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# Colonial Imprints: Settler-Colonialism as a Fundamental Feature of Israeli Constitutional Law

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## **Abstract:**

Many constitutional questions in Israel are dealt with through the lens of the nation-state paradigm where the state is constitutionally associated with an ethnically and religiously defined majority group. Thus, many of the challenges that face Israeli society and the legal system are often presented as a result of an exceptionally antagonistic majority-minority relationship in a nation-state. This article offers a novel way of analysing the Israeli constitutional regime using the framework of settler-colonialism. It argues that adding the settler-colonial lens will help better understand many features of Israeli constitutional law. Drawing on theoretical frameworks developed by theorists of colonialism, the article explores a number of foundational aspects of Israeli constitutional law and demonstrates how they were shaped, and continue to be shaped, by settler-colonialism. The article argues that settler-colonialism is one of the central features that animate Israeli constitutional law.

## **1. Introduction**

The fundamental constitutional principle that Israel is the nation-state of the Jewish people is one of the most significant factors that shape debates in Israeli constitutional law (Rubenstein & Jakobson 2009; Gans 2008; *Ben Shalom v. CEC* 1989; *CEC v. Tibi* 2003; *Ornan v. Ministry of Interior* 2013). The Supreme Court has repeatedly emphasised this principle ruling that ‘*the raison d’être* of the state is being a Jewish state’ (*CEC v. Tibi* 2003:21) The nation-state in this context is understood as ‘a framework for organising nations on national, ethnic, cultural, historical, religious basis within a state framework’ (Gavison 1999:26; Rubenstein & Medina, 2005:319), and as such it provides exclusive advantages to the ethnic group that the state is associated with, and imposes ‘a burden’ on those who do not belong to same group (Gavison 2002:54). The nation in the

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'nation-state' is the religiously defined Jewish nation which does not include the entire population of the state but rather a narrower group which constitutes 75% of the population. Approximately 20% are Palestinian Arab (officially known as Israeli Arabs). Thus, the population is legally and politically divided along national lines, and there will always be a minority (or minorities, as the official position is) that do not belong to this nation. The strong constitutional association of the state with an ethnically and religiously defined group and the inevitable existence of minorities animate significant aspects of Israeli constitutional law. This is especially true when it comes to the relationship between the state and the native Palestinians who are Israeli citizens. The meaning, justification and the implications of the constitutional definition of Israel as a Jewish and democratic state are inherently linked to the nation-state paradigm which is often presented as a normative paradigm and not just as a descriptive model. Similarly, the question of who is included in the nation, which in the Israeli context is the question of 'who is a Jew', is one of the most important questions of Israeli constitutional law (*Pesro (Goldstein) v. Minister of Interior* 1995).

The dominance of this paradigm over Israeli constitutional law is palpable in many areas. Much of the academic writing on Israeli constitutional law, especially on areas such as immigration, citizenship, human rights, political participation, equality, and resource allocation, centres on this paradigm or at least engages it through discussions of the Jewish character and its significance, majority-minority relations, majority rights, or minority rights. A majority of authors on these topics defend the use of the nation-state paradigm and the associated hegemony and advantages granted to members of the associated nation (Rubenstein & Medina, 2005; Rubenstein & Yakobson 2009; Gans 2008; Gavison 1999; Gavison 2002; Kretzmer 1990; Barak 2004; Saban 2004). Others take more critical approaches to the nation-state question and highlight some of its problems. Some, like Azmi Bishara (2005) and Baruch Kimmerling (1999) highlight the incompatibility between the Jewish definition and the notion that the state should belong equally to all its citizens, which is an essential characteristic of democracy. Highlighting the ideal of citizenship, Nadim Rouhana and Nimer Sultany note how the Jewish character of the state was the justification for adopting measures that restricted the scope of rights and political activity (Rouhana & Sultany 2003). Gad Barzilai approaches the question from a socio-political point of view that acknowledges the existence of

communities with multiple identities and complex relationships with the state and state law. Barzilai observes that even when liberal values are adopted by the legal system, this does not result in any significant change since there is no recognition of Palestinians as a community, and liberal frameworks assume equal access to political power which is not the case in Israel (Barzilai 2000; Barzilai 2003). Hassan Jabareen makes similar points highlighting the prominence of Jewish identity in constitutional discourse and the failure of the legal system to see Palestinians as a national group but rather as disparate religious sects, which affects the allocation of civil rights (Jabareen 2002).

This approach, which highlights majority-minority relationship in a nation-state, fails to take account of or explain historical events and many of the state policies. For example, it does not take account of the process by which the majority became a majority and the minority became a minority. Nor does it take into account the fact that the majority is comprised of recent immigrants compared to the indigenous minority. It also fails to explain many of the policies that are related to land control and expropriation, political representation, and population control.

In this article, I challenge the dominance of the nation-state paradigm (and its corollary, the majority and national minority tension) and offer a novel way of looking at the Israeli constitutional regime. I argue that in order to understand many features of Israeli constitutionalism, especially (but not exclusively) the relationship between the state and the Palestinians who are also Israeli citizens, we need to go beyond the nation-state paradigm and analyse it through the lens of settler-colonialism. I further argue that settler-colonialism is one of the central features that animate Israeli constitutional law. In this context, settler-colonialism is not necessarily in conflict with the nation-state paradigm, but rather adds the relevant insight that this is a case of a settler-nation in a settler-colonial context, which has implications for the evolution and shaping of the law.

Since the 1990s, there has been a marked increase in academic research that uses settler-colonialism to inform analysis about the Israeli state and society.<sup>1</sup> Most of these studies situate Israel in the same category as other settler states such as Australia, Canada and the United States. The studies encompass a wide range of disciplines. Lawyers and law as a discipline, however, are lagging

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<sup>1</sup> For a list of some titles on the topic, see section 2.2.

behind. Thus far, apart from some studies that make links between settler-colonialism and Israeli land law (especially in the context of the treatment of the Bedouins who are part of the Palestinian population) (e.g. Amara, Abu-Saad & Yiftachel 2013; Bhandar 2016),<sup>2</sup> there have been no publications that explore the links between settler-colonialism and Israeli law in general or Israeli constitutional law in particular. In this article, I will start the task of filling this gap, and chart the way for research in this direction. In doing so, I rely and build on the work of two major authors whose work has contributed tremendously to the study of colonialism. I draw on the work of the anthropologist Patrick Wolfe who is one of the leading theorists of settler-colonialism. Wolfe's major contribution is in proposing 'the logic of elimination' as the main features of settler-colonialism. The logic of elimination-which encompasses a range of practices, not all of them physical or violent- has become one of the leading concepts used in settler-colonial studies. The second author is Anthony Anghie, whose work on colonialism and international law has contributed to shaping a new approach to studying law known as Third World Approaches to International Law.

The exploration focuses on three foundational aspects of Israeli constitutional law. Taking a functional approach, a constitution is not limited to formal written texts but rather extends to rules, principles, theories and interpretations that allocate and regulate power within the state, and govern the relationship of the state with the public (Elkins, Ginsburg & Melton, 2009). The discussion will therefore include a range of sources which include Basic Laws, legislation and case law. The three foundational areas I focus on play a significant role in the constitutional order. I begin with the Declaration of Establishment of the State of Israel, which is a document of constitutional and historical significance that declared the end of one constitutional order and the founding of a new order and polity. The second aspect I examine is the composition of the polity, which was shaped through citizenship and immigration laws and policies. Citizenship, which indicates membership in the polity, claims a central role in defining and regulating the relationship between the individual and the state and is the legal expression of this relationship. The third aspect relates to political representation in the institutions of government. The idea of

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<sup>2</sup> Alexandre Kedar explores the theme of legal geography in settler societies, but he does not explicitly use the term settler-colonialism (Kedar 2002).

representation is central to parliamentary systems and governing in general. Given that this is the first attempt to introduce settler-colonialism as a tool of analysis to understand the development and the operation of the constitutional order, I will end this article with a few remarks and a suggestion for a research agenda.

Before I elaborate on the argument, I want to highlight that the discussion in this article concerns Israel within the 1967 borders. All references to the Palestinians, unless otherwise indicated, refer to Palestinians who are also Israeli citizens. The analysis provided here could also be extended to the occupied West Bank and Gaza Strip, but this article will be limited to Israel and Israeli constitutional law only.

## **2. Israel and Settler-colonialism**

### *2.1. The Emergence of Settler-colonial Studies*

Settler-colonialism has emerged as a new field of study in the past four decades. Many studies, from a variety of disciplines focus on settler-colonialism as a distinct form of colonialism. This area of study emerged from the realisation that colonialism has many strands, and that the types of colonies differ according to a number of factors (Fieldhouse 1967). While some colonies were colonies of ‘occupation’, others were colonies of settlement. Settlement colonies, which Fieldhouse classified as plantation colonies, mixed colonies, or pure colonies, are ‘characterized by a significant and permanent –or at least long-lasting– population of Europeans’ (Fredrickson 1988:219). Settlers in such colonies ‘had some expectation of transplanting “civilization” (basic aspects of the way of life that they had left behind in their countries of origin) to the new environment’ (Fredrickson 1988:219).

Settlement colonies share many features with other forms of colonialism, but they have their own dynamics and unique aspects that call for studying settler-colonialism as a distinct field of inquiry. In settler-colonies, settlers come with the intention to stay (Veracini 2010:53). They form societies distinct from the native population and seek to control land and resources and establish their own economy and modes of governance. Thus, as Caroline Elkins and Susan Pederson argue, settler-colonialism is marked by ‘a particular structure of privilege’ (Elkins & Pederson 2005:4). The privilege is expressed in deep and pervasive inequalities between the settler and indigenous populations. Such

divisions are usually ‘built into the economy, the political system, and the law’ (Elkins & Pederson 2005:4).

Land plays an important role in settler-colonialism. As Patrick Wolfe explains,

[t]he primary object of settler-colonization is the land itself rather than the surplus value to be derived from mixing native labour with it. Though, in practice, Indigenous labour was indispensable to Europeans, settler-colonization is at base a winner-take-all project whose dominant feature is not exploitation but replacement. The logic of this project, a sustained institutional tendency to eliminate the Indigenous population, informs a range of historical practices that might otherwise appear distinct – invasion is a structure not an event (Wolfe 1999:163).

The logic of elimination does not necessarily mean actual physical or violent elimination. Wolfe sees it as having positive and negative dimensions: ‘[n]egatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base’ (Wolfe 2006:388). Highlighting that it is a structure and not an event, Wolfe emphasises that in its positive dimension ‘elimination is an organizing principle of settler-colonial society rather than a one-off (and superseded) occurrence’ (Wolfe 2006:388). It could be pursued through a range of practices that could include actual physical elimination, displacement, or assimilation, which targets the cultural identity, heritage and institutions of the indigenous population.

## 2.2. *Israel as a Settler-Colonial State*

As part of the development of settler-colonialism as a discipline, many writers argue that the Zionist colonisation project is a form of settler-colonialism. The scholarship on the issue started as early as the 1960s, (Sayeg 1965; Trabulsi 1969) and developed throughout the 1970s and 1980s with significant contributions by Maxime Rodinson (1973), Edward Said (1979) and Elia Zureik (1979). These authors highlighted the fact that the Zionist movement started in Europe with the majority of the Israeli society having been recent immigrants from mostly European states. They also emphasised features that are characteristic of settler societies such as the effort to control the land at the price of dispossessing and displacing the native population, deep antagonism and conflict with the native population, and separation between the settler society and the native society. In



1989, the sociologist Gershon Shafir (1989) published a book that used comparative settler-colonialism to analyse important historical events that predated the establishment of Israel and had significant implications for the formation of the Israeli state and society. This study linked state formation and some social and political trends to settler-colonialism.

The use of settler-colonialism as an analytical framework has intensified in the past decade, and a substantial literature on the issue has emerged with academics from a variety of disciplines examining a diverse range of questions through the lens of Israeli settler-colonialism. The studies cover almost the full spectrum of the social sciences and the humanities, including history, sociology, anthropology, gender and women studies, religion, sexuality studies, literature, geography, and citizenship studies (e.g. Piterberg 2008; Robinson 2013; Shafir & Peled 2004; Shalhoub-Kevorkian 2015; Rouhana & Sabbagh-Khoury 2015; Amara, Abu-Saad & Yiftachel 2013; Morgensen 2012; Masalha 2013). On the other hand, this perspective has been rejected by other academics that highlight the historical, cultural and religious ties between the Jewish people and the region. They argue that Jewish settlement in Palestine cannot be seen as colonialism since many Jews view it as their ancestral land. Some writers distinguish Zionist colonisation from other forms of colonisation arguing that the Zionist immigrants were not sent by a colonial power as in, for example, North America or Australia (Dershowitz 2003; Tuvia Frilling 2003; Rubenstein & Yakobson 2009; Aaronsohn 1996).

Despite the opposing views, settler-colonialism provides a useful analytical tool for understanding certain attitudes and trends within the state and society. Settler-colonial states differ in a number of respects from the nation-state model that is presented by authors such as Gavison (2002), Rubenstein and Yakobson (2009) which is mostly based on east and central European states where the hegemony of the dominant national group is often presented as an inevitable and justified outcome of national self-determination of a specific national group. Settler states on the other hand were created as a result of settler-colonialism, and as such, many features of settler-colonialism such as the political domination over the native population and the need to control the land become central themes that define the relationship with the native population. As Wolfe notes in the case of Australia, '[t]he determination "settler-colonial state" is Australian society's primary structural characteristic rather than merely a statement about its origins.' (Wolfe 1999:163). The notion that settler-

colonialism does not ‘end’ with the creation of the settler-state but rather becomes one of its defining feature is also shared by Elkins and Pederson (Elkins & Pederson 2005:3). As such, the political domination, the structure of privilege and Wolfe’s logic of elimination are carried on into the settler state.

In this article, I do not aim to prove that settler-colonialism applies to Israel, but rather, relying on the considerable academic literature on the topic, I take this as a premise. Of course, as in other cases, there are differences between settler-colonialism in Israel and other settler-colonial situations. For example, Israel has a significant proportion of the settler population who are non-European immigrants from Arab countries. Usually known as *Mizrahim*, this group was culturally close to the native population at the time of the migration. Nevertheless, emphasising the religious identity of the group, the founding elites of the state thought of this group as part of the settler group, and it served the role of bolstering the demographic preponderance of the settler nation (Shafir & Peled 2004). As in other settler-colonial situations, diversity and differences among the settler population did not blur the settler-native distinction (Wolfe 1994:94). This highlights a distinct feature of settler-colonialism in Israel but does not negate it; on the contrary, observing that the Zionist logic of elimination is more exclusive than in Australia or the United States, Wolfe argues that ‘Zionist policy in Palestine constituted an intensification of, rather than a departure from, settler-colonialism’ (Wolfe 2012: 136).

### 2.3. *Settler-colonialism and the Law: Tools of Analysis*

Wolfe’s logic of elimination provides a powerful analytical tool to examine how settler-colonialism shapes the constitutional order. The other analytical tool that I adopt is Anthony Anghie’s ‘dynamic of difference’. In exploring the development of the concept of sovereignty in international law, Anghie focuses on colonialism and its underlying logic. He situates the ‘civilising mission’ at the centre of the colonial project, arguing that it has provided the intellectual justification for ‘colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilisation of Europe’ (Anghie 2004:3). This view highlights the differences between the European and the non-European peoples and casts the latter as uncivilised and backwards, and justifies the use of law to ‘bridge’ this gap. Anghie calls this ‘endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilised and the

other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society’ the dynamic of difference (Anghie 2004:3). In this context, ‘legal doctrines play the crucial role of identifying the other – and this has the effect of expelling the other from the realm of law – and then proceeding to develop the doctrines necessary to suppress, transform, redeem the other’ (Anghie 2006:394).

Anghie traces the operation of the dynamic of difference back to the colonial encounters and shows how it has animated the development of international law since then, and has been reproduced in dealing with colonised people and post-colonial states. Based on this dynamic of difference, colonised people were deprived of access to sovereignty, for this was the exclusive domain of ‘civilised’ nations. It was used in the 19<sup>th</sup> century to justify the dispossession of the indigenous population in North America and the colonisation of significant parts of Asia and Africa. It animated the Mandate system created by the League of Nations, and later on through the idea of international development, it justified the imposition of the Bretton-Woods institutions, and most recently, the ‘War on Terror’.

### **3. The Logic of Elimination and Constitutional Beginnings: The Declaration**

The Declaration of the Establishment of the State of Israel (the Declaration) was the first constitutional document of the state. Contrary to the prevailing view among the majority of constitutional lawyers that see it as seeking the inclusion of Palestinians, I examine certain textual and legal aspects of the Declaration, and argue that the Declaration painted a picture of Palestine as *terra nullius*, which facilitated the processes associated with the logic of elimination.

The origins of the Declaration could be traced back to the United Nations General Assembly resolution 181 calling for the partition of Palestine into an ‘Arab state’ and a ‘Jewish state’, which was adopted in November 1947. The plan included stipulations that should be included in a declaration to be made to the United Nations before independence. These stipulations were to become ‘fundamental laws of the State’. As is well known, the Partition Plan was rejected by the Palestinians and the Arab states, and violence between Palestinian volunteer militias and Jewish paramilitary groups ensued. In April 1948 the United Kingdom announced that it would be Mandate in May 1948. The

Declaration was drafted under these circumstances in April/May of 1948 in partial fulfillment of the ‘declaration’ requirement of the Plan (Shahar 2002).

The Declaration could be divided into three parts. The first part chronicles a brief history of the Jewish people, and the Zionist movement, and summons the moral and legal authorities in support of the creation of the Jewish state highlighting the history of persecution of Jews and the Holocaust. The second part is the declaratory one. The third part sets out some of the practical and legal arrangements for the nascent state and includes general statements about its character and aspirations.

### 3.1. *The Positive Dimension of Settler-Colonialism: Erecting the Settler Nation*

The Declaration was a momentous event for the settler society. It marked its transformation from a settler community under British tutelage into a collective of citizens in a state. It created a ‘we the people’ moment. Who was the ‘we’ in the Declaration? In the declaratory paragraphs, after affirming ‘the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State’ (para. 10), the Declaration went on to state that:

Accordingly we, members of the People’s Council, representatives of the Jewish Community of Eretz-Israel and of the Zionist movement, are here assembled on the day of the termination of the British Mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish State in Eretz-Israel to be known as the State of Israel (para. 11).

‘We’ refers here to the members of the People’s Council representing ‘the Jewish Community of *Eretz-Israel*’ and the Zionist movement. But this collective, this ‘we’, is not just particular in the religious/ethnic lines of inclusion, it is also particular in that it is mostly comprised of settlers who joined a collective and a political movement that aimed at creating a state that is purely for the settler community. The settler ethos could be seen clearly throughout the Declaration, but nowhere does this ethos come to life as in following paragraph where the Declaration describes the settlers and their deeds:

Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. Pioneers,

ma'pilim [(Hebrew) - immigrants coming to Eretz-Israel in defiance of restrictive legislation] and defenders, they made deserts bloom, revived the Hebrew language, built villages and towns, and created a thriving community controlling its own economy and culture, loving peace but knowing how to defend itself, bringing the blessings of progress to all the country's inhabitants, and aspiring towards independent nationhood (para. 3).

This paragraph glorifies the heroism of Jewish immigrants: not just simple immigrants, but 'pioneers', who came to the country despite the barriers, and who were very active and energetic in building the country ('made deserts bloom') and building their own community that has its own separate and distinct economy, culture, and language ('built villages and towns, and created a thriving community controlling its own economy and culture'). This immigration and settlement was not for the benefit of the settlers only. In the tradition of the civilising mission, the settlers also brought 'the blessings of progress to all the country's inhabitants'. The motifs of immigration, settlement, building and benefits for the other 'inhabitants' reverberate throughout the Declaration.

### *3.2. The Declaration's Colonial Encounter*

As a Declaration of the Jewish state, its main themes concerned the Jewish people. But the starting point of the Declaration was not the people but the land. The opening paragraph emphasised that

*Eretz Yesrael* [Palestine] was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.

After opening with the land, the Declaration moves on to chronicle historical events. The history here is not of the geographical area that the Declaration opened with, but of a trans-territorial Jewish people. It is described as a community trying to re-establish its state creating the impression that it seeks to do so on a vacant land. Not only is it vacant land, but, 'a desert' that lacks civilisation, culture or progress. The land needs the settlers to settle on it and reverse its horrid conditions and 'make the desert bloom'. As Orit Kamir observes, as a literary text, the Declaration empties the land from the majority

of its inhabitants (the Palestinians) (Kamir 1999). In essence, it paints a picture of the land as *terra nullius*. The negative dimension of Wolfe's understanding of settler-colonialism, the dissolution of the native society, is clear to see here. Having done that, the Declaration moves to the positive dimension and erects a settler-colonial society by admiring the pioneering settlers and their achievements as explained above.

But presenting the land as an empty desert did clash with the realities on the ground. The reality of the presence of a native majority which was resisting what it saw as an invasion was strong and could not be totally ignored, and it made its way to the Declaration where its framers

appeal - in the very midst of the onslaught launched against us now for months - to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions (para. 15).

The indigenous Palestinians, or 'the Arab inhabitants of the State of Israel', are not part of the history of the land but are only part of the present, and mainly when they plunge into the last parts of the text in the form of assailants. And when they do enter the text, they are presented as merely passive 'inhabitants', as opposed to the active Jewish pioneers who 'made the desert bloom'.

This paragraph could also be read as an invitation to join the emerging state. Indeed, this oft-quoted paragraph is seen as one of the sources of equality in Israeli law as it offers 'full and equal citizenship' (*Adalah v. Minister of Religious Affairs* 2000; *Ka'dan v. Land Administration of Israel* 2000). However, in addition to this appeal, this paragraph also creates, or at least reinforces, the conception of the emerging (Jewish) settler nation which has exclusive control over the state as a matter of law. It creates the dichotomy of the we/you, where 'we' are the (Jewish) sovereign people who, by virtue of this sovereignty, can offer 'you' - the 'Other' - citizenship and equality. This is not citizenship as of right based on habitual residence, nor is it citizenship based on a 'natural and historic right', similar to the rights mentioned in the Declaration as belonging to the Jewish people. It is citizenship that 'we', the civilised and cultured settler nation, will 'give' to 'you', the violent assailants who happen to be here, if you attain a level of civility and 'preserve the peace'.

It is reasonable to view the invitation to join the state on the basis of equal citizenship as a sign of commitment to equality, as it is often presented (e.g. *Adalah v. Minister of Religious Affairs* 2000); *Ka'dan v. Land Administration of Israel* 2000; Rubenstein 2000). This gesture, however, should be assessed against two important points. The first point is the composition of the population in the area that was assigned to the Jewish state according to the 1947 Partition Plan. According to the report of the United Nations Special Committee on Palestine (UNSCOP), 49.9% of the population in the area designated for the Jewish state was Palestinian Arab in 1947 (UNSCOP Report 1947).<sup>3</sup> Thus, the Declaration does not include 49.9% of the population but invites them, after the fact, and conditionally, to join as citizens. Those who are not part of the 'we' are a little less than the majority of the population if not the majority. The second point is that by the time the Declaration was made, about 300,000 Palestinians had been expelled or fled from the areas which were under the control of the embryonic state as part of a wider process of displacement (Morris 2004; Pappé 2007). At the same time the text of the Declaration was offering conditional citizenship and equal rights to the Palestinians, military and para-military groups that answered to the signers of the Declaration were actively working on expelling them. About 85% of the Palestinians who were in the areas that fell under Israeli control had been expelled or fled by the end of the war in 1949.

### 3.3. *The Legal Status of the Declaration*

Even though the Declaration is not applied directly by courts like Basic Laws - which have constitutional status- it is a relevant constitutional document, and has gained more prominence after the enactment of *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*. Both Basic Laws refer to the 'spirit of the principles set forth in the Declaration' as a reference point for upholding human rights. These principles include 'freedom, justice and peace as envisaged by the prophets of Israel...complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex...freedom of religion, conscience, language, education and culture' (para. 12).

But this rise of constitutional protection of rights is relatively recent. The universal rights and values mentioned in Declaration did not impose legal limits

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<sup>3</sup> Other UN documents put the percentage of the Arab population in the Jewish state at 50.5%. See Ad Hoc Committee on the Palestinian Question: Report of Sub-Committee 2, (11 November 1947).

on the powers of the different branches of the state. The Supreme Court ruled, as early as 1948, that the Declaration is meant to announce the creation of the state as a matter of international law. While it does express ‘the people’s vision and its ‘I believe’” (*Zeev v. Officer in Charge the Tel-Aviv Urban Area* 1948: 89), it is not a constitutional statute that regulates the validity of legislation. The status of the Declaration has evolved since then, and it is now considered to play a role in the process of interpretation of legislation (Rubenstein & Medina 2005:40). It is seen as ‘anchoring the basic principles of the regime’ and includes a number of principles that are foundational (*Shakdi’el v. Minister of Religious Affairs* 1988:275). Thus, based on the spirit of the Declaration, a number of rights and freedoms were recognised as part of Israeli law. However, these rights and principles were recognised in cases of judicial review of administrative actions only. Legislation was immune from judicial review based on the principles enshrined in the Declaration (*Kol Ha’Am v. Minister of Interior* 1953; Kamir 1999:522).

The principles and values in the Declaration are not limited to the universal values. Many of the values are inherently connected to the settler nation. As former Chief Justice Aharon Barak says, the principles of the Declaration include ‘[t]he connection between the Land and the Jewish people, the right of the [Jewish] people over the Land, the revival of the Hebrew Language and the striving for peace’ (Barak 1994:306). The Declaration therefore does not always serve as an interpretative tool for the promotion of human rights: at times, especially when the dominance of the settler nation and its underlying ideology are challenged, the Declaration also serves as a tool to deny them.

The prime example where the basic principles emanating from the Declaration were used to deny rights is the 1965 ruling in the case of *Yerdor v. CEC* (1965). In this case, the Supreme Court relied on the principles in the Declaration to affirm a decision by the Central Elections Committee (CEC) prohibiting candidates from participating in the general elections despite the absence of statutory authority for taking such action. The disqualified slate, known as ‘the Socialist List’, included members of the Palestinian *Al-Ard* organisation which was declared an illegal organisation for sympathising with Arab nationalism and calling for a just solution to the Palestine problem based on self-determination for the Palestinian people. In his opinion, then Chief Justice Agranat stated that in order to examine whether the CEC was authorised



to bar *Al-Ard's* participation, a number of constitutional facts should be emphasised. Quoting the Declaration, he stated that there is no doubt that

not only is Israel sovereign, independent, and freedom-seeking and characterised by a regime of the rule of the people, but it was also created 'as a Jewish state in Eretz Yesre'el' [and there is no doubt] that the act of its creation was carried out, first and foremost, by virtue of 'the natural and historic right of the Jewish people to live, like all other peoples, standing in its own right in its sovereign state, [and there is no doubt] that this act embodied the ambitions of the generations for the redemption of Israel' (*Yerdor v. CEC* 1965:385).

Based on this constitutional fact, Agranat concluded that the CEC was acting within its powers when it barred the slate from participating in the elections.

Even when the Declaration was cited as a normative source in recognising equal rights of the Palestinians citizens, as in the case of *Ka'dan*, a closer and more careful reading of the ruling and the context shows that it is in fact squarely within the settler-colonial framework. The *Ka'dan* ruling concerned a petition to the Supreme Court against the Israel Land Administration and the Jewish Agency for refusing to sell land in the town of *Katẓir* (a town built on land expropriated by the state from other Palestinians) to a Palestinian citizen. The state justified the refusal arguing that because the land was allocated to the Jewish Agency, which, beholden to Jews only, is justified in discriminating against Arab. The Court, using an antidiscrimination approach, decided that the values of the Jewish and democratic state do not justify discrimination against non-Jews.

In providing a deeper analysis of this case, Hassan Jabareen argues that the Court's approach to equality represents a new form of 'Israeliness' that is only future-oriented, which could include Palestinians, but this would be conditional upon assuming a new identity which would accept the ideological values of Zionism (Jabareen 2002:197). As Jabareen observes, the Court viewed the petitioners as individuals who do not challenge the Jewish identity of the state or the history of settlement. They are portrayed as agreeing with Zionist principles, even those that conflict with their interests.<sup>4</sup> Furthermore, they were

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<sup>4</sup> '37. The petitioner's counsel does not dispute the important role played by the Jewish Agency in the history of the State of Israel, nor does he criticise the policy adopted over many years with respect to the establishment of Jewish settlements throughout the country. The petitioner states as follows in the petition:

not seen as an indigenous people with land claims, but merely belonging to a minority among the many minorities in Israel with the only collective that amounts to a nation being the settler nation.<sup>5</sup> These observations situate the *Ka'dan* ruling as part of the settler-colonial process: while the negative aspect of (judicially) dissolving the native population and turning them into many minority groups that have no problem with the colonisation process is present, the positive dimension is also alive when the Court goes on to highlight the prominence of the new (Jewish) settler society. Indeed, Wolfe's observations about *Mabo v. Queensland* (1992) apply here- the ruling in *Mabo* removed the doctrine of *terra nullius* at the point when it had completed its historical task (Wolfe 1994:122). Similarly, the *Ka'dan* ruling was needed to congeal and legitimate the earlier land expropriation which amounts to 70% of the land that the Palestinians used to own (Abu Hussein & McKay 2003:7), and to grant the state, its colonisation efforts, and its judicial system, 'a façade of legitimacy', as Baruch Kimmerling puts it (2002:1121).

#### 4. The Logic of Elimination and Population Laws and Policy

Land is at the centre of settler-colonialism. The early Zionist maxim of '*kibboush haAdamah*' [occupation of land], and the early formation of a special organisation (the Jewish National Fund) with the mandate of acquiring land in Palestine under the Ottomans and later under the British Mandate are only examples of the centrality of the control of land for the Zionist movement. But the presence of the natives on the land is a barrier for settler-colonialism. To quote Patrick Wolfe

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"This petition is primarily forward-looking. It is not our intention to examine anew the long-standing policy by virtue of which (with the assistance of settlement organizations) settlements - *kibbutzim*, *moshavim*, and outposts -- were established in which, almost always, only Jewish residents lived and live. The petitioners are not focusing their claims on the legitimacy of the policy practiced in this area in the period prior to the establishment of the State and during the years since its establishment.'" (*Ka'dan v. Land Administration of Israel*: 284-285).

<sup>5</sup> 'Indeed, the return of the Jewish people to their historic homeland is derived from the values of the State of Israel as both a Jewish and democratic state. From these values -- each separately and from their amalgamation -- several conclusions arise. Hebrew, for instance, is necessarily the principal language of the State, and its primary holidays will reflect the national renewal of the Jewish nation. Jewish heritage constitutes a central component of Israel's religious and cultural heritage, and a number of other conclusions are implicit, but need not be expanded upon at present.... The State of Israel is a Jewish state in which various minorities, including the Arab minority, live. Each of the minorities living in Israel enjoys complete equality of rights.' (*Ka'dan v. Land Administration of Israel*: 281-282).

(who refers to the Australian historian Deborah Rose), ‘to get in the way of settler-colonisation, all the native has to do is stay at home’ (Wolfe 2006:388). Since the control of land by the settler society is inherently related to the demographic presence of settlers, demography becomes a central issue for settler-colonialism. Gershon Shafir (1989:13) expresses this centrality in his discussion of the ‘demographic interest’, which emerges from the interrelationship of land and population.

Elimination, as noted earlier, could take many forms which are not necessarily physical or violent. Some of these forms are present in the case of Israel, and these were sanctioned and aided by legal frameworks which were made possible by the settler-colonial constitutional order. Indeed, where violence stopped being effective, law became an effective tool in the elimination process. In this part, I will discuss some of the most important junctions related to laws and policies that regulate population.

#### 4.1. *Elimination by Expulsion: The Nakba and its Aftermath*

Since the early years of the twentieth century, the leaders of the Zionist movement were preoccupied with what they called ‘the Arab Problem’ or ‘the Arab Question’. The problem was the existence of a large number of Palestinian Arabs, which would make the task of establishing a Jewish state -which was envisioned to have a Jewish majority- hard if not impossible. Israel’s founding Prime Minister, David Ben-Gurion argued that the fact that more than 40% of the population in the area allocated to the Jewish state under the 1947 plan were Arab ‘questions our ability to maintain Jewish sovereignty... Only a state with at least 80 per cent Jews is a viable and stable state’ (Pappe 2007:48). The transfer of the Arab population was a central theme in the thinking about the ‘Arab question’. The idea can be traced back to the beginning of political Zionism in the late nineteenth century (Masalha 1992), though it was discussed and took a more concrete shape in the 1930s and 1940s. This mindset, which is squarely within Wolfe’s logic of elimination, was the prevailing mind-set on the eve the war in 1948.

The skirmishes which started in December 1947 developed into a full-fledged war in May 1948. Between December 1947 and the end of the war in 1949, the overwhelming majority of the Palestinians living in the areas that became Israel fled or were expelled (Masalha 1992; Morris 2004; Pappe 2007; Shlaim 1995). This massive exodus reduced the number of Palestinians in Israeli-

controlled areas by 80%-85%. The leadership of the new state saw this demographic shift as a major war gain (Morris 1993:153), and approvingly described the exodus of the Palestinians as a great achievement and ‘a miracle’ (Morris 2004:348). In addition to the expulsions, the state took a number of measures in order to block attempts to return and in order to make return unattractive, such as destroying the villages from which the refugees fled. Law played an important role in the process of preserving the ‘war gains’ and contributed to reducing the number of the Palestinians.

Citizenship was only regulated in 1952 with the enactment of the *Citizenship Law-1952*. But even before it was enacted, Israel admitted hundreds of thousands of (Jewish) immigrants, and at the same time, continued to expel Palestinians. This was facilitated by conducting a census, and the enactment of a number of statutes which were meant to count and register the population. Essentially, these were the tools that aimed for completing the task of elimination by expulsion. During the war, even before the Israeli army had gained control over many parts of what became Israeli territory, the authorities were debating the best way to block the trickle of refugees attempting to return in order to ‘freeze’ the demographic picture then (Leibler & Brelau 2005:891; Robinson 2013:72-76). One of the ways to do so was to count and verify the identity of those who did not leave to make it easier to distinguish between returning refugees, who were designated as ‘illegal’, and Palestinians who did not leave, who were deemed ‘lawful’ (Leibler & Brelau 2005:892). As in other colonial situations, the census also played a role in the creation and maintenance of different population categories, the effective surveillance of the population (mainly Palestinians), and facilitated devising methods for their control (Leibler 2011).

The registration of the inhabitants was done according to *Emergency Regulations (Registration of Inhabitants), 1948*, and after February 1949, according to the *Inhabitants Registration Ordinance-1949*. Residency, in the sense established by this ordinance allowed the ‘legal’ residents to stay in the country. The officials of the Interior Ministry interpreted the provisions of the ordinance narrowly to exclude as many Palestinians as possible (Robinson 2013). Many of the ‘illegal’ residents were expelled after large ‘sweeping’ campaigns by the Israeli authorities. The expulsions were tempered somewhat by petitions to the Supreme Court. The Court’s approach, however, was not consistent and relied mainly on technicalities (Hofnung 1991:144). The expulsion was facilitated

further by the introduction of the *Prohibition of Infiltration Ordinance-1954*. In addition to expulsion, fatal force was used as a matter of policy in order to deter returning refugees. Morris observes that by 1956, 2700-5000 refugees were killed trying to return (Morris 1993:125-133, 145-147).

#### 4.2. *Elimination by Grant of Citizenship*

The *Citizenship Law-1952* prescribed a number of ways to acquire citizenship. For Jews, it referred to the *Law of Return-1950*. Citizenship for this category was automatic. Acquisition of citizenship for non-Jews, mainly Palestinians, was granted based on residence. According to section 3, non-Jews who were residents of Palestine had to meet a number of conditions in order to obtain Israeli citizenship. They had to prove uninterrupted residency from May 1948 up to the day the *Citizenship Law-1952* came into force (14 July 1952). While the law creates channels of inclusion and grants of citizenship, it is important to pay attention to the nuances to see the flip side of citizenship: for when it defines who is included and how, law also defines who is excluded.

The *Citizenship Law-1952* essentially deprived all of the Palestinian refugees from the right to citizenship. It gave the legal stamp of approval for the elimination by expulsion making sure that this elimination is not reversed. For those who were not expelled the conditions of section 3 proved to be hard to meet for many. Because of the war situation and the arbitrary policies adopted since 1948, many did not meet the criteria. The result was that a significant number were not entitled to citizenship and had to *naturalise* (Robinson 2013). This group also lost most of their property to the state because they were deemed ‘absentees’ according to the *Absentee Property Law-1950*, giving rise to the oxymoronic category of ‘present absentees’. Naturalisation was subject to the discretion of the Minister of Interior and was not a matter of right, and many remained stateless until the law was amended in 1980.

#### 4.3. *The Negative and Positive Dimensions of Settler-colonialism: The Law of Return and the Settler Society*

The eliminatory effect of the *Citizenship Law* cannot be fully appreciated without considering the *Law of Return-1950*. The law, whose main section provides that ‘[E]very Jew has the right to ascend [immigrate] to the Country’, is seen as one of main expressions of the Jewishness of the state, in addition to being its main immigration law. The Supreme Court regards it as a constitutional ‘Basic Law in

essence', and see is as 'the most fundamental of all laws' (*Toshbeim v. Minister of Interior* 2005:733). The right is given to anyone who is Jewish, his/her children, grandchildren and their spouses. The right is almost absolute; there are only a few exceptions relating to public health and safety.

The *Law of Return* constitutes the cornerstone of the positive dimension of settler-colonialism as it presents a unique and swift channel of gaining citizenship which is distinguishable from naturalisation, or citizenship by residence. It also distinguishes the Jewish citizens from other citizens in that it sees all Jews as one unit subject to one rule whatever their place of origin is. Thus, Jews who were citizens of Mandate Palestine prior to 1948 were deemed as '*olim*' (ascenders- Jewish immigrants) according to section 4 of the law. This provision reflects the desire to eliminate any distinction between Jews who were born abroad and those born in Mandate Palestine/Israel. Despite the fact that section 4 no longer has any practical relevance because of changes introduced in 1980 (although it is still formally valid), it still carries symbolic and political significance. Barak for example cited section 4 to emphasise 'the inclusive nature and broad conception of the *Law of Return*' and that '*Aliya*' is not a technical term. It is a social, value-laden, and national term' (*Toshbeim v. Minister of Interior* 2005: para.23). In this sense, the *Law of Return*' is the main factor in deciding the boundaries of the polity. The demographic impact of the *Law of Return* also highlights the positive dimension of Israeli settler-colonialism. In the years 1948-2011, more than three million people immigrated to Israel under the *Law of Return*, with (Jewish) immigration reaching 199,516 in 1990 (Statistical Abstract of Israel 2012:232). Approximately 61% of all citizens classified as 'Jews and others' (others being non-Jewish family members eligible for immigration under the law) are reported to have a place of origin other than Israel. About 30% of 'Jews and others' were foreign born in 2011. This figure was 64% in 1948 (Statistical Abstract of Israel 2012:160).

The population policies today still follow the main logic of elimination. The issue of demography is still at the heart of Israel's population policies. More restrictions are placed on the Palestinian citizens in Israel, mainly in the form of banning family reunification with other Palestinians, and more efforts are directed at increasing Jewish immigration (Masri 2013). These policies and the associated laws, which are central to Israeli settler-colonialism, are at the core of Israeli constitutionalism. For many, and indeed according to the Supreme Court, the Jewish majority is an essential component of Israel's definition as a Jewish

state, and is seen as one of the foremost manifestations of the Jewishness of the state (*Ben Shalom v. CEC* 1989; *CEC v. Tibi* 2003; *Galon v. The Attorney General* 2012). The Court even intimated that demographic concerns (of the settler society) are appropriate considerations to take into account when devising policy and enacting legislation, even if they violate protected constitutional rights (Masri 2013).

## 5. Political Representation

Elections are more than a mechanism to choose political representatives: political participation –to put it in the words of the German Constitutional Court- also means participating ‘in the legitimation of state power.’ (Maastricht Treaty Case, 1993: 239). In a settler-colonial context, the participation of the indigenous population in the electoral process is seen as a form of assimilation. In Israel, all citizens are entitled to vote, but this almost universal franchise is controlled by certain constitutional provisions and principles that prevent electoral politics from being a vehicle to challenge the dominant political ideologies that the state was built on.

### 5.1. *Basic Law: The Knesset and the Dynamics of Difference*

In 1985, the Knesset enacted section 7A of *Basic Law: The Knesset*. This section was essentially the codification of the principle that was adopted in the *Yerdor* case (discussed in section 3.3 above). As it stands today, section 7A bans the participation in elections of individuals and parties if their goals and actions, expressly or by implication include ‘negation of the existence of the State of Israel as a Jewish and democratic state’ [s.7A(1)], or ‘incitement to racism’ [s.7A(2)], or ‘support for armed struggle by a hostile state or a terrorist organization against the State of Israel’ [s.7A(3)].

The Supreme Court has dealt with section 7A in a series of cases. The most elaborate judicial discussion of section 7A was in the *Tibi* case (2003). In this case, discussing the interpretation of section 7A, Barak highlighted the democratic features of the state such as periodical elections and fundamental human rights. In discussing the ‘Jewish’ element of the definition, he highlighted its components, which

have a Zionist perspective and a traditional perspective at the same time . . . At their centre stands the right of every Jew to make *aliya* [Jewish immigration to Israel] to the State of Israel, that in Israel Jews constitute a majority, Hebrew is

the main official language of the state, and its main holidays and symbols reflect the national emergence of the Jewish people, the heritage of Israel is a central component of the state's religious and cultural heritage. A list of candidates, or a candidate, shall not participate in the election if their rejection or negation of these characteristics is central and dominant in their ambitions and activities (*CEC v. Tibi* 2003:22).

Based on this interpretation, Barak ruled that while the evidence against Azmi Bishara and the party he chaired – the National Democratic Assembly- did not meet the evidentiary threshold, Barak commented that Bishara's approach to the idea that Israel should be the state of all its citizens 'comes close, in a dangerous manner, to the possibility that negates the existence of the State of Israel as a Jewish state' (*CEC v. Tibi* 2003:43).

The Court, along with many academics, justified the restrictions of section 7A using the principle of 'defensive democracy' - the idea that democracy as a system of governance should have mechanisms to protect itself. This often means that anti-democratic forces should not be allowed to benefit from the right to participate in elections since their goal is to eliminate democracy (*Yerdor v. CEC* 1965; *CEC v. Tibi* 2003; Rubenstein & Medina 2005:588). This is quite understandable when it comes to rejecting democracy or democratic principles such as equality or universal suffrage, but it becomes harder to justify when 'defensive democracy' is invoked to exclude parties that reject the Jewish definition of the state because of democratic and egalitarian principles. Nevertheless, the idea of 'defensive democracy' has become so deeply entrenched in legal and academic discourses that the Court and academics use it to justify arrangements such as section 7A.

It should be highlighted that virtually in all cases other than the landmark 1965 *Yerdor* case, the Court allowed the candidacy to stand and the candidates or parties did participate. Section 7A imposes restrictions on political participation but does not inhibit it. Despite the success of the Court in tempering the impact of section 7A it is hard to ignore its expressive role. Law has an expressive function: it expresses certain sentiments about social norms or phenomena. This is even more pronounced when it comes to constitutional law which, in addition to its functional role, also reflects constitutional norms and a certain image of the political community. In this sense, section 7A makes statements about the undesirability of certain political beliefs. But more



interesting for our purposes are the justifications that many mainstream constitutional law scholars provide for section 7A. Amnon Rubenstein and Barak Medina, for example, offer two understandings of ‘defensive democracy’. The first understanding entails the defence of a democratic regime from violent transformation (Rubenstein & Medina 2005:605). The second understanding takes into account features of democracy that need to be defended more broadly. Those include basic human rights including the right of the Jewish people to self-determination, which Rubenstein and Medina see as a precondition for the protection of the basic rights of the Jewish collective. They argue that rejecting the need for a Jewish majority or Jewish self-determination in the form of a state could result in endangering the life of Jewish citizens since this is the only possible way to ensure the security of Jews. They argue that other constitutional arrangements, such as a bi-national state that also gives expression to Palestinian identity, could result in ‘severe [violent] disturbances’ (Rubenstein & Medina 2005:612). Thus a political party that aims to change the Jewish character of the state is seen as undemocratic because it disregards the wishes of the majority to define the state as Jewish (Rubenstein & Medina 2005:611), it is also seen as condoning violence.

Ruth Gavison provides a somewhat similar position. She would tolerate a party with a ‘preference’ to change the Jewish character of the state to a ‘state of all its citizens’ if that position is accompanied by a commitment to democracy and an acknowledgment that the majority does not accept such a demand (Gavison 2007:165-167). But she thinks that candidates or parties should be banned if they assert ‘that the continuing existence of Israel as a Jewish nation-state is not legitimate and could not be reconciled with democracy and human rights’ (Gavison 2007:167) because such a position means a rejection of the will of the majority, and a willingness to turn to ‘foreign’ elements in order to change it. Gavison prefaces the discussion with a contextual comment on security and war, and it is clear that she equates the rejection of the Jewish definition of the state with some kind of a security threat (Gavison 2007:166). Echoes of this position linking could also be heard in the *Yerdor* decision. In his short opinion, Justice Sussman asserted that for a party to be banned from the elections, its objectives should ‘seek to eliminate the state, to visit a holocaust upon the majority of its residents for whom it was created, and to join its [the state’s] enemies’ (*Yerdor v. CEC* 1965:389). He even compared the situation to a situation

where someone plans to get elected to the Knesset in order to hurl a hand grenade in its halls (*Yerdor v. CEC* 1965:390).

This justification that Rubenstein, Medina and Gavison provide for section 7A is one manifestation of the settler-colonial outlook. It reflects a position that sees equal (even if limited) manifestation of Palestinian self-determination as necessarily causing violence, and that sees a Jewish majority as necessary for security and even for democracy (Rubenstein & Medina 2005:626). This dichotomy that these authors create -of Jewish majority or self-determination/ democracy versus Palestinian majority or a bi-national state/violence- echoes dichotomies that were created during colonial encounters in the sixteenth and seventeenth centuries. What we see here is an intellectual exercise similar to Anghie's dynamic of difference: Jewish self-determination and dominance is seen as 'universal', 'civilised' and 'liberal'. On the other hand the native Palestinians demanding similar rights are portrayed as 'particular', 'uncivilised' and violent. Section 7A is therefore necessary to bridge this gap and normalise the 'aberrant' natives and protect the Jewish majority by limiting the right of the Palestinians to participate in elections if they demand rights similar to those reserved for the Jewish collective only. The 'dynamic of difference' is present in both the process of conceptualising the difference and the process of 'filling the gap'.

### 5.2. *Elimination through Conformism*

While the Court did play a role in tempering the impact of section 7A (*Neiman v. Chairman of CEC*, 1988; *CEC v. Tibi*, 2003) , still, the fact that in almost every single elections at least one Palestinian group or candidate need judicial intervention to stand in the elections serves to delegitimise the candidates and the candidacy. More importantly, section 7A plays a role in the positive dimensions of settler-colonialism in that it helps shape the society and provides a model of what assimilation in this context could be. Although section 7A does not necessarily block the access of Palestinian citizens to the Knesset, it does seek to block the access of ideas that actively seek to challenge the status quo based on universal values. What the section does, to put it in the words of former Chief Justice Meir Shamgar, is to 'screen, in advance, what the image of the Knesset and its elected members will be after the elections' (*Mi'ari v Speaker of the Knesset* 1987:211). The goal of section 7A is to stop the natives from using electoral politics in order to challenge the dominance of the settler society and

to create a new individual political actor with no claims that challenge the existing structure. This is essentially a form of assimilation by acquiescing to the status quo even if it is against the immediate interests of the native. To be clear, full assimilation is not really possible because of the more exclusive nature of Zionism that Wolfe highlights, but a form of conditional and limited inclusion is possible. Settler-colonialism in this sense allows incorporation that dissolves the native society into individuals or religious groups or clans, devoid of any uniting national consciousness. At the same time this does not mean full assimilation in the dominant settler society especially that this society does not recognise an 'Israeli nation' (*Tamarin v. State of Israel*, 1972; *Ornan v. Ministry of Interior* 2013). It means re-shaping the indigenous society as a group of individuals at the margins of the settler society (Bishara 2005).

## 6. Conclusions: A new Paradigm and Research Agenda

Over the past few years, many studies have demonstrated the utility of settler-colonialism as a framework to explain and theorise certain social and political patterns in Israel. In this article I apply this lens to Israeli constitutional law, and demonstrate how settler-colonialism shapes and animates Israeli constitutional law. This could be seen in three foundational aspects of Israeli constitutional law. The negative dimension of settler-colonialism, as conceptualised by Wolfe, is present in the Declaration of Establishment of the State. It is also present in immigration and citizenship laws that highlight demography and the majority status of the settler group, which also indicates the undesirability of the indigenous minority. The positive dimension is present in the strong emphasis on Jewish immigration, culture and heritage. It is also present in other junctures such as the right to political participation. We can also see that some of the justifications for adopting certain exclusionary measures, as in the case of political representation, mirror some of the justifications that were put forward in the past to justify colonialism and colonial legal structures as Anghie demonstrates in his discussion of the dynamic of difference.

The impact of settler-colonialism on state law is hardly surprising, especially that settler-colonialism, as Wolfe describes it, is a structure not an event. One of the central threads that combines the three areas of constitutional law covered here is the emphasis on the Jewish definition of the state. The definition of the state is not merely descriptive but normative; the Supreme Court has emphasised that the state *must* have a Jewish majority, and highlighted

the primacy of other elements such as Jewish culture and heritage, and Zionism and Jewish settlement (see, e.g., *CEC v. Tibi* 2003; *Gaza Shore Regional Council v The Knesset* 2005). In this sense, the definition of the state as a Jewish and democratic state essentially encapsulates the negative and positive dimensions of settler-colonialism. Given the significance of the definition for the entire legal system, one can even argue that settler-colonialism permeates the whole legal system. The definition, according to Aharon Barak, has a ‘normative constitutional status that is above the law’ (Barak 2004:83). Barak sees the values of ‘Jewish and democratic’ as ‘standards for the interpretation of the purposes of all Basic Laws’ (Barak 2004:83; *Horev v. Minister of Transport* 1997). According to *Basic Law: Human Dignity and Freedom*, and *Basic Law: Freedom of Occupation*, and as interpreted by the Supreme Court, consistency with these values is a condition to any restriction on human rights. Barak goes as far as suggesting a general interpretative presumption that assumes ‘that the general purpose of every legal text is to fulfil Israel’s values as a Jewish and Democratic state’ (Barak 2004:83). The centrality of the definition, and its relationship with settler-colonialism, it could be argued that the legal system will always be available to facilitate settler-colonial policies and practices, and give them the legal cover and legitimacy.

This observation about the legal system and its potential role in facilitating settler-colonial policies and practices provides us with better tools to understand and analyse law. An analysis that takes into account settler-colonialism and its impact can provide a historically, socially and politically informed understanding of law and its function. It can help us understand how law contributes to creating the ‘structure’ of settler-colonialism, as Wolfe views it, and how it also operates within the ‘structure’ to maintain it and the maintain the privileges of the settler population. Furthermore, understanding the relationship between settler-colonialism and law could also be an opening to think about possibilities of decolonisation, its shape, and what role law could play in the decolonisation process. Analysing settler-colonialism as a ‘structure’ as Wolfe advises, and the way it works and its legal nuts and bolts will be a first step towards thinking about decolonisation.

The observation that settler-colonialism permeates the legal system opens up the opportunity to explore how settler-colonialism shapes and animates other areas of law. In this article I try to demonstrate how this could be done in the field of constitutional law, and how this provides an important additional framework for understanding the existing legal arrangements. While

we see beginnings of such inquiry in the area of property law, research in this area should be extended beyond the Naqab/Negev to explore how settler-colonialism drives the development of the law. Other areas of law, especially those related to the use of violence such as criminal law and procedure and military law, or areas where there is jurisdictional differentiation such as family law and education, could be fertile land for research on the relationship between settler-colonialism and the law.

### References

- Aaronsohn, Ran (1996) 'Settlement in Eretz Israel: A Colonial Enterprise? 'Critical' Scholarship and Historical Geography,' 1(2) *Israel Studies* 214.
- Abu Hussein, Hussein & Fiona McKay, *Access Denied Palestinian Land Rights in Israel*. London: Zed Books.
- Amara, Ahmad, Ismael Abu-Saad and Oren Yiftachel (2013) *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev*. Cambridge: Harvard University Press.
- Anghie, Anthony (2004) *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press.
- \_\_\_\_\_ (2006) 'On Critique and the Other,' in A. Orford, ed., *International Law and its Others*. Cambridge: Cambridge University Press.
- Barak, Aharon (1994) *Interpretation in Law*. vol 3 Jerusalem: Nevo Publishing (Hebrew).
- \_\_\_\_\_ (2004), *A Judge in a Democratic Society* (In Hebrew). Jerusalem: Nevo Publishing.

- Barzilai, Gad, (2000) 'Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics, and the Israeli Arab-Palestinian Community,' 34(3) *Israel Law Review* 425.
- \_\_\_\_\_ (2003) *Communities and Law: Politics and Cultures of Legal Identities*. Ann Arbor: University of Michigan Press.
- Bhandar, Brenna (2016) 'Possession, Occupation and Registration: Recombinant Ownership in the Settler Colony,' 2(6) *Settler Colonial Studies* 119.
- Bishara, Azmi (2005) *From the Jewish State to Sharon: A study in the Contradictions of the Israeli Democracy*. Ramallah: Muwatin (Arabic).
- Dershowitz, Alan (2003) *The Case for Israel*. Hoboken, NJ: John Wiley & Sons.
- Elkins, Zachery, Ginsburg, Tom and Melton, James (2009) *The Endurance of National Constitutions*, Cambridge University Press, Cambridge.
- Elkins, Caroline and Susan Pederson (2005) 'Settler-colonialism: A Concept and its Uses' in. Caroline Elkins and Susan Pederson eds., *Settler-colonialism in the Twentieth Century*. London and New York: Routledge.
- Fieldhouse, David K. (1967) *The Colonial Empires: A Comparative Survey from the Eighteenth Century*. New York: Delacorte Press.
- Fredrickson, George (1988) *The Arrogance of Race, Historical Perspectives on Slavery, Racism and Social Inequality*. Hanover: Wesleyan University Press.
- Frilling, Tuvia (2003) *An Answer to a Post-Zionist Colleague*. Tel-Aviv: Yedi'ot Aharaonot Publisher & Sefrei Hemed (Hebrew).
- Gans, Chaim (2008) *A just Zionism: On the Morality of the Jewish State*. New York: Oxford University Press.
- Gavison, Ruth (1999) *Israel as a Jewish and Democratic State: Tensions and Possibilities*. Jerusalem, Israel: VanLeer (Hebrew).
- \_\_\_\_\_ (2002) 'The Jewish state: the principle justification and the desirable character'. *Tkhelet* 13: 50–87 (Hebrew).
- \_\_\_\_\_ (2007) 'Thoughts about the significance and implications of 'Jewish' in the expression 'A Jewish and democratic state,' in Ravitzky Aviezer and Stern Yedidiaa eds, *The Jewishness of Israel*. Jerusalem: Israel Democracy Institute, pp. 107–178 (Hebrew).
- Hofnung, Menachem (1991) *Israel- Security Needs vs. The Rule of Law*. Jerusalem: Nevo Publishing (Hebrew).

- Jabareen, Hassan (2002) 'The Future of Arab Citizenship in Israel: Jewish-Zionist Time in a Place with no Palestinian Memory,' in D. Levy & Y. Weiss, eds., *Challenging Ethnic Citizenship*. New York: Berghahn Books.
- Kamir, Orit (1999) 'The Declaration [of Independence] Has Two Faces: The Zionist Declaration and the Democratic Declaration,' 23 *Iyunei Mishpat* 473 (Hebrew).
- Kedar, Alexandre (2002) 'On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda' in Jane Holder and C. Harrison eds., *Law and Geography*. Oxford: Oxford University Press.
- Kimmerling, Baruch (1999) 'Religion, Nationalism and Democracy in Israel' 6(3) *Constellations* 341.
- \_\_\_\_\_ (2002) 'Jurisdiction in an Immigrant-Settler Society: The 'Jewish and Democratic State'' 35(10) *Comparative Political Studies* 1119.
- Kretzmer, David (1990) *The Legal Status of the Arabs in Israel*. Jerusalem: VanLeer Institute.
- Leibler, Anat (2011) 'You Must Know Your Stock': Census as Surveillance Practice in 1948 and 1967' in E. Zureik, D. Lyon and Y. Abu Laban eds., *Surveillance and Control in Israel/Palestine*. London: Routledge.
- Leibler, Anat & Daniel Breslau (2005) 'The Uncounted: Citizenship and Exclusion in the Israeli Census of 1948,' 28(5) *Ethnic and Racial Studies* 880.
- Masalha, Nur (1992) *The Expulsion of the Palestinians: The Concept of 'Transfer' in Zionist Political Thinking*. Washington D.C.: Institute of Palestine Studies.
- \_\_\_\_\_ (2013) *The Zionist Bible: Biblical Precedent, Colonialism and the Erasure of Memory*. London and New York: Routledge.
- Masri, Mazen (2013) 'Love Suspended: Demography, Comparative Law, and Palestinian Couples in the Israeli Supreme Court' 22(3) *Social and Legal Studies* 309.
- Morgensen, Scot L. (2012) 'Queer Settler-colonialism in Canada and Israel: Articulating Two-Spirit and Palestinian Queer Critiques' 2(2) *Settler-colonial Studies* 167.
- Morris, Benny (1993) *Israel's Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War*. Oxford: Oxford University Press.
- \_\_\_\_\_ (2004) *The Birth of the Palestinian Refugee Problem Revisited*. Cambridge: Cambridge University Press.
- Rodinson, Maxim (1973) *Israel: a Colonial Settler State?*. New York: Monad Press.

- Pappe, Ilan (2007) *The Ethnic Cleansing of Palestine*. Oxford: One World.
- Piterberg, Gabriel (2008) *The Returns of Zionism: Myths, Politics and Scholarship in Israel*. London: Verso.
- Robinson, Shira (2013) *Citizen Strangers, Palestinians and the Birth of Israel's Liberal Settler State*. Stanford: Stanford University Press.
- Rouhana, Nadim & Areej Sabbagh-Khoury (2015) 'Settler-Colonial Citizenship: Conceptualizing the Relationship between Israel and its Palestinian Citizens,' 5(3) *Settler-colonial Studies* 205.
- Rouhana, Nadim & Nimer Sultany (2003) 'Redrawing the Boundaries of Citizenship: Israel's New Hegemony' 33(1) *Journal of Palestine Studies* 5.
- Rubenstein, Amnon (2000) 'The Knesset and the Basic Laws on Human Rights,' 5 *Mishpat o Mimsbal* 339 (Hebrew).
- Rubenstein, Amnon & Barak Medina (2005) *Constitutional Law of the State of Israel*. 6th ed. Jerusalem and Tel-Aviv: Schocken Publishing House (Hebrew).
- Rubenstein Amnon & Alexander Jakobson (2009) *Israel and Family of Nations*. New York, NY: Routledge.
- Saban, Ilan (2004) 'Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel' 36 *New York University Journal of International Law & Politics* 885.
- Said, Edward (1979) *The Question of Palestine*. New York: Times Books.
- Sayeg, Fayez (1965) *Zionist Colonialism in Palestine*. Beirut: Research Center – Palestine Liberation Organization.
- Shafir, Gershon (1989) *Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882–1914*. Berkeley: California University Press.
- Shafir, Gershon & Yoav Peled (2004) *Being Israeli: The Dynamics of Multiple Citizenship*. Cambridge: Cambridge University Press.
- Shahar, Yoram (2002) 'Earlier Drafts of the Declaration of Independence' 26(2) *Iyunei Mishpat* 523 (Hebrew).
- Shalhoub-Kevorkian, Nadera (2015) *Security Theology, Surveillance and the Politics of Fear*. Cambridge: Cambridge University Press.
- Shlaim, Avi (1995) 'The Debate About 1948' (1995) 27(3) *International Journal of Middle East Studies* 287.
- Statistical Abstract of Israel 2012* (Jerusalem: Central Bureau of Statistics, 2013).
- Trabulsi, Fawwaz (1969) 'The Palestine Problem: Zionism and Imperialism in the Middle East,' 57 (September- October) *New Left Review* 53.



- Veracini, Lorenzo (2010) *Settler-colonialism: A Theoretical Overview*. New York: Palgrave Macmillan.
- United Nations Special Committee on Palestine: Report to the General Assembly (3 September 1947) A/364 (1947).
- United Nations Ad Hoc Committee on the Palestinian Question: Report of Subcommittee 2, (11 November 1947) A/AC.14/32 (1947).
- Wolfe, Patrick (1994) 'Nation and Miscegenation: Discursive Continuity in the Post-Mabo Era' 36 *Social Analysis* 93.
- \_\_\_\_\_ (1999) *Settler-colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event*. London: Cassel.
- \_\_\_\_\_ (2006) 'Settler-colonialism and the Elimination of the Native' 8(4) *Journal of Genocide Research* 387.
- \_\_\_\_\_ (2012) 'Purchase by Other Means: The Palestinian Nakba and Zionism's Conquest of Economics' 2(1) *Settler-colonial Studies* 133.
- Zureik, Elia T (1979) *The Palestinians in Israel: A Study in Internal Colonialism*. London: Routledge & Kegan Paul.

### Israeli Cases Cited

- HCJ 1113/99 *Adalah v. Minister of Religious Affairs* (2000), IsrSC 54(2) 164.
- EA 2/88 *Ben Shalom v. Central Elections Committee* (1989) IsrSC43(4) 221.
- EC 11280/02 *CEC v Tibi* (2003), IsrSC 57(4) 1.
- HCJ 466/07 *Galon v. The Attorney General* (2012), IsrSC -unreported.
- HCJ 1661/05 *Gaza Shore Regional Council v The Knesset* (2005), IsrSC 59(2) 481.
- HCJ 5016/96 *Horev v. Minister of Transport* (1997), IsrSC 51(4) 1
- HCJ 6698/96 *Ka'dan v. Land Administration of Israel* (2000), IsrSC 54 (1) 258.
- HCJ 73/53 *Kol Ha'Am v. Minister of Interior* (1953), IsrSC 7(2) 871.
- HCJ 620/85 *Mi'ari v Speaker of the Knesset* (1987), IsrSC 41(4) 169.
- EA 1/88 *Neiman v Chairman of CEC* (1988), IsrSC 42(4) 177.
- CA 8573/08 *Ornan v. Ministry of Interior* (2013), IsrSC -unreported.
- HCJ1031/93 *Pesro (Goldstein) v. Minister of Interior* (1995) IsrSC 49(4) 661.
- HCJ 153/87 *Shakdi'el v. Minister of Religious Affairs* (1988), IsrSC 42 (2) 221.
- CA 630/70 *Tamarin v. The State of Israel* (1972), IsrSC 26(1) 197.
- HCJ 2597/99 *Tosbheim v. Minister of Interior* (2005), IsrSC 59(3) 721 at 733.
- EA 1/65 *Yerdor v. CEC* (1965), IsrSC 19 (3) 365.
- HCJ 10/48 *Zeev v. Officer in Charge the Tel-Aviv Urban Area* (1948), IsrSC 1 85.

**Australian Cases Cited**

*Mabo and Others v Queensland (No.2)*, (1992) 175 CLR 1.

**German Cases Cited**

*Maastricht Treaty Case*, 89 BVerfGE 155 (1993).