

# How the Law of Return Creates One Legal Order in Palestine

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*The prevailing discourse in Israeli academia on justifying the values of Israel as a “Jewish and democratic state” takes the form of a debate involving questions of group rights of a national minority, as in any liberal democracy. The framework of this discourse relies on three interconnected, hegemonic assertions. These assertions assume the applicability of equal individual rights, put aside the Occupation of the West Bank and Gaza as irrelevant for the “Jewishness” of the state as it belongs to a different rule of recognition, and conceptualize the Green Line based on majority-minority relations with Jewish group rights, including the Law of Return, as not leading to discrimination against individuals. I contend that these assertions are invalid and that colonialism is the relevant framework of Israel’s constitutional identity in Palestine (the Green Line, the West Bank including Jerusalem and Gaza). I argue there is one Constitution in Palestine based on one conception of sovereignty, regardless of any rules of recognition where the Law of Return, together with the value of “preserving a Jewish majority,” constitutes its very essence that targets the Palestinians as such. The Article presents a case-law study regarding family life between spouses and their children in Palestine. This case-law reveals*

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*an unfamiliar phenomenon. Unlike the plurality of written laws that characterize colonial regimes, the Israeli legal system introduces a unique model in which racial domination is created mostly by decisionism of the Court, out of the written laws and regardless of any rule of recognition.*

## INTRODUCTION

The prevailing discourse in Israeli academia on justifying the values of Israel as a “Jewish and democratic state” takes the form of a debate involving questions of group rights of a national minority, as in any liberal democracy.<sup>1</sup> The framework of this discourse relies on three interconnected hegemonic assertions. This Article questions the validity of these assertions through a case-law study regarding family life between spouses and their children in Palestine—within the Green Line, as well as in the West Bank (including Jerusalem) and Gaza. If these assertions are wrong, I contend, colonialism is the relevant framework of Israel’s constitutional identity in Palestine.

The first assertion on which the prevailing discourse is founded is that Israeli constitutional law ensures equality to all of the country’s individual citizens, Jews and Palestinians. According to this assertion, at least since the enactment of the two 1992 Basic Laws, which are considered to be a “constitutional revolution,” Israel has become a “constitutional democracy.”<sup>2</sup> The landmark *Ka’adan* case, for instance, illustrates a “new beginning” when then-Chief Justice Aharon Barak rejected the government’s position to continue with its policy of excluding Palestinian citizens from housing since 1948.<sup>3</sup> Justice Barak stressed that the values of the state as ‘Jewish and democratic’ ensure equality to every citizen, emphasizing that “it is always important to know not only from where we came, but also where we are heading.”<sup>4</sup> Indeed, the

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1 Kymlicka defines this type of liberal democracy as one in which a “basic commitment is to the freedom and equality of its individual citizens,” but not to the group rights of its national minorities. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 35 (1995).

2 See *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013). Most of the authors in the book are leading Israeli constitutional scholars and the book celebrates the Israeli constitutional revolution as one that ensures freedom and equality for all citizens in the “Jewish and democratic state,” as in any Western liberal democracy.

3 H CJ 6698/95 *Ka’adan v. Israel Land Administration* 54(1) PD 258 (2000) (Isr.).

4 *Id.* at ¶ 37.

academic writing on justifications for the “Jewish and democratic state” started to flourish widely after *Ka’adan*, focusing mostly on “where we are heading.”

The second assertion is that the Israeli occupation of the West Bank and Gaza is irrelevant to the discussion on justifications of the state’s “Jewishness.” This assertion relies on a strict distinction between two allegedly separate legal systems: one that applies Israeli constitutional law within the Green Line (including Jerusalem and the Golan Heights), and the other that applies international humanitarian law (IHL) to the Palestinians living in the West Bank and Gaza. Based on H.L.A. Hart’s concept, each legal system has only one rule of recognition, which provides different concepts of sovereignty.<sup>5</sup> The Israeli rule of recognition provides that legal acts within the Green Line (including Jerusalem and the Golan Heights) must comply with the Israeli Basic Laws.<sup>6</sup> The IHL rule of recognition provides that the military commander’s legal acts must comply, *inter alia*, with protecting the public order and public life of the population, and the Commander serves only as a trustee, as sovereignty is *not* transferred there.

This distinction is the main starting point of the discourse. As Justice Barak put it, just as U.S. constitutional rights have nothing to do with the U.S. occupation of Iraq, so the Israeli occupation has nothing to do with Israeli constitutional values.<sup>7</sup> Indeed, as the Articles in this volume indicate, the framework for justifying these values excludes the Israeli occupation. Israeli legal scholars, human rights lawyers including the Palestinians, and international lawyers all refer to the distinction between two separate rules of recognition as a fact, and there is no legal literature that challenges this assertion.<sup>8</sup>

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5 H. L. A. HART, *THE CONCEPT OF LAW* 100-23 (2012).

6 CA 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village 49(4) PD 221 (1995) (Isr.).

7 AHARON BARAK, *SHOFET BE’HEVRA DEMOCRATIT [A JUDGE IN A DEMOCRATIC SOCIETY]* 147-48 (2005) (Isr.).

8 For example, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* (2002), which discusses the applicability of IHL to the West Bank and Gaza as a separate legal system from that of Israel; *see also supra* note 2, which discusses Israeli constitutionalism without referring to the law that applies to the West Bank and Gaza. While the international community, including human rights lawyers, views East Jerusalem as occupied by Israel, it recognizes that the law that is applied to Palestinians in the West Bank and Gaza is different, and is not Israeli law. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. (July 9), which is also based on this distinction between two separate legal systems.

The third assertion is that Jewish group rights, which include the Law of Return and maintaining a Jewish demographic majority in Israel, do not lead to discrimination against Palestinian individuals. This assertion conceptualizes the entire debate on the “Jewish and democratic state” as one of majority-minority relations within the Green Line. According to this assertion, it is justified to preserve the Jewish majority and the dominance of Jewish cultural group rights, including the Law of Return, in order to protect the Jewish people’s right to self-determination.<sup>9</sup> Under this framing, the Law of Return is a matter of immigration that a democratic sovereign state is entitled to determine, and as noted in *Ka’adan*, “The Law of Return only concerns the right to enter ‘the gate of the home’ but once inside ‘the home,’ every citizen is equal before the law.”<sup>10</sup> Thus, this assertion is mainly about “*separate* (group rights including the Law of Return) *and equal* (individual rights).”

Indeed, most writings, including those of non-Zionists, perceive the majority-minority relationship as the starting point of the discussion. Allen Patten’s article in this volume is an example of this framing.<sup>11</sup> The discussion thereby moves to the question of group rights of the Palestinian minority, and the debate on the Law of Return moves to the question of the right of return of Palestinian refugees.

These three hegemonic assertions are interconnected. Without the first and second assertions, it would not be easy to conceptualize the Green Line based on a majority-minority relationship. Without the three assertions together, which consider the Palestinian people as three separate units—Palestinians subject to the Israeli rule of recognition, Palestinians under IHL, and Palestinian refugees as “outsiders”—Israeli sovereignty would be perceived as dominating the Palestinian people in Palestine. Only by assuming the applicability of equal individual rights, putting aside the relevance of the Occupation, and conceptualizing Jewish group rights as not leading to discrimination against individuals, can one reach the framework of a liberal democracy.

I contend that these three assertions are invalid. I argue there is one Constitution in Palestine that applies to the fundamental rights of both

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9 Na’ama Carmi, *Immigration Policy: Between Demographic Considerations and Preservation of Culture*, 2(1) L. & ETHICS HUM. RTS. (2008); Ruth Gavison, *The Jews’ Right to Statehood: A Defense*, 15 AZURE 70 (2003); CHAIM GANS, A JUST ZIONISM: ON THE MORALITY OF THE JEWISH STATE 111-42 (2008).

10 H CJ 6698/95 *Ka’adan v. Israel Land Administration* 54(1) PD 258 (2000) (Isr.) at ¶ 31.

11 Allen Patten, *The Idea of Israel as a Jewish State*, 21 THEORETICAL INQUIRIES L. 531 (2020)

populations.<sup>12</sup> This Constitution relies on one conception of sovereignty regardless of any rules of recognition. The Law of Return, together with the value of “preserving a Jewish majority,” constitutes the very essence of this Constitution that targets the Palestinians as such. As I will show, due to this Constitution, the Israeli Supreme Court has denied their family rights as a legal right on both sides of the Green Line since 1948. I argue that this Constitution is a colonial one.

Before moving on to the case-law, I will identify the fundamental principles that make a Constitution a colonial one. I am not interested in historical processes of who came first, whether it be Palestinians or Zionists, or who are the natives or the immigrants/settlers. Nor am I interested in any sociological, ideological or anthropological relationship such as colonizers-colonized. I am interested in state structure: the Constitution. My starting point is that the fundamental principles of a colonial Constitution must be derived from the fundamental features of the historical formation of the European colonial regimes.<sup>13</sup> Thus, the domination of groups who live under the jurisdiction of the Constitution is the constitutive feature, and race is its leading principle.<sup>14</sup>

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- 12 By Constitution, I mean written or unwritten fundamental principles that precede constitutional law, legislation, or court judgments, as it constitutes the political identity of the state. See CARL SCHMITT, *CONSTITUTIONAL THEORY* 59-66 (2008); YANIV ROZNAI, *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS* (2017).
- 13 On features of a colonial constitution that derives from historical formation see Yash Ghai and Jill Cottrell, *A Tale of Three Constitutions: Ethnicity and Politics in Fiji*, 5(4) I.CON 639 (2007). Mamdani sees that while colonialism is a European historical formation, “its structure everywhere came to share fundamental features,” and thus revealing these common features allows us to conceptualize the colonial state. See MAHMOUD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 16-18 (1996). Similarly, Comaroff asked the question of what makes a state a colonial state. See John L. Comaroff, *Reflections on the Colonial State in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions*, 4 SOC. IDENTITIES 321, 321-61 (1998). See also Leland de la Durantaye, *The Paradigm of Colonialism*, in AGAMBEN AND COLONIALISM 229, 229-38 (Marcelo Svirsky & Simone Bignall eds., 2012), which refers to the ancient Greek *polis* as the paradigm. Kohn and Reddy refer to the main common features of European colonial history in order to conceptualize colonialism, see, Margaret Kohn & Kavita Reddy, *Colonialism*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2017).
- 14 For Arendt, colonialism had two leading principles: “One was race as a principle of the body politics, and the other bureaucracy as a principle of foreign domination.” HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 185 (1951). For Chatterjee, what distinguishes the colonial state from other forms is the “rule of difference”

The plurality of laws and legal systems that define different statuses of the groups are a fundamental principle.<sup>15</sup> As the dominant group must control the security apparatus to sustain the racial domination, the constitutional scope of national security must further carry a racial-demographic meaning.<sup>16</sup> Citizenship, based on inclusion-exclusion and the duality of citizen-subjects, constitutes ‘We the People’ of this Constitution.<sup>17</sup>

From ancient Athens and the writing of Aristotle, Bodin, Hobbes and Rousseau to modern theories, citizenship (including the duality of citizen-subject) is considered the basic unit of understanding the conception of sovereignty of any polity.<sup>18</sup> Family life, as the generic form of citizenship, is my basic unit of analysis in this Article.

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and “marking this difference was race”: PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* 14, 19 (1993). For Kohn and Reddy, “Colonialism is a practice of domination, which involves the subjugation of one people to another.” *Supra* note 13, at 1.

- 15 See Sally Engle Merry, *Law and Colonialism*, 25(4) L. & SOC’Y REV. 869, 889-922 (1991). This article reviews nine books, which refer to this feature of plurality of legal systems and racial laws under colonial regimes.
- 16 About racial biopolitics and security under the colony, see Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11-40 (2003). About the scope of emergency, which carries racial meaning under the colonial state, see NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND RULE OF LAW* (2003). About security and demography before the U.S. Supreme Court, including cases on deportation and immigration during the 19<sup>th</sup> century, see Sumi Cho & Gil Gott, *The Racial Sovereign*, in *SOVEREIGNTY, EMERGENCY, LEGALITY* 182, 182-227 (Austin Sarat ed., 2010).
- 17 See generally FREDERICK COOPER, *CITIZENSHIP, INEQUALITY AND DIFFERENCE: HISTORICAL PERSPECTIVE* (2018). For Dyzenhaus, the main characteristic of a regime that belongs to the family of Apartheid regimes is that its legal order creates a second class of citizenship. See David Dyzenhaus, *Dugardian Legal Theory*, in *THE PURSUIT OF A BRAVE NEW WORLD IN INTERNATIONAL LAW* 3 (Tiyanjana Maluma, Max du Plessis & Dire Tladi eds., 2017). Mamdani and Comaroff also identified citizen-subject as the leading principle that identifies the colonial-state. De la Durantaye explains that the *polis* is the paradigm of colonialism at Agamben due to its conception of citizenship that is based on citizen-subject. The case of *Dred Scott v. Sandford*, 60 U.S. 393 (1857) is the paradigmatic American case, in which the Court decided that blacks do not belong to “We the People” and thereby justified slavery. For the political moments of each period in American history that shape ‘We the People’ were determined based on the status of citizenship. See 1 BRUCE ACKERMAN, *WE THE PEOPLE, FOUNDATION* (1991).
- 18 See the references in Kim Rubenstein, *Globalization and Citizenship and Nationality*, in 159 *JURISPRUDENCE INTERCONNECTED GLOBE* 3-4 (Catherine Dauvergne

This Article reveals a unique and unfamiliar phenomenon. Unlike the plurality of written laws that constitute the colonial Constitution, this case-law shows that court decisions create racial domination regardless of written laws through deciding on the exception. Indeed, while the debate between the jurisprudential schools is about how the court reaches the law, none of these schools recognizes the court's ability to decide a valid decision without telling us what the law is, meaning, to determine a type of behavior or to give guidance to be followed in future cases. Even Carl Schmitt, an anti-positivist who asserted that "the sovereign is he who decides on the exception," did not advocate this political role of the Court.<sup>19</sup> Still the characterization of Schmitt's *decision* is helpful. For him, it suspends the entire legal order, derives itself from nowhere and creates no normativity.<sup>20</sup> Following this, I define the scope of deciding on the exception by the court as follows: a valid court decision that suspends the law in a particular case, and derives itself from no law and creates no future legal obligation.<sup>21</sup> In this case-law, when the Israeli Supreme Court accepts a Palestinian family unification request, its *decision* is more like the granting of a gift, similar to a monarch's decision to grant a pardon, which does not create any legal obligation to be followed in other cases.<sup>22</sup>

This Article proceeds in three parts. Part I discusses the case-law of the Israeli Supreme Court concerning family unification within the Green Line, Jerusalem, the West Bank, and Gaza. Here I show that the court has denied the legal rights for Palestinian family life since 1948, and has applied one conception of sovereignty, regardless of any rules of recognition. It also examines the three interconnected hegemonic assertions in light of this case-law. Part II posits a substitute framework of Israel's constitutional identity: colonialism. Here I explain that there is one Constitution in Palestine, which dominates the fundamental family life of the Palestinians regardless of their geography. Part III sets forth the conclusion.

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ed., 2003), <https://ssrn.com/abstract=530382>.

19 For Schmitt, the judge is "bound to statute" and "normatively determined." See SCHMITT, *supra* note 12 at 299.

20 CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 18-37 (1985).

21 For Agamben, "the exception is a kind of exclusion. What is excluded from the general rule is an individual case," and "The rule applies to the exception in no longer applying, in withdrawing from it." GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 17-18, 23 (1998).

22 As Paul Kahn put it, the sovereign power's decision on the exception in such cases is like granting a gift, and it is "outside the law but not illegal," and the principle of "treat[ing] like cases alike" is irrelevant. PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 34 (2011).

## I. FAMILY UNIFICATION

### A. The Adalah Case

The legal academia, human rights lawyers and the media were all surprised on 14 May 2006 when the Supreme Court announced its six-to-five decision to uphold the constitutionality of the law banning Palestinian family unification in Israel and Jerusalem (hereinafter: the *Adalah* case).<sup>23</sup> No other case in recent memory gained such local and international notoriety, or drew such strong criticism by the Israeli academia.<sup>24</sup> The 2003 law bans family unification of Israeli citizens and permanent residents (Jerusalem) with their Palestinian spouses from the West Bank and Gaza (hereinafter: the 2003 ban).<sup>25</sup> The

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23 HCJ 7052/03 Adalah et al. v. Minister of Interior et al. 61(1) PD 443 (2006) (Isr.). For the English translation of the decision, see, [https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\03\520\070\447&fileName=03070520\\_a47.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\03\520\070\447&fileName=03070520_a47.txt&type=4).

For transparency, I was the lead lawyer in this case.

24 See e.g., Daphna Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6(1) INT'L J. CONST. L. 184 (2008); Liav Orgad, *Love and War: Family Migration in Time of National Emergency*, 22 GEO. IMMIGR. L.J. 85 (2008); Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8(2) THEOR. INQ. L. 603 (2007); Barak Medina & Ilan Saban, *Zhuyot Adam VeNetilat Sicunim Al Democratia, 'TiYug Etny VeMivhaney Piskat Ha'Hagbala (Belkvot Psak Din Hok HaEzrahut VeHacnisa LeIsrael)* [*Human Rights and Risk-Taking: On Democracy, Ethnic-Profilng and the Limitation Clause (Following the Decision on the Validity of the Citizenship and Entry into Israel Law)*] 39 MISHPATIM 47 (2009) (Hebrew); Aeyal M. Gross, *Me'ohav Le'oyev: Zedek, Yosher Ve'sechel Yashar Ben Israel Le'otopia Be'bagatz Hok Ha'ezrahut* [*In Love with the Enemy: Justice, Truth, Integrity and Common Sense Between Israel and Utopia in the Citizenship Law Case*] 23 HAMISHPAT 79 (2007); Yaacov Ben-Shemesh, *Zhuyot Hukatiyot, Hagira VeDemographia, Belkvot Bagatz Hok HaEzrahut VeHacnisa LeIsrael*, [*Constitutional Rights, Immigration and Demography (Following the Citizenship and Entry into Israel Law)*], 10 MISHPAT UMIMSHAL 47 (2007) (Hebrew) : Guy Davidov, Amnon Reichman, Ilan Saban, & Jonathan Yovel, *Medina O Mishpaha? Hok HaEzrahut VeHacnisa LeIsrael (Hora'At Sha'A) 2003* [*State or Family? The Citizenship and Entry to Israel Act (Temporary Order) 2003*], 8 LAW & GOV'T 643 (2005) (Hebrew).

25 The Citizenship and Entry into Israel Law (Temporary Provision), 5753-2003 1901 SH 544.



Court delivered the *Adalah* case after *Ka'adan*,<sup>26</sup> which as mentioned above, emphasized ensuring equal rights for all individual citizens.

Relying on the “enemy alien” doctrine, the state claimed that the purpose of the 2003 ban was to protect national security. It asserted that Palestinians living in the West Bank and Gaza are enemy aliens, and as such, they are not allowed to enter Israel. The petitioners argued that the ban discriminates against Palestinian citizens; that its purpose is racist, based on demographical considerations to preserve the Jewish majority; and that it is not proportionate.

Most of the justices accepted that the law’s purpose is security and not demography.<sup>27</sup> Justice Cheshin wrote the leading majority opinion. He reasoned that the law’s enactment is not a matter of citizens’ rights, but belongs to the realm of state sovereignty, which allows every state to decide its immigration policy and

demands that each citizen is not given a free hand, on the level of a constitutional right, to change the social *status quo ante* by bringing foreigners to Israel, even as spouses. The “state” is the authorized spokesperson . . . a state would not be prepared to open up its borders entrusting to every citizen the key that opens the gates of the state, even for the immigration of a spouse or parent into the state. . . . it is the state that will decide who will be entitled to immigrate into it.<sup>28</sup>

Justice Cheshin accepted the state claims regarding the applicability of the “enemy alien” doctrine and further ruled that the law does not prohibit the marriage of citizens, as they “can exercise their right for marriage and establishing family in another place,”<sup>29</sup> but not in Israel.

Chief Justice Barak wrote the leading minority opinion. He rejected the majority’s contention that exercising family life is a matter of immigration, as citizens must be entitled to exercise their constitutional rights in Israel. He explained that the law leads to discrimination against Arab citizens, as its consequences limit their ability to exercise their right to family life.<sup>30</sup> For him, while the 2003 ban is justified for security reasons, it fails to pass the proportionality test. Justice Barak rejected the petitioners’ claim regarding the “means” of the proportionality test, as for him, the examination of individual

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26 H CJ 6698/95 *Ka'adan v. Israel Land Administration* 54(1) PD 258 (2000) (Isr.).

27 Only Justices Jubran and Procaccia raised serious doubt as to whether real security reasons and not demography stood behind the enactment of the law.

28 *Id.* at ¶¶ 54-55 of Justice Cheshin’s ruling.

29 *Id.* at ¶ 121 of Justice Cheshin’s ruling.

30 *Id.* at ¶ 46 of Chief Justice Barak’s ruling.

cases based on written criteria does not ensure national security.<sup>31</sup> However, he struck down the 2003 ban, based on a cost-benefit analysis of the proportionality test: the additional value of national security does not justify discrimination against thousands of Israeli spouses.

While both the majority and minority opinions refer to the West Bank and Gaza as a foreign entity (the second assertion), for Justice Barak, Palestinian citizens are equal (the first assertion) and immigration policy should not discriminate against them as “insiders” (the third assertion). Most of the academic writings criticized the majority opinion as deviating from the legal heritage, and supported Justice Barak’s minority opinion.<sup>32</sup>

I contend that the academics’ analysis missed the main points of both the majority and the minority opinions. First, the problem with Justice Cheshin’s opinion is not that it fails to apply the proportionality test, but rather its conception of sovereignty suspends the entire applicability of the constitutional law. For him, since immigration policy falls under the absolute discretion of state sovereignty, there is no right for insiders to bring their foreign spouses, as the key to the gate is not a matter of the 1992 Basic Laws. Second, regarding Justice Barak’s opinion, I argue that the academics’ writings missed the full scope of his opinion. The question that his opinion raises is what the solution is if there are no means to satisfy the security interest. Justice Barak’s answer is that at least “then there is a need for a mechanism that allows exceptional cases such as humanitarian exceptions,”<sup>33</sup> and it is the legislators’ duty to regulate a mechanism “for exceptions that provide answers for exceptional and justified circumstances”<sup>34</sup> and to examine them on a case-by-case basis. He suggested that the legislator could choose the Supreme Court’s rulings that apply to West Bank and Gaza as a solution:

Why is it not possible to allow a permit to enter Israel in individual cases where there are humanitarian reasons of great weight? In this context, the remarks of President M. Shamgar concerning the reunification of families between foreigners from outside the territories and spouses in

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31 As Justice Barak puts it: “our conclusion, therefore, that under these circumstances, individual examination on a case-by-case basis does not fulfill the purpose of the legislation to the same extent as the sweeping prohibition.” *See Id.* at ¶ 89 of Justice Barak’s ruling.

32 *See e.g.*, Daphna Barak-Erez, *supra* note 24; Barak Medina & Ilan Saban, *supra* note 24; Liav Orgad, *supra* note 24; Yoav Peled, *supra* note 24; Aeyal M. Gross, *supra* note 24; Yaacov Ben-Shemesh, *supra* note 24; Guy Davidov, Amnon Reichman, Ilan Saban, & Jonathan Yovel, *supra* note 24.

33 Adalah, *supra* note 23, at ¶ 72 of Justice Barak’s ruling.

34 *Id.*

the territories should be cited. The President wrote: “The respondent’s aforesaid policy and mode of operation includes the weighing of each and every case in accordance with its circumstances, and each case will also be reconsidered if there are unusual humanitarian circumstances.”<sup>35</sup>

This opinion invites questions regarding the three assertions noted in the Introduction. First, how is the solution regarding the West Bank and Gaza, which is determined based on a different rule of recognition (the second assertion), relevant to the legal system of Israel? Second, since Palestinian citizens of Israel should enjoy equal constitutional rights (first assertion), how does the “humanitarian case” fit constitutionalism, as there is no “humanitarian right” and no legal definition of this category? Third, how does the examination on a case-by-case basis ensure equal rights?

In order to understand the scope of this decision, we must examine the West Bank and Gaza cases. I do so in the next section.

## **B. Family Life in the West Bank-Gaza**

When the Israeli army entered the West Bank and Gaza as an occupying power in June 1967, the military commander declared that these areas were under his control and that the local laws (Jordanian law) would continue to be valid, as long as they did not contradict his new authority.<sup>36</sup> Following this, the Israeli Supreme Court referred to this declaration as a social fact and decided that Article 43 of the 1907 Hague Regulations is “the Basic Norm” or the “constitutional framework” as the IHL rule of recognition, which aims to maintain public order, the public life of the population, the status quo, and the local law, as much as possible.<sup>37</sup> Accordingly, the commander should consider only the interests of the local population and the security of the area in its strict meaning.<sup>38</sup> As Justice Barak emphasized, the military commander is not allowed to consider the diplomatic, political, social, economic or even the general security interests of his state.<sup>39</sup> Indeed, these rulings and norms show that the IHL rule of recognition is different from the Israeli rule of

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35 *Id.* at ¶ 95 of Justice Barak’s ruling.

36 The Proclamation on The Arrangements of Law and Authority (West Bank Region) (No. 2) (1967).

37 H CJ 302/72 Abu Hilu v. The Government of Israel 27(2) PD 169, 180 (1973) (Isr.); H CJ 390/79 Dweekat v. The Government of Israel 34(1) PD 1, 13 (1979) (Isr.).

38 KRETZMER, *supra* note 8, at 25-26.

39 H CJ 393/82 Jam’ayat Iskan v. Commander of IDF Forces in the Judea and Samaria Region et al. 37(4) PD 785, 794-95 (1983) (Isr.).

recognition, as the second assertion of the Israeli discourse puts it, and it lays out a different concept of sovereignty.<sup>40</sup>

Despite these differences, the Court decided otherwise in family life cases. Already in 1972, the Court rejected the applicability of Article 43 in Palestinian family life cases by ruling that the local Jordanian law is not relevant; like *Adalah*, which made the linkage between immigration policy and the rights of the insiders, the Court decided here that the entrance to this area is a decision of the Israeli army.<sup>41</sup> While the “family right” is ensured directly through specific IHL regulations,<sup>42</sup> the Court ruled that these regulations do not include explicit reference to the entry of “foreigners” to the region.<sup>43</sup>

As Justice Cheshin ruled in *Adalah* that the “key to the gate” belongs to the absolute discretion of the state and is not a matter of insiders’ rights, Justice Shamgar, in 1986, stated:

The State of Israel is not willing to accept a situation in which any resident of the region who so wishes can marry a woman from outside and bring her here, or any [female] resident of the region, or her family, can decide that she will marry someone living abroad and bring him to the region. The decision about who will enter and who will settle in one of the regions (Judea and Samaria, or the Gaza Strip) is a matter

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40 See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 5-6 (1993). As Prof. Benvenisti explained,

The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty... Thus the occupant’s status is conceived to be that of a trustee.

41 HCJ 500/72 Miryam Abu Al-Tin v. Minister of Defense 27(1) PD 481 (1970) (Isr.).

42 According to the Hague Regulations, “Family honour and rights [...] must be respected [...]” Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, art. 46, Oct. 18, 1907, 36 Stat. 2277; according to the Fourth Geneva Convention,

Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity

Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, art. 27, Aug. 12, 1949, 75 U.N.T.S. 287.

43 HCJ 13/86 Shahin v. Commander of the Judea and Samaria Region 41(4) PD 197, 208 (1987) (Isr.).

for the government's decision, and no resident is entitled to impose his private decision on the government in this matter.<sup>44</sup>

Further, just as the majority in *Adalah* reasoned that the solution is that the families voluntarily leave, since the 2003 ban does not prohibit them from living outside of Israel, the same Court applied the same logic two decades earlier in a Gaza case:

It should be emphasized that the refusal to grant entry to a husband or wife from outside of the region does not mean that the couple is forced to live apart, because there is nothing to prevent the spouse from leaving for the purpose of family unification outside of the region. If the unity of the family is indeed the supreme consideration of those seeking family unification, then this consideration can be duly satisfied in this way.<sup>45</sup>

Based on this conception, the Court accepted that demographical policy is legitimate. As Justice Shamgar put it, "The policy is to minimize as much as possible the granting of family unification, awarding it only in cases in which there are extremely exceptional circumstances."<sup>46</sup> In another case, the military commander explained that setting criteria for family unification cases would compel the acceptance of other cases, and Justice Barak ruled: "it is true, putting and exercising criteria for family unification is actually a sensitive matter that refers to the State's security and its foreign relations."<sup>47</sup>

What is the scope of the minority's opinion in *Adalah* regarding "humanitarian exceptions"? In 1976, the Court already ruled that "family unification . . . is a special act of benevolence of the Israeli authorities, anchored in humanitarian considerations," and that it would be granted only "in rare and very exceptional cases"<sup>48</sup> in which "extraordinary and special humanitarian considerations exist,"<sup>49</sup> This means that the idea of "exceptional humanitarian cases" is in itself a sweeping policy.<sup>50</sup>

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44 H CJ 673/86 Al-Saudi v. Head of the Civil Administration in the Gaza Strip 41(3) PD 138, 140 (1987) (Isr.).

45 *Id.*

46 H CJ 106/86, Al-Saufiri v. Head of the Civil Administration (Dec. 31, 1986) Nevo Legal Database (by subscription, in Hebrew (Isr.).

47 H CJ 802/79 Samara v. Commander of the Judea and Samaria Region 34(4) PD 1, ¶ 3 (1980) (Isr.).

48 H CJ 489/76 Ta'yeh v. Minister of Defense (unpublished) (Isr.).

49 H CJ 209/86 Al-Atrash v. Head of the Civil Administration (Dec. 12, 1986) Nevo Legal Database (by subscription, in Hebrew (Isr.); *See also* Shahin, *supra* note 43.

50 For example, when the military commander declared that his policy is not to check applications when "the foreign spouse" lives in the territory and not "abroad,"

The “humanitarian case” is not a legal right; it is like a gesture that follows no norm and creates no norm. As Jacques Derrida noted, this sort of deciding on the exception illustrates the “particular in its particular situation.”<sup>51</sup> Thus, the understanding that similar cases should be treated alike is irrelevant, and as Justice Shamgar provided, it is an “exceptional personal gesture, when implemented at a particular time, [it] does not become a standard according to which the authorities must continue to act in every case.”<sup>52</sup>

The 1979 *Samara* case is the only case accepted by the Court since the 1967 occupation.<sup>53</sup> This case concerned a Palestinian native of the West Bank who traveled to Germany for work, and while his pending application to return was approved, he did not come back because he was hospitalized. The military commander decided not to renew the approval of family unification with his wife, but the Court granted his request. Yoram Dinstein and David Kretzmer later criticized the Court for failing to use *Samara* as a precedent in other cases that allow family unification when the person does not constitute a security threat.<sup>54</sup> However, *Samara* is not about security but about particular facts and not law, as Justice Barak ruled that “these circumstances are extremely exceptional” and “the humanitarian nature is prominent.” As he explained,

The Commander is concerned that granting the permit to the petitioners will force him to grant permits in other cases...and thus it will impede the entire policy. This Commander’s concern in the case before us is not a concern at all...The case before us is unique in a number of

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Justice Shamgar accepted this policy regardless if the wife is already pregnant: H CJ 683/85 Mashtaha v. Military Commander of the Gaza Strip Region, 40(1) PD 309 (1986) (Isr.). In another case, the policy did not grant a widower with children family unification, even when he remarried and had twins with his second wife, as Justice Barak decided that “the rule is that the entrance to the region is prohibited unless it is allowed. Regarding family unification, a specific policy was put which allows entrance in exceptional instances.” H CJ 11/86 Hateeb v. The Interior Minister (July 9, 1986) Nevo Legal Database (by subscription, in Hebrew (Isr.).

51 Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, in 3 DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 17 (Drucilla Cornell et al. eds., 1992).

52 H CJ 263/85 Awad v. Commander of the Civil Administration, Ramallah District 40(2) PD 281, 285 (1986) (Isr.).

53 See *Samara*, *supra* note 47.

54 Yoram Dinstein, *Ihud Mishpahot Beshtahim Hamuhzakim [Family Unification in the Administered Territories]* 13 IYUNEI MISHPAT (LEGAL STUDIES) 221, 229 (1987). See KRETZMER, *supra* note 8, at 110.

respects, and although each of them may exist in many other cases, their accumulation together sets it apart from the situation before us.<sup>55</sup>

Indeed, when the Court was subsequently asked to apply *Samara*, it stated that *Samara* had been accepted due to its extraordinary humanitarian circumstances, and it rejected many other cases with even more compelling facts.<sup>56</sup>

While the Court was sharply divided on the constitutionality of the 2003 ban in *Adalah*, the same Court ruled in 2000 to uphold a new policy to freeze tens of thousands of family unification applications to the West Bank and Gaza, resulting in much harsher consequences than the 2003 ban. Justice Barak confirmed the new policy with only a few lines explaining that the Court would only review on a case-by-case basis. After this, the Court rejected all of the following cases,<sup>57</sup> even where they posed extremely painful human circumstances.<sup>58</sup>

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55 See *supra* note 47, at ¶ 2.

56 H CJ 724/85 Khalil v. Commander of the Judea and Samaria Region (1986) (May 1, 1986) Nevo Legal Database (by subscription, in Hebrew) (Isr.). In this case, the Court rejected the request even when the woman became stateless; H CJ 31/87 Sharab v. Head of the Civil Administration in the Gaza Strip 41(4) PD 670, ¶ 671 (Isr.). There, a woman from Gaza resided with her family in Kuwait but lost her residency in Kuwait and the Court did not accept the case; H CJ 42/88 Saba'aneh v. Commander of IDF Forces in the Judea and Samaria Region (Mar. 16, 1988), Takdin Legal Database (by subscription, in Hebrew) (Isr.). There, it stated that in case H CJ 147/81, the woman was in a foreign state for about ten years and she, like the petitioner, did not become a citizen there. It was therefore stated (by Justice Barak): "... in this matter, there is no decisive significance in the fact that the petitioner did not acquire Colombian citizenship."

57 H CJ 323/04 Abu Dakhan v. Minister of Defense (May 30, 2005) Nevo Legal Database (by subscription, in Hebrew) (Isr.). Subsequently, the issue of freezing applications again arose in H CJ 11698/04 Karni v. Commander of IDF Forces in the Gaza Strip (Aug. 2, 2005) Nevo Legal Database (by subscription, in Hebrew) (Isr.). The petitioner, a resident of Rafah in the Gaza Strip, requested an entry permit for his wife and their two children.

58 See, e.g., H CJ 5829/09 Mansour v. Military Commander of the West Bank Region (July 30, 2009) Nevo Legal Database (by subscription, in Hebrew) (Isr.), where the court rejected a petition from a Gazan woman to visit her brother in the West Bank who was suffering from serious bodily injuries; H CJ 5263/08 Al-Harimi v. Commander of Military Forces in the Territories (2009) (unpublished) (Isr.). The court rejected a petition from a West Bank resident and her children to visit the father of the family, who had been expelled to Gaza; H CJ 9657/07 Jarbu'a v. Commander of Army Forces in the West Bank (July 24, 2008) Nevo Legal

Notably, Jewish Israeli settlers in the West Bank have a different track. While the military orders in the West Bank-Gaza regarding residency, entry and family unification do not refer to ethnicity and read as neutral, the Law of Return applies, in fact, only to the Jewish settlers. The Emergency Regulations that apply to the West Bank provide a different track to any person who is entitled for immigration based on the Law of Return. By this order, every Jewish person, including non-Israeli citizens, has legal rights, whereas West Bank Palestinians lack any right.<sup>59</sup>

Let us summarize. Since the 1967 Israeli occupation, the Supreme Court has denied the right to family life in the West Bank and Gaza and adopted the deportation and separation of Palestinian families as a legitimate policy.<sup>60</sup> The Court clearly adopted a demographical policy to minimize the numbers of approved family unification requests, by confirming the absolute power of the military commander. Contrary to the second assertion of the Israeli discourse (that the Occupation is irrelevant), the Israeli constitutional protection based on the Israeli rule of recognition in *Adalah* and the IHL rule of recognition in the West Bank-Gaza was suspended in these cases, and both rules did not create a different conception of sovereignty based on geography. In both kinds of cases, the Court adopted the same conception of sovereignty that holds that the state has absolute authority over the keys to the gate. Like *Adalah*, since there is no right for “outsiders” to enter to exercise their family life, there is no such legal right for the “insiders”, as it is matter of immigration policy. However, the Jewish population living in the West Bank enjoys the applicability of the Law of Return, regardless of whether or not they are Israelis.

Still this comparison is not enough. It may indicate that Israeli control is colonial in the West Bank and Gaza, but we cannot generalize regarding the Green Line. *Adalah* could be perceived as an exceptional ruling delivered by a divided Court. In the next chapter, I examine whether or not *Adalah* represents the law since Israel’s establishment.

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Database (by subscription, in Hebrew) (Isr.). The court rejected a petition from a Gazan woman who sought to visit her three children living in the West Bank.

59 See The Emergency Regulations (Judea and Samaria - Adjudication of Offences and Legal Assistance), 5767–1967, Art. 6. For more details, see Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551, 584-87 (2005).

60 Note that this Article deals only with cases brought before and decided by the Supreme Court. Some applications for family unification were accepted through the intervention of the Office of the Attorney General without establishing criteria for accepting applications. See Yoav Dotan, *Government Lawyers as Adjudicators: Pre-Petitions in the High Court of Justice Department 1990-1997*, 35 ISR. L. REV 453 (2001).



### C. Back to the Green Line and Jerusalem

Israeli written laws on citizenship rights respect the third assertion of the Israeli discourse as a matter of *separate* (group rights including the Law of Return) and *equal* (individual rights including family life). They are based on two ethnic tracks of citizenship: one for Jews, including their non-Jewish family members, based on the Law of Return 5710-1950, and the other for non-Jews based on the Citizenship Law 5712-1952. Indeed, the Citizenship Law recognizes the right to naturalization of the spouse of a non-Jewish Israeli citizen, as Section 7 provides: “The spouse of a person who is an Israeli citizen . . . may obtain Israeli citizenship by naturalization even if he does not meet the conditions of Section 5A.”

Despite the written law, the Court decided otherwise. The first Palestinian case was brought before the Supreme Court in 1955, where the petitioner asked the Interior Minister, based on Section 7, to provide a permit for his wife.<sup>61</sup> In just a few lines, the Court rejected Zayed’s petition, ruling that

We were not convinced that the Interior Minister exercised improper judgment in refusing to grant the petitioner’s wife permission to enter Israel. It is true that under the Citizenship Law – 1952 the wife is entitled to receive Israeli citizenship as her husband – the applicant – is an Israeli citizen. For this purpose, she has to submit an application to declare allegiance (see Section 5 (b) and 5(c)). However, nowhere in the law does it say that the Interior Minister is obligated to award an entry permit to a person to come from outside of the state to exercise her right to submit her application for naturalization.<sup>62</sup>

The Court linked the applicability of the legal right of the insider with the state’s immigration policy and entry. Accordingly, since the permit is not matter of citizenship rights, Section 7 of the Citizenship Law became a dead letter. Thus, the Entry into Israel Law 5712-1952, which deals with permits for foreigners to enter the country, became the relevant law.

The first Palestinian case to rely on the Entry into Israel Law was brought in 1973.<sup>63</sup> Chief Justice Landau decided that except in cases involving the Law of Return, “The Interior Minister’s discretion . . . to permit or refuse a permit to enter the State . . . is absolute.”<sup>64</sup> Further, for the first time, the Court ruled that the Minister’s decision “can be influenced by humanitarian

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61 H CJ 37/55 Zayed v. Minister of Interior 9 PD 732, ¶ 9 (1955) (Isr.).

62 *Id.*

63 H CJ 209/73 Najla Lafi v. Minister of Interior 28(1) PD 13 (1973) (Isr.).

64 *Id.* at ¶ 15

considerations.<sup>65</sup> The petitioners claimed that the decision was arbitrary, as the Minister provided permits to another two families from their village in circumstances much less compelling than their own. It ruled that since there is absolute state authority on immigration, equality between citizens is irrelevant: “A claim of discrimination in these kinds of cases is irrelevant, since this is not a matter of maintaining equality between citizens, but the state authorities operate in them externally, and the state itself is the one that faces those who wish to enter for permanent residence.”<sup>66</sup>

Notably, this 1973 case was very significant as a precedent for the West Bank-Gaza cases. For example, in *Samara*, Justice Barak referred to it as central in defining the scope of the military commander’s authority: “For this purpose, I see no difference between the discretion of the commander before us and the discretion of the Interior Minister under the Entry into Israel Law. The two powers are dealing with very similar material.”<sup>67</sup>

After the 1992 Basic Laws, petitioners argued that the policy violates the rule of law and infringes the constitutional right to human dignity. Justice Goldberg rejected these claims, stating that “A permit for permanent residency for foreigners, who do not immigrate under the Law of Return, cannot be granted except in exceptional cases where unique considerations exist.”<sup>68</sup> As in the previously noted 1973 case and *Adalah*, Justice Goldberg ruled: “The petitioners do not have any vested right,”<sup>69</sup> and thus the constitutional right to human dignity is irrelevant. The Court refused to intervene despite its confirmation that “the criteria set by the Interior Minister for exceptions remain invisible.”<sup>70</sup>

The deportation of Palestinians has taken different forms, without any legislation to authorize these decisions. For example, bigamy is frequently used to reject women’s requests for residency, which leads to their deportation.<sup>71</sup> Additionally, Palestinian women lost their status and became stateless only for technical reasons, such as delays in requests.<sup>72</sup>

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65 *Id.* at ¶ 16.

66 *Id.*

67 *See Samara, supra* note 47, at ¶ 3.

68 H CJ 1689/94 Harari v. The Interior Minister 41(1) PD 15, 19 (1994) (Isr.).

69 *Id.*

70 *Id.*

71 Sawsan Zaher, *When the Right to Family Life Clashes with the Right to a United Family*, 20 ADALAH’S NEWSLETTER (2005).

72 *See, e.g.,* H CJ 9037/02 Rifa’ah v. Minister of Interior (Dec. 13, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.), which involved an Arab Bedouin woman, a citizen of Israel, who gave up her Israeli citizenship in order to marry a family member from Jordan and reside there. She later became a widow and

The Court also started to use the “enemy-alien doctrine” without any legislative authority. It severed the 11-year marriage of a Palestinian woman, a citizen of Israel, just because her husband had served in the Palestinian police in the West Bank in the distant past.<sup>73</sup> It broke up the family of a Palestinian woman, a citizen of Israel, after nine years, as her Syrian husband had served in the Syrian army, although military service in Syria is compulsory as in Israel.<sup>74</sup>

The deportation also continues through illegal cooperation with the Israel Security Agency (ISA). The Court accepted the ISA position in cases without providing reasons based on secret evidence. For example, Justice Beinisch explained in just a few lines that the Court upholds an ISA decision to deport a man with no criminal or security record who was in a long marriage with a citizen.<sup>75</sup>

Prior to *Adalah*, then, the Court already denied Palestinians’ family rights, despite the enactment of the 1992 Basic Laws and *Ka’adan* (the first assertion). It is not clear why or how the academics writing against the majority opinion in *Adalah* arrived at their critique, when the decision simply follows the legal

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did not receive Jordanian citizenship. She asked to restore her Israeli citizenship, but the court ruled that she was late in applying; H CJ 9778/04 Alwan v. Ministry of Interior (Apr. 20, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.). There, a spouse from the West Bank married an Israeli citizen in 1994. Despite being married for 10 years and having three children, their request was denied for technical reasons. *See also* H CJ 10191/03 Tamadar v. Minister of Interior (Feb. 17, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.); H CJ 3432/05 Sabrin v. Minister of Interior (Nov. 17, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.); H CJ 5635/05 Jabareen v. Minister of Interior (Nov. 22, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

73 H CJ 4961/01 Abu Zahiban v. Minister of the Interior (July 03, 2002), Takdin Legal Database (by subscription, in Hebrew) (Isr.). There, the petition was rejected in two paragraphs.

74 H CJ 10642/06 Abbas v. Minister of Interior (Dec. 24, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.). There, the petition was rejected in one page.

75 H CJ 2527/03 As’id et al. v. Minister of Interior 58(1) PD 139 (2003), (Isr.). *See also* H CJ 8405/05 Tawatha v. Minister of Interior (Mar. 2, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.), in which the Court rejected a woman’s petition based on information that concerned her brothers and not her and in one paragraph terminated her family life in Israel after eight years of marriage. Another example is H CJ 7202/96 Mansour et al. v. Acting Deputy Director of the Population Registry (Mar. 23, 1997), Nevo Legal Database (by subscription, in Hebrew) (Isr.), in which Justice Barak stated that although the petitioner was convicted, the facts in the indictment do not describe the full danger he poses to the public. For this reason, the Court confirmed the order to expel him from the country.

heritage; the Court never accepted any Palestinian case before *Adalah*. It is also astonishing that the academics failed to comprehend the scope of the minority opinion in *Adalah*, which advocated for *decisionism*—deciding on the exception on a case-by-case basis.

After *Adalah*, in 2007, the Knesset added more prohibitions on family unification to include persons originally from four “enemy-states”—Iran, Iraq, Syria and Lebanon.<sup>76</sup> Further, it established a new mechanism—“the Committee for Humanitarian Cases”—to review applications.<sup>77</sup> The Supreme Court again upheld the constitutionality of this 2007 amendment in a split six-to-five decision in 2012.<sup>78</sup> In fact, this amendment just set forth the judicial policy before *Adalah*. Still, the question remains as to why we see minority opinions against the legislation. I will come back to this question later.

Surprisingly, it was only after *Adalah*, in 2010, that the Court accepted a Palestinian citizen’s case for the first time. As in *Samara* (the West Bank), the Court provided a gesture and repeatedly stressed that the case involved very exceptional humanitarian circumstances.<sup>79</sup> Also like *Samara*, it was never used as a precedent. In 2010, the Court also partially accepted another petition.<sup>80</sup> The Court again emphasized: “The rule is that the applicant for a residence

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76 The Citizenship and Entry into Israel Law (Temporary Provision), § 2, 5753-2003 1901 SH 544

77 *Id.* at § 3

78 H CJ 466/07 MK Zahava Gal-On v. The Attorney General 65(2) PD 44 (2012) (Isr.).

79 H CJ 7444/03 Daka v. Minister of Interior (Feb. 22, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.). In this case, an Israeli citizen married a woman from the West Bank and the court stated the unique exceptional facts: (1) this is a 14-year marriage; (2) the wife learned Hebrew; (3) the couple lives in Israel with their children; (4) there is no security record against her; (5) the husband is a public servant; (6) she worked in the Israeli Shar’ia Court; and (7) she always received temporary permits in the past. The Court imposed severe restrictions on her, namely, that she is not allowed to have any contact, directly or indirectly, with her family in the West Bank; she is not allowed to enter this area; and if she wishes to travel abroad, she should inform the authorities.

80 H CJ 1905/03 Akel v. The Interior Minister (Dec. 5, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The woman, who originally came from the West Bank, had been living in Israel for 25 years and her child is a minor and an Israeli citizen. She learned Hebrew and became “involved with the Jewish society,” studied law in Israel and graduated with excellent grades. Following this decision, the Court accepted another two petitions for technical reasons: that the petitioners filed their motions before the 2003 ban and the authorities neglected to answer the families on time.

permit under the Entry into Israel Law does not have a vested right.”<sup>81</sup> Chief Justice Beinisch stated: “The circumstances of Petitioner 3 are special and exceptional, and since there is no rule without exceptions, Petitioner 3 is the exception.”<sup>82</sup> The Court noted that this formula for examining applicants on a case-by-case basis follows the minority opinion in *Adalah*.<sup>83</sup> In a 2017 case, the justices disputed whether the case was humanitarian. Justice Barak-Erez, who wrote the minority opinion to grant a permit, opened her decision with these honest words: “How bad and difficult should a person’s life be in order to be recognized as ‘humanitarian’ which justifies granting a status in Israel? This question hovered over the petition before us. However, of course, we are not required to answer it in its abstract or general form.”<sup>84</sup>

Indeed, the scope of the “humanitarian case” cannot be derived from a “general form” or an abstract principle, as the solution is a “case-by-case examination.”<sup>85</sup> Simply put, the Court’s role is like that of a king who provides his pardon without any legal standard and his decisions cannot bind him. Probably the justices themselves have no idea when they will grant their gift.

Let us summarize. Since 1948, the Supreme Court has denied the right of family unification to Palestinian citizens, including residents of Jerusalem. The two assertions of the Israeli discourse (the first and the third) are invalid: If you do not belong to the people of the Law of Return, you are not equal before the law as an individual insider. For this reason, the Citizenship Law, including its Section 7, became irrelevant. The formula of deciding on the exception case-by-case, which completely suspended the Israeli rule of recognition and its conception of sovereignty, was transferred to West Bank-Gaza cases in the 1970s. Contrary to the second assertion regarding the separation between the two legal systems, the Court cites and quotes cases from each side of the Green Line as relevant to one another and as one unit of case-law, as we saw in *Samara*, for example.

Why, then, did the Knesset legislate the 2003 ban when the Court was already implementing such policies? This question is discussed below.

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81 *Id.* at ¶ 10.

82 *Id.* (The concurring opinion of Justice Beinisch).

83 *Id.* at ¶ 9.

84 HCJ 4380/11 Plonit v. The State of Israel - Ministry of Interior (Mar. 26, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

85 For example, a recent case involved a Palestinian woman, a citizen of Israel, and her husband from the West Bank; this couple cannot even visit each other. Justice Barak-Erez stated: “Despite the considerable implications of the decision for the lives of the petitioners, this is not an exceptional and unique case.” HCJ 896/17 Jaber v. The Interior Minister (Oct. 11, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

#### D. Family Unification as a Jewish Problem: The Logic of the 2003 Ban

Due to the closure of the West Bank and Gaza in the mid-1990s, the Israeli labor market needed foreign workers to replace the Palestinians. Some of these “foreigners” married Israeli Jews and asked for citizenship under the Law of Return. The Interior Ministry claimed that many of these marriages were fictitious and for that reason, it adopted a new interpretation of the Law of Return, specifically that the law will apply only when the Jewish person and his non-Jewish spouse immigrate together as a family unit to Israel and not when the Jewish person is an insider.<sup>86</sup> Until 1995 and before the Interior Ministry changed its policy, the Law of Return applied to the non-Jewish (non-Palestinian) spouse of an Israeli Jewish citizen, and citizenship was granted to the spouse automatically.<sup>87</sup> For the first time, after 1995, family unification became a Jewish problem.

The Court delivered its landmark *Stamka* ruling in 1999.<sup>88</sup> While Justice Cheshin accepted the Interior Ministry’s new interpretation, for the first time, this family life decision follows the first assertion regarding equal rights between all the insiders, the citizens. He explained that this interpretation is for a good purpose, as it places all the insiders on an equal footing; if only a Jewish citizen were to be able to obtain citizenship for his spouse, it would be a “severe act of discrimination and we did not find a suitable purpose for this practice.”<sup>89</sup> His next step marked a return to legality. Justice Cheshin criticized the lawyers’ use of the term “family unification.” Relying on the second assertion of the Israeli discourse, Justice Cheshin contended that the term applies to the West Bank-Gaza and that “the borrowing of this term” into the Israeli legal system is problematic, “as the legal basis of each is different.”<sup>90</sup> For Justice Cheshin, this case is about citizenship rights and “citizenship is a fundamental right” under Israeli law, where “the citizen carries his citizenship with him on his back, and wherever he goes, it goes with him.”<sup>91</sup> Therefore, “criteria that reside in the clerk’s drawer and do not see the light of day, invite arbitrariness.”<sup>92</sup>

Most importantly, Justice Cheshin ruled that the Ministry, by separating a couple,<sup>93</sup> was ignoring the Citizenship Law:

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86 H CJ 3648/97 *Stamka v. Minister of Interior* 53(2) PD 728 (1999) (Isr.).

87 *Id.* at ¶ 5.

88 *Id.*

89 *Id.* at 758-59.

90 *Id.* at ¶ 70.

91 *Id.* at ¶ 80.

92 *Id.* at ¶ 46.

93 *Id.* at 778-80.

As any other kind of discretion, there are boundaries and limits to the Interior Minister's discretion provided by the Citizenship Law. One of these limits is specified by Section 7 of the Citizenship Law, in which the legislator expressed its will to ease [the process] with the spouses of Israeli citizens when they ask to be naturalized. These are the legislator's words and the Minister is prohibited from ignoring the legislator's instruction.<sup>94</sup>

This landmark case should have been a revolutionary moment for Palestinian citizens of Israel. It returned the track of Section 7 of the Citizenship Law that the Court had suspended since 1955. It views the issue as a citizenship right, it cancelled the arbitrary policy, and it requires putting clear written reasonable criteria that leads to naturalization within five years.

After *Stamka* but before it started to apply, in 2002, the government froze all applications for Palestinian family unification and pronounced that its decision applies retroactively to all pending requests.<sup>95</sup> The Court issued an *order nisi* against this decision on petitions brought by human rights organizations, which claimed that it deviated from *Stamka* and that no legislation authorized it.<sup>96</sup> After that, the Knesset passed the 2003 ban. As previously noted, the military commander also froze all the applications for family unification in the West Bank and Gaza in 2000. Thus, I argue that the 2003 ban was enacted due to changes in the applicability of the Law of Return.

If *Ka'adan* and *Stamka* are taken seriously, family life cases should discuss "simple discrimination" in citizenship between insiders. However, for this purpose, the Law of Return should be present, but this law is not a matter for comparison, as it is the very essence of the Jewish state. Instead, the formula of examining these issues case-by-case appeared. Equality is never examined based on this formula, but solely on the general principle of antidiscrimination as the only guidance. It is no wonder that in *Adalah* Justice Cheshin, who suspended constitutional rights, supported this formula and stated:

We were disturbed by the absence of a provision designed for special humanitarian cases. This omission admittedly is not capable of resulting in the voidance of the law, but I think the state ought to consider adding an exception of this kind to the law, in one form or another.<sup>97</sup>

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94 *Id.* at ¶ 80.

95 Decision No. 1813 of the 29<sup>th</sup> Government (May 12, 2002) (Isr.).

96 HCJ 4022/02 The Association for Civil Rights in Israel v. Minister of Interior (Jan. 11, 2007), Nevo Legal Database (by subscription, in Hebrew (Isr.))

97 *Adalah*, *supra* note 23, ¶ 126 of Justice Cheshin's opinion.

Thus, while for a long time the concept of the Law of Return led to the suspension of citizenship rights by the Court, later it led to the suspension of rights by the law through the 2003 ban. When Justice Cheshin stated in *Adalah* that the authority regarding “the key to the gate” is absolute, he meant except for the people of the Law of Return.<sup>98</sup>

The main significant point of the third assertion of the Israeli discourse is the Court’s ruling in *Ka’adan*: “The Law of Return only concerns the right to enter ‘the gate of the home,’ but once inside ‘the home,’ every citizen is equal before the law.” This case study shows that this statement is false.

### E. The Three Assertions in Light of the Case-law

Let us now evaluate the three hegemonic assertions that are considered to be the foundation of the Israeli discourse on justifying the “Jewish and democratic state” in light of the case-law. The first assertion is that the Israeli constitutional law ensures equality to all of its individual citizens, Jews and Palestinians alike. As I have argued, the citizenship rights of Palestinian citizens of Israel are neither a constitutional right nor even a legal right. Rather, such matters are decided as a humanitarian case, which knows no law. With the absence of a legal right of citizenship, there is no equal individual right to citizenship. Absolute authority controls the Israeli-Palestinian family, whereas Israeli Jewish families enjoy citizenship as a legal right.

The second assertion relies on a strict distinction and posits that two separate legal systems exist: one that applies the Israeli rule of recognition and the other that applies the IHL rule of recognition. The case-law shows clearly that neither of these two rules of recognition applies to Palestinian family life, as the latter case is treated as a humanitarian issue and knows no legality in Palestine regardless of geography. By contrast, Israeli Jewish

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98 After *Stamka* and a year before *Adalah*, a wide panel of the Court discussed whether a non-Jewish spouse of an Israeli citizen is allowed to convert to Judaism in a fast and easy ceremony abroad and return as a Jew based on the Law of Return or must pass a longer process in Israel. The Court confirmed “quickie conversions” and Justice Cheshin ruled:

Jewish communities throughout the world hold ... the power and authority to give converts a key to enter Israel, to return and receive immediate citizenship ... all of these are empowered to decide who will enter the gates of Israel as people entitled to rights... This is the mandate of the Law of Return... and no one will tell Jewish communities outside of Israel what they may or may not do.

HJC 2597/99 Rodriguez-Tushbeim v. Minister of Interior 58(5) PD 412, ¶7 of Justice Cheshin’s ruling (2005).



family life enjoys the applicability of the Israeli rule of recognition based on the Law of Return regardless of geography. Changes in the interpretation of the Law of Return directly affected the status of Palestinians on both sides of the Green Line. One conception of state-sovereignty applies on both sides of the Green Line regardless of the different conceptions based on the rules of recognition. The Interior Minister for inside the Green Line and the military commander in the West Bank enjoy absolute authority, as both deal, as the Court put it, with the “same material” and both, together with the Court, decide on the exception: who is to be included and who is to be excluded.

The third assertion contends that the Law of Return and the value of “preserving a Jewish majority” do not lead to discrimination against insiders, as these are only matters of group rights for the Jewish population as a majority group. This assertion is an illusion. The immigration policy based on the Law of Return targets the insiders, the Palestinian citizens, and leads to “separate but unequal” citizenship rights. This conception of sovereignty holds that except in the case of the Law of Return, the state has absolute authority over the keys to the gate, and since there is no right for “outsiders” to enter, there is also no legal right for the “insiders.”

The collapse of the three assertions renders the prevailing Israeli discourse on a “Jewish and democratic state” irrelevant. It discusses norms that arguably refer to sovereignty and self-determination, which by their nature belong to the realm of politics in the abstract and rely only on the normativity of the written law without any examination of the relevant judgments. Indeed, the text of the Law of Return says nothing about Palestinians; the value of “preserving a Jewish majority” is not supported by written law; IHL norms are not a part of Israeli laws; and the written citizenship laws articulate a doctrine of “separate and equal between citizens.” However, the Israeli Supreme Court has suspended the two rules of recognition.

Law is what is decided in cases and how it functions in the case-law.<sup>99</sup> Its scope cannot be grasped without considering the applicability of the norms/values it encapsulates.<sup>100</sup> We must consider how the Law of Return functions in the concrete reality of Palestine, and not whether it has a good moral justification as a norm. We know very well that despite the endless moral justifications for the doctrine of “separate and equal,” before *Brown v. Board of Education* it functioned as ‘separate and unequal’. Thus, Israeli academia’s ceaseless engagement with the moral justifications behind the

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99 KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 9 (1951); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* § 276 (1909).

100 KAHN, *supra* note 22, at 90.

Law of Return, as we see in part in this journal,<sup>101</sup> reveals nothing about the workings of the law itself, as it does not explain how this law functions in Palestine. Justification of the law is one thing, how it applies is another thing altogether.<sup>102</sup>

An expected response is that the norms and values that constitute the essence of the Jewish state *should not* have played the role they did through their use by the Court. This response, however, does not grasp the political moment of the *decision*. All the justices who dealt with hundreds of Palestinian family life cases since 1955 have shared in the suspension of legality. Thus, in order to take this response seriously, we must conclude that either all of the justices are racist, or they do not understand the scope of the Jewish state. The moment of deciding on the exception reveals the essence of the regime, as Schmitt put it.<sup>103</sup> It is about the *raison d'état* of the state that expresses the state's very essence, where all judges yield to it, as Foucault articulated.<sup>104</sup> It trumps personal opinions, as shown by Robert Cover's work on liberal judges who confirmed the norms of slavery, although before their nomination, they held anti-slavery positions.<sup>105</sup> It is the values of Ackerman's political moment, which trump the personal values of any judge.<sup>106</sup> As I explain in the next section, this is the power of the Constitution that precedes the rules of recognition.

## II. ALTERNATIVE FRAMEWORK: COLONIALISM

I argue that there is one Constitution in Palestine. Schmitt distinguished between the Constitution that refers to the values of the political identity and constitutional law that refers to written laws, basic laws and judgments. For him, the Constitution precedes and sometimes trumps the constitutional law.<sup>107</sup>

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101 See *supra* note 9.

102 This discourse does not notice that if the Law of Return is a matter of peoples' self-determination, which by itself a revolutionary act that occurs rarely and mostly illegally, how the mere existence of this law, which is supposed to self-determine at every moment, does not lead to decisionism.

103 SCHMITT, *supra* note 12, at 13.

104 MICHEL FOUCAULT, SECURITY, TERRITORIALITY, POPULATION 257 (2007).

105 ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984).

106 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 1314 (1991).

107 SCHMITT, *supra* note 12. Ackerman's dualist model expresses a similar idea as it distinguishes between the values of the 'political moment' (Schmitt's Constitution) that appear in rare times, such as the foundation, through extra-legality, and it continues to shape and precede the 'normal politics', which is

The Israeli Constitution in Palestine constitutes the essence of the Jewish political identity, which is to maintain the superiority of Jewish demography through the value of preserving the Jewish majority (and minimizing the Palestinian population) and the Law of Return. As mentioned above, the moment of the political decision on the exception by all the justices is due to the appearance of the very essence of the Constitution in Palestine.<sup>108</sup> For this reason, the Israeli Supreme Court's decisions on the exception in family life cases are valid, and did not create a political crisis with the other branches of government, but in fact led to mutuality between the branches, as has been shown here. In this sense, the Court is the guardian of the Constitution in Palestine.

Within this structure, the two rules of recognition may work and the Court may deliver rulings like *Ka'adan* based on the Israeli rule of recognition and other judgments based on the IHL rule of recognition. However, at least in matters of demography, the Constitution trumps the rules of recognition, as it relies on a conception of sovereignty that precedes Section 7 of the Citizenship Law and IHL norms. As I noted earlier, the citizenship, including family life as its generic form which determines the duality of the citizen-subject, expresses the essence of sovereignty that the Constitution rests on.<sup>109</sup>

This is a colonial Constitution. The main principle of a colonial Constitution is domination, where race is its basic unit.<sup>110</sup> Domination appears here when the Court negates the only two legitimate kinds of legal regimes under international law: equality before the national law, as required by international human rights law, and IHL, or the laws of war.<sup>111</sup> This sort of domination renders the

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expressed in day-to-day politics through the constitutional law and legislation (Schmitt's constitutional law). See ACKERMAN *supra* note 17. Akhil Amar also developed a similar dualist model and contended that the original meaning of the Constitution (Schmitt's Constitution) is even able to create constitutional changes, including against Article V (Schmitt's constitutional law) at any time, as it limits only governmental agents and not the will of the people. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUMBIA L. REV. 457 (1994). Today, Schmitt's concept of Constitution explains the doctrine of "unconstitutional constitutional amendment" in many countries. See Roznai, *supra* note 12.

108 Also for Agamben, the moment of exception expresses the state's understanding of its sovereignty, which tells us about the very essence of the polity. See AGAMBEN, *supra* note 21, at 183.

109 See *supra* note 18.

110 *Supra* note 14.

111 This form of domination appears for Agamben regarding the detainees at Guantanamo, as they neither have "the status of persons" under U.S. law or

Palestinian citizen of Israel and the Palestinian protected person under IHL only a Palestinian subject to absolute power without any legal protection. Race is its basic unit, as it targets the Palestinians as such. At the same time, as we saw in the West Bank cases, Jewish individuals enjoy the applicability of the Israeli rule of recognition as Jews and not even as Israeli citizens. Hannah Arendt is the first philosopher to have noted the “humanitarian case.”<sup>112</sup> The fall of the nation-state between the two World Wars led to the stripping of citizenship from ethnic groups, who became “stateless” refugees, and “humanitarian cases,” as just “a human” with no legal status. Indeed, the “humanitarian case” transforms the Palestinians into foreigners in their homeland.

Still, how is racial domination relevant within the Green Line when almost half of the justices voted to strike down the 2003 ban in *Adalah*? My short answer refers to the self-understanding of the rule of law of the “Jewish democracy.” The Israeli rule of recognition must maintain the integrity of the Israeli written laws, as it is “our own laws” that represent and reflect “our Jewish state.” Decisionism, by conducting a case-by-case examination, is the alternative way to keep the written laws free of ethnicity. For this reason, I contend, the Court showed indifference when the military commander froze all family unification applications in the West Bank-Gaza in 2000. Simply, this decision, in contrast to the 2003 ban, did not concern the Israeli written law of the Knesset. In another article, I explain in detail that the Israeli legal culture prefers *decisionism*, which leaves the written laws free of direct racial discrimination.<sup>113</sup>

The model of “ethnic democracy,” as articulated by Sami Smooha, attempts to challenge racial domination.<sup>114</sup> According to this model, while Israel discriminates against its Palestinian citizens in almost all aspects of life, they still participate in the national Israeli elections, and the state adheres to separation of powers, including access to the Court and the independence of the judiciary. First, however, under this state of exception the parliament is marginal. The Court, together with the executive branch, decides on the exception against parliamentary laws, which makes political participation

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the status of prisoners of war (POWs), and thus they are “neither prisoners nor persons accused, but simply ‘detainees’.” GIORGIO AGAM BEN, *STATE OF EXCEPTION* 3 (2005).

112 ARENDT, *supra* note 14, at 269-302.

113 Hassan Jabareen, *The Paradigm of Originalism: Israeli Constitutional Law and Legal Thought: Review Essay of Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds.)*, *Israeli Constitutional Law in the Making* (Hart Publishing 2013), 52 *ISR. L. REV.* 427 (2019).

114 Sami Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State*, 8 *NATIONS AND NATIONALISM* 475 (2002).

and separation of powers, as such, ineffective.<sup>115</sup> Second, the main question should be who decides on crucial sovereign matters such as family life and citizenship? The answer is that all the Palestinian people in Palestine, regardless of whether or not they participate in the Knesset's election, are controlled by an "alien" absolute power, as they lack any power to influence these crucial decisions. This sort of control and domination is the same whether the Palestinian lives under Israeli occupation or is a citizen of Israel. Third and most importantly, the model of "ethnic democracy" is about "Jewish democracy," which by itself is about colonial constitutionalism that is also known as "white democracy."<sup>116</sup>

The principle of a plurality of legal systems and racial laws is a leading feature of the colonial Constitution. The aim of this plurality, as Chatterjee posits, is to create racial superiority under the "rule of difference" in order to maintain the racial values of "separate and unequal."<sup>117</sup> In fact, the second and third assertions are about creating different rules based on group ethnic belonging and geography by dividing the Palestinian people into three separate units, when in fact all the Palestinian people in Palestine live under the same Constitutional jurisdiction. Still, the Israeli model introduces a form different than that of other colonial states. Besides some of the written laws, decisionism is a main means for maintaining the rule of difference. The case-law here shows that the Palestinian individual is the law as regards exclusion. In this regard, the Israeli Constitution is very close to the model of the Constitution of the *polis*, which according to Agamben is the paradigm of colonialism.<sup>118</sup> Banishing, deportations, and the subjugation of the noncitizens living in the *polis* were accomplished by decisionism without written laws, as these laws are for the citizens and therefore their integrity should be maintained.<sup>119</sup>

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115 As we saw here, for example, the court suspended the applicability of Section 7 of the Citizenship Law, and at the same time, it decided on the exception prior to the 2003 ban.

116 Dyzenhaus explains that while South Africa was colonial during the Apartheid era, as racial discrimination in all fields of life was its policy, it was a state of rule of law, which adhered to separation of powers, provided access to courts, had an independent judiciary, and was governed by law through "white democracy." See Dyzenhaus *supra* note 17 (comparing also the Apartheid regime with the Israeli legal order on both sides of the Green Line in relation to the rule of law).

117 See CHATTERJEE, *supra* note 14.

118 See de la Durantaye, *supra* note 13.

119 Steven DeCaroli, *Giorgio Agamben and the Field of Sovereignty*, in *GIORGIO AGAMBEN: SOVEREIGNTY & LIFE* 43-69 (Matthew Calarco & Steven DeCaroli eds., 2007).

Under the colonial Constitution, demography and security are intertwined. Israeli academics questioned whether *Adalah* is indeed about security or whether it is just about demography, i.e., preserving a Jewish majority.<sup>120</sup> It is about both. It is “the demography of security” or “the security of demography.” This also explains why the ISA was involved in family unification cases, and why the “enemy alien” doctrine is dominant in these cases. Similarly, in the West Bank-Gaza cases, the Court justified the military commander’s refusal to posit criteria for family unification, reasoning that it is “a sensitive matter that refers to the State’s security.”<sup>121</sup>

The constitutional identity of this Constitution is based on “We the Jewish People.” Its leading principle as regards citizenship is “separate and unequal” and the duality of citizen-subject. As Comaroff put it, “one of the most fundamental constitutive features of the colonial state” is that it is “a state *sans* nation,”<sup>122</sup> as it rejects the principle of nationality/citizenship based on territorial belonging. Indeed, the Israeli Supreme Court even refused to recognize the existence of ‘Israeli nationality’.<sup>123</sup> The Basic Law: Israel – The Nation State of the Jewish People, which was enacted in 2018, reveals this sharply. While it emphasizes only the rights of the Jewish people in Palestine, it does not even define who is a citizen. Benvenisti and Lustig portray it rightly as a law about “We the Jewish People” in Palestine.<sup>124</sup>

The colonial Constitution in Palestine targets the most crucial matters of Palestinian life. It targets what makes a citizen a citizen, or a person a protected person under IHL. For John Locke, even in the case of occupation, targeting the family life of non-fighters is prohibited.<sup>125</sup> For Arendt, citizenship is “the right to have rights.”<sup>126</sup> For John Rawls, the regime becomes illegitimate when it reaches a level of too much injustice.<sup>127</sup> For Justice Barak in *Adalah*,

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120 See Ben Shemesh, *supra* note 24.

121 *Samara*, *supra* note 47.

122 Comaroff, *supra* note 13, at 346.

123 The Court dismissed a petition by Jewish citizens to register ‘Israeli’ instead of ‘Jewish’ as their nationality on their identity cards, explaining that there is no such category. H CJ 8573/08 Ornan v. Minister of Interior 66(3) PD 44 (2013) (Isr.).

124 Eyal Benvenisti & Doreen Lustig, *We the Jewish People – A deep look into Israel’s new law*, JUST SECURITY (July 24, 2018), <https://www.justsecurity.org/59632/israel-nationality-jewish-state-law/>.

125 JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT at ch. 16 (1689).

126 ARENDT, *supra* note 14, at 296-97.

127 JOHN RAWLS, A THEORY OF JUSTICE (1971).

Democracy does not... separate its citizens from their spouses... [nor] give its citizens the option of living in it without their spouse or leaving the state in order to live a proper family life [nor] . . . separate parents from their children [nor] . . . discriminate between its citizens with regard to the realization of their family life.<sup>128</sup>

Israel's law schools still insist on teaching constitutional law based on the three hegemonic assertions. One of the characteristics of colonialism is that it constructs a hegemony that justifies its control based on universal and liberal values.<sup>129</sup> This is how "the rule of difference" attempts to separate groups based on the idea of respect for different cultures, while at the same time articulating different individual rights based on group belonging. And this is why the three assertions together portray the state as a liberal democracy. The strength of such hegemony explains why the Law of Return is accepted as a very moral law, which has nothing to do with other groups.<sup>130</sup> This belief, which has turned into a kind of religion, may explain why there has been no research into whether this law leads to exclusion. In other disciplines, however, we find that scholars do perceive the Israeli regime within the Green Line as colonial.<sup>131</sup>

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128 See Adalah, *supra* note 23, at ¶ 93 of Justice Barak's ruling.

129 KARUNA MANTENA, *ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM* (2010).

130 About building such a hegemony, see Hassan Jabareen, *The Paradigm of Originalism*, *supra* note 113.

131 For the leading systematic work, see OREN YIFTACHEL, *ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE* (2006). His work shows that Israeli policy is based on an ethnocratic regime, where one ethnic group dominated the land and colonized the natives through land confiscation and exclusion in land allocation and housing. Nadim Rouhana is one of the first scholars who refers to the identity of the state as a matter of domination over Palestinian citizens. See NADIM ROUHANA, *PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT* (1997). Kimmerling also refers to the case of inside Israel as a form of colonialism vis-à-vis Palestinian citizens. Baruch Kimmerling, *Jurisdiction in an Immigrant-Settler Society: The "Jewish and Democratic State"*, 35(10) *COMP. POL. STUD.* 1119-144 (2002). I also discuss the formation of Palestinian citizenship as colonial, through an analysis of Palestinians' participation in national elections in: Hassan Jabareen, *Hobbesian Citizenship: How the Palestinians Became a Minority in Israel*, in *MULTICULTURALISM AND MINORITY RIGHTS IN THE ARAB WORLD* 189-218 (Will Kymlicka & Eva Pföstl eds., 2014).

## CONCLUSION

While the three hegemonic assertions refer to the Palestinians as three separate units, the Israeli Supreme Court refers to them as one unit, whether they live within the Green Line, in Jerusalem, or in the West Bank or Gaza. The three assertions imagine the Palestinians as foreigners to each other: the Occupation is foreign to Israeli citizens, including the Palestinian citizens, and the refugees are total outsiders.<sup>132</sup> Daily, the Supreme Court faces cases of Palestinian family unification, which challenge the foreignness by replacing it with intimacy and love between the members of *a people*. The Court's solution is domination and exclusion. The Israeli legal academia's solution relies on an imagined partitioning of Palestine based on hegemonic ethnicity within the Green Line, as the first order based on the values of a "Jewish and democratic state." These values are the sword of domination in the case-law. We have seen here that the deportation, fragmentation and separation of Palestinian families has been the main policy since 1948.

The lessons of the family unification issue compel us to consider decolonization as the top priority in Palestine. Decolonization deals with the domination and the *foreignness*. For this reason, it must refer to the Palestinian people as one unit and establish equality between the two peoples as the first order. The discussion must avoid the distinctions: the Israeli rule of recognition versus the IHL rule of recognition, group rights versus individual rights, and outsiders-insiders. These distinctions belong to the plurality of laws that characterize colonial constitutionalism.

Decolonization establishes equality on both levels, group rights and individual rights in Palestine, as one territory, and it should also refer to the historical injustice. The family unification cases ask us to think first about the rights of the people whose members wish to live together with freedom in their homeland and not about the state or sovereignty, which creates imagined borders as a first order. The partitioning of Palestine, if needed, must be the second order that refers to political arrangements. However, these arrangements cannot put limitations on the right of equality between the peoples to exercise their liberty and freedom in Palestine.

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132 See Leora Bilsky, *Citizenship as Mask: Between the Imposter and the Refugee*, 15 CONSTITUTION 72-96 (2008) (discussing the Adalah case as it refers to the Palestinians as foreigners to each other).