

A Case Study in the Banning of Political Parties:

The Pan-Arab Movement El Ard and the Israeli Supreme Court

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Abstract

Attempts to outlaw political groups that are alleged to approve the use of violence, to limit the expression of views that challenge the core values of democratic nation-states, and to ban radical, separatist, or religious political parties are more widespread in recent years than at any other time since 1945. They gave rise in the last few years to litigation in Constitutional Courts and Supreme Courts in Spain, Germany, Turkey, France, Israel, and Latvia, as well as in the European courts.

The present article tells the story of the encounter in the years 1959-1965 between the Pan-Arab national movement El Ard (“The Land”) and the Israeli executive and judicial branches. The movement’s affairs were litigated in the Israeli Supreme Court six times in less than five years. Taken together, the six decisions raise important questions of civil rights, judicial review, jurisprudence, and legal theory.

The article uses the case of El Ard in a manner that can be of interest to scholars of comparative constitutional law: it elaborates on the question of how to interpret the objectives of a party; it grapples with the question of what constitutes support for terror and for the use of violence; it raises issues related to the nature of separatism, *irredenta*, and pan-nationalism; it problematizes the test for adherence to democratic principles; and it deals with the effects of emergency and post-war situations. The case study places in thick context, with ample nuances, the dilemmas and doubts involved in the ban of political parties, which have recently come to preoccupy many of Europe’s governments and courts.

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1 Foreword

In the US, the right to be elected is generally viewed as an individual right. Historically it was challenged mainly with respect to individual Members of Congress or individual candidates. Two tracks were used for this: expelling serving Members of Congress based on Article I § 5 of the US Constitution with the concurrence of two thirds in the relevant House; and disqualifying candidates who did not meet requirements added by federal or state legislation to the existing requirements of age, citizenship, and residence contained in Article I § 2 of the Constitution. Both tracks were used primarily in order to expel or exclude individuals for reasons of corruption, criminal acts, election fraud, and the like. Only in a handful of cases, notably with respect to supporters of the Confederation during and after the Civil War, but also with respect to one Mormon, one Communist, and one radical black activist, did the political views of the person motivate the majority in Congress. Most recently, the constitutionality of the exclusion of candidates was litigated with respect to term limits set in legislation for long serving candidates. This is a more general category of excluded candidates, yet, the attempted exclusion in these cases, as in most previous ones, is not based on the political views of the candidates.

In Europe and in some other democracies the right to be elected is denied usually at the level of the political party and it is based on the party's views and objectives. It became clear in recent years that efforts to ban political parties are not taking place only in non-democratic states and are not a matter of the past in many democracies. The banning of parties is exercised frequently, litigated in the highest national and European courts, and intensely debated in the academia and the media. The current phase of the debate originates in the aftermath of World War II. In both Germany and Italy Constitutional provisions were established to exclude Nazi and Fascist parties from participating in the elections. The German provision, article 21.2 of the German Basic Law, was drafted with wider

applicability, allowing the banning of political parties aiming to impair or destroy the free democratic order. Based on this law, both a National Socialist party (SRP) and the Communist Party (KPD) were banned in 1951. Article 21.2 was used again in the early 2000s to ban a radical right wing party (NPD). The ban was not confirmed by the German Constitutional Court and is likely to occupy that court and the legal academia again in the near future. The outlawing and banning of Neo-nazi and Neo-fascist parties was considered and exercised elsewhere in Europe. Exclusion of candidates associated with former regimes was carried out in the former Yugoslav states and is likely to be an issue in Iraq.

Recently banning on the grounds of separatism made headlines. In 2003 in Spain the right to be elected was denied to Batasuna, the Basque separatist party. The ban was based on Batasuna's support for ETA and its use of violence. Spain's Supreme Court and Constitutional Court approved the ban. It was the first Spanish political party to be banned since the death of Francisco Franco in 1975. In May 2004 Spain's Supreme Court upheld a ban on the Basque nationalist party Herritarren Zerrenda from participating in European elections. The court said in its ruling that ETA and its banned political party Batasuna were organizing political, social, and financial support for the Herritarren Zerrenda party. The Spanish Constitutional Court reaffirmed the ban shortly before the June elections. As it involves elections to the European Parliament, this move is likely to be litigated and debated on the level of the European Union as well. In Turkey two separatist Kurdish parties were prevented from taking part in political life on the grounds that they supported Kurdish self-determination and were affiliated with the terrorist group PKK. These bans have reached the European Court of Human Rights (ECHR) and are a factor in the ongoing negotiations between Turkey and the EU.

The right to be elected of non-separatist national minority candidates became an issue in Eastern Europe, which has a complex and substantial structure of often non-

territorial minorities. A non-Latvian speaking candidate, member of a party whose aim is to advance the interests of the Russian-speaking minority, was removed from the list because she allegedly did not meet the Latvian language qualification requirement in the law. This case reached the ECHR that held Latvia in violation of the European Convention. A religious based ban arrived at the ECHR from Turkey. The Welfare Party (Refah Partisi) was banned, while still in opposition, by Turkey's Constitutional Court in 1998 for activities against the principle of secularism that were manifested in the party's objectives, such as the institution of Sharia law and a theocratic regime. This case also reached the ECHR, which refused to rule against Turkey. Somewhat similar cases may emerge when groups within Muslim minorities in Europe will seek to form religious political parties.

The present article tells the story of the encounter, in the years 1959-1965, between the Pan-Arab national movement El Ard ("The Land") and the executive and judicial branches in Israel. The executive branch argued that the movement's objectives threatened the existence of the State of Israel and its territorial integrity. It took a variety of measure to limit the movement's political activity. These included shutting down its newspaper, declaring it an illegal association, refusing to register the movement's corporation, and finally disqualifying the movement's list of candidates for the 1965 general elections. These effectively banned the movement from participating in Israel's political process. Disputes of the El Ard movement reached the Israeli Supreme Court six times between the years 1960-1965. Two of the decisions involving El Ard, the *Kardosh*¹ and *Yeredor*² cases, have become part of the main canon of Israeli case law.³ These decisions are cited and studied in every discussion dealing with freedom of association and the right to be elected in Israel. Taken

¹ High Court of Justice 60/241 Mansur Tewfik Kardosh v. Registrar of Companies, P.D. 15(2) 1151 (henceforth *Kardosh* case).

² Elections App. 65/1 Yaakov Yeredor v. Chairman of the Central Election Commission for the Sixth Knesset, P.D. 19(3) 365 (henceforth *Yeredor* case).

³ This was reflected in their inclusion among the 50 cases that were exhibited in The court of law: fifty years of adjudication in Israel (David Heshin et al. eds., 1999), pp. 61, 62, 64, 66-67, 84-86, 93, 153.

together, the six decisions raise important questions of civil rights, judicial review, jurisprudence, and legal theory. They deal with the status of unwritten principles and natural law in the constitutional order of a system without a written constitution. Few movements and organizations, if any, have had such far-reaching impact on the shaping of Israeli constitutional law. This remarkable accomplishment was achieved by a small Arab national political movement, without financial resources.

The case of El Ard can serve well scholars interested in comparative constitutional law. It features many of the elements that resurfaced in recent years with respect to the banning of political parties in other countries. It involves questions about what constitutes support for terror and for the use of violence as a means of advancing the party's objectives. It raises the issue of the nature of separatism, of *irredenta*, and of pan-nationalism. It problematizes the test for adherence to democracy. It grapples with the effects of emergency and post-war situations. And it deals with the question how to interpret the objectives of a party. The case study presents in detailed context and with ample nuances the dilemmas and doubts that recently came to preoccupy many of Europe's governments, courts, and regional institutions. The article does not carry out a comparison or supply explicit normative conclusions, but provides a unique case study and presents it in a manner that allows readers to gain the relevant insights for the cases that interest them, lending itself to future comparisons.

As a byproduct, the story can enlighten those who wish to learn more about the roots of the present Palestinian-Israeli conflict. The basic problems of this conflict were present long before the outbreak of the current uprising in 2001 or even the occupation of the West Bank and Gaza in 1967. They originated in 1948 and before, and were exacerbated in 1967. They keep coming to the fore of the discussion about the conflict, as exemplified by such issues as: the lines along which the country is to be divided between Jews and Arabs; the

extent, if any, of the right of return of the Palestinians; the affiliation of the Arab minority in Israel with the Palestinian state, the Arab nation, and Islam; the right of Jews to self-determination in the form of a Jewish state; the nexus of Israeli Jews to world Jewry and to the Western powers and culture. These issues, which have lingered for a long time in the margins of the discussion, became relevant at the height of the Oslo-Camp David peace process, and although they have been neglected since are likely to resurface in the future. The return to the pre-1967 roots of the conflict will make the El Ard affair, which preceded the 1967 war, relevant once again in the following years.

The first objective of the article is to tell the story of the movement and its legal encounters. It was not a trivial one, as it raises a variety of methodological and historiographic challenges. The existing historical and political science literature does not pay sufficient attention to the legal aspects of El Ard's activities and of the Government's responses. The legal and constitutional literature discusses each court ruling and its doctrinal and jurisprudential significance in isolation from other court decisions and from the movement's history as a whole. The only book that discusses all the decisions involving El Ard is Pnina Lahav's *Judgment in Jerusalem*.⁴ But this book was written as an intellectual history of Chief Justice Agranat and does not focus on El Ard.

The present article focuses exclusively on El Ard, its history, and its encounters with the legal system. It does not analyze each of the Supreme Court cases in the context of its constitutional doctrine and in isolation from the other cases. On the contrary, it highlights the dynamics between the cases. The article does not deal exclusively with the Supreme Court but with other legal institutions as well, especially the Attorney General, the Chief Prosecutor, the Chairman of the Central Elections Commission, and the Registrar of Companies. It was these institutions and not the Supreme Court that established the legal

policy with regard to El Ard and to the Arab minority in Israel in general, so these institutions form a more interesting subject of study than the Supreme Court. In addition to court records and administrative files the article also uses non-legal documents such as newspaper articles and political statements.

The article places and interprets the various texts within their historical contexts. This contextualization takes place at two levels: placing the legal action against El Ard within the context of the general policy of government agencies vis-à-vis the Arab minority, and placing the legal activities of El Ard within the political context of the Arab minority in Israel, of the Palestinian national struggle, and of the Arab world.

Unlike other works, the present article shows the El Ard members as active players in the story, who not only decided to organize as a political party and set themselves political goals, but also chose to wage a judicial battle, which they pursued with great success. They acted in a way that embarrassed the authorities and forced them to take oppressive legal action. They subjected these actions to judicial review, making sure to exhaust every legal proceeding and instance. Treating the El Ard movement as a passive victim leads to the formulation of a story in which there are only two actors: the oppressive or enlightened state, and a movement that reacts to the actions of the state and suffers its consequences. This article presents an El Ard movement that initiates action and chooses from available options. In the past, the El Ard movement has been treated as a victim and as a result it has never been evaluated critically. Critical Jewish-Israeli historians tended to be critical toward the Jewish-Israeli subjects of their research because of an ethical sense of collective responsibility, because of a desire to promote a political agenda of compromise and peace, and because they possessed better tools (language, archives, research literature, acquaintance) for being critical of members of their group.

⁴ Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley,

The article begins with a nutshell presentation of the basic story of the El Ard movement. This is followed by a presentation of the wider context, beginning with the post-1948 military rule over Arabs in Israel, moving to political activity within that minority, the difference between the state responses to El Ard and to the Communist Parties, the finally to the relationship between El Ard, the Arab world, and the emerging Palestinian national movement. These contexts are essential for a better understanding of the movement, its activities, and its objectives. All these finally lead up to the discussion of three decisive constitutional points of contact between the movement and the court: freedom of speech, freedom of association, and the right to be elected.

2 The Basic Story

In the first decade of the state, the political activity of the Arab minority in Israel found three conduits of expression: Arab parties associated with the governing labor party - *Mapai*, the socialist United Workers Party (*Mapam*) – that was in the opposition for most though not all of the period discussed here, and the Israeli Communist Party (*Maki*). The establishment of El Ard at the beginning of the second decade as a movement not associated to those parties was a new phenomenon in the Israeli political landscape. Following the rift in 1959 in the Arab world between the pro-Soviet camp led by Iraqi leader Abdul Karim Kassem and between the nationalist, pan-Arab camp of Egyptian president Gamal Abdul Nasser, tensions developed in *Maki*, and a group of young Arab intellectuals withdrew from it. After its separation from *Maki* toward the end of 1959, the group began to organize an Arab political movement called El Ard, the first such group without Jewish participation, at a time when many of the leaders of *Maki* and about half its voters were Jews. The most prominent among the leaders of the new movement were Mansur Kardosh, Habib Qa' uqji, and Sabri Jirys. Unlike the other political alternatives, El Ard offered a pan-Arab national

Calif.: University of California Press, 1997), pp. 252-272.

platform, not a socialist or communist one. El Ard championed a change in the internal political arrangement created after Israel's War of Independence in 1949, and was not satisfied to struggle for the rights of Arab citizens within the State of Israel as a Jewish state existing within the borders of that time. El Ard struggled on three fronts to establish its political status: against the Israeli authorities, against traditional Arab society, and against *Maki*. At first, El Ard was organized as an extra-parliamentary political movement, and it did not run for the Knesset in 1959 and 1961. Its activity consisted of the publication of newspapers and manifestos, membership drives, the organization of meetings and assemblies, and the development of an organizational and financial infrastructure. It was only on the eve of the 1965 elections that the movement submitted a list of candidates for the Knesset.

The Israeli authorities tried various methods to restrict the activities of El Ard throughout the years of its existence. The movement chose to confront these attempts by legal means.⁵ As a result, several attempts to limit El Ard activities were tested in the Supreme Court, which handed down six important decisions in cases involving El Ard over a five year period (1960-1965). At first, the movement requested a license to publish a newspaper, while printing "one-time" sheets, each with a different title and editor to circumvent the interdiction of the Press Ordinance. The sheets were widely distributed and received attention. Consequently, the Advisor to the Prime Minister on Arab Affairs called a news conference, warning about the dangers that the activities of the movement represented to the state, and announced the government's intention to take drastic steps against it. The

⁵ Jacob M. Landau, *The Arabs in Israel: A Political Study* 111-124 (1971); Sabri Jirys, *The Arabs in Israel* (1966). Lahav, *supra* n. 4, pp. 252-272; I. Amitai, "The Arab Minority in Israel: The Years of Military Administration, 1948-1966," in *Independence, The First Fifty Years* 129 (Anita Shapira ed., Jerusalem, Israel, 1998).

newspaper was subsequently shut down, and six of its editors were indicted and convicted in trial court, a conviction upheld by the district court and the Supreme Court.⁶

The group continued to operate in the years 1960-1962 in two directions: a request for a license to publish a weekly and a request to incorporate as an Ltd. for-profit company in the business of printing and publishing newspapers and books. When the request for a publishing license was denied, the group petitioned the High Court of Justice against the District Supervisor of the Interior Ministry, but the court rejected the plea.⁷ However, when the group filed a petition against the Registrar of Companies who refused to register the company, the court granted the petition with a majority of two to one (Agranat and Vitkon against the minority view of Haim Cohn, who interpreted the language of the law in a literal way so as to provide the Registrar of Companies absolute discretion).⁸ The Attorney General, Gideon Hausner, asked for a further discussion and appeared in person before a larger panel of five justices. The High Court of Justice did not change its decision, and this time with a majority of three to two (Agranat, Vitkon, and Sussman against Cohn and Chief Justice Olshan) instructed the registrar to incorporate El Ard, Ltd.⁹

The movement, which was unsuccessful in publishing a newspaper, continued to operate in a lower key: it created branch offices, organized rallies, and marketed shares of El Ard, Ltd. to expand its membership. As of 1962, it appears that El Ard decided to raise its level of visibility one notch: it began appealing to the Secretary General of the United Nations, to the international press, and to foreign ambassadors in Israel.¹⁰ The movement also received open support from Radio Cairo. In 1964 it announced that it was organizing as an Ottoman

⁶ Cri. App. 60/228 Qa'uqji v. Attorney General, P.D. 14(3) 1929 (henceforth the *Qa'uqji* case).

⁷ High Court of Justice 64/39 El Ard Company, Ltd. v. Supervisor of Northern District, P.D. 18(2) 340 (henceforth the *El Ard, Ltd.* case).

⁸ *Kardosh* case, *supra* n. 1.

⁹ Further Discussion 61/61 Registrar of Companies v. Kardosh, P.D. 17(2) 1209 (henceforth *Kardosh* Further Discussion).

¹⁰ Regarding the non-legal activities of the movement, see High Court of Justice decision 64/253, Jirys v. Supervisor of Haifa District, P.D. 18(4) 673 (henceforth the *Jirys* case).

Association – a non-commercial, not-for-profit association – perhaps in preparation to organizing as a political party and running for the Knesset, since this type of organization was more suitable for political activity than a for-profit corporation. The District Supervisor of the Interior Ministry informed members of El Ard that the organization of the movement as an association is not permitted, and El Ard again petitioned the High Court of Justice. This time the court decided unanimously to reject the plea and to forbid the movement from organizing as an association.¹¹ Shortly afterwards several of the prominent activists of the movement were arrested, and the Minister of Defense declared the El Ard movement illegal by a decree based on the state of emergency regulations.

In 1965 El Ard decided to run in the elections to the sixth Knesset under the name “The Socialists List.” The Elections Commission disqualified the list claiming that its candidates were members in an illegal association, which was banned, and that the objectives of the association threatened the existence of the State of Israel and its territorial integrity. The Supreme Court rejected the appeal with a majority of two to one (Agranat and Sussman against Cohn) and let the disqualification stand.¹² With most legal means at its disposal disallowed and its main activists dispersed, the El Ard movement then ceased to exist for all practical purposes.¹³

3 Arab Politics within the Pincers of Military Rule

The 1947-49 war, Israel’s War of Independence began with the Arab rejection of the UN partition Resolution of November 1947 that called for the formation of a Jewish state and an Arab state in Palestine-Eretz Israel. The war intensified in May 1948 with the end of

¹¹ The *Jirys* case, *ibid.*

¹² The *Yeredor* case, *supra* n. 2.

¹³ One of the leaders of the movement, Habib Qa’uqji, later joined the Syrian intelligence service, and was claimed to have recruited the network of Jewish-Arab spies that was captured in the early 1970s. Another leader, Sabri Jirys, joined the PLO, began researching the Jewish-Arab conflict, and returned to Israel only after the signing of the Oslo accords. See Lahav, *supra* n. 4, footnote 35 on p. 399.

the British mandate in Palestine, the declaration of Independence of the State of Israel and the military invasion of the neighboring Arab Countries. By the end of the war Israel controlled territories that were considerably larger than those that were allocated to it in the UN resolution. Hundreds of thousands of Arabs fled or were expelled from their homes and became refugees in what is known in Palestinian collective memory as Al-Nakba (the “catastrophe”). Some 160,000 Arabs, many of which involved just months earlier in fighting against the Jews, remained in the newly formed State of Israel and formed nearly 20% of its population. Most of these Arabs soon received Israeli citizenship, including the right to vote.

The military administration was established in October 1949, at the closing of the war. It quickly pushed aside the Ministry of Minority Affairs led by Bechor Shalom Shitrit, which was set up at the time of the establishment of the state. The military administration lasted eighteen years during which most of the Arab citizens of Israel were ruled by the army and not by the civilian departments of the government.¹⁴ The military administration held sway over territories that were labeled “closed areas” and “security districts.” Approximately 75% of Israel’s Arab citizens lived in these areas, which included the Galilee, Wadi Ara, the “Triangle” (Meshulash), and the Negev. Jewish residents in the same areas were in practice not subject to the military rule. Arabs who lived outside the areas of the military administration, for example in Haifa, Acre, Jaffa, Ramla, and Lod, were subject to the military administration only when they wanted to travel to areas that were under military rule.

¹⁴ For a discussion of the political and legal status of Israeli Arabs in the period of the military administration and of the consequences of their status in this period for their status at later times, see Ian Lustik, *Arabs in the Jewish State, Israel’s Control of a National Minority* (University of Texas Press, Austin, Texas, 1980), Mifras Publishing House, Haifa, 1980; Uzi Benziman and Atallah Mansour, *Subtenants: Israeli Arabs, Their Status, and the Policy Toward Them* (Keter Publishing House, Jerusalem, Israel 1992); Ori Stendel, *The Arabs in Israel, Between the Hammer and the Anvil* (Academon, Jerusalem, Israel, 1992); Landau, *supra* n. 9; Ilan Saban, *The Legal Status of Minorities in Democratic Deeply-Divided Countries: The Arab Minority in Israel and the Francophone Minority in Canada* (PhD thesis submitted to the Hebrew University in Jerusalem, 2000); David Kretzmer, *The Legal Status of Arabs in Israel* (1990); Baruch Kimerling and Joel Migdal, *Palestinians: The Making of a People* (1994).

The legal authority of the military administration was based on the Defense (Emergency) Regulations enacted in 1945 by the British Mandatory government.¹⁵ The regulations contained some 170 sections and invested the executive branch with broad authority that trumped regular legislation and allowed the infringement of civil rights. The military administration used primarily six of the regulations: regulation 125, which allowed limiting movement within areas declared “closed” and making it conditional upon a permit issued by the administration; regulation 110, which allowed limiting the movement of individuals and their placement under police supervision; regulation 109, which allowed the deportation of people from areas of their residence; regulation 111, which allowed administrative detention; regulation 124, which allowed the imposition of curfews; and regulation 137, which regulated the licensing of weapons. The defense regulations of the Mandatory government, inherited by Israeli law, were in force over the entire territory of the state.

The areas under military rule were unique in that they were administered by a staff under the command of a governor who was entitled to exercise his authority personally. This delegation of authority from the Defense Minister made the intensive daily enforcement of the regulations easy throughout the areas under military rule. The establishment of separate courts further distinguished the areas under military rule. Judges in these courts were army officers, usually not jurists, who were in fact part of the military administration. It was not possible to appeal their decisions.¹⁶

Another legal instrument, in addition to the regulations of the Mandatory government, was the Emergency Regulations (Security Areas) of 1949.¹⁷ The regulations were enacted by the Defense Minister based on his authority under of the Jurisdiction and Powers Ordinance of

¹⁵ Defense (Emergency) Regulations, 1945, Official Gazette Supplement B, p. 855 (henceforth Defense (Emergency) Regulations).

¹⁶ The best analysis of the legal mechanisms of the military administration is in Jirys, *supra* n. 9.

¹⁷ Adriana Kemp, “The Mirror Language of the Border: State Territoriality and National Minorities in Israel,” *Israeli Sociology* 2(1) 1999, p. 319, attributes great importance to these regulations. Jirys, however,

1948¹⁸ and its validity was extended every year until 1972. The regulations established a protected zone along the borders of Israel (10 km in the north and center, 25 km in the south) within which the Defense Minister was entitled to designate security zones. The Israeli regulations were important in the first years, because in addition to the powers based on regulations of the Mandatory government, they granted the authority to evacuate citizens from the security areas. These regulations were used to remove residents from these areas and prevent their return to the villages, among them Iqrit and Birim. Over time, the importance of the Israeli regulations decreased and the difference was obscured between closed areas declared by virtue of the Defense Regulations of the Mandatory government and the security areas established under the strength of the Israeli Emergency Regulations. The legal framework of the military administration did not determine its nature, because although it allowed the use of the same legal means toward the Jewish residents of these areas, it was clear to all that this would not happen. Moreover, it was possible to use other regulations, in addition to the six, against Arab residents of these areas, but they were not used. It would have been possible to distinguish between security areas close to the border and closed areas inside the country, but these areas were administered jointly. It would have been possible to apply all the defense regulations of the Mandatory government to Arabs as well as Jews outside the areas of the military administration, but this was hardly ever done. Even toward the Arab population inside the areas of military rule the policy changed over the years. Gradually, rules were eased for residents in these areas and many types of movement were allowed without authorization: movement on specific days, for specific purposes, to specific areas. Toward the end of the military administration, movement between settlements and areas was almost entirely free, and collective limitations were

emphasizes the overlap between them and the defense regulations and the similar extent of control that the administration exercised in border areas and inside the country.

¹⁸ Jurisdiction and Powers Ordinance

replaced by individual ones. Thus it was policy and not legal framework that dictated how the military administration functioned.

What was the policy that guided the military administration? Research reveals that the purpose of the military rule has not been clearly defined at the outset.¹⁹ In the course of the War of Independence, a new situation arose in which the Jewish state gained control over an Arab population.²⁰ The situation was fluid. Battles continued, the borders have not been finalized, and a large Arab population has not yet found its place. The military rule grew out of the necessity of the moment, in order to replace the military units that had conquered areas in which the Arab residents did not flee and were not driven out. The main function of the military administration was to control that population and ensure that it did not become once more a fighting force against the Jews. At the end of the war, after the armistice agreements were signed, the problem of refugees trying to return to their homes, referred to in Israel as “infiltrators,” became a central security issue. In addition, there was the fear of a “second round” initiated by the Arab states, to attack and destroy Israel, which would be joined by the Arab residents of the state as a fifth column. It quickly became clear that the military administration could not address both security threats, which were handled by the regular army forces, the police, and the General Security Services. The military administration continued its existence by virtue of bureaucratic inertia and from an organization with security objectives it became one that promoted the overall political objectives of the government vis-à-vis the Arab population. The policy was one of making the Jewish state more Jewish, a process measured by two main indicators: land and demography. On a more abstract level, the military administration was supposed to

¹⁹ Amitay, *supra* n. 9.

²⁰ In fact, a situation of this nature was likely to develop in the wake of the partition plan, except that the international and constitutional mechanisms that were specified in Resolution 181 of the UN Assembly for the protection of the rights of Arabs in the Jewish state and of Jews in the Arab state have not been fleshed out. Moreover, were the partition plan to be executed, the subjection of Arab residents to the Jewish state

discipline and restrain the Arab population to allow the strengthening of the Jewish state.

From a necessity of the moment the military administration became a methodology.

As of the mid 1950s, it was frequently claimed that the military administration no longer served security or national-Zionist interests but rather the political interests of the ruling *Mapai* party. It was claimed that following the Sinai campaign of 1956 (in conjunction with Anglo-French operations in the Suez Canal) the security threat was not as great as in the past, and in any case it was being addressed by other agencies. The Jewish makeover of the state was nearly complete once the refugees were prevented from returning to their homes and the transfer of many lands from Arab to Jewish hands completed – processes that were also handled by other agencies.²¹ The military administration was in the service of *Mapai* in two ways: first through direct support of Arab parties affiliated with *Mapai*, and second by preventing the organization of independent Arab political parties that may compete with *Mapai*.²² In time, critics of the military administration from among Arab activists were joined by many parties in the Knesset, extending from left to right: *Maki*, *Mapam*, *Achdut Ha'avoda*, the Liberal Party, and *Herut*. The growing opposition to the military administration resulted in several reviews of its justification. In 1949 a committee was set up under the leadership of minister Shitrit; in 1951 the Knesset decided that the Constitution, Statute, and Law Committee would prepare a proposal for the abolition of the Mandatory laws on which military rule was based; in 1955 an investigative commission was

would not have occurred in enmity and by threats, war, and the removal of large numbers of residents from their homes.

²¹ Alexander Kedar, "Majority Time, Minority Time, Land, Nation and the Law of Adverse Possession in Israel," *Tel-Aviv University L. Rev.* 21 (1998) 665-646; Oren Yiftachel & Alexander Kedar, "Landed Power: The Making of the Israeli Land Regime," *Theory and Criticism* 16 (2000) 67-100. Oren Bracha, "Unfortunate or perilous: the infiltrators, the law and the Supreme Court 1948-1954," *Tel-Aviv University L. Rev.* 21 (1998) 333.

²² See, for example, the letter of the military administrator of the northern region, warning about the public activities of the *Maki* central committee on the even of the Knesset debate about the abolition of military rule at the beginning of 1964. The letter is addressed to the Army General Staff, the police, and the Advisor to the Prime Minister on Arab Affairs. Letter of 18.12.63, Israel State Archive (henceforth ISA) Department 79, Folder 30 186, Northern District Minority Supervision. For an additional example, see

established under retired general Yochanan Ratner to look into the necessity of the military administration; after the Kafr Qasim massacre (1956), the need for the military administration was examined once again; in 1958 a ministerial committee led by Justice Minister Pinhas Rosen was created to investigate the matter. All through these years, there was growing criticism of the military administration on the part of intellectuals, non-parliamentary political groups, and even the State Comptroller. In 1962, a proposal to abolish military rule was rejected in Knesset by a slim majority of 59 to 55. In 1963, a new proposal to abolish military rule was rejected by a single vote. The balance was tipped by the votes of two Arab members of Knesset who were compelled by *Mapai* to vote against abolition disregarding their views on the matter and at great cost to their political status. It can be said that in the period of El Ard's activity, the military administration survived thanks to the votes of Arab members of the Knesset. The basis of political support for the military administration gradually shrank in the 1950s and early 1960s, and its continued existence was possible only by Prime Minister David Ben-Gurion applying the full weight of his personal influence on members of *Mapai*, the Arab factions associated with it, and the other members of the government coalition.

After Ben-Gurion resigned, in 1963, the situation changed. His successor, Levy Eshkol, while he didn't act to immediately abolish military rule, as many had expected, enacted several measures of relief. Finally, after three more years and a power struggle between the supporters and opponents of military rule within the Prime Minister's office and the security establishment, Eshkol decided in favor of abolishing military rule. The abolishment was effected only in November 1966, a year after the disqualification of El Ard and the elections to the sixth Knesset.²³ The civilian functions of the military administration were transferred

letter of 5.2.63 in the same folder reporting about a broadside in Arabic circulated by *Mapam* in the Acco region calling for the abolition of military rule.

²³ Knesset Debate 47 (1967) 228. Major Knesset Debates, 1948-1981, Vol. 4, edited by Netanel Lorch, p. 1522, University Press of America, Maryland, USA, 1993.

to civilian authorities and the military functions to the regional commands. No legislation was involved in abolishing military rule. What was abolished in fact was the administrative mechanism of military rule within the army, not the legal framework of the emergency legislation that made its operation possible. The Mandatory and Israeli emergency legislation remained in force. In parallel with the abolishing of military rule over the Arab population as a whole, individual injunctions remained in force against several hundred Arab activists who had been black listed under the military administration. Additionally, limitations on movement continued in several of the closed areas. Abolishment of the military administration did not result in a comprehensive cancellation of all the limitations imposed on the Arab minority. Some were abolished gradually before 1966, while others continued after the military administration ceased to exist.

Mapai used the mechanisms of the military administration to further its political objectives. The Advisor to the Prime Minister on Arab Affairs was the linchpin between the party, the government organs, and the military administration. Through restrictions placed on movement between the various security and closed areas as well as the individual restrictions on political activists, the military administration obstructed the formation of a nation-wide Arab party as it obstructed the activities of the Communist Party. The military administration handed out various benefits to voters of the parties affiliated with *Mapai*, promised before elections to ease restrictions, and its officers appeared on election rallies together with candidates connected with *Mapai*. The justification for the political involvement of the military administration was found in the claim that the relationship between the Arab population and the ruling party promoted the national interest and prevented the emergence of security threats.

Mapai tried to use the mechanisms of the military administration to influence Arab voters in favor of the Arab parties affiliated with it, but there is no evidence that it completely

succeeded in doing so. At that time, *Mapai* did not include Arabs in its list of candidates to the Knesset, and did not allow membership of Arabs in the party, but used affiliated Arab parties, which were controlled by *Mapai* leadership and its Arab department. The parties were created on a regional and ethnic basis designed to attract various groups of voters and to allow rival groups and clans to support various lists of candidates affiliated with *Mapai*. The military administration used the carrot and the stick to induce the Arab population to vote for these parties. However, in parallel with the military administration, there were others active in the Arab sector, including the sprawling *Maki* apparatus; ministries that were not under *Mapai* control (Interior, Labor, Transportation, Religious Affairs) and tried to promote the political interests of their ministers; affiliated parties created by Achdut Ha'avoda and later *Rafi*; neighboring kibbutzim belonging to the Shomer Ha'tzair movement, and others.²⁴ The secrecy of the ballot was largely respected, allowing voters to vote inside the booth in relative freedom, and numerous Arab citizens were not afraid to openly abstain from voting in elections to the Knesset.²⁵ With the aid of the military administration, *Mapai* achieved significant success among the Arab minority but it was not all-powerful, not in its ability to perpetuate the military rule and not to further its political interests.

The El Ard story cannot be told without understanding the administrative and judicial ability of military rule to intervene in Arab politics. It is impossible to understand the activities of the military administration and of the Advisor to the Prime Minister on Arab Affairs toward El Ard without considering the central role played by the military administration in

²⁴ See, for example, the letter written by the Police Minister's permanent secretary to Uri Lubrani of the Prime Minister's office, describing the manner in which *Mapam* is attempting to bolster the Arab party affiliated with it by providing employment to party supporters in the Ministry of Labor and other institutions controlled by *Mapam*. Folder 3 3328 Arab Parties.

²⁵ For a discussion of the manner in which local Arab leaders used the political system, the Jewish parties, and the election campaigns to further their local and clan interests during the period of military rule, see A. Cohen, *Arab Border-Villages in Israel* (Manchester Univ. Press, Manchester, 1965); M. Gorkin, *Days of Honey, Days of Onion: The Story of a Palestinian Family in Israel* (Beacon Press, Boston, 1991).

preserving *Mapai*'s political power. Finally, it is impossible to understand the story without grasping the centrality of the struggle to abolish military rule, which reached its zenith in the years of El Ard's activity. Obviously, these factors all influenced El Ard's activity. The opinion of the Attorney General and the decisions of the Supreme Court were probably also influenced by these wide and important contexts.

4 The Objectives of El Ard and the Limits of Israeli Politics

It is not easy to know what the objectives of the El Ard movement were. The legal discussion generally focuses on the "Objectives" section in the articles of organization of the El Ard association. Objectives A, B, E, and F in the "Objectives" section deal with "raising the educational, scientific, health, economic, and political level of its members;" the "establishment of full equality and social justice among all segments of the population of Israel;" an "action to achieve peace in the Middle East in particular and in the world in general;" and even "support for all progressive movements worldwide that oppose imperialism, and support for all peoples that attempt to free themselves from it." These objectives were not considered problematic. The discussion focused in general on objectives C and D, which stated the following:

- C. Finding a just solution to the Palestinian problem – by seeing it as an indivisible unit – according to the will of the Arab Palestinian people, that provides an answer to its interests and aspirations, returns to it its political existence, ensures its full and legal rights, and regards it as owner of the primary right to determine its destiny within the supreme aspirations of the Arab nation.

- D. Support for the liberation, unification, and socialist movement in the Arab world, through all legal means, by seeing that movement as a determining force in the Arab world, and requiring Israel to consider it in a positive way.

Security and law enforcement agencies in Israel claimed that these two objectives must be interpreted to mean that El Ard categorically denies the right of the State of Israel to exist and seeks to establish an Arab-Palestinian state in the entire territory of Mandatory Palestine. El Ard's attorney in the *Jirys* and *Yeredor* cases, Dr. Yaakov Yeredor, offered an entirely different interpretation, according to which the State of Israel already exists and hence there is no need to recognize its right to exist, while the Arab people have not yet obtained their state and it is for this reason that their right to a political existence is mentioned. But Yeredor, in his interpretation, did not address the question of what will be the boundaries of the Palestinian political entity and what will be the nexus between it and the Arab nation as a whole.²⁶

Justice Vitkon, speaking for the court in the *Jirys* decision, ruled that the objective of the movement "denies totally and completely the existence of the State of Israel in general, and particularly the existence of the state within its present borders." In the *Yeredor* case, Chief Justice Agranat reiterated the argument unequivocally: "Before us is a list of candidates whose aim is the liquidation of the State of Israel."

Three main types of records used by historians to examine the positions of political movements and parties are not available in the case of El Ard: party newspapers, Knesset protocols of debates, and protocols of internal discussions within the movement. Since the movement was not allowed to issue a newspaper, we do not possess the important source of a party newspaper such as the ones that can be used by historians of *Maki*, Herut, or the workers' parties. Since the leaders of El Ard did not have the opportunity to be elected to

the Knesset, its positions cannot be evaluated based on speeches of its members delivered before the Knesset.

Moreover, it appears that El Ard has not documented its activities formally; there are no protocols of internal discussions or of binding resolutions, probably as a result of the low level of formalization within the movement, its organs, and rules, and the fear that the security agencies or political rivals might get hold of such documentation. Consequently, there is a great historical lacuna with regard to the official positions of the movement, of its leaders, its various factions, and its internal organs (if there were such).

One source that survived and has been used by the authorities in legal action against El Ard are the one-time pamphlets that the movement published under different names toward the end of 1959 and the beginning of 1960, and for the publication of which several El Ard members were tried. The general tone of the sheets praised pan-Arab nationalism: “The Arab revival movement, which awoke at the beginning of the current century, is now storming with awesome force and striking out at foreign influence... It will do its best for the freedom and unity of the Arab world from the Persian Gulf to the Atlantic Ocean and it is clear that victory is assured.”²⁷ The Jewish national movement is treated differently: “World Zionism saw in the [United Nation’s] partition plan a first basic step in the implementation of its plans in the Arab world and was satisfied for the moment with a portion of the land, while it secretly plotted to swallow all of Palestine and to prepare in this way the country to serve as a bridgehead for the conquest of the other Arab states.”²⁸ The refugee question receives great attention in the pamphlets. The political demand is for the recognition of the right of return. The writer dismisses Ben-Gurion’s proposal to participate in the relocation of the refugees in the Arab states as a proposal that will persuade only people “at the mental

²⁶ For a similar commentary, see also the actual text of the articles of organization as submitted to the Supreme Court in the *Jirys* case, quoted by Jirys, *supra* n. 9, pp. 118-119.

²⁷ ISA, Court folder, *Kardosh* case, *supra* n. 1, 7.10.59.

level of a female cook at Sde Boker” (a reference who Ben Gurion’s wife, who lived in kibbutz Sde Boker). The writer dismisses the claim that there is no room for the refugees by reminding the readers of the great Jewish immigration and the intention of absorbing three million Jews from Russia. The writer answers the claim that the refugees hate Jews with the following: “According to your own ‘good’ judgment, what is your right to live in the heart of the Arab orient while you abhor its residents and spread hatred between them and your people.”²⁹ The sheets contain some comparisons between Jewish and Nazi rule, and threats as to what is awaiting the Jews and their state: “This negative view of Arab nationalism will by itself, in our view, seal the dark fate of this people.” “It should not be allowed to fade from the mind of Israel’s rulers that it is time to solve this problem (the problem of the Palestinian Arabs) in a just way before another sword will solve it, and a what a sword this will be!”³⁰ The sheets do not specify who will bring these threats to fruition and what is required of the Jews, other than the return of the refugees, to remove the threat. They mention the foreignness of the Jews in the Arab east, and there is no recognition of the existence of a Jewish state, so that it appears that even after the right of return is implemented the Jews do not have a right to exist within the framework of a state – Jewish, bi-national, or democratic – that is not part of the Arab nation, and it is possible that there will be no place for them in the Arab world as individuals either.

Jurists, who examined the affair with the benefit of hindsight and after the fact emphasized the vagueness of the objectives of El Ard. They focused on the language of the articles of organization even more than jurists of the period. The latter were influenced to a greater or lesser extent by the wider context of events and opinions of the time, while the former were at times treating the text of the articles of organization in isolation from their historical context. Ruth Gavison’s article “Twenty Years to the *Yeredor* Decision,” is a good example

²⁸ *Ibid* 7.12.59

²⁹ *Ibid* 28.12.59

of the approach that examines fascinating questions in the *Yeredor* decision. It is also an example of an original philosophical and legal discussion, but essentially a-historical and non-contextual. In several crucial points, while considering whether or not the *Yeredor* decision was justified, she treats the objectives of the movement as a question of legal evidence: “It appears that one of the reasons for the disqualification of El Ard was that the court believed that in fact the list of candidates represented [such] a combined threat to the existence of the state. It is not clear what was the evidence in support of this threat...” She adds in a footnote that it was said that the movement did not recognize the existence of the state, “but other than the saying of it there is no such evidence.” And later: “I don’t have data about the positions of El Ard, but based on the decision it appears that its charter did not include a denial of the right of self determination of the Jewish people.”³¹ In many cases, jurists were satisfied with the facts as they appear in the text of the main decisions involving El Ard; they do so because of their approach whereby the means of investigating the objectives of El Ard is to peruse legal documents and court decisions, and because of a lack of ability or interest to carry out a broad and incisive historical research into the objectives of El Ard.

Historians use different methods to investigate the positions and objectives of El Ard. They turn to non-legal documents, like the movement’s printed literature. They try to acquire documentation about conversations and meetings in which its leaders participated. They try to position the movement in a broad political context, within Israeli as well as Palestinian and Arab politics. The present article relies on the work of historians to learn about the positions of El Ard by examining its position relative to competing parties within the political space of the Arab minority in Israel. The article also analyzes the positions of El

³⁰ *Ibid* 7.12.59

³¹ See Ruth Gavizon, *Essays in Honor of Shimon Agranat*, (Aharon Barak et al. eds., 1997) P. 145, 160.

Ard in relation to the positions of Arab states and the organizations of the Palestinian national movement at the time.

5 El Ard and the Israeli Communist Parties

Understanding the political positioning of El Ard with relation to *Maki*, the Israeli Communist Party, can be indicative of its positions. But first, it is important to understand the internal tensions within *Maki* in the years 1957-1965, the period of El Ard's existence. *Maki* was not monolithic. It included both Arab and Jewish members and leaders. It included members with different views about the nature of subordination to the Soviet Union, about nationalism, imperialism, the solution to the Jewish-Arab conflict, the leaders of various Arab countries, and the means and stages necessary to reach the party's objectives. The party's 12th (1952) and 13th (1957) congresses passed similar resolutions according to which "the State of Israel must recognize the right to self-determination, including separation, of the Arab people in the Land of Israel... and the right of the refugees to return to their homeland and be rehabilitated."³² In retrospect, based primarily on the memoirs of several of the Jewish leaders published after they had left the party, it appears that this version of the text was the result of a compromise. The Arab camp demanded the inclusion in the platform of a demand for the implementation of the 1947 UN partition plan, but the Jewish camp opposed it. The words "including separation" represented a vague compromise about this point – with regard to which the camps exchanged their previous positions of 1947-48, when the Jews supported the partition and the Arabs rejected it.³³ Since the

³² Ely Reches, "Relations between Arabs and Jews within *Maki*," *State, Government and International Relations*, 1987, Vol. 27, p. 67, 71, quoting from The 13th Congress of the Communist Party of Israel (1957), p. 211 and from A. Drukman, "From Lessons of the Past to the Present," *Kol Ha'am* 22.12.71.

³³ Between the mid 1920s and 1934, the Palestine Communist Party (PKP in its Yiddish acronym) had a mixed Jewish-Arab membership. In 1934, the Arab communists seceded from the binational PKP and founded a separate party, the National Liberation League. The PKP remained a Jewish party. At the time of the partition resolution and the establishment of the State of Israel, the Jewish communists, following the Soviet Union's lead and with its approval, supported the partition plan. The Arab communists opposed the partition of the land or the establishment of a binational state in which the rights of the Jewish minority

establishment of the Jewish-Arab Israeli Communist Party, in October 1948, its members did not give free rein to tensions that existed between the Arab and Jewish communists already during the Mandate,³⁴ but after the 13th party congress, in 1957, it became impossible to suppress the old tensions, and the internal relations deteriorated. The Arab camp demanded that in areas of Israel which according to the partition plan were supposed to belong to the Arab state the party should set up a separate organization as a token of its refusal to recognize Israel's right of sovereignty over these areas, but the Jewish camp prevented this action. Arab members opposed the expression "Israel's right to exist," and wanted to substitute for it the phrase "the right of the Israeli people to self-determination." Other members claimed that Israel should withdraw to the 1947 borders before demanding the recognition of Arab states. In 1958 the tension reached such a pitch that Arab and Jewish leaders began holding separate discussions in Moscow to persuade the Soviets to support their side. According to one of the Jewish leaders of the party, Tewfik Toubi, an Arab party leader, tried to persuade the leaders of the Soviet Union in Moscow that the Soviet support for the establishment of the State of Israel was a "Stalinist error." Arab party members began meeting separately, without the knowledge of the *Maki* Central Committee. There is disagreement as to what exactly was discussed at these meetings. Some claim that the Arab leaders wanted to organize in order to bring the party to change its platform in accordance with their views or to strengthen their positions within party institutions. Others claim that the discussion at one of the meetings focused on the possibility of carrying out guerilla warfare in Israel in the style of the FLN warfare against the French in Algeria, and yet others maintain that this meeting was taped by the General Security Services (*Shabak*) and its content was passed to the party's Jewish leaders. Opponents of this version of the event

would be guaranteed, and demanded the establishment of a democratic state with a large Arab majority over the entire territory of Mandatory Palestine.

claim that it was a *Shabak* provocation.³⁵ In any case, on May Day 1958 the Nazareth branch of the party organized a mass rally without police authorization and without the approval of the party's national institutions. In the course of the procession a violent confrontation erupted between police and demonstrators, several of whom were arrested. These events led to the formation, in the summer of 1958, of the "Arab Front," which then changed its name to the "Popular Front" after the District Supervisor refused to incorporate it under the first name.³⁶ The front was formed by Arab party activists and nationalist Arab groups from outside the party despite the disapproval of some of *Maki's* Jewish leaders. There is disagreement as to the connection between the Front and *Maki*. Some claim that members of the Front used it to strengthen their position within *Maki*. A variation of this claim maintains that the Front was intended to persuade nationalist Arabs to vote for the Communist Party. Others maintain that the Front was intended to serve as a basis for an Arab organization outside of *Maki*.

Because of the heterogeneous composition of the Front, which included both communists and nationalists, its platform was drafted very cautiously. No Marxist or socialist ideas were incorporated, nor sensitive issues regarding the Jewish-Arab conflict. The platform dealt mostly with domestic matters: a demand for the abolition of military rule, a halt to land expropriation and return of the land to its original owners, abolition of discrimination between Jews and Arabs, use of the Arab language, and improvement of the educational system. External aspects were broached only in the demand for the return of the refugees to the places of their residence.³⁷ It is possible that this compromising formulation was not the

³⁴ For a history of the Communist Party in its various incarnations, see G.Z. Israeli, *MPC-PKP-Maki: The History of the Communist Party in Israel* (1953); D.H. Nahas, *The Israeli Communist Party* (London, 1976).

³⁵ Reches, *supra* n. 32, p. 73; Isser Harel, *Soviet Espionage*, Edanim Publishers, 1987, Tel-Aviv, p. 236.

³⁶ On the refusal of the District Supervisor, see Jirys, *supra* n. 9, p. 114, footnote 1.

³⁷ Reches, *supra* n. 32, p. 75.

result of internal disagreements alone but also of fear of intervention on the side of the authorities.

The Popular Front existed for about a year and was dissolved in July 1959. A crisis in the Arab world caused its collapse and the creation of El Ard. The crisis developed between the Egyptian President Nasser, whose first priority was pan-Arab nationalism, and Iraqi President Kassem, whose first priority was universal communism. The Soviet Union supported Kassem, and Egyptian-Soviet relations deteriorated. The communist members of the Popular Front were faced with a difficult dilemma: continue the partnership with the nationalist, Nasserite members of the Front or toe the Soviet line, which required support for Kassem and criticism of Nasser? Communist members decided in favor of the Soviet line, whereas a group of nationalist members split away from the Front and created an independent political group, which became the founding nucleus of El Ard. The process of El Ard's birth reveals much more about its positions than the charter of the movement. Regarding to the Jewish-Arab conflict, the position of the nationalist group within the Popular Front, from which El Ard was forged, could not have been less nationalistic than the opinions, presented above, of the members of the communist group within the Front (that is, the Arab camp within *Maki*).

The tension between the Arab and Jewish camps within *Maki* did not end with the dissolution of the Popular Front; on the contrary. The Arab camp accused the Jewish camp and the party's anti-Nasserite line of being responsible for the severe defeat the party suffered in the 1959 elections, as a result of which its representation in the Knesset was reduced from six seats to three. The tension between the camps continued in subsequent years and reached a new climax on the eve of the 1965 elections. In August 1965 the party split. The Arab faction, led by Tewfik Toubi and Emil Habibi, together with a few Jewish leaders headed by Meir Wilner, established *Rakah* (The New Communist List). The Jewish

camp, headed by Moshe Sneh, Shmuel Mikunis, and Esther Vilenska, remained mostly within *Maki* (the Communist Party). El Ard chose to run for the Knesset precisely in 1965, right after the communist split and in the first election contested by a party (*Rakah*) whose membership and voters were preponderantly Arab and whose platform emphasized the Arab national issues. The division of *Maki* is the key to understanding the spot El Ard was attempting to stake out for itself in the elections, in which it ended up not participating because of its disqualification and subsequent loss in the *Yeredor* case. The controversy that caused the rift within *Maki* did not relate to communist doctrine or to the struggle between Trotskyites and Leninists, or between pro-Soviet and pro-Chinese communists; the controversy had to do with the party's position on the Jewish-Arab conflict.³⁸ To this, a personal component was added, in the form of age-old personal rivalries between Wilner, Mikunis, and Sneh. A central controversy between the camps involved the interpretation of the narrative about the establishment of the State of Israel. While the Arab camp viewed the establishment of the state as an act of Anglo-American imperialism, and saw in its existence an imperialist bridgehead, the Jewish camp maintained that the state was established by the people of Israel with the support of the Soviet Union and other progressive countries. Moreover, the Jewish camp claimed that when it condemned Arab nationalism and chauvinism together with Jewish nationalism and chauvinism, the Arab camp accused it of campaigning against the Arab anti-imperialist movement. The main controversies involved the party's position on such matters as the UN partition plan; whether to demand the physical return of the refugees or a formula that would allow the refugees to choose between return and reparations; whether Israel should first acknowledge Palestinian rights or should the Arab states recognize Israel's right to exist; Arab attitude toward leaders who are calling for the destruction of Israel; whether the conflict can be solved before the connection

³⁸ For the circumstances and controversies that caused the split, see Ely Reches, *The Arab Minority in Israel: Between Communism and Arab Nationalism, 1965-1991*, 1993, pp.32-34; *The 15th Congress*

between Israel and American imperialism is severed, or should the link be severed first and only then the conflict resolved. At the root of the controversy there was also a pragmatic issue: should the party present a more nationalist platform to attract more Arab voters, or a platform that is less Arab-nationalist and more communist-socialist to retain the support of its Jewish voters and the ties with the leftist Zionist parties?³⁹ In many ways, the split of 1965 was a replay of the split of 1943, when tensions between Arabs and Jews caused the collapse of class- and ideology-based solidarity.

In the 1965 elections El Ard didn't look to compete with the Jewish-Arab *Maki* of the previous elections, a party that promoted formulas for compromise in the Jewish-Arab conflict, recognized unequivocally Israel's right to exist, and struggled to make up its mind in the question of borders (1949 or 1947) and of the refugees' right of return (return to their homes or substitutes for it). El Ard looked to compete with *Rakah*, a new party, on the verge of forming a more Arab-nationalist platform and no longer satisfied with compromises that had been reached in the past fifteen years within *Maki*. El Ard no doubt sought to accomplish more than the nationalist camp did when it formulated the objectives of the Popular Front in 1958-1959, and in which the right to return had already been included. El Ard was a pro-Nasserite movement, a luxury that was denied *Rakah* because of its allegiance to directives from the Kremlin. Therefore, El Ard was more pan-Arab than *Rakah* and emphasized Arab nationalism, rather than local Arab nationalism, as did the Iraqi regime toward which *Maki*, and after it *Rakah*, were leaning.

What is the connection between the analysis of the objectives of the movement and the question of its disqualification from the elections in 1965 and the denial of its leaders' right to be elected? Why was El Ard disqualified and not *Rakah*? In what respects are their platforms and objectives similar and how do they differ? It appears that both parties

Communist Party of Israel, 1965; Nahas, *supra* n. 34, pp. 55-75.

supported the return of the refugees to the Jewish state; both parties appear to have maintained that the 1949 borders must change. Three main constraints limited *Rakah* in its leaning toward Arab nationalism. First, the party was compelled to toe the Soviet line. This line recognized Israel's right to exist and the Soviet Union recognized Israel *de jure* after the state was established, whether within the 1947 UN Partition Resolution or the 1949 armistice borders – an issue that was intentionally left in a haze. The Soviet line welcomed communists from both Israel and the Arab states into the international communist camp. Second, the party was bi-national even if the overwhelming majority of its voters was Arab. As a result, its Arab leaders consented to certain limitations in consideration of the Jewish leaders and of the continued dialog with them. Third, the party was determined to retain its legitimacy in the eyes of the authorities and not to bring about a test of the legality of its activities and institutions. *Rakah* was aware of El Ard's confrontation with Israeli law and did not want to follow in its footsteps. The difference between El Ard and *Rakah* and between their platforms was rooted in these three constraints. At least until the 1967 war, *Rakah* demanded a return to the 1947 borders but not the cessation of Israel's existence. *Rakah* was anti-Zionist in the sense that it viewed Zionism as a reactionary, bourgeois political movement dependent on imperialism and not a movement of national liberation. But *Rakah* did not reject the right for self-determination of the Jews in Israel. It also tried to dissociate itself from calls by Arab leaders for the destruction of Israel. It recognized the existence of such a position but claimed that the Israeli side inflated it as well as and the annihilation threat to Israel. It claimed further that chauvinistic tendencies were temporary and likely to disappear with the advance of socialism in the Arab world.⁴⁰ Apparently El Ard did not agree with this position. Had it agreed, it would have associated itself with the Arab camp within *Maki*, encourage it to secede, and establish with it, after the secession, a

³⁹ In the last elections before it split, *Maki* received approximately 20,000 Arab and 22,000 Jewish votes.

⁴⁰ Reches, *supra* n. 38, pp. 35-41.

common political front, similar to the Popular Front of 1958. A front or party including communists who had already achieved political legitimacy and seats in the Knesset would have had a clear advantage from El Ard's point of view because the authorities would have had greater difficulty limiting its activities.

6 El Ard and the Arab World

Did El Ard recognize Israel's right to exist in the sense that *Rakah* did? To answer this question it is necessary to discuss the position of the Arab countries toward Israel's existence and the nexus between El Ard and these countries.

In the first half of the 1960s the Arab world was divided into two main camps: a royalist, conservative camp with Western connections, represented primarily by Saudi Arabia and Jordan, together with Sudan, Libya, and Yemen, and as a second tier, even Iran; and a radical, revolutionary, republican camp, connected with the Soviet block, whose most prominent representatives were Egypt, Syria, and Iraq.⁴¹ It was the radical camp that was active in the Israeli-Arab conflict and in urging the resolution of the Palestinian problem. Countries in the royalist camp were apprehensive that an intensification of the conflict and especially of the issue of Palestinian status, would undermine the stability of their regimes and would cause a deterioration in their relations with the Western countries that supported them. Of these, the situation of Jordan was the most complex because it had annexed the West Bank of the Jordan river and granted Jordanian citizenship to its Palestinian residents, which was contrary to the interests of the Palestinian organizations.

During the time of El Ard's activity, Egypt, Syria, and Iraq maintained that Israel had no right to exist as a state with a Zionist, Jewish, or any other identify. In their view, for

ideological, historical, and political reasons, Israel would have to cease to exist within the Arab space,⁴² and its place must be taken by an Arab Palestinian state over the entire territory of Mandatory Palestine, connected to the Arab nation in general. Each of these states hoped to extend its sponsorship to the Palestinian state, when it was to be established, and hence the three did not act in complete concert. At the rhetorical level, the leaders of the three countries competed with each other, especially at times of inter-Arab tensions, in statements about the need to destroy Israel, and at times even about their ability to do so soon.

As to how this objective was to be achieved, opinion was divided and it changed from time to time. In the years 1959-63, Iraqi President Kassem developed the “vision of the eternal Palestinian republic.” He proposed to implement the vision in stages: first in Palestinian areas that were under Arab control, that is, the West Bank (that had been annexed by Jordan) and the Gaza Strip (which was under Egyptian military control), and afterwards in all of Palestine. In this conception, the Palestinians, under the leadership of the Mufti, Haj Amin al-Huseini (who was the religious and political leader of Palestinian Arabs until 1948), would liberate the portions of their land from under Israeli control using as their basis the lands that were under Arab control. This conception followed the Algerian model and was expected to take place with the aid of the Arab countries.⁴³ This vision was opposed vigorously not only by Jordan but also by Nasser’s Egypt, who believed that it was first necessary to build up the Arab military capability for victory over Israel. He maintained that the united Arab countries would lead the liberation war, that new institutions should be

⁴¹ For a discussion of the Arab world at that time, see M.H. Kerr, *The Arab Cold War, Gamal Abd al-Nasir and His Rivals, 1958-1970* (New York, 3rd ed., 1971); P. Seale, *The Struggle for Syria: A Study of Post-War Arab Politics 1945-1958* (1965).

⁴² This conclusion is based primarily on an earlier work of Yehoshafat Harkabi, the leading Israeli scholar in this field. Although Harkabi later changed his opinion regarding the solution to the conflict, he persisted in his earlier analysis of the position of the Arab states regarding Israel in the first half of the 1960s.

⁴³ Moshe Shemesh, *General Qasim’s Vision for an Immortal Palestinian State, 1959-1963*, *Studies in Zionism, The Yishuv and the State of Israel* (1998) Vol. 8, p. 181.

created to represent the Palestinian people, and supported the establishment of the Palestine Liberation Organization (PLO) in May 1964. The army of the PLO was integrated within the Egyptian army and did not carry out independent operations. Nasser spoke of a Palestinian entity and was not specific as to whether in the end there would be an independent state in Palestine or would Palestine form part of a united Arab nation that he envisioned. A somewhat similar controversy developed between Egypt and Syria after the dissolution of the United Arab Republic, and especially after the rise to power of the Baath party in Damascus, in 1963.⁴⁴ Although Syria did not champion the establishment of a Palestinian state on the Palestinian territories under Jordanian and Egyptian control, it was more militant than Egypt with regard to the timing of the military confrontation with Israel. Syria was willing to take the risk that the water diversion enterprise aimed at depriving Israel of disputed Jordan river water would lead to a wider war with Israel. Like Iraq, Syria also spoke about a popular war of liberation modeled after Vietnam and Algeria as a possible alternative to a conventional, frontal confrontation,⁴⁵ and began to support Yasser Arafat's El Fatah movement, which as of January 1965 carried out incursions into Israel and operations against water targets, and later against additional civilian targets.

The diplomatic initiative of Habib Bourguiba, the Tunisian President, who tried to bring about a breakthrough in the Jewish-Arab conflict, is relevant to the present discussion first because of its proximity to the climax of the El Ard story: the Bourguiba initiative and reactions to it occurred in the first half of 1965; second, because reaction to the initiative is instructive as to the basic approach of Arab states toward Israel and the means of confronting it; third, because the initiative allows us to examine the entire space of possible opinions within El Ard regarding the solutions to the Palestinian problem and the future of the State of Israel.

⁴⁴ P. Seale, "The Emerging Political Map of the Middle East," *Asian Affairs* 64(1), 1977.

At the beginning of 1965, Bourguiba initiated a diplomatic drive to break the deadlock in the Israeli-Arab conflict and to find a solution to the Palestinian problem. He recommended that the Arab states agree to recognize the existence of Israel and that Israel agree to carry out all the UN resolutions, in particular the partition plan (General Assembly Resolution 181) and the decision regarding the return of the refugees (General Assembly Resolution 194). Other Arab leaders, among them Nasser, have occasionally demanded the implementation of UN resolutions, but were not specific as to what was required of Israel and did not offer to recognize Israel in return for the implementation of the resolutions. The great innovation in Bourguiba's position was the indication of a willingness to coexist with Israel. Bourguiba's offer produced great anger in Arab countries and among Palestinians. Nasser and the Egyptian newspapers led the charge. It was claimed that Bourguiba betrayed the Palestinian cause. There were those who said that the refugees would return only to an Arab Palestine and not to a Zionist Israel. Others added that what was taken by force would be returned only by force and not by negotiations, that this was the only way to restore the honor injured in 1948.⁴⁶

Battered and isolated, Bourguiba explained that a return to the partition borders did not represent the end of the conflict. Acceptance of the partition resolution was a tactical step intended to isolate Israel in the international community if it refused to comply. If Israel accepted the partition, it would be possible to establish a Palestinian state within the partition borders and continue from there the struggle against Israel.⁴⁷ It is difficult to determine whether Bourguiba had initially intended the implementation of UN resolutions as a basis for a final peace agreement and only later, and apologetically, changed his explanation, or had from the outset offered the adoption of a phased approach to the

⁴⁵ Eyal Zisser, *Between Syria and Israel: The Six-Days War and its Aftermath, The Yishuv and the State of Israel* (1998) Vol. 8, pp. 212-222.

⁴⁶ Yehoshafat Harkabi, *The Arabs' Position in Their Conflict With Israel*, Dvir, Tel-Aviv, 1968.

destruction of Israel by realizing that Egypt and Syria did not possess the ability to defeat Israel in a direct military confrontation. But even the explanations offered by Bourguiba did not quell Arab criticism against him. Nasser and others perceived an acceptance of UN resolutions that recognized Israel's right to exist as a Jewish state, even as a tactical move, as a dangerous deviation that was liable to be misunderstood by the Arab public and prevent the later realization of the objective.⁴⁸

The Bourguiba affair also sheds a great deal of light on the objectives of El Ard and shows that the maneuvering room available to Arabs in presenting proposals for the resolution of the conflict was very limited. When Bourguiba tried to step outside it, he was attacked from all directions and forced to retreat or at least to greatly obscure his proposal. El Ard could not have offered at that time a proposal similar to Bourguiba's without exposing itself to severe criticism in the Arab world. It is clear that there were among the Arab minority in Israel many who openly recognized Israel's right to exist within its borders at the time, but they were active in the Zionist parties or close to them. They relied on Israel's political and military power and did not expect recognition from Arab countries. The communists also recognized Israel's right to exist, within the 1949 or the 1947 borders, but unlike Bourguiba, Arab communists in Israel derived the legitimacy of this stance from the Soviet superpower. El Ard, as a pan-Arab nationalist party, did not rely on Israel or the Soviet Union for the purpose of legitimizing its position. The movement had difficulty developing an independent position regarding the conflict, and it found it easier to support, openly or by implication, the position of the leading Arab countries. It is difficult to believe that Radio Cairo would have supported El Ard and called for a vote for El Ard only months after it attacked Bourguiba, if El Ard held views similar to Bourguiba's or even more conciliatory.

⁴⁷ See Bourguiba's speech in Jericho and his letter to Nasser quoted in Harkabi, *The Arab Plan of Action Against Israel, 1949-1967* (1972, Vol. 1), pp. 132-137.

The positions of El Ard, swaying in the whirlwind of the Arab world, were influenced by events in that world. In the early days of the Popular Front, the movement was strongly influenced by Nasser's charismatic leadership. During the conflict between Nasser and Kassem, *Maki* leaned toward Kassem and El Ard toward Nasser, causing the break-up of the Front. In the aftermath of the dissolution of the United Arab Republic, El Ard again leaned toward Nasser and viewed the Syrian withdrawal from unification with Egypt as a blow to Arab unity. El Ard did not identify with the countries that maintained that the Palestinians must play an active and important role in the liberation of Palestine. The movement identified with Nasser, who believed that the time for the liberation of Palestine has not yet arrived, and that the way to make it happen was to build up the conventional military forces of Egypt and the Arab states and bring about cooperation among their countries. The Arab minority in Israel would therefore have to await that time but they had no central role to play in expediting it, and if they had any role to play at all, it was political and propagandistic, not military.

7 El Ard and the Palestinian National Movement

In the years after the Al-Nakba, the Palestinian political entity dissolved and the independent political representation of Palestinians was lost.⁴⁹ Palestinian representation in the Arab League and outside it was entrusted to Arab leaders. For about a decade the question of the Palestinian entity was pushed aside, as Palestinians were deprived of

⁴⁸ Nasser began making oblique references to the partition plan only after the Six Day War. Sadat accepted it formally as a basis for making diplomatic progress only on the even of the Yom Kippur War. The PLO accepted the phased approach as a tactic only after that war.

⁴⁹ The Gaza Strip was under Egyptian military rule. The West Bank was annexed by Jordan, and its citizens, as well as the Palestinian refugees on the East Bank, received Jordanian citizenship out of King Abdallah's (and later King Hussein's) desire to bring about a Jordanization of the kingdom's Palestinian residents. Haj Amin al-Husseini, the Mufti of Jerusalem and leader of the Palestinians during the British Mandate, was accused by many of cowardice, of abandoning his people, and causing the defeat. His political power was completely broken. The All Palestine government established in September 1948 by the Supreme Arab Council (the central Arab political organization during the British Mandate) under the leadership of Ahmed Hilmi, disappeared within a couple of years.

effective political representation. In parallel, there were signs of a waning of Palestinian nationalism. In 1959 Nasser raised the issue of the Palestinian entity as part of a radical, nationalist Arab movement that he proposed to lead. The process of awakening reached its climax in May 1964 with the establishment of the PLO under Egyptian sponsorship, and in January 1965 with the beginning of the military strikes within Israel by El Fatah, under the leadership of Arafat and with Syrian backing.

In the period during which El Ard was active a formative turning point occurred in the history of Palestinian activity outside Israel. From a bird's eye view, the appearance of El Ard, its activity, and objectives seem to be part of this process. Both were driven by a young generation that opposed the traditional leadership and the generation of the Al-Nakba. Both were inspired by the rise of various shades of Arab nationalism, and especially by Nasser. Nevertheless, the direct connection between the two seems loose. The new Palestinian organizations did not rely on the Arab minority in Israel to serve as a bridgehead or fifth column, as had not the Arab states in 1948. The PLO, whose Palestinian headquarters were in the Gaza Strip, was subordinate to the Egyptian policy and not given political or military freedom of action. El Fatah, organized in Syria with its support, and used by it to jab at Nasser, operated mostly from Jordanian territory. El Fatah did not appear to have tried at the time to establish a presence in the West Bank or in Israel. It operated by carrying out attacks and withdrawing, without trying to obtain assistance from the Arab minority in Israel. It could be that El Fatah feared that local Arabs might refuse to take part in these actions or that approaching them would expose the El Fatah people to the Israeli security agencies. There is no indication of the Arab minority in Israel joining any Palestinian organizations that used violent means against Israel before the 1967 Six Day War. And there are only few known cases in which members of the Arab minority in Israel provided intelligence to

Palestinian organizations or to Arab armies.⁵⁰ Moreover, there is no indication of El Ard people organizing to carry out terror activities before the movement was disqualified from running for the Knesset in 1965. And there is no information pointing toward any substantial relationship at that time, military or political, between members of El Ard and the PLO or El Fatah. It has been claimed that Egyptian and Syrian intelligence agents sought contact with El Ard activists and that infiltrators sent by Arab intelligence services were apprehended around the border with letters for El Ard members.⁵¹ But there are no unclassified sources attesting to the fact that El Ard members initiated such contacts or cooperated with these organizations, not even among material written by former officers of the security services, members of the military administration, and the Advisor to the Prime Minister on Arab Affairs. In later years, some former El Ard members made contact with the Syrian intelligence (Qa'ujji) and with the PLO (Jirys), but this does not imply that such contacts had been made before the movement was disqualified from running for the Knesset. Indeed, it is possible that the contact was established precisely because the authorities shut down all legal means of Arab political activity in Israel before El Ard. And it is possible that the contacts were established only after these activists had left Israel.

There is a similarity between the language in which the PLO objectives are couched, as they appear in the Palestinian National Charter, and the objectives of El Ard listed in the articles of organization and in publications of the movement. The Charter was drafted by Ahmad

⁵⁰ Muhammad Amara: *Political Violence Among Arabs in Israel: Its Incentives and Characteristics*, 1997, pp. 17-19; Alina Korn, "Criminalization of a political conflict: Crime within the Israeli Arab population in the 1950s," *Law and Politics*, Vol. 8, 2000, pp. 179-189; In her study, Korn shows that the rate of convictions for political offenses among Israeli Arabs declined in the 1960s to 0.1-0.3% of all criminal offenses among Arabs, and in absolute numbers to 7-21 convictions per year. The rate of offenses against state security declined to approximately 0.1% of all convictions for violating the defense regulations, and in absolute numbers to 1-2 convictions per year.

⁵¹ Ori Stendel, *The Arabs in Israel, Between the Hammer and the Anvil*. Academon, Jerusalem, 1992, pp. 193, 210.

Shukayri, and it was ratified by the founding congress of the PLO on June 2, 1964.⁵² Section 1 of the Charter states: “Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation.” Section 2 adds: “Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit.” Section 3 says: “The Palestinian Arab people possess the legal right to their homeland and have the right to determine their destiny after achieving the liberation of their country in accordance with their wishes and entirely of their own accord and will.” According to Section 4: “The people of Palestine determines its destiny when it completes the liberation of its homeland in accordance with its own wishes and free will and choice.”⁵³ Objective C in the objectives section of the El Ard articles of organization contains central components of the Charter sections quoted here.

There is no complete identity between the Charter and the El Ard objectives. The two documents were drafted at the beginning of 1964, and I don’t know whether El Ard members possessed a copy of the Charter at the time they requested the right to incorporate. It is possible that both documents drew on the same pool of ideas about Palestinian nationalism and the Arab nation, which were current in the Nasserite world in the early 1960s, and that the El Ard drafters did not import material directly from the Charter.

Statements similar to those in the remaining sections of the 1964 Charter, which is more moderate than the 1968 revision, cannot be found in El Ard documents. These sections state that the partition of Palestine in 1947 and the establishment of Israel are by definition void, that the Balfour declaration and the definition of the British Mandate are considered void, that the claims about the historical and cultural connection between the Jewish people and

⁵² The Charter was amended significantly at the Fourth Convention of the Palestinian National Council in 1968, following the Six Day War and the rise of Fatah, with Arafat at its head, to a dominant position within the PLO. These amendments are beyond the scope of this discussion.

Palestine are incompatible with historical facts, that Judaism, as a heavenly religion, is not national movement, that the Jews are not one people, that Zionism is a fascistic, aggressive, racist, imperialistic movement in its intentions and means. An accepted interpretation of Section 7 of the Charter is that Jews who arrived in Palestine after 1947 will not be considered Palestinians and will not be allowed to remain in Palestine.⁵⁴ The solution adopted by the PLO at the time of its foundation, inspired by Nasser and sanctioned by him, opposed the acceptance of the partition plan and opposed the establishment of a democratic state in the entire territory of Palestine even after the right of return has been realized. The solution involved the departure of most of the Jews from Palestine (ethnic cleansing, in current vocabulary) and the establishment of a Palestinian-Arab state over the entire territory of Mandatory Palestine. The question of whether Palestine included also the East Bank of the Jordan was intentionally left vague.

Did El Ard adopt the Palestinian National Charter? El Ard did not explicitly include within its objectives the statements of the Charter, and could not have done so in any case given that its leaders were under Israeli military rule. Had El Ard adopted these statements it could not have challenged the Israeli government and legal systems. None of the El Ard documents or statements of its leaders that have been examined for the present article contain a clear answer to the question of what El Ard's position was with regard to the Charter. mention of the "establishment of full equality and social justice among all segments

⁵³ For the complete text of the 1964 Charter, see Harkabi, *supra* n. 46. For the changes introduced in 1968, their background, and an interpretation of the Charter, see Y. Harkabi, *The Palestinian Charter and its Meaning: Explanations and Consequences* (1977).

⁵⁴ One expression of the more extreme stance of the Charter of 1968 relative to that of 1964 (in addition to the statement that armed struggle is the only path toward the liberation of Palestine) is the statement in Section 6 that only Jews who resided in Palestine before the Zionist invasion, which in the accepted Palestinian interpretation is the year 1917, will be considered Palestinians, meaning that Jews who arrived later will not participate in the government, will enjoy no rights, and will likely be expelled. Sabri Jirys, one of the former leaders of El Ard, called in 1975 for the repeal of Section 6, which he believed to be an exaggerated escalation in rigidity relative to Section 7 of the 1964 Charter. According to Jirys, this section caused the Palestinians great harm in progressive international circles. See Jirys quoted in Harkabi, *supra* n. 53, pp. 34-35. But it is difficult to learn from this statement by Jirys what was his position nine years

of the population of Israel” shows a recognition of Israel’s existence and a desire to take action within the Israeli system. But mention of “steps toward achieving peace in the Middle East” does not necessarily imply a peace that recognizes Israel’s right to exist, as the Charter also declares itself in support of peace in the area but states that this can be achieved only after the complete liberation of Palestine. The “support for the liberation, unification, and socialist movement in the Arab world, through all legal means” indicates pan-Arab aspirations that are not necessarily compatible with life within a Jewish state, but also a desire to promote these goals through legal means. At the same time, the perception of that national liberation movement as “a determining force in the Arab world, and requiring Israel to consider it in a positive way” resembles in its ultimate formulation the calls in the Charter to consider only the will of the Arab Palestinian people. El Ard did not explicitly state whether its final target was an Israel within the 1949 borders following the return of the refugees, an Israel within the partition borders, a binational state, a secular a-national state on the entire territory of Mandatory Palestine (with or without Jordan), or a Palestinian-Arab state on the entire territory of Palestine. It is reasonable to assume that its final objective was different from that of the Communist Party, whose objective shifted between a binational state and a secular democratic state, and which did not mention the possibility that a portion of the Jews would not be included among the citizenry. It is reasonable to assume that El Ard’s position was closer to that of the national Palestinian movement sponsored by Nasser, or it would not have challenged *Rakah* in the Knesset elections but try to form a common front with it in the spirit of the Front of 1958.

The Israeli public, like the Supreme Court, was greatly influenced by what was said in the Arab press about El Ard. Here is what Justice Vitkon says with regard to *Jirys*: “No wonder that the El Ard movement received enthusiastic praise from Arab nationalist propaganda

earlier, whether he supported Section 7 of the 1964 Charter, which stated that Jews who arrived after 1947 would be forced to leave Palestine, or opposed this more lenient section.

organs that incite to the destruction of Israel day and night, as we learned from newspaper clippings and Radio Cairo broadcasts supplied by the Attorney General.”⁵⁵ Similarly, members of the Elections Commission (quoted by Justice Cohn in the *Yeredor* decision) mention the cheering of El Ard by Radio Cairo. It was claimed that the Saut El Arab radio station, broadcasting from Cairo to the Arab world, called explicitly on the Arab minority in Israel, on the eve of the election in 1965 and before El Ard was disqualified, to vote for its list.⁵⁶ There is no basis to the statements of Knesset members and justices that allude to the fact that the Arab countries supported El Ard because they were behind its establishment and were controlling it, since El Ard was established by local initiative inside Israel. The statements also allude to the fear that El Ard may become a fifth column in time of war, but the basis for that fear is not clear. But there is a basis to the claim that the support for El Ard in the Egyptian media was intended to show that El Ard’s positions enjoyed Nasser’s approval. Nevertheless, the fact that unlike in previous Israeli elections, the Egyptian media called on the Arab minority in Israel to vote in the 1965 elections, was a novelty. Obviously, Nasser did not call on the Arab minority in Israel to recognize Israel and vote for the Zionist parties, but wanted to use Israeli democracy to further his own policy aims; to do so, he was prepared to use the institutions of the Zionist state, which he had not done in the past.

To summarize El Ard’s objectives and connections: the movement was not satisfied with the abolition of military rule and the advance of equality for the Arab minority in Israel based on the existing political reality. The movement wanted to change the status quo established in 1949. It sought the return of the refugees and the return of the lands to their previous owners. It sought to change the borders and establish an Arab state. Unlike Bourguiba, El Ard apparently was not satisfied with the land intended for this state by the partition plan and sought to establish this state on all the territory of Palestine. It spoke loosely about the

⁵⁵ The *Jirys* case, *supra* n. 10, pp. 677-678.

⁵⁶ Stendel, *supra* n. 51, p. 211.

right of the State of Israel to exist, but did not specify the conditions subject to which this state would be recognized. El Ard recognized the State of Israel *de facto* by requesting to be legally registered as an association, and eventually changed its position from boycotting the elections to trying to take part in them. In its statements, it supported Nasser's Egypt, which proposed the destruction of Israel through the use of force and the establishment of a Palestinian entity in the entire territory of Mandatory Palestine, but did not explicitly support this component of the Egyptian policy. El Ard members probably would not have opposed Egypt in implementing this component, and perhaps would have gladly accepted it. Egypt supported El Ard in its statements and called on its constituents to vote for its list. El Ard did not explicitly refer to the national Palestinian movement that existed outside Israel, in its various incarnations, including El Fatah and the PLO. There is a similarity between the objectives of El Ard and the first sections of the Palestinian National Charter. El Ard did not refer to the subsequent sections of the Charter, which rejected the partition of the land, the recognition of any type of national rights of the Jews, and the rights of Jews who arrived after 1947 to live in Israel. But there is no clear statement by El Ard opposing any of it. El Ard did not call on its members to use force, but neither did it oppose the use of force by others to further its objectives and the wishes of the Palestinians and the Arabs. It did not call for a resolution of the conflict by peaceful means only, but its members do not seem to have been involved in violence and did not make preparations for such involvement.

8 Choosing the Courts as the Arena for Political Struggle

The legal struggle between the authorities and El Ard provides insight into the patterns of political activity among the Arab minority before the abolition of military rule. Arab political activity at that time was influenced by the legal framework in which it operated.

The Mandatory emergency regulations⁵⁷ granted the security forces wide ranging powers that held sway over the entire territory of the country, and in principle over Jews as well. But as mentioned above with regard to Arab citizens, these powers were supplemented by the executive organs of the military administrators who were ready to use them, and by areas declared closed areas or security zones where numerous restrictions on movement were imposed. Using a range of legal means, the authorities had many ways of blocking political activity that appeared threatening to them. The political activity of El Ard was restricted and regulated by these legal means.

At the same time, El Ard chose to pursue an puzzling legal approach. The movement could have cut all contact with the authorities and denied their legitimacy through demonstrative disregard, public protest, civil disobedience, or violence. But it chose to act within the rules of the Israeli political game and test its limits. El Ard may have been caught in this legal battle for lack of an alternative. In some of the cases the movement was dragged into court by the authorities. But the leeway that the law allowed for maneuvering was small to begin with, and although any attempt to extend the activity resulted in legal confrontation, it appears that the movement itself chose the tactics of legal confrontation and succeeded in reaching the Supreme Court six times between 1960 and 1965. This pattern of operation resembles that of civil rights organizations in the US, such as the ACLU and NAACP, especially regarding the rights of African-American people, around the same time, that is, the years following *Brown v. Board of Education* (1954),⁵⁸ which ruled racial segregation in education to be illegal and paved the way for frequent litigation by organizations representing the black population and other minorities for the improvement of their conditions.

⁵⁷ *Supra* n. 15.

⁵⁸ 347 US 483 (1954).

El Ard was able to raise before the Supreme Court difficult questions of principle, which was not an easy matter. Under the military administration, Arab political activity in Israel was controlled through the Mandatory Defense (Emergency) Regulations.⁵⁹ The regulations granted broad powers to the security agencies. On the authority of regulation 125, some areas were declared closed. On the authority of regulations 109 and 110, the freedom of movement of people was curtailed. On the authority of regulation 111, people were placed under administrative detention. These and other regulations were used to limit the political activities of Arabs in Israel. It was possible to object to injunctions based on these regulations only through the courts of the military administration, benches composed of officers who were not jurists.⁶⁰ It was very difficult to attack the implementation of these regulations through the High Court of Justice, because this court has repeatedly stated in its decisions since the establishment of the state that it would not interfere with the discretion of the security agencies when they issued injunctions based on the Defense Regulations, but would limit itself to verifying the authority of the agency that issued the injunction, and the observance of the formal requirements necessary before and at the time when the injunctions were issued.⁶¹ El Ard reached the Supreme Court despite the barrier posed by the Defense Regulations,⁶² by succeeding in testing government actions that were not based on the authority of the Defense Regulations⁶³ but on that of the Company Law and the Ottoman Association Law, or were without legal authorization, as when the Central Elections Commission disqualified the El Ard list.

⁵⁹ *Supra* n. 15.

⁶⁰ As of 18.7.1963 it was possible to appeal decisions of the military administration courts through the regular military courts. See Jirys, *supra* n. 9, p. 40.

⁶¹ Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, Ma'agalay Da'at, Tel-Aviv, 1993, pp. 40-44. Ron Harris, *Israeli Law: The First Decade - 1949-1959* (1998); *First Judgments* (Daphne Barak-Erez, ed.) Hakibbutz Hameuchad, Tel-Aviv, (1999).

⁶² *Supra* n. 15.

⁶³ *Ibid.*

The decision to pursue a legal tactic is not surprising in view of the personalities involved. Most of the members of the group were intellectuals, or at least people with college education. Some claim that the movement started at the Hebrew University in Jerusalem, in the mid 1950s, indeed within the Law School of that university, from where some of the El Ard members had graduated. Sabri Jirys, one of the prominent members of the group, was a graduate of the Hebrew University Law School. Jirys frequently initiated legal actions, and in his writing, for example in his book *Arabs in Israel*, he demonstrates a thorough understanding of the legal methods of action of Israeli authorities toward the Arab minority. The group also enjoyed the continuous support of Dr. Yaakov Yeredor, an attorney and founder of the Semitic Action group (together with Nathan Yellin-Mor and Uri Avnery), and one of the former leaders (before 1948) of the left-wing of the Fighters for the Freedom of Israel group (*Lehi*). Yeredor represented the movement in the *El Ard Ltd.*, *Jirys*, and *Yeredor* cases. In the *Kardosh* case the movement was represented by attorney Hanna Nakara, a leader of Maki and one of the prominent Arab lawyers of the time. (He also represented, among others, the newspaper Al-Ittihad in the famous *Kol Ha'am* case before the High Court of Justice.)⁶⁴ Attorney Arie Marinsky, a former member of the National Military Organization (*Etzel*) and a lawyer in Shmuel Tamir's office, must also be mentioned as someone who did not recoil from confrontation with the *Mapai* establishment and represented Qa'uqji and his five colleagues in the case bearing his name. It appears, therefore, that the leaders of the movement were able to see the potential of the legal battle, and were able to mobilize the necessary professional assistance to carry on the battle. It is likely that the legal tactics of El Ard were shaped by Jirys and Yeredor. Thus, they played a role resembling Thurgood Marshall's (who eventually became the first black justice in the US Supreme Court) in the black civil rights movement in the US.

⁶⁴ High Court of Justice 53/73 *Kol Ha'am Company, Ltd. v. Interior Minister*, P.D. 8 871 (henceforth the *Kol Ha'am* case).

In the manner of political interest groups representing blacks, women, and other minorities in the US, and that of similar groups in Israel during a later period, El Ard chose to act through the judiciary because as a small minority group that was not considered a potential political partner, it understood that it would not be able to achieve its goals through the executive or legislative branches of government. Its tactics involved filing various requests with the authorities, and when these responded to the challenge, rejected the requests, and imposed restrictions on the movement, El Ard tested the restrictions in the courts. The movement used this approach consistently, and did not miss an opportunity to submit a petition or to appeal a decision, exhausting all available proceeding to the highest instance: the Supreme Court. It brought many difficult legal challenges to the judicial branch. The purpose of the legal struggle was not only to win the proceedings and pursue a given political activity but also to compel the security agencies to reveal their methods of oppression and discrimination, to present the Supreme Court as part of the oppressive mechanism of the government, and to present before the Arab public a higher level of activity than that of competing parties.

This characteristic of El Ard, as a movement that carried on a legal battle against the judicial system in Israel, was neglected by both legal scholars and historians. The legal scholars did not fathom the meaning of the successive litigations. Some did not take the trouble to ask why and how did the need arise to decide about the right to be elected in 1965. Others were satisfied with the answer that the elections happened to be held just when a new movement happened to come into being. The historians identified the succession, but some of them regarded these as a succession of legal restrictions that the state was imposing on the movement. Historians who are not jurists are less aware of this pattern of legal action, and do not identify the fact that members of El Ard were an active and initiating party in the confrontation. Other historian claimed that El Ard sought to benefit from the protection of

the law because its chances of operating underground were slim and because it found it difficult to draft supporters for illegal activities.⁶⁵

9 How the Supreme Court Grappled with the El Ard Challenges

The insight that active litigation was characteristic of the El Ard movement is necessary to understand this litigation and the court decisions involving the movement and its members. The legal campaign of El Ard forced the Supreme Court to address central issues in the area of constitutional law: the freedom of association, freedom of the press, the right to be elected, the extent of judicial supervision over government agencies in matters of security, and the place that basic constitutional principles and natural law occupy in cases where there is no legislation. Freedom of expression, freedom of association, and the right to be elected are each considered separately below.

9.1 Freedom of Expression (*Qa'uqji, Kardosh, El Ard., Ltd.*)

When it started its activity, El Ard sought to publish a newspaper, as political parties and movements at the time usually did, and requested permission to do so from the District Supervisor. Probably assuming that the Supervisor was temporizing and intended to reject the request, El Ard did not wait for the answer and tried to circumvent the prohibition against publishing a newspaper without a permit by issuing several purportedly one-time sheets, under different names, but with the words El Ard present in the heading of each sheet. The District Supervisor rejected El Ard's request and at the same time the state decided to indict the publishers of the unauthorized one-time sheets.

From this difficult starting point, El Ard and its representatives succeeded in bringing about a discussion of the extent of freedom of expression in three separate legal actions: first in

⁶⁵ Ori Stendel, Rights of Minorities in Israelis Law, Tel-Aviv Law Review, 3 (2), 1973, pp. 556, 566.

defending the *Qa'ujji* case⁶⁶, in which criminal action was taken against several members of the movement for publishing a newspaper without a permit; second in petitioning the *Kardosh* case, which addressed the legality of the refusal of the Registrar of Companies to register a company the objective of which is the publication of newspapers; third in petitioning the case of *El Ard Ltd.*,⁶⁷ in which the Interior Ministry's Supervisor of the Northern District refused to grant the company, after it has been allowed to incorporate, a permit to publish a weekly newspaper.

Despite *El Ard*'s attempt to place the freedom of expression and of the press in the center of the legal discussion, and despite the broad protection of this freedom that was formed in the *Kol Ha'am* ruling of 1953,⁶⁸ in which the High Court of Justice ordered the cancellation of the closure injunction issued by the Interior Minister against the newspapers of the Communist Party, the Supreme Court avoided addressing the extent or applicability of freedom of expression in all three cases in which *El Ard* brought them up. The proceedings in the *Qa'ujji* case⁶⁹ were a second-round appeal concerning the severity of punishment for the publication of a newspaper without a permit. Attorneys for the defendants, Marinsky and Segal, claimed in their appeal that the offenses of the defendants were merely technical: a failure to obtain permits for the publication of one-time sheets, and that the severity of the punishment was influenced by the content of the expression and not by the gravity of the offense. In this way, *El Ard* hoped to expand the scope of the discussion to the content of the one-time sheets and the limits of the freedom of expression. They claimed that in the lower instances the content of these sheets has not been discussed based on facts, and that the content in itself was not illegal. Refusal of the license, they claimed, denied one of the basic rights of citizens of the state and the severe punishment reflected the political views of

⁶⁶ The *Qa'ujji* case, *supra* n. 6.

⁶⁷ The *El Ard, Ltd.* case, *supra* n. 7.

⁶⁸ The *Kol Ha'am* case, *supra* n. 64.

⁶⁹ The *Qa'ujji* case, *supra* n. 6.

the judges. The Attorney General helped the court by removing from the original indictment counts that were based on provisions of the criminal law, such as incitement, which would have required a discussion of the content of the sheets to bring about a conviction. Thus, the court could lower the fine imposed on four of the defendants and abstain from addressing the political and constitutional claims of their attorneys.⁷⁰ In the *Kardosh* case, all the justices except Agranat chose to address the issue as having to do with corporation and administrative law: the extent of the authority and discretion of the Registrar of Companies. In the case of *El Ard, Ltd.*,⁷¹ the attorney representing the claimant, Yaakov Yeredor, claimed that the reason behind the refusal to grant the company a permit to publish a newspaper was political discrimination, which represented severe injury to the freedom of the press and of the speech. But here again, the court framed the question as coming from the field of administrative law: the extent of the authority of the District Supervisor and the question whether he needed to provide reasons for his refusal to grant the permit.⁷² The court refused to intervene in the decision not to grant the movement a permit to publish a newspaper, and stated that it was not qualified to address the broader questions raised by the claimant regarding the injury to the freedom of expression. These questions must be addressed to the legislators, who are the only ones in a position to change the Mandatory Defense Regulations.

Why did *El Ard* fail to publish its paper while *Maki* succeeded in publishing theirs, even when the authorities attempted to prevent them from doing so? The *El Ard, Ltd.*⁷³ case is different from *Kol Ha'am*⁷⁴ in that the discussion did not extend to newspapers that had been

⁷⁰ About the attempts of the defendants' attorneys to carry out the legal discussion in political and constitutional terms, see "Appeal Arguments" in the Supreme Court file at ISA, Container B 4141 Criminal Appeal 228/60. See also the decision itself, *Qa'uqji* case, *supra* n. 6.

⁷¹ The *El Ard, Ltd.* case, *supra* n. 7.

⁷² See the petition and the protocol in the Supreme Court file at ISA, Container B 5149, High Court of Justice 39/64.

⁷³ The *El Ard, Ltd.* case, *supra* n. 7.

⁷⁴ The *Kol Ha'am* case, *supra* n. 64.

published legally and the dissemination of which had been suspended (based on Section 19 of the Press Ordinance),⁷⁵ but was limited to newspapers for the publication of which no license had been issued, as required under regulation number 94 of the Defense (Emergency) Regulations of 1945.⁷⁶ The presence of two separate legal frameworks allowed the court to establish a relatively broad freedom of expression for Jewish political movements whose papers, most of the time, already had licenses to publish or had no difficulty obtaining them. The legal questions regarding these papers focused on whether censorship and sanctions can be exercised in their case to restrict their freedom of expression after the fact. By contrast, the freedom of expression of Arab political movements, who required to obtain licenses, could be restricted, and the legal question in their case was whether it was possible to intervene in the administrative decision to deny them such a license.⁷⁷

The separation between the two frameworks was not entirely dichotomous. *Maki's* Arabic publication *Al-Ittihad*, fell into the first legal category, intended apparently for Jewish publications, as it served a binational party, but its publication continued unencumbered even after it became *Rakah's* newspaper. The same attorney, Hanna Nakara, represented both *Al-Ittihad* in the *Kol Ha'am* case⁷⁸ and *El Ard* in the *Kardosh* case, in which *El Ard* asked to incorporate for the purpose of publishing its newspaper, but was unable to reach similar results in both cases. The different legal frameworks allowed the court to reach different decisions without being accused of discriminating against Arab expression.

Moreover, the regional and international context within which the freedom of expression of the two movements was discussed, 1953 in the first case, 1959-64 in the second, was vastly different. Between the two dates dramatic changes have taken place: in the Soviet Union,

⁷⁵ Press Ordinance, Laws of Palestine, 1933, Vol.2, Cap 116, p. 1214.

⁷⁶ *Supra* n. 15.

⁷⁷ Ronen Shamir, "Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity -- the Case of Israel" 19 *International J. of the Sociology of Law* (1991) 45.

⁷⁸ The *Kol Ha'am* case, *supra* n. 64.

Stalin's death; in Egypt, the revolution and the rise of Nasser; in Israel, the ousting of Ben-Gurion and his retirement, the Sinai war, and more. The publication of *Kol Ha'am* and *Al-Itihad* created problems in Israel's relations with a great power; *El Ard*'s publications created problems in the context of the Jewish-Arab conflict. But it is not clear that the authorities perceived the threat to the security of the state caused by the publication of *Kol Ha'am* to be less than that caused by the *El Ard* publications.

It appears that between the middle of the first and second decades of the state, there was a change in the way the Supreme Court balanced freedom of expression with the security threat to the state, giving state security greater consideration, but without explicitly changing the balancing formula that it created with the *Kol Ha'am* case.⁷⁹ It was easy for the court to effect this change because in the *El Ard, Ltd.* decision⁸⁰ it was asked to examine the actions of the District Supervisor on the basis of regulation 94 of the Defense Regulations. The different legal framework allowed the court not to mention at all the *Kol Ha'am* decision⁸¹ and the centrality of freedom of expression and of the "test of close certainty," which were at the center of Justice Agranat's ruling in the *Kol Ha'am* case.⁸² *El Ard* was not able to force the court to discuss the content of its publications and the question of whether they represented a threat of any kind to the security of the state. The movement succeeded in raising the question of freedom of expression for the Arab minority in Israel and the injury to it, though not in affecting in the Supreme Court's decision,

9.2 Freedom of Association (*Kardosh*)

The *Kardosh* case raised the question of the freedom of associating into a corporation. In April 1960, several *El Ard* members submitted to the Registrar of Companies the forms

⁷⁹ Lahav, *supra* n. 4; P. Lahav, "The new version of the Press Ordinance: Anachronism in Elegant Hebrew," *Emda* 3 (1978), p. 18.

⁸⁰ The *El Ard, Ltd.* case, *supra* n. 7.

⁸¹ The *Kol Ha'am* case, *supra* n. 64.

required to register a company named “El Ard Company, Ltd.” In the charter submitted to the registrar, the objectives of the company were described to include, among others, “dealing with all matters of print, publication, translation of press reports, importation of books and other printed matter of all types.” Based on a description of the facts included in the decision, the registrar, after examining the Department of Justice and police files, and after obtaining the opinion of the Attorney General, refused to register the company, relying on Section 14 of the Companies Ordinance that allowed him to refuse registering a company “according to his absolute discretion.”

Justice Agranat accepted the Attorney General’s opinion that the court should intervene in the broad discretion granted to the Registrar of Companies only in extreme and rare circumstances, but decided that this was one such case because the refusal to register the company was not reached for the ends to which the discretion was granted. The registrar did not have the authority to censure or supervise the press; this activity was regulated by the Press Ordinance,⁸³ which granted the authority to issue licenses for the publication of a newspaper to the District Supervisor, and by the Defense Regulations, which granted the authority to prohibit the publication of certain materials to the censor. Agranat repeated what he had said in the *Kol Ha’am* case⁸⁴ about the high social value associated with freedom of expression, which can be curtailed only by those whom the legislation has explicitly empowered to do so. The Registrar of Companies was not authorized by law to restrict the freedom of expression and to protect the security of the state. Therefore, in this case, the registrar acted for a flawed reason and his refusal to register the company was void. In a short ruling, Justice Vitkon joined Agranat and stated that Section 14 authorized the registrar to apply considerations within the realm of company law. He added that employees of other state agencies “can no doubt prevent the publication of incitement and

⁸² The *Kol Ha’am* case, *ibid.*

⁸³ *Supra* n. 75

destructive propaganda, and they are more knowledgeable and efficient in their work than the respondent [the registrar] can be.” Nevertheless, Justice Vitkon opened a breach for the application of security considerations by reference to Section 4 of the ordinance, which states that companies must be established for legal purposes only. Justice Cohn, however, stated that the discretion granted by the legislators to the registrar is absolute and there is no basis in law for court intervention in its application. The court should therefore not exceed the limits set by legislation and not specify situations in which the registrar’s decisions are voided. In sum, with a dissent opinion, the court ordered the registrar to register El Ard Company, Ltd.

Gideon Hausner, the Attorney General, asked the Supreme Court for a further consideration of this decision. In this discussion, in which Hausner himself represented the Registrar of Companies, Justice Sussman added his vote to the majority and Chief Justice Olshan to Justice Cohn’s minority opinion. Thus, the decision to order the Registrar of Companies to register the El Ard Company stood with a three-to-two majority.

The two decisions, *Kardosh v. The Registrar of Companies* and *Further Discussion The Registrar of Companies v. Kardosh*, given in 1961 and 1962, are often treated independently of the sequence of decisions relating to El Ard. Legal scholars regard the *Kardosh* decision as a declaration of the principle of freedom of association in Israel. Regarding the *Kardosh* decision and quoting from it, Smadar Ottolenghi writes that “case law has already recognized that the freedom to associate is one of the basic freedoms in Israeli law. This has been stated clearly with regard to association as a company: this is a right, which is one of the human freedoms.”⁸⁵ Amnon Rubinstein views *Kardosh* as the first and central decision

⁸⁴ The *Kol Ha’am* case, *supra* n. 64.

⁸⁵ Smadar Ottolenghi, *Cooperative Societies: Law and Procedure* (1995, Vol. 1), p. 34.

in the development of the freedom of association.⁸⁶ Irit Haviv-Segal adds: “The Supreme Court anchored in this decision the right of individuals to freely associate in a commercial company... The decision of the Supreme Court in the *Kardosh* case represents a landmark in this institution’s willingness to come to defend the individual from the authorities.”⁸⁷

None of these discussions mention the fact that in November 1964 El Ard Company, Ltd. was declared an illegal association by the Minister of Defense.⁸⁸ Nor is it mentioned that shortly afterward, the Haifa District Court granted the request of the Attorney General to forfeit the company’s assets and dissolve the company.⁸⁹ Only by viewing the *Kardosh* ruling in isolation from other decisions of the Supreme Court and from government actions regarding the El Ard movement, can *Kardosh* be considered a pinnacle and important landmark in the Supreme Court’s readiness to develop rights and freedoms and to protect citizens from the authorities.

Documents in the State Archive demonstrate that while it decided the fate of the El Ard Company, *Kardosh* did not affect significantly the status of freedom of association in Israel. A file named “Registration of companies in areas under military rule,” reveals a hidden world that is not mentioned in the Companies Ordinance or in the *Kardosh* decisions. In a letter to Attorney General Gideon Hausner, the Registrar of Companies, A. Danziger, writes on July 20, 1962:

More than ten years ago, the Attorney General issued an order requiring that I furnish to the Attorney General information about every company whose founders reside on the territories of the military administration, so that it can advise, following consultation

⁸⁶ Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel*, 5th Edition (1957, Vol. 2) pp. 1116-1124.

⁸⁷ Irit Haviv-Segal, “Freedom of incorporation: A right, not a favor,” in *The Court: 50 Years of Judgment in Israel* (David Chassin et al, eds., 1999), pp. 66-67; see also Irit Haviv-Segal, *Corporate law in Israel*, Vol. 1, 1999, p. 82.

⁸⁸ Anthology of publications 1134, 23.11.1964. p. 638. The declaration was carried out by virtue of the Defense (Emergency) Regulations, *supra* n. 15.

with the military administration, whether there are reasons that justify use of the discretion granted by Section 14 of the Companies Ordinance to the Justice Minister, and delegated to the Registrar of Companies, to refuse registering the company.”⁹⁰

It turns out that as of the beginning of the 1950s, requests for an association in which one or more of the founders lived in the territories of the military administration were approved by the registrar only after he obtained, as instructed by the Attorney General, the approval of the Ministry of Justice, which in turn obtained the approval of the military administration, which quite likely obtained the approval of the General Security Services.

The letter makes reference not only to a decade-old practice, but also to the recent *Kardosh* decision:

Given that the High Court of Justice stated that security considerations cannot serve as guidelines in using my discretion according to Section 14 of the Companies Ordinance, I see no reason to continue furnishing information about companies... and to delay for some time the registration of the companies... In my opinion, I would be defying the High Court of Justice if I were to continue furnishing the information... Please confirm that there is no need for me to continue furnishing this information.”

Apparently, the High Court of Justice decision was clear and so should be the Attorney General’s answer. The *Kardosh Further Discussion* denied the Minister of Justice and all those under him the authority, which they believed they had, to prevent the formation of a company for reasons of state security. But this was not how matters were perceived in the Ministry of Justice. In a detailed opinion written for the Attorney General, Zvi Tarlo (who as Deputy Attorney General represented the Registrar of Companies before the Supreme Court in two rounds of the *Kardosh* case) and Michel Chasin of the State Prosecutor’s office

⁸⁹ Landau, *supra* n. 9, p. 117.

⁹⁰ ISA, Section 74 Ministry of Justice, folder 3 4/5718, Registration of companies in areas under military rule, letter from 20.7.62.

(currently a Supreme Court Justice), reached an opposite conclusion. According to their analysis, justice Agranat was alone in his opinion on the central issue under discussion here, and the four other justices did not accept his opinion. According to the opinion of Tarlo and Chasin, none of the four other justices stated that the Registrar of Companies was prohibited from using security considerations. Based on an analysis of the arguments of each of the four justices and the sum of these arguments, the state prosecutors reached the following conclusion:

If people forming an association ask to register a company in order to pursue an objective that is against the laws of the state, the Registrar of Companies is entitled not to register it even if its stated objectives are legal as long as there is a substantiated basis for a suspicion that the company is being organized for an illegal purpose. Therefore, the Registrar of Companies is entitled, according to this approach, to refuse to register a company if he has sufficient reason to suspect such a purpose based on the security information before him.⁹¹

In the authors' interpretation of the Supreme Court opinion, the registrar's mistake was to base his refusal on Section 14 of the ordinance. In their opinion, justices Sussman and Vitkon based their conclusions on Section 4, as taken together with Section 14; Olshan based his conclusion on both Sections 4 and 14; Cohn on Section 14, and by joining the opinion of the Chief Justice, on Section 4 as well. Cohn, who in his previous function of Attorney General had instructed the Registrar of Companies to submit applications for security evaluation, continued in his new function to justify his earlier directive and to maintain that the registrar was entitled to refuse to register companies based on Section 14 alone. The bottom line of the opinion is that even after the *Kardosh Further Discussion* there was no need to change the existing arrangement whereby applications for association of Arabs living under military rule were submitted for the evaluation of the security

agencies, and whereby the Registrar of Companies was authorized to refuse to register companies if “there is a reasonable basis to suspect that behind the objectives listed in the articles of organization an illegal objective is being concealed.” Four additional months passed before the Ministry of Justice decided to adopt the opinion, and in the end the ministry issued an unequivocal directive to the Registrar of Companies to continue the existing procedure.⁹²

In subsequent years, the registrar continued the procedure, as evidenced by the many letters in the file, in which he furnished the information about requests for incorporation to the ministry, which then passed it on to the military administration before the association was registered. Occasionally, the officer of the military administration responsible for the matter noted that there was negative security information on one of the members of an association, asked for additional information about the company being organized, its partners, purposes, and intended business, or suggested reducing its objectives or delaying its registration. The registrar continued to fight a rearguard action against the Attorney General’s directive. He used various opportunities to express his opinion that at least a portion of the requests for incorporation, for example those in which some of the members were Jews, and those whose objectives appeared to be legal, should not be delayed until the security evaluation was received. The Ministry of Justice repeatedly clarified its point to the registrar that the procedure in place before the *Kardosh Further Discussion* should not be changed in any way. Both the registrar and the heads of the Justice Ministry continued to voice their opposing views, and the ministry again ordered the registrar to submit every single

⁹¹ *Ibid*, memorandum from 8.5.62.

⁹² *Ibid*, letter of Yosef Kukia to the Registrar of Companies from 2.12.62.

application for security evaluation and under no circumstances to rely in his decision on the incorporation documents alone.⁹³

In the end, in 1966, the registrar won under somewhat ironic circumstances. It turned out that the abolishers of the military administration forgot to abolish the procedure requiring the registrar to submit requests for incorporation to their approval. But Danziger didn't forget. Two weeks before the final abolition of the military administration, he wrote to the Director General of the Ministry of Justice that he learned from the press and the radio about the impending abolition of the military administration and asked whether he should continue observing the directive of the Attorney General. The Director General sent the request to the military administration, which replied: "We are not interested in reviewing applications for incorporation."⁹⁴ This is how the fifteen-year-old procedure of security supervision over Arab incorporation came to an end. It was not the Supreme Court, in a learned decision handed down in a Further Discussion by five justices that stopped this procedure, but Moshe Tadmor, acting staff officer at the military administration headquarters, who accomplished it in a letter containing one short paragraph. Looking at it from a somewhat different angle, it was not the judiciary nor the legislative branch that stopped the practice, but the executive, in its decision to dismantle the mechanism of the military administration.

Approximately two years after the right of members of El Ard to form an organization was established, they asked to incorporate an association named "The El Ard Movement."

According to the Ottoman Associations Law, there is no need to obtain a permit for the association. The only requirement is to send a notice about the association after the fact to the District Supervisor. After receiving the notice, the supervisor sent a letter informing the members of El Ard that "it is prohibited to establish an entity that pretends to call itself 'The

⁹³ *Ibid*, Danziger's comment at the bottom of his letter from 15.5.63 regarding the Arab Israeli Development Company, Ltd., the brief answer at the bottom of his letter from 21.5.63 regarding the same company, Danziger's letter to the Attorney General from 24.5.63, brief answer from 31.7.63.

El Ard Movement,” and “if it happens that despite the above you operate as a body, legal action may be taken against you.” The District Supervisor based his opinion on Section 3 of the Ottoman Associations Law, which stated: “It is prohibited to form associations against the law and the general morals, and ones that the basis for which is illegal, or that are harmful to the peace and integrity of the state, or against the state with the intention of changing its current system of government or to divide ethnic groups for political purposes.” There was criticism against the use of Section 3. It has been claimed that this section was an anachronistic vestige of the Ottoman era, when the imperial authorities were wary about separatist groups and conflicts that may flare up between various ethnic and religious groups. It has also been claimed that Section 3 could be applied to almost any political movement in Israel, and that the *Mapai* government could use it against any Jewish political organization in opposition. Critics maintained that the Supervisor should have used Section 4 of the law, which prohibits political organizations founded on the basis of nationality and race. But use of this section would also have been problematic, because many of the political organizations in Israel were avowedly Jewish, and some excluded Arabs. A sharper criticism maintained that neither section should have been used: “It appears that the Haifa District Supervisor envied his colleague, the Registrar of Companies, and decided to do something that would make the El Ard people the standard bearers in the struggle for the freedom of democratic association in Israel.”⁹⁵

Sabri Jirys, one of the directors of the association, appealed to the High Court of Justice against the District Supervisor’s decision. The three justices who heard the case, Vitkon, Landau, and Berinson, agreed to reject the appeal and uphold the prohibition against the incorporation of the El Ard movement. The difference between the decision regarding incorporation as a company in the *Kardosh* case, and incorporation as an association in the

⁹⁴ *Ibid*, letters from 14.11.66, 22.11.66, 27.11.66, 7.12.66.

⁹⁵ A. Neeman, “The place of freedom and the ‘El Ard’ group,” *Hauma* 2(10), 1964, pp. 342, 344.

Jirys case, stemmed from a legal approach of unclear origin whereby Ltd. companies, as business organizations, warrant lesser state intervention in their affairs than associations of a more political and social nature. But it also stemmed from the fact that the association asked to participate in a broader range of activities, including political activity, and not merely the publication of a newspaper. Already at that time there was talk about the movement asking to take part a year later in the Knesset elections, and it is possible that the court was influenced in its decision by this possibility as well. Moreover, the association's objectives were described in its charter more clearly and explicitly than in the articles of organization of the El Ard company, which made it easier for the court to justify its decision to uphold the prohibition of the association.

It appears that the announcement by El Ard about its association and the itemized list of its objectives were intended to test the government and the court. El Ard members could have continued to operate within the framework of the existing company or on an unincorporated basis. And it was not necessary to form an association to participate in the elections, since lists of individual candidates and not incorporated parties ran for the Knesset. Finally, they could have formulated a charter containing only three or four of the six points that were included. The points dealing with "raising the educational, scientific, health, economic, and political level of its members," with the "establishment of full equality and social justice among all segments of the population of Israel;" with "action to achieve peace in the Middle East in particular and in the world in general;" and even with "support for all progressive movements worldwide that oppose imperialism, and support for all peoples that attempt to free themselves from it" would most likely not have angered the authorities and the High Court of Justice. These objectives would have permitted the association a wide range of activities in the political arena as well.

However, members of the movement also wanted to include objectives C and D, which discuss the mode of solution of the Palestinian problem and supported a certain movement in the Arab world. These objectives were at the center of the discussion in the High Court of Justice and eventually caused the prohibition of the association. The El Ard people were interested in including these objectives, although in a somewhat hazy formulation, to test the authorities. They did not place their hopes in the District Supervisor, given his past record. The more meaningful test was that of the Supreme Court. Following the Further Discussion of *Kardosh*, the court looked like the right arena. If they cannot secure the support of the High Court of Justice, they can at least embarrass it and expose its Zionist leanings.

Contributing to the change in the court's ruling were the development of El Ard and the expansion of its objectives on one hand, and the growing Nasserite threat on the other. The change is manifest in the court's shift from a formal or even formalistic discussion in the *Kardosh* case to a discussion of values in the *Jirys* case. It is a mistake to maintain, as some jurists do, that the *Kardosh* decision takes a broader view of the right of association and of the freedom of expression than the *Jirys* decision.

The *Kardosh* case deals with the authority of the Registrar of Companies and with the interpretation of Section 14 of the ordinance. In the *Kardosh* case, the rights are in the margins. In the first round, only Agranat attaches importance to the freedom of expression and association on his way to a decision. Here the court is giving the authorities a lesson on dealing with El Ard: rather than prohibiting its incorporation, they must deny it a license to publish a newspaper based on their authority under the Press Ordinance, and censor its publications based on their authority under the Defense Regulations. If the authorities still want to prevent its incorporation, they ought to use Section 4 of the ordinance and not Section 14. But the court does not undertake a substantive discussion of the objectives of El Ard.

In the *Jirys* case, however, the objectives of El Ard are at the center of the discussion, together with the politics of the Jewish-Arab conflict, partly because the movement pushed the court in that direction, and partly because the justices feel a strong need to bring the issue into view. Justices Vitkon and Landau are not content in the *Jirys* case with a literal commentary on the two problematic sections in the El Ard objectives; they interpret these sections in light of the broader context of the Jewish-Arab conflict. Says Landau:

The court is entitled to use its *information* about what is happening in the world, especially in this part of the world, as matters of public knowledge that *do not require evidence*. The concepts “the liberation movement, union and socialism in the Arab world,” and their joining together, have a clear and well-defined meaning in the contemporary political lexicon.⁹⁶

The court interprets this expression, present in the charter, based on the justices’ personal understanding of the reality they experience as Jews living in Israel in the year 1964. In addition, the justices are using press reprints and radio broadcasts from the Arab world, supplied to them by the Attorney General to reveal the true objectives, in their view, of the El Ard movement. But the justices reject the Attorney General’s offer to peruse classified material regarding the El Ard movement and its founders:

In order not to deprive the claimant of his rights, we decided at the time not to accept this material as long as we were not convinced based on the material open for all to see that the claimant was in the right, so in any case we do not need it now, after we see clearly from the unclassified material that the claim is to be rejected.⁹⁷

The court chose not to inspect the classified material in order to create the impression of equality between the parties contending before it. It was the *Jirys* and not the *Yeredor*

⁹⁶ The *Jirys* case, supra n. 10, p. 680 (author’s emphasis).

⁹⁷ *Ibid*, p. 677.

decision that signaled the shift in the Supreme Court's attitude toward El Ard. In the *Yeredor* case, the justices merely continued that line, relying heavily on the *Jirys* discussion of the objectives of the movement.

9.3 The Right to Be Elected (*Yeredor*)

In 1959, shortly after the formation of the El Ard movement, elections were held for the fourth Knesset. El Ard's position, as reflected in the first issue of its publication, in October of the same year, was against participation, and the sheet called on the Arab minority in Israel to boycott the elections. This caused great concern among the leaders of *Maki*. El Ard did not take part in the elections to the fifth Knesset, in 1961, but there is no evidence whether or not it called for a boycott. On September 3, 1965, Yaakov Yeredor, representative of the El Ard movement, presented to the Elections Commission to the Sixth Knesset a list of ten candidates that chose the name "The Socialists List." First on the list were Salih Baransi, Habib Qa'uqji, and Sabri Jirys, and the last one was Mansur Kardosh – all of them known figures from earlier legal confrontations of El Ard. Two of the candidates were lawyers, two were teachers, and two were workers. Three of the candidates lived in Nazareth, two in Taybeh, and two in Haifa. This was a country-wide list representing various classes associated with El Ard. Six of the candidates were among the founders of the El Ard, Ltd. company, incorporated according to law following the decision of the High Court of Justice, and which was subsequently declared by the Defense Minister as an illegal association. Five of the candidates were among the originators of the El Ard association, the establishment of which was prohibited by the Haifa District Supervisor. With the list of candidates were submitted seven booklets containing 750 signatures, as required by the Election Law.⁹⁸

⁹⁸ The original list of candidates, with the signatures, is found at ISA, the folders of the Elections Commission to the Sixth Knesset, 3 7062, box 33, book 1-7.

Two contradictory explanations can be adduced for El Ard's change of approach with regard to the elections. One maintains that the decision to run followed from the movement's acceptance of the basic rules of Israeli democracy and a desire to have a say in it, and perhaps also a recognition of Israel's legitimacy. The other maintains that it was the result of an absence of alternatives and not of choice, as the authorities and the courts have closed all other activities before the movement. Yet another explanation claims that the leaders of the movement wanted to take advantage of the election to obtain the immunity granted to members of Knesset from limitations imposed on their activities and from indictment for these activities. This last explanation is somewhat puzzling, as it does not address the question of why didn't the leaders of the movement attempt to take advantage of the immunity in two previous elections, since from the beginning they were aware of the fact that the military administration and the security services would not allow them to operate freely. Furthermore, this explanation does not address the question of whether the El Ard leaders indeed believed in their chances of electing even one member to the Knesset. The decision to run for election involved certain risks, for the individuals and the movement alike. It is therefore possible that the leaders changed their position about parliamentary activity or were interested in yet another legal battle as part of their struggle by judicial means.

In any case, the movement's decision to run presented a serious challenge first to the Central Elections Commission and subsequently to the Supreme Court. The Knesset Elections Law,⁹⁹ as well as the Basic Law: The Knesset,¹⁰⁰ have defined certain technical requirements for a list of candidates, but no conditions or restrictions regarding their objectives or platforms. When it became clear that there was opposition on the part of representatives of various parties in the Elections Commission to the acceptance of El Ard, the first question

⁹⁹ Knesset Elections Law (1959) S.H. 138.

¹⁰⁰ Basic Law: The Knesset (1958) S.H. 69.

that arose was whether the commission had the authority to discuss the matter and rule on it. To understand the legal context within which the commission operated, a review of the legislative history of the right to vote and to be elected is in order. The question of who has the right to vote and to be elected was raised immediately after the establishment of the state. The first section of the first law passed in the State of Israel, on May 19, 1948, the Jurisdiction and Powers Ordinance,¹⁰¹ states: “The representatives of Arab citizens of the state who recognize the State of Israel will be included in the Provisional State Council...” This section indicates that the recognition of the State of Israel is a condition for Arabs to bear the right to be represented in the state’s legislative council, and perhaps a condition that the representatives themselves must meet. In practice, no Arab representatives were included in the state council at that time, and the subject became relevant only on the eve of elections to the Constituent Assembly in 1949.

In the meantime, in September 1948, following the Altalena incident, the question arose of restricting the political activities of Jewish parties, especially of the Herut movement. In a memorandum of September 8, 1948 entitled “The government’s options of dealing with political parties whose activities are suspected of being illegal,” several possible actions were being evaluated by the Ministry of Justice. The recommendation was that the Ottoman Association Law, in conjunction with the Criminal Code Ordinance, provided adequate means. The author of the memorandum, Dr. W. Schofep, did not address explicitly the possibility of using regulations 84 and 88 of the Mandatory Defense (Emergency) Regulations¹⁰² “considering the fact that these regulations are about to be abolished.”¹⁰³ The

¹⁰¹ *Supra* n. 18.

¹⁰² *Supra* n. 15.

¹⁰³ Memorandum from 8.9.48, ISA Section 74 Ministry of Justice, folder 3 5/8004 The Herut movement – The government’s options of dealing with political parties whose activities are suspected of being illegal.

assassination of UN envoy Count Bernadotte, about two weeks later, triggered the passing of the Prevention of Terror Ordinance¹⁰⁴ and its use against the *Lehi* movement.

Although the issue of the legitimacy of Jewish and Arab political movements arose soon after the establishment of the state, no substantive restrictions to the right to vote and to be elected were specified in the Elections Ordinance for the Constituent Assembly¹⁰⁵ (which became the first Knesset). Neither have such restriction been specified in subsequent elections laws. Even when the Knesset passed permanent legislation in this area (Basic Law: Knesset,¹⁰⁶ in 1958 and the Knesset Elections Law,¹⁰⁷ in 1959), the situation remained unchanged: the legislation addressed technical and procedural details but placed no restrictions on the lists of candidates based on their objectives. After elections to the fifth Knesset, in 1961, the Chairman of the Elections Commission, Zvi Berinson, sent a memorandum to the Prime Minister in which he pointed out several deficiencies and omissions in the law and proposed the creation of a committee to recommend remedies. Discussion of the Berinson recommendations in the Ministry of Justice continued through most of the term of the fifth Knesset. And although the El Ard movement already existing during this period, the possibility of placing restrictions on what constituted a submittable list of candidates, or on the authority of the Elections Commission to disqualify a list was not raised during the discussions.¹⁰⁸ It is possible that the hidden assumption was that El Ard and similar movements will not reach the stage of submitting lists of candidates to Knesset elections because the authorities will be able to stop them during their formative stage

¹⁰⁴ Prevention of Terror Ordinance (1948) Official Gazette, Supplement A 73.

¹⁰⁵ Elections Ordinance for the Constituent Assembly (1948) Official Gazette, Supplement A 52.

¹⁰⁶ *Supra*, n. 00.

¹⁰⁷ *Supra*, n. 99.

¹⁰⁸ See Berinson's letter of 1.22.61 to the Prime Minister and the letter written by the Justice Minister, Dov Yosef, to the Prime Minister on 10.6.64. ISA Section 43 Office of the Prime Minister, folder 3 6278.

through the Ottoman Association Law, the Mandatory Defense Regulations,¹⁰⁹ and the Israeli Prevention of Terror Ordinance.¹¹⁰

The lack of provisions within the law for the disqualification of lists of candidates did not deter the members of the Elections Commission to the sixth Knesset.

The line-up of forces regarding El Ard was unlike that regarding military rule. Most of the parties united against *Mapai* in their opposition to military rule. In the disqualification of El Ard, *Mapai* was joined by the other Zionist parties. Representatives of *Maki* and *Rakah* in the commission opposed the disqualification of El Ard, although *Rakah* people claimed that *Maki's* opposition to the disqualification was only lip service. Others claimed that *Rakah* also hoped to see El Ard disqualified to boost its own chances in the elections.

As has been shown above, the differences between the platforms of *Rakah* and El Ard have led to competition between the two parties for the affections of Arab intellectuals, for the support of Arab states, and for the votes of Arab voters. Incidentally, *Rakah* did not appear to fear that the disqualification of El Ard will lead to its own disqualification later. For several reasons, the authorities treated *Rakah* with less hostility. Injury to the party could have negative repercussions for Israel's relations with the Soviet Union. The party even served as a conduit between the governments of Israel and of the Soviet Union in Middle Eastern affairs and on matters relating to Soviet Jewry. *Rakah* was a faction of a movement that had run in every election and it would have been difficult to justify its sudden disqualification. Meir Wilner, one of its leaders, was among the signatories of the Declaration of Independence and a member of Knesset since.

The chairman of the Central Elections Commission, justice Landau, played a key role in the commission's decision to disqualify El Ard.¹¹¹ It appears that Landau not only chaired the

¹⁰⁹ *Supra*, n. 15.

¹¹⁰ *Supra*, n104.

discussions of party representatives, but also led and structured them. He reached the conclusion that the commission was authorized to disqualify a list, offered criteria for disqualification, and maintained that El Ard met those criteria. He said, among others:

We are not meeting here as a court of law, and therefore do not demand proof as a court would, based on the rules of evidence. We can be content with less... And the Supreme Court, in my opinion, will uphold the position of this commission... Our function is to designate the border... And in my opinion it is possible and necessary to designate this border.

Landau also creates the legal pattern which, in his opinion, grants the commission the authority to disqualify a list of candidates by a combined interpretation of the Basic Law: The Knesset,¹¹² the Knesset Elections Law,¹¹³ and the Ottoman Association Law. Landau summarizes the case thus:

Organizations that deny the existence of the state should not join the Knesset, the sovereign body in the country... These are basic concepts of our constitutional regime, which we are entitled to include among the sections of the Knesset Elections Law.

Landau made frequent references to the *Jirys* decision during his presentations before the commission; he was the senior justice on that case. He has known the El Ard members for at least five years since he wrote the decision in the *Qa'ujji* case,¹¹⁴ toward the end of 1960. Landau did not hesitate to express his opinion regarding the manner in which the Supreme Court is expected to react to the commission's decision. There is no doubt that the authority with which he presented his factual position and his legal conclusions influenced the

¹¹¹ The protocols of the Elections Commission were not found. They are not in the state archive, at the Knesset, or at the Supreme Court. Consequently, the most reliable source about the positions of the various parties on the disqualification of El Ard, about the evidence presented before the commission regarding the El Ard platform, and about the role played by Justice Landau in the discussion is not available. Therefore, the above discussion is based only on the portions of discussion that are quoted in the *Yeredor* decision.

¹¹² *Supra* n. 100.

¹¹³ *Supra* n. 99.

commission's decision. He also influenced the Attorney General who adopted Landau's position and reasoning in his arguments before the Supreme Court in the *Yeredor* case. It is likely that Landau's opinion has helped form the positions of his colleagues in the Supreme Court. Landau's central role in the El Ard affair has not been properly assessed.¹¹⁵

El Ard's decision to run in the elections to the sixth Knesset presented the toughest challenge yet to the Supreme Court. The primary reason for this is that no restrictions have been legislated on the right to be elected. Second, the High Court of Justice has not been asked before to decide on the matter, and it had to do so for the first time seventeen years after the establishment of the state, without any case law to rely on. Third, because justice Landau put the weight of all his prestige behind the decision of the Central Elections Commission. Forth, because owing to the closeness of the elections the court had only four days, including the Sabbath and a holiday, to decide. Fifth, because much was at stake: on one hand, a basic constitutional right, and on the other, the fear that if the restriction is not put in place at that time, it will not be possible to do so after the candidates are elected to the Knesset and acquire immunity.

The court ruled and established the important precedent that the right to be elected in Israel is restricted and can be denied to a list of candidates whose objective is to place on the agenda the question of the destruction of the state and the denial of its sovereignty. But the court could not have reached this decision through a formalistic line of argumentation based on the explicit language of the law or of legal precedents; it needed interpretive acrobatics, which exposed its ideological leanings. The majority justices, Agranat and Sussman, overcame the absence of basis for the disqualification of a list of candidates in the Knesset Elections Law by basing it on other sources: the historical narrative of Judaism and Zionism, the holocaust, the Declaration of Independence, Abraham Lincoln's correspondence, the

¹¹⁴ The *Qa'ujji* case, *supra* n. 6.

lessons of the Weimar Republic, and the literature on statehood theory. Agranat's solution was especially interpretive: the laws of the state, in particular its constitutional laws, must be interpreted in light of the "constitutional given... that the State of Israel is lasting and that its continuing existence and eternity are not in question." For Sussman, the solution lay in the recognition of supreme principles found in positive law and even above the constitution, which can be called "natural law." They both went beyond Landau's position, who proposed a standard interpretation of the election laws¹¹⁶ in combination with the association law. Haim Cohn, in his minority view, interpreted the Knesset Election Law literally¹¹⁷ and found no authorization for the Elections Commission or the Supreme Court to disqualify a list of candidates based on its objectives.

In the absence of such authorization on the part of the legislator, there is no justification for unilaterally making laws and denying one's right: not in logic, necessity, the love of homeland, and no other consideration, whatever it may be.

In the absence of legal authorization, there is no possibility of discussing El Ard's objectives and the measure of threat it represents to the existence of the state. Cohn maintains that the disqualification should be voided and adds a recommendation to the legislators to define by law the authority to disqualify a list of candidates, similarly to the manner of the German constitution after the second world war.

Most of the above discussion of El Ard's objectives is not an analysis based on an attempt to understand in retrospect what contemporaries were not able to grasp. It is based primarily on freely available sources, that are not classified or locked up in archives, and on studies based on open sources. These sources include court decisions, statements made by politicians,

¹¹⁵ The *El Ard, Ltd.* case, *supra* n. 7.

¹¹⁶ *Supra* n. 99.

¹¹⁷ *Ibid.*

material from Israeli newspapers, including those of *Maki*, *Rakah*, and *El Ard*.¹¹⁸ This means that the picture presented above, if the mosaic has been assembled correctly, is similar to that received by the Israeli public, the Attorney General, and the justices of the Supreme Court during the period under investigation. The question as to whether the disqualification of *El Ard* was proper must be viewed in this light. The discussion of *El Ard*'s objectives complicates the question of the movement's disqualification. *El Ard*'s objectives make it difficult to find an easy answer. The movement did not use violence and did not call for it. It did not call for the abolition of basic democratic rule in Israel, and showed no signs that if it were to come to power in Israel it intended to cancel democracy, which already shows that the analogy with Weimar is problematic. It is not clear that *El Ard* supported the continued existence of Israel or recognized its right to exist. But it is difficult to maintain that the movement, in 1965, posed a threat to the existence of the state with any degree of certainty. Were it to join with external Arab forces at time of war, would it make the military threat faced by Israel more severe? It is difficult to believe that in such a case a few *El Ard* members of Knesset would count for much compared with Nasser's call to arms on one hand, and compared with suppression by Israeli security forces on the other.

Therefore, Ruth Gavison reasonably claims that what was at stake in the *Yeredor* case, and perhaps already in the *Jirys* case, was not the security aspect, the clear and present danger to the state. What was at stake was the fundamental incompatibility of *El Ard*'s objectives with the basic values of the state. The question was: What is the threshold beyond which a

¹¹⁸ Nearly all the secondary sources used in this article are of Jewish origin – whatever bias this may involve. These sources base their discussion partly on openly available Arab sources. The publication of secondary research in Arabic and of archival material by Arab countries or by the Palestinians may change the picture. Publication of the memoirs of former *El Ard* activists can also shed more light on the objectives of the movement. Publication of information held by the *Shabak* and by other Israeli government agencies, if it should ever happen, may require a reevaluation of the conclusions presented in this paper. On 18.1.2002, *Ha'aretz* reported that in 2001 Nachman Tal completed a Ph.D. thesis at the Haifa University with a dissertation entitled "Changes in security policy toward the Arab minority 1948-1967." Nachman Tal served in the *Shabak* since 1955 and eventually came to head the Arab desk there. This academic work,

movement cannot participate in the state's political process because the gap between its values and those of the state is too great? The majority answer of the justices was that the gap between the values of El Ard and those of the state was too wide, which denied them the right to participate in the political dialog of the election campaign and the Knesset. But the court didn't specify where exactly the borderline was. Are to be disqualified only movements that propose the establishment on the entire territory of Mandatory Palestine of an Arab Palestinian state, which is part of the Arab nation? Is it possible to disqualify any movement that proposes a change in the country's 1949 borders, for example by implementing the UN Partition Plan of 1947? Does a call for the return of all the refugees create a gap that justifies disqualification? Is the issue of the means others intend to use to implement objectives they share with the movement relevant; for example, in a situation in which the movement does not call for the use of violence by its members but supports (or does not condemn) such use by others who share its objectives? Is cooperation with entities outside Israel for the furtherance of the objective enough to disqualify the movement? These and other questions remained unanswered by the *Yeredor* decision.

The interpretive move used in the *Yeredor* ruling points toward two important phenomena in the shaping of the jurisprudence of the Supreme Court in the second decade of the state. The court did not see itself closely bound by the language of legislation as it did in the first decade, but, when it saw fit, interpreted the parliamentary acts more freely to meet its objectives. Consequently, the court placed itself in a position that would enable it to intervene and define the extent of discretion of the executive branch. It took away from the Registrar of Companies the absolute discretion which it was granted by the legislators, but granted substantive discretion to the Knesset Elections Commission despite the fact that the law authorized the commission only to examine the technical compliance of the documents

which could serve as an important secondary source for the present study, has exceptionally been classified, and its only copy is held at *Shabak* headquarters.

submitted by the lists of candidates. In the case of the restriction of the right to be elected, the court went one step further in freeing itself from the letter of the law by recognizing the principles of natural law and unwritten constitutional principles. The special characteristic of these vague principles is that it is the court that defines their content, as they are not the result of legislation, and that legislation is subject to them. Nevertheless, the court did not subject laws passed by the Knesset to judicial review based on these principles, but interpreted the laws with reference to these principles.

The court, however, did not review laws passed by the Knesset in light of these principles, but interpreted them in this light. To disqualify the El Ard list, the court effected toward the end of the second decade a dramatic shift in the legal theory by which it operated. The question is whether this was a local, instrumental shift for the purpose of achieving a desired ideological objective in the case at hand, or a basic shift that was part of a broader trend, reflected in court decisions in a range of areas. Based on an examination of several important rulings by justice Agranat in the mid 1960s, Pnina Lahav suggests the second alternative.¹¹⁹

10 Afterword

Were El Ard not curbed, would it have altered the patterns of political activity and voting among the Arab minority? It is possible that the restrictions imposed on El Ard delayed the development of Arab political parties in Israel by a decade or two, but it is also possible that the movement was ahead of its time. It is difficult to estimate the support the movement would have enjoyed had it been allowed to organize, express itself, and freely participate in the elections. It is also difficult to determine the role played by legal actions in halting the activity of the movement, which faced difficulties within its own community and not only on the part of the authorities. The effects of legal restrictions on parties and their

supporters are difficult to measure in other countries as well and controversies over the effectiveness of party banning are common.

El Ard didn't go all the way in its attempts to expose the limits of Israeli democracy, the areas of legitimate political activity for the Arab minority, and the meaning of the Jewishness of the state, because it deliberately obscured its objectives and means. Thus, it is not possible to determine with certainty, based on its publications and claims expressed in court, whether or not it proposed the destruction of the Jewish state and the establishment of an Arab state in its stead. It was also not clear what its position was on the question of the means to be used to achieve its objectives: joining of entities outside Israel, use of violence, civil protest and disobedience, or action within the elected bodies of the state. As a result, some of the interesting issues that relate to the limits of political discourse in Israel were not explored at that affair.¹²⁰ The objectives of political parties and the intended means of achieving them are often elusive. Court attempts to define them using legal evidence rules often turn out to be more complicated than expected.

In the case of El Ard, as long as the regular legislative system, and especially the emergency legislation, delivered the desired outcomes, the court could afford to argue its decisions formalistically and hide behind the law. The shift that took place in the Supreme Court in the mid 1960s can be partially explained by the fact that El Ard was able to touch upon sensitive issues that forced the court to reveal its ideological leanings. Specifically, by deciding not to settle for extra-parliamentary activity and to run in the elections it exposed the court. The case of El Ard is unique in that in its case the right to be elected was deprived by a decree that claimed to rely on authority grounded in basic constitutional and historical principles that were not mentioned in any constitutional document, parliamentary

¹¹⁹ Lahav, *supra* n. 4, pp. 270-272, 300-306;

¹²⁰ See Barak Medina, "The Limits of the Knesset's Power to Set Supra-Majority Rules, Law and Government in Israel," 6 (2), 2003, p. 509.

legislation, or court precedent. The court was forced to use the Zionist narrative, the Weimer legacy, natural law, and constitutional principles because the legislators didn't equip it with a provision that allowed the disqualification of a list of candidates. Even when written and codified constitutions exist that provide a formal basis for the exclusion of candidates and the banning of parties, the empowering clauses are often vague and open to a variety of interpretations and applications. Discussion of the litigation over the banning of political parties allows scholars to examine the fundamental values of any society, state, and supra-national organization.

It is possible that the shift in the Court's attitude toward El Ard resulted not from the movement's objects and actions but rather from a shift in the Court's perception of the nature of the threat, which was affected by the growing pan-Arab enthusiasm and the inflammatory rhetoric calling for the destruction of Israel. The justices may not have excelled in analyzing Israel's strategic position: its military strength, its developing nuclear capability, the reality of the threat to its water sources, and the danger in the terrorist incursions. They had neither the information nor the expertise to do so. They may have been able to form an opinion about the desired boundaries of political discourse, but not regarding the probability of an actual threat from the part of El Ard to the existence of the State of Israel. Real and perceived threats are the prime causes for the banning of political parties. The question whether courts can tell one from the other, and should they be expected to do so, must be central to any discussion of the role of the courts in restricting political activity.

It became clear in recent years that efforts to ban political parties are not taking place only in non-democratic states and are not a matter of the past in many democracies. Attempts to outlaw political groups that are alleged to approve the use of violence, attempts to limit the expression of views that challenge the core values of democratic nation-states,

and attempts to ban radical right, separatist, or religious political parties are more widespread in recent years than at any other time since 1945. This trend has not yet peaked.

The present article attempts to shed light on some of the aspects of the interaction between the El Ard movement and the Israeli Supreme Court. The article does not purport to present a comprehensive normative discussion or recommend a desired set of rules in matters of freedom of speech, freedom of association, and the right to be elected. The case presented here can contribute to discussions of this nature and of the broader issues of legitimate political activity in a democracy and the right of the democracy to protect itself at the constitutional level.