

Walter | Medina | Scholz | Wabnitz (eds.)

The Israeli Legal System

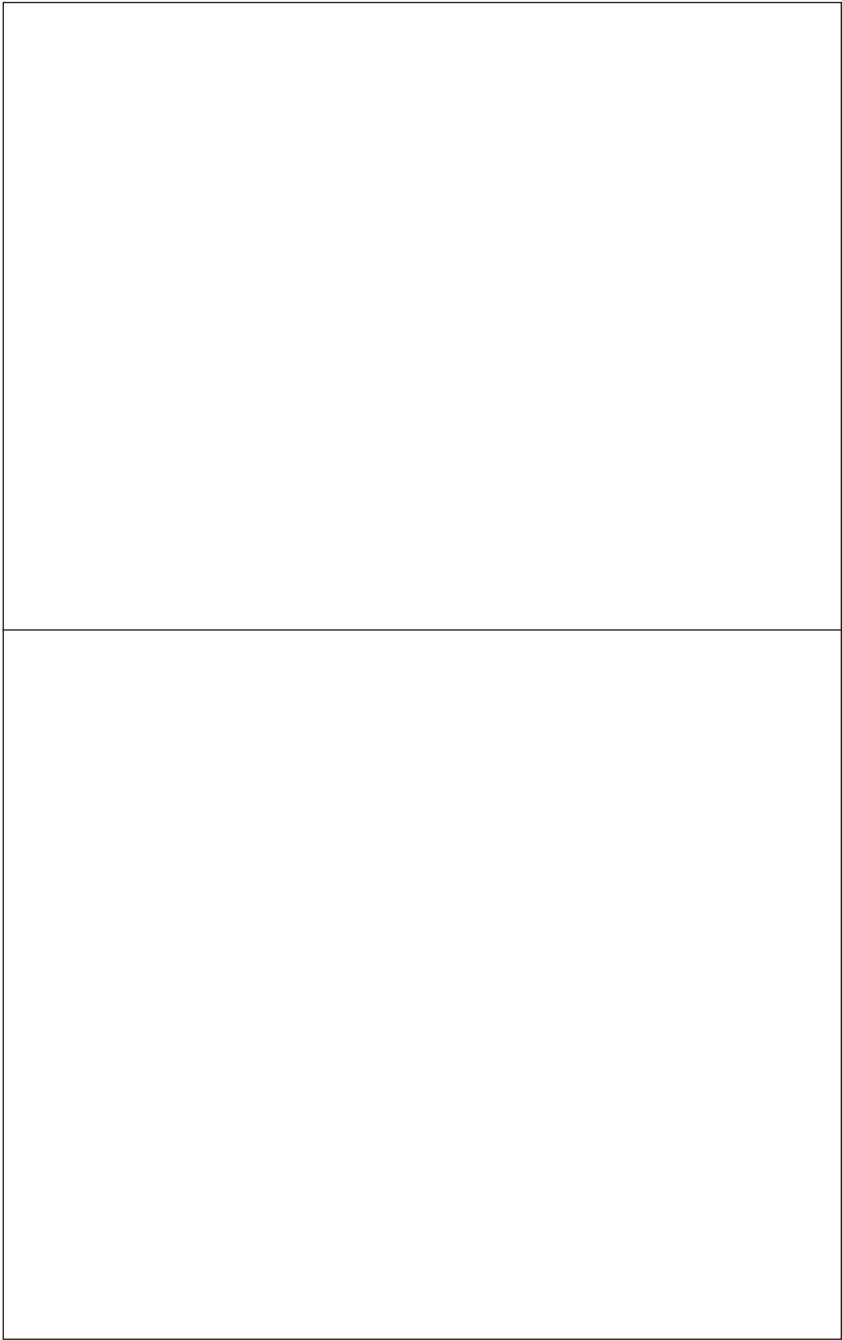
An Introduction



HART
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Nomos



Christian Walter | Barak Medina | Lothar Scholz
Heinz-Bernd Wabnitz (eds.)

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Preface

The idea for this book was generated many years ago among the editors and within the German Israeli Lawyer's Association. The initial project was to come up with a brief "Introduction to the Law of Israel", written in German. After several attempts in this direction, we realized that a broader approach was necessary which also implied the, more or less, simultaneous publication of an English and a German version of the book. We are very grateful that it was possible to bring together a group of prominent authors who are all experts in their respective fields and, except for some authors in the international section of the book, insiders in the sense that they live and work in Israel at the most prestigious Law Faculties of the country. The project could not have been realized without their personal commitment and admirable discipline. We are very grateful to all of them.

The realization of the book would also not have been possible without the tireless and extremely competent help of many hands at the Chair for Public International Law and International Law at Ludwig-Maximilians-University Munich (LMU). We want to specifically thank *Stefan Schäferling* for the English native speaker check, which he did on almost all chapters. The editorial assistance of *Ingeborg Neber-Germeier* and *Kathrin Tremml* was invaluable, notably in the final phase of the preparation of the book. We are also very grateful to the Central Council of Jews in Germany for its support of the project. Finally, we want to thank the publishers C.H. Beck, Nomos and Hart for realizing the rather unconventional project of publishing simultaneously an introduction to a foreign legal system, both in English and in German.

Munich, Jerusalem, Dresden and Hof in December 2018,

Christian Walter
Barak Medina
Lothar Scholz
Heinz-Bernd Wabnitz

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List of Abbreviations

AA	Administrative Appeal
AJIL	American Journal of International Law
ALR	Annotated Law Reports
CA	Civil Appeal
CC	Civil Claim
CEC	Central Elections Committee
CFH	Criminal Further Hearing
CISG	UN Convention on Contracts for the International Sale of Goods
CJ	Chief Justice
Colum. L. Rev.	Columbia Law Review
Comp. Lab. L. & Policy J.	Comparative Labor Law and Policy Journal
CrA	Criminal Appeal
CPR	Civil Procedure Regulations
CRS	Common Reporting Standard
CWO	Civil Wrongs Ordinance
DA	Derivative Action
DK	<i>Divrei HaKnesset</i> (Protocols of <i>Knesset</i> proceedings)
EA	Elections Appeal
ENP	European Neighbourhood Policy
European L. Rev.	European Law Review
FamA	Family Appeal
FamC	Family Case
FH	Further Hearing
FHCA	Further Hearing Civil Appeal
FJEL	Foreign Judgements Enforcement Law
FTA	Free Trade Agreement
HC	High Court
HCJ	High Court of Justice
Hebrew Univ. L. J.	Hebrew University Law Journal (= <i>Mishpatim</i>)
HH	<i>Hatza'ot Hok</i> (Bills presented to the <i>Knesset</i>)
HMO	Health Maintenance Organization
IAA	Israeli Antitrust Authority
ICC	International Criminal Court
ICJ	International Court of Justice
IDF	Israel Defense Force
IIC	International Review of Industrial Property and Copyright Law
ILA	Israel Land Authority
ILO	International Labor Organization
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
Isr. L. Rev.	Israel Law Review
IsrSC	→ PD
ITA	Israeli Tax Authority
ITO	Income Tax Ordinance
J.	Justice
J.L. & Soc'y	Journal of Law and Society
KT	<i>Kovetz HaTakanot</i> (Regulations issued by government ministries)

List of Abbreviations

LC	Labor Case
LCA	Leave for Civil Appeal
LCrA	Leave for Criminal Appeal
LDPA	Liability for Defective Products Act
LFA	Leave for Family Appeal
L.Q.R.	Law Quarterly Review
L.S.I.	Laws of the State of Israel
Md. L. Rev.	Maryland Law Review
Mich. J. Int'l L.	Michigan Journal of International Law
MK	Member of <i>Knesset</i>
Mo.	Motion
NASDAQ	National Association of Securities Dealers Automated Quotations
N.C. J.L. & Tech.	North Carolina Journal of Law and Technology
NIS	New Israeli Shekel
NLC	National Labor Court
PCA	Private Class Action
Perm. CA	Permission for Civil Appeal
PD	<i>Piskei Din</i> (Official publication of judgments of the Supreme Court of Israel)
PM	<i>Pesakim Mehoziim</i> (unofficial publications of decisions of the Supreme Court of Israel)
SCDC	Selected Cases of the District Courts
S.C.R.	Canada Supreme Court Reports
Sct	Supreme Court (of the United States)
SH	<i>Sefer HaHukim</i> (Laws promulgated by the <i>Knesset</i>)
S.J.	Selected Judgements of the Supreme Court of Israel
Tel Aviv Univ. L. Rev.	Tel Aviv University Law Review (= <i>Iyoney Mishpat</i>)
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UNEF	United Nations Emergency Force
Univ. Haifa L. Rev.	University of Haifa Law Review (= <i>Din U'Dvarim</i>)
UNSCOP	United Nations Committee on Palestine
UNTS	United Nations Treaty Series

Part I Foundations

§ 1 History and Sources

Ron Harris

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The part of the Middle East known today as Israel has a long history and a long legal history, among the longest in human history. It is where Mosaic Law was followed and Egyptian and Mesopotamian legal traditions met. It was for centuries influenced by Greek law and then Roman law, and then by the fusion of the two in the form of Byzantine law. With a short interval during the Crusades it was for a long span in the domain of Islamic law. For the purposes of understanding the historical impact on modern law the historical survey can begin in the last half a century of the Ottoman Empire. This chapter will follow the recent legal history of the region in order to demonstrate that Israeli law is constructed of six historical layers: Islamic, Jewish, French, British, German and American. The six layers are in one respect chronological, but in another intertwine with each other. The final outcome is a legal system that can be classified as a mixed jurisdiction. 1

I. The Ottoman period

The Ottoman era in the region began in 1517 with the conquest of the Mamluk Sultanate of Egypt and the Levant by the armies of the Turkish Sultan Selim I. The Ottoman legal system which was applied in the region was based upon Islamic law, the Sharia, and more particularly on the Sunnite Hanafi School of jurisprudence.¹ It was complemented by the Kanun legal decrees issued by the Sultan in his secular capacity. The Kanun dealt mostly with issues of taxation, administration and land ownership and use.² Based on long Islamic tradition, Christians and Jews were given legal autonomy in matters of family, religion and community life. The autonomy was granted based on personal confession and not on ethnic identity. By the 2

1 *Burak*, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire*, 2015.

2 *Gerber*, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, 1994.

19th century the system became more formal and hierarchical and known as the Millet System.³

- 3 As the 19th century progressed, due to what was perceived by some contemporary Ottoman observers as crisis or at least a relative decline and by leaders of foreign powers as the death breaths of “the sick man upon the Bosphorus”, the debates in the Ottoman Empire with respect to the need for wide range reforms intensified. Series of reforms known as the Tanzimat (“Reorganization”) were initiated in the Ottoman Empire between 1839 and 1876 under the reigns of the sultans Abdülmejid I and Abdülaziz⁴ with respect to the army, the administration, the economy and the legal system. Legal reforms were along two lines. The first was a reorganization of Islamic and Ottoman law. The Mejlle was a civil law collection, dealing mostly with contract law, which was issued in 16 volumes between 1869 and 1876.⁵ It was based on the Sharia. Some view it as mere collection or digest, others view it as endeavor at the modernization of Islamic law or as a codification based on the jurisprudential concepts of the French code. The Ottoman Land Code of 1858, prepared by the Tanzimat Council, was based on decrees of the Sultan and on actual land tenure practices. It used Islamic terminology but the genre was European.
- 4 The second was the importation of French law. French Napoleonic codes were translated verbatim or with modification into Turkish and proclaimed as binding Ottoman codes. The Ottoman Commercial Code (1850), Code of Criminal Procedure (1850), Penal Code (1858), Maritime Code (1867) and Code of Civil Procedure (1914) are the major examples for French based transplants.⁶
- 5 The French inspired codes could not be interpreted and implemented organically by sharia courts. A French inspired court reform followed. The French three tier system was imitated in the Nizamiye courts system, composed of trial courts, courts of appeal (in the provincial capitals) and court of cassation (in Istanbul). In a stage in which only judges and lawyers educated in Islamic law were available, the sharia courts and the Nizamiye courts were not fully distinct from the start.⁷
- 6 By the eve of World War I the Ottoman Empire's legal system was a mix of Islamic law, Ottoman law and French law and its judicial system included Sharia courts, French inspired Nizamiye courts, religious courts of Christian and Jewish communities and extra-territorial consular courts of the various Western powers.⁸

II. The British Mandate period

- 7 The 400 years of Ottoman rule ended in 1917-18, when Palestine was conquered by the British Army, commanded by General Allenby, which advanced from
 - 3 *Masters*, Christians and Jews in the Ottoman Arab World: The Roots of Sectarianism, 2001; *Abu Jabber*, The Millet System in the 19th Century Ottoman Empire, 57(3) The Muslim World 1967, 212-223.
 - 4 *Ma'oz*, The Ottoman Reform in Syria and Palestine, 1840-1861: The Impact of the Tanzimat on Politics and Society, 1968.
 - 5 The Mejlle: [http://www.legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://www.legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf); *Meron*, Mejlle Tested by Its Application, 5 Isr. L. Rev. 1970, 203-215..
 - 6 *Eisenman*, Islamic Law in Palestine and Israel: A History of Survival of Tanzimat and Shari'a in The British Mandate and The Jewish State, 1978.
 - 7 *Rubin*, Ottoman Nizamiye Courts: Law and Modernity, 2011.
 - 8 *Rubin*, Ottoman Judicial Change in the Age of Modernity: A Reappraisal, 7(1) History Compass 2009, 119-140.

Egypt, through the Sinai Desert and occupied the Southern part of the Levant. They stopped there because the British and the French agreed to split the Middle East between them in the secret Sykes-Picot Agreement in 1916, the British receiving much of modern day Iraq, Jordan and Israel, and the French modern day Syria and Lebanon.⁹ This agreement was only one of three war days commitments made by the British. In the McMahon-Hussein Correspondence (1915 to 1916) between the British High Commissioner in Egypt and the Sharif of Mecca, Britain agreed to recognize Arab independence in only partially specified territories after World War I.¹⁰ In the Balfour Declaration of 1917 the British promised, via Lord Rothschild, homeland for the Jews in Palestine.¹¹ The British initially held Palestine under military rule (1917 to August 1920), then under civil administration (until July 1922) and on July 24, 1922 received it officially as a Mandate from the newly established League of Nations.

The League of Nations British Mandate for Palestine and the Palestine Order in Council, which was issued at Buckingham Palace London two weeks later, formed in many respects the constitution of Mandate Palestine. The Mandate included decree to Britain to facilitate

8

the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine.¹²

The King's Order in Council established three branches, the Executive headed by the High Commissioner, the Legislature, composed of 10 officials and 12 elected members, and the Judiciary.¹³

The Judiciary's lowest layer was a Magistrate Court, based on the Ottoman Court of Peace. Its second layer was the newly created District Court having residual trial court jurisdiction that at the same time served as court of appeals on Magistrate Court judgments. The highest court in Palestine was the Supreme Court that served in one capacity as High Court of Justice as first instance in certain petitions against the state, and in another capacity as court of appeals. Cases from the Supreme Court could be appealed to the Judicial Committee of the Privy Council in London.¹⁴ The British abolished the extraterritorial consular courts. However, they were obliged by the League of Nations Mandate to retain the millet system which meant maintaining religious courts' jurisdiction over family and personal status issues. The structure of the Judiciary was hybrid. It embodied Ottoman and British

9

9 British Government, 'The Sykes-Picot Agreement', World War I Document Archive, May 1916: http://www.avalon.law.yale.edu/20th_century/sykes.asp.

10 The full text of the correspondence (consisting of ten letters) can be found at: http://www.avalon.law.yale.edu/20th_century/angap04.asp.

11 Letter from the United Kingdom Foreign Secretary, Arthur James Balfour, to Baron Walter Rothschild, 2 November 1917 (Balfour Declaration): http://www.avalon.law.yale.edu/20th_century/balfour.asp.

12 The British Mandate for Palestine confirmed by the Council of the League of Nations, 24 July 1922, League of Nations Official Journal 1007 (Palestine Mandate): http://www.avalon.law.yale.edu/20th_century/palmanda.asp.

13 The Palestine Order in Council: <https://www.unispal.un.org/DPA/DPR/unispal.nsf/0/C7AAE196F41AA055052565F50054E656>.

14 For the courts during the mandate period see: *Likhovski, Law and Identity in Mandate Palestine*, 2006, 27-31.

Imperial features but was unique and idiosyncratic, having none of the basic features of either the British or the French courts systems. This court system is still the core of Israel's court system.

- 10 Article 46 of the Palestine Order in Council 1922 determined the continuation of the Ottoman law as it was at the outbreak of World War I. It added that gaps in Ottoman law “shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England [...] so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary”. In fact, the British could export to Palestine their own law through three channels. The first was by enacting for Palestine, either from Jerusalem by way of Government of Palestine Ordinances, or from London by way of Acts of Parliament or by King's Orders in Council issued by the Colonial Office and signed by the Crown. The second was gapfilling based on Article 46. The third channel was the interpretation of the Ordinances enacted for Palestine based on the laws of England, as many of the new Ordinances required. How were these channels used in practice?¹⁵
- 11 The main channel through which British and Imperial Law was imported to Palestine was legislation. In the first few years of the Mandate legislation dealt mostly with issues in which the government had direct interest such as taxation and tariffs, currency, the operation of courts, firearms, holy places and archeological sites, and more. The second wave, which culminated in the late 1920s and early 1930s, included the importation of a set of commercial law legislation, including: copyright, patents, companies, partnerships, bills of exchange, maritime commerce, bills of lading, bankruptcy and more. Many of these ordinances were based on British legislation and a few reflected the commitment to international conventions.¹⁶ By the 1930s due to the growing tensions in the triangle of Arabs, Jews and British, the legal ambitions of the Government of Palestine to Anglicize the legal system subsided. Two exceptions to the trend were the Criminal Code Ordinance of 1936 and the Civil Wrongs Ordinance of 1944-47. The first was based on Imperial legislation that was drafted in Queensland, Australia and migrated to Africa and Cyprus before arriving in Palestine.¹⁷ The second was a digest of the basic wrongs of English common law.

15 *Likhovski*, In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine, 29(3) *Isr. L. Rev.* 1995, 291-359.

16 *Likhovski*, Is Tax Law Culturally Specific? Lessons from the History of Income Tax Law in Mandatory Palestine, 11(2) *Theoretical Inquiries in Law* 2010, 725-763; *Birnhack*, Hebrew Authors and English Copyright Law in Mandate Palestine, 12(1) *Theoretical Inquiries in Law* 2011, 201-240; *Birnhack*, Colonial copyright intellectual property in mandate Palestine, 2012; *Schorr*, Water law in British-ruled Palestine, 6(3) *Water History* 2014, 247-263; *Margalit*, Labor-Movement Co-operatives in Mandatory Palestine: Legal Transplants and Cultural Implants, Working Paper 03/10 New York, NYU School of Law, 2010; *Bunton*, Land Legislation in Mandate Palestine, 2009; *Harris*, Legitimizing the Imprisonment of Poor Debtors: Lawyers, Legislators, Judges, in: *Harris/Kedar/Lahav/Likhovski* (eds.), *The History of Law in a Multi-Cultural Society: Israel, 1917-1967*, 2002, 217-271; *Harris/Crystal*, Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine, 10(2) *Theoretical Inquiries in Law* 2009, 561-587.; *Forman/Kedar*, Colonialism, Colonization and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective, 4(2) *Theoretical Inquiries in Law* 2003, 491-540; *Likhovski*, Law and Identity in Mandate Palestine, 2006.

17 *Shachar*, The Sources of The Criminal Code Ordinance 1936, 7 *Tel-Aviv Univ. L. Review* 1979, 75-113 (in Hebrew); *Abrams*, Interpreting The Criminal Code Ordinance, 1936-The Untapped Well, 7 *Isr. L. Rev.* 1972, 25-64.

By the end of the British Mandate significant fields of law, such as contract law and land law, were still based on the Ottoman law. However, many other fields of law had changed considerably during the three decades of British rule. The local legal system now was a mix of significant doses of British law and smaller doses of French and Islamic-based Ottoman Law. 12

In terms of public law, the second half of the Mandate period was dominated by the intensifying ethnic conflict. The 1929 clashes led to a White Paper (policy paper) issued by the British government that instructed the government of Palestine to restrict Jewish immigration and land purchase. The Arab Mutiny (1936-39) led to another White Paper that resulted in an almost complete halt of Jewish migration and prohibited Jews from buying land in most parts of Palestine.¹⁸ The Jews petitioned to the League of Nations arguing that the immigration legislation and land legislation was invalid as it infringed the terms of the Mandate.¹⁹ However, the lack of standing for the Jewish community of Palestine in the League in Geneva and in the Permanent Court of International Justice in The Hague and the outbreak of World War II curtailed their efforts. 13

The British on their part began a wide scale issuing of emergency regulations. These coincided with the Arab Mutiny (1937), World War II (1939) and the post-war ethnic conflict (1945). By 1945, the regulations permitted search and seizure, censorship, detention without trial, deportation, imposition of curfew and resort to military courts, and in fact established a regime of martial law and infringed on any remaining rights of the Arab and Jewish population of Palestine.²⁰ 14

III. The establishment of the State of Israel

The holocaust and the new post-war world order intensified the discussion of the future of Palestine. Eventually, the newly created international organization, the United Nations, decided in its General Assembly on 29 November 1947 on termination of the British mandate and the partition of Palestine into an Arab state and a Jewish state.²¹ The partition resolution required that each of the two states will adopt a constitution that will secure the rights of its minority population. It was supported by the Jews in Palestine and objected to by the Arabs.²² 15

In the following months the situation in Palestine deteriorated into a total civil war between Arabs and Jews. The British decided to terminate their Mandate-based rule earlier than intended, on 15 May 1948. The Jews prepared for independence in many realms of life including the legal. However, the legal preparations were not well organized to begin with and were further disrupted by the war. By the end of the Mandate no real legal alternative to the laws and institutions of the Mandate 16

18 The White Paper 1930: <http://www.jewishvirtuallibrary.org/jsource/History/passfield.html>; The White Paper 1939: http://www.cojs.org/palestine-_statement_of_policy_-cmd-_6019-_-_may_1939_-_the_white_paper_of_1939/.

19 The Jewish case against the Palestine White Paper: documents submitted to the permanent mandates Commission of the League of Nations July 12 1939, American Jewish committee library.

20 *Likhovski* 2006 (n 14).

21 United Nations General Assembly Resolution 181: http://www.avalon.law.yale.edu/20th_century/res181.asp.

22 *Morris*, 1948: A History of The First Arab-Israeli war, 2008.

Gasvion, The Two-State Solution: The UN Partition Resolution of Mandatory Palestine: Analysis and Sources, 2013.

was ready and a constitution was not drafted. A declaration of independence was drafted in the first two weeks of May by lawyers and politicians with final touches by David Ben Gurion himself.²³ The legitimization to declare the State of Israel was based on historical rights, the natural right to self-determination and the UN partition resolution. The Declaration tried to abide by the partition resolution, among other things by promising a wide array of rights to all citizens, including Arab citizens, and committing to draft a constitution by 1 October 1948.²⁴ The Declaration had no constitutional or normative status.²⁵

- 17 Five days later, on 19 May 1948, the Law and Administration Ordinance became the first piece of legislation of the State of Israel.²⁶ It was in fact a mini constitution that fixed the structure of the three branches of government, an Interim Legislative Council, an Interim Government and a judiciary based on the structure of the judiciary of Mandatory Palestine. The Ordinance also determined that the law that was in force on the eve of independence would remain in force in the new state with modifications as required by the independence.²⁷ Modifications include the abolishment of any restrictions imposed based on the White Paper on Jewish immigration and purchase of land by Jews and any privileges granted to British and special ties with Britain. The Ordinance also empowered the Government to issue emergency decrees as long as the emergency-situation prevails. Note that four days earlier the armies of five surrounding Arab countries invaded the borders of Mandate Palestine.
- 18 Why did Israel decide to maintain the law of Mandate Palestine? The Jewish community of Palestine clashed with the British in the last years of the Mandate because it perceived the British as retreating from their commitment in the Balfour Declaration and by the Mandate Charter to establish a Jewish homeland. They objected the wide use of emergency powers. Some Jewish leaders believed that the law of the new Jewish State should be based on Jewish law.²⁸ Many of the lawyers and jurists of the time were émigrés from Germany and Eastern Europe that studied law in the best German and German inspired universities. The main explanation for opting for continuation of Mandate law was the lack of ready alternatives. Another explanation is that lawyers that were educated in the Mandatory Law Classes in Jerusalem and in Britain during the previous three decades were vested

23 *Shachar*, Jefferson Goes East: The American Origins of the Israeli Declaration of Independence, 10(2) Theoretical Inquiries in Law 2009, 589-618; for more information about the drafting process, see *Shachar*, The Early Drafts of the Declaration of Independence, 26 Tel-Aviv Law Review 2002, 523-600 (in Hebrew).

24 Israeli Declaration of Independence: https://www.knesset.gov.il/docs/eng/megilat_eng.htm.

25 *Rubinstein*, The Declaration of Independence as a Basic Document of The State of Israel, 3(1) Israel Studies 1998, 195-210; *Lieblich/Shachar*, Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence, 84(1) The British Yearbook of International Law 2014, 1-51; *Lahav*, A 'Jewish State... to Be Known as the State of Israel': Notes on Israeli Legal Historiography, 19(2) Law and History Review 2001, 387-433.

26 Law and Administration Ordinance: http://www.knesset.gov.il/review/data/eng/law/kns0_govt-justice_eng.pdf.

27 Section 11 in Law and Administration Ordinance.

28 *Likhovski*, The Invention of "Hebrew Law" in Mandatory Palestine, 46(2) American Journal of Comparative Law 1998, 339-373; *Harris/Likhovski/Lahav*, Israeli Legal History: Past and Present, in: *Harris/Kedar/Lahav/Likhovski* (eds.), The History of Law in a Multi-Cultural Society: Israel, 1917- 1967, 2002, 1-34; a revised German version of this article was published as: *Israelische Rechtsgeschichte: Vergangenheit und Gegenwart*, 25(1/2) Zeitschrift für Neuere Rechtsgeschichte 2003, 70-94.

in the existing law and objected to any change.²⁹ The special relationship to English law included the continuation of gap filling based on common law and equity and the continuation of interpretation of Mandatory ordinances based on English law. It included an application of personal law in religious courts on Christians, Muslims and Jews based on the millet system. Early Israeli law was still a mixed British-Ottoman law.³⁰

IV. Constitutional history

The requirement by the UN Partition Resolution and the commitment in the Declaration of Independence, to draft a constitution by 1 October 1948 was never fulfilled. The Constituent Assembly that was formed by the first general elections of January 1949 debated concrete proposals for a constitution for about a year and a half. The debates reached a dead-end. The Constituent Assembly converted itself into the First Knesset (Parliament) and resolved in the famous Harari Decision to shift from drafting a codified constitution to the gradual drafting and legislation over time of basic law by the Knesset.³¹ The first institutional basic law, which dealt with the structure and function of parliament, was enacted in 1958.³² The first basic law that dealt with human rights was enacted in 1992.³³ The Supreme Court decided in the famous Mizrahi Bank case in 1995 that it can review and annul regular legislation based on basic laws.³⁴ These developments are discussed in detail in the chapter on “Constitutional Law” by Suzie Navot.

Why didn't Israel promulgate a constitution in its early years as it committed to do? Note that in the very same years the newly created Western Germany and India did adopt constitutions. Four explanations can be found in the literature. The first is that Ben Gurion did not want to self-impose restrictions on his powers as Prime Minister. The second is that the Jewish religious parties objected to any kind of secular constitution. The third is that the political leadership did not want to draft a constitution at a time in which many of the Jews were still in the diaspora and the wave of mass migration to Israel was only in its early phase. The fourth is that the legal and political leadership was Anglophile and preferred the British constitution-

29 *Likhovski*, Between Mandate and State: Re-thinking the Periodization of Israeli Legal History, 19(2) *The Journal of Israel History* 1998, 39-68.

30 *Friedmann*, Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period, 10 *Isr. L. R.* 1975, 192-206.

31 The Harari Resolution: “the First Knesset assigns to the Constitution, Law and Justice Committee the preparation of a proposed constitution for the state. The constitution will be made up of chapters, each of which will constitute a separate basic law. The chapters will be brought to the Knesset, as the Committee completes its work, and all the chapters together will constitute the constitution of the state.” (https://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm#4) for more: *Gavison*, Legislatures and the Quest for a Constitution: The Case of Israel, 11(2) *Review of Constitutional Studies* 2006, 345-400; *Gross*, The Politics of Rights in Israeli Constitutional Law, 3(2) *Israel Studies* 1998, 80-118; about Israel's first years see *Rozin*, Infiltration and The Making of Israel's Emotional Regime in The State's Early Years, 52(3) *Middle Eastern Studies* 2016, 448-472..

32 Basic Law: The Knesset, 12 L.S.I. 85 (1958): https://www.knesset.gov.il/laws/special/eng/basic2_eng.htm.

33 Basic Law: Human Dignity and Liberty: http://www.servat.unibe.ch/icl/is12000_.html.

34 CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* (1995): <http://www.versa.car.dozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>.

al model of Supremacy of Parliament over the American model of supremacy of the constitution.³⁵

- 21 Whatever the immediate reason was, in fact Israel developed a British style constitution in its early years. Piece by piece, in a regular legislation, the institutions of the state were created. Parliament, the Government, the presidency, the Military forces and the electoral system were organized in 1948-50 in structures that are still in the most part in existence today. A judicial bill of rights was also formed, on a case-by-case basis, in the first decade after independence. This bill included freedom of speech,³⁶ freedom of occupation, and a basic conception of the rule of law.³⁷ The effect of this bill of rights should not be overplayed. The mandatory emergency regulations and a few additional Israeli emergency decrees were used in order to infringe upon the rights of the Arab minority and extreme right wing Jewish activists.³⁸
- 22 The constitutional revolution of the 1990s, began with the enactment of the Basic Law: Human Dignity and Liberty³⁹ and Basic Law: Freedom of Occupation⁴⁰, which for the first time in Israel's history protected individual rights on the level of basic laws. It culminated with the *Mizrahi Bank*⁴¹ decision that affirmed the normative superiority of basic laws over regular Knesset legislation and introduced judicial review of legislation, shifting Israel from the British constitutional model of substantive constitution, sometimes called unwritten constitution, towards the American constitutional model of written, codified, entrenched and paramount constitution. The Supreme Court was positioned by the revolution as a player in the political arena, the ultimate interpreter of the constitution and the institution that exercises judicial review over legislation.⁴²

V. Civil law codification

- 23 The public service and particularly the Ministry of Justice attracted many German-Jewish immigrants. In the early years of the state it was often the case that the Minister, the Attorney General and the Director General were all of German background. Apparently, German Jews were attracted to the Ministry because they believed that legislation and codification are central to any legal system, because they

35 *Kedar*, Ben-Gurion's Opposition To A Written Constitution, 12(1) *Journal of Modern Jewish Studies* 2013, 1-16; *Rozin*, Forming a collective Identity: The Debate over the Proposed Constitution, 1948-1950, 26(2) *The Journal of Israeli History* 2007, 251-271.

36 *Lahav*, Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century, 1997.

37 *Rozin*, Infiltration and the making of Israel's emotional regime in the state's early years, 52(3) *Middle Eastern Studies* 2016, 448-472; *Kedar*, Democracy and Judicial Autonomy in Israel's Early Years, 15(1) *Israel Studies* 2010, 25-46.

38 *Harris*, State Identity, Territorial Integrity and Party Banning: A Pan-Arab Political Party in Israel, 4 *Socio-Legal Review* 2008, 19-65; *Kedar*, The Jewish State and The Arab Possessor: 1948-1967, in *Harris/Kedar/Lahav/ Likhovski* (eds.), *The History of Law in a Multi-Cultural Society: Israel, 1917- 1967*, 2002, 311-379.

39 Basic Law: Human Dignity and Liberty: http://www.servat.unibe.ch/icl/is12000_.html.

40 Basic Law: Freedom of Occupation: http://www.servat.unibe.ch/icl/is11000_.html.

41 CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* (1995): <http://www.versa.carodozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>.

42 *Kretzmer*, The New Basic Laws on Human Rights: a Mini-Revolution in Israeli Constitutional Law?, 14(2) *Netherlands Quarterly of Human Rights* 1996, 173-183; *Kretzmer*, Judicial review of Knesset decisions, 8 *Tel-Aviv University Studies in Law* 1988, 95-155; *Friedmann*, *The Purse and the Sword: The Trials of Israel's Legal Revolution*, 2016.

wanted to carry the system in the direction of the civil law tradition and because they were disadvantaged in the British common law based Mandate period.⁴³ A legal planning department was formed in the Ministry. It was headed by Uri Yadin (Rudolf Heinsheimer), who was born in Baden-Baden and had studied in Berlin. The department planned a civil code to Israel that was to be formulated based on the German code.⁴⁴ But unlike the German code that was promulgated on a single day, January, 1st 1900, the Israeli code was planned to be legislated chapter by chapter over a long period of time. To reduce alienation by families of holocaust victims and holocaust survivors the code was disguised as based on Swiss or “civil law” rather than on the German model.

Not much progress was achieved during the 1950s due to the need to deal with more urgent legal issues that related to the outcomes of the 1948/49 war, to mass-migration and to the economic crisis. However, by the late 1950s the drafting ensued and during the 1960s and 1970 a series of some 20 new laws were enacted in the field of civil law. The very first laws dealt with legal personality and guardianship and with inheritance. Most other laws dealt with contracts: a general part, remedies, specific contracts such as insurance, leasing, construction, sale, agency, gifts and more.⁴⁵ The general structure was similar to that of the German code. The jurisprudential and interpretive approaches adhered to by the drafters were also German, assuming coherency, wholeness, no gaps and extensive use of analogies between different pieces of the new civil law legislation.⁴⁶ Some of the new laws included “independence” clauses that excluded them from the obligation imposed by article 46 of the King's Order in Council of 1922 to turn to Britain for gap filling.⁴⁷ A debate unfolded in the 1970s and 1980s between those who viewed the new legislation as code in the making that bore all the above ramifications and those who argued that these are regular laws of the Knesset that should be interpreted just like any other law, based on the regular (Anglo-American) canons of statutory interpretation. It is interesting to note the parallels between the debate on chapter-by-chapter constitution making and the debate on chapter-by-chapter civil code making.⁴⁸ Anyway, by the mid-1970s Israeli contract law was not based anymore on Islamic-Ottoman law but rather on German law. The new civil legislation rendered the Ottoman Mejelle unnecessary, and in 1984 its last sections that were still in force were symbolically abolished, making Israel one of the very last post-ottoman territories to abolish it.

24

43 *Yadin*, Reception and Rejection of English Law in Israel, 11(1) International and Comparative Law Quarterly, 1962, 59-72.

44 *Friedmann*, Independent Development of Israeli Law, 10 Isr. L. Rev. 1975, 515-568.

45 For example: Capacity and Guardianship Law, 1962; Agency Law, 1965; Sale Law, 1968; Gift Law, 1968; Contracts (Remedies for Breach of Contract) Law, 1970; Hire and Loan Law, 1971; Contracts (General Part) Law, 1973.

46 *Barak*, The Codification of Civil Law and the Law of Torts, 24 Isr. L. Rev. 1990, 628-650; *Zamir*, Private Law Codification in a Mixed Legal System – The Israeli Successful Experience, in: *Rivera* (ed.), The Scope and Structure of Civil Codes, 2013, 233-248; *Shalev/Herman*, A Source Study of Israel's Contract Codification, 35 Louisiana Law Review 1975, 1091-1115; *Barak-Erez*, Codification and Legal Culture: In Comparative Perspective, 13 Tulane European and Civil Law Forum, 1998, 125-137.

47 For example, Land Law Section 160.

48 *Friedmann*, On the Interpretation of Modern Israeli Legislation, 5 Tel-Aviv Univ. L. Rev. 1977, 463-490 (in Hebrew); *Barak*, Towards Codification of the Civil Law, 1 Tel-Aviv University Studies in Law 1975, 9-34.

VI. Anglo-american influences

- 25 The special relationship of the local system with the English legal system, that began in 1922 was terminated in 1980, three years after the political upheaval and the formation of the first right-wing coalition headed by Menachem Begin as Prime Minister, with the enactment of the Foundations of Law Act.⁴⁹ This law repealed Article 46 of the Palestine Order in Council, 1922. The new act replaced it with a new gap filling clause: “Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage”. Some jurists understood the new law as making Jewish law the gap filler of the Israeli legal system.⁵⁰ Others argued that due to the new civil law codification, the use of analogies and of open-ended principles such as “good faith” in fact the system would be comprehensive and complete and gaps would almost never be created. Even in the rare occasions in which gaps could be identified they were to be completed by the universal principles that are embodied in Jewish heritage and not by the specific doctrines of Jewish Halakha and Jewish law.⁵¹
- 26 Beginning in the 1970s and with intensification in the 1980s and 1990s, American influence on Israeli law grew. Legal education became more Americanized in terms of its curriculum, the formation of law reviews, legal clinics, the massive turn of young students to top American law schools for doctoral degrees, and the production of American type scholarship, more theoretical and interdisciplinary, published in top American journals, by the leading Israeli legal scholars.⁵² The judicial activism of the 1980s that was manifested in stricter review of executive decision-making, in the decline of legal formalism and in the adoption of liberal values, was inspired by the Warren era of the U.S. Supreme Court.⁵³ One of the manifestations of the growing American influence was an increase in the number and percentage of citations of American legal sources by the Supreme Court.⁵⁴ The constitutional revolution made American constitutional law more relevant and influential (though Canadian and German influences can also be identified as well as interface with a global trend). Israeli legislation in fields such as corporations and copyright were influenced by American law.⁵⁵

49 The Foundations of Law Act: <http://www.israellawresourcecenter.org/israellaws/fulltext/foundationsoflaw.htm>.

50 *Elon*, Jewish Law: History, Sources, Principles, 1994.

51 *Barak*, The Role of The Supreme Court in A Democracy, 3(2) Israel Studies 1998, 6-29; *Barak*, The Foundations of Law Act and the Heritage of Israel, Shenaton ha-Mishpat ha-Ivri (Annual of The Institute for Research in Jewish Law) 1987, 265-283 (in Hebrew).

52 *Lahav*, American moment(s): When, How and Why Did Israeli Law Faculties Come to Resemble Elite U.S Law Schools?, 10(2) Theoretical Inquiries in Law 2009, 653-697.

53 *Kenneth*, Judicial Activism in Comparative Perspective, 1991; *Mautner*, The Decline of Formalism and The Rise of Values, in: Law and the Culture of Israel, 2011, 75-99.

54 *Lahav*, American Influence on Israel’s Jurisprudence of Free Speech, 9(1) Hastings Constitutional Law Quarterly 1981, 21-108; *Lahav*, American Influence on Israeli Law: Freedom of Expression, in: *Freedman* (ed.), Israel and the United States: Six Decades of US-Israeli Relations, 2012, 187-214; *Harris/Shachar/Gross*, Citation Practices of Israel’s Supreme Court: Quantitative Analysis, 27(1) Mishpatim 1996, 119-217 (in Hebrew).

55 *Procaccia*, Designing a New Corporate Code For Israel, 35(3) The American Journal of Comparative Law 1987, 581-597; *Radzyner*, Inheritance from Uncle Sam: the American influence on Israeli succession law, 4(1) Comparative Legal History 2016, 19-50.; *Likhovski*, Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling, 10(2) Theoretical Inquiries in Law 2009, 619-651.

VII. Conclusion

This introductory chapter focused on the constitutional model, on civil law codification and on foreign influences on the domestic legal system. It had to neglect other important aspects of the pre-independence and post-independence legal system. It demonstrated that Israeli law was constructed historically layer upon layer. The deepest layer which still has some contemporary remnants is that of Ottoman Islamic law. On top of it are French, British, German, Jewish and American layers. The layers diffused and combined with each other. Israel is a mixed jurisdiction – mixed in a very unique and peculiar way. It is more “mixed” than other mixed jurisdictions which typically have one continental historical layer and on top of it one Anglo-American layer. The understanding of Israel's present day legal system requires understanding of its past.

27

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§ 2 Courts and Judiciary

Shimon Shetreet

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I. Introduction

The judges and courts in Israel are independent and generally enjoy public confidence. The courts adjudicate all matters including criminal, civil, and public matters. Criminal and civil matters are adjudicated by all the levels of courts hierarchy: Magistrate courts, District courts, and the Supreme Court. The Supreme Court, the highest court in the land, hears appeals from the lower courts. Most public and administrative matters, *i.e.* disputes between the citizen and government authorities and agencies, are submitted directly to the Supreme Court, in its role as the High Court of Justice.¹ Within the general court system there is some specialization. Certain divisions are entrusted with adjudicating specialized matters including family matters, administrative matters, and economic matters

In addition to the general court system, there are specialized courts. These courts include religious, labor, and military courts. The general courts have general jurisdiction over criminal, civil, and administrative matters while the specialized courts possess jurisdiction in their area of expertise. The Supreme Court has limited review jurisdiction over the appellate level of the specialized courts.

Trials in the Israeli judicial system are of an adversarial nature. Advocates present the arguments of the parties they represent and judges seek to find the truth in each case. The parties or their attorneys submit the evidence and question witnesses. The judge plays an active role, asking clarifying questions. The judge also acts as the gatekeeper, ruling on the admissibility of evidence and questions. In certain cases, a judge may request specific evidence or ask questions that the parties have

1 For the statutory regulation of the courts and judges see Basic Law: Adjudication, and the Courts Law. For general analysis see generally *Shetreet*, Justice in Israel, 1994; *Shetreet*, Judicial Independence and Accountability in Israel, 33 L.Q.R. 1984, 979; *Shetreet*, On Adjudication, 2004 (in Hebrew); *Shetreet*, Culture of Judicial Independence in Israel: Substantive and Institutional Aspects of the Judiciary in Historical Perspectives, 10 Law and Business 2010, 525 (in Hebrew).

deliberately left out. This helps the judge find the factual truth.² The outcome of a civil litigation does not have to be adjudicative. The Knesset has passed a legislative amendment that encourages out of court compromises to alleviate the burden of an overloaded court system. The result is that many cases are settled by means of compromise or are transferred to arbitration or mediation.³

- 4 This chapter will present the different elements and issues regarding the Israeli courts and Judiciary. It will begin by delineating the competence and Jurisdiction of the different courts (II.) as well as their administration and rules of procedures (III.). Following these, the chapter will elaborate characteristic doctrines of the Israeli Judicial System and methods of maintaining public confidence (IV.). The chapter will proceed to explain Israeli Judges' appointment and tenure (V.) as well as their judicial independence (VI.). Finally, the chapter will briefly discuss the role of the Legal Advisor to the Government (VII.).

II. Competence and jurisdiction of the courts

1. Magistrate and District Courts

- 5 Almost every city in Israel has a Magistrate Court. Concerning criminal matters, Magistrate Courts have jurisdiction over offenses that are punishable by fines and offenses that carry a statutory prison sentence of less than seven years. Regarding civil matters, Magistrate Courts have jurisdiction over all claims not involving immovable property of a value of up to ILS 2,500,000.⁴ The court is also qualified to hear claims involving the use, possession, and partition of immovable property.⁵ Magistrate courts may also act as specialized courts such as juvenile, family, or small claims courts. The court is composed of a one-judge panel, however, the President of the court may decide that a particular matter be heard by a three-judge panel. Magistrate Court decisions are appealed to the District Courts.⁶ There are twenty-nine Magistrate Courts in Israel, based upon geographic areas.
- 6 Israel is divided into six districts where the District Courts sit respectively: North (Nazareth), South (Be'er Sheva), Center (Lod), Jerusalem (Jerusalem), Tel-Aviv (Tel-Aviv) and Haifa (Haifa). The District Courts hold residual authority thus they hear any case in their district not under the jurisdiction of the Magistrate Courts or any other tribunal.⁷ These comprise civil claims with a value in dispute over ILS 2,500,000 and criminal offenses punishable by more than seven years imprisonment. They serve as an appellate court for decisions of Magistrate Courts in their district.⁸ A District Court's decisions as a court of first instance may be appealed to the Supreme Court. Generally, the courts sit as a one-judge panel, but specific matters statutorily require a three-judge panel. These matters include offenses carrying a potential punishment of ten or more years' imprisonment, appeals, and any other matter that the President of the District Court orders.⁹ Magistrate and District

2 *Rosen-Zvi*, The Civil Process 31, 2015 (in Hebrew).

3 Courts Law (Amendment no. 15), 1992, sec. 10.

4 At the time this text was written, this sum was approximately € 600,000.

5 Article 51 of the Courts Law (Consolidated Version) 1984, SH, p. 198; 38 L.S.I. 271.

6 Article 52 of the Courts Law.

7 Article 40(1) of the Courts Law.

8 Article 40(3) of the Courts Law.

9 Article 37 of the Courts Law.

Courts only have jurisdiction in their respective geographic areas (excluding Jerusalem that includes areas not covered by any other district).

2. The Supreme Court

The Supreme Court serves as a court of last resort for appeals of District Court decisions, as well as the High Court of Justice that deals with administrative matters. The Supreme Court has jurisdiction throughout the country. The Court is composed of fifteen justices. The Court sits in three-judge panels, but the President of the Supreme Court can request for a case to be heard by a larger panel. For example, cases that present Constitutional questions are often heard by panels of nine or eleven justices.¹⁰ 7

Claims that an individual was aggrieved by the State can be submitted directly to the Supreme Court in its role as High Court of Justice. Through this jurisdiction, the Court develops the constitutional law of the State. While the Court can invalidate lower court decisions, it can also invalidate military decisions on the ground that they are unreasonable or exceed powers. Its review powers also extend to internal Knesset procedures and enforcing the rules of public law (for example, the principle of equality) in government companies and certain private bodies.¹¹ The Supreme Court also has special jurisdiction for appeals regarding administrative detentions, disciplinary rulings of the Israel Bar Association, rulings of the Civil Service Commission, and appeals regarding Knesset elections. 8

In Israel, lower courts are bound by the principle of precedent, but only those precedents set by the Supreme Court. Only the Supreme Court is not bound by its own previous rulings, although in practice the judges of the Supreme Court do tend to follow them. 9

The Supreme Court has wide discretion in determining whether or not to hear a case. Petitioners must show that they have standing, meaning that they have been personally, significantly, and directly harmed by the matter addressed in their petition. There must be a true dispute to be decided, not merely a public grievance. However, in cases involving claims of violations of the rule of law or breach of human rights, the Court has intervened even if the petitioner had no personal interest in the matter. A petitioner's claim must also be justiciable. Some petitions are inappropriate for the Court because they present a political question that must be resolved by other branches of the government. This allows the Court to avoid sensitive public issues. Political questions include partisan issues, foreign relations, and review of military authorities. More recently, the Court has relaxed its barriers concerning standing and justiciability and has heard cases that do not completely meet these standards.¹² 10

From the outset, the Supreme Court, and in fact the entire judicial system, demonstrated complete independence in their rulings. It must be remembered that the State was threatened with destruction from external powers and faced major securi- 11

10 Article 26 of the Courts Law. See CA 6821/93 *Bank HaMizrahi HaMeuhad Ltd. v. Migdal Kfar Shitufi*, PD 49(4) 221 (1995); HCJ 1661/05 *Local Municipality Gaza Beach v. Knesset of Israel*, PD 59(2) 481 (2005); HCJ 4541/94 *Alice Miller v. The Minister of Defense*, PD 49(4) 94 (1995); HCJ 5016/96 *Horev v. The Minister of Transportation*, PD 51(4) 1 (1997).

11 See for instance *Zamir*, Courts and Politics in Israel, Public Law 1991, 523.

12 *Navot*, Constitutional Law of Israel, 2007, 127.