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APPLICATION OF ISRAELI LAW TO THE GOLAN HEIGHTS IS NOT ANNEXATION

*Leon Sheleff**

I. INTRODUCTION

A short while after the initial hints began to circulate that the Israeli government was considering the possibility of withdrawing from part of the Golan Heights,¹ the first extensive public debate began regarding its political and legal status. It is indicative of the intensity of the debate that an appeal was lodged with the Israeli High Court of Justice (only to be rejected), asserting that even entertaining the possibility of partial withdrawal from the Heights would constitute a felony.² Central to the debate on the Heights legal status in Israeli law is the Golan Heights Law.³ Simply stated, the law applies the authority of Israeli law and administrative institutions to the Golan Heights. If the law served to annex the Golan Heights to Israel, then there may be no way of withdrawing from the region without explicit Israeli legislation. If the law did not have the effect of annexation, then the Heights are simply territories captured from Syria which remain under Syrian sovereignty, and from which Israel may withdraw at any time.

In the midst of this debate come political efforts aimed at passing a Basic Law: The Golan Heights⁴ that would explicitly

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1. For a general summary of the negotiations, see Milton Viorst, *Assad Story . . . With A Happy Ending: A Guide to Those Continuing Syrian-Israeli Talks*, WASH. POST, Aug. 14, 1994, at C4.

2. A petition was filed and rejected extemporaneously. The decision of the High Court of Justice, dated January 10, 1993, stated that the topic was not justiciable. This decision further illustrates the need for the legal community to correctly define the situation which may be addressed in the future by those legal bodies involved in the negotiations.

3. The Golan Heights Law, 5742-1981, 1981-1982 SEFER HA-CHUKKIM [S.H.] 6, translated in 36 LAWS OF THE STATE OF ISRAEL [L.S.I.] 7 (1981-1982).

4. Since Israel does not have a written constitution, the Knesset has passed a series of Basic Laws (now 11 in number), which deal with various aspects of Israeli constitutional structure. While Basic Laws are enacted in the same way as ordinary legislation, they are given a special status. In fact, while some Basic Laws may be amended by a simple majority, a few clauses have been entrenched in the Israeli legal system and may only be amended by special majorities. For a description of Basic Laws see ARIEL BIN-NUN, THE LAW OF THE STATE OF ISRAEL

establish the status of the Golan Heights as part of Israel. Such a law might change the status of the Golan Heights in Israeli law in much the same way the Basic Law: Jerusalem indisputably made East Jerusalem a part of Israel, at least as far as Israeli law is concerned.⁵

Adding yet another facet to the debate is the fact that the Golan Heights Law was hastily passed with three readings in one day, without substantial and thorough preparatory research, without any in-depth debate in the public arena or even in the Knesset itself, and without its import being properly clarified and understood.⁶ In addition to its hasty passage through the Knesset, the legislation was passed in *prima facie* breach of the principles of international law.⁷ Yet despite this

36-40 (1990); see also Asher Maoz, *The System of Government in Israel*, 8 TEL AVIV STUDIES IN LAW 9 (1988).

5. See Basic Law: Jerusalem: The Capital of Israel, 1979-1980 S.H. 186, translated in 34 L.S.I. 209 (1979-1980). See *infra* pp. 341-44.

6. The three readings took place on December 14, 1981, with the opening session at 5:22 P.M. and the vote on the third reading taking place less than six hours later at 11:15 P.M. . 92 DIVREI HAKNESSET [D.K.] 763-85 (1981-1982). The following day, the law was formally promulgated. *Id.* The law was passed in this manner at the behest of the then-Prime Minister Menachem Begin at a time when he could take the opposition by surprise. Begin had just left the hospital after a brief stay, and the leading opposition figures, Shimon Peres and Yitzchak Rabin, were out of the country. *The Passage of the Golan Heights Law*, HAARETZ Dec. 15, 1981, at 2. HaAretz described the following chronology leading up to the enactment of the law:

At 8:00 A.M. Begin invited Foreign Minister Yitzchak Shamir and Defense Minister Ariel Sharon to his room at Jerusalem's Hadassah Hospital, informed them of his intentions to present the law and directed them to be prepared, diplomatically and militarily, for reaction to the law.

From 10:00 A.M. until noon Attorney General Yitzchak Zamir and Ministry of Justice staff prepared the draft bill.

At 11:30 A.M. the government printer received an order to be prepared to print a draft bill.

At noon a cabinet meeting was held at Mr. Begin's home, where he had been taken upon release from the hospital.

By 3:00 P.M. final consultations were completed at the Ministry of Justice on the text of the draft bill, and the bill was sent to the government printer. At approximately the same time, Minister of Justice Moshe Nissim notified the Speaker of the Knesset, Menachem Savidor, of the government's intention, and asked to change the agenda of the Knesset for the day. Mr Nissim also obtained from the Committee of the Knesset (responsible for procedural matters) a waiver of the normal requirement that the government present a draft bill to the Knesset at least two days before the debate takes place. *Id.*

7. See YORAM DINSTEIN, *THE LAW OF WAR* 210-11 (1983) ("The proprietary right of the Occupied State to the Occupied Territory, neither expires with the conquest, nor is it even temporarily waived during the military occupation.")

tattered legislative history, the Golan Heights Law appeared to alter the borders of Israel, and to establish a new legal status applicable to a piece of land that had previously belonged to an enemy state, Syria.

The circumstances in which the Golan Heights Law came into being provide an indication of the nature of its continued treatment, or rather lack thereof. The law has been ignored entirely by the legal community. It is indicative of the minimal treatment granted the law that in the most recent, expanded edition of a leading book on the constitutional law of Israel, the author makes but one mention of the Golan Heights,⁸ determining that by virtue of the Golan Heights Law, the area was annexed to Israel. This mention was also incidental.⁹

Consequently, unless a definitive Basic Law is passed, the status of the Golan Heights remains, in my opinion, the same as it was at the time it was occupied territory controlled by Israel as captured territory. This is definitely the situation in terms of international law, and it would appear that it is also the situation with respect to the internal law of Israel. The legal status of the Golan after the passing of the Golan Heights Law is none other than that described in the law itself—the application of Israeli law in territory that is not part of Israeli sovereignty.

This Article will argue that the Golan Heights was not annexed to Israel, notwithstanding the passing of the Golan Heights Law. The argument will center mainly on the internal Israeli legal system, with regard to both the language of the

8. See AMNON RUBINSTEIN, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 86 (4th ed. 1991).

9. It was more of a footnote to the detailed and value-based debate between Yoram Dinstein and Yehuda Blum regarding the status of East Jerusalem, pursuant to the application of Israeli law and administration to the municipal area, by way of combined legislative and administrative action immediately following the Six Day War, in June 1967. See Yehuda Z. Blum, *Zion Was Redeemed by International Law*, 27 *HAPRAKLIT* 315, 317-18 (1971-1972); Yoram Dinstein, *Zion by International Law Shall Be Redeemed*, 27 *HAPRAKLIT* 5, 7 (1971-1972); see also Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, 1966-1967 S.H. 74, translated in 21 *L.S.I.* 75 (1966-1967); cf. Law and Administration Order (No. 1), 5727-1967, 1966-1967 KOVETZ HATAKKANUT [K.T.] 2690.

The tendency of lawyers to ignore the issue of the status of the Golan Heights may well be the result of this debate, and the feeling that all there was to be said regarding the legal implications of the "application of the Israeli Law" had already been covered in that debate. This debate is treated in more detail *infra* notes 35-40 and accompanying text.

Golan Heights Law itself, and the actions undertaken pursuant to the law. The argument is presented against the background of international law, for the lack of clarity as to the status of the Heights demands that the internal legal situation be interpreted wherever possible in a manner consistent with the requirements of international law.¹⁰

Throughout this Article, it must be remembered that the question of annexing territory is a complex one for a number of reasons, inter alia, that political reality is tied to legal principles. When the legislature specifically states that the law is an annexation, or it states that the law is a Basic Law, then the intention of the legislature is quite clear. But in cases where the legislature chooses not to explicitly state the basic legislative purpose for reasons of sensitivity to international public opinion (as was apparently the case with the Golan Heights Law),¹¹ the interpretation of the law may differ from the origi-

10. One significant distinction in the interpretation of international law is whether the source is declaratory or constitutive international law; one is obligatory and the other is not. For more on this distinction, see YORAM DINSTEIN, *INTERNATIONAL LAW AND THE STATE* 37 (1971):

The international law may be seen as deriving partly as an outgrowth of the human will and partly as the product of the 'natural law.' . . . One branch, referred to as the 'necessary law,' is comprised of basic principles rooted in natural law which provide its obligatory foundation. The other branch is referred to as the 'volitional law,' and is comprised of the conventions and international agreements whose obligatory nature is based upon the will of the states.

This Article will not discuss whether the provisions regarding annexation are declaratory or constitutive law, since this Article is concerned with the nature of the internal law. As with other aspects of international law, a case can be made for both views and I need not decide between them. Reference is only made to the topic in order to stress the importance of striving for optimal coordination between the international law and internal law, even if the international law is only based upon agreement, which is non-obligatory. In that sense I am relying on Dinstein's position, and it seems to me that his claim that international law does not recognize unilateral "annexation" (as was the case in East Jerusalem, and subsequently in the Golan Heights) is the most accurate statement of the legal position. See Dinstein, *supra* note 9.

The distinction between declaratory and constitutive international law has not been addressed in the Israeli legal literature dealing with the occupation of the West Bank and Gaza, (and was not even mentioned in the Dinstein-Blum debate). There is, however, a discussion, in both Israeli case law and legal literature regarding the specific question of whether the Geneva Convention is based upon declaratory law (thus obliging the legal system), or upon constitutive law (thus being non-obligatory). See *supra* note 9.

11. Member of the Knesset [M.K.] Charlie Biton, who opposed the law, proposed changing its name to "The Law for the Annexation of the Golan Heights."

nal intentions of those who initiated the legislation.

In Israeli judicial decisions, efforts have been made to differentiate between judicial truth and historical or empirical truth.¹² Legislative interpretation should also seek to differentiate between political truth and legal truth.¹³ According to the political conception, the Golan Heights was clearly annexed (and the Israeli public, including the legal community, understood as much).¹⁴ However, a legal construction of the law's language ("application of the law" as opposed to "annexation")¹⁵ leads to the incontrovertible conclusion that the Golan Heights was not annexed.

II. THE DISTINCTION BETWEEN THE APPLICATION OF ISRAELI LAW AND ANNEXATION

A. Filling a Legal Vacuum: The Political Reality in the Golan Heights

The Golan Heights Law does not amount to annexation because it does no more than what is written therein; apply Israeli law, administration and government to the Golan Heights. This application is quite simply an affirmation of the existing situation in the Heights where Israeli law fills a void caused by an absence of regular Syrian institutions, such as a judiciary. This vacuum formed because the majority of the

93 D.K. 1693-94 (1982). His proposal was not offered in support of the government, but apparently to embarrass it.

The proposed amendment was rejected, but it is important because it renders impossible the claim that the term "annex" was not used merely because of some oversight due to the haste in which the law was passed. The fact is that when the Knesset was directly presented with the opportunity to spell out its intention to annex, it rejected the approach.

12. See *Biazi v. Levi*, [42] 1 Piskei Din [P.D.] 445 (1988) (Isr.); *Moadi v. Israel*, [38] 1 P.D. 197 (1988) (Isr.); *Elon v. Israel*, [36] 4 P.D. 449 (1982) (Isr.).

13. See Leon Sheeff, *Four Truths: Legal and Political, Judicial and Historical*, in 16 ONATI PROCEEDINGS: LEGAL SEMIOTICS AND SOCIOLOGY OF LAW 73 (B.S. Jackson ed., 1994).

14. Immediately prior to raising the issue for discussion, I conducted a survey among a small portion of my colleagues regarding their understanding of the Golan Heights Law. The almost unanimous answer was that the law was an act of annexation. Some of them added that it was an illegal annexation (from the perspective of international law), to which the reply was made that there is no illegal annexation in so far as the act of annexation is one which indicates a certain degree of legality.

15. The Golan Heights Law, 5742-1981, 1981-1982 S.H. 6, translated in 36 L.S.I. 7 (1981-1982).

population fled the Heights during the Six Day War,¹⁶ when the territory was occupied by the Israeli Defense Force (I.D.F.).¹⁷

Thus, for a substantial period of time prior to the passing of the Golan Heights Law, Syrian law had ceased to be an effective legal instrument in the Golan Heights, and legal problems were solved either by I.D.F. institutions, or, and perhaps principally, by the autonomous activities of the Druze community which comprised most of the Syrian population remaining in the Heights after the termination of the war. The customs of the community and the influence of its leaders are the central factors in resolving day-to-day disputes and legal questions facing the local population.¹⁸ In that sense, there has been no essential change in their way of life since before the Six Day War.

But although the custom of the Druze community is an effective legal system for settling local disputes,¹⁹ the territorial status of the Golan Heights will be determined not by their practices, but by Israeli law. My claim is therefore quite simple: the Israeli legal and administrative system does not generally relate to the Golan as if it was really a part of Israel, and when it does relate to the Golan Heights as a part of Israel, it may well be overstepping its authority.²⁰

16. The 1960 Syrian census indicated that the population of the Golan Heights was 91,933. WILLIAM HARRIS, *TAKING ROOT: ISRAELI SETTLEMENT IN THE WEST BANK, THE GOLAN AND GAZA-SINAI, 1967-1980*, at 23 (1980). The August 1967 census showed a drastic change—a desertion by 93% of the 1960 population of all parts of the Golan except the Druze villages. *Id.* Noting that the population of the Golan may have increased after 1960, the author concludes that the calculation does provide a strong indication of the extensive scale of the movement. *Id.*

17. In stark contrast to the situation in the Golan, in the West Bank most of the Jordanian governing institutions remained, including the courts and judiciary. *See generally* GEORGE E. BISHARAT, *PALESTINIAN LAWYERS UNDER ISRAELI RULE* (1989); MOSHE DRORI, *LEGISLATION IN THE ZONE OF JUDEA AND SAMARIA* (1975) (providing further information regarding the problems of the situation, including occasional strikes by judges and lawyers in the West Bank).

18. GABRIEL BEN-DOR, *THE DRUZE IN ISRAEL: A POLITICAL STUDY* 33-69 (1979).

19. This informal legal practice has been called a situation of "living law." *See* EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Lewis A. Coser ed., Arno Press 1975).

20. An example of this type of restricted attitude to the Heights as part of Israel is the granting of voting rights and Israeli passports to only a limited number of people at their request. It is quite possible that in doing so, the administration is actually in violation of the law, and only the High Court of Justice can finally rule upon the matter. However, there is no one who is likely to file a peti-

B. A Distinction Between Types of "Occupied Territories"

In order to understand the current legal situation in the Golan Heights, it is important to understand the original addition of territories to Israel; namely those territories that were annexed to Israel immediately after the War of Independence in accordance with the armistice agreements.²¹ The Arab residents living in those areas which had been conquered by Israel were granted automatic citizenship. In addition, the annexation was done in compliance with international law and received the recognition of those states which recognize Israel. Although there was some discussion of the application of Israeli law to the newly conquered territory, the discussion was entirely different than the present case in the Golan Heights because the Israeli borders were not specifically defined at that time.²² Because the borders were not defined, it was impossible to distinguish between Israeli law applied within Israel, and Israeli law applied to territory that had been captured.

The situation was clarified in the initial legislation following the definition of the Israeli borders. Specifically, the Area of Jurisdiction and Powers Ordinance (No. 29), 5708-1948 states:

Any law applying to the whole of the state of Israel shall be deemed to apply to the whole of the area including both the areas of the state of Israel and any part of the Land of Israel which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel.²³

tion to the High Court regarding this issue, since the government has to date assented to the different requests of the Druze in the Golan Heights.

21. The armistice agreements with Israel's four immediate neighbors (Egypt, Jordan, Lebanon and Syria) were signed on various dates in 1949. *State of Israel: Historical Survey*, in 9 *ENCYCLOPEDIA OF JUDAICA*. Although the agreements specifically reserve to the parties the right to make historical claims in the future, it was stated in each case that the agreement was concluded in order to facilitate the transition from the present truce to permanent peace in Palestine. The demarcation line thus constituted de facto boundaries as long as they were respected by all sides and, despite repeated violations, they served as such until the Six Day War in 1967.

22. The borders were formally defined in September 1948 when the Council enacted the Area of Jurisdiction and Powers Ordinance (No. 29), 5708-1948. 1948 *ITON RISHMI* [I.R.] 61 (Supp. 1), translated in 1 *L.S.I.* 64. The ordinance continues to define the Israeli borders to the present.

23. *Id.*

This law, referring as it does to the "application of the law," serves as a clear distinction between Israel and the area of the Land of Israel to which Israeli law is also to be applied. While a great part of this area subsequently became part of Israel, this process did not occur automatically, but as a result of additional legal measures that were not adopted unilaterally, and which were accompanied by granting citizenship to all the residents of those areas.²⁴ Until that time there may have been no annexation at all, but only the application of the Israeli law as a means of ensuring the orderly conduct of everyday life in the territories that had been occupied.

It must further be remembered that: (a) the law in the occupied territory was almost identical to Israeli law in that all of the territory had previously been under British rule; (b) the Israeli forces had captured territories that were essentially lacking any sovereign, for the Palestinians had refused to declare the area granted to them by the partition plan as their own state, and thus a legal and political vacuum had been created; (c) part of the area that had been captured and to which Israeli law was applied was subsequently transferred to the sovereignty of the Arab states under the armistice agreements, and it is difficult to believe that Israel would have conceded these territories, if the aim of the law had really been their annexation.

Furthermore, every state that recognized Israel did so according to the border that was fixed as the Green Line in the framework of the armistice (although there were problems regarding the recognition of Jerusalem due to the UN decision to give the city the status of an international city).²⁵ This recognition of Israel was the exact opposite of the stance adopted by most countries with respect to Jordan's annexation of the West Bank. Great Britain and Pakistan were the only two states that officially recognized this act of annexation even though the Jordanian action was accompanied by its changing

24. Unlike the Golan Heights, the Arab residents living in these annexed areas were granted automatic citizenship. In addition, the annexation was done in compliance with international law and received the recognition of those nations recognizing Israel. Citizenship was also granted to numerous persons permitted to return to Israel within the framework of uniting families.

25. This is the reason that most of those states which maintain relations with Israel do not locate their embassies in Jerusalem.

its name from "Trans-Jordan" to "Jordan" to emphasize the change in its territory, as well as the granting of citizenship to the residents of the West Bank, including refugees.

Paradoxically, it was Israel that conferred a certain legal recognition on the situation by declaring that Jordanian law would continue to apply to the newly conquered territories of the West Bank. This state of affairs continues today, although many new laws have been introduced since then, by way of orders of the Military Commander (some of them translations of Israeli law). This is a kind of "partial application" of Israeli law in the West Bank.²⁶ In the same way, Israel has recognized that Jordanian citizenship was granted to the residents of the West Bank, pursuant to Trans-Jordan's "annexation," by virtue of its honoring Jordanian passports.

The West Bank also provides a parenthetical example of the application of Israeli law in the territory, via the law that recognizes the personal legal status of Israelis resident or present in the West Bank.²⁷ This is yet another example of the fact that there is no connection between the question of applying the law and the separate question of annexing territory into a state.

C. The Contrasting Case of the Annexation of East Jerusalem

In discussing the legal status of the Golan Heights it is illustrative to contrast the Israeli annexation of East Jerusalem, as the two differ in several significant ways.²⁸ First, the application of the law in East Jerusalem was effected by an administrative act and not by an act of direct legislation, as

26. Over the last twenty-five years, more than a thousand such orders have been issued by the Military Commander. It is quite possible that they comprise more than half of the legal system, although their exact number is not known given the indiscriminate method by which they are issued. For an instructive analysis of the changing and increasingly confusing legal situation, see Amnon Rubinstein, *The Changing Status of the Territories—From Trust to Legal Hybrid*, 11 TEL AVIV U. L. REV. 439 (1986).

27. See Emergency Regulation (Offenses in the Occupied Territories-Jurisdiction and Legal Assistance), 5727-1967, 1966-1967 K.T. 2741; see also RUBINSTEIN, *supra* note 8, at 105 ("The Knesset was very active in legislation aimed at granting special status to those Israelis living or present in the Territories, via the application of the Israeli Law to them, in a personal, extraterritorial manner.")

28. See, e.g., E. Duwek, *A Response to Dr. Yoram Dinstein's Article: Zion by International Law Shall Be Redeemed*, 27 HAPRAKAIT 290 (1971-1972).

was the case with the Golan Heights.²⁹ Second, East Jerusalem was a part of the Land of Israel, which had been annexed together with the West Bank (probably illegally) by Jordan.³⁰ Finally, there is a real historical tie to East Jerusalem dating back to biblical times, unlike the more recent and pragmatic link to the Golan Heights.

The original intention to annex East Jerusalem was realized by applying Israeli law to that part of the city, albeit in a less direct manner than that used in the Golan Heights. Just a few days after the termination of the Six Day War, the Law and Administration Ordinance (Amendment No. 11), 5727-1967, was passed providing for the application of Israeli law to any part of Palestine designated by order of the Minister of the Interior.³¹ Shortly thereafter, the Minister of the Interior issued an order specifying points on a map more or less constituting the municipal border of East Jerusalem, and stated that Israeli law would apply within.³² Simultaneously, another order was published expanding the territory of Jerusalem.³³ This order detailed the identical points set out in the first order, and completed the consolidation of East and West Jerusalem.³⁴

The intention to annex was justified by the fact that the united city of Jerusalem was originally a single municipal unit prior to the War of Independence; thus, its unification was in effect a return to its initial status. Despite the intention to annex, citizenship was not automatically granted, though the authorities did express a willingness to confer citizenship on the few likely to request it.

The orders did not, however, settle the question as to whether East Jerusalem was also annexed to Israel. This was

29. See Dinstein, *supra* note 9.

30. See Moshe Drori, *The Parallel Criminal Jurisdiction of Military Courts and Local Courts in the Administered Territories*, 32 HAPRAKMIT 386 (1979).

31. 1966-1967 S.H. 74, translated in 21 L.S.I. 75 (1966-1967).

32. Law and Administration Order (No. 1), 5727-1967, 1966-1967 K.T. 2690. The Order states, "the area of the Land of Israel as described in the schedule is hereby determined as the area to which the law, jurisdiction and administration shall apply." *Id.*

33. The Jerusalem Declaration (Extension of Municipal Boundaries), 5727-1967, 1966-1967 K.T. 2065. The order states, "The area of Jerusalem shall be extended by the widening of the area as defined in the schedule." *Id.*

34. *Id.* It should be emphasized that the term "East Jerusalem" does not appear in the law.

the question upon which the Dinstein-Blum debate hinged.³⁵ Briefly, Professor Blum argued that there was no need for a formal annexation of East Jerusalem since in any case it was liberated territory:

[I]t is therefore clear that the Amendment to the Law and Administration Ordinance of 1967 was designed to emphasize that not only did Israel not see itself as an occupying power in the various areas of the land of Israel . . . the areas referred to by the Minister of Justice as areas which the I.D.F. had "liberated from the yolk of strangers"—but also saw itself as authorized to take "sovereign action" with respect to them, insofar as they were located "legally and practically under Israeli Sovereignty."³⁶

Blum then emphasized the unique nature of the territories of "the Land of Israel," but this serves to stress the differences between the situation in the Golan and the situation in East Jerusalem:

Israel does not annex territories that were previously a part of the mandatory land of Israel; Israel does not see itself in these territories as an occupying state, in so far as the Arab countries who invaded the land of Israel in 1948 have never been perceived as having legal sovereignty over the areas in the Land of Israel which they conquered, but were perceived as military occupiers thereon.³⁷

According to Dinstein, however, it would have been preferable to have brought East Jerusalem under Israeli sovereignty in accordance with the principles and provisions of international law as they apply to the annexation of territories.³⁸ Specifically, Dinstein argued:

[T]he central problem arises when [the Israelis'] enthusiasm for their proprietary right leads them to jeopardize the possessory right In the case of East Jerusalem, the defeated state, Jordan, did not cease to exist. As a result, while Israel may continue to exercise legal possession of East Jerusalem, for as long as the situation of occupation pursuant to war

35. See *supra* note 9 and accompanying text.

36. See Blum, *supra* note 9, at 317.

37. See Blum, *supra* note 9, at 316.

38. Dinstein, *supra* note 9.

continues, international law does not allow it to annex this territory. Thus, it is unfortunate that so many hasty comments have been made on the issue, and all the more so when it comes to the rulings of the Supreme Court. It would be preferable to remember and ensure that in the event that "Zion by law shall be redeemed," according to the updated and relevant meaning of the verse, then the perspective of Israeli law is insufficient, for international law too must be taken into account.³⁹

Dinstein added:

[T]he longer Israeli rule in East Jerusalem continues de facto, the longer the facts on the ground shall continue to be created, thus the situation of actual possession could give rise to a complete and unfettered proprietary right. After an extended period of time under such rule, and if there is an abatement of the Arab disturbances in the City . . . Israel's proprietary right to the territory will be recognized.⁴⁰

A few years after the debate, the Basic Law was adopted, establishing Jerusalem's status as the complete and united capital of Israel.⁴¹ Though this may not have altered the validity of the arguments raised by Dinstein and Blum with respect to international law, it was this legislation that probably altered Jerusalem's internal status with regard to the Israeli legal system.

The Basic Law makes no mention of East Jerusalem as such, nor is there any reference to the points that were referred to in the orders mentioned above. These are replaced by the declaration "Jerusalem, complete and united, is the capital of Israel."⁴²

D. Citizenship for Residents as a Requirement for Annexation

The real criterion for annexation is not the application of the law, but rather the granting of citizenship to the popula-

39. Dinstein, *supra* note 9, at 11.

40. See Dinstein, *supra* note 9, at 11, 12. Of course, there has been no such abatement.

41. See 1979-1980 S.H. 186, translated in 34 L.S.I. 209 (1979-1980).

42. *Id.* When the law was passed, a number of states whose embassies had previously been located in Jerusalem decided to transfer them to Tel Aviv in protest.

tion of the occupied territory.⁴³ A state desirous of annexing a territory (whether or not in compliance with the requirements of international law) must grant citizenship to all the residents of that territory, with the exception of those residents who have good reason for not accepting it. For example, citizenship need not be extended to those residents of the area who possess citizenship in a third state, or those who have reasons of conscience for rejecting the offer of citizenship.

But Israel adopted precisely the opposite position in the case of the Golan Heights. At the time of the law's passage, the residents of the Heights (members of the Druze community who were also Syrian citizens) were not granted Israeli citizenship.⁴⁴ Admittedly, the residents were awarded identity certificates, but only after a protracted, organized refusal by the residents to accept the certificates.⁴⁵ This was followed by a petition on behalf of the residents to the High Court of Justice, in which the High Court ruled that the residents were indeed obliged to carry identity certificates.⁴⁶ The ruling was issued by Justice A. Barak and has been interpreted as a judicial recognition of the act of annexation—but this is not the case. A close examination of the ruling indicates that the High Court refused to stray from the specific language of the law, preferring to refrain from any clear ruling regarding the legal status of the Golan Heights.⁴⁷

The High Court determined that given the applicability of Israeli law to the Golan Heights, its residents must act in the same manner as other residents of the state, i.e., they must

43. This is especially true with regard to democracies which provide a framework allowing a person to be influential by virtue of his right to vote.

44. The meaning of sovereignty has always been a thorny issue, and there still is no clear definition of the term. However, one of the characteristics of sovereignty is that citizenship is granted to the majority of the population permanently in the area.

45. This refusal continued for a period of six weeks and embraced the whole population. Finally, in a nighttime army operation conducted under the scrutiny of the I.D.F., the certificates were handed out directly by personnel of the Ministry of the Interior.

46. See *Kang Abou Tzalach v. Minister of the Interior*, [37] 2 P.D. 718 (1983) (Isr.).

47. The petition dealt with the application of the Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity Law), 5731-1971, 1970-1971 S.H. 109, translated in 25 L.S.I. 108 (1970-1971), to the Golan Heights, by virtue of the Golan Heights Law, 5742-1981.

carry identification certificates:

Each of the petitioners is a 'resident' with respect to the Population Register Law, and is therefore also a resident with regard to the Emergency Regulations (Possession and Presentation of Identity Certificate) (Extension of Validity) Law. He is consequently also obliged to receive, carry and present an identity certificate.⁴⁸

The result is that the decision was not based on the status of the Golan Heights as a part of Israel, but rather on the fact that the Israeli law was applied in the Golan Heights. Thus, the situation today is that of a total of 15,000 Druze residents in the Golan Heights, only a few hundred have been granted citizenship.⁴⁹

Although citizenship was not granted to each resident of East Jerusalem at the time of the application of Israeli law in 1967, residents could request citizenship, although only a small minority actually realized the right. Arab residents of East Jerusalem were, however, granted municipal voting rights that some have exercised by participating in elections for Mayor and Local Council.⁵⁰

E. The International Arena: Other Examples of Application Without Annexation

In order to deal with the complex of problems presented by this case, it is necessary to clarify the differences between the application of the law, the implications of which are restricted to the legal system being applied, and the legal status of the

48. See *Kang Abou Tzalach*, [37] 2 P.D. at 721.

49. There were 862 people living in Druze villages on the Golan who were registered to vote in the 1992 general elections. See 1 OFFICIAL RESULTS OF THE ELECTIONS FOR THE 13TH KNESSET (1993).

50. As an aside to the discussion of citizenship, it is significant that the members of the Druze community in the Golan are not drafted into the I.D.F. If the Golan Heights were truly considered a part of Israel, the young men of the Golan Heights Druze community would be liable for compulsory service. Even if they had not been issued citizenship, but had only been granted the status of permanent residents, there would still be an obligation of service as is the case with any other permanent resident of Israel who is not a citizen. I am aware of the special considerations for the Druze of the Golan Heights (for instance, some have close relatives in Syria), but it is also well known that one of the characteristic features of this community is that their loyalty is invariably given to the state in which they are residents.

area in which the system is being applied. In determining that Israeli law would apply to the Heights, the Knesset adopted the fairly routine measure of grafting a legal system onto an area in which the system was not previously valid.

There is no shortage of examples of a law originating in another legal system being applied without influencing the legal status or the sovereignty of the territory on which it was imposed. For example, when a state joins the European Community, it agrees, in effect, that within certain areas, its own laws will be subject to the laws of the Community,⁵¹ and accepts the fact that decisions in areas controlled by Community law will be made by the court of the Community and are binding upon that state. Even Great Britain agreed to this condition, despite its Parliament's reputation as a sovereign body not subject to any judicial supervision.⁵² Thus, a substantial constitutional change in Britain was effected by its joining the Community.⁵³ I would also add that in doing so the Parliament waived some of the sovereignty of the state as a whole, albeit not to the extent of the elimination of British sovereignty.⁵⁴ In the same manner, the United States recognized the special status of some of the Native American tribes and determined special areas in which tribal law would apply as opposed to United States law.⁵⁵ Yet this was not generally interpreted as a waiver of United States sovereignty in the tribal territory, or as a recognition of tribal sovereignty, even though there are a number of rulings that raised a certain doubt in

51. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 69 (1993); JOHN USHER, *EUROPEAN COMMUNITY LAW AND NATIONAL LAW* 34 (1981).

52. Even the well-known observation that the power of the British Parliament was limited only by its inability to turn men into women is today nothing more than a historical curiosity.

53. Note that the merger of 1972 was done in a manner both unusual and unprecedented in that the decision to merge was presented to the nation for its approval by referendum.

54. It is in fact possible that the passing of the Golan Heights Law limited Syrian sovereignty over the Golan, even if not to the extent of the total elimination of Syrian sovereignty and its replacement by Israeli sovereignty. Similarly, Israel's declaration regarding the security zone in southern Lebanon and its cooperation with the South Lebanese Army, though definitely derogating from Lebanese sovereignty, does not eliminate it altogether.

55. See generally WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (1981) (establishing that Native American tribes are independent entities with inherent powers of self government).

that respect.⁵⁶ Thus, the United States recognized the application of the tribal law, jurisdiction and administration in certain zones, even without any waiver of American sovereignty in those areas. In New Zealand and Canada too, there are particular arrangements applying to the indigenous peoples allowing them to apply their own law without any derogation of the sovereignty of the state.⁵⁷

The existence of these kinds of situations is not purely by virtue of special consideration being granted to the tribes. Even after the unification of England and Scotland, which was, in effect, the annexation of Scotland to England,⁵⁸ there was nonetheless recognition of the Scottish legal system as a separate jurisdiction that continued to be valid in that part of the country. This situation still obtains today, despite the absence of a Scottish parliament,⁵⁹ but with the existence of a separate judicial system at all levels, with the exception of the House of Lords, where there is normally one or more representatives of the Scottish judicial system.

Israel too, in its very first act of legislation after achieving independence, determined that the English common law would continue to apply in the state.⁶⁰ The situation resembles that of most of the countries in the British Commonwealth in which the common law applies. Pursuant to this arrangement, the final appeal authority of certain national judicial systems is

56. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

57. See, e.g., ANDREW SHARP, *JUSTICE AND THE MAORI* 249-82 (1990); *THE QUEST FOR JUSTICE* (Menno Boldt et al. eds., 1985); *PATHWAYS TO SELF DETERMINATION* (Leroy Little Bear et al. eds., 1984).

58. But see T.B. Smith, *The Union of 1707 as Fundamental Law*, in *PUBLIC LAW — THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE COMMONWEALTH* 99 (J.A.G. Griffith ed., 1957).

59. Laws applying exclusively to Scotland are still passed in the British Parliament. Recently, there has been increased pressure to create a Scottish Parliament in charge of all regional matters. It seems that the majority of the Scottish population supports this position. There is also a minority who demand total independence.

60. Law and Administration Ordinance (§ 11), 5708-1948, 1948 [I.R.] (Supp. 1), translated in 1 L.S.I. 7:

The law which existed in Palestine on the 5th Iyar, 5708 (May 14, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the state and its authorities.

the British Privy Council—a body which is extraterritorial as to the sovereign state—sitting permanently in London and in which the vast majority of the judges are English.⁶¹

There is an additional method of applying the law of one state in another state. This occurs when a legislative act of one state is used as an example for legislation in another state, or is directly translated into the law of the state.⁶²

Thus it is clear that there are varied methods by which one national legal system is applied to another national framework. Generally speaking, the process is not as total and all-embracing as the case of the Golan Heights, but the circumstances are not normally so exceptional. This was a case of a territory from which the majority of its residents had fled, with the handful remaining belonging mainly to a homogenous community with its own special religion and customs.

Thus, it may be inferred that a territory may be annexed without necessarily applying the law of the annexing state (e.g., the annexation of Scotland to England), and also that the law may be applied either in its entirety or partially without annexation (e.g., the addition of a state to the European Community).

III. CONCLUSION

Until quite recently, the question of the legal status of the Golan Heights may have been academic since there were few expectations that Israel would reach the stage of negotiations on withdrawal from the Golan Heights with the Syrians; this may also explain the dearth of any serious, substantive discussion of the status of the Heights within the legal community, although I personally addressed the topic at an international conference conducted a few years ago.⁶³ In my work on the topic, I distinguished between the political reality that some of the members of the Knesset had done their best to create by presuming to annex the Golan Heights, and the legal truth which seemed to reflect an entirely different situation, namely that the Golan Heights had not been annexed to Israel.⁶⁴ In

61. See generally DAVID B. SWINFEN, *IMPERIAL APPEAL* (1987).

62. See generally A. WATSON, *LEGAL TRANSPLANTS* (1974).

63. See Sheleff, *supra* note 13.

64. See Sheleff, *supra* note 13.

my opinion, in view of these facts there is no escaping the conclusion that the Golan Heights was not annexed to Israel.

IV. EPILOGUE: IN RESPONSE TO PROFESSOR MAOZ'S CHARACTERIZATION OF THE RESPECTIVE POSITIONS OF THE ISRAELI KNESSET AND SUPREME COURT ON THE GOLAN HEIGHTS LAW

After preparing my article for print, I had the opportunity to read the response written by Professor Asher Maoz,⁶⁵ and I would like to react to his main arguments. It seems to me that his mistake (and that of others) is anchored in the gap between his initial consent that according to international law occupied territory cannot be annexed without the consent of the other side, and his conclusion that the Golan was in fact annexed.⁶⁶ If international law does in fact prohibit unilateral annexation, then it would seem that any such act, or act purporting to breach this principle, should be given a strict interpretation. In any interpretation one must aim at harmonization between international law and state law. Any doubt as to the meaning of words or actions should be resolved in a manner consistent with the spirit and intention of international law; any ambivalence should be interpreted in the direction of compliance with and not the breach of international law. A state wishing to breach international law must gird its loins and show a measure of courage commensurate with the dimensions of the act (the determination of a new border for the state) and perform the act openly, explicitly and in an unequivocal manner.

If it is so easy for Maoz to determine in an orderly and reasoned argument that there was an act of annexation, then why was it so difficult for those formulating the law to make explicit use of the word "annexation," or a synonym thereof. My article is based on the simple fact that the "application of the law" is not identical, indeed, not even similar, to annexation, and I gave examples of application without annexation, and of annexation without application. Maoz takes issue with the examples, but ignores the fact that I did not seek examples comparable to the Golan Heights case (and it would appear

65. See Asher Maoz, *The Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 355 (1994).

66. *Id.*

that there is no precedent for such a case). I presented examples that clarified the basic distinction between the application of Israeli law and annexation. Maoz also ignores the reason for my noting that the Golan Heights Law is a regular law as opposed to the legislative approach to Jerusalem. It was my intention to distinguish between this law and the Basic Law: Jerusalem-the Capital of Israel;⁶⁷ it was not my intention to distinguish between this law and the administrative action taken vis-a-vis Jerusalem by the Minister of the Interior in 1967.⁶⁸

Capitalizing on the Golan Heights Law's lack of clarity, Maoz attempts to find support in the comments made by the Members of Knesset prior to the passing of the law.⁶⁹ Interestingly enough, he also quotes those who opposed the law,⁷⁰ but it would appear to me that their words of criticism cannot serve as a basis for understanding the true intentions of those who supported the law. In contrast to these quotes, I gave concrete examples of administrative actions that would seem to indicate that there was no act of annexation. But the truth is that neither the politicians nor the administrators can provide a definite and authoritative answer regarding the status of the Golan Heights. I would also add that neither can the academics in their articles and lectures, though this does not absolve us of the obligation to contribute to the discussion regarding complicated legal problems. The definite and authoritative answer regarding the unclear wording of a law must come from the judiciary, and Maoz does in fact attempt to find support in two rulings that I also had occasion to examine.

On two occasions the Supreme Court had the opportunity to clarify the situation and openly declare that what the Knesset had done on the day it passed the Golan Heights Law was annexation.⁷¹ But on both occasions the High Court of Justice preferred to leave the question as one requiring further examination, thus leaving the position as unclear as it had

67. 1979-1980 S.H. 186, translated in 34 L.S.I. 209 (1979-1980).

68. See Law and Administration Order (No. 1), 5727-1967, 1966-1967 K.T. 2690.

69. See Maoz, *supra* note 65, at 377-80.

70. See Maoz, *supra* note 65, at 377-80.

71. Kang Abou Tzalach v. Minister of the Interior, [37] 2 P.D. 718 (1983) (Isr.); Movement of the Faithful of the Temple Mount and the Land of Israel v. Prime Minister, [47] 1 P.D. 37 (1992) (Isr.).

been.⁷² This situation works in favor of interpreting the law in a manner that is, as stated, consistent with international law. Still, Maoz claims that the justices really ruled in favor of annexation (or to be more precise—in the direction of annexation).⁷³ I shall not repeat the arguments that I have already forwarded regarding the necessary interpretation of Justice Barak's opinion,⁷⁴ or those relating to the fact that the petition was rejected out of hand in the second case.⁷⁵

However, I will respond to Maoz's attempt to find support in the ruling of the Deputy President, Justice Elon, in *Temple Mount Faithful*.⁷⁶ In the words quoted from the ruling there is no explicit declaration of annexation, and so in his interpretation Maoz is forced to resort to terms such as "this conclusion is explained perhaps"⁷⁷ and other similarly forced expressions. It is true that Justice Elon does suggest that any conclusion of the political negotiations regarding the fate of the Golan Heights should be brought before the Knesset for its approval. Yet this has a precedent—the withdrawal from Sinai was presented to the Knesset for approval, and as is well known, the Sinai peninsula was never annexed to Israel.

Thus, the mere fact that the Court suggests that a settlement be set before the Knesset for its approval neither adds to, nor clarifies the present status of the Golan Heights. Justice Elon did not in fact relate to the question of withdrawal as such (or in Maoz's conception—the possibility of conceding part of the sovereign territory of Israel).⁷⁸ All he did was mention the need for Knesset approval regarding any conclusion of the negotiations.⁷⁹ This ruling leaves open a variety of possibilities, including annexation to Israel together with Syria conceding part of its territory, long term lease of the territory to Israel by Syria, Israeli withdrawal to the 1967 line, or partial

72. *Id.*

73. See Maoz, *supra* note 65, at 381-83.

74. *Kang Abou Tzalach*, [37] 2 P.D. at 718.

75. *Movement of the Faithful of the Temple Mount and the Land of Israel*, [47] 1 P.D. at 37.

76. See Maoz, *supra* note 65, at 383.

77. See Maoz, *supra* note 65, at 382-83; see also *Movement of the Faithful of the Temple Mount and the Land of Israel*, [47] 1 P.D. at 37.

78. See Maoz, *supra* note 65, at 383; see also *Movement of the Faithful of the Temple Mount and the Land of Israel*, [47] 1 P.D. at 37.

79. *Movement of the Faithful of the Temple Mount and the Land of Israel*, [47] 1 P.D. at 37.

Israeli withdrawal with alterations of the border. In other words, Justice Elon was of the opinion that in any of these cases there is a need for approval by the Knesset, without relating to the question of whether the territory is a sovereign part of Israel.⁸⁰

The only interpretation that necessarily flows from the words of Justice Elon is the exact opposite of the interpretation proposed by Maoz. Let me repeat in full the words of Justice Elon, as they also appear in Maoz's article: "It may be assumed that the Government of Israel shall act within the framework of the laws of the state, and if it arrives at *any kind* of agreement in the political negotiations, the agreement shall be brought for approval of the Knesset."⁸¹ In other words, *every* agreement will be brought for approval, including, for example, an agreement by which Syria agrees to concede the Golan. Now clearly, if the Golan has already been annexed to Israel and if Syria agreed post facto to this unilateral annexation, there would be no need to present the Syrian concession for the Knesset's approval. Obviously, if there already had been annexation, a celebratory declaration of the settlement would suffice—a declaration that the annexation that had initially been performed in defiance of international law, had in the end been adjusted to meet the requirements of international law. Consequently, the stipulation of Justice Elon that *every* conclusion be brought for the approval of the Knesset, leads inevitably to the conclusion that there was no annexation.

If Israel returns the Golan, Justice Elon's position is that the agreement should be brought for Knesset approval, apparently as a result of the Sinai precedent. On the other hand, if Syria concedes the Golan, Justice Elon's position is still that the agreement should be approved in order to officially declare the act of annexation publically and explicitly; i.e. the alteration in the status of the Golan Heights. In the latter case, we may assume that this time words like "application of the law" would not be used, and the formula would be the explicit terms of annexation, legally and according to the rules of the international law.

80. *Id.*

81. See Maoz, *supra* note 65, at 390; see also *Movement of the Faithful of the Temple Mount and the Land of Israel*, [47] 1 P.D. at 43 (emphasis added).

