

Zionism, Law and Citizenship: Perils for the Palestinian Arab Minority

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Contents

Abstract.....	4
Declaration.....	5
Copyright Statement.....	6
Acknowledgements.....	7
The Author.....	8
Table of Cases.....	9
Introduction.....	11

Chapter One- “Variations of Zionist Thought”

An everlasting relationship.....	14
Zionism as Liberation.....	18
Zionism as Imperialism and Racism.....	29

Chapter Two- “Zionism, Implications for Law and the Palestinian Minority”

The Relics of Ottoman, Religious and Mandatory Law.....	37
A Brief History of Israeli State Formation.....	41
To codify or not to codify; that is the Constitution.....	43
‘Jewish and Democratic’; achieving the impossible?.....	49
Development of Equality and Human Rights Jurisprudence in Israel.....	52
Judicial Independence; toward a Zionist Jurisprudence.....	65
Conclusion.....	69

**Chapter Three- “Demography and Democracy:
The ‘Ticking Time Bomb’ for Israeli Law
Makers”**

The Yeredor Ruling and Demography.....71
Theorising Demography.....73
Demography in Zionist Thought.....77
“War of Cradles”-Political Demography in Israel.....79
Law, Policy and Demographic Supremacy.....86
Conclusion.....98

**Chapter Four- “Zionism and Citizenship: A
workable model?”**

Where do we go from here?.....100
Israeli Citizenship Revisited.....102
“De-Zionised Citizenship?”111
Social Membership as Citizenship Acquisition.....131
Social Membership under Zionism.....137
Conclusion.....139

Conclusion.....141

Bibliography.....143

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Abstract

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Zionism enjoys an unrivalled privilege in Israel. It is the supreme law, the ideology, both the fulfilment and achievement of its Zionist founders. It has been both celebrated as the movement of liberation for the Jewish people and now the principles upon which the state is governed; but similarly, it has been condemned as a progeny of imperialism and racist colonization- the apotheosis of egalitarians the world over. This thesis looks at several factors which observe the impact of Zionism on equality law in Israel and the legal and political experiences of the Palestinian Arab minority. Firstly, it contends with the different conceptions and perceptions of Zionism, trying to identify common themes in this multifarious doctrine. Having determined as such, the study then moves onto looking at the influence of Zionism, given the *privilege of Ideology* in Israel, on equality law and democracy observing the consequential impact on the minority Palestinian Arabs. Given the *particularist* democratic structures in Israel, the work then introduces the aspect of demography, with a specific focus on how Zionism, in the context of a particularist democracy, demands demographic supremacy in order to maintain its perpetuity. Thus further elaboration of how democracy suffers, particularly for the Palestinian Arab minority, is then followed by looking at how laws and policy entrench such practices. Finally, the last section deals with radically reforming such statutes with a concentrated focus on the Citizenship laws in Israel; the cornerstones of the Zionist mantra. These reforms use the principles of recognition and democratic inclusion as their impetus and fundamentally re-evaluate the compatibility (or lack thereof) of Zionism with democracy in light of the repercussions on the Palestinian Arabs.

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This thesis is for Shahina and Aftab.

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The Author is an MPhil research student in the School of Law at the University of Manchester. His research interests include Public International Law, Israeli Law and Minorities, Human Rights and Critical Legal Theory. He has written several online op-eds on the subjects of the International Criminal Court and various legal issues surrounding the Israel-Palestine Conflict.

Table of Cases

<i>Adal Ka'adan vs. Israel Lands Authority</i>	(2000) 54 (1) P.D. 258
<i>Agudat Derech Eretz v. Broadcasting Authority</i>	(1981) 35 (iv) P.D. 794
<i>Bank Hamizrahi v. Migdal Cooperative</i>	(1995) 49 (iv) P.D. 589
<i>Batzul v. Minister of Interior</i>	(1965) 19 P.D. 337
<i>Bergman v. Minister of Finance</i>	(1969) 23 (i) P.D. 693
<i>Boronovski v. Chief Rabbinate</i>	(1971) 25 P.D. 7
<i>Braun v. Prime Minister and Minister of Defence</i>	(1948) 1 P.D. 108
<i>Calvin Case</i>	7 1a, 77 ER 377
<i>Collins v. Secretary of State for Work and Pensions</i>	[2006] EWCA Civ 376
<i>Darwish v. Israel Prison Authority</i>	(1980) 35 (i) P.D. 536
<i>Ezuz v. Ezer</i>	(1963) 17 P.D. 2541
<i>Israel Films Studies v. Film and Play Censorship Board</i>	(1962) 16 P.D. 2407
<i>Jiryis v. District Commissioner of Northern District</i>	(1964) 18 (iv) P.D. 673
<i>Kaniel v. Minister of Justice</i>	(1973) 27 (i) P.D. 794
<i>Kardosh v. Registrar of Companies</i>	(1960) 15 P.D. 1151
<i>Khalil Calef v. Ministry of Interior</i>	(1953) 7 P.D. 308
<i>Kol Ha'am v. Minister of Interior</i>	(1953) 7 P.D. 87
<i>Kremer et al v. Municipality of Jerusalem et al</i>	(1971) 25 (i) P.D. 767
<i>Liechtenstein v. Guatemala</i>	(1955) I.C.J. 4
<i>Lifshitz-Aviram v. Law Society</i>	(1976) 31 (1) P.D. 250
<i>Miron v. Minister of Labour</i>	(1970) 24 (i) P.D. 340
<i>Mussa v. Ministry of Interior</i>	(1960) 16 P.D. 69
<i>Nag'ib Musa v. Minister of Interior</i>	(1962) 16 P.D. 2467
<i>Re'em Engineers Ltd. v. Municipality of Nazareth Elite</i>	(1992) 47 (v) P.D. 189
<i>Ressler v. Chairman of Central Elections Committee</i>	(1977) 31 (ii) P.D. 556

<i>Rubenstein v. Speaker of Knesset</i>	(1982) 37 (iii) P.D. 141
<i>Rotenburg v. Deputy Head of Manpower Division</i>	(1959) 13 P.D. 469
<i>Shaya v. Minister of Interior</i>	(1960) 45 P.D. 308
<i>Yafora Ltd v. Broadcasting Authority</i>	(1971) 25 (ii) P.D. 741
<i>Yeredor v. Central Elections Committee for the 6th Knesset</i>	(1965) 19 (iii) P.D. 365
<i>Zeev v. Gubernik</i>	(1948)1 P.D. 85

Introduction

There is a tendency, and one which can be harmful, to oversimplify the complex- particularly when discussing some of the more pressing issues of our time. This process of 'oversimplification' is modelled on the inclination toward homogenizing varied terms. Terms which have a wealth of meaning, which people have painstakingly researched over, terms which men have fought over to define. Our meanings and understandings of words are laden, not just with many technical meanings, but with various social and cultural meanings too. Often, when we talk about these words, we reduce them to a paradigm which is 'useful'. Here useful is that which can be communicated with ease but with little appreciation for its multitudinous etymologies. Our reductionism, when a lot is at stake, can do great injustices to those who suffer. The question of Israel-Palestine is one such example.

'Israel is democratic', 'Universal Citizenship and Suffrage', 'Individual Rights'- these are laden terms. Our reductionism immediately paints a laudatory picture of Israel. These simple media-friendly bites resonate with us because we are able to transfer this discourse in the communication of knowledge with relative ease. It is easier than talking about the complexities of what democracy can actually mean, or the intricacies of universal citizenship, or whether individual rights can help collective entities for example. Herein lies the problem- these terms have many meanings and we do ourselves, others and those involved in the conflict a huge disservice.

One of the unusual aspects of the relationship between the Palestinian Minority in Israel and the Israeli state is that *prima facie*, they have it pretty good. Israel, too all intents and purposes is democratic and as such, allows for Minority representatives in its legislature. We now even have the first Israeli Supreme Court Judge, Salim Joubran. Some Palestinians also hold high positions in office and on paper, there appears to be a

picture of relative harmony- on paper. But the aim of this thesis is to take that on paper and create a multi-dimensional reality. Such declarations are only *prima facie* true if we fall victim to the problem of 'oversimplification.' The protests in October 2002, in which 13 Palestinians were killed (12 from Israel) were the culmination of a growing resentment toward a government which had failed them. Their trials and tribulations emanate from being locked between a rock and a hard place. If universality exists within the so called democratic State of Israel, why is there such resentment? No government ever get's it completely right but the Palestinian's resentment does not come exclusively from what the state is doing, but fundamentally what the state *is*. We need to therefore look a little closer.

We soon begin to unravel that our inability to see the convoluted nature of the situation stems from our ineptitude of understanding these terms of 'democracy' and 'citizenship.' Yes they exist but they also existed in Apartheid South Africa. The aim of the coming chapters therefore is to acknowledge the complexities of these terms and find out what is really happening.

Zionism is often the bone of contention in Israel. It governed and governs all affairs from its pre-statehood to the contemporary era. But, like our discussion above, there are various articulations of it. From the revisionist to the cultural, Zionism is a multi-layered doctrine. In addition, another patina of understanding sits on top of this. We also have to look not only at differing conceptions, but differing perceptions. How did people observe Zionism and did this change?

The same exercise needs to be conducted when looking at the issue of citizenship and democracy. These too often have positive connotations because of our hasty reductionist method. We need to look beyond the term and look at its histories. Maybe then we can understand why Palestinians are constantly protesting, lobbying and campaigning.

Another interesting aspect which this study will look at relates to the nature of Israel's mutated democratic structures. This involves the issues posed by demography and the advantages and disadvantages of demographic supremacy as an aid to maintaining democratic supremacy. The considerations of demography are absolutely vital in understanding the disparity between rhetoric and reality in Israel; universal rights can be codified in law but are not executed in practice.

In light of this discussion, the following work aims to understand the complexities of the Palestinian Arab experience in Israel and the state's commitment to Zionism. Initially, we begin by dissecting the ideology which enjoys privilege, Zionism, and its history and common values. The next part will determine how such an ideology affects democracy and law. Zionism and democracy's torrid affair can be chartered by looking at the case and statute laws which concretise the relationship between these miscible concepts. Next, the issue of demography is discussed, explicating why it is vital in explaining Israel's democratic illusion. Demographic supremacy is maintained through key laws which are the mainstays of the Zionist tenets- paramount of these is the Law of Return and it is this which forms the co-ordinates of the final chapter. By deconstructing the law and creating one which is truly universal, the end result poses very tough questions for Zionism and democratic inclusion.

Chapter One

Variations of Zionist Thought

An everlasting relationship

Law and Politics share an intimate and enveloping relationship. Indeed, scrolling through the annals of history provides us with a wealth of examples illustrating this marriage; whether it was the Soviet legal system which abolished private property, solidarity rights as enshrined in the African Charter following political decolonization, or the western liberal tradition which accorded rights to the individual against the state, the two are symbiotically one.

One can be hard pressed to be convinced by the staunch advocates of '*legal reasoning*'. It is a theory that decisions in cases are based entirely on the law and are abstinent in their reference to moral, political, religious or social reasoning¹. Some suggest an absolute polarity exists; placing law at one end and politics distinctly at the other.² To echo the words of Kairy "*legal reasoning is not a method or process that leads reasonable, competent and fair minded people to particular results in particular cases*³"

A lecturer once told our final year cohort that mooting and legal debating, whether in the class room or in the court room, has little to do with knowledge of the law. He suggested that the *ratio decidendi* in cases tended to be the product of well hammered out philosophical debates.

¹ David Kairy, 'Law and Politics' (1983) 52 George Washington Law Review, 243

² Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer, Stockholm 2007) 1

³ Kairy (n 1) 244

Conclusions and decisions in law therefore, are draped in legal dressing, a cloak, a thin veneer. The general point he was trying to make was that we cannot completely neutralise ourselves from our dispositions, desires or deficiencies and although we try our damned hardest to, our other ideas and values will always bleed in. 'Legal Reasoning' in the sense described above is a fallacy. Lord Wedderburn once famously said that he favoured a legal study being more than just "*a game of exciting but and rules [as] social context elevated law from instruction to education.*" Rather, as David Kretzmer cites "*Law is determined by sociological factors. It reflects ideologies, interest and attitudes*"⁴ and it is often a by product of political relations and forces.

Few can reasonably show any criticism of this phenomenon, whether it is a result of social conditioning or a form of intuitionism. If anything one should embrace it and dispel the notions of independence and objectivity in there absolutist sense. This is nothing to be ashamed of but certainly something which must be considered in light of the following discussion.

Let us now develop this idea further and talk about the effect of ideology on law. Ideology is merely a composite of politics and that composite can exist in many different types. Loosely speaking, we can describe ideology as "*a coherent set of representations which give meaning to social relations...by giving meaning, I mean that the social players involved in these relations find them natural, true, justifiable and legitimate- in short not absurd.*"⁵ Adam Schaff⁶ categorises ideology into three branches; firstly the *genetic* category which is shaped by the effect of environmental pressures which give birth to the emergence of an ideology. Secondly, is the *structural* definition which distinguishes one ideology from the other based from the viewpoint of logic and epistemology. And thirdly, we have the *functional* interpretation which focuses on its use in society, to groups and individuals.

⁴ David Kretzmer, '*The Legal Status of the Arabs in Israel*' (Westview Press, Oxford 1990) xi

⁵ Guy Bajoit, 'Zionism and Imperialism' in *Zionism and Racism* (Billing and Sons, Guildford 1977) 131

⁶ Sayed Yassin, 'Zionism as a Racist Ideology' in Abdul Wahhab Kayyali, "*Zionism, Imperialism, and Racism*" (Croon Helm, California 1979) 87

Another interesting aspect of ideology is that we all, arguably, have one, whether we are conscious of it or not. We all have a collection of ideas which have a common theme that govern our behaviour and our acceptance or rejection of the status quo. One could even go as far as saying that apathy is an ideology (apathy defined as laziness rather than disillusionment with the political process); perhaps we are not conscious of it but our acquiescence is enough to express tacit acceptance of these values. Laziness, accepting normality, passivity are such actions (or inactions) which provide our tacit consent to this type of social organisation. This is arguably found in liberal societies. The lack of opposition forms the core values of that type of ideology, the freedom to be nothing. Being able to *justify* doing nothing is an externalisation of this ideology.

Assessing whether an ideology is correct or indeed relevant is difficult. We can look at the merits and demerits of the doctrine and determine the morality of its values in terms of good or bad. However, elevating the discussion to a metaphysical level, the very benchmarks of good and bad themselves need to be assessed as they are by no means semantically universal. It may appear that my sentiments seem to be peppered with a generous sprinkling of puritanical relativism but the reality is that *we do* share a lot of common values of right and wrong so perhaps this type of simple analysis will serve us well in determining the morality of ideology.

It may not be entirely obvious why such scant and rushed discussion of these topics on law, politics, ideology and relativism is useful. Indeed the discussion has been more personal than academic. But as it will soon emerge, they are all critically relevant to the crux of this thesis. However, it is essential that we identify the points and set out the co-ordinates of this first chapter.

The main concern of this first chapter will not be a purely legal pursuit. I will look at the history of Zionist Ideology as its political manifestation (although some reference will be made to the religious conception of it)

and the different narratives it has evoked. Zionism can be understood or defined as the national liberation movement of the Jewish Diaspora. A political discourse which swept the hearts and minds of one of the most brutally oppressed peoples in history to create a state of their own by invoking their biblical right to what was then Mandatory Palestine. This is what I shall examine in a section entitled *Zionism as Liberation*.

However, perhaps not surprisingly, a contrasting dialogue emerged around about the time Political Zionism was beginning to gather momentum. Particularly after the wars, when the fervour and flavour of political decolonization swept Africa, South America and the Middle East, Zionism was equated with its antecedents of Imperialism and Racism. These cries came not from the shamed and fanatical zealots of defeated Germany but rather from the indigenous peoples of the Levantine region, the non-aligned and progressive intelligentsia. This particular narrative I will explore in a section called *Zionism as Imperialism and Racism*.

One final word; Israel is trapped in a perpetual conflict between legal and political *particularism and universalism*. This is something worthy of note as Israel continually attempts to replicate western models of social, political and economic organisation. Therefore, at times, I shall elevate the debate to a more general attack on liberal theory and account for its inadequacies in how it details with the grievances of the Palestinian Arab Minority.

Zionism as Liberation

“The Jews...must not be content to wait for a miracle. The time has come for them to redeem the soil of Palestine by their own exertions...to pass from passive expectancy to active endeavour.”⁷

-Rabbi Zvi Hirsch Kalischer

Firstly, it must be stated that Zionism is neither a monolithic ideology nor does it denote a homogenous identity.⁸ Whilst it does have core tenets which characterise it as such, there is much room for various discursive articulations.⁹

Activists and academics across student campuses, who protest for or against Zionism and Zionist policy, tend to allot in their discussions, Theodore Herzl as being the pioneer of the Zionist movement. Indeed, much can be and should be attributed to the Herzlian tradition in terms of the fruition of *Political* Zionism. However, for a more critical study, one must look at its ideological precursors. Our starting point must therefore look at the pre-Herzlian emergence of Zionism.

Anti-Semitism can be traced as far back to Ancient Greek literature but its proliferation in Christian Europe is perhaps what had the most profound impact on Zionism. Cast as *the other*, hostility toward Jewry stemmed from the religious, often due to the conflict of Christianity with its Jewish roots. Anti-Semitic remarks were not only embedded within the fabric of society but were often dissipated from its upper echelons. Patches of tolerance was only due to the realisation of their expertise in many fields¹⁰ but often religious fanatics of the Reformation adopted a pejorative

⁷ Leonard Stein, *Zionism* (Richard Clay & Sons Suffolk 1925) 22

⁸ Pnina Lahav, *Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press, California 1997) xii

⁹ Yvonne Schmidt, 'Foundations of Civil and Political Rights in Israel and the Occupied Territories' (Doctoral Thesis, University of Vienna 2008) 33

¹⁰ Leon Poliakov (trs Miriam Kochan), *The History of Anti-Semitism: From Voltaire to Wagner* (University of Pennsylvania Press, Pennsylvania 2003) 7

discourse. As such, it was not unusual to see caps on the population of Jews in cities such as Breslau, conditional residency as in Bohemia or forced conversions as was the case in the Pale of Settlement. Indeed, even in the sparse pockets of social progression such as in Joseph II's *Edict of Tolerance of 1782* which temporarily improved certain aspects of Jewish life¹¹, this was on the proviso that cultural elements of Judaism were purged from the public forum (such as the use of Hebraic script and the Yiddish language). Indeed, even a little later, The *May Laws* of 1882 in the Russian Empire were specifically aimed at Russian Jewry in hampering their ability to move, apply for loans or to observe their holy day of Shabbat. *The Age of Enlightenment* as we shall see, failed to be the saving grace of European Jewry. Such epochal transformations posed the *Jewish Question* and whilst rights were extended to Jews, there were only done so partially and conditionally.¹² Jewish exigencies and the crushing wave of anti-Semitism were also fuelled by increasing European ethno-nationalism (the so-called dichotomy of civilisations between the European Aryans and the Jewish Semites) and adjacent theories of eugenics and Imperialism.¹³ From the outset, we can begin to piece together that Zionism was therefore a reaction, a *discourse of resistance* shaped by the spreading plumes of racist smoke covering Europe.

The discussion of who is accorded pioneer status is itself of scholarly debate. Jacob Katz¹⁴ makes the distinction between *thought* and *action*. Many Rabbis would talk about the *Return to Zion* taking their basis from Holy Scripture. This fever of Religious Zionism that the divine would return the Jews from their exilic condition back to the Holy Land of Israel was the prevailing wind of thought throughout the Jewish elite. However, student movements, growing increasingly impatient at the lethargy of their representative elites, began to mobilise themselves and believe that *the*

¹¹ see also Charles H. O'Brien, 'Ideas of Religious Toleration at the Time of Joseph II. A Study of the Enlightenment among Catholics in Austria' (1969) 59 *American Philosophical Society* 7, 1-80

¹² Steven Beller, 'Anti-Semitism: A Very Short Introduction' (Oxford University Press, Oxford 2007) 25

¹³ Beller (n 12) 58

¹⁴ Jacob Katz, 'The Forerunners of Zionism' in Jehuda Reinharz and Anita Shapira (eds), 'Essential Papers on Zionism' (New York University, New York Press 1996) 36

rehabilitation of Jewry was conditional on the revival of Jewish political autonomy. Contention lay over whether this revival should take place in America, Eretz Israel or the so-called *Ugandan Proposal*.¹⁵

Inevitably what began to compel the notion of settlement process theory were the steadily increasing pogroms in Eastern Europe; the idea being to set up Jewish colonies in Mandatory Palestine. The first notable pogrom started as early as 1821 in Odessa and continued throughout until the apogee of human tragedy, *Ha Shoah* or the Holocaust. Concurrently around the beginning of the 18th Century, we observe the commencement of the *Age of Enlightenment* which advocated reason and critical thinking as its core values. It was there to challenge the pathological discrimination of the ecclesiastical authorities which had so often harmed Jewry, and replace it with scepticism, human individualism, and liberation. But Moses Leib Lilienblum, a passionate writer and religious student, became disillusioned with the Enlightenment and what it could do to resolve the plight of Jewish subordination. He was not alone in this school of thought as many of the religious leaders were disappointed by the Enlightenment; not because of ideological indifference but because of growing impatience and a withering faith in its promised merits. This angst concentrated particularly in light of the Dreyfus Affair in France which was one of the first and few countries to offer equal rights to Jews. Lilienblum referred to it as a *false dawn and brief respite*.¹⁶ It is arguably here that the concretization of this *historic right* to settlement in Palestine was cultivated. This was premised on an assertion that the land of Palestine was held in perpetuity for its beneficiaries, the Jewish people, and could be invoked at anytime. His writings spoke passionately of pride and empowerment rather than humiliation and slavishness. His often crude analysis of the state of world Jewry is what captured the hearts and minds of his audience.

¹⁵ see also Arieh Bruce Saposnik, *'The Uganda Affair'* (2008) *Becoming Hebrew* 46-65

¹⁶ David Vital, *'The Origins of Zionism'* (Oxford University Press, Oxford, 1975) 119

Another ideologue was Leo Pinsker of Odessa and his pamphlet '*Autoemancipation! Mahnruf an seine Stammesgenossen von einem Russischen Juden*' published anonymously in 1882. He criticised what he thought of as the legitimisation of Jewish oppression, an attack on *Jewish feebleness, timidity and apologetics*. It was fiercely self-critical but universally appraised by Jew and non-Jew alike. Echoing similar sentiments of Lilienblum, he had criticised the reliance on universal liberalism and saw nothing from the enlightenment which could eradicate the ignominious narrative that beset the world Jewry. Instead he suggested that the Jewish community look inward for solutions and create their own panacea rather than looking to a society which had often failed them. He saw the hatred of Jews, specifically in Eastern Europe as pathological. Like Lilienblum, having initially favoured assimilation, Pinsker was radicalised by the pogroms in the Russian Empire. He therefore founded, along with Lilienblum, *Hovevei Zion* or Lovers of Zion in the 1880's which helped found the first colonies in rural Palestine.¹⁷ Along with the *Society for Settlement in Eretz Israel* they created the first Zionist colonies circa. 1880 in Judea (Rishon le Zion), Samaria (Zichron Jacob) and Galilee (Rosh Pina)¹⁸ with varying success.

Religious Zionism began metamorphosis into a practical paradigm, moving from thought to *action* as Katz articulated. Other religious scholars emerged, such as Moses Hess who came to the conclusion of Judaism as an "*ethnic-spiritual entity which should be preserved and strengthened because it contained forces of the future. Spiritual revival was to happen in Eretz Israel.*"¹⁹ The '*practicalisation*' of Religious Zionism began to invoke this *perpetual* and *biblical right* to Palestine and Rabbis such as Hirsch also began to encourage settlement there. Indeed, "*the Jews had territorial bonds with their homeland, nourished by historical memories and messianic hopes. Collective consciousness*

¹⁷ Vital (n 16) 65

¹⁸ Muhammad Siddiq Querishi, 'Zionism and Racism: a history of Zionist Colonialism and Imperialism' (Islamic Publications Ltd, Lahore 1981) 45

¹⁹ Katz (n 14) 43

*sustained the memory of the Land of Israel. It gave symbolic expression to the idea of exile.*²⁰

Political Zionism began to emerge around the late 1800's as a result of breaking away from orthodoxy. Whilst finding momentum from the *practicalisation* of the movement, some religious Zionists were unsettled by the increasing secularization of the ideology and its movement toward socialist and communist manifestations. What both the political and religious Zionists did share in common was disillusionment with the deleterious racism in Europe and the fear of more Pogroms; but the latter sought to realise Zionist goals on the condition of divine intervention. Correlations could be made on the focus of nationalism as central organising principles that made Political Zionism trump the Religious form. As Political Zionism began to move forward, important questions arose regarding the realisation of this *perpetual right*; there were those who were interested in political sovereignty for the Jewish Diaspora and those concerned with land; in short *the territorial vs. the ethnic*.

Zionists were thus presented with a dilemma. What was to take precedence; aspirations for a Return to Zion or Jewish political sovereignty? The latter was not concerned, in its purest sense, with the proxemics of such a nation nor, initially, the promotion of Hebraic culture, but rather solving the *Judennot* or 'Jewish Plight.' However, as the years continued, an assimilation of these aspirations began to take place which gave birth to the controversial maxim that legitimised historical Palestine as a land for the Jewish Diaspora. The so called '*land without a people for a people without a land*' (see also '*Zionism as Imperialism and Racism*') became etched into the Jewish conscious. The *conceptualisation of Palestine* came to fruition²¹. In other words, rather than being *any* piece of land, it was *the* land. It is important to note this as a key development in Zionist thought; the emergence of a narrative of Jewish political and territorial sovereignty which united previous

²⁰ Shmuel Almog, '*People and Land in Modern Jewish Nationalism*' in Jehuda Reinharz and Anita Shapira (eds), '*Essential Papers on Zionism*' (New York University, New York Press 1996) 50

²¹ Stein (n 7) 202

dissidents. However, to the bystander, it already seemed problematic; more so if we consider an indigenous population was already living there.

Simon Dubnow's *Theory of Jewish Nationalism*²² in 1897 also brought interesting ideas to the table. It stated that despite the Jews being in Diaspora or *non-territorial* as he referred to it, they have remained a nation. As well as having civil and political rights, they would have national rights to be recognised as a minority which would foster Jewish self-rule and formulate what he called the *Jewish World-Nation*. Indeed, elements of this were incorporated in the minority provisions in the Treaty of Versailles in 1919²³ but the exponential increase in nationalist exclusionary politics began to take centre stage and neutralised such pluralism.

To its ideologues, the arguments, rather than being antithetical, were mutually re-enforcing. It would be the *nation-state* that solved the very real problem of anti-Semitism in Europe. Where else would be better than the historical land of *Eretz Israel*. In other words, the political legitimised the religious and the religious legitimised the political. Indeed, "*it was not just a result of social, political and economic pressures, but also adherence to a specific land [that] set it apart from the immigration movement in general...to this were added social, religious and cultural utopias, images of society in which social or religious values would be realised, or in which unique cultural values would be created.*"²⁴ There had been a failure to realise something different; assimilation had clearly fallen short. Dubnow's ideas of self-rule tripped at the hurdle of the nation-state. But this was it, the hurdle, the nation-state as an expression of nationalism had taken centre stage. It was clearly seen as the dominant paradigm in which to implement certain principles; this was so the case for the *liberal nationalists* wanting to install liberal dogma across

²² Sophie Dubnow-Ehrlich (trs Judith Vowles) (eds Jeffrey Shandler), 'The Life and Work of S.M Dubnow: Diaspora Nationalism and Jewish History' (1st Edition Indiana University Press, Indiana 1991)

²³ Simon Dubnow, '*Nationalism and History: essays on Old and New Judaism*' (1958) Jewish Publication Society of America, 42

²⁴ Katz (n 14) 37

Western Europe.²⁵ In addition, this was certainly the era of nation-states particularly following decolonization in Africa, South-America, Asia and the Middle East. It was not all too surprising therefore that Zionism began to take the shape of a national liberation movement with a view to emancipate the Diaspora from its exile and restore the '*status quo*' of the right people to its historic homeland.²⁶ Restoration through the model of a nation-state was the popular emerging trend.

It is now suitable to introduce Theodore Herzl into the equation. Herzl has almost (and also ironically given his staunch secularist views) been deified in Israel. Indeed "*Herzl was the hero of the Zionist movement...its only hero. So he was seen by its members and its adepts; and so he saw himself. He looked the hero. He acted the hero. He displayed virtues and qualities that typically suggest hero.*"²⁷ Zionism, to use Schaff's previous analogies of ideologies, became less functional and more genetic. Increasing pogroms enriched the movement out of necessity and duress. Katz sums it clearly and concisely in that "*ideas which emerge but only became influential at a later stage are common in enough history, and the usual sociological explanation is that their influence does not depend on the degree of their 'rightness' or 'justice' but then coinciding with political and social conditions which lend them urgency.*"²⁸

What Herzl did which was pioneering was to codify practical steps toward the settlement of Palestine through a narrative of urgency. Whilst not initially too concerned with prioritising Hebrew and Hebraic culture, his work did eventually expound a collective Jewish identity²⁹ which consisted of a language, a territory and a culture. Herzl, initially firmly within the camp of those favouring political sovereignty, began to realise the merits of the territorial aspect. On the eve of Kaiser Wilhelm's visit to

²⁵ Will Kymlicka and Christine Straehle, '*Cosmopolitanism, Nation-States, and Minority Nationalism; A Critical Review of Recent Literature*', (2002) 7 *European Journal of Philosophy* 1, 66

²⁶ Nathan Feinberg, '*The Arab-Israeli Conflict in International Law*' (Magnes Press-Hebrew University, Jerusalem 1971) 101

²⁷ Vital (n 16) 233

²⁸ Katz (n 14) 38

²⁹ Lahav (n 8) 91

Palestine, he alluded that Zionism could play a key role in bridging the Orient with the Occident.³⁰

The basic tenets of Political Zionism can be identified as follows;³¹ firstly, *kibbutz galuot* which was the facilitation of mass Jewish immigration (or *Aliyah*) to Mandatory Palestine. Secondly, *geulat haaretz* or redemption of the land. This was obviously a relic of the religious influence from the Pre-Herzlian tradition and was premised on the perpetual right to establish *Eretz Israel* in Mandatory Palestine. The *negation of this exile* therefore was significant as exile was imbued as the fundamental root of all Jewish problems.³² Thirdly, came the *yehud ha-galil* or the Judaization of Galilee and finally *avoda ivrit* which was the consolidation of the Jewish proletariat. Whilst Herzl contended that in theory, civil equality did not contradict the rudimentary principles of Zionism, no explicit mention was made of the indigenous Arab population in Palestine in his seminal work *Der Judenstaat*. Indeed in this he stated that “Every man is free in his belief or lack of belief, just as he is free in his nationality. And should it come to pass that there shall live amongst us members of other faiths and nationalities, they shall find honourable protection and refuge, in common with all citizens of the state.”³³ Reference of the native populace would come later (see also section ‘Zionism as Imperialism and Racism’).

Herzl’s *Der Judenstaat* did some interesting things. He continued in the same vein as Leo Pinkser’s empowerment of Jewry doing away with the common discourse of Jewish submission. But *Der Judenstaat* also solidified the nationalist aspect of Zionism and its reductionist method identified statehood as the only option. This is what characterised Political Zionism and tied it within the prevailing framework of nation-states; the *Jewish Question* had become *the National Question*. It is not difficult to see why this was so appealing to the Zionist Congress of Basle, to whom this was first presented to in 1897. He firmly posited that ‘*the Jewish*

³⁰ Almog (n 20) 50

³¹ Lustick (n 31) 6

³² Lahav (n 8) xii

³³ Ori Stendel, ‘*The Rights of the Arab Minority in Israel*’ (1971) 11 *Israel Yearbook on Human Rights*, 137

*question is a national question which can be solved only by making it a political world question to be discussed and settled by the civilised nations of the world in council.*³⁴ With this injection of nationalist pride, the pressing circumstances of the time, the growing impatience with the enlightenment as the last vestige of the Jews, the illusion of desolation and dereliction in Mandatory Palestine, and the affirmation of state-hood as the only resolution, Zionism had only one outcome; universal approval.

Popular support among Jew and non-Jew alike began to collect behind Herzl's Political Zionism. For the spiritual and holy, they were appeased given Palestine's rich Jewish heritage. For those who did not necessarily have a firm religious connection, they were subsumed by the collective consciousness which *Eretz Israel* evoked and felt it gave *symbolic expression to the idea of exile*³⁵. In other words, as well as appearing to finally solve the problem of anti-Semitism in Europe, it empowered the Jew in an entirely new narrative. To its advocates, traditionally western supporters; a Jewish and Democratic state would be a bastion of western liberalism amongst a terrain of predominately hostile and 'anti-western' nation-states. Israel was to be an expression of democracy, human rights and freedom. This was elucidated by the well-known *Balfour Declaration* of 1917³⁶ which promised the Jewish people a home in Mandatory Palestine (this was in direct contravention of the McMahon-Hussein Correspondence between 1915-1916 which made similar promises to the native Arabs- but this is not of concern to us here).

The Holocaust marked the zenith of the European's pathological hatred against the Ashkenazi. However, this systematic genocide worked in Zionism's favour as it gave it more impetus, credibility and urgency to the movement. It also earmarked the flaws of an ethnocentric nation-state; a criticism which would often be levelled against the State of Israel from its inception.

³⁴ Querishi (n18) 50

³⁵ Almog (n 20) 50

³⁶ see also Jonathan Schneer, 'The Balfour Declaration: The Origins of the Arab-Israeli Conflict (Bloomsbury Publishing Square, London 2010)

It is also right to elucidate on counter-narratives to the *Jewish problem* and Zionism as its all encompassing panacea. I will not delve too deeply into this as the next section will explore this in more detail. The reason why I shall discuss the particular narrative in this section is that these particular individuals did align themselves with the Zionist movement but their conceptions of it were far different.

Asher Zvi Hirsch Ginsberg, known better by his pseudonymous name Ahad Ha'am is often titled as the founder of *Cultural Zionism*. He spoke as the internal critic of the Zionist Congress and after many visits to Mandatory Palestine, wrote of the perils of establishing a state there. In one of his acclaimed essays, he condemned the Orientalist conception of Arabs within the congress, instead giving them a much more accurate and favourable description.³⁷ Having been a member of Hovevei Zion, he realised the impracticalities of immigration to Palestine and sought to create a *spiritual and cultural* centre for Jews in Palestine whilst stressing an importance on Jewish and Hebrew culture. In his essay '*The Jewish State and Jewish Problem*'³⁸ he even identified the problems of creating a *Volkerrechtlich* state or one recognised under public international law. With the varying success and failures of the first settlements, a nationalist revival abroad was needed without which, a state would be weak and sustainable.

Contrastingly, another notable formulation of Zionist thinking, which today is the mainstay of the Likud Party in Israel, is *Revisionist Zionism* cultivated by Ze'ev Jabotinsky. This pedigree of Zionism, centred purely on Political Zionism, was focussed on territorial maximalism into what is the current day Westbank, Gaza, parts of Jordan, Sinai and the Golan Heights. After the British thwarted this dream, they advocated militancy in order to gain control of the region. In Jabotinsky's seminal essay, *Iron Wall* written in 1923, he discussed Zionist relations with the Arabs. His

³⁷ Ahad Ha'am, 'A Truth from Eretz Yisrael' (<http://www.accessmylibrary.com/article-1G1-67583304/truth-eretz-israel.html>) (2000)

³⁸ Ahad Ha'am 'The Jewish State and Jewish Problem' (<http://www.jewishvirtuallibrary.org/jsource/Zionism/haam2.html>) (2000)

often racist discourse, which refers to the Arabs as 500 years culturally behind them, is oddly dotted with patches of parity with the Arabs but these contradict the general tone of the piece which speaks of them as inferior and ripe for colonisation and expulsion.

The discussion of Zionism as liberation is by no means meant to be a definitive historical account of Zionism; rather it aims to identify and explain key ideological influences to its dogma. As has been reiterated before, Zionism was a discordant and multifarious doctrine. There were those, like Ha'am, which wanted to create a *spiritual home* rather than a nation in Palestine. Others like Judan Leon Magnes, a prominent American Rabbi, wanted reconciliation with the Arabs. This can be set adjacent to the Herzlian tradition and Jabotinsky's Revisionist Zionism which was arguably a far more exclusionary form of Zionist thought. But the common themes were that Zionism and Jewish nationalism were portrayed as if they were instrumentalist values; tools for national liberation which fed into a Jewish Consciousness of self-sacrifice and suffering, more so in the milieu of *Ha Shoah*. Even to this day, many see it as a manifestation of a perpetual struggle against oppression and anti-Semitism. Indeed Israeli Ambassador Yosef Tekoah in a debate with the UN described it as *anti-imperialist* and a *liberation movement of the Jewish people*.³⁹ We cannot deny the strength of the arguments nor its claim to being a movement of liberation and collective emancipation. Zionism was powerful but righteous. It had impetus, sophistication and appealed to, whether real or not, a collective conscious which united all Jews no matter how different they were. Zionism runs on a continuity of time, linking its history from thousands of year to the perennial suffering in 20th century Europe. This time line stretches all the way back and the perpetual right to the Holy Land runs alongside it. History is the lifeblood of Zionism and it is hard to ignore its necessity.

This is Zionism as an ideology of liberation.

³⁹ Abdeen Jabara, 'Zionism: Racism or Liberation' (http://www.al-moharer.net/falasteen_docs/abdeen_jabara.htm)

Zionism as Imperialism and Racism

To think of Zionism as something entirely different from what we have previously discussed seems somewhat bewildering. But this is typically the nature of all discussion. United Nations General Assembly Resolution 3379⁴⁰ 'World Conference to combat Racism and Racial Discrimination' stated that "*the racist regime in Occupied Palestine and the racist regimes in Zimbabwe and South Africa have a common imperialist origin, forming a whole and having the same racist structure and being organically linked in their policy aimed at repression of the dignity and integrity of the human being*⁴¹ " finally ending the resolution in the stern words that state "*we...determine that Zionism is a form of racism and racial discrimination*⁴²". Of course this is not enough to determine Zionism and its supposed racist-imperialist character even though it was voted by the general assembly. We do not want to be duped into the fallacy of majority belief, therefore we need to explore the contentious critically. Whereas the discussion of Zionism as liberation was more descriptive and passive, Zionism as Imperialism and Racism must be challenged given the strong accusations. I shall not observe whether Zionism was racist or imperialist based on the international legal standard but rather, like the resolution, the origins of these sentiments with reference to the academic literature.

Such accusations were more prevalent post-Israeli statehood when Zionism manifested itself through its policy toward the Palestinian population within Israel and the Occupied Territories. Further elaboration of this phenomenon shall come later in this study. For now, we focus on its intellectual origins. Edward Said, Palestine's most revered academic, in his magnum opus *Orientalism* deconstructed western narratives in the arts and social sciences. To very briefly summarise (and do little justice to this definitive work) he said that perceptions of the east by the west (the

⁴⁰ United Nations General Assembly, *Resolution 3379* (<http://www.un.org/documents/ga/res/30/ares30.htm>) (1975)

⁴¹ United Nations General Assembly (n 40)

⁴² United Nations General Assembly (n 40)

east-west schism indeed having being conjured by the latter) are distorted by a lens of preconceived ideas. For example, when we think about the Middle East, we think of patriarchy, belly dancers, opium dens and war; many of which are unfortunate relics of western colonialism. Imperialism and colonialism is a strong focus in Said's work and one in which he uses to identify the origins of Zionism. It is therefore a useful starting point.

Said defines imperialism as "*promotion of a peculiar and even esoteric mythology. One myth is that a culture is superior to another, in that reality can be changed to create natural hierarchies.*"⁴³ Like the Western European Powers, particularly the French and the English who sought to carve up the Levantine region in what was known as the *Sykes-Picot Agreement*, Zionism, he posits was aimed on territorial acquisition and expansion and its legitimization. The expansion element would be particularly prevalent post-1948 but the acquisition element is of interest to us at this juncture. Said's compelling analysis said that the underlying philosophical basis for such a 'moral reasoning' related back to his natural hierarchies. He suggested *it is the history of uses and abuses, the formation and deformation of the sciences*⁴⁴. European sciences categorized collective groups and peoples into a taxonomic hierarchy. Therefore Said's exercise was essentially a comparative one. This he did by consoling the *tragic blindness of Zionism*⁴⁵ in its complicity with its European oppressors to which they were subservient to. By yearning to create a state elsewhere, it in effect legitimised European intolerance. Ironically, Balfour was himself clear in his opposition to Jewish immigration into Britain coupled along with his support for the 1905 Aliens Act that indirectly discriminated against European Jewry.⁴⁶

⁴³ Edward W. Said, 'Intellectual Origins of Imperialism and Zionism' in *Zionism and Racism* (Billing and Sons, Guildford 1977) 125

⁴⁴ Said (n 43) 125

⁴⁵ Said (n 43) 125

⁴⁶ Viktor Kattan, 'From coexistence to conquest: International Law and the Origins of the Arab-Israeli conflict, 1891-1949' (Pluto Press, Michigan 2009) 16

Said also suggests that Zionist thinking was shaped by its intellectual milieus (which feeds nicely into Schaff's categorisation of *genetic ideologies*). It was sensitive to its surroundings in two respects: in a very real way, the dogma accrued such wide support because of the omnipotence of Jewish suffering and the failure of the Enlightenment to address this effectively. However, it was also sensitive to the thinking of Imperial Europe and the framework of colonial practice. Author Leonard Stein stated that, "*here is a derelict country in which everything remains to be done. Let the Jews rebuild it; let them reclaim its wastes, let them develop its neglected resources; let them make it a model of a healthy and well-ordered society; let them give it a place of its own in the world of thought and leaning*"⁴⁷; this is text book imperial discourse. In the previous pages of this book, Stein acknowledges the existence of an Arab population. Therefore, in the context of these words, the implication is that the Arabs are inept and inferior. It is this re-interpretation of history which neatly brings us to another species of analysis.

The *Re-interpretation of History* can also be used to identify Zionism as an enclave within Imperialist thought. The origins of Zionism rest on 3 basic premises⁴⁸. The first is the sense of *Unity* which emanates from the Jewry's difference and exceptionalism as a frequently suppressed race. The second is *Uniqueness* which embellishes the notion of Jewish suffering being apart from other forms of collective suffering. As a result of their *de facto* uniqueness, they are unable to integrate. This particular proposition is interesting for two reasons. Firstly, a clash emerges which is typical of Israeli politics and law which is the age old tussle between particularism and universalism. I shall explore this in further detail later.

The Second observation develops the previous position of Said's *tragic blindness*. Such *uniqueness* is self-defeating. It legitimises European racism and indirectly affords some kind of credibility to their treatment of

⁴⁷ Stein (n 7) 203

⁴⁸ Bajoit (n 5) 133

European Jewry. This apologist reasoning is indeed unsettling, unconvincing and untrue.

The final re-interpretation of history is *Continuity* which we discussed very briefly before. This premise feeds into a narrative of abstract and perpetual lands rights of the Jewish Diaspora which have stood the test of time. Indeed, although time has been disrupted by events, the perpetual right is non-derogable and inderogable. Even in the state's *Declaration of Independence*, reference is made to the irrevocable General Assembly resolution which mandated the states creation referring to it as a *natural right*.⁴⁹

Collectively, these types of observation were congruous to imperialist thought. European settlers typically used analogous dialogues in justifying the creation of communities within 'uncivilised worlds'. Similarly, imperialist movements would often communicate a liberation-humanitarian-type discourse to rationalize and rouse popular support for action. For example, Zionists would say that they had fought against British imperialists in Mandatory Palestine.

One thing we must accentuate is this notion of Palestine as a barren, desolate and uncultivated land. Let us ask ourselves some simple questions. If we are fully aware that people inhabit such a land *yet* we choose to ignore or deny their existence, we are led down a moral quagmire. People would begin to ask us why such ignorance or denial. The axiom of *Palestine without Palestinians*⁵⁰ embraces a re-interpretation of history and when we ask ourselves these tough questions, we end up with similarly tough conclusions.

However, is it enough for us to say that Zionism was either imperialist or racist with an abstract comparison of its origins? What does it matter if

⁴⁹ 'Israel's Written Constitution: Verbatim English Translations of the Declaration of the Independence and of the Basic Laws, Consolidated and Updated as of January 10, 1999' (3rd Edition Aryeh Greenfield Publications, Haifa, 1999) 7

⁵⁰ Nazih Qurah 'The Arabs in Israel since 1948' in *Zionism and Racism* (Billing and Sons, Guildford 1977) 91

Zionism was its intellectual progeny? That does not necessarily denote it as similar in sentiment.

I shall now introduce the question of the Arabs and Zionism and explore the changing dialogue of this minority within the framework of Zionist discourse. We shall focus more on developments pre-1948 but make intermittent reference to post-1948. It is important to note that Zionism made no explicit references to Jewish-Arab relations.⁵¹

Let us take as our starting point that Arabs did inhabit the land which is irrefutable. While we may shift and shuffle uncomfortably in our seats, let us remember the tough questions we asked ourselves about denial of such an indigenous population. Recall that the *Balfour Declaration* made no reference to the Arabs. It was not until growing anxiety amongst Arabs regarding increased Jewish immigration in the shadow of creating a state that Zionists began to acknowledge this as an issue. Realising that Arab opposition would not dissipate, particularly in the wake of the growing Pan-Arab Nationalist movement, Zionist leaders sought to appease their counterparts (notably with *other* Arab states and not with the indigenous Palestinian Arab population). This was achieved through rhetoric of *parity*. Surely then, Zionism as Herzl said, could not be deemed to favour one over the other.

Following this opposition, Zionists began to talk about parity with the Arabs⁵². This is peculiar for two reasons. We can be certain knowledge of Arabs living there was known to prominent Zionist leaders. The number of Arabs and the nature of the land is irrelevant but this presents us with two possible conclusions; that the Zionist leaders did know but chose to ignore or deny their existence which brings us back to the unsettling aforementioned conclusion. Or that they did acknowledge their presence but *initially* considered them inferior. Consequently, had it not been for Arab opposition, this inferiority complex would have continued (and may

⁵¹ Lustick (n 31) 51

⁵² Lustick (n 31) 30

still do as this chapter later explores). Deputy Director of the Jewish National Fund (which would later become a quasi-public body which encourages land acquisition for Jews only) Joseph Weitz wrote in the Hebrew newspaper *Davar* that “*there is not enough room for two peoples to live together*” and that the Arabs must be transferred.⁵³ Former Israeli military leader and politician Moshe Dayan speaking in the liberal Israeli paper *Ha’Aretz* said that there was not a single place built in this country that did not have a former Arab population.⁵⁴ We can infer therefore that the second of our conclusions seems to be the more fitting.

Around the years 1936-1938, there was a distinct strand of thought running through Zionist camps. Indeed, “*parity was originally put forward as a constitutional scheme and political principle which would protect the right of the Jewish minority in Palestine. Parity meant preventing the Arab majority from ‘democratically’ putting an end to the development of the Jewish national home. The doctrine also held out the promise to Arabs that even if and when a Jewish Majority emerged in Palestine, the Arab community would nevertheless remain as an equal partner on the affairs of the country.*”⁵⁵ Even Israel’s first president and former University of Manchester Lecturer Chaim Weissman re-iterated these provisions. The points to identify from this is that a democratic bar was imposed which halted the Arabs from democratically restricting Jewish immigration in exchange for equal representation in a newly formed state. David Ben-Gurion went even further stating that Arabs in Israel would enjoy a privileged position in contrast to their surrounding counterparts.⁵⁶ These parity measures were founded upon the knowledge that the Arab opposition was the main obstacle to Zionist fulfilment. As was the case, “*although official Zionism eventually retreated from its belief that Arab opposition was not rooted in nationalist motivations, this assumption influenced policies toward the Arabs in Palestine until 1936. During these years, Zionism declared that it had no desire to rule others (i.e. Arabs),*

⁵³ Qurah (n 50) 91

⁵⁴ Walid Khalidi, ‘That Remains’ (Institute of Palestine Studies, <http://www.palestine-studies.org/enakba/Books/All%20That%20Remains%20Intro.pdf>) (2000) xxxi

⁵⁵ Lustick (n 31) 33

⁵⁶ Lustick (n 31) 38

and was not willing to have others rule it...however, none of the attempts made by official Zionism to reach a Jewish-Arab agreement, at the heart of which was the principle of parity (equality of rule regardless of the current majority-minority balance), bore fruit.⁵⁷ Following antagonisms and the infamous riots of 1936, a Royal Commission was dispatched by the British Government. Zionists were clear in their position that parity was feasible only upon *tripartite agreements between the English and the Arabs in that the interests of the national home would be safeguarded*.⁵⁸ The Commission suggested two states, one Jewish, one Arab and, if need be, population transfers (if necessary, by force) to ensure majority demographics for each state.

After 1936 however, things began to dramatically change. After the periods of mass Jewish immigration or *Aliyah*, Zionist leaders conducted an abrupt policy U-turn. Realising that Jewish immigration was proceeding at a faster rate than initially conceived, Ben-Gurion had more leverage than he had realised. As a result, all promises of parity were broken⁵⁹.

Determining whether Zionism was Imperialist and Racist is a difficult exercise if we focus exclusively on the pre-statehood era. It seems the easiest way to determine such labelling is through exploration of its origins *in addition* to seeing how it dealt with the issue of minorities; both which we have done. It is not enough to say therefore that '*Zionism and its legal framework in Israel can be defined as being based on the principle of exclusion*'⁶⁰. Further work needs to be conducted which initiate an analysis on law and policy after 1948. This is where we shall head toward now.

Very briefly, however, we shall outline some preliminary points.

⁵⁷ Yossi Katz, *Status and rights of the Arab Minority in nascent Jewish State* (1997) 33 Middle Eastern Studies 3, 537

⁵⁸ Katz (n 57) 540

⁵⁹ Lustick (n 31) 34

⁶⁰ Jabara (n 39)

How do we refute the claim of Jewish self-determination? Let us take Lenin's theory of self-determination⁶¹ in which he stipulates that fighting for equality within the state in which you are oppressed in is a necessity. He also added further that such a collective right is absolute when exercised by an oppressed nation. The issue of the Jewish right to self-determination is absolutely unequivocal and unconditional. However, whilst absolute, there is the precursor; the environment in which that self-determinating community exists cannot be realised at the expense of another people. This is perhaps the deafening cry to the calls of Zionism. Also, as a general criticism, it may be said that self-determination is *not* an absolute right.

Remembering that Zionist tenets are general and therefore would require a *lex specialis* to determine whether certain actions/words are indeed a part of the ideology, it becomes a piecemeal exercise of taking each policy of a Zionist leader and matching it to the tenets objectively. This is also ignoring the problem, which we acknowledged before, that Zionism is not homogenous. It is beginning to appear that such an exercise is perhaps too excessive and inconclusive. But what this does do is set the parameters of the competing narratives. Whilst we may not be able to see whether Zionism as imperialism and racism is either strict adherence or flaccid distortion of the ideology, what we have done is to extrapolate the ideology to both extremes; and our later legal analysis, whether it affirms either of the poles or situates itself somewhere in between, means we are prepared for it. Only then can we determine which of the accounts of Zionism is most convincing. No one can reasonably hold that Zionism could be considered in the latter formation because of the limitations of the analysis. There was the ignorance of an indigenous population and the flippant policy U-turns, but as we have said before, we can't determine whether this is adherence or non-compliance.

⁶¹ Stanley W. Page, 'Lenin and Self-Determination' (1950) 28 The Slavonic and East European Review 71, 345

Chapter Two

Zionism, Implications for Law and the Palestinian Minority

The Relics of Ottoman, Religious and Mandatory Law

Having explained these two competing narratives, I will now move onto the legal discussion. This will look at the effects of Zionism on the state structures and the various deficiencies which can be seen to perpetuate the *Zionist Project*. Following on from this, I shall chart and critique the development of human rights and equality Jurisprudence in Israel. This shall also briefly look at the impact on judicial independence and procedural fairness and throughout the discussion, a focus shall be made citing the impact on the Palestinian Arab population who live within Israel.

How does Zionism permeate into law? What are its visible manifestations? These questions can be answered by acknowledging the states interesting, almost exceptional quality of being influenced by a mix of various legal systems and jurisprudence. Given this and the earlier general remarks about law intertwining with politics and its sensitivity to other influences, it is worth some detailed mention of the legal system from which the Israeli one emerged. This discussion is important as we can unearth some parallels between elements of pre-Israeli Colonial Law and the proliferation of the Zionist project in Israeli society. Indeed, there was by no means a clean cut disassociation from its legal precedents. In much the same fashion that the principle of *stare decisis* functions, Israeli law observed similar obedience to its antecedents. The Law and Administration Ordinance 1948 ensured the continuity of Ottoman and

English Law so long as it did not conflict with an ordinance of the Provisional Council (which was the interim legislature of Israel).⁶² This is interesting for several reasons. Inferences could be drawn as to the nature of Israeli law from its legal ancestor; to use the popular analogy *like father, like son*. In much the same way we did when we discussed Zionism as Imperialism and Racism and we tried to deduce some conclusions based on its intellectual origins, the same *could* be said here. Was Zionism therefore merely a continuation of Colonial Law?

Pre-Israeli law was a veritable blend of common, civil and religious law which covered many different areas⁶³. Ottoman Law, even after its disintegration remained in place in areas of private law, special obligations and real property. The *Mejelle* was an Ottoman codification of private laws and procedural laws which had heavy influences from Islamic Jurisprudence and Napoleonic Civil Code. Resultantly, French jurisprudence featured heavily.⁶⁴ One of the most tangible relics of the Pre-Israeli era is the exclusive jurisdiction of religious courts in matters of family and marriage, and this *millet system* still remains in place today.

Naturally, British Mandatory Laws provided another sediment to the legal system. These laws had two functions; one was to modernise the system and the other provided power to the High Commissioner to smash Jewish resistance (generally any anti-colonialist forces) following the Aliyahs and growing Zionist settlement in the region. One of the notable residues of the Mandatory Laws came in the form of Defence (Emergency) Regulations which are still in force today.⁶⁵ These allow civilians to be tried under military jurisdiction with no right of appeal and restrictions on individual freedoms.⁶⁶ The effects of these, particularly in relation to the discourse on national security, have been of some concern to human rights organisations, particularly with their seemingly arbitrary application

⁶² Henry E. Baker, 'The Legal System of Israel' (Israel University Press, Jerusalem 1968) 8

⁶³ Ariel Bin-Nun, 'The Law of the State of Israel: An Introduction' (Rubin Mass Ltd, Jerusalem 1990) 4

⁶⁴ Baker (n 62) 61

⁶⁵ *At the time of writing, a bill has been introduced to entrench these regulations in law- see later in this section.*

⁶⁶ B'tselem- The Israeli Information Centre for Human Rights in the Occupied Territories. '*Defence (Emergency) Regulations*' (http://www.btselem.org/english/Legal_Documents/Emergency_Regulations.asp.) (2007).

toward the Palestinian Arab population. The prevalence of the regulations has caused concern in terms of protection of civil liberties and minority protection.⁶⁷ As stated before, these were used to stifle resistance and dissent by the Colonial power and their use today, is seemingly unchanged. The conclusion one could draw here is one which gives stature to the notion of Zionism as Imperialism.

In addition, there were common law and equity principles and also other 'soft laws' on the legal system such as aversion to other jurisdictions of liberal democracies as well as Jewish ethics; although it should be noted that "*application of western principles of rule of law is more in the nature of grafting than transplantation.*"⁶⁸

Jewish ethics, it should not be underestimated, play a huge part in adjudication both pre- and post-statehood; and a largely positive one too. Indeed, *an analysis of Israeli Judiciary requires an examination of relevant developments within Jewish Law.*⁶⁹ Judaism boasts an impressive range of law sources, from the Talmudic law; this is the classical exposition of Jewish Law composed of books from prominent scholars in addition to the *Midrash* which are a set of commentaries on the holy scriptures. Two Talmud exist, one of which is kept in *Babylon* and the other in *Eretz Israel*; the former having supra-status should a conflict arise. In the Babylonian Talmud, Alexander Yannai, a powerful king was summoned to the court having been brought by one of his slaves.⁷⁰ Similarly in the Jerusalem Talmud, it clearly states in *Leviticus 22:9* that if an *earthly king issues a decree, at his will, he observes it himself.* These are all basic principles pertaining to the supremacy and rule of law.

⁶⁷ Sammy Smooha, '*Minority Status in an Ethnic Democracy: the state of the Arab Minority in Israel*' (1990) 13 Ethical and Racial Studies 3, 393

⁶⁸ Gideon Hausner, '*The Rights of Individuals in Court*' (1974) 9 Israeli Law Review, 477

⁶⁹ Shimon Shetreet, '*Justice In Israel: A Study of the Israeli Judiciary*' (Martinus Nijhoff Publishers, Dordrecht 1994) 19

⁷⁰ Asher Moaz, '*The Values of a Jewish and Democratic State*' (1996) 26 Israeli Yearbook on Human Rights, Martinus Nijhoff Publishers, Dordrecht, 294

Finally, the *Torah* is the five books of the Pentateuch. This is where *Halacha* or religious law is derived and typically the expression of the orthodox community within Israel. This is a very concise and by no means erudite explanation of Jewish law but it is evident that a tradition of Jewish law, ethics and jurisprudence clearly exists.

In addition, “*when the court, faced with a legal question requiring decision finds no answer to it in statute law nor in case law nor by analogy, it shall make the decision in accordance with the principles of freedom, justice, equity and peace, found in Jewish Tradition.*”⁷¹ Such a phenomena, incidentally, is not unique to Israel. US Chief Justice Earl Warren relies *expressly* on Jewish Law as stated by Maimonides in establishing the rule against self-incrimination.⁷²

From the very start of our discussion, we have talked about how other prejudices can seep into judicial decision making and this is testament to such a fact. Once again, it must be emphasised that this is not necessarily a negative phenomenon.

The previous legal system, as we can clearly see, featured heavily within the Israeli one. Or at least it certainly did in the infant years of Israel’s birth. The Foundations Law 1980 finally emancipated Israeli law from English law; one part repealed the edict of former British Mandatory power concerning the binding force of English Law as a subsidiary source and the other section identified what sources of law the judges should use. However, Defence (Emergency) Regulations still remain in use. Indeed, at the time of writing, a bill has received its first reading which aims to square these regulations into the statute books so that they become a regular feature of Israel’s legislation.⁷³ It will also become apparent that many of the judges, particularly those of the *Beit HaMishpat HaElyon* or Supreme Court, came from liberal western democracies and

⁷¹ Bin-Nun (n 63) 10

⁷² Moaz (n 70) 291

⁷³ Association for Civil Rights Israel, ‘*Summary of the Knesset Session- Summer 2011*’ (<http://www.acri.org.il/en/?p=3100>) (2011)

infused their knowledge of these legal systems into the Israeli one. Whilst it was not always an easy transposition, such a tradition is observable in the judgments.

What can we therefore infer from glancing at the pre-Israeli legal complexion? The resilience of Colonial Law in the form of Emergency (Defence) Regulations provided a useful tool for state authorities to suspend liberties in the name of national security; naturally this could be used to thwart anti-Zionist sentiment amongst the population and maintain Zionist hegemony. Another notable influence is Jewish ethics which tend to span the boundaries of ethnicity and religion by providing sound universal guidelines for general principles of law. Whilst the pre-Israeli analysis has certainly been important, it is now pertinent to move the clock forward to observe Israel's nation-building infancy. Israel wanted to replicate European models of government but had the added complication of imploring the Zionist mantra. It becomes necessary to therefore look at how these potentially volatile ideas played out.

A Brief History of Israeli State Formation

At its inception, the *Moetzet Ha-am* (National Council), which comprised of the Yishuv and World Zionist representatives, would create an interim Provisional Council until elections could help with a constitution. Notably, the Provisional Council was empowered to lift restrictions on Jewish immigration and land transfers to Jews which were originally imposed by the British Government White Paper of 1939.⁷⁴ The objective of the Provisional Council was that such a constitution would be adopted by a *H'assefa Hamechonenet* (Constituent Assembly) no later than the 1st October 1948.⁷⁵ In addition the *Minhelet Ha-am* (Executive organ), would constitute the provisional government. But it was the Transition Law of 1949, the first law passed by the Constituent Assembly which would plan

⁷⁴ Baker (n 62) 7

⁷⁵ Baker (n 62) 7

out the structures of the Israeli state. Many of the changes were merely cosmetic such as changing the name of 'ordinances' to 'laws'. Some were more substantial. For example, the Constituent Assembly now became the *First Knesset* and as the Israeli Parliament, it was *officially* competent to legislate.

The Knesset composes legislation which is at the top of the normative legal order.⁷⁶ In the case of *Zeev v. Gubernik*⁷⁷ the judges took the *positivist and formalist* approach stipulating that the *provisional state council (now Knesset) is the superior institution in whose jurisdiction lies the discretion to prefer the needs of public security over individual rights*. Thus, the notion of a *theoretically* sovereign Knesset was established. In the cases of *Batzul v. Minister of Interior*⁷⁸ and *Ezuz v. Ezer*⁷⁹, the supremacy of the Knesset was accentuated. Indeed, "*the Knesset is free to choose the subject matter of its laws and to determine their contents...after a law has been enacted by the Knesset and published in the Official Gazette, we must bow before it and not doubt its provisions, instructions and directions*".⁸⁰

One interesting trait of the Knesset, something which laid the playing ground for its relationship with the judiciary, was demonstrated by the case of *Bergman v. Minister of Finance*⁸¹ and has been exemplified in other cases. This was the peculiar phenomenon in which the Knesset would often amend Basic Laws or Statutes accordingly following a case decision. This tit-for-tat is a drop in the ocean of clashes and collusions with the judiciary; one which is essentially premised in differing schools of moral thought.

⁷⁶ Amos Shapira, 'Legislative and Judicial Law-Making Concerning Educational Liberty and Equality: Some Israeli Constitutional Law Perspectives' (1977) 9 Israel Yearbook on Human Rights, Intesdar Shamir Ltd, Tel Aviv 1977, 183

⁷⁷ (1948)1 P.D. 85

⁷⁸ (1965) 19 P.D. 337

⁷⁹ (1963) 17 P.D. 2541

⁸⁰ Baruch Bracha, 'The Protection of Human Rights in Israel' (1982)12 Israel Yearbook on Human Rights, Alpha Press, Jerusalem, 111

⁸¹ (1969) 23 (i) P.D. 693

The Knesset and Judiciary seemed to be eternally locked in a moral battle. It is a battle of conflicting schools of moral philosophy (or so it seems). The Knesset is often seen as being the champion of consequentialist moral reasoning and this was reflective of its tendency to promote Mamlakhtiyut in the early days of Israeli statehood (and is increasingly becoming the case with bills being discussed on loyalty oaths). The Courts however, *appear* to be the bastion of rights based deontological reasoning. Through the years, and as I shall explain further, the Judiciary have often tried to counteract the utilitarian tendencies of the Knesset by promoting a strong tradition of human rights and individual liberty. One such example of judicial dissent from the Knesset is the case of *Boronovski v. Chief Rabbinate*⁸² in which, rather than referring to the legislation which outlawed bigamy, the judges departed from this and cultivated their own principles of equality. However, I shall argue later that even the judiciary, in its pursuit of a Kantian- liberal jurisprudence, often capitulates to utilitarian thinking in the name of Zionism.

Whilst I have not elaborated on this position just yet, there is one more area which needs to be explored. Assuming that a rights based approach to law making and judging were not encouraged by the legislative and judiciary respectively, what of the state of constitutionalism? How did this interact with the proliferation of Zionism?

To codify or not to codify; that is the Constitution

Israel's relationship with the task of codification is telling. Modern constitutionalism was arguably conceived in the United States. A written constitution, the forefathers said, *would be the last contribution to the science of politics*.⁸³ They envisioned that such a document would help resolve issues fundamental to good governance, define powers of state structures and ensure individual rights.⁸⁴ Calls for codification were

⁸² (1971) 25 P.D. 7

⁸³ Martin Edelman, 'Courts, Politics and Culture in Israel' (University Press of Virginia, Virginia 1994) 6

⁸⁴ Aryeh Greenfield Publication (n 49) 2

numerous and resounding due to aspirations of strengthening Israel's democratic functions. It, on the surface, would suggest Israel's commitment and character as a democratic state.

Like Britain, Israel is part of an exclusive club of countries who do not have a codified constitution. But like Britain, the proposition that Israel has no constitution is in error. Indeed *"while we still may properly enough refer to the document itself as the constitution, in a larger sense, the constitution is the document as enveloped in a vast, living, changing, complex of interpretations and usages."*⁸⁵ Statute, case law and convention are such sources of constitutional law in Britain and Israel alike. Thus codification does not mean absence of a constitution. Quiet to the contrary, Israel documents an interesting history of its *emerging constitution*.

The Jewish community in Mandatory Palestine, the *Yishuv*, in the shadow of pending statehood, set up a committee on 'Constitutional Questions' to create a codified document which would eventually be enacted as the constitution.⁸⁶ They did not obviously envisage the complications which came with the state's establishment based on such a unique Zionist ideology. Dr Leo Kohn wrote several constitutions in which the main sticking point (something we shall delve into shortly) was trying to assimilate the concepts of democracy and the Jewish character of the state. His preliminary drafts included the name of the state, language, the flag and symbols, human rights, state organs and promulgation.⁸⁷ In addition to the external mitigations, party opposition also rendered enactment obsolete. Ben-Gurion's socialist slant and centrally planned economy meant there was little need for a constitution affording individual rights. Interestingly, the Mapam and Communist parties were compelled to oppose the drafts due to its omission of Arab rights. Whilst they did not want to necessarily create a binational state,

⁸⁵ Emanuel Rackman, 'Israel's Emerging Constitution 1948-1951' (Columbia Press, New York 1955) x

⁸⁶ Edelman (n 83) 7

⁸⁷ Edelman (n 83) 38

and they were resolute in this, they were perturbed by the lack of universality.

After its inception and the creation of an interim government, the Provisional Council of State delegated the task of creating a draft constitution to the Constitution, Law and Justice Committee.⁸⁸ Again, Ben-Gurion delayed such a task, feeling the executive could not be constitutionally restricted given Israel's existential crisis. This attitude was universal and embraced by both secularists and religious alike; the reason being that the integrity and legitimacy of Israel as a Jewish state was being perpetually challenged. The Constitution, Law and Justice committee referred the issue to a full plenum wherein a compromise was reached that a constitution would be created piecemeal, law by law; the eventual goal being these would be assembled together to create a codified and coherent document. The *Harari Decision* as it became known was a landmark constitutional law case. These *Basic Laws* predictably identified several areas of government; some worthy of note include the United Capital of Jerusalem, eligibility of the President and Land Transfer and acquisition. These Basic Laws tended to be the codification of an already established convention.⁸⁹ Interestingly, mention of Judaism was explicit in order to tie the land to its historical legacy and satisfy criteria of the Zionist project.

Importantly, whether these basic laws do or do not have supra-statutory status is a contentious issue. No statute existed which determined the relationship between these laws and ordinary legislation, but there had been much Judicial flip-flopping. In *Bergman v. Minister of Finance*, the court ruled in favour of giving preference to basic laws to override the current finance law (which the Knesset promptly amended) which only provided public funding for existing parties thus violating the principle of equal elections in s. 4 Basic Law: Knesset. After this case, legislation was then drafted to establish a legislative hierarchy between ordinary law and

⁸⁸ Lahav (n 8) 11

⁸⁹ Edelman (n 83) 23

Basic Law but this was quashed by the following administration.⁹⁰ Judicial reluctance to carry on the Bergman ruling soon followed but this indifference could no longer sustain itself. In the case of *Agudat Derech Eretz v. Broadcasting Authority*⁹¹ and similarly in *Rubenstein v. Speaker of Knesset*⁹² the same ruling was ratified. But in the aftermath of these rulings, there was a judicial u-turn in the cases of *Kaniel v. Minister of Justice*⁹³ and *Ressler v. Chairman of Central Elections Committee*⁹⁴; the consensus being that differences between the basic laws and ordinary statutes were purely semantic.

However, the story does not end there; following the *constitutional revolution* in 1992, Barak J made a speech in the Supreme Court in which he said *any ordinary legislation which contradicts the provisions of the Basic Law without stating explicitly that it is doing so will not be valid.*⁹⁵ Three years later in *Bank Hamizrahi v. Migdal Cooperative*⁹⁶ the courts created a precedent to the effect of giving the two new basic laws introduced in 1992, that of *Human Dignity and Freedom* and *Freedom of Occupation*, conditional higher normative status; conditional on the basis that no express provisions repudiated its supra-status.

What can we learn from these tendencies? There existed a fluctuating indifference toward codification varying from party to party and from epoch to epoch. Indeed, in the state's inception, the problematic road toward statehood and alleged anxiety over national security fostered a brand of communitarian etatism known as *Mamlakhtiyut*.⁹⁷ This culture encouraged a suspicion of constitutionalism and its corollaries particularly from those in power. The fundamental social unit in such a form of social organisation as Mamlakhtiyut would be the Jewish community and this was instrumental in advancing the Zionist narrative; more so in light of Israel's

⁹⁰ Edelman (n 83) 15

⁹¹ (1981) 35 (iv) P.D. 794

⁹² (1982) 37 (iii) P.D. 141

⁹³ (1973) 27 (i) P.D. 794

⁹⁴ (1977) 31 (ii) P.D. 556

⁹⁵ Aharon Barak, 'A Constitutional Revolution: Israel's Basic Laws' (1992) 4 Constitutional Forum, 83

⁹⁶ (1995) 49 (iv) P.D. 589

⁹⁷ Lahav (n 8) xi

'existential threats'. Such a consideration, therefore, shows the sensitivity of this project to political circumstances. As far as loyal statesmen saw it, they were a *democracy under siege* and this effectively had the reverse effect of liberalising and individualising state institutions.⁹⁸ The implication that could be extrapolated from this hesitancy is that such a constitution (were it to be codified) would have had the countenance of one which protected individual liberties or *A Bill of Rights*. The position is therefore that such a culture may undermine the 'Zionisation' of the state structures as it would give equal footing to non-Jewish inhabitants. Whilst the suggestion is there and perhaps strong, it is by no means conclusive.

Another document we can afford some constitutional stature and necessitates discussion was the National Council's *Declaration of Independence*.

*"The state will foster development of the country for the benefit of its inhabitants...it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture...we appeal- in the very midst of the onslaught launched against us now for months- to the Arab inhabitants of the State of Israel to keep the peace and participate in the up building of the state on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions"*⁹⁹

Whilst this did ratify Herzl's statements of civil equality, it was characteristic of Zionist policies indifference and uncertainty over the Arab minority. Although the National Council were not empowered to legislate, judges were divided as to its legal gravitas. Whilst Zmora J in *Zeev v. Gubernik*¹⁰⁰ said that it did not have constitutional status, Agranat J in *Kol Ha'am v. Minister of Interior*¹⁰¹ said that *we must pay attention to*

⁹⁸ Bracha (n 80) 110

⁹⁹ Aryeh Greenfield Publication (n 49) 1

¹⁰⁰ (1948) 1 P.D. 85

¹⁰¹ (1953) 7 P.D. 87

*the statement made in it when we attempt to interpret or clarify the laws of state.*¹⁰² This invoked a model formulated by Professor Zachariah Chafee¹⁰³ holding that the laws of a nation should be interpreted in light of the national vision and its core values. Agranat J conferred on the declaration therefore, normative validity. Such a formulation is noteworthy in the development of Israeli jurisprudence and warrants further excavation. As shall become clear in analysis of legislation, because there is no equality legislation, it is perhaps in the interests of those egalitarians that some legal collateral can be assigned to the Declaration.

It is now apt to discuss these developments in relation to fulfilment of the Zionist Project and briefly discuss the impact on the Palestinian Arab Minority. The apparent relationship between the political crisis Israel found itself immersed in and its reluctance to adopt a codified constitution, whilst not definitively causal, does help to answer some questions. Assuming, like most codified constitutions of liberal democracies, we can predict that such a codification would have the effect of liberalising institutions, the argument is then that those in power foresaw the dangers of Arab redress undermining the Zionist project. This teleological reasoning is more so compounded by the fact that Pan-Arabist sentiment was popular at the time. Equal legal recourse and representation in the Knesset (of which Arab members do exist) may have compromised some of the aspects of the Zionist vision (although as we shall later see, a law of equal rights would not actually undermine Zionistic policy).

Looking at some of its history, the Jewish state seemed to be riddled with problems; a legal system which still harnessed its old colonial master, an embittering battle between the legislative and judicial chambers and an unusual reluctance to codify. However, perhaps its biggest perpetual problem was one of reconciliation. Being a Zionist Jewish state and democratic raised a few eyebrows and it is important to discuss this if we

¹⁰² Stendel (n 33) 138

¹⁰³ Lahav (n 8) 190

are to understand the problems of the Palestinian Arab minority. It is to this section we now turn.

'Jewish and Democratic'; achieving the impossible?

This specific area has warranted much discussion and rightly so. It brings into question the seemingly opposite notions of being a Jewish state and being one which is democratic. Does Israel want to be identified as a liberal democracy like its western counterparts or does it classify itself on a remote island away from the rest, based on a collective memory of unique *Jewish suffering*? Indeed in the *Eichman case*, Agranat asked himself which '*world view to take*'; should they rely upon the crime against humanity like other nations or should they introduce crimes against *Jewish* people which acknowledged the heightened suffering of this group?¹⁰⁴ This problem is by no means ephemeral but a dynamic phenomenon which persistently troubles the state of Israel. Much depends on how we define both terms of 'Jewish' and 'democracy' because like Zionism, they are not homogenous ideologies. Much also depends on self-perception; does the Israeli politic see itself among the class of western nations or as something different?

Ancient Athens established itself as the cradle of democracy and has since become the golden standard of social organisation in nation-states. But we often use the word democracy sloppily and do not acknowledge its many variations and sophisticated intricacies. Democracies have existed in some of the most oppressive regimes in the world; yet connotations of something being *democratic* are often positive. Therefore, we must appreciate the varying schools of thought within democratic theory; the orthodoxy and heterodoxy. In Israel, Zionism's attempt to infuse *Jewishness* into democracy is no placid challenge. Yoram Shachar makes interesting points about this debate. Often when we consider such

¹⁰⁴ Lahav (n 8) xii

ideas to be contradictory, we assume Jewishness as *Halacha* or Jewish Law rather than the ethics of Judaism which, as we discussed before, often harnessed many of the principles of democracy such as equality before the law.¹⁰⁵ If we consider *Jewish* as the latter, then we really don't appear to have many problems (i.e. it is a philosophy rather than a religion). Indeed Shachar also refers to the League of Nations in 1922 and the United Nations Resolution in 1947 which called for a Democratic Jewish state. This *Jewish Promise* and the *Democratic Promise* would form the basis of the Israeli state.¹⁰⁶ Such an analysis seems to present the two as easily workable. Justice Shamgar suggested the Jewishness of Israel's democracy is no different from the Frenchness of France's. But one howling difference is apparent here; denying the Frenchness of France would not prohibit you from participating in it's democracy- this is not the case in Israel as we shall see.

In order to deduce what kind of democratic framework exists in Israel, I shall refer to the scholarship of Sammy Smooha. Because it is difficult to ascertain what composes of Jewish in a Jewish democracy, we shall focus on the type of democracy relating it to models in democratic theory. Israel is often referred to as a *Majoritarian Democracy*. In such a framework, ethnicity is privatised but a common language, identity, nationalism and institutions are cultivated¹⁰⁷. An ethnic group will determine the content of these ideas but it is still ethnically neutral. Smooha suggests Israel, contrary to popular believe is *not* a majoritarian democracy as such. The other type of democracy which it is sometimes labelled is a *Consociational Democracy*.¹⁰⁸ In this model, ethnicity is accepted as the principle for organisation of the state. Here individuals are judged on merit but different ethnic groups exist and are granted certain *public rights*. Representatives from the respective groups' elites engage in a politics of accommodation and compromise. However

¹⁰⁵ Yoram Shachar, 'The Dialectics of Zionism and Democracy in the Law of Mandatory Palestine' in 'The History of Law in a Multicultural Society: Israel 1917-1967' edited by Ron Harris, Alexander (Sandy) Kedar, Pnina Lahav and Assaf Likhovski (Asghate Publishing Company, Burlington 2002) 95

¹⁰⁶ Shachar (n 105) 97

¹⁰⁷ Smooha (n 67) 390

¹⁰⁸ Smooha (n 67) 390

Smootha suggests that Israel characterises an *Ethnic Democracy*¹⁰⁹. In such a democracy, the state will offer civil and political rights to individuals and certain collective rights *but* with institutionalised dominance of one ethnic group over the other. Amal Jamal says that in Israel, 'representative politics' automatically results in a Jewish majority and that most decisions are made in institutions in which there is *Jewish hegemony*.¹¹⁰

Israel's system has sometimes been referred to as a *Herrenvolk* democracy of which Apartheid South Africa was one. Meron Benvenisti suggested that Arabs in Israel were treated like second class citizens at the behest of the *Master Race*. Smootha says this is misguided referring to Ian Lustick's analysis that the Arabs are able to participate to some extent in the political process but it is in fact a process of *control* by the state which stifles their ability to realise such rights¹¹¹. Because they are actually mentioned in certain laws and the declaration of the independence, such an analysis is rendered obsolete. Determining which of these formulations is the correct requires, at least, analysis of the case law and legislation. But the *Ethnic Democracy* seems the most compelling of these formulations.

We can say that democracies get diluted down for whatever reason. For example, I would refer to a direct democracy, where democracy is more than just procedural, as a *concentrated* democracy. An ethnic democracy, which is a form of representative democracy, is more diluted. The reason being that here, democracy is merely procedural and with an *ethnic* democracy, it centres on the promotion of one ethnicity, often at the expense of another i.e. participation is less and engagement with the political process and its outcomes is far more remote.

As the case law will demonstrate, democracy often capitulates to maintaining the *Jewishness*, (whatever that is) of the state. This puts

¹⁰⁹ Smootha (n 67) 391

¹¹⁰ Amal Jamal, 'On the Morality of Arab Collective Rights in Israel' (2005) 12 Adalah's Newsletter, 6

¹¹¹ Lustick (n 31) 25

Israeli democracy (and if we elevate it to a more general theory, liberalism) to the test and this apparent internal contradiction, which I would argue is perpetual, is put under the microscope.

The discussion so far has been fairly elementary. It is now time for some forensic analysis and critique. What we have inferred is that many unique problems present themselves within Israel and this is in some shape or form, related to Zionism. We have also observed an adjacent struggle of universalism versus particularism. If the pendulum swings toward particularism, we can see how problems manifest. In addition, we have briefly looked at how the state structures and lack of codification perhaps fulfil some of the goals of Zionism. Our attention must now look at repercussions on the resident Arab Palestinian minority and this warrants a discussion at the development of human rights and equality in Israel.

Development of Equality and Human Rights Jurisprudence in Israel

Arab Palestinians in Israel are a living oxymoron; Palestinian nationality with Israeli citizenship. They fight two battles; trying to equalise their civil and political rights with their Israeli Jewish brethren in a state which is simultaneously engaged in a perpetual occupation with their brothers and sisters in the Westbank and Gaza. Indeed, *“this existential predicament of being ‘Israeli Arab’ or ‘Palestinian Arab’ has become essential with their relations with the state.”*¹¹² They linger on *“a tightrope balancing precariously over an abyss and buffeted by winds from both sides.”*¹¹³ Previously under Israeli law, identification as a Palestinian within Israel was considered illegal under Israeli military law.¹¹⁴ Such a situation has

¹¹² Gad Barzilai, *Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics and the Israeli Arab-Palestinian Community* (2000) 34 *Israeli Law Review*, 432

¹¹³ Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab Palestinian Minority in Israel* (2004) 36 *International Law and Politics*, 890

¹¹⁴ Barzilai (n 112) 432

been created by the exceptionalism of the Israeli legal system as the mutated progeny of the western common and civil law models¹¹⁵.

Only since the Or Commission of 2000, which investigated the Palestinian Arab protests in Israel, has there ever been official documentation of the minorities' historical discourse. Prior to this, they existed outside the Zionist narrative, regarded as a security threat and a fifth column. Indeed up until the 1967 war, they were subject to military jurisdiction under the Defence (Emergency) Regulations.

When observing the rights of Arab Palestinians in Israel, it is not enough to say that they have rights of expression, conscience etc but they also need the ability to formulate and implement such rights. In other words, they have certain rights but are neither able to determine the content of those rights nor determine the process in which they are changed.

The development of human rights and equality in Israeli jurisprudence is fascinating. What I will argue is that, although no explicit references are made to it, a shadow is perpetually cast over the Israeli legal system; one that impacts on equality before the law, judicial independence, the piece meal agglutination of human rights and equality principles. This shadow is that of Zionism which essentially affects all areas of the legal system. Indeed, it is "*nourished by restrictive, utilitarian, dogmatic concepts such as legal positivism, legal formalism, British Colonialism and Zionism on the one hand, and by liberal/libertarian, legal realist and sociological conceptions, such as British constitutional liberalism, British constitutionalism and American realism on the other hand.*"¹¹⁶

Following the state's birth we observe very strong utilitarian tendencies by the Knesset and the Executive.¹¹⁷ With a strong emphasis on national

¹¹⁵ *It is common law origins come as no surprise given it's British law ancestor but for the first 30 years, Israel's legal system was heavily influenced by continental civil law principles; perhaps because of the many German judges which sat on the bench- see also 'The German Heritage of the Israeli Supreme Court' (together with Fania Oz-Salzberger), 31 Iyunei Mishpat – Tel Aviv university Law Review (1998) 259- 294*

¹¹⁶ Schmidt (n 9) 399

¹¹⁷ Lahav (n 8) 95

security and trying to *protect itself from hostile Arab states* (see also *Israel condemned in bombing of Tuwaitha Nuclear Facility, Osirak UN Security Council, Resolution 487, (1981) of 19 June 1981, S/RES/487 (1981)*). Typically with utilitarian calculations, we have to maximise preference satisfaction and inevitably this results in, what Kant refers to, the moral separateness of persons i.e. certain people's right will either be infringed or violated. As aforementioned, in the case of *Zeev v. Gubernik*, the court acknowledges such superiority to the legislative chamber as a requirement to secure this maximum preference satisfaction. This has set up a dilemma that has rocked every justice of the Supreme Court that "*on the one hand, judges and lawyers wished to restrain the executive branch, maintain the rule of law, and expose manifestations of illegality. On the other hand, they were constantly aware of the government's fragility, the dangers from without and within. There was always a sense that the state was holding on by the skin of its teeth; that the world was arrayed against us, applying a magnifying glass to Israel's slips and errors; that citizens had a duty to protect the government against the chorus of ill-wishers.*"¹¹⁸

The state of *Mamlakhtiyut* would continue to feature in Israel's jurisprudential infancy. Chief Justice Smoira announced that "*when the security of the state and the public peace are in grave danger, ordinary legal tools might not be sufficient, and it is necessary to prefer the needs of state security over the protection of individual rights. In such a case, the public mandates that every citizen sacrifices his rights for the benefit of the public.*"¹¹⁹ Whilst there is the contention that many of the threats it perceived were hyperbolised, that is not the issue here. What is more pertinent is this clash of moral reasoning, which is not unique to Israel, between utilitarian and deontological ethics.

Thus a path was paved for a *judicial bill of rights*; its foundation predominately being in *natural law*. Indeed, in *Bergman v. Minister of Finance*¹²⁰ Landau J stipulated that no prohibiting rules existed which prevented construing statutes in terms of the principles of natural justice.

¹¹⁸ Lahav (n 8) 89

¹¹⁹ *Braun v. Prime Minister and Minister of Defence* (1948) 1 P.D. 108

¹²⁰ (1969) 23 (i) P.D. 693

In the absence of a constitution, coupled with the encroaching activities of the government and the fact Basic Laws did not have normative supra-status, such a phenomenon was expected. Etzionis J in the High Court *Kremer et al v. Municipality of Jerusalem et al*¹²¹ said that “*in our state lacking a constitution which protects the individuals’ fundamental freedoms explicitly, this court, sitting as a High Court of Justice, is obliged to guarantee these freedoms and bestow the remedy applied for by the citizen when one of his basic rights was injured by an act of governmental authorities.*” Indeed these sentiments were concretised in *Miron v. Minister of Labour*¹²² in which Berinson J pronounced that the “*court is the safest and most objective mainstay which the individual can have in dispute with the authorities.*” Two key cases emerge in the case literature, which embodies these two conflicting schools of thought; the infamous *Yeredor Ruling* and the *Kol Ha’am* case.

Prior to the seminal case of *Kol Ha’am v. Minister of Interior*¹²³ there was only the common law principle of *presumed liberty*¹²⁴ which could easily be rebutted by Knesset supremacy or judge-made law which warranted it. Although this was technically the main reason for ruling in *Kol Ha’am*, many of the judgements made important announcements about the nature of Israeli democracy. The facts of the case are rudimentary; s.19(2)(a) of the Press Ordinance 1933 (from the mandatory law) empowered the competent authority to suspend publications of articles “*...if any matter appearing in a newspaper is, in the opinion of the High-Commissioner of Council, likely to endanger public peace.*” The Minister of Interior exercised this authority to suspend *Kol Ha’am* and its sister paper *Al-Ittihad* on articles it wrote about the Korean war. The Supreme Court upheld the petition and ruled that the suspension be set aside.

Agranat J pursued two key tasks in this judgement. The first was a jurimetric analysis of the Ordinance, specifically on the word *likely*. In this

¹²¹ (1971) 25 (i) P.D. 767

¹²² (1970) 24 (i) P.D. 340

¹²³ (1953) 7 P.D. 87

¹²⁴ David Kretzmer, *‘Democracy in the Jurisprudence of the Supreme Court of Israel’* (1996) 26 Israel Year Book of Human Rights, Martinus Nijhoff publishers, Dordrecht, 267

respect, he said that it had to be *probable* rather than a *bare tendency*. Secondly, and which is of more interest to us, was conceptualising Israeli democracy. The conception of democracy had been clear cut prior to this decision. It separated the law making powers of the Knesset and the law applying functions of the court. However, Kol Ha'am signalled a departure from this and Agranat said it was *necessary to arrive at a deeper understanding of the democratic regime*. His opinion was based much on John Stuart Mill's conception of pursuit of the truth *through the means of negotiation, discussion, open debate and free exchange*. Interestingly, he made reference to the Declaration of Independence and that *the law of the peoples must be studied in the light of its national way of life*.¹²⁵ It is here perhaps that we can say the Jewish way of life is tantamount to the *national way of life*.

What this did was explain the proliferation of democracy in jurisprudence discourse. We see here that the freedom of expression is seen as an intrinsic and instrumental right for the social interest. It logically follows that such a right is afforded in order to submit the democracy to accountability and scrutiny. The protection of this right opened up the floodgates to the development of a more expansive liberal jurisprudence. Indeed, *"the courts rhetoric changed from the link between expression and democratic process to accepted standards in enlightened democracy"*.¹²⁶ What has in actual fact happened is that the *presumed liberty* has become canonised in the case law as a principle of natural justice emanating from the *national way of life*. Now it becomes concretised in law, only explicit Knesset legislation could curb it (one may argue that the presumption that existed before and its entrenchment in law makes no difference but to change it from natural to positive law).

The ruling however, was re-enforced in the case of *Israel Films Studies v. Film and Play Censorship Board*¹²⁷ where the Film Board attempted to censor a film showing Israeli Police evacuating an area in Tel-Aviv. The

¹²⁵ (1953) 7 P.D. 87 at 105

¹²⁶ Kretzmer (n 124) 287

¹²⁷ (1962) 16 P.D. 2407

court said that “*this right is intimately connected to the right to freedom of expression, and it therefore belongs to those basic rights which do not appear in any book, but which are directly derived from the nature of our State as a democratic state that pursues freedom.*”¹²⁸ The pendulum seems to have swung from the utilitarian tendencies of the executive and the Knesset toward the deontological rights-based approach of the Judiciary. There also seem to be a strong sense of mutualism between Democracy and Jewishness going on from the seemingly unproblematic position of Shachar stated earlier. Ignoring statutes, the case law and jurisprudence present a harmonious picture of the two.

This is until we look at the notorious case of *Yeredor v. Central Elections Committee for the 6th Knesset*¹²⁹. The case dealt with a “Socialist List” of candidates for parliamentary elections of which 6 were members of the El-Ard group. El-Ard was a Palestinian socialist group which sought the reunification of Mandatory Palestine and the unification of the Arab world under the banner of Socialism. Indeed its defined aims refer to the Palestinian people as an *indivisible unit*. The movement was declared illegal in the case of *Jiryis v. District Commissioner of Northern District*¹³⁰ under Sub-Regulation 84(1)(b) of the Defence (Emergency) Regulations 1945 when it attempted to register as a political party. The Supreme Court dismissed the petition to overrule the decision for various reasons. Witkon J said in strong words that this group denied the Jewish right to self-determination and any way of achieving its above aims through peaceful means were disingenuous. Landau opted for a slightly different line of argument referring to their charter, which stipulated solidarity with enemies of Israel which have vowed to bring it down by force. The courts were initially reluctant to ban them as they had initially allowed them to operate as a limited liability company¹³¹. What seemed apparent, is that the judiciary seem to become partisan; it realised that allowing the Arab Palestinians to form independent political parties may threaten the

¹²⁸ (1962) 16 P.D. 2407 at 2415

¹²⁹ (1965) 19 (iii) P.D. 365

¹³⁰ (1964) 18 (iv) P.D. 673

¹³¹ see also *Kardosh v. Registrar of Companies* (1960) 15 P.D. 1151

Jewishness of the state as they conceive it. Now I shall return back to the 'Yeredor Ruling.'

Haim Cohn J was the only judge who dissented stipulating that the Chairman of the committee had acted *ultra vires*. Agranat J, the unlikely suspect here, was one of the judges who spoke vociferously and, with the support of the other judges, to uphold the committee's decision. This judicial hypocrisy is fascinating given his commitment to liberal democratic values and begins to highlight the reality of the perpetual contradiction between Jewishness and democracy. If we take Shachar's conception of Jewishness; Jewishness as Shachar conceptualised is equivalent to liberalism since liberalism is essentially a restatement of the values of Jewish ethics and traditions. However, if this really was the case, then surely conduct which undermines Jewishness but would be entirely acceptable within the confines of liberalism (i.e. participation of such a political party) would be allowed. This heavily suggests that the latter cannot be conceived as how Shachar places it. Agranat J said that *Israel is the yearning of the Jewish people and that they must interpret laws and decide cases in such a way to ensure its future- this is a fundamental constitutional fact.*

Let us pause for a moment and consider this *fundamental constitutional fact*. Essentially this says that statutes, when we draft them, executive decisions, when we make them, and judicial decisions, when we decide them must always have in the background this incontrovertible fact. The yearnings of the Jewish people are to promote Zionist goals and the *values, rights and interests of the Jewish population;*¹³² it is a fundamental part of Israeli jurisprudence. This has *absolutely staggering consequences* on many of the key tenets of the rule of law.

The implications of such a ruling would have massively detrimental impacts on manifested legal rights of those who were non-Jewish. In

¹³² Schmidt (n 9) 267

addition, it compromises many other principles of due process and legal recourse. If this impacts on interpretation of legal norms, such discrimination between Jewish and non-Jewish people could be said to be *systematic*. As a result of this *well nourished jurisprudence* to which Yvonne Schmidt refers¹³³, there is a departure from natural justice which plays reference to Israel's Jewish character (which we have already seen is problematic) and suggests that the only source of individual rights are etched in positive law.

We can say that Jews and non-Jews enjoy formal equality in *statutory* law. But we cannot say that they enjoy neither formal equality in case law nor formal equality *before* the law if we take before the law to mean proceedings of civil and criminal action. I shall now discuss some theory behind the principle of equality for a moment then turn back to this problem of the *fundamental constitutional fact* and how its defenders advocate it within the framework of democracy.

Of the two cases, *Kol Ha'am* and *Yeredor*, the former is a lesser of the two evils as it advocates a human rights approach, albeit with its imperfections. Equality in Israeli Jurisprudence can be observed through a pre-1992 lens and the post 1992 lens i.e. after the introduction of the 2 basic laws. Given the above discussion, we must look at equality as a *changing axiom in legal theory*¹³⁴. Frances Raday uses the Aristotelian conception of equality that likes are treated the same and 'unlikes' are treated differently. This breeds the *politics of exclusion* using a formal test of equality rather than a dynamic and substantive one¹³⁵ and feeds into the postulation that highlights the fallacies of liberal formal equality coupled with the internal contradictions of the Israeli infrastructure.¹³⁶ The problem with this *state-centred approach* is that it measures the quality of the legal systems based on individual rights and ignores communities or

¹³³ see also Yvonne Schmidt, 'Foundations of Civil and Political Rights in Israel and the Occupied Territories' (Doctoral Thesis, University of Vienna 2008) 399

¹³⁴ Frances Raday, 'On Equality- Judicial Profiles' (2001) 35 Israeli Law Review, 383

¹³⁵ Raday (n 134) 382

¹³⁶ Barzilai (n 112) 426

collectives and their identity.¹³⁷ This is clearly evidenced by the failures in Yeredor. Whilst I shall not focus in too much detail on the allocation of resources, David Kretzmer's work clearly shows that allocation of such resources to Arab neighbourhoods for funding, water and sanitation, healthcare, social security, transport is massively disproportionate showing clearly that the resources which are given, are merely tokenistic. An excellent illustration of this tokenism is the case of *Re'em*.

In the *Re'em Engineers Ltd. v. Municipality of Nazareth Elite*¹³⁸ an engineering company which predominately built in Arab neighbourhoods in Nazareth wanted to advertise in Arabic (*Arabic is officially the second language of Israel but is rarely adhered to*) but the local authorities said it could only advertise in Hebrew. There was an appeal to the Supreme Court and they reversed it saying that Arabic should be allowed on the basis of freedom of expression. But something here is unsettling. The appeal was allowed, not on the basis that Arabic was the collective mother tongue of that minority. It did not matter that it had been enshrined in the Declaration of Independence or in positive law. The point of reference was liberal theory rather than sensitivity to communitarian needs. Indeed, such a ruling demarks no difference between resident Palestinian Arabs and tourists.¹³⁹

A formulation of equality is required which is preceded by collective rights of the minority or '*group differentiated rights*'. Group differentiated rights "*are rights that stem from distinctness. They are rights that are granted to the members of a certain group to enable them to continue preserving and giving expression to their distinct culture.*"¹⁴⁰ Therefore, in order to quell any accusation that such an attitudinal difference exists toward the Arab Palestinian minority, it needs to acknowledge such group differentiated rights. '*Equality of opportunity*' is the next step from formal equality. In such a conception, disparities in ability between individuals

¹³⁷ Barzilai (n 112) 428

¹³⁸ (1992) 47 (v) P.D. 189

¹³⁹ Barzilai (n 112) 395

¹⁴⁰ Saban (n 113) 888

are morally arbitrary as such disparity is inevitably the result of privilege which, by definition, is denied to others. Therefore in order to recalibrate this inequality, formal barriers are removed so that all may exercise their right. This also aims, unlike formal equality, to mitigate institutional complexities which may discriminate. However the problem with equality of opportunity is that *it assumes the liberal ideal of sameness*¹⁴¹. Alternatively, 'affirmative action' conceptually acknowledges differences between people and communities. This moves from passivity by introducing measures which acknowledge historical plights to certain groups' disadvantages. Affirmative rights are a means to realising such group differentiated rights.¹⁴² These can include greater representation by quota-systems, compensatory or distributive provisions etc. These types of equality principles, from 'equality of opportunity' to affirmative action, are far more sensitive to cultural needs and their respective histories and thus it seems more adept in providing adequate resources for non-Jewish citizens. Agranat J endorsed a formal equality approach. Indeed in the case of *Lifshitz-Aviram v. Law Society*¹⁴³, he did not think that maternity leave warranted a reduction in the length of an apprenticeship and applied a gender-neutral approach. This decontextualisation and purely legalist approach resulted in a contentious outcome. Further case law does not suggest any lubrication from this absolutist approach. Even in the relatively recent case of *Adal Ka'adan vs. Israel Lands Authority*¹⁴⁴, the policy of the authority meant it was able to allot land to private companies which sell to veterans. Although laws do not explicitly discriminate against Palestinian Arabs, it does so *indirectly* given that they are far less likely to serve in the army. For example, the allocation of government housing assistance which provides highly attractive subsidies for ex-conscripts or the Discharged Soldiers Law 1984 which entitles conscripts preferential entry into the job market is such an illustration.

¹⁴¹ Raday (n 134) 386

¹⁴² Saban (n 113) 903

¹⁴³ (1976) 31 (1) P.D. 250

¹⁴⁴ (2000) 54 (1) P.D. 258

Liberal theory allows such discrimination to occur to a group of people without referring to them explicitly. Its inherent chasm between theory and implementation means that it can explicitly refer to universal rights. But the actualisation is far from the rhetoric. Justice Yaakov Tirkel once said that rarely will legislation overtly say Jew or Non-Jew. As a result, one must look at the semantics.

There are particular cases which are the judicial equivalent of a *photo-opportunity* between two rival statesmen. Their aim is to give an impression of compromise and diplomacy to the public when in actual fact, they still hold deep resentment for one another. The following examples are symptomatic of wider *superficial* human rights jurisprudence in that these rights are universally afforded *regardless of ethnicity* but these have no effect on fulfilling the Zionist goals. In the case of *Darwish v. Israel Prison Authority*,¹⁴⁵ a Palestinian prisoner was refused a request for a bed on the basis that he may dismantle it and use the parts as weapons. Haim Cohn J said that the human dignity of prisoners must be respected. This demonstrates judicial activism in a positive step affording the rights to any human irrespective of their ethnicity. Another such case in which the equality principle was conceptualised was in *Yafora Ltd v. Broadcasting Authority*¹⁴⁶ where the Attorney General stated that a clause in a coalition agreement to fire Arabs was against the principles of Administrative law. Affording such rights works because these particular areas are unlikely to compromise the fulfilment of the Zionist narrative.

David Kretzmer suggests that the equality principle in Israeli jurisprudence is accepted beyond reasonable doubt in Israeli law.¹⁴⁷ Such a principle is only limited by Knesset legislation according to Kretzmer. But I would also add that the principle is equally limited by judicial interference. This line of reasoning finds its origins in the *fundamental constitutional fact* (combined with the ongoing discourse of national security).

¹⁴⁵ (1980) 35 (i) P.D. 536

¹⁴⁶ (1971) 25 (ii) P.D. 741

¹⁴⁷ Kretzmer (n 4) 77

There is an argument which democracies (or purported democracies) like Israel put forward to justify this protocol and that is *democratic self-defence*. Democratic self-defence was introduced in post-war Germany as a means to prevent the repeat of the Nazi genocide in Europe. Essentially, it insists on the right of a constitutional democracy to protect itself from forces that aim to undermine its existence. Agranat J used this argument in Kol Ha'am stating that such reasoning both reconciles the apparent immiscibility of Israel being democratic and Jewish and also the ruling in the case. He makes reference to the Nazi's defeating the Weimar Republic through the democratic channels. This statement requires both a legal and political response. The legal response is that such a constitutional bar can be used to quell legitimate dissent. If Agranat and the other heroes of liberal jurisprudence sincerely believe in their *Millian* pursuit of truth, purging a valuable voice from the public arena would be the last thing for them to do. One could then reply back by saying that indeed such an action should be the last resort but based on utilitarian backgrounds, candidates like the Arab Socialists in the Kol Ha'am case are there to undermine the majority Jewish consensus. We see the self-defeating nature of this argument. By succeeding to this line of thought, we resort back to the consequentialist tendencies reminiscent of the Executive in the old days which the Judiciary were, apparently, trying to reduce. This obvious circularity in Israeli legal reasoning makes it clear enough that internal contradictions stem from a need to self-define as Jewish. Ultimately, because the Arabs do not share this conception of exclusionary politics (ignoring for the time being how exclusionary) then their voice is not worth listening to.

The political response is equally as damning. The comparison of the Nazi's during the Weimar Republic and the Arabs is, to say the least, unfair and racist. It completely decontextualises the history of the Palestinian Arab communities that lived in peaceful co-existence with the Christian, Jewish and secular communities. It also arrogantly ignores the suffering they endured during Israel's inception. Indeed Ilan Saban puts it well when he says that "*the members of the Arab Palestinian minority did*

not knock on Israel's door and become absorbed into it. In other words, Israel's national minority is not in the country out of grace, it does not owe loyalty to any sort of basic framework of an adopted nation."¹⁴⁸ This is to say that the Arab Palestinians are an indigenous minority and purging these views from the public voice is incredibly difficult to defend.

The circular self-defeating argument I alluded to earlier I shall now try to elaborate on it a bit more detail. We have as our starting point the proliferation of a liberal jurisprudence as a response to the utilitarian tendencies of the Executive. With this emerging liberal jurisprudence, we steer in the new era of individualism, freedom of speech and other symbols of this school of thought. These rights are not absolute. Many liberal societies do not have absolute rights as doing so would trivialise the realisation of freedom for others. Limits therefore are natural but must be applied sparingly. The limit in this sense is the *fundamental constitutional fact* and this is re-enforced by the democratic self-defence postulation. The discussion then becomes, when can such rights be restricted and to start this we have to observe the nature of the overriding fact. In our case, the *fundamental constitutional fact* is there to preserve both national security; this is understandable (although many debates span over the abuse of such discourse) and also to preserve the state's Jewishness. This latter aspect is cultural, racial and ethnic rather than political. It alleviates an entirely arbitrary factor, which an individual can neither determine nor control, to the national domain i.e. it nationalises private identities. If we were to have a *fundamental constitutional fact* which was to preserve the whiteness of Britain, we would have considerable difficulty trying to justify this under the pretext of democracy. As a result, the character of this *fundamental constitutional fact* has to be exclusionary because if you refuse to allude to the *national way of life* as Yeredor cites, then you have little opportunity in defining your good life. Israel's existence as an ethnic democracy illustrates that such a *fundamental constitutional fact* is vital to the perpetuity of its existence as

¹⁴⁸ Saban (n 113) 903

an ethnic democracy. Otherwise, it would cease to be so. This *fundamental constitutional fact* is instrumental to the installation of the Zionist goals. *It is a product of and means to Zionisation in Israel.*

No suggestion is being made that Arab Palestinians have no legal recourse because they clearly do however, to suggest that Israel is a purely liberal democracy is harmful on two levels. The first, we have discussed above that it essentially can be curbed on arbitrary grounds. The second is that liberalism as an imperfectionist theory, has in fact failed the minority in addressing their collective needs. The disproportionately low numbers of Palestinian Arabs that do have high positions, such as seats in the Knesset, only give the impression of a representative democracy.

Judicial Independence; toward a Zionist Jurisprudence

It seems right to briefly talk about judicial independence in Israel and throw up some potential problems in light of the *immortality of the State of Israel as a 'fundamental constitutional premise'*. We may understand judicial independence in two forms ¹⁴⁹. The first is *Individual Independence* which can be further sub-divided into substantive (sometimes called decisional or functional) and personal independence. The former is what we typically associate with this principle that a judge should be subject to no other authority but the law. This will mean being politically impartial in his rulings, not associated with business interests or any other special interest groups so as to rule out a conflict of interest. Personal Independence is that the job of the judiciary is secure. The second type of judicial independence is *collective*. This is the notion that the judiciary has collective responsibility similar to corporate responsibility

¹⁴⁹ Shetreet (n 69) 177

which guarantees their independence.¹⁵⁰ This can be determined by the judge's administrative independence within the judiciary. Simon Shetreet also formulates *internal independence*¹⁵¹ which is the independence from judicial superiors and colleagues. Whilst not undermining the importance of the other forms of independence, because they certainly are, I shall focus primarily on the substantive form of judicial independence.

Lord Lloyd once said that “*one of the important guarantees of judicial independence was a strong tradition in favour of ignoring political considerations when making judicial appointments.*”¹⁵² After its proclamation of statehood, Judge Aharon Sham, a prominent Jewish judge in Mandatory Palestine, was overlooked as being appointed a district judge despite having practised for many years.¹⁵³ The reason? He was a well established anti-Zionist. This small incident is symptomatic of a larger problem within the Israeli judiciary and judicial appointments. Judicial Independence enables impartiality of judgments or, in light of the brief discussion at the beginning of this chapter, the appearance of impartiality which is equally as important.¹⁵⁴ This maintains (or restores) public confidence in the judiciary which was crucial in Israel's early days when support for the Executive often waxed and waned. Indeed the old common law principle that “*[It is of] fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*” is worthy of mention. The judges in Israel have a duty to not only deliver justice but also appear to deliver justice. This naturally follows from objectivity of the judges in the eyes of all of its citizens in Israel. But can Israel and its many internal contradictions be sincerely impartial?

When a judge adjudicates on a case, he has to look at the facts of the case and apply the law as best it fits. He may take the conventionalist approach and refer to case or statutes. There may be problems with

¹⁵⁰ Shetreet (n 69) 219

¹⁵¹ Shetreet (n 69) 179

¹⁵² Shetreet (n 69) 179

¹⁵³ Lahav (n 8) 82

¹⁵⁴ Shetreet (n 69) 192

interpreting a statute and therefore techniques maybe used such as in Britain (i.e. literal, golden, mischief rule etc) or they may refer to the Parliamentary debates as aids to interpretation. They may abandon positive sources of law and refer to concepts of justice which is certainly a tendency within Israeli Jurisprudence. Judges, as we have discussed earlier, will often refer to ethics of Jewish Law and often they mirror democratic principles. This is essentially a question of the sources of Law in Israel.

If a judge has, as one of the basic sources of the law, this *fundamental constitutional fact* as padded out in the Yeredor ruling, then we have to think of some ways this could impact on procedural fairness and judicial independence. From the judge's perspective, all the judge is doing is applying a previous case. However, the consequences of this could mean that rather than judging a case on the merit of the facts, what we have as our factual precursor is this 'fundamental constitutional fact' which is essentially an embodiment of the exclusionary Zionist goals. Therefore, if an individual or an organization acts within the letter or the law, they may *still* be deemed to be acting illegally. We may normally describe their action as unconstitutional. But, and this is paramount, there is absolutely nothing in the case or statute law which suggests that this particular ruling has supra-statutory status to normal legislation or the basic laws. The ruling stipulates it as a basic constitutional premise but it cannot have such status as there is nothing which characterizes it from other case law. Since then, certain aspects of this have been enshrined in Basic Law: The Knesset which cites that candidates cannot endorse as in s.(7)A(1) the denial of the existence of the State of Israel as a Jewish and democratic state but, as our previous discussion has seen, the determination of whether Basic Laws have superior status is itself contentious and, arguably, would only apply, if at all, to the Basic Laws introduced in 1992. Therefore the allegation of unconstitutionality fails.

The logical question then becomes what rule is more important and here we turn again to a rights-based approach versus the consequentialist one.

I shall not explore this battle any further as we have done so previously. What is up for debate though is can, therefore, a judiciary really be *substantively* independent if he has as his starting point the ‘fundamental constitutional fact’ (i.e. the proliferation of the Zionist project) knowing he cannot rely upon the justification of constitutionality in a strict sense? If I were a judge, and I had as my starting point, the proliferation of a state of footballers, then if a cricketer was to come up to me and was acting within the law but against the goals of the state, then his action would be deemed illegal. It is unlikely that the cricketer would support a state which promotes just one type of sportsmen (indeed footballing cricket-sympathisers would be dealt with similarly). As is with the case of Israel, we can see that this is going to indirectly impact on the Arab Palestinian population because they are more likely to deny the nature of Israel as Jewish. This charge is completely legitimate given Ilan Saban’s words that they owe nothing to the framework of an adopted nation. It would be staggering if a judge was to decide a case on anything other than the merits and facts of it. The mere fact that a person’s ethnicity, whether this is a direct or indirect consideration, would come into play in adjudicating the case, is reprehensible. More so if the individual is acting within the law.

What is this Zionist Jurisprudence? It is a form of selective liberal jurisprudence in that it will afford universal human rights even to Arabs when such extension would not compromise the goals of the Zionist project. However, fundamentally, it is only purely liberal for the Jewish population in Israel. In addition, Jewish Israelis would never be affected by the catches of the *fundamental constitutional fact* unless they denied the state of Israel as Zionist (which has happened). But as we see, this has disproportionately affected the Palestinian Arabs. Such jurisprudence, as have been aforementioned, its notion of formal equality is immobile and insensitive to the history of the minority. Indeed, the fact that the state does not recognize them as a national minority speaks volumes.¹⁵⁵

¹⁵⁵ Suzie Navot, ‘Constitutional Law of Israel, (Kluwer Law International, Alphen aan den Rijn 2007) 251

In light of the points made at the beginning of this chapter, surely we should just attribute this as another form of our personal convictions which skew this absolutist conception of objectivity (which in reality is not achievable). This is indeed true and something which is morally difficult to escape. If we accept that objectivity is impossible and we accept this imperfect reality, then the case of Israel should be no different. However, whilst we do acknowledge objectivity and immunity from personal prejudices as hyper-idealistic, this does not mean we should do all we can to mitigate such partisanship. Indeed, we have a duty when making decisions to be informed and dilute our prejudices. Whilst it maybe wishful to make a distinction between conscious and subconscious prejudices, it is certainly a starting point. For example, making prejudicial judgments based on life experiences maybe excusable as we are not fully aware of them. But when we are aware of the prejudice, when it is etched in our laws, when it is systematic, when it is tangible, we should do all we can to thwart them. The *fundamental constitutional fact* is such an example of the latter. This ignorance is characteristic of the *Zionist Jurisprudence*.

Conclusion

Saying one thing and doing another. This maxim resonates throughout Israeli law when we consider its application to the Palestinian Arab minority. The state's legal history has been plagued with misnomer and internal contradiction with its attempts to uneasily assimilate Jewishness with Democracy. Whilst we acknowledge that Jewish Law shares many congruencies with democratic principles, the way Jewishness manifests itself in reality, it is unable to instigate these liberal values. Given this, worrying developments are beginning to take place in the Knesset as a bill has been introduced that would *make democratic rule subservient to the State's definition as 'the national home for the Jewish People.'* The

same bill also calls on the state *act to ingather the exiles of Israel and [further] Jewish settlement within it, and allocate resources to this end.*¹⁵⁶

At the time of writing, the Knesset has gone into summer recess and the bills, already with considerable support, are likely to be passed in the Winter session.

¹⁵⁶ Jonathan Lis, 'Lawmakers seek to drop Arabic as one of Israel's official languages' (Ha'Aretz <http://www.haaretz.com/print-edition/news/lawmakers-seek-to-drop-arabic-as-one-of-israel-s-official-languages-1.376829>) (2011)

Chapter Three

Demography and Democracy: The 'Ticking Time Bomb' for Israeli Law Makers

The Yeredor Ruling and Demography

The *Yeredor* ruling captures the essence of Zionism. It embodies the notion of Zionist hegemony in Israeli society, likening itself to a *jus cogens* from which there is no derogation. Indeed, if a conflict occurs between this peremptory norm and democracy, the latter becomes absorbed into it; it creates *a social situation which is unchallengeable because there are not even terms with which to characterise or question it.*¹⁵⁷ In *Yeredor*, we see the immortality of the Jewish state as a fundamental constitutional fact. Naturally, what tends to flow from such reasoning is that laws and policies will be adopted to maintain this basic constitutional premise. Recalling the conclusions from the previous chapter, Israel does exhibit democratic –like structures and qualities, the so called *ethnic democracy* which offers universal rights *but* with an institutional dominance of one race. Yoav Peled offers an interesting analysis which essentially summarises the *selective liberal jurisprudence* detailed in the previous chapter by describing Israel as a *confluence of liberalism and republicanism...in which Arabs are barred from attending to the common good.*¹⁵⁸ That said, maintaining this quasi *jus cogens* and Jewish demographic supremacy in a state with quasi-democratic

¹⁵⁷ Baruch Kimmerling, 'Religion, Nationalism and Democracy in Israel' (1999) 6 *Constellations* 3, 340

¹⁵⁸ Yoav Peled, 'Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State' (1992) 86 *The American Political Science Review* 2, 432

structures are *inextricably linked*. Demography therefore becomes the lifeblood of Zionism and the Yeredor ruling canonizes this. The assumption can be made that if Israel was a *Herrenvolk Democracy* which denied the vote to Arabs, then demography would not be an issue. However, as is apparent, this is not the case. Given that democratic structures exist, its nexus with demography is crucial. Major General Schlomo Gazit once said that there are times when *democracy has to be subordinated to demography*.¹⁵⁹ These *times* to which he refers are instances which threaten the exclusionary character of the state as Jewish.

Demography has become a cornerstone of Zionist policy and this is not just contained to Palestinian Arabs within the Green Line¹⁶⁰. Indeed demographic considerations *explicitly played an important role in shaping the evolution of Israel as a Jewish State*.¹⁶¹ If demography poses as huge a problem as it appears, then the question of law making becomes very interesting indeed. Demographic theory, although still ad hoc in nature due to its tendency to *grab onto other disciplines*¹⁶² does have some consistency in terms of how it can manifest itself as policy. This can range from pro-natalist measures to incentivised emigrations packages for certain groups. With lots at stake, obvious moral and ethical questions begin to emerge; do we enter the territory of *demographic engineering*? The demographic and democratic nexus has to be understood in order to understand patterns in law making. Indeed, if demographic hegemony is paramount, then “*there is little space available for political democratization that would enable natives to take matters into their own hands and impose restrictions*.”¹⁶³ The main crux of this chapter will look at how demography has affected and may affect law making in the Israeli state. However, the study of demography itself is complex and

¹⁵⁹ Lily Galili, ‘*Jewish Demographic State*’ (2002) 32 *Journal of Palestine Studies* 1, 92

¹⁶⁰ Elia Zureik, ‘*Demography and Transfer: Israel’s road to nowhere*’ (2003) 23 *Third World Quarterly*, 621

¹⁶¹ Dov Friedlander and Calvin Goldscheider, ‘*Peace and the Demographic Future of Israel*’ (1974) 18 *Journal of Conflict Resolution* 3, 487

¹⁶² Philippe Fargues, ‘*Demography and Politics in the Arab World*’ (1993) 5 *Population: An English Selection*,

2

¹⁶³ Myron Weiner and Michael Teitelbaum, ‘*Political Demography, Demographic Engineering*’ (Berghahn Books, New York 2001) 61

multifarious. Therefore, the investigation will begin with a general overview of demographic theory and political demography before looking at the links between it and Zionist thought. I will then look at the politicisation of the demographic debate within the Israeli context and ask tough questions on whether demography is a real threat or a manifested one used to justify certain policies.¹⁶⁴ Finally, in much the same spirit as the previous chapter, I will end with a detailed discussion of law and policy implications, observing how these considerations have determined them and how it will determine them in the future.

Theorising Demography

Having accentuated the importance of demography, it becomes pertinent to discuss theories of demography and demographic policy. In its purest sense, demography is a statistical study of a human population. States will often invest time and resources into census' to identify composition of their inhabitants in various categories and nomenclatures. Whereas the collation of demographic data is statistical, subsequent analysis should and often is read in light of other concepts¹⁶⁵ such as economic, social, political and cultural. Therefore demography, I would surmise, can be assessed at a data stage and an analysis stage.

Theories of demography have been pieced together as far back as the great philosophers of Aristotle and Ibn Khaldun. The size of a population was once thought of as analogous to military power; following their defeat in the Franco-Prussian war, French elites attributed their loss to low fertility rates.¹⁶⁶ Economic theorists have equally allayed a similar amount of interest in the field from Marxists to the Causal theories. Thomas Robert Malthus is perhaps the most widely known British scholar

¹⁶⁴ Galili (n 159) 92

¹⁶⁵ Galili (n 159) 92

¹⁶⁶ Teitelbaum (n 166) 724

to have written about the perils of overpopulation being limited by *the means of subsistence*.

In the 1950's, inflation in the developing world gave birth to the syncretism of demography and politics.¹⁶⁷ Demography therefore has always had a highly political facet. However, although a strong current of politics and political argument runs through political demography, as a science, it does not exist.¹⁶⁸ Weiner provides the most lucid definition (although perhaps not the most succinct) when he says that "*political demography is the study of the size, composition and distribution of population in relation to both government and politics. It is concerned with the political consequences of population change, especially the effects of population change on the demands made upon governments, on the performance of governments, on the distribution of political power within states, and on the distribution of national power among states. It also considers the political determinants of population change, especially the political causes of the movement of people, the relationship of various population configurations to the structure and functions of government, and public policies directed at affecting the size, composition and distribution of population. Finally, in the study of political demography, it is not enough to know the facts and figures of population, that is fertility, mortality and migration rates; it is also necessary to consider the knowledge and attitudes that people and their governments have toward population issues.*"¹⁶⁹ This identifies the process of data collection and analysis but shows awareness of the fact that political biases can percolate into both stages.

Problems with data collection stem from the modus operandi. Collection can be both direct and indirect; the former being based on registries, the latter being based on projected formulas. Herein lies the first set of problems with demography. Long term demographic projections often turn out to be unsound despite having a sound historical-evidential basis.

¹⁶⁷ Fargues (n 162) 1

¹⁶⁸ Fargues (n 162) 1

¹⁶⁹ Teitelbaum (n 166) 719

Indeed *what is presented with a patina of scientific legitimacy is often simply someone's best guess*¹⁷⁰. Robert Bacchi, perhaps one of Israel's most revered demographers would often create four projections based on an optimistic calculation, a pessimistic one and two other types of projection to identify as many possible outcomes. These were based on fertility rates of both Arabs and Jews within the years 1938-1942¹⁷¹. Although appearing entirely reasonable in his use of empirical data, all of his projections were a considerable way out. This goes to highlight many of the problems with data collection and despite the sophisticated methods utilized, no models have yet been produced forecasting long term changes.¹⁷² However, as will become clear in the next section, other non-statistical influences also affect the accruing of data.

The problems that belie the protocol of data accrual also belie the procedures of data analysis. As aforementioned, this has plagued the discipline with a tendency to be ad hoc, frivolously latching itself onto other areas; albeit necessarily so. Dov Friedlander and Calvin Goldscheider attribute demographic analysis to social-political-economic-cultural factors as cause and effect¹⁷³. Modernization as a cultural phenomenon also came to fruition as an explanation in demographic shifts¹⁷⁴ with *demographic transition theories*, which purported explaining changing trends in Western Europe, also gaining popularity. In the context of Israel and the Occupied Territories, there is also a spatial or *territorial* element which is also crucial in analysis and meta-analysis.

Other considerations which could go toward explaining such demographic trends include income disparities and political representation, and age distribution.¹⁷⁵ Also an increasingly vocal arena of debate is demography within the context of the national security discourse,¹⁷⁶ introducing the

¹⁷⁰ Yakov Faitelson, 'The Politics of Palestinian Demography' (2009) Middle East Quarterly, 51

¹⁷¹ Faitelson (n 170) 52-53

¹⁷² Teitelbaum (n 166) 722

¹⁷³ Friedlander & Goldscheider (n 161) 489

¹⁷⁴ Jon Anson and Avinoam Meir, 'Religiosity, Nationalism and Fertility in Israel' (1996) 12 European Journal of Population, 64

¹⁷⁵ Teitelbaum (n 166) 720

¹⁷⁶ Weiner & Teitelbaum (n 163) 52

influence of conflict on these matters.¹⁷⁷ Such explanations for data trends have become fiercely political in substantiating claims of Israel being a Zionist state.

Another aspect we must look at is the relationship between demography and policy types. This will help to shape the final but detailed sections on current laws and potential laws which aim to maintain the status quo. Myron Weiner and Michael Teitelbaum are erudite in their analysis of *demographic engineering* to which we referred previously. This involves the use of policy instruments and laws to force or encourage demographics to imbue a certain compositional complexion. In our case, that complexion is Zionist and would necessitate the requirement of a Jewish majority. State intervention therefore can take four key forms. Firstly, *addition*¹⁷⁸ is a policy type to encourage dominant national or ethnic groups into areas where subordinate or minority groups live. *Subtraction*¹⁷⁹ is designed to remove certain minorities from the state in order to harden national or regional identities. *Substitution*¹⁸⁰ is a confluence of the two and finally *emigration*¹⁸¹ which aims to generate domestic and international benefits both economic and political. These policy types are particularly interesting in the light of Israel as these are not constrained only to the population inside, *but also*, the Jewish Diaspora, which provides another source of demographic clout. Internal demographic policy can introduce the prevalence of one identity over another which is typical of Ethnic Democracy such as in Israel.

Whilst demography is seen as a study looking into population both on a statistical level and through a social sciences lens, we can see that types in population policy, its limitations and delimitations are also important. Population policy is often defined as *“positive deliberate action by the government taken expressly to facilitate achievement of adopted goals*

¹⁷⁷ Philippe Fargues, 'Protracted National Conflict and Fertility Chance: Palestinians and Israelis in the Twentieth Century' (2000) 23 Population and Development Review 3, 442

¹⁷⁸ Teitelbaum (n 166) 55

¹⁷⁹ Teitelbaum (n 166) 55

¹⁸⁰ Teitelbaum (n 166) 56

¹⁸¹ Teitelbaum (n 166) 56

*relative to population size, growth and composition in the interest of national well-being.*¹⁸² Heterodoxy in the literature exists as to whether population policies can be responsive or influencing¹⁸³ or whether they are the result of other economic or social measures.¹⁸⁴ These will all be useful frameworks when discussing the Israeli context.

Sergio Della Pergola suggests that in the context of Israel and its claim as being so densely populated, an *integrated approach* is required including factors such as trends in health, mortality, fertility, migration and territorial distribution; cultural, community with institutional variables deserve significant weight too.¹⁸⁵

Having discussed demography briefly at a normative level, we'll look at the situation of Israel in the light of Zionism and apply it to the different policy types. In order to do this, a short examination of demographic hegemony in Zionist political thought is required. What does this ideology say, if anything about demographics in the Jewish state? This is exemplified in more obvious detail in Zionist policy post-statehood but its pre-statehood form is worthy of some mention.

Demography in Zionist Thought

Transfer¹⁸⁶ and demographic change¹⁸⁷ are enduring themes in Zionist political thought.

Indeed, it is documented that Theodor Herzl asked for the transfer of the indigenous Palestinian peasant community to Ottoman.¹⁸⁸ For Zionists,

¹⁸² Gary Schiff, 'The Politics of Fertility Policy in Israel' in Paul Ritterband 'Modern Jewish Fertility' (Brill, Leiden 1982) 255

¹⁸³ Schiff (n 182) 255

¹⁸⁴ Schiff (n 182) 255

¹⁸⁵ Sergio Della Pergola, 'Demography in Israel/Palestine: Trends, Prospects, Policy Implications' (General Population Conference Salvador de Bahia, The A.Harman Institute of Contemporary Jewry, Jerusalem, August 2001) 2

¹⁸⁶ Zureik (n 160) 621

¹⁸⁷ Friedlander & Goldscheider (n 161) 487

¹⁸⁸ Zureik (n 160) 619

*“the quintessential issue was to create a majority community in Palestine”*¹⁸⁹ Whilst transfer is something we shall later come onto, demographic change and fertility have obvious connections. Jacqueline Portugese formulates three interlocking principles¹⁹⁰ of fertility policy in Israel; hegemonic Jewish Religious establishment, Zionism and Patriarchal familism. Although all three necessitate a symbiotic relationship, she identifies Zionism as the main driving force. The complexity of religious and secular orientations of Zionism shall not be discussed here (indeed some reference was made in the previous chapter) however, religious dogma and its synthesis with Zionism offered a compelling justification for pro-natalism. Indeed the duty to procreate is the *first mitzvah* of the Jewish Torah¹⁹¹. Religious support stemmed from a belief that, although according to conventional wisdom that the creation of the State through non-divine will was forbidden, it was justified on the basis of encouraging redemption.¹⁹² This syncretism of religiosity and nationalism concretized the advocacy for a Jewish state and imbued a duty to maintain it as a centre for Jewish spirituality and redemption. The holy scripture therefore reinforced political duty to the state in maintaining this majority demographic.

Another such explanation offered suggests that pro-natalism increases nationalist sentiment attributed to Israel's *“singular position in the world system and in the specific conditions under which Israelis live.”*¹⁹³ In 1968, the government adopted a decision on Demographic Trends in which it stated that *“the Government decision expresses deep concern about the demographic trends in Israel and the Diaspora. The government thereby decides to adopt a comprehensive, co-ordinated and long term demographic policies aimed at securing an adequate level of growth of the Jewish population.”*¹⁹⁴ If anything is a clearer demonstration of Zionist

¹⁸⁹ Asher Susser, *Partition and the Arab Palestinian Minority in Israel* (2009) 14 Israel Studies 2, 106

¹⁹⁰ Jacqueline Portugese, *Fertility policy in Israel: The Politics of Religion, Gender and Nation* (Greenwood Publishing Group, Westport 1998) 20

¹⁹¹ Anson & Meir (n 174) 65

¹⁹² Kevin A. Avruch, *Traditionalizing Israeli Nationalism: The Development of Gush Emunim* (1979) 1 Political Psychology 1, 54

¹⁹³ Anson & Meir (n 174) 73-74

¹⁹⁴ Fargues (n 177) 455

policy to pro-natalism, this was embedded in the Natality Committee Report of 1966¹⁹⁵ which identified the threat of the Arab minority to the demographic integrity of the Jewish Majority.

It follows that fertility and demography are intimately linked. We see both heavy inferences and explicit statements made that encourage pro-natalism. This is more so apparent in the implementation of Zionist thought through policy and law. It is to this point we now turn but in addition to looking at the manifestation of Zionism, we also look at the politicization of the demographic debate. Demography has become a fiercely contested battle within the political discourse and given this, biases and subjectivities often infiltrate the debate which can lead to hyperbolisation and embellishment.

“War of Cradles”-Political Demography in Israel

The so called *war of cradles* in which *borders are negotiated with babies*¹⁹⁶ describes the toing and froing of demography and its essentialism in Zionist hegemony. Palestinian leadership called on the *Mothers of Nation* as they perceived it as a potent weapon against Zionist hegemony. Whilst demography has been an obsession of the Israeli politic, it has fuelled similar passions from Palestinian civil society. Some have pandered to the hysteria, positioning demography as potentially instrumental to the resolution of both sides’ miseries. In this section, I shall firstly look at the popularization of the demographic debate coupled with an observation of the rates of fertility amongst Palestinian Arabs inside Israel and Israelis. What is apparent is that these figures are often contested and are symptomatic of the problems earlier discussed with projection methods. However, the problems which belie these projection methods are often political rather than a statistical anomaly. The debate

¹⁹⁵ Schiff (n 182) 255

¹⁹⁶ Youssef Courbage, ‘Reshuffling the Demographic Cards in Israel/Palestine’ (1999) 28 *Journal of Palestine Studies* 4, 26

will then lead onto discussing the use of demography as a political weapon on both sides. In addition, it will determine whether or not demography actually poses the threat popular discourse leads one to believe. Finally, I will look at the implications for democracy providing another scathing attack based, not on its exclusionary nature as discussed before, but on its capitulation to demographic supremacy.

Ehud Olmert vividly describes *a demographic battle, drowned in blood and tears*.¹⁹⁷ The alarmist discourse renewed demographic supremacy as a cornerstone to Zionist perpetuity. The Demographic debate arguably began with Yisrael Koenig's memorandum administered in 1976 entitled "*The Demographic Problem and the Manifestations of Arab Nationalism*"¹⁹⁸ and, although it had no legal stature, it was a highly influential document in Israeli policy as well as summing up together the popular mood at the time. Based on the sizeable Arab populations in the Galilee region, he suggested several measures to *appease* Arab nationalism. These included trying to build Jewish settlements to dampen potential of an independent Arab union¹⁹⁹, smear campaigns to delegitimize Arab activists, and creating political parties which stressed equality and humanism in theory but were fundamentally Zionist. In addition, the document also discussed encouraging Arabs into areas of employment which would give them less time to *dabble in nationalism* as well as neutralizing grants to bigger families. The Koenig report centralized the threat of demography bringing it in from the periphery. On the back of the Iranian revolution some years prior and an enduring revolutionary spirit throughout the Middle East, focus was not so much on increasing Jewish fertility but on decreasing Arab natalism. This is arguably the birth of pro-natalism and nationalisms inextricable link. Whilst there has been a slight shift in that focus now also lies on encouraging Jewish fertility, undermining Arab fertility and also facilitating emigration is still a fundamental policy.

¹⁹⁷ Faitelson (n 170) 51

¹⁹⁸ Yisrael Koenig 'The Demographic Problem and the Manifestations of Arab Nationalism' (1976) (http://issuu.com/joeexample1/docs/koenig_report)

¹⁹⁹ Koenig (n 198)

These sentiments are by no means isolated to the military. Professor Arnon Sofer, the so called *Arab Counter* says that demography is fundamental to Arab-Jewish relations. In a letter he wrote to the prime minister published in Ha'Aretz²⁰⁰, he describes separation *from our insane neighbour* and that while the Israeli Defence Forces (IDF) kill terrorists, 400 more children are being born, many of whom will become terrorists.

For a developed country, Israel has an exceptionally dense land with equally high fertility rates.²⁰¹ The population for Jews and Arabs in the State of Israel are 6,016,476 and 1,535,573 respectively as of the 31st December 2009²⁰². According to the same documents, Total Fertility Rates (TFR) have remained relatively stable.²⁰³ This type of statistical collation seems relatively unproblematic but the very accrual of data has itself become politicized. Let us be very clear about this. We are not merely talking about projections (which are naturally subjective based on criteria one thinks worthy of consideration) but we are also talking about the supposedly objective data collating. This maybe due to double counting of certain populations, omission of certain areas given contested boundaries or political exigencies. In light of this, it is very difficult to obtain absolute figures for fertility rates. Generally however, there is a consensus that Arab TFR is higher than Jewish TFR but the latter has steadily increased whilst the former has taken a drop²⁰⁴. Contrastingly, Sergio Della Pergola suggests that Israel's TFR has remained relatively stable.²⁰⁵ His projection models will often formulate high and low estimations based on either *instant reduction* or *indefinite continuation*.²⁰⁶ Zimmerman, Said and Wise's projections based their projections on population, fertility and immigration making allowances for high, medium

²⁰⁰ Galili (n 159) 90

²⁰¹ Anson & Meir (n 174) 64

²⁰² Shlomo Yitzkahi, *Israel in Figures* (Israel Central Bureau of Statistics, Jerusalem 2010)

(http://www1.cbs.gov.il/publications/isr_in_n10e.pdf) 10- note, figures are published one year in arrears

²⁰³ Yitzkahi (n 202) 11

²⁰⁴ Bennett Zimmerman, Robert Seid, and Michael L. Wise, 'Population Forecast for Israel and Westbank 2025' (Presentation at the 6th Herzliya Conference, Herzliya, January 2003) 7

²⁰⁵ Sergio Della Pergola, *Fertility and Population Policies in Israel* (2006) Jewish People Policy Planning, 6

²⁰⁶ Della Pergola (n 185) 18

and low predictions. They affirm popular ideas of *Jewish demographic momentum* citing that faulty projections are predicated on the misnomer that Arab fertility rates are increasing when in fact the opposite is true. Other demographers suggest that Arabs are in the early stages of their demographic evolution.²⁰⁷

Because of the alarmist discourse that has usurped the demographic debate, demography whether a fictional or factual dilemma, is used as a weapon for both sides. Accusations, particularly levelled at the Palestinian ministry, of embellishing census figures often skew the debate from scientific and statistical to political. Often statistics for Palestinians will have various sources²⁰⁸ with certain groups of people in particular areas, as stated before, being double-counted depending on who is conducting the census. This is rife with areas such as East Jerusalem.

What we are observing therefore and these points seem to be uncontroversial (although within such a highly politicized debate, a dose of scepticism is always healthy), is that TFR's among the Arab minority are higher than those of the Jewish inhabitants. However, contrary to popular belief, Arab fertility rates are steadily dropping albeit at a slow rate and still remain much higher than Jewish ones despite the latter steadily increasing. The reasoning behind Jewish TFR's steady increasing seems to be attributed to the religious-nationalist sector within Israel. Indeed *"the political structure, which saw the supremacy of Labour, then Likud, could be shaken by this religious shock wave, all the more so in that it is fed by a truly explosive demography."*²⁰⁹ By increasing the numbers, the religious right aims to increase their influence of power through democratic channels. Such conjecture of these figures and reasons is the focus of the next part of this discussion; the politicization of demography.

²⁰⁷ Friedlander & Goldscheider (n 161) 487

²⁰⁸ Fargues (n 177) 443

²⁰⁹ Courbage (n 196) 35

*Demography*²¹⁰ is not a typographical error but an astute portmanteau which captures the heart of this next section. It describes the politicization of the demographic debate by both sides of the conflict. Whilst it transcends the borders into the occupied territories of the Westbank and the Gaza Strip, nowhere does it have the same significance than in Israel itself. As a result, both sides have used it as a political weapon to justify action. “*The misuse of demography has been one of the most prominent yet unexamined aspects of the Israeli-Palestinian Conflict.*”²¹¹ This is perhaps because of the appearing simplicity of the demographic debate. It appears uniquely two dimensional against the back of a hugely complex conflict.

For the Israeli state, demography is seen as essential to Zionist perpetuity. It allows for two things; it embeds a deeper consciousness of nationalism and allows for a more entrenched and pervasive security discourse. This former point, as has been touched on previously, is characteristic of the Religious right but is also the common link to other nationalists. It highlights the importance of group strength²¹² and an expression of strongly felt nationalist sentiment.²¹³ The latter point provides the momentum for policy proposals the most controversial, which will be discussed later, being transfer.

For the Palestinian minority, demography has an equally important role. It is the weapon of the weak against Israel²¹⁴. Having stifled legal recourse and even few civil and political rights, demography exists above these spheres of which the Israeli state has no control. It is one of the few things which the minority are completely in command of. According to Yakov Faitelson, it also serves other purposes, one psychological and the other remunerative. The *demographic time bomb* of which the Palestinians are the fuse, gives them a sense of worth and power. The state and military’s inability to maintain a long term numerical superiority

²¹⁰ Zureik (n 160) 627

²¹¹ Faitelson (n 170) 55

²¹² Anson & Meir (n 174) 74

²¹³ Anson & Meir (n 174) 73

²¹⁴ Zureik (n 160) 623

means an equal inability to hinder the minorities' demographic momentum. However, popular demographic theory states that it is not unusual for minorities to exaggerate their numbers in order to gain recognition.²¹⁵ Coupled with higher fertility rates, the odds seemed to be stacked against the state.

Also, financial stipends are donated to the Palestinian Authority conditional of the number of inhabitants they have. Indeed, "*The Palestinians of all religions have a shared common fate. To defend their common interest, demography is incontestably the most effective weapon they have ever had at hand. This catches Israel out in the very spot where it holds itself up as an example: democracy.*"²¹⁶

Given these motives, one has to be weary of the facts and figures of the demographic debate. In fact one has to be weary of the actual inclusion of the debate itself. Professor Ehud Sprinzak refuted that demography explained everything and suggested other motives at play²¹⁷. Dr Aziz Haider of the Hebrew University said that *the ideological discussion of demography is a big lie that people create to serve their interests.*²¹⁸ However, if we recall one of our conceptual frameworks; *political demography addresses both the political determinants and political consequences of demographic change*²¹⁹ - we have to remember that demographic change is occurring, no matter how slight. Political consequences are therefore expected. Our only issue therefore is the extent to which these consequences are used. A possible restatement could be therefore that demography exists as a problem but its impact is disputed.

Given that demography *does* exist as a problem, we need to assess *what kind* of problem. We will do this by referring to our earlier *Jewish* and *democratic* maxim. The problems it poses for democracy will be

²¹⁵ Fargues (n 162)8

²¹⁶ Fargues (n 162) 13

²¹⁷ Galili (n 159) 92

²¹⁸ Galili (n 159) 92

²¹⁹ Teitelbaum (n 166) 719

explained shortly. But briefly, the problems it poses for *Jewishness* or Zionism- demographic hegemony would not be essential for Israel were it not democratic (or at least showcasing some democratic features). By outright denying votes to Palestinian Arabs, they could rule with a minority. However, certain democratic structures *do* exist therefore demographic hegemony is crucial. This obliges the law makers and executive to introduce law and policy which ensures this.

In the context of pluralism and diversity and a population's aspiration for democracy, it is this which brings demography into the political limelight.²²⁰ The nature of Israeli democracy has already been discussed at length. But demography further dilutes the nature of democracy. Imperfections of Israeli democracy are often attributed to external exigencies.²²¹ But here we argue that demography, predominately an internal matter and which is entirely under the remit of the state authorities, is what undermines democracy. The position that extenuating circumstances render Israel's democracy imperfect is illusory.

If we recall the words earlier of General Major Schlomo Gazit who said that there are times when democracy will have to be subordinated by demography; the suggestion here is that democracy is the default (which we have said before itself is still compromised) but will be suspended when strains are imposed on demography. This is itself also a *jus cogens* from which no exception can be made. The Israeli state, regardless of whether this threat is real or fantasy, always presents it as the former. Therefore we have a position where, because the threat is perpetual, then it logically follows that democracy, or what is left of it, is perpetually suspended. This is fundamentally because of Zionism, as it necessitates genuine demographic supremacy. It follows that if the Arab minority were given full democratic equality and a share in the common good as Yoav Peled articulates, then the state would cease to exist in its current form. Thus, there is little space available for political democratization. The

²²⁰ Fargues (n 162) 6

²²¹ Kimmerling (n 157) 339

Strategic Studies Centre in Tel Aviv said that in order for Israel to remain as it is, it would have to either deny political and participatory rights of the minority or transfer them to the Westbank.²²²

To summarise this position therefore, an ethnic democracy coupled with a particular demographic agenda creates the look of a liberal jurisprudence (liberalism itself riddled with problems as discussed in the previous chapter) but in reality, as we have seen, it shows all the signs of hardened Zionist ebullience. Therefore the Palestinian Arab minority's very existence, *poses both a demographic and, as a result, democratic threat to Israel*. Unusually, we would not conceive this- *an indigenous minority*, as a threat in a conventional sense. Vying for civil and political equality and the freedom to procreate are not inherently violent in any manifestation. Yet these are threats to Zionism. The demographic threat means that if the scales are tipped toward an Arab majority, Israel may have to resort to a *Herrenvolk democracy*. The democratic threat is that should Arabs ever have full civil and political rights, then the complexion of the Zionist state would inevitably change.

Given these threats to the Zionist state, what are the possible law and policy outcomes? In the next section, I will focus on several pieces of legislation which are meant to encourage and facilitate Jewish Demographic supremacy in Israel. In addition to this, I will look at potential laws it may wish to introduce should it want to maintain the status quo. What soon becomes apparent is that the withering Israeli democracy becomes even further shattered.

Law, Policy and Demographic Supremacy

Demographic supremacy is indirectly captured by the *Yeredor* ruling in its reference to the immortality of a Jewish state. Indeed policy toward

²²² Fargues (n 177) 468

Palestinians, *on both sides of the Green Line* remains tied to demographics.²²³ Recently there have been a multitude of various laws and bills introduced into the Knesset which directly or indirectly relate to demographic supremacy. These range from increased bureaucracy over land rights and building permission, draconian laws which mandate loyalty to ideological oaths and cultural law bills which deny the commemoration of the Palestinian catastrophe or *Al-Nakba*.²²⁴ Policies such as transfer, annexation etc are not new manifestations but have been common throughout the annals of Zionist history. Indeed, prior to the formation of the state, the Jewish Agency set up the Population Transfer Committee which researched into the logistics of population transfer. However, David Ben Gurion in 1939 following the United Kingdom's withdrawal of support for partition announced that *"I stated [!] too no longer see the proposal as particularly practical, not because transfer is out of the question, but because the political conditions and the negotiating circumstances are not convenient."*²²⁵ Nor are these policy proposals of transfer isolated to the echelons of the academia but proliferate throughout popular discourse.²²⁶ The link, although we have alluded to it previously, between demography and law and policy needs to be accentuated. It is the law which maintains that Zionism, through demographic supremacy, is upheld and sustained.

In this final section of the chapter, we will look at some pieces of legislation and case law to examine how the law favours Jewish immigration and citizenship. This will look at the positions for and against such a legislation including exploring the charges of discrimination. Then, having considered demography as a problem, we will look at potential policy and law challenges facing the Israeli legislature. This will look at some of the bills currently being passed through the Knesset in addition to formulating some ideas of what else they could try to pass.

²²³ Zureik (n 160) 621

²²⁴ Adalah *'New Discriminatory Laws and Bills in Israel'* (2010) (http://www.adalah.org/upfiles/2011/New_Discriminatory_Laws.pdf)

²²⁵ Portugese (n 190) 28

²²⁶ Zureik (n 160) 620

On the 46th Anniversary of Theodore Herzl's death, the Israeli legislature enacted the Law of Return 1950/5710. Two years later, the Nationality 1952-5712 Law came into effect. These statutes dealt with who were an immigrant or *oleh* and the various modes of citizenship acquisition respectively. There was also a subsequent amendment to the Law of Return in 1970 which determined the age old question of 'who is a Jew?' but that is not of particular concern to us at this juncture. What is of concern to us are these two pieces of legislation; they supplement and interlock into one another. The Law of Return aims to encourage and facilitate the *kibbutz galuiot* or ingathering of exiles giving legal basis to one of the basic tenets of political Zionism. Noting that nationality laws can be a reflection of constitutional ideology²²⁷ and the Law of Return is clearly ideologically motivated, one can *also* therefore look at the law against such a background.

The Law of Return allows for any Jewish person to emigrate and settle in Israel giving them the status of *oleh* or immigrant. By virtue of being an *oleh*, this automatically qualifies the person for citizenship status through one of the modes of citizenship acquisition stipulated in the Nationality law. Although not a basic law, it is often referred to as a natural right which precedes the state.²²⁸ This stems from the biblical right which exists in restoring the status quo ante of the Jews in *Eretz Israel*. Immigration is seen as repatriation which the name, *return*, lucidly suggests.²²⁹ In the act, s.4 refers to residents born in the country citing that they are also considered *oleh* despite some (i.e. those born in the state) having not physically emigrated to the country. This adds credence to the fact that this returning relates to the negation of their exilic condition and return to Israel.

The Law of Return, whilst mandating the executive to facilitate Jewish immigration, is both symbolic and instrumental to demographic

²²⁷ M.D. Gouldman, 'Israel Nationality Law' (Institute for Legislative Research and Comparative Law, Alfa Press, Jerusalem 1979) 9

²²⁸ Gouldman (n 227) 19

²²⁹ Claude Klein, 'Right of Return in Israeli Law' (1997) 13 Tel Aviv University Studies Law Review 53, 56

supremacy. As *oleh* status is *only* granted to Jews, it obliterates the possibility of Arabs or any other ethnicity or racial group immigrating to the country and thus non-Jews have to acquire nationality through the other, more stringent methods. This particular method of citizenship acquisition is a form of *jus soli*; only the *right of soil* to which it refers is not only spatial but temporal.

Another interesting aspect of the Law of Return lies in the common law requirements of becoming an *oleh*. *Expression* and not *intent* is the standard; thus in the case of *Rotenburg v. Deputy Head of Manpower Division*²³⁰ the person eventually wanted to settle in the Soviet Union but thought his chances would be substantially improved by using the Israeli authorities as a conduit. He emigrated to Israel and although he had no intention to settle there, his expression of coming there was enough.

Its interpolation with the Nationality Law specifically s. 2 (a) stipulates that by virtue of being an *oleh*, they become a national. In light of the discussion thus far, *only Jewish* people can acquire citizenship through this channel. It is at this point that we meet our first criticism of the law; discrimination.

An interesting exercise to examine this charge is to momentarily imagine that I am trying to defend this piece of legislation. The question becomes what positions of defence I present. The first defence maybe that the Nationality Law offers other forms of citizenship acquisition, so the accusation of discrimination quickly begins to crumble. I shall explore this when looking at the Nationality law shortly. Another argument, which is very much in the spirit of this temporally sensitive piece of legislation, is that the law is necessary to avoid another holocaust or pogrom. It is very difficult to refute that the Jewish people have been relentlessly persecuted and a law which provides for their wellbeing is instrumental. Here advocates would cite the *Convention on the Elimination of All Forms*

²³⁰ (1959) 13 P.D. 469

*of Racial Discrimination*²³¹ which allows for preferential immigration measures to remedy past injustices. This also feeds into the idea of *positive discrimination* which is equally backed up by the aforementioned convention. Many may also suggest that the law *cannot be divorced from its historical context*.²³²

These are compelling defences and should not be taken lightly. Indeed positive discrimination and ensuring the safety of a people are two noble pursuits. Whether the Law of Return and the State of Israel ensures the latter is a question of considerable debate but Israel, it must be mentioned, is by no means unique in offering preferential treatment. Indeed, in Germany, legislation has been in place which offers privileges to individuals with certain ethnic ties, and although this is not a comparative study, the similar question of ‘*who is German?*’ appears in s.116 of German Basic Law.²³³

It doesn’t require erudite analysis to see that the laws or at least provisions of the laws we have looked at so far, would certainly encourage demographic supremacy. Acquisition of citizenship for non-Jews is the new direction of this discussion; certainly if admission of non-Jews is as easy as for Jews through *oleh* status, then our early defences will maintain their robustness.

Citizenship is the individual’s immemorial relationship with the state and membership of an independent political community which entails reciprocal rights and duties.²³⁴ One way of acquiring citizenship is *nationality by residence*²³⁵ whereby an individual, who had Palestinian citizenship, is resident; in addition, they have to be registered on the 1st March 1952 under the Registration of Inhabitancies Ordinance, be inhabitant on the day of the Nationality Law coming into force and

²³¹ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS 660, (ICERD) (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en)

²³² Gouldman (n 227) 67

²³³ Klein (n 229) 54

²³⁴ Gouldman (n 227) 9

²³⁵ Gouldman (n 227) 68

remained in Israel since its inception. There are a few problems with these conditions which make it particularly difficult for many Palestinian Arabs to acquire this type of *jus soli* citizenship. The Courts have said that the requirement that the individual be registered under the terms of the ordinance is absolute²³⁶ however, they were more relaxed with regards to *having remained in Israel*; initially *continuity* was paramount as cited in the case of *Shaya v. Minister of Interior*²³⁷ but this was deemed unreasonable and in the case of *Nag'ib Musa v. Minister of Interior*²³⁸ a more liberal approach was adopted.

One event that the provision omitted in consideration of this law (or perhaps it was considered but ignored) was the expulsion of over 750,000 Arabs following the 1948 war. For these, acquisition of citizenship by residence is going to be difficult if not unlikely; indeed very few returned or were able to return because of *absentee laws* which seized their property and transferred it over to the state. Once again, it does not require an in depth analysis to see the *oleh* provision is far more facilitative and less bureaucratic. Thus, this form of citizenship acquisition surely stifles the demographic momentum of Arabs. However, the last population registration was conducted in the 1980's. Therefore this form of citizenship is arguably redundant.

Citizenship by birth adopts the *jus sanguinis* approach. Children born to an Israeli citizen may acquire citizenship even if born outside the state. However, this means that descendants of the children would *not* acquire citizenship through this method as the parent has to have had acquired it either through return, residence or naturalization. For Jews, this is an ephemeral hurdle as they can quite easily acquire citizenship through return status. However, for non-Jews this would be problematic particularly for their progeny.

²³⁶ Khalil Calef v. Ministry of Interior (1953) 7 P.D. 308

²³⁷ (1960) 45 P.D. 308

²³⁸ (1962) 16 P.D. 2467

The final method of acquiring citizenship is via *naturalization*. This requires that the individual has lived in the country lawfully for three out of the previous five years. Also, s.5 which deals with this method, also stipulates that *intention* rather than *expression* is required in addition to some knowledge of Hebrew. To the government's embarrassment however, many of their residents still remained stateless so an amendment was introduced in 1968 which allowed for applications to be made between the 18-21st birthday of the individual. This form of acquisition is at the discretion of the Minister of Interior. His decision must be substantiated with reasons which are made known to the applicant and are subject to appeal.

Methods of citizenship acquisition are available to all, regardless of ethnicity. This is clear. However, of the methods of citizenship, *return* is by far the easiest. Given that immigrant status is only afforded to Jews, the preferential treatment becomes blaringly apparent. What would be interesting to see are the number of applications for citizenship by naturalization, the reasons and how many of these were Arab.²³⁹ Residence and Birth are equally obstructed but not surprisingly, Return is the most conducive. This should not surprise us given the privilege of Zionism; it only goes to further dilute Israel's already tattered democratic structures. These laws therefore are ideological and have strong currents that flow toward a certain demographic complexion. Interestingly, Israeli public consciousness does not deem these laws as controversial. They are not just rules which exist outside the sphere of public consciousness (as is often the unfortunate case with law) but rather rooted in it. Indeed, "*calls for its abolishment are very weak and in some respects, this is a veritable taboo.*"²⁴⁰

Knowing that Arab fertility rates are higher than Jewish ones, there is some element of demographic momentum with the Palestinian minority. A perceptible shift toward the right politically, although not the focus of this

²³⁹ I contacted the Central Bureau of Statistics (Israel) for these figures and at the time immediately prior to publication, I received no reply.

²⁴⁰ Klein (n 229) 61

study, is important to consider for this has resulted in is a series of policy proposals and bills which aim to dissolve the Arab demographic momentum altogether. The next and final sections will look at these bills and proposals and also investigate the likelihood of their approval. A final note will also be made on how these laws are influenced by the dynamism of the Zionist project.

Transfer, territorial exchanges, loyalty oaths and land swaps- some describe very obvious policy proposals while others are more euphemistic terminology. Policy proposals have ebbed and flowed throughout time and seem to find more popularity in particular periods than others. Whether this means controversial 'land-swaps' or population relocation, few struggle to talk about them. A look at the selection of bills which are currently elbowing their way through the Knesset makes for interesting reading. Whilst there are many which *prima facie* discriminate against non-Jews, I will focus on the handful which I suggest have strong links toward demographic supremacy and Zionist perpetuity.

Both the Association for Civil Rights in Israel²⁴¹ and Adalah²⁴², a legal centre for Arab minority rights in Israel have each published papers highlighting concerns on bills which aim to threaten civil liberties, human rights and democracy. The first is the notorious '*Pledge of Allegiance*' bill²⁴³ which requires that citizens swear loyalty to Israel as a Jewish and Democratic state thus recklessly politicising the oath. The repercussions mean that such refusals to accept the oath are criminalised and would in effect quash legitimate political dissent. Although this has no obvious connection to demography, it does go to strongly and resolutely reaffirm Zionist perpetuity. At the time of writing, this bill did not pass but still has considerable support and continues to be discussed within political ranks.

²⁴¹ ACRI, '*Knesset 2010 Winter Session: Expectations and Concerns*,'(2010) (<http://www.acri.org.il/en/?p=769>)
14

²⁴² Adalah (n 224)

²⁴³ ACRI, '*Knesset 2010 Winter Session: Expectations and Concerns*,'(2010) (<http://www.acri.org.il/en/?p=769>)
15

Attacks on the courts and rule of law have also continued. *The Basic Law: The Judiciary* was recently subject to attacks limiting and in some cases eradicating their power to invalidate laws of the Knesset but this has since ceased. However, in 2009 a bill to amend *The Basic Law: Human Dignity and Liberty*²⁴⁴ which would limit judicial review powers of the Supreme Court on issues relating to citizenship was introduced. Whilst the duties of the Minister of Interior with regards to refusing applications for Naturalization are quite progressive, this aims to roll back executive accountability and adds another brick fence in an already tricky citizenship process for non-Jews.

Forms of social and ethnic exclusion and cleansing are also being discussed. A bill on *Admission Committees of Communal Settlements* will enable committees to refuse residence to people who *fail to meet the fundamental values of the settlement...its social fabric and so on.*²⁴⁵ This has massive impacts on the demographic make up of many formerly Arab towns and villages and the paper from the Association for Civil Rights in Israel suggest that the devolved powers used arbitrarily along ethnic lines.²⁴⁶ It is not known whether the bill allows for the expulsion of residents however, according to a newspaper article, a member of the Jewish Agency Hilltop Planning team was quoted as saying that the measures were to prevent Arabs from taking over.²⁴⁷ MK Shai Hermesh, one of the proposers of the bill says it ensures demographic homogeneity and social lubrication.²⁴⁸ Currently this bill has passed its first reading and has been approved for its second and third reading.

Two further bills, one previously alluded to, threaten to harm Palestinian livelihood in Israel. These include the government sponsored Counter-

²⁴⁴ Adalah, 'New Discriminatory Laws and Bills in Israel'(2010) (<http://www.adalah.org/newsletter/eng/nov10/docs/ndl.doc>)

²⁴⁵ ACRI, 'Knesset 2010 Winter Session: Expectations and Concerns,'(2010) (<http://www.acri.org.il/en/?p=769>)17-18

²⁴⁶ ACRI (n 245) 18

²⁴⁷ Ben White, 'Israel's Law of Citizenship will have dire consequences', *New Statesmen* (19 October 2010) <<http://www.newstatesmen.com/blogs/the-staggers/2010/10/israel-dahmash-palestinian>

²⁴⁸ David Sheen, 'Can't we all just get along - separately?', *Ha'Aretz* (24 February 2011) <<http://www.haaretz.com/news/national/can-t-we-all-just-get-along-separately-1.345450>

Terrorism Bill,²⁴⁹ which aims to codify into permanent legislation, the draconian Defence (Emergency) Regulations (the infamous Regulation 119 which invests authorities the power to demolish homes of an individual they suspect of having committed a crime or carrying an explosive). At the time of writing, this has passed its first reading in the Knesset plenum. Secondly, a bill which essentially ratifies the *Yeredor* ruling in statue law subverting democratic principles to the Jewishness of the state.²⁵⁰

These are the key bills which have some relationship with demographic change; although it should be noted, as said before, that these are not the only bills which have a potentially negative impact on the Arab Palestinian minority. In light of this, we turn to policy proposals. Two which resonate within the Israeli Zionist narrative are transfer and annexation. The final focus will look, not necessarily at what these policies entail, but rather why they exist as popular policy proposals.

Transfer has become a normalised part of Israeli “public speak.”²⁵¹ It exists in both a direct and indirect form. These range from forced expulsion to ‘softer’ forms such as incentivising emigration or forfeiture of certain rights if they remain in the state. As a result, policy proposals aim to work with other social factors. For example, MK Michael Kleiner has put forward emigration packages for Arabs with financial incentives; in the backdrop of high unemployment and discrimination against Arab labour, this has the force of appeal.²⁵² Voices from the right, particularly the party *Yisrael Beiteinu* and its controversial leader MK Avigdor Lieberman have routinely called for loyalty oaths or forfeiting for the right to vote; the so called *no loyalty, no citizenship* slogan for his party which obviously effects Arab Palestinians, was key in their recent campaign.

²⁴⁹ ACRI (n 245) 18

²⁵⁰ Lis (n 156)

²⁵¹ Zureik (n 160) 620

²⁵² Zureik (n 160) 625

Referring back to our categorisation of policy types, Israel appears to be an amalgam of at least a few, either in practice or theory. Through the Law of Return and Nationality Law which encourage and disproportionately facilitate Jewish immigration, it employs the policy type of *addition* by persistently diluting the Arab Palestinian demographic momentum. At the national level, the *Absentees' Property Law 5710-1950* (and its relevant amendments) appointed a custodian of property which Palestinians had fled during the war and invested the custodian with the power to sell the land on- often to the Jewish National Fund which sells exclusively to Jews. At the regional level, we have already seen how a bill for committees aims to upset the demographics in the Galilee and Nazareth areas with. Also, *emigration* is certainly not beyond the realms of possibility as we have seen with proposals for incentivising emigration packages which relinquish citizenship.

The likelihood of transfer now is politically unfavourable and would cause a huge international outcry. However, soft forms of transfer, the likes of which we have discussed are entirely possible. These softer forms also do not necessarily need to come in the obvious forms of emigration packages but the denial of basic resources, civil and political rights and their manifestation, all go toward making the quality of life for non-Jews particularly unbearable and may force them to 'emigrate by duress.' Incidentally, when politicians and law makers talk about transfer, the phrase population exchange has similar meaning. This is more akin to the *substitution* policy type exchanging the Arab Palestinian minority for people from the Jewish Diaspora or Jews within Israel.

Territorial exchanges and boundary adjustments have always been entrenched in Zionist discourse. Indeed, the capture of the various territories in the 1967 war is essential to the understanding of Zionist pro-natalism²⁵³. By introducing a population of Arabs in the Westbank and the Gaza Strip, Israel employed a policy of *addition* by building settlements

²⁵³ Portugese (n 190) 31

for Israeli Jews only in order to redress the demographic imbalance. Since the illegal occupation of these lands, various proposals have been put forward in determining how to deal with these territories from an Israeli security vantage point. The four positions²⁵⁴ posited by Dov Friedlander and Calvin Goldscheider are worthy of mention. The first *minimalist conception* would start by giving back East Jerusalem and the Golan Heights followed by the next proposal which includes the minimalist conception plus the Gaza Strip. The penultimate position would not give the Gaza Strip but would include the Westbank followed by the *maximalist conception* which would include everything including the Egyptian Sinai. What is apparent here is that any opposition to annexation is based on demographic rather than moral concerns.²⁵⁵ These ideas of demography inevitably introduce the wider aspects of the conflict.

Territorial exchanges suggest that two powers exist to swap areas on equal terms perhaps because of mutual demographic aspirations. For example, were there an independent Arab Palestinian state, it may want to exchange an area with Israel for a neighbourhood which is predominately Arab for one which is Jewish. I make no comment on whether this is right or wrong but only that this is the ideal situation. However, contrary to this idealism, Israel has entire control and no independent Arab state exists. Therefore territorial exchanges would naturally occur on their own terms given its position of power. That said, 'concessions' of territory are most likely strategic, as was the case in 2006 following the withdrawal from the Gaza Strip. Boundary adjustments, in all their euphemistic glory, have similar strategic elements. Suggestions from the Executive have put forward the idea of redrawing boundaries to exclude Arab neighbourhoods and in effect ethnically cleanse certain areas.

²⁵⁴ Friedlander & Goldscheider (n 161) 490

²⁵⁵ Portugese (n 190) 30

The likelihood of these proposals increases with each day. Given the facts and given the increasing nationalist sentiment amongst the Israeli Jewish population in addition to the Zionisation of the state, such proposals are not farfetched. Indeed the mere fact that they exist in popular discourse is testament to the fact that their attractiveness amongst the Israeli political echelons is pervasive.

Conclusion

I have suggested that a strong linear link exists between Zionism, demographic supremacy and law and policy. Each makes demands on the predecessor; Zionism demands demographic supremacy which in turn demands a favourable law and policy. Perhaps the point of contention is the extent to which demography actually exists as a problem but as we have stated previously, the issue is not the extent of the problem but that we know that it exists. In this sense, striking a chord with our earlier example of the French during the Franco-Prussian war at the beginning of the chapter, numbers do contribute to power. Whilst I and many others would not suggest that size is not the *only determinant of power*²⁵⁶ it certainly does play a pivotal role.

Thus we see the second method in which democratic rights in Israel are rendered useless. They are either banned by the state *or* because of the majoritarian make up of the state and the democratic process as merely procedural, they are merely a cross on a ballot paper and little else.

Throughout the first chapters we have seen the benchmark of democracy being gradually weathered and eroded to something not recognisable. Therefore the aim of the next chapter is to amend that. It is fitting that we ended on laws looking at citizenship for the final chapter will put forward ideas for alternative models of citizenship.

²⁵⁶ Weiner & Teitelbaum (n 163) 32

Chapter Four

Zionism and Citizenship: A workable model?

Where do we go from here?

We arrive at the terminus of this study but by no means should we alight just yet. The complexities and inadequacies of Israeli Citizenship Law have been touched upon albeit lightly. The Law of Return is a clear example of Israeli particularism guised under the thin and rapidly withering veil of universalism. We observed in the previous chapter this duality, Jewish democracy, is becoming increasingly unsustainable. The first chapter observed a selective liberal jurisprudence employed by the judiciary which capitulates to the Zionist *jus cogens*, ignoring collective and group rights of the Palestinians; the second chapter provided an insight into a further weathering of Israeli democracy through Zionism's eminent progeny- that of demography. Therefore, after all this chipping away at the totem pole of democracy, it seems necessary that we begin to do some fixing and a good starting place seems to be the Law of Return.

Laws and policies, as have been previously mentioned, are rarely drafted in such a way that mentions particular races or ethnicity. The Law of Return is anomalous in this respect. Given the privilege of ideology in Israeli politics, this seems far from unusual. Nationality, or *le'om*, provides the grounds for ethnic equality amongst Jews in Israel²⁵⁷ but defining

²⁵⁷ Don Handleman, 'Contradictions between Citizenship and Nationality: Their consequences for ethnicity and inequality in Israel'(1994) 7 International Journal of Politics, Culture and Society 3, 443

nationality has often been a topic of conjecture. Whether it refers to Jewish, Hebrew or any other such nomenclatures, it problematizes nationality in Israel. If we take Zionism as the dominant form of nationalism, then we can begin to explore what consequences these have for endorsing exclusionary practices in the state. Citizenship is the door to which one is able to realise and utilise rights whether they be political, civil or social. As already demonstrated in Chapter Two, we have an unusual situation in which Palestinians in Israel are citizens but are also subject to a citizenry deficit. Kretzmer elucidates that the lack of social and economic rights of the minority reflects deep inequalities and this is emblematic of institutional discriminatory practice.²⁵⁸ We used Peled's analysis to show that Palestinians, although having formal equality, do not have access to the resources which should be universally shared and beneficial or *the common good*, which is attributable to Zionist political hegemony in the proliferation and perpetuity of its project in Israel. Indeed "*the formal principle by which states define citizenship is not necessarily the same as it is in actual practice- in many concrete cases, the formal structures of citizenship diverge from both the ideological claims of the nation state and their actual policy-making practices.*"²⁵⁹ In effect, it is a second class citizenship.

Whilst the Nationality Law does allow for citizenship acquisition for Palestinians, albeit hindered and hampered to the point that an overt preference for Jews is apparent, the laws are clearly ideological. There is a strong current of one historical narrative that imbues the law with an esoteric stature so much that David Ben Gurion extolled its Zionist virtues; indeed it is *a priori* the state.²⁶⁰ In this final chapter, I will respond once again to the 'Jewish and democracy' diametric looking also at the homogenization of Jewish identity and Zionism as a form of ethno-nationalism. I shall go back to the Law of Return and Nationality law looking firstly at what compatibilities exist with being Israeli and non-

²⁵⁸ see also David Kretzmer, 'The Legal Status of the Arabs in Israel' (Westview Press, Oxford 1990)

²⁵⁹ Haldun Güllalp (eds) 'Citizenship and Ethnic Conflict – Challenging the Nation-State' (Routledge, London 2004) 1

²⁶⁰ Akiva Orr, 'The unJewish State: the politics of Jewish Identity in Israel' (Ithacan Press, London 1983) 27

Jewish. This will involve determining the relationship between Jewish Nationality and Israeli Citizenship and also the types of virtues which Zionism espouses. This will conclude that Zionism is a form of nationalism which essentially excludes those who are not Jewish. Having determined these indices, I will elevate the debate to a more general discussion on citizenship theory focussing predominately on admission to citizenship rather than just its content. In this vital section, I will look at the syncretism of nationality, identity and other types of belonging with citizenship and how they are inherently exclusionary. Given the assault on democracy, I shall argue that through the notions of democratic inclusion and the politics of recognition, a model of citizenship needs to be adopted which is inclusive and recognises the Palestinian minority not merely on an individual basis but as an indigenous and collective minority. This will take the shape of determining the *demos* and will inevitably bring into question the larger context of the conflict- those living in the Westbank, the Gaza Strip and refugees. Finally, I shall end by seeing whether such an inclusive model of citizenship is possible under the pre-emptory norm of Zionism; if it occurs that such a model is not, then it will hopefully put to affirm that the duality of Jewishness and democracy as authored by Zionism is incompatible and in the interest of democrats and egalitarians, it will finally mean that Zionism must cease to exist.

Israeli Citizenship Revisited

The Law of Return and the Nationality laws are ideological. They are infused with a tight and winding rope of values concomitant to Zionism and Zionist nationality. A determination of what nationality and citizenship is in Israel makes the question of what an *Israeli* is all the more convoluted and interesting. Can one be an Israeli and a *Palestinian Arab*²⁶¹ in a state that defines itself as, in the words of former Deputy of the Supreme Court Justice Menchem Elon, *of the Jewish people and the*

²⁶¹ Oscar Kraines, 'The Impossible Dilemma: Who is a Jew in the State of Israel?' (Block Publishing Company, New York 1976) 1

*Jewish people only?*²⁶² Can one be an Israeli if you denounce the State of Israel as '*Jewish and democratic*'? The circularity in this argument, that such an epithet *Israeli* would not exist is apparent (or certainly not as we know it) but it shows problems with the 'Jewish and Democratic' mantra once again. What determines the content of the '*Israeli*' is defined by the tenets of Zionism- how does it define the '*Israeli*'? These questions are important to negotiate as the promotion of any monolithic identity, *prima facie* will inevitably have exclusionary formations.

Certain forms of Zionism have always expounded a form of political liberty- but it places, on equal footing at least, the preservation of a collective identity (canonized in its *Jewish and Democratic* maxim). Its particularist semiotics ensures the preservation of this collective identity; from the symbol on the flag, to the language they speak, and the proliferation of a religious discourse in the political sphere.²⁶³ The Declaration of Independence '*provides the myth of unbroken Jewish unity and the birth of the Jewish people in ancient Eretz Israel.*'²⁶⁴ This rhetoric has become the bastion of Zionist discourse designed to construct a homogenizing Jewish people hood.

Criticising citizenship law in the context of its colonial beginnings is essential.²⁶⁵ During the formation of Zionist colonies, the Labour Settler Movement aimed toward the one goal of Zionist proliferation- indeed this was its republican virtue²⁶⁶ (I make no suggestion that Israel exhibits a pure form of republican citizenship as will become apparent later- indeed much of the literature cites that neither forms of liberal, communitarian or republican models exist in isolation and rather bleed into one another in practice²⁶⁷) Other virtues of the settler movement included *chalutziyut*²⁶⁸

²⁶² Amal Jamal, '*Nationalizing States and the Construction of 'Hollow Citizenship': Israel and its Palestinian Citizens*' (2007) 6 *Ethnopolitics* 4, 477

²⁶³ Alain Diedhoff, '*The Nation in Israel: Between democracy and ethnicity*' in Haldun Güllalp (eds) '*Citizenship and Ethnic Conflict – Challenging the Nation-State*' (Routledge, London 2004) 85

²⁶⁴ Handleman (n 257) 441- see also Schlomo Sand '*The Invention of the Jewish People*' (1st Edition Verso, London 2009) in which Sand examines and contests the popular notion of Jewish Exile

²⁶⁵ Gershon Shafir and Yoav Peled, '*Being Israeli: The Dynamics of Multiple Citizenship*' (Cambridge University Press, Cambridge 2001) 1

²⁶⁶ Shafir & Peled (n 265) 10

²⁶⁷ Herman van Gunsteren "4 Conceptions of Citizenship" in Bart van Steenburgen (eds) "*The Condition of Citizenship*" (Sage Publications, London 1994) 63

or pioneering which dealt with the merit and redemptive quality of their work in Palestine. Various institutions from the kibbutz and moshavs to the Jewish National Fund and the infamous labour association, Histadrut all espoused these civic republican virtues which, following the expulsion of the Palestinians in 1948, took on an increasingly legalistic and political character; the so called *mamlakhtiyut*²⁶⁹. As the baton passed from the egregious failures of the Mandate to the incompetence of the UN, the Zionists were handed sovereignty of the land which embedded these virtues. Indeed, “*individuals and social groups were to continue to be measured by their contributions to the common good as defined by the Zionist project.*”²⁷⁰ It is often said that ethnic collectives can become national ones if they organise to influence, or themselves shape, political structures²⁷¹ and this can clearly be observed with the UN’s apportioning of Jewish sovereignty. The Histadrut, with the support of other institutions was able to ensure the privilege of the Jews (particularly the Ashkenazi immigrants in contrast to the Yishuv) in historical Palestine.²⁷²

What one can reduce from this is that in a republican perspective, civic virtues are equated to doing that which extends and maintains Zionist hegemony. For example, the judges in *Yeredor* when ruling that Israel as a Jewish state is an incontrovertible fact, were merely exercising republican virtues. When a young Israeli reaches the age of maturity and he/she is conscripted into the Israeli Defence Forces, this is his or hers civic virtue. When the Knesset introduced amendments to Basic Laws which prohibited the entry of parties which reconfigure the state to make it more inclusive, this is a civic virtue. We can begin to see cracks appearing. The suggestion is that, at least in a republican sense, an Israeli who does not extol Zionist virtues, is no citizen at all (or certainly not a good one). By having republican virtues which are essentially exclusionary, it allows discrimination *through the back door*. A good example of this is conscription; this is not mandatory for Palestinians

²⁶⁸ Shafir & Peled (n 265) 17

²⁶⁹ see also Chapter 1

²⁷⁰ Yoav Peled, ‘The Evolution of Israeli Citizenship: an overview’ (2008) *Citizenship Studies* 12, 336

²⁷¹ Handleman (n 257) 448

²⁷² Peled (n 270) 336

(rather by administrative practice rather than law). In theory, Palestinians are not exercising these civic virtues and in addition, because many laws tie social rights and economic advantages to conscription, they suffer indirect discrimination.

The creation of Israeli identity stems from two ideological periods. The *mizug galuiot* or 'melding of the exiles' aimed to banish all ethnic distinctions between Jews²⁷³ to create a *new Israeli person*. The second period aimed to foster an *edot* or cohesive community premised on the *essential sameness* of all Jews²⁷⁴ (what in actual fact has happened is a quasi-caste system which ranks Ashkenazi Jews at the top with a heavy set social agenda on the westernisation of the Mizrahi/Falush community but this is not relevant to our discussion here). Nothing however, is assumed to the non-Jewish population. The affirmation of Israeliness is only discussed and defined in the context of Jewishness and Jewish egalitarianism. This is perhaps why we hear calls of *Apartheid* or *Herrenvolk* democracy in Israel.²⁷⁵

Israeli identity, like any other identity, is dynamic, always being penetrated by Zionism. In Amal Jamal's analysis, he suggests that one of the frameworks needed to examine law and policy is the *cultural and symbolic dimensions of the Israeli entity*.²⁷⁶ This he links into the 'politics of recognition' looking at various scholars who map out a symbiosis between symbolic-cultural artefacts and social justice. Of course there is no insinuation that this and only this is the cause, but he does provide for the fact that "*providing cultural groups with the opportunity to design an autonomous and unique cultural space is positive, but only so as to serve as stable ground and cultural support for the participation of minorities in designing and participating in the overall public sphere.*"²⁷⁷ This is often the failure of liberal citizenship as we saw in the earlier case of *Re'em*

²⁷³ Handleman (n 257) 451

²⁷⁴ Handleman (n 257) 451

²⁷⁵ The label of Apartheid tends to be used in reference to specific policies in Israeli toward the Palestinians and on the whole, to Israel's Occupation in the Territories. For further reading, see also Ben White, 'Israeli Apartheid: A Beginners Guide' (Pluto Press, London 2009)

²⁷⁶ Jamal (n 262) 473

²⁷⁷ Jamal (n 262) 476

*Engineers Ltd. v. Municipality of Nazareth Elite*²⁷⁸. There is a clear symbolism relating to Jewish history and redemption which is conflated with Israeli identity. Indeed *“Israel is a nationalizing state driven by a clear and strict ethnonational ethos as elucidated in its founding Zionist ideology”*²⁷⁹ Zionism is therefore a form of ethnonationalism as it derives its character and sentiment from the hegemony of one ethnicity- and as is apparent, *“issues of ethnicity add another complex multiplicity”*²⁸⁰ to the proceedings. There is a clear drive to preserve and maintain one identity and, through institutions like the Jewish National Fund and the Jewish Agency it becomes obvious that there is an institutional dominance. However, can we conclusively say that being Israeli is denied to those who do not necessarily adhere to cultural and symbolic emblems of the state?

This is where we uncover different levels of stratification of Israeli citizenship. The first stratification exists between Jews (and within them, the Ashkenazi, Mizrahi, Sephardim and Falush) and Palestinians in Israel (including, although we shall not discuss this in great detail here, the Palestinians in the Occupied Territories and Refugees). The second stratification, which we mentioned briefly before, refers to the *‘incorporation regime’* which is constituted of *“a collectivist republican discourse, based on the civic virtue of pioneering colonization; an ethno-national discourse, based on Jewish descent and an individualist liberal discourse, based on civic criteria of membership.”*²⁸¹ The former is of interest to us here. If citizenship in Israel is hierarchical rather than equalizing, it’s worth finding out why.

To be Jewish, as defined in Israel’s population registries, is a nationality. What is the relationship between citizenship and nationality? Whilst citizenship acquisition is possible through alternative avenues sans the Law of Return, what judges and legislators say about nationality is crucial

²⁷⁸ (1992) (v) P.D. 189 see also chapter one

²⁷⁹ Jamal (n 262) 476

²⁸⁰ David McCrone & Richard Kiely, ‘Nationalism and Citizenship’ (2004) *Sociology*, 20

²⁸¹ Shafir & Peled (n 265) 408

in creating a sense of belonging, particularly for those who are non-Jewish.

The case of *George Tamarin v. State of Israel*²⁸² involved a Jewish Israeli who requested that his *le'om* (nationality) be changed from Jewish to Israeli in the population registers. The petition was rejected with Agranat J saying that “*there is no Israeli nation separate from the Jewish people...The Jewish people is composed not only of those residing in Israel but also of Diaspora Jewry.*” The court essentially equated Jewish Nationality with Israeli Nationality in that nationality, as differentiated from citizenship, is synonymous with ethnicity insofar as Jews in Israel are concerned.²⁸³ The implication from this case is that nationality status has no link to origin or domicile as is often explicated in International Law but rather it appoints ethnic character as admission to enjoy rights- “*in sum, ‘nationality’ provides the epistemological grounds for ethnic equality amongst Jews, while the idea of Jewish ethnicity promotes inequality between Jew and non-Jew.*”²⁸⁴ Equating Jewish nationality and Israeli Nationality heavily implies that Israeli Nationality is afforded by virtue of being Jewish. The logic behind this would be that citizenship and nationality would be cleaved apart making it possible, at least in a formalistic sense, that non-Jews could have Israeli citizenship.

The issue of *le'om* is very problematic therefore and the courts have not provided much clarification. As our pending investigation will later illustrate, defining the content of nationality with all its vagaries becomes more so precarious when the issue of ethnicity is introduced. *Le'om* as defined by ethnicity opens up the *discourse of difference*²⁸⁵. One may ask, why this is an issue for Palestinians who have citizenship; this is evidence to the fact that this is not as worrying a development as one may think. This is where the Law of Return comes in, transforming Jewish Nationality into Citizenship. Don Handleman shows how an external

²⁸² (1970) 26 (i) P.D. 197

²⁸³ Kraines (n 261) 67

²⁸⁴ Handleman (n 257) 443

²⁸⁵ Handleman (n 257) 444

(through legislation and case law) rather than an internal (self-defined) rule of *le'om* essentially stratifies people; *“le'om exists as a category that separates citizens into groups, each of which depends on a conception of personhood infused with essentialist qualities of being..[it] equates nationality and ascribed ethnicity therefore no free will is here regarding your membership... Nationality exists as a totalizing concept that separates Jews from others in absolutist terms.”*²⁸⁶

The debate still rages on whether ethnicised nationality and citizenship actually do share a symbiotic relationship. This tension is not unique to Israel; rather *“every nation has a potential tension between citizenship in the state and membership in the nation...the former determines the criteria for formal participation in the community, the latter determines the criteria of substantive participation in the political community.”*²⁸⁷ There are parts of the judiciary and intelligentsia who tend to oversimplify the debate saying that one can have Israeli citizenship without having Jewish Nationality. But we can only say that this position is true if citizenship is an equalizing mechanism which it clearly is not. However, this still does not explain why Palestinians still enjoy citizenship despite the problems we have come across. This moves us onto our second type of stratification.

As we discussed earlier, the incorporation regime which exists in Israel offers overlapping types of citizenship. Gershon Shafir and Yoav Peled coherently state that *“Arabs enjoy civil and political rights in the individual and liberal sense. But they are excluded in a republican sense that is, from participation in attending to the common good of society. This exclusion is normalized by the dominance of the ethno-republican discourse on citizenship; Jewish citizenship is a necessary condition for membership in the political community and the contribution to the process of Zionist redemption is a measure of one’s civic virtue.”*²⁸⁸ Essentially,

²⁸⁶ Handleman (n 257) 446-447

²⁸⁷ Ayelet Shachar, ‘Whose republic?: Citizenship and Membership in the Israeli Polity’ (1999) 13 Georgetown Immigration Law Journal, 261

²⁸⁸ Shafir & Peled (n 265) 125

the liberal citizenship affords Palestinian Arabs formal equality but the trump card is that such liberal rights are curtailed if there are antithetical to the state's republican values and these values are defined by an exclusionary Zionist ethnonationalist discourse. Thus Palestinian Arabs have no general right to partake or determine civic virtues (unless they accord with Zionist virtues). The Basic Law: Knesset and *Yeredor* ruling harness this sentiment.

Referring to Amal Jamal once again, his postulation represents a *hollowing out* rather than a stratification of Israeli citizenship for Palestinian Arabs. His analysis employs a wider theoretical framework looking at the state as an autonomous actor generating inequality, the ethnic division of labour and, as we touched on before, the cultural and symbolic dimensions of Israeli ethnonational expression.²⁸⁹ Jamal's obvious frustration with liberal citizenship is that it is merely tokenistic and, using Kymlicka's analysis, says it offends cultural rights.²⁹⁰ The question for him is not admission to, but rather content of citizenship. While not the exact focus of this chapter it is still important to consider.

What we are thinking about therefore is the admission of citizenship. It is clear that admission of citizenship is nuanced and complex. We can't simply say that there are four methods of citizenship acquisition one of which favours Jews over non-Jews. The conceptualisation of *le'om* is essential as it has "*invented a social category that in legal terms functions as an instrument of administration and bureaucracy then turned into a moral issue of Jewish people*" which moved toward a conceptual separation of Jew and non-Jew, fragmenting the political unity of citizenship.²⁹¹ In the context of the politics of recognition and the politics of belonging, this is a crucial issue. The Law of Return is a statutory expression seeking to nationalize an ancient religious and ethnic community.²⁹² At worst, there is certainly a link between nationality and

²⁸⁹ Jamal (n 262) 473

²⁹⁰ Jamal (n 262) 474

²⁹¹ Handleman (n 257) 449

²⁹² Shafir & Peled (n 265) 411

citizenship. What this means in real terms, I suggest, is that the other methods of citizenship acquisition, residency, naturalisation and birth exists *extra*-nationality. Simply put, a non-Jew cannot be an Israeli national in a *real sense*, purely in a formalistic one. It may say in the population registry that he or she is Israeli, but they are not Jewish Israeli- they do not fulfil the Zionist requirements and therefore will not be entitled to a full set of rights. Indeed some scholars suggest that real Israeliness is linked, not with citizenship, but with enrolment in the army- a paramount civic virtue.²⁹³ An *incorporation regime* is can be thought of as forming concentric circles, in which the boundaries become more rigid as one moves toward the periphery.²⁹⁴

What is also interesting is this has demonstrated that the dividing line between *acquisition* and *content* of citizenship is not as discrete as we may conceive- acquisition does not guarantee universality. That said however, a de-zionised version of le'om, can be equalizing. Two key amendments have to be made however which will complement that de-zionised version of entry and these relate to the content- scraping the requirement of military service to social and economic benefits and acknowledging group differentiated rights of the Palestinian Minority.

Citizenship therefore can be and is used as a tool to maintain the Zionist narrative. Indeed, it "*establishes a legal mechanism for a society to achieve regeneration- passing down a legacy from one generation to another indefinitely, while asserting a link back into time immemorial.*"²⁹⁵

Interestingly, in July 2003, the Knesset enacted the Citizenship and Entry into Israel Law (Temporary Order)²⁹⁶ that prohibited the granting of residency or citizenship in Israel to Palestinians from the Occupied Territories even if they are married to Israeli citizens. This new law, rather than allowing naturalization of the spouse, creates a clear distinction

²⁹³ Diedhoff (n 263) 91

²⁹⁴ Shafir & Peled (n 265) 412

²⁹⁵ Ayelet Shachar, 'The Birthright Lottery: Citizenship and Global Inequality' (Harvard University Press, London 2009) 124

²⁹⁶ (http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm)

between citizenship rights of Palestinians and Jewish citizens justifying the discrimination under the alleged context of security. The Provision Order has continues to be renewed.

“De-Zionised Citizenship?”

It is unusual to zoom in on the Israeli case then zoom back out to a general level of discussion; it is rather like doing the case study before discussing the theories. However, the reason why I have structured it this way is to give the reader an opportunity to appreciate Israeli exceptionalism and compare this with general ideas on citizenship. The aim of this section is to repair what is ‘broken’, so it makes sense to see how it broke so that we may know how to fix it.

My argument for a new model of citizenship will primarily be based on the premise of democracy, the ‘*path of full inclusion*’²⁹⁷ ensuring enjoyment of equal rights and duties and democratic self-governance. Given that democracy has been twisted and turned into something unrecognisable in Israel, it seems apt that this be our starting point.

The annals of literature of citizenship can be classified in two branches which we have stated in passing before. To clarify, citizenship “*defines a new and politically constructed identity- as a member of the national community and who is out. Secondly, a citizenship formally endows and burdens the members of the community with a set of rights and obligations.*”²⁹⁸ We are primarily concerned with the former given that nationality and citizenship have strong links in Israeli jurisprudence and as we have seen, and as we shall see, this often manifests itself in exclusionary practice. Essentially however, citizenship can be seen as

²⁹⁷ Ruth Rubio-Marín, ‘Immigration as a democratic challenge: Citizenship and Inclusion in Germany and the United States’ (Cambridge, Cambridge University Press 2000) 20- *strictly speaking, this ensures formal equality but we can suggest that the same collective rights offered to the Jews are extended to all groups and as such, are implemented. Rubio-Marín goes into detail on pp. 77*

²⁹⁸ Güllalp (n 259) 2

that which includes or that which excludes. If citizenship is to be an equalising mechanism, it is in our interests to make it as inclusive as possible. Therefore any impediments, whether legal or bureaucratic, need to be removed. Before we determine what type of criteria we should adopt for acquisition, a few preliminary points shall be established.

To accentuate this point, the links between citizenship and *le'om* in Israel are statutorily expressed through the Law of Return. Therefore we need to address forms of nationality and nationalism as a method of citizenship acquisition. If our 'tick-boxes' are inclusion and democracy, then we can use these as barometers to determine the normative value of nationality as citizenship. This shall therefore examine varying forms of cultural, ethnic and civic nationalism. The other significant point to make is that when we are referring to the Palestinian Arabs in Israel, we are *not* referring to an immigrant community but rather an indigenous one. Inevitably issues of the Palestinians in the Westbank, Gaza and the Palestinian Diaspora will also come into the forefront of the debate.

Another preliminary issue to consider is the '*politics of recognition.*' To this date, the Palestinian Arab minority have yet to be recognised as a national minority (primarily because this would accept, or at least partially, responsibility for the expulsion of hundreds of thousand of Palestinians during 1948 dispelling the age old Zionist mantra of a *land without a people for a people without a land*). The Politics of Recognition spawned from the failure of universalism in acknowledging individual and collective differences thus sparking the genesis of social movements based around identity and class for inclusion and voice in polity.²⁹⁹ If we are to take citizenship and democracy seriously, then "*realising and recognising difference is the best means of inclusion*"³⁰⁰ But the schema of inclusion is not simply affording liberal equality to all thus employing a racial/gender/ethnic blind approach. Young talks about the assumed

²⁹⁹ Barbara Hobson, Marcus Carson & Rebecca Lawrence, '*Recognition Struggles in Trans-national Arenas: Negotiating Identities and Framing Citizenship*' in Birte Siim & Judith Squires (eds) '*Contesting Citizenship*' (Routledge, Oxford 2008) 42

³⁰⁰ Dora Kostakopoulou, '*The Future Governance of Citizenship*' (Cambridge University Press, Cambridge 2008) 30

generality of citizenship theory which is premised on a misguided notion of universal sameness transcending particularity; conceptions of equality are linked to this historically inert notion of sameness.³⁰¹

Coleman and Higgins make a superb analysis of racism and ethnocentrism observing historically how ancient conventions mediated inter-ethnic conflicts. These were through the conventions of continuity, consent and most importantly '*audi alterem partem*' or recognition.³⁰² Indeed they place the politics of recognition on an intellectual pedestal citing that it "*is a most important front in the struggle for just and pluricultural societies and nation-states, and for equal and inclusive citizenship*"³⁰³. The emphasis, that it shapes identity and feeds our innate urge to find out who and what we are and where we belong in order to function socially and psychologically.³⁰⁴ Ann Yeatman refers to this as the '*legitimacy of difference*' which often is neutralised by assimilation, subjugation or denial of recognition.³⁰⁵ Similarly, Coleman and Higgins virulently oppose notions of assimilation, instead suggesting alternatives such as institutions that equip all citizens with skills to participate in a culturally specific public life but also continue the minority culture into which they were born.³⁰⁶ In our case, this would mitigate the institutional dominance Zionist organisations have in Israel, particularly in relation to education. Amal Jamal makes clear points pertaining to this in his analysis of deliberate state policies that foster national-cultural misrecognition.³⁰⁷

There is also the contrasting vernacular that is often exclusionary-laden; that of the *Politics of Belonging* which has typically riddled contemporary citizenship theory and practice. Former Conservative MP Norman Tebbit once famously cultivated the notorious '*cricket test*'- assume England

³⁰¹ Iris Marion Young, '*Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*' (1989) 99 Ethics, 250

³⁰² Ann Coleman and Winton Higgins, '*Racial and Cultural Diversity in Contemporary Citizenship*' in Andrew Vandenburg (eds) '*Citizenship and Democracy in a Global Era*' (Macmillan Press, London 2000) 53

³⁰³ Coleman & Higgins (n 302) 65

³⁰⁴ Coleman & Higgins (n 302) 63

³⁰⁵ Coleman & Higgins (n 302) 95

³⁰⁶ Coleman & Higgins (n 302) 68

³⁰⁷ Jamal (n 262) 486

were playing either India, Pakistan or Bangladesh, the majority of ethnic minorities would support the latter rather than the former and this was a useful indication of ones sense of belonging³⁰⁸ or to put it another crass way, if you are of '*appropriate stock*'.³⁰⁹

To summarise, our position is that democracy suffers when individuals are arbitrarily excluded. Individuals are *not* limited to tax payers, legal residents etc but those that habitually reside in the territory (naturally excluding visitors). Therefore we need a de-ethnicised and de-racialised 'demos' which is as inclusive as possible. In other words, it is a *political* demos, one which is facilitative to the principles of democratic inclusion. These issues of inclusion stem from a commitment to the politics of recognition as a means to neutralise the institutional discrimination and racist practices toward the indigenous Palestinian Arabs. Further, we recognised that the Palestinian Arabs are indigenous and that they are discriminated against, socially, economically, culturally, politically and legally. In light of these developments, our position needs to reflect a *content* of citizenship which accepts these factors and responds through affording group differentiated rights. However, our primary concern lay with citizenship *acquisition*.

When considering Nationality and Citizenship, we must identify what are the forms of nationality. Is it possible to reconstruct nationality in such a way which is not exclusionary such as the Zionistic form of ethnonationalism? Kostakopoulou establishes four clear theses which underpin such a form of citizenship acquisition; *priority* which describes a preferences for the wellbeing to a fellow co-national over non-nationals, *exclusivity*, *supremacy* which reflects a unitary national identity and *cohesion* which assumes that *heterogeneity and pluralism are not conducive to political stability and democratic governance*.³¹⁰ The suggestion is that Nationality has the '*us and the other*' diametric woven

³⁰⁸ Nira Yuval-Davis, '*Intersectionality, Citizenship and Contemporary politics of Belonging*' in Birte Siim & Judith Squires (eds) '*Contesting Citizenship*' (Routledge, Oxford 2008) 161

³⁰⁹ Shachar (n 295) 121

³¹⁰ Kostakopoulou (n 300) 3-4

into its fabric. It is premised on a politics of difference- this fear of difference is unusual given that citizenship, as we stated earlier, is ultimately about inclusion and exclusion premised on distinction and difference. Given that nationality contains a pathological enmity toward heterogeneity, we can see that it is going to be difficult to re-define nationality in an inclusionary formulation. However, we shall try.

The Nation-State grew in the shadow of nationalism and therefore the centrality of the Nation-State paradigm needs to be appreciated. We can define nationalism as being *a type of national consciousness formed in social movements at times of modernization- collective consciousness which both presupposes a reflexive appropriation of cultural traditions that have been filtered through historiography and spreads only via the channels of modern mass communication.*³¹¹ The idea of a 'nation', formulated by the French Revolution, has been characterised in various manners but the common themes seem to be *"a people, a folk, held together by some or all such more or less immutable characteristics as common descent, territory, history, language, religion, way of life or other attributes that members of a group can have from birth onwards."*³¹² The State however, related not to the nation but to *collectivity of the citizen with civil, political and social entitlements.*³¹³ The Nation-State model demonstrates a confluence of the two creating a seemingly 'natural' bond between the state and each of its members.³¹⁴ The members of the state are analogous to the nation- admission is two-ply, both into the nation and as a citizen of the state. The adhesion to the nation-state paradigm is therefore very problematic as it codifies many of the inherent problems of nationalism and exclusion. There is purchase in the argument that the nation-state is a diminishing and disintegrating form³¹⁵ but its structural convenience provides for rational administration and a legal frame for free

³¹¹ Jürgen Habermas, 'Citizenship and National Identity' in Edited by Bart van Steenburgen "The Condition of Citizenship" (Sage Publications, London 1994) 22

³¹² T.K.Oommen, 'Citizenship, Nationality and Ethnicity: Reconciling Competing Identities' (Blackwell Publishers, Cambridge 1997) 29

³¹³ Oommen (n 312) 24

³¹⁴ Ann Dummert, 'Citizenship and Nationality' (Runnymede Trust Publication, London 1976) 9

³¹⁵ Gunsteren (n 267) 63

individual and collective action, ensuring some longevity.³¹⁶ But is the nation-state an immovable reality? Kostakopoulou once again provides a sound refutation of popular defences of the paradigm;³¹⁷ the assumption that nations can be genuinely ethical communities plausible as a component of one's cultural identity, coupled with a rhetoric of belonging vindicating ethnic identities under the banner of 'common citizenship and shared values' is a standard one. It is the position of a community's expression and desire for cultural preservation which they have a right by virtue of their membership.³¹⁸ Liberal nationalism has however, "*developed an ethical particularist perspective that justifies the principle of co-national partiality within territory*".³¹⁹ Indeed, the mere fact that the paradigm exists as an empirical fact is not compelling enough; rather it conflates its tenacity with its supposed empiricism.³²⁰ Kostakopoulou also more than adequately responds to the liberal communitarian argument forwarded by Kymlicka in that national culture is a precondition for realisation of liberal autonomy- *there is no freedom without choice*.³²¹ She identifies the buckling weakness in Kymlicka's postulation stating that the "*assumption of cultural structure that needs protection is one which privileges autonomy as a moral value with reliance on nation-state paradigm*".³²² The issue here is that a national culture imposed without consent, tacit or otherwise, of the minority would not provide *them* with the relevant options.

We are starting to move into the realm of determining types of nationalism; whether they be cultural, ethnic or civic. The point to surmise from our previous discussion is that the nation-state forms the basis for the syncretism between nationality and citizenship- this is fundamentally problematic. It is not compelling enough to justify on the basis of the state being the *norm*, nor can we explain it on the reasoning that preservation of national culture encourages liberal autonomy. However, it is worth

³¹⁶ Habermas (n 311) 21

³¹⁷ Kostakopoulou (n 300) 48-49

³¹⁸ Shachar (n 295) 149

³¹⁹ Kostakopoulou (n 300) 49

³²⁰ Kostakopoulou (n 300) 50

³²¹ Coleman & Higgins (n 302) 69

³²² Kostakopoulou (n 300) 52

looking at why there is such prominence in the literature of nationalism as a means to preserve cultural distinctness. It is to this point we shall now turn toward.

Culture provides the relevant context for one or a collective to establish their identity. It encourages a sense of belonging. Herzl's conception used the state as an instrument to protect the specific Jewish culture.³²³ There is no suggestion from myself or any other of the scholars that culture does not matter as it certainly does both as an intrinsic and instrumental good. People take great pride in their culture and understandably so. However, the promotion of culture as a reason to mitigate inclusion in citizenship acquisition is problematic especially from a democratic perspective. There is a tendency, as Shachar rightly states, for national cultures to blanket the problems and disparities certain acquisition methods can yield (in this instance she is referring to the principles of *jus sanguinis* and *jus soli*).³²⁴ The exercise then becomes one of balancing priorities; in our conception, inclusion will take precedence as it is one of our bases. Indeed the nation-state paradigm necessitates cultural homogeneity³²⁵. This notion, of cultural supremacy falsifies what culture is, likening it to 'billiard balls, entirely separate, internally homogenous'³²⁶ and if we liken culture as a means to practice autonomy, then surely *all* cultures should be respected and promoted rather than a liberal conception which would ignore historical exigencies to a particular cultural community. There needs to be a shift from the '*container view of culture*'³²⁷ which provides the dominant narrative of rootedness of human beings in a homeland to a pluricultural one.

What if we were to adopt a '*thin*' sense of belonging so that rather than attributing nationalism to a common past, history and culture, or so-called '*thick*' conceptions³²⁸, we adhere to one which creates a sense of

³²³ Diedhoff (n 263) 84

³²⁴ Shachar (n 295) 149

³²⁵ Oommen (n 312) 135

³²⁶ Coleman & Higgins (n 302) 68

³²⁷ Kostakopoulou (n 300) 66

³²⁸ Kostakopoulou (n 300) 57

belonging to a polity. These thinning notions are the bastion of civic nationalists. Civic nationalism purports to alleviate nationalist discourse of any ethnic infusion espousing principles of tolerance, equality and freedom. It is a form where “*secular, rationalist and democratic norms are understood as following out of and expressing the unique and distinctive virtue of a particular national community.*”³²⁹ It aims to foster a ‘*civic-mindedness*’³³⁰ or a moral character which shares such values. It appears favourable as it is contingent on voluntarism and consent providing the individual with a choice to join or abstain from the polity. The *Jacobian definition* of community-nation in France consisted of all inhabitants who obeyed the law and performed various other duties thus capturing even non-ethnically French so long as they identified with the common interest and ideals.³³¹ Ascriptive forms of citizenship such as *jus sanguinis* are contrary to the ideals of civic nationalism (although in reality as with the U.S. and Canada as stalwart nations of civic nationalism, they still employ ascriptive modes of citizenship). On reflection, a definition of nationalism premised on civic nationalism seems ideal. It does not make membership contingent on arbitrary factors, such as ethnicity and the commitment to values of the polity seem to be positive intuitively. However, a few points need to be made.

Firstly, the ability, indeed the successful ability, to sever notions of civic nationalism from cultural layers is difficult. Kostakopoulou summarises it well when she says that “*civic nationalism is underpinned by and propagates a conception of culture as an atomised thing with mutually limiting boundaries.*”³³² Coleman is equally as condemnatory invoking that we are ‘born’ into our national identities. This powerful civic myth of national hood derived from *foundationalism* which stimulates the idea that nations spring into being from a founding moment, whereas the real history extends much further back, is liberal fantasy which presupposes a

³²⁹ Anna Yeatman, ‘*The Subject of democratic theory and the challenge of co-existence*’ in Andrew Vandenburg (eds) ‘*Citizenship and Democracy in a Global Era*’ (Macmillan Press, London 2000) 97

³³⁰ William Safran, ‘*Citizenship and Nationality in Democratic Systems: Approaches to defining and Acquiring Membership in the Political Community*’ (1997) *International Political Science Review*, 313

³³¹ Safran (n 330) 315

³³² Kostakopoulou (n 300) 82

neutral state that necessarily has a cultural dimension.³³³ In its best form, determining such shared polity values is arguably a form of de-ethnicized culture or a political culture; but one which excludes nonetheless. In its worst form, ethnic understandings of culture will inevitably seep into these values when defining them. Ultimately, it still carries with it the inclusion-exclusion quandary by only distributing membership following affirmation of those civic values.

Civic and Cultural forms of Nationalism thus have pitfalls which offend our desire to be inclusive. Both rest on an assumption that internal homogeneity is conducive to democratic functionality. Ethnic manifestations of nationalism have obvious obstructions as the previous pages have demonstrated. Le'om as captured by the Law of Return infuses ethnic forms of nationalism into citizenship acquisition. However, re-defining nationalism in civic or cultural forms is equally damaging to our bases of democratic inclusion and recognition. We must therefore abandon nationality of citizenship and thus the Law of Return as a mode of membership. This is a radical step given the constitutional weight placed upon this law and its esteem as an expression of the Zionist tenets. However, if we are to take democracy and equality seriously, we must eradicate such laws which compromise these virtues, regardless of whether they define the complexion of the state. This is a clear illustration once again of how democracy and equality cower in Israel's Zionist hegemony. Nationality, for us Zionism, provides a conceptually claustrophobic conception of citizenship. Conceptually, it stops us as we enter the door and provides little room for movement. Therefore, in order to explore other ideas, we need to take another entrance altogether. There is some alleged merit in these different shades of nationalism such as solidarity and trust to which we shall return to later.

Other forms of citizenship acquisition fall under either naturalization or the traditional principles of *jus soli* or *jus sanguinis*- these are the building

³³³ Coleman & Higgins (n 302) 67

blocks of automatic incorporation. Do these instruments of automatic incorporation undermine state prerogatives on membership or re-enforce them? More importantly, do they fully accord with our bases of democratic inclusion and recognition?

Naturalisation laws are seen as indications of a state's adherence to its national culture and tells us a great deal about the character of its democracy.³³⁴ These laws will often require residency varying in length with additional requirements which demonstrate a certain level of integration. It is seen as a *rite of passage*, a type of socialisation process³³⁵ to dilute the individual's former allegiances and align them with the dominant one. The process therefore is a cultural filter, weaning out the wheat from the chaff. When one is naturalised, they are recognised as having transferred their allegiances to the host community. Admission through this channel is often discretionary with reasons for refusals sometimes not made public. Certainly in Israel, its naturalisation laws do not differ from any other country but notably, the Ministry of Interior does exercises discretion over those accorded citizenship via this channel.

Requirements for naturalisation can vary from cosmetic and superficial to strict bordering on the absurd. Germany, prior to its amendment laws in 2000, exercised some of the toughest naturalisations laws in the world which required a full command of the language and self-sustenance without reliance on welfare. Typically, one must have also renounced ones previous citizenship. The integrationist streak in naturalisation laws is not surprising giving its feudal origins. In light of these, it can often be the harshest path of membership.

As we are introducing integrationist elements into membership, these run counter-intuitive to our *path of inclusion*. Integration offends our premise of recognition and imports exclusionary nationalist components into membership. There is certainly a nationalist vein running through

³³⁴ Bryan S. Turner, '*Citizenship Studies: A General Theory*' (1997) 1 *Citizenship Studies*1, 7

³³⁵ Kostakopoulou (n 300) 81

channels of naturalisation laws. That said, it is perhaps the right time to introduce various arguments supporting naturalisation laws and nationality as citizenship before recommending a position which is more in tune with our normative principles of inclusion and democracy.

In spite of the exclusionary externalities of citizenship modelled on these ideas, objections do exist supporting these positions. The task then naturally becomes which of these are more convincing. One quick reminder to restate; we in the context of this investigation, are dealing with an indigenous population not an immigrant one (I make no suggestion that the result would be any different but this is an important issue to raise).

The first objection is a disregard for the host community's concerns³³⁶ and distinct culture³³⁷- allegiance is paramount to ensuring a faithful and obedient polity and preserving one's cultural distinctness is a right stemming from its intrinsic value. The first part of the objection is faulty on two grounds. Firstly, it assumes homogeneity- a unanimous allegiance; secondly it assumes homogeneity equates to faithfulness and obedience. With Israel, naturalisation obliges the individual to take an oath and this is typical of many states. There is no empirical evidence to suggest that this oath will solidify one's allegiance. The reality is that there is a general obligation to obey the law and such oaths do not encourage or exacerbates one's lawfulness. A superficial declaration is just that and nothing more. It does not concretise the ties that bind or promote any more or less obedient behaviour. The second part of the objection is compelling but it does not provide a convincing argument for an integrationist-exclusionist form of membership. It also assumes that cultural survival can only exist through hegemonic narratives rather than ones in which several exist adjacent to one another.

³³⁶ Kostakopoulou (n 300) 89

³³⁷ Shachar (n 295) 147

Another objection, which ties into the former is the requirements of language and knowledge³³⁸ as an instrumental good. It assumes that with these one can flourish in society and appreciate the history, values and forms of life of the majority demographic. It will facilitate their belonging to the national culture and encourage more effective participation in the polity. There is certainly a functional advantage to this argument³³⁹ but this does not hinder one's ability to participate politically. Political participation is a universal language which people are able to appreciate and understand regardless of language barriers; language makes the process more convenient but it does not necessarily hinder our political judgement in any manner. Indeed, if there is a real commitment to equalise democratic participation, the onus should be on the state to provide such accommodation. Recalling once again the case of Israel, there is a legal obligation to translate public documents in Arabic as well as Hebrew but there is a lack of enforcement on this rule. In spite of this lethargy, Palestinian Arabs have been able 'do as much as they can with what little they have' in political and civil spheres. In addition, many Palestinians in Israel speak both Arabic and Hebrew; there is certainly a willingness to learn the language but often state institutions ignore the expense of doing so.

The final objection is that radical reform of naturalisation laws is pointless given the growing trend toward de-ethnicisation.³⁴⁰ If our example in Israel is anything to go by with the introduction of the Citizenship and Entry provision, this is contrary to popular belief. The commitment toward Zionist ideals has not weakened its resolve rather the opposite, with the emphasis being placed on demography and the increasing nationalist sentiment, ethnic stratifications have become emboldened and have prospered as the hegemonic narrative.

There is yet no convincing argument to adhere to a particular definition of nationality. More and more, we see citizenship and nationality as

³³⁸ Kostakopoulou (n 300) 92

³³⁹ Kostakopoulou (n 300) 94

³⁴⁰ Kostakopoulou (n 300) 97

theoretically antonymic. Citizenship and democracy complement and define one another but the introduction of nationality provides an uneasy fit. It erodes the democratic perspective “*if there is a divergence between formal citizenship and informal membership which results in long periods of residence and citizenship without suffrage...similarly, it is a deficit of democracy if majoritarianism becomes a vehicle for the domination of minority groups by a cultural majority and for hardening existing lines of privilege.*”³⁴¹ Is there a temporal argument in accepting nationality as membership? Surely the first culture, one that is indigenous to the territory is the one that should prevail? The complexity of responding to such a question is hopefully apparent and even if we were to muster a convincing answer, the prominence and strength of democratic inclusion and recognition are not easy to grind down.

If we accept that there is a growing trend toward plurality and increasing globalisation in states and their borders, particularly with Europe becoming more porous, naturalisation seems an archaic and wasteful institution. Kostakopoulou’s “*civic registration model*” provides a sound basis for a reworking of such laws in addition to igniting ideas about general citizenship acquisition.³⁴² These come under the same scrutiny of the objections we have just responded to but, having also been placed on a commitment to democratic inclusion, such objections dissolve quickly. The civic registration model is predicated on the fact that “*residence generates entitlements owing to participation of people in the web of social interactions*”; which we shall refer to as *de facto social membership*.³⁴³ This is a very exciting idea which abandons abstraction and faces reality. It combines the real life facts of social relations individuals make with other individuals and the *de jure* interactions of these people with social and civil spheres. The only requirements of such a form of naturalisation is a short number of years residency and no criminal convictions. This requirement is not exclusionary for the obvious fact that one has to be resident in the territory in order to establish claim

³⁴¹ Kostakopoulou (n 300) 87

³⁴² Kostakopoulou (n 300) 85-88

³⁴³ Kostakopoulou (n 300) 87

for citizenship. The short duration of residency allows for sufficient time to establish one's de facto social membership without creating the democratic deficit and exclusion.

These models are for more appealing to democrats and egalitarians than communitarian, liberal or libertarian modes of naturalisation.³⁴⁴ More importantly however, they are realistic and pluralistic. They acknowledge civic engagement of the minority population, using that as a channel to membership rather than nationalist discourse which is by definition exclusionary. It embodies real-life social relations and canonises this as a form of membership. In addition to the objections we levelled before, it illustrates the ineptitude of such criticism in highlighting its assumptive nature.

From this civic registration model, we can take the de facto social membership as a promising beginning to formulating a form of citizenship acquisition which is inclusive. However, before doing that, it becomes necessary to discuss and discern the principles of *jus soli* and *jus sanguinis*.

The former, right of the soil, has feudal origins relating back to allegiance to feudal lords affirmed by Lord Coke in the *Calvin Case*.³⁴⁵ The latter, the right of blood, emblematises state sovereignty re-enforcing the centrality of the nation-state paradigm. *Jus sanguinis* was often employed in *historic states* arising out of a pre-existing, pre-political community in contrast to *jus soli* which were used for settler states.³⁴⁶ Shachar makes an interesting point of being *trapped in the lottery of birth*³⁴⁷ in which such instruments of membership are based on morally arbitrary criteria of birth vindicating citizenship. The implications of this are far more than *“demarcating who maybe included in the polity...but like other property regimes, decision-making processes and opportunity enhancing*

³⁴⁴ for a comparison with different models of naturalisation see Dora Kostakopoulou, 'The Future Governance of Citizenship' (Cambridge University Press, Cambridge 2008) 87 fig 3.1

³⁴⁵ 7 Coke Report 1a, 77 ER 377

³⁴⁶ Safran (n 330) 314

³⁴⁷ Shachar (n 295) 4

institutions” it is consequential to citizenship. The problem this presents us with is over-inclusion of those who never step foot in the state (consider the Law of Return and the case of *Rotenburg v. Deputy Head of Manpower Division*³⁴⁸) and under-inclusion of those who reside there.³⁴⁹ I shall now focus on each of these principles in turn considering their merits and demerits.

Jus soli recognises the right of each person born in the physical jurisdiction of the state to acquire full and equal citizenship within that polity.³⁵⁰ There are certainly positives in the jus soli dictate in that immigrants who are recently settled, their progeny will be inducted into the polity. However, in our case, we are dealing with that which is already there; an indigenous population so this doesn’t necessarily carry the same level of benefit as it would with immigrant communities, although those living there would still fall under jus soli. It is a useful mechanism to reduce statelessness, something particularly apt in our case study and it seems relatively easy to satisfy. There is no requirement to integrate or abide by certain cultural norms. On the face, there is a benevolence to the jus soli principle in both its all encompassing nature and its relative ease.

Shachar’s normative criticisms of jus soli are worthy of note. These stem from the principles of autonomy³⁵¹ and the imposition of citizenship of the individual. It is true that jus soli considers only birth place and thus it impinges on the right of individuals to direct their own life. But it is considerably more flexible and could be a way of redefining nationality so as to capture the actual plurality of identities, attachments and loyalty already co-existing within a state.³⁵² Its ‘intolerance of intolerance’ so to speak, or in other words, its abstinence from cultural or any other nationalistic fusing is attractive. There is the concern, which relates to jus soli more than jus sanguinis, of over inclusion- those with ephemeral ties

³⁴⁸ (1959) 13 P.D. 469 see also chapter two at n230

³⁴⁹ Shachar (n 295) 112

³⁵⁰ Shachar (n 295) 114

³⁵¹ Shachar (n 295) 115

³⁵² Rubio-Marín (n 297) 111

would be granted citizenship. While citizenship granted to those with tenuous connections would keep up Malthusians at night, I would suggest a problem of over inclusion in jus soli is not a huge problem in reality (perhaps more a concern philosophically). Does it accord with our normative principles to afford citizenship to people with weak links? In my absolutist approach to democratic inclusion, I would not find a problem with this however, a sound refutation to my approach would be this; those with tenuous links would correctly have rights of democratic participation but would not necessarily endure the consequences of those decisions. Is it right therefore that those with superficial links to the polity decide what laws and policy should effect the more permanent of us? In the spirit of self-determination and one being the governor and being governed, perhaps jus soli and the anxiety of over inclusion is valid.

That said jus soli rarely exists in its pure undiluted form. In Israel, citizenship by residence massively hampers the ability of Palestinian refugees that were expelled in 1948 requiring applicants to have been in continuous residency from the states inception.

What is attractive about the principle of jus soli has already been stated. But the problems levelled at it are on an abstract normative basis and ground-level real terms basis. They impinge the notions of consent and autonomy and they may include those with few links to the polity subjecting those who do live permanently, to laws to which the former would not be subject to.

Jus Sanguinis is based on descent placing its origins in Roman Law. It was considered radical, linking each citizen to one another rather than to the land.³⁵³ There is nothing inherently ethnocultural and thus exclusionary about such a form of citizenship particularly if people from different backgrounds are eligible for this. However, historically, it has been tinged with ethnic overtones often as a means to perpetuate and

³⁵³ Shachar (n 295) 120

maintain a certain 'pedigree'. This should come as no surprise given the close relationship with the nation-state paradigm.

Israel's approach is indicative of a confluence of the two approaches with added conditions.³⁵⁴ These added conditions make it difficult to stand up against the mandatory requirements of democratic inclusion and recognition. However, Shachar has identified potential objections to eradicating such a form a membership. I shall go through these objections whilst presenting positions of my own.

The first relates to democratic self-government³⁵⁵ in that the laws of the polity ought to serve and reflect the interests of all those who regularly reside within its territory. Shachar rightly confirms that this assumes once again an immobile populace which is far removed from reality. However, if we are to take the principle of democratic self-government seriously, then we would actually abandon the principle of *jus soli* on the basis of over inclusion for the reasons discussed above. So in actual fact, the argument for democratic self-government is not an argument for *jus soli/sanguinis* but rather staunchly against it.

Coupled with this objection is that the demos should be able to define membership into it. Bauböck says that the question of membership must precede democratic deliberation.³⁵⁶ This is crucial in bridging the democratic deficit gap- those who are subject to the burdens but not the benefits. Indeed democratic legitimacy only derives itself from its citizens being able to share in the enterprise. This introduces the age old problem of the chicken and the egg. The circularity exists in that the demos are able to determine who enters it; but who in turn are the demos? Some process or criterion needs to exist independent of the demos to determine its membership but not in a way which undermines democratic self-government particularly with that which characterises it; membership. It would be like telling a footballer which feet he can and cannot use. The

³⁵⁴ Safran (n 330) 325

³⁵⁵ Shachar (n 295) 135

³⁵⁶ Rubio-Marín (n 297) 27

response to this needs to be subtle and nuanced and as of yet, few satisfactory answers have emerged. This ultimately pits democratic self-government against democratic inclusion. By curbing the latter, we create the democratic legitimacy gap depriving democracy of its potential, but the former forms the basis of sovereignty contained within the people. An examination of which holds more stature could help determine that which is more important of the two. However, that is not of immediate concern to us here. What is relevant is that a detailed and complex understanding of democratic self-government shows the redundancy of jus soli/sanguinis mechanisms.

The next position is that of administrative convenience³⁵⁷ in that *it provides a clear and reliable international filing system, according which people are automatically sorted into specific filing units*. This requires a simple case and policy analysis to see that many states have actually gone above and beyond fighting certain interpretations of these civil and common law rules thus quashing any suggestion that administrative convenience is a goal or aspiration. This is also demonstrated by the fact that very few states have these principles existing in their unaltered form. Many have in fact very bureaucratic manifestations of soli/sanguinis to indicate that administrative convenience is the last thing on their agenda. Finally, an argument of administrative convenience fails because *the stakes are too high*. We are not dealing with private pieces of legislation which will affect only a few (and even arguments of scope are not convincing) but that which determines entrance into the polity.

Another opinion is *arbitrariness as fairness*³⁵⁸ which posits that *by making the determination of political membership entirely independent of substantive considerations, we avoid the moral judgment about who deserves to be a citizen*. This appears to harbour an *anationalistic* approach which would suggest some inclusionary quality in this position. But soli/sanguinis are blind to gender/race/sex differences and this

³⁵⁷ Shachar (n 295) 140

³⁵⁸ Shachar (n 295) 146

offends our principles of recognition. It imposes a liberal entitlement without realising it fosters a homogeneity it is unaware of. We have observed how liberal theory has maintained a majority-minority demographic and its perpetuity of the Zionist domination in all public spheres. These types of membership do not eradicate this but in fact fuel it by failing to recognise cultural, social and economic inequalities. They assume, as we have said before, a 'sameness' and once again are deluded by the liberal dream of a neutral state. For example, the use of *jus sanguinis* in Germany is not arbitrary use of a civil law principle but rather used as a firm commitment to maintaining Germanic blood ties and, at the very least, a national culture through their stringent naturalisation laws.

Therefore we see that they are anything but arbitrary. In fact they are calculated and contrived, premised on *a pre-commitment...born out of specific political, contextual and historical events that follow particular membership attribution rules.*³⁵⁹ As we have discussed previously, these laws rarely exist in a puritanical form but with it, are attached other conditions which compromise their alleged arbitrariness. Their adoption is entirely political; indeed citizenship arises out of positive law rather than the state of nature.³⁶⁰

The *jus soli* and *sanguinis* positions fail on several accounts. For a moment, let us zoom in and focus back in on Israeli citizenship law. The four types of membership either accord nationality as a pre-requisite or they employ forms of *jus soli/sanguinis* approaches with very political decisions. I shall briefly recap on each of the provisions in light of our discussions thus far.

Citizenship acquisition by Return, introduces an open door policy bringing its metaphysical justification by Zionist interpretations of Jewish history and trusteeship. If one is Jewish, then it is entirely unrestrictive, a *carte*

³⁵⁹ Shachar (n 295) 147

³⁶⁰ Shachar (n 295) 147

blanche which allows even for Jews with tenuous links to the polity membership. Membership by return does not run into the problems with defining the demos as it is already pre-determined. However, strictly speaking this is not true as many forces have quarrelled over the interpretation of who is and who is not a Jew. But the obvious ethnic requirement is clearly damaging to our commitments to inclusion and recognition. Re-iterating what we have already said, membership by return can simply not exist if we are to be firm and resolute to inclusion and recognition. In the context of these battles, they are just simply unsustainable and present clearly how this *constitutional law* is at odds with democratic inclusion and recognition.

Citizenship by residence presents an opening for the *jus soli* paradigm. However, we have already levelled fatal criticism to *jus soli* generally and this law specifically in its ignorance of the expulsion of Palestinian Arabs during 1948. These have been relaxed since the case of *Mussa v. Ministry of Interior*³⁶¹ in which the Supreme Court recognised the sanctity of citizenship, stipulating it could not be denied because of procedural faults.

Thirdly we have citizenship by birth which employs the *jus sanguinis* approach. Being born of an Israeli citizen either within or without the territory affords one citizenship if their parent acquired it through either of the other four methods which thus limits it to one generation living abroad. This seems fair if they have few social ties to the territory but Israeli law allows for them to acquire citizenship through return provided they are Jewish.

Finally we have naturalisation as a form of membership. This method of acquisition is discretionary and needs certain requirements such as basic knowledge of Hebrew with an obligation to renounce previous citizenship. The latter requirement is a *reflection of a deeply entrenched ethnocultural*

³⁶¹ (1960) 16 P.D. 69

*conception of Israeli Citizenship.*³⁶² Naturalisation offends principles of inclusion and recognition creating a *rite of passage* which harmonises Zionist tenets.

Before we move onto the final task of trying to construct a coherent form of inclusive membership with a strong ethos of recognition, I shall make a few remarks about the reality of citizenship in Israel. The previous chapter of demography may appear anomalous in this study however, demographic supremacy allows Israel to provide limited citizenship to Palestinian Arabs. The *real* test for Israeli citizenship requires looking at the non-citizens in the occupied territories and the Diaspora community. Israel is responsible, at the very least to the people it occupies in the Westbank and the Gaza Strip under International Humanitarian Law, and at the very most the Palestinian Diaspora which it created. Their buildings of settlements, all which violate international law, increase their responsibility to non-citizens. If we are to take inclusion and recognition seriously, this would require that the minority in Israel are subsequently acknowledged as a national minority. Further, it inevitably brings in the question of non-citizens. This would ultimately reverse the demographic make up of the region and subject the institutions of democracy and citizenship under the banner of Zionism to intense scrutiny.

We are presented with a situation where Palestinian Arabs are able to acquire citizenship but there are impediments. Any impediment, regardless of how muted, must be removed. The onus is on the impediment to explain its presence; these have been quashed and the positions in our pretext of repairing democracy are hard to refute.

Social Membership as Citizenship Acquisition

A short restatement of our aims in formulating our conception of citizenship acquisition seems apt. Democracy and democratic values

³⁶² Shachar (n 295) 254

seem to have taken a battering from the hammer of Zionism. Whilst we appreciate that there is diversity in democratic theory, we do accept whole heartedly that there are common themes which define it as such. In order for democracy to thrive and flourish, there needs to be an expansive and ultimately inclusive demos. In other words we need to include as many people in the pursuit as possible for several reasons. Fundamentally, inclusion is a universally accepted condition of legitimacy in democratic politics; without it, there is a democratic deficit. Also, those who would typically be expected to abide by the rules but would be excluded from formulating them would not longer be used as mere means; therefore there is the aspect of dignity. In addition, this also invokes the Millian conception of the *Pursuit of Truth*. Indeed, “*inclusion allows for maximum expression of interests, opinions, and perspectives relevant to the problems or issues for which a public seeks solutions.*”³⁶³ More ideas inevitably increases the chances for a purer form of government. These tie in with the politics of recognition which we have skimmed over; indeed for such inclusion to exist, its concomitant relationship with recognition seems obvious. Segments of society which are excluded and have not realised their rights and are not able to determine the rules which both change or define the content of those rights cannot be said to have been recognised. Here, we must revisit the idea of *social membership* and discuss its merits and demerits.

These ideas are put forward by the likes of Kostakopoulou and Schachar with slight variations. To remind us once again, the premise of these formulae stems from citizenship as a *network good*³⁶⁴ flowing from active connections. Such conception of citizenship goes to the heart of our social interactions with one another and with civil society and uses this as the basis for inclusion into citizenship. This eradicates many of the problems with identity, exclusion, the issue of non-citizens in the Westbank, Gaza and Diasporic community. It emphasises equality and reduces exclusionary facets of Israeli ‘Jewish Democracy’. Interactions

³⁶³ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, Oxford 2000) 23

³⁶⁴ Kostakopoulou (n 300) 108

are necessary to our survival, indeed they are automatic in their nature likening them to our reflexes. I would suggest that mere living for a substantial period of time and social interactions with people and civil institutions are one and the same. This wonderfully solves the problem with individuals with tenuous ties- those who are born in a territory and acquire citizenship via jus soli principles and then move elsewhere would not, by virtue of having not concretised social relationships be able to acquire citizenship thus solving the issue of over-inclusion. Simply put, everyone has social interactions that harden and solidify over time; these are facts.³⁶⁵ It seems that something which everyone does composes ideal mechanisms for citizenship.

Ayelet Schachar postulates a *jus nexi* which is similarly based on citizenship through established social links which are incidental to living. She looks to the international jurisprudence in the case of *Liechtenstein v. Guatemala*³⁶⁶ more commonly known as the *Nottebohm* case. This concerned a German citizen who acquired citizenship through naturalisation in the state of Liechtenstein. He later emigrated to Guatemala who did not recognise his naturalisation and considered him an alien of the enemy state Germany. The courts said that citizenship *“must reflect a legal bond having as its basis the social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It maybe said to constitute the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connected with the populations of the state conferring [citizenship] than with any other state.”*³⁶⁷ Importantly the court seemed to abandon a merely legalistic approach instead giving more weight to factual status. Schachar employs a similar sentiment from the court in observing acts, conduct and surrounding circumstances drawing inspiration from property, contract and family law. As she puts it, her conception is based on *“granting secure membership status based on the social connectedness that has*

³⁶⁵ Rubio-Marín (n 297) 21

³⁶⁶ 1955 I.C.J. 4

³⁶⁷ Shachar (n 295) 166

already been established. Such an approach enables us to welcome into the political community those who have already become social members based on their actual participation in the everyday life and the economy of the jurisdiction, and through their interdependence with its legal and governance structure".³⁶⁸ There is an engagement with legal rules and social reality which embarks on a truer conception of living. It highlights the ineptitude of legal rules that detach themselves from social reality in the name of sovereignty. Rather than seeing them as *nominal heirs* we observe them as *resident stakeholders*.³⁶⁹ Such individuals or collectives establish their right by virtue of links fostered through residency and interaction with the polity. The longer one stays, the more deep rooted they become. In the case of *Collins v. Secretary of State for Work and Pensions*³⁷⁰ the facts were that the claimant, who had dual Irish and US nationality was denied Job Seeker's Allowance. The question lay on whether he was a worker under European law or a person from abroad. The court held that benefits must be reserved for those who have established, through their behaviour, a genuine link of involvement and interdependency that is distinct from mere ascriptive entitlement to citizenship.

The benefits with social membership seem to strike a strong chord with our commitment to democracy, recognition and inclusion. They harness a universal reality. But what are the variations of social membership and what are their normative values?

Social membership can presuppose, as stated earlier that as a result of residency for a substantial period of time, social links are established. The question of variation between types of social membership therefore lies in determining types of residency or domicile. Rubio-Marín highlights the definitional difference between *residency* and *domicile*³⁷¹; the latter 'imports a legal relationship between the individual and a country

³⁶⁸ Shachar (n 295) 169

³⁶⁹ Shachar (n 295) 171

³⁷⁰ [2006] EWCA Civ 376

³⁷¹ Rubio-Marín (n 297) 22

governed by a system of law' whereas the former is habitual, forming ties which can be both legal and illegal. Kostakopoulou elucidates her position basing it on domicile. She distinguishes this from residence and inhabitancy by infusing domicile with an element of permanency. Indeed the test is *qualitative rather than quantitative*.³⁷² This once again circumvents the problem of over-inclusiveness denying those with tenuous links to the state (that is common to jus soli principles). There is the charge of autonomy which Rubio-Marín levels to such a position but Kostakopoulou posits that such an egalitarian approach mitigates the dangers of *unprincipled consensual liberalism*. The approach becomes more refined distinguishing between domicile by birth, choice or association.³⁷³ Birth is certainly not in tune with free will particularly if one wants to renounce one's citizenship and is unable to do so. Thus domicile by choice which necessitates *factum et animus*³⁷⁴ imbues a free will on part of the individual. Domicile by association allows such membership if one's parental domicile is different from one's domicile of birth.

We therefore identify domicile as something particular and different from a mere physical presence. The idea is that domicile creates a sense of rootedness, but a rootedness disconnected from exclusionary identities. Rather the rootedness is anchored in social relations which are an inevitable by product of domicile. If we critically look at these models based on domicile, we confront ourselves with many of the same arguments levelled at other forms of acquisition. To recall, these may undermine notions of solidarity and trust within sections of society, and sever cultural links with those that may wish to live elsewhere but maintain their former states identity. This second point holds particular purchase in an increasingly globalised world. However, these ideas work on faulty presuppositions. Hegemonic narratives are often used because many believe they are the only method of cultural survivance. This totality ignores the idea that cultures can exist adjacent to one another as previously stated. Inquiries into anational citizenship often misleadingly

³⁷² Kostakopoulou (n 300) 113

³⁷³ Kostakopoulou (n 300) 119

³⁷⁴ Kostakopoulou (n 300) 121

entertain the idea of cultural dissolution. As for the second point, affirmation of ones ties to a former country need not be showcased through citizenship. There are other ways of demonstrating pride and this is certainly the case of peoples who are stateless.

The subtleties in Kostakopoulou's model and Schachar, in my opinion are difficult to conceptually cleave apart. The former asserts a model of domicile wherein the implication is that they become a stakeholder through the social associations they inevitably foster, conceiving citizenship as a network good. The latter states that it is residence *and* social interaction; indeed it therefore requires *actual, real and genuine connection to that polity*.³⁷⁵ The difference lay perhaps in the expression, Schachar does not explicitly convey that social interaction with the polity is an inevitable by product of residence which Kostakopoulou, and I agree with her, does. Schachar also suggests that it is different from pure domicile in that it does not force membership but merely creates eligibility or the presumption of inclusion.³⁷⁶ This strikes a harmony with the liberal principle of autonomy much like Kostakopoulou's domicile by choice. However, in my eyes, little distinguishes the two. Rubio-Marín introduces the aspect of permanence which I feel is implied in the other's position as a pre-requisite to forming social networks.

The model would naturally dissolve the Law of Return and the other three acquisition methods. Instead, our membership would be based on social membership. Whilst it is acknowledged that stratification within Israeli society exists, Palestinian Arabs still interact with civil and social institutions; they have political parties, community groups, they contribute to the economy, their labour is exploited and thus there is no doubt that they will have easily satisfied such requirements of social rootedness. However, as we have explicitly mentioned before, here we deal not with an immigrant community but an indigenous one. For those Palestinian Arabs living in Israel and their progeny, this modus operandi of social

³⁷⁵ Shachar (n 295) 183

³⁷⁶ Shachar (n 295) 179

membership is essentially an equalizing citizenship and if we recall Schachar's remarks about citizenship being a legal mechanism for regeneration, then efforts are welcomed to prevent the regeneration of inequalities which citizenship clearly fosters. We are presented with the dilemma of non-nationals in the Westbank, Gaza and Diaspora. Whilst not in the remit of this investigation, I shall briefly mention a few points.

Were non-nationals in these areas able to become citizens of Israel, the demographic and territorial countenance of the country would dramatically change. The Jewish population would no longer harness the demographic supremacy they continually require, and questions of sustainability in the Zionist program would begin to surface more frequently. The only options for the government to deal with these non-nationals so as not to upset such a delicate balance would either be not to grant them citizenship and maintain their occupation; or grant their citizenship within Israel and relegate the privileged Zionist jus cogens. It is to this we turn.

Social Membership under Zionism

It should come as no surprise that the two are incompatible. Social membership facilitates democratic inclusion moving from the type of oxymoronic 'exclusionary democracy' that is inextricably linked to Zionism. If we are to sincerely recognise the Palestinian Arabs as a minority and we are fully committed to democratic inclusion, there is little room for Zionism to exist as it exudes an ethnonationalistic discourse with exclusionary manifestations. Zionism, even in its more diluted forms as discussed in the first chapter, in which Ahad Ha'am discusses spiritual Zionism, still falls foul to the problems of cultural nationalism. No amount of reconfiguration, unless it is to abandon its fundamental values, is able to accommodate the social membership model. Because we have likened social membership to democracy, it does suggest that there are certain

democratic elements in the State of Israel. However, we have not denied this premise. Indeed we have discussed the variations of Israel's particularist democracy.

If we are to take democracy seriously, Zionism is simply just not sustainable. It therefore becomes a case of one or the other. Citizenship serves as a useful mechanism to highlight the problems with having Zionism exist as a *jus cogens* which disturbs the proper practice of the rule of law. Whereas Zionism aims to de-stratify relationships between Jews from the Diaspora community, whether they have originated from the Middle-East or from Eastern Europe, it does not propound a similar levelling with Arab inhabitants. The principles of *edot* and *mamlakhtiyut* are exclusively Jewish pursuits. Accepted, they do aim to encourage a sense of societal interaction and community but exclusively within Jewish circles. Palestinian Arabs are not factored into this. However, given these social agendas, Palestinian Arabs have been able to circumvent this exclusion, creating and forming social relations with others and civil organisations. Often these organisations may not have their concerns at heart and in some cases be contrary to their interests but they interact with them nonetheless. The courts illustrate one such example.

However, surely if non-Jews are able to make these social connections under Zionism, then such a formulation of citizenship acquisition must be possible. The response to this is that while we accept that such social connections can be made, this does not, in and of itself, prove compatibility. Such social membership is based on recognition and inclusion. For example, if a non-Jewish immigrant or a Palestinian Refugee were to enter the country with no ties to the indigenous population or the Jewish race, his only recourse would be the problematic route of naturalisation. Surely the issue therefore is with naturalisation and not Zionism? The Law of Return, which encapsulates the Zionist mantra offend the principles of recognition and inclusion. Therefore our answer is thus, whilst Zionism does not hamper the social membership

thesis, it does offend its derivatives of inclusion and recognition and for this reason, they are fundamentally incompatible.

Conclusion

Make no mistake; altering citizenship to make it more inclusive is not a replacement for restorative justice. It does not aim to amend past grievances and often citizenship, as we have alluded to, can perpetuate ongoing prejudices. However, citizenship has proved a useful tool to see the nature of the prejudices that are embedded within the legal structure; indeed *“it can thus be both an instrument for maintaining the status quo and an invitation to social and political change.”*³⁷⁷ Throughout this study, we have seen that the case of Israel is not as straight forward as the Herrenvolk democracies of Apartheid South Africa but are far more nuanced. Even with its citizenship laws, the case is not a straightforward exclusion of non-Jews. Instead, we have indirect forms of discrimination, cases in which social and economic rights are attributed to military service. More importantly, while the collective rights of the Jewish are rightly recognised, the same should be afforded to the Palestinian minority and other indigenous minorities (i.e. Bedouin, Druze, Circassians etc). This would require dispelling the cultural hegemonic narrative and accepting cultural differences. Iris Marion Young says that culturally excluded groups need *institutionalised means* for explicit recognition and representation and they have distinctive needs which can only be met through group differentiated rights.³⁷⁸ Whilst our focus lies primarily with membership rather than content, these points do need to be made as unimpeded citizenship acquisition would mean very little if the content still embedded prejudices.

Fundamentally, what this shows is that the more we move toward democracy on the spectrum, the further away from Zionism we are. There

³⁷⁷ Kostakopoulou (n 300) 1

³⁷⁸ Will Kymlicka & Wayne Norman, *Return of the Citizen: A survey of Recent Work on Citizenship Theory* (1994) 104 Ethics 2, 371

are problems that citizenship cannot solve however, it certainly can remedy many of them and the more steps we take in the right direction toward democracy, the more likely it is that Zionism will be nothing more than a small disappearing dot on the distancing horizon.

CONCLUSION

The introduction set out to steer away from the pitfalls of reductionism. Hopefully, through this extensive study, we have explored all the concepts and their many meanings. By appreciating the complexities of terms associated with Israel, we see its true character as a 'democracy.' From this, we can draw the following conclusions.

Israel does exhibit democratic-like structures such as universal suffrage. Thus we have Arabs in the Knesset and other high positions in public office. However, these democratic rights are limited. Political parties which call for the reconfiguration of the state and collective rights are banned. Thus support for such organisations, travelling to certain countries deemed in a 'state of war' with Israel, these are prohibited. Thus these democratic rights are merely tokenistic. They are rendered obsolete by *two phenomena*. One is the out right banning of such rights as described above. The second phenomenon is this; because democracy is merely procedural in Israel, i.e. you vote for Members of Knesset rather than on laws, and the country has a Jewish demographic majority, Arab voting rights are nothing more than a cross on a ballot paper. They have no means of determining the process of how laws are changed or indeed the content of these law because firstly, they do not have the same demographic clout as the Jewish population (due to the calculated engineering of the government) but secondly, there is the prevalence of one culture which suppresses the expression of any other in the public sphere.

Therefore, demography is a highly sophisticated tool for the reductionist. It is slight. The state can quite happily have universal suffrage whilst it works toward ensuring the demographic momentum of the Jewish population in Israel. Essentially it is a numbers games where voting power of the Arabs is mitigated by the consistently higher number of Jews. In addition, cultural prevalence while tying rights to military service of an

ethnonationalist state means that Arabs are severely discriminated against for not sharing in this common good which is defined as Jewish. Demography allows for democratic channels to exist, but the form of democracy in fact perpetuates the inequality toward Arabs.

One such law which is fundamental toward ensuring such demographic supremacy is the Law of Return. The Law of Return, alongside the Citizenship laws, highlight the inconsistencies with democratic inclusion. We observe therefore that if we are *seriously* committed to democratic inclusion and recognition, then the Law of Return, both the culmination of Zionism and its obsession with demographic power, is simply is not possible.

What my research has therefore contributed is this; it has identified the problems underlying the benevolent imagery of Israel and contributed a lasting solution. If the State of Israel is genuinely concerned about its Palestinian Arab minority, the hegemony of Zionism which exists, *must* cease. This means dismantling all laws and policies which ensure demographic supremacy or that ban real democratic universality and inclusion. In addition, it also means content of citizenship is not linked to Zionist republican civic virtues like conscription, and rather social and economic rights are granted by virtue of the *de facto social membership* model. This also requires the abolition of the cultural dominance of Zionism in the Israeli public sphere.

Above all however, something even more drastic needs to happen.

Israel *must* recognise it's Palestinian minority as a *national* minority; one that is indigenous. However, in order to do so, it needs to come face to face with its dark past and acknowledge its responsibility for the catastrophe it has created. Ilan Saban puts it perfectly by saying that the Palestinians, they owe nothing to State of Israel. Indeed, if anything, the State of Israel owes them.

Bibliography

Books

Bajoit, G. 'Zionism and Imperialism' in *Zionism and Racism* (Billing and Sons, Guilford 1977)

Baker, H. 'The Legal System of Israel' (Israel University Press, Jerusalem 1968)

Beller, S. 'Anti-Semitism: A Very Short Introduction' (Oxford University Press, Oxford 2007)

Bin-Nun, A. 'The Law of the State of Israel: An Introduction' (Rubin Mass Ltd, Jerusalem 1990)

Dubnow-Ehrlich, S. (trs Vowles , J) (eds Shandler, J), 'The Life and Work of S.M Dubnow: Diaspora Nationalism and Jewish History' (1st Edition Indiana University Press, Indiana 1991)

Dummett, A 'Citizenship and Nationality' (Runnymede Trust Publication, London 1976)

Edelman, M. 'Courts, Politics and Culture in Israel' (University Press of Virginia, Virginia 1994)

Feinberg, N. 'The Arab-Israeli Conflict in International Law' (Magnes Press-Hebrew University, Jerusalem 1971)

Gouldman, M.D 'Israel Nationality Law' (Institute for Legislative Research and Comparative Law, Alfa Press, Jerusalem 1979)

Gülalp, H. (eds) 'Citizenship and Ethnic Conflict – Challenging the Nation-State' (Routledge, London 2004)

Kattan,V. 'From coexistence to conquest: International Law and the Origins of the Arab-Israeli conflict, 1891-1949' (Pluto Press, Michigan 2009)

Kostakopoulou, D. 'The Future Governance of Citizenship' (Cambridge University Press, Cambridge 2008)

Kraines, O. 'The Impossible Dilemma: Who is a Jew in the State of Israel?' (Block Publishing Company, New York 1976)

Kretzmer,D. '*The Legal Status of the Arabs in Israel*' (Westview Press, Oxford 1990)

Lahav, P. *'Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century'* (University of California Press, California 1997)

Lustick, I. *'Arabs in the Jewish State: Israel's Control of a National Minority'* (University of Texas Press, Texas 1980)

Navot, S. *'Constitutional Law of Israel'* (Kluwer Law International, Alphen aan den Rijn 2007)

Oommen, T.K. *'Citizenship, Nationality and Ethnicity: Reconciling Competing Identities'* (Blackwell Publishers, Cambridge 1997)

Orr, A. *'The unJewish State: the politics of Jewish Identity in Israel'* (Ithacan Press, London 1983)

Poliakov, L (trs Kochan, M). *The History of Anti-Semitism: From Voltaire to Wagner* (University of Pennsylvania Press, Pennsylvania 2003)

Portugese, J. *'Fertility policy in Israel: The Politics of Religion, Gender and Nation'* (Greenwood Publishing Group, Westport 1998)

Qurah, N. *'The Arabs in Israel since 1948'* in *Zionism and Racism* (Billing and Sons, Guilford 1977)

Rackman, E. *'Israel's Emerging Constitution 1948-1951'* (Columbia Press, New York 1955)

Reinharz, J and Shapira, A (eds). *'Essential Papers on Zionism'* (New York University, New York Press 1996)

Rubio-Marín, R. *'Immigration as a democratic challenge: Citizenship and Inclusion in Germany and the United States'* (Cambridge, Cambridge University Press 2000)

Said, E. *'Intellectual Origins of Imperialism and Zionism'* in *Zionism and Racism* (Billing and Sons, Guilford 1977)

Sand, S *'The Invention of the Jewish People'*(1st Edition Verso, London 2009)

Schneer,J. *'The Balfour Declaration: The Origins of the Arab-Israeli Conflict'* (Bloomsbury Publishing Square, London 2010)

Shachar, A. *'The Birthright Lottery: Citizenship and Global Inequality'* (Harvard University Press, London 2009)

Shafir, G and Peled, Y. *'Being Israeli: The Dynamics of Multiple Citizenship'* (Cambridge University Press, Cambridge 2001)

Shetreet, S. 'Justice In Israel: A Study of the Israeli Judiciary'
(Martinus Nijhoff Publishers, Dordrecht 1994)

Siddiq Querishi, M. 'Zionism and Racism: a history of Zionist Colonialism and Imperialism' (Islamic Publications Ltd, Lahore 1981)

Siim, B & Squires J (eds). 'Contesting Citizenship' (Routledge, Oxford 2008)

Steenburgen, B.V. (eds) "The Condition of Citizenship" (Sage Publications, London 1994)

Stein, L. *Zionism* (Richard Clay & Sons Suffolk 1925)

Vandenburg. A (eds). 'Citizenship and Democracy in a Global Era'
(Macmillan Press, London 2000)

Vital, D. 'The Origins of Zionism' (Oxford University Press, Oxford, 1975)

Weiner, M and Teitelbaum, M. 'Political Demography, Demographic Engineering' (Berghahn Books, New York 2001)

White, B. 'Israeli Apartheid: A Beginners Guide' (Pluto Press, London 2009)

Yassin, S. 'Zionism as a Racist Ideology' in Abdul Wahhab Kayyali, *"Zionism, Imperialism, and Racism"* (Croon Helm, California 1979)

Young, I.M. 'Inclusion and Democracy' (Oxford University Press, Oxford 2000)

Yuval-Davis, N. 'Intersectionality, Citizenship and Contemporary politics of Belonging' in Birte Siim & Judith Squires (eds) *'Contesting Citizenship'* (Routledge, Oxford 2008)

Zamboni, M. *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer, Stockholm 2007)

*** Israel's Written Constitution: Verbatim English Translations of the Declaration of the Independence and of the Basic Laws, Consolidated and Updated as of January 10, 1999 (3rd Edition Aryeh Greenfield Publications, Haifa, 1999)**

Journals

Anson, J and Meir, A. 'Religiosity, Nationalism and Fertility in Israel' (1996) 12 European Journal of Population

Avruch, K.A. 'Traditionalizing Israeli Nationalism: The Development of Gush Emunim' (1979) 1 Political Psychology

Barak, A. 'A Constitutional Revolution: Israel's Basic Laws' (1992) 4 Constitutional Forum

Barzilai, G. 'Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics and the Israeli Arab-Palestinian Community' (2000) 34 Israeli Law Review

Bracha, B. 'The Protection of Human Rights in Israel' (1982)12 Israel Yearbook on Human Rights, Alpha Press, Jerusalem

Courbage, Y. 'Reshuffling the Demographic Cards in Israel/Palestine' (1999) 28 Journal of Palestine Studies

Dubnow, S 'Nationalism and History: essays on Old and New Judaism' (1958) Jewish Publication Society of America

Della Pergola, S. 'Fertility and Population Policies in Israel' (2006) Jewish People Policy Planning

Faitelson, Y. 'The Politics of Palestinian Demography' (2009) Middle East Quarterly

Fargues, P. 'Demography and Politics in the Arab World' (1993) 5 Population: An English Selection

Fargues, P. 'Protracted National Conflict and Fertility Chance: Palestinians and Israelis in the Twentieth Century' (2000) 23 Population and Development Review 3

Friedlander, D and Goldscheider, C. 'Peace and the Demographic Future of Israel' (1974) 18 Journal of Conflict Resolution 3

Galili, L. 'Jewish Demographic State' (2002) 32 Journal of Palestine Studies 1

Handleman, D. 'Contradictions between Citizenship and Nationality: Their consequences for ethnicity and inequality in Israel'(1994) 7 International Journal of Politics, Culture and Society 3

- Harris, R, Kedar, A, Lahav P and Likhovski, A (eds). **'Law and History Review'** (Asghate Publishing Company, Burlington 2002)
- Hausner, G. **'The Rights of Individuals in Court'** (1974) 9 Israeli Law Review
- Jamal, A. **'Nationalizing States and the Construction of 'Hollow Citizenship': Israel and its Palestinian Citizens'** (2007) 6 Ethnopolitics 4
- Kairys, D. **'Law and Politics'** (1983) 52 George Washington Law Review
- Katz, Y. **'Status and rights of the Arab Minority in nascent Jewish State'** (1997) 33 Middle Eastern Studies 3
- Kimmerling, B. **'Religion, Nationalism and Democracy in Israel'** (1999) 6 Constellations 3
- Klein, C **'Right of Return in Israeli Law'** (1997) 13 Tel Aviv University Studies Law Review 53
- Kretzmer, K. **'Democracy in the Jurisprudence of the Supreme Court of Israel'** (1996) 26 Israel Year Book of Human Rights, Martinus Nijhoff publishers, Dordrecht
- Kymlicka, W & Norman, W. **'Return of the Citizen: A survey of Recent Work on Citizenship Theory'** (1994) 104 Ethics 2
- Kymlicka, W & Straehle, C. **'Cosmopolitanism, Nation-States, and Minority Nationalism; A Critical Review of Recent Literature'**, (2002) 7 European Journal of Philosophy 1
- McCrone, D & Kiely, R. **'Nationalism and Citizenship'** (2004) Sociology
- Moaz, A. **'The Values of a Jewish and Democratic State'** (1996) 26 Israeli Yearbook on Human Rights, Martinus Nijhoff Publishers, Dordrecht
- O'Brien, H. **'Ideas of Religious Toleration at the Time of Joseph II. A Study of the Enlightenment among Catholics in Austria'** (1969) 59 American Philosophical Society 7, 1-80
- Page, S.W. **'Lenin and Self-Determination'** (1950) 28 The Slavonic and East European Review 71

Peled, Y. *'Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State'* (1992) 86 *The American Political Science Review* 2

Peled, Y. "The evolution of Israeli Citizenship: an overview" (2008) *Citizenship Studies* 12

Raday, F. *'On Equality- Judicial Profiles'* (2001) 35 *Israeli Law Review*

Saban, I. *'Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab Palestinian Minority in Israel'* (2004) 36 *International Law and Politics*

Safran, W. *'Citizenship and Nationality in Democratic Systems: Approaches to defining and Acquiring Membership in the Political Community'* (1997) *International Political Science Review*

Saposnik, A.B. *'The Uganda Affair'* (2008) *Becoming Hebrew*

Schiff, G. *'The Politics of Fertility Policy in Israel'* in Paul Ritterband *'Modern Jewish Fertility'* (Brill, Leiden 1982)

Shachar, A. *'Whose republic?: Citizenship and Membership in the Israeli Polity'* (1999) 13 *Georgetown Immigration Law Journal*

Shafir, G and Peled, Y. *'Citizenship and Stratification in an Ethnic Democracy'* (1998) 21 *Ethnic and Racial Studies* 3

Shapira, A. *'Legislative and Judicial Law-Making Concerning Educational Liberty and Equality: Some Israeli Constitutional Law Perspectives'* (1977) 9 *Israel Yearbook on Human Rights*, Intesdar Shamir Ltd, Tel Aviv

Smootha, S. *'Minority Status in an Ethnic Democracy: the state of the Arab Minority in Israel'* (1990) 13 *Ethical and Racial Studies* 3

Stendel, O. *'The Rights of the Arab Minority in Israel'* (1971) 11 *Israel Yearbook on Human Rights*

Susser, A. *'Partition and the Arab Palestinian Minority in Israel'* (2009) 14 *Israel Studies* 2

Teitelbaum. M. *'Political Demography'* (2005) 3 *Handbook of Population, Handbooks of Sociology and Social Research*

Turner, B.S. *'Citizenship Studies: A General Theory'* (1997) 1 *Citizenship Studies* 1

Young, I.M. *'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship'* (1989) 99 *Ethics*

Zureik, E. *'Demography and Transfer: Israel's road to nowhere'* (2003) 23 *Third World Quarterly*

Newspapers/Online Articles

Ha'am, A. *'A Truth from Eretz Yisrael'*
(<http://www.accessmylibrary.com/article-1G1-67583304/truth-eretz-israel.html>) (2000)

Ha'am, A. *'The Jewish State and Jewish Problem'*
(<http://www.jewishvirtuallibrary.org/jsource/Zionism/haam2.html>) (2000)

Jabara, A. *'Zionism: Racism or Liberation'* (http://www.al-moharer.net/falasteen_docs/abdeen_jabara.htm)

Jamal, A. *'On the Morality of Arab Collective Rights in Israel'* (2005)
12 Adalah's Newsletter

Koenig, Y. *'The Demographic Problem and the Manifestations of Arab Nationalism'* (1976)
(http://issuu.com/joeexample1/docs/koenig_report)

Khalidi, W. *'That Remains'* (Institute of Palestine Studies,
<http://www.palestine-studies.org/enakba/Books/All%20That%20Remains%20Intro.pdf>) (2000)
xxxi

Lis, J. *'Lawmakers seek to drop Arabic as one of Israel's official languages'* (Ha'Aretz <http://www.haaretz.com/print-edition/news/lawmakers-seek-to-drop-arabic-as-one-of-israel-s-official-languages-1.376829>) (2011)

Sheen, D. *'Can't we all just get along - separately?'*, *Ha'Aretz* (24 February 2011) <<http://www.haaretz.com/news/national/can-t-we-all-just-get-along-separately-1.345450>

International Treaties/Resolutions

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS 660, (ICERD) (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-V-2&chapter=4&lang=en)

United Nations General Assembly, Resolution 3379 (<http://www.un.org/documents/ga/res/30/ares30.htm>) (1975)

Dissertations/Theses

Schmidt, Y. 'Foundations of Civil and Political Rights in Israel and the Occupied Territories' (Doctoral Thesis, University of Vienna 2008)

Conference papers

Della Pergola, S. 'Demography in Israel/Palestine: Trends, Prospects, Policy Implications' (General Population Conference Salvador de Bahia, The A.Harman Institute of Contemporary Jewry, Jerusalem, August 2001)

Zimmerman, B, Seid, R. and Wise, M.L. 'Population Forecast for Israel and Westbank 2025' (Presentation at the 6th Herzliya Conference, Herzliya, January 2003)

Online Documents

Association for Civil Rights Israel, '**Summary of the Knesset Session- Summer 2011**' (2011) (<http://www.acri.org.il/en/?p=3100>)

Association for Civil Rights Israel, '**Knesset 2010 Winter Session: Expectations and Concerns,**' (2010) (<http://www.acri.org.il/en/?p=769>)

Adalah '**New Discriminatory Laws and Bills in Israel**' (2010) (http://www.adalah.org/upfiles/2011/New_Discriminatory_Laws.pdf)

Adalah, '**New Discriminatory Laws and Bills in Israel**' (2010) (<http://www.adalah.org/newsletter/eng/nov10/docs/ndl.doc>)

B'tselem- The Israeli Information Centre for Human Rights in the Occupied Territories. '**Defence (Emergency) Regulations**' (2007)

(http://www.btselem.org/english/Legal_Documents/Emergency_Regulations.asp.)

Yitzkahi, S. 'Israel in Figures' (Israel Central Bureau of Statistics, Jerusalem 2010) (http://www1.cbs.gov.il/publications/isr_in_n10e.pdf)