting the flying of the flag in the public sphere, it will constitute an additional attempt in a long line of attempts to deny the indigenous people of the country their right to express their collective identity, and will therefore constitute a breach not only of domestic constitutional law, but also of international law, including the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and United Nations declarations regarding the rights of indigenous peoples and ethnic and national minorities.

4. The right of Palestinians to display their flag derives from the status of the flag as the most basic component of their national identity. This is a natural right as it relates to both the identity of the individual and to the identity of the nation, and it is therefore not subject to regulation based on views of the majority in the Knesset.

³⁸ See the above footnote no. 30.

³⁹ In this context, the theories regarding the expressive function of the law are also relevant to the issue of the discourse underlying any legal policy. See: Elizabeth S. Anderson and Richard Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144(5) U. PA. L. REV. (1996) 2021.