

**STATE IDENTITY, TERRITORIAL INTEGRITY AND PARTY  
BANNING: THE CASE OF A PAN-ARAB  
POLITICAL PARTY IN ISRAEL**

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*The banning of political parties in democracies, something which seemed to be a matter of the past, has reemerged in recent years in many countries, from Germany to Turkey, from Britain to Israel, and from Spain to Latvia. The present article tells the story of an encounter in the years between 1959 and 1965, between the pan-Arab national movement El Ard and the Israeli executive and judicial branches. According to the author's interpretation of its history, El Ard was what he calls a "third generation party" based on his categorisation of party objectives and means. It sought to alter the identity of Israel in a radical manner. Yet it was not associated explicitly with organisations or states that aimed at destructing Israel or altering its identity as a Jewish state.*

*The article elaborates on the question of how to interpret the objectives of a party; it grapples with the question of what constitutes support*

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*for terror and for the use of violence; it raises issues related to the nature of separatism, irredenta, and pan-nationalism; it problematises 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 governments and courts*

INTRODUCTION .....	20
I. THE RECENT DEBATES ON BANS IN DEMOCRACIES .....	21
II. THE BASIC NARRATIVE .....	27
III. THE HISTORICAL CONTEXT .....	30
IV. THE PARTY'S OBJECTIVES .....	32
V. THE CHOICE OF LITIGATION AS A PRE-EMINENT POLITICAL TACTIC .....	36
VI. FREEDOM OF EXPRESSION .....	40
VII. FREEDOM OF ASSOCIATION .....	45
VIII. LIBERTY TO CONTEST ELECTION .....	53
AFTERWORD .....	63

## Introduction

The present article tells the story of an encounter, in the years 1959–1965, between the pan-Arab national movement *El Ard* (“The Land”) and the executive and judicial branches of the state in Israel. Asserting that the movement’s objectives threatened the existence of the State of Israel and its territorial integrity, the executive took a variety of measures to limit the movement’s political activity. These included shutting down its newspaper, declaring it an illegal association and refusing to register the movement as a corporation. Litigation became a major form of political activity for *El Ard*.

Cases of the *El Ard* movement reached the Israeli Supreme Court six times between the years 1960 and 1965. The success was mixed. Finally, the movement's list of candidates for the 1965 general elections was disqualified by the elections Committee and the Supreme Court. The Supreme Court, by a majority, approved the decision. This effectively banned the movement from participating in Israel's political process.

This article does not purport to present a comprehensive normative discussion of, or recommend a desired set of rules in matters of freedom of speech, freedom of association, and access to the electoral arena by political parties. Yet the case presented here can contribute to normative and policy discussions on these topics in contemporary discourse.

## **I. The Recent Debates on Bans in Democracies**

I wish to argue that it is possible to identify three types of political parties, based on their objectives, that were subject to bans in the post-World War II period. The first type consists of parties that aim at altering the democratic form of government once elected democratically. The second type is that of parties that aim to change the borders of pre-existing states by advocating cessation. The third type is that of parties that aim at changing fundamental principles that compose the core identity of states. In fact, the three types appeared chronologically and can be termed the three generations of political parties.

Another perspective from which parties can be identified is the issue of means. Here again, three types of means can be identified. The first type – intention to use force and violence in order to promote its objectives – is the oldest that may be identified, and the easiest to justify based on liberal principles. The second type is that of separation between a political party and a military wing. The political party promotes objectives similar to those of the military wing, but does not call for the use of force. The third type is that of a political party that promotes objectives that are similar to those promoted by other organisations that use or support the use of force; however, the party is neither

connected to these other organisations, and nor does it denounce the use of force by the other organisation.<sup>1</sup>

A common liberal view is that political parties should be banned only if they pose a threat to democracy in a direct and immediate way.<sup>2</sup> The paradigmatic case is that of a party that aims at rising to power using democratic means with the intention to then use its majority in order to abolish the democracy. The German Nazi party is the prime example of such a practice. Fascist parties elsewhere in Europe serve as other examples. Similar concerns about the abolition of democracy were raised with respect to Communist parties in Europe.<sup>3</sup> I would call such concerns, which preoccupied democracies and scholars in the post World War II period, as first generation concerns.

A more problematic issue that became more prevalent in the 1970s and 1980s concerned the claims of territorial minorities for self-determination. The attempt by states to ban secessionist parties on the basis of claims to territorial

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<sup>1</sup> A fourth type that is beyond the current discussion and examples is that of a party that does all that it can to denounce the use of force and to disassociate itself from the organisation that uses force.

<sup>2</sup> Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L. L.J. 1, 70 (1995); Peter Niesen, *Anti Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties*, 3 GERMAN L.J. 1 (2002); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L.R. 1405 (2007).

<sup>3</sup> In both Germany and Italy, constitutional provisions were established to exclude Nazi and Fascist parties from participating in the elections. The German provision 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. It was used again in 2003 to ban a radical right wing party (NPD). The ban was not confirmed by the German Constitutional Court on evidentiary grounds. The outlawing and banning of Neo-Nazi and Neo-Fascist parties was considered and exercised elsewhere in Europe.

integrity can be viewed as the second generation concern. The banning of the Basque party in Spain in 2003 is a paradigmatic example of such a concern.<sup>4</sup> 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.<sup>5</sup>

It has become clear in recent years that in many democracies, efforts to ban political parties are not just a thing of the past. They are more widespread in recent years than at any other time in the past since 1945. Banning of political parties has been a debated issue in Britain, Australia, Denmark and the Netherlands;<sup>6</sup> it has been legislated upon and has been subject to judicial review

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<sup>4</sup> 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 stated in its ruling that ETA and its banned political party Batasuna were organising 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.

<sup>5</sup> These bans have reached the European Court of Human Rights (ECHR) and are a factor in the ongoing negotiations between Turkey and the EU.

<sup>6</sup> I shall elaborate on the British case to provide a concrete example. *Hizb ut-Tahrir* is a Sunni, anti-nationalist, pan-Islamist political party whose goal is to unite all Muslim countries in a unitary Islamic state or caliphate Tony Blair announced after the 7 July, 2005 London bombings the intention to ban the organisation in Britain under new legislation. But eventually the British government abandoned this intention. The British National Party (BNP) is a far-right white nationalist party. While there was no operative initiative to ban it, parties and organisations in Britain used a variety of measures, on the speech, association and other levels to stop its activities.

in Turkey, the Ukraine, Latvia, Israel, India, Australia and Britain.<sup>7</sup> The latest episodes that evoked claims about limits on political-participation and for calls to ban certain political parties are concerned with the identity of the state. I will typify these identity issues as third generation issues.

For example, the identity question in Turkey is secularity. The question here is whether a party that wishes to alter the fundamental principle of the secularity of the state can take part in the democratic process? The Welfare Party (*Refah Partisi*) was banned, while still in opposition, by Turkey's Constitutional Court in 1998. The Court held that the party's objectives, such as the institution of Sharia law and a theocratic regime, contradict the fundamental principle of secularism that was entrenched in Turkey's Constitution. This case reached the European Court of Human Rights (ECHR), which refused to rule against Turkey. Most recently, the Turkish Chief Prosecutor petitioned for the banning of the ruling moderate and conservative Justice and Development Party. The prosecutor claimed that the attempt to amend the secularism clauses of the constitution is prohibited and that statements by party leaders saying that that courts and the constitution have no right to disallow the public use of headscarf indicate that they view religious law as supreme. The petition is now pending a review by the constitutional court.

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<sup>7</sup> The United States is exceptional in that limitations on participation in the political process did not become a public and legal issue in recent years. Its federal and presidential political system that gave rise to a stable two parties system may be the main reason. Issues of separatism or of Muslim political activities were not prominent in the United States. The entrenchment of the Constitution prevented the ban on participation in the elections. According to the Constitution, only Congress could ban a member, only after he was elected, by excluding him from entering office. It could do this only individually on a case by case basis and not by banning a party from participating in the elections. Famously, Marxist and Communist politicians were restricted at the political speech and political association levels, in Red Scare eras, before a ban on participation in elections became an issue. These restrictions were at their height during the era of McCarthyism. They were accompanied by criminal prosecution of Communist and alleged Communist leaders.

The right of non-separatist national minority candidates to be elected became an issue in Eastern Europe after the end of the Cold War and the rolling back of Russian dominance. Eastern Europe has a complex and substantial structure of ethnic and linguistic minorities that are often non-territorial and have no separatist inspirations. In this context, the issue at hand is often the significance of the role given to the minority's identity in the State. For instance, in the newly independent states that were part of the former Soviet Union, the question is often whether the identity of the state will be that of the majority group. Factors such as ties with Russia, the role of the Russian language and citizenship laws are at stake. For example, a non-Latvian speaking candidate, member of a party whose aim was 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, which held Latvia in violation of the European Convention.

Another example is that of the *Hizb ut-Tabrir*, a Sunni Islamist political party whose main goal is to establish a caliphate in the Middle East (based on Islamic law), in order to unite the Muslim world. The limits on the political activities of the *Hizb ut-Tabrir*, along with the reasons provided and the forms of these limits, has been heatedly debated in recent years in several Western countries with significant Muslim population. On one hand, it has been argued that the party doesn't aim at forming theocratic regimes in the Western countries in which it is active, and that the desire to make the caliphate a dominant power in the world is irrelevant for a domestic ban; furthermore, it is so unrealistic that the party should not be banned for promoting theocratic or anti-democratic views. On the other hand, it was argued, for example, in Denmark, that the party promoted racial hatred and manifested extreme anti-Semitic opinions, up to the point of calling for the killing of all the Jews or making them second rate subjects of the caliphate. In Germany, the allegation of cooperation with neo-Nazi NPD party was a second motivation for imposing a ban on some of its political activities. In Britain and Australia, the demands for a ban relied primarily on the party's ambiguous position with respect to the terrorist attacks that were inflicted on their civilians in recent years and on implicit threats attributed to the party in order to generate riots in Muslim populated suburbs.

Parties in various countries are placed in Table 1 along two dimensions, that of the objects of the party, and that of the means it uses and endorses. The objects are often subject to different interpretations. The means are often presented by the parties as non-violent and disconnected from violent organisations; on the other hand, they are presented by the state as involving violence or at least association with, or endorsement of, violence. A tabular presentation of complex phenomena as political movements requires some simplification. For the purpose of this table, I have used the characteristics that the various states attributed to political parties they wished to ban. This does not necessarily reflect the parties' self conceptions or my understanding of the parties.

Table 1

	<b>Change Democratic Form of Government</b>	<b>Change Borders</b>	<b>Change Identity</b>
<b>Use of Violence</b>	SRP (National Socialist, Germany)  KPD (Communist Party, Germany)	PKK (Kurdish Party, Turkey)	
<b>Association with a Fraction that Uses Violence</b>	SRP (Germany)	<i>Batasuna</i> (Basque, Spain)	<i>Hizb ut-Tabrir</i>
<b>No Association with Organisations and States that Use Violence</b>			Justice and Development Party (Turkey) Welfare Party (Turkey) NPD (Germany)



The renewed interest in the limits on participation in the political process in democracies has been reflected in academic discourse.<sup>8</sup> The German, Basque, Turkish and Israeli cases have received most of the attention. In the United States, the discourse is gaining momentum as part of the discussion of democratisation and of fragile democracies. While the immediate post-World War II interest was concentrated in the top left cell of the table, recent interest is shifting to the bottom right cell.

The case of *El Ard* is interesting because it involved a party that typified the third category along both dimensions. It was a party that aimed at changing the core identity principles of a state. It was a party that was not associated with organisations that used force but identified with their objectives and did not condemn them. This intersection raises some of the most interesting and difficult issues about political participation. The case of *El Ard* is remarkable also because it was a very early case which falls into the bottom left cell of the table. It presents factual complexities that were not matched by other cases until recently.

## II. The Basic Narrative

In the first decade of the State of Israel (1948–58), the political activity of the Arab minority was confined to joint Jewish-Arab parties. The establishment of *El Ard* (“The Land”) in 1959 as an Arab only party was a new phenomenon in the Israeli political landscape. *El Ard* offered a pan-Arab national platform, as opposed to a socialist or communist one offered by alternative opposition parties attracting Arab voters. *El Ard* was not satisfied with struggling for the equal rights of Arab citizens within the State of Israel. It challenged the identity of Israel as a Jewish state. It challenged its borders that were shaped by the 1947–49 war. *El Ard* struggled on three fronts to establish its political status: against the Israeli authorities, against traditional Arab society, and against the Communist Party (*Maki*). At first, *El Ard* was organised as an extra-parliamentary

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<sup>8</sup> See sources cited *supra* note 2.

political movement, and it did not run for Parliament (the “Knesset”) in 1959 and 1961. Its activity consisted of the publication of newspapers and manifestos, membership drives, the organisation of meetings and assemblies, and the development of an organisational and financial infrastructure. These were intended to allow the party to promote its objectives, which shall be discussed below. 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.<sup>9</sup> 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).

The group continued to operate in the years 1960–1962 in two dimensions: a request for a licence to publish a weekly, and a request to incorporate as a limited liability, for-profit company in the business of printing and publishing newspapers and books. When the request for a publishing licence was denied, the group petitioned the High Court of Justice against the District Supervisor of the Interior Ministry, but the Court rejected the plea.<sup>10</sup> However, when the group filed a petition against the Registrar of Companies who refused to register the company, the Court granted the petition by a majority of two to one.<sup>11</sup> The Attorney General asked for further consideration and appeared in person before

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<sup>9</sup> JACOB M. LANDAU, *THE ARABS IN ISRAEL: A POLITICAL STUDY* 111-124 (1971); SABRI JIRYS, *THE ARABS IN ISRAEL* (1966); PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY* 252-272 (1997); Y. Amitai, *The Arab Minority in Israel: The Years of Military Rule, 1948-1966*, in *INDEPENDENCE - THE FIRST FIFTY YEARS* 108 (Anita Shapira ed., 1998).

<sup>10</sup> HCJ 39/64 *El Ard Company, Ltd. v. Commissioner of Northern District* [1964] IsrSC 18(2) 340 [hereinafter the *El Ard, Ltd. case*].

<sup>11</sup> HCJ 241/60 *Mansur Tewfik Kardosh v. Registrar of Companies* [1961] IsrSC 15(2) 1151 [hereinafter the *Kardosh case*].

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 instructed the registrar to incorporate El Ard Ltd.<sup>12</sup>

The movement, which was unsuccessful in publishing a newspaper, continued to operate at a lower level: it created branch offices, organised rallies, and marketed shares of El Ard Ltd. in order to expand its membership. In 1962, *El Ard* decided to raise its level of visibility by a notch: it began appealing to the Secretary General of the United Nations, to the international press, and to foreign ambassadors in Israel.<sup>13</sup> The movement also received open support from Radio Cairo, that broadcasted anti-Israeli propaganda in both Arabic and Hebrew to Israel. In 1964, it announced that it was organising itself as an Ottoman Association – a non-commercial, not-for-profit association – possibly in preparation to organising as a political party and running for the Knesset. This was because this type of organisation was more suitable for political activity than a for-profit corporation. The District Supervisor of the Interior Ministry informed the members of *El Ard* that the organisation of the movement as an association was not permitted. *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 organising itself as an association.<sup>14</sup> 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, which had been enacted in 1945 by the British Mandatory government.<sup>15</sup>

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<sup>12</sup> HCJ 16/61 Further Consideration Registrar of Companies v. Kardosh [1962] IsrSC 17(2) 1209 [hereinafter the Kardosh Further Consideration case].

<sup>13</sup> Regarding the non-legal activities of the movement, see HCJ 253/64 Jirys v. Supervisor of Haifa District [1965] IsrSC 18(4) 673 [hereinafter the Jirys case].

<sup>14</sup> *Id.*

<sup>15</sup> Defense (Emergency) Regulations, 1945, KT 1442, 855 [hereinafter Defense (Emergency) Regulations].

In 1965, *El Ard* decided to run in the elections to the sixth Knesset under a somewhat misleading name: "The Socialists List." The Israeli Central 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 matter reached the Supreme Court, which rejected the appeal with a majority of two to one and let the disqualification stand.<sup>16</sup> This was the first case in Israel's history in which a political party was banned from running in the election. With almost all legal means at its disposal disallowed, and its main activists dispersed, the *El Ard* movement then ceased to exist for all practical purposes.<sup>17</sup>

### III. The Historical Context

The UN Partition Resolution of 1947 and the Arab-Israeli War of 1947–49 led to the formation of the State of Israel in large parts of the territory of the British Mandate of Palestine and to the control of Egypt on the Gaza Strip and of Jordan in the West Bank. The Arab-Palestinian minority in Israel received citizenship that included the right to vote by secret ballot. Much of the Arab minority was placed under military rule from 1949 until 1966. It faced a variety of informal obstacles in organising independent political parties. Arabs voted mainly for three parties: Arab affiliate parties of the ruling *Mapai*, a centre-labour party headed by Prime Minister Ben Gurion; *Mapam*, a left-socialist party;

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<sup>16</sup> EA 1/65 Yaakov Yeredor v. Chairman of the Central Election Commission for the Sixth Knesset [1965] IsrSC 19(3) 365 [hereinafter the Yeredor case].

<sup>17</sup> 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* note 9, at 399.

and *Maki*, the Communist Party (that was at the time supported by the Soviet Union).<sup>18</sup>

The most radical option open to Arab voters was the Communist Party. *El Ard* was initially formed in 1959 by a splinter group of the Communist Party. It was composed of Arab activists who wished to create a nationalist, pan-Arab and exclusively Arab political party. Its formation reflected the widening cleavage within the Arab world between the pro-Soviet line of the Iraqi President Kassem and the pan-Arab line of the Egyptian President Abd al Nasir. As *El Ard's* members supported Nasir, they could not join forces with the Communists any more. The Communist party was split into two fractions in 1965. One of the fractions, RAKAH, remained pro-Soviet and was predominantly Arab in leadership and voters. The other, MAKI, renounced Soviet dogma and was supported mostly by Jewish voters. Many of the Arab activists that joined RAKAH viewed the Soviet support to the establishment of Israel in 1947-48 as a "Stalinist mistake". They rejected the UN Partition Resolution and viewed Israel as an Anglo-American imperialist bridgehead. The formation of the pro-Soviet, anti-Zionist and more radical RAKAH party attracted more Arab voters to the party. It may have triggered *El Ard's* decision to turn into a political party that ran a list of candidates in the general elections.

After the defeat in the 1948 war, the failure to establish an independent state and the massive deportation and flight of refugees from the newly established Israel, the Palestinian national movement was eclipsed. Only in early 1960, a revival of Palestinian identity and inspirations began. The creation of the Palestine Liberation Organisation (PLO) in 1964 and the founding of *El-Fatah* as a political-military organisation by Yasser Arafat in 1965 signalled

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<sup>18</sup> For party organisation and voting patterns among the Arab minority in Israel see LANDAU, *supra* note 9; JIRYS, *supra* note 9; AMITAI, *supra* note 9; IAN LUSTIK, ARABS IN THE JEWISH STATE, ISRAEL'S CONTROL OF A NATIONAL MINORITY (1980); UZI BENZIMAN & ATALLAH MANSOUR, SUBTENANTS: ISRAELI ARABS, THEIR STATUS, AND THE POLICY TOWARD THEM (1992); ORI STENDEL, THE ARABS IN ISRAEL, BETWEEN THE HAMMER AND THE ANVIL (1992).

the revival of the Palestinian national movement. The PLO National Charter of 1964 declared that the establishment of Israel was illegal, null and void, that Palestine could not be divided, and that the Jews had no right to establish a state in Palestine.<sup>19</sup> The establishment of the PLO was sponsored by the Arab League. The Charter reflected a dual commitment both to local Palestinian nationality and to pan-Arab nationality.

The context in which *El Ard* was formed was one of growing tension between Communism and pan-Arabism in the Arab world, and between Communism and nationalism among the Arab minority in Israel. The turning of the *El Ard* from an extra-parliamentary political movement to a political party should be understood within the context of the split in the Communist Party between the more moderate, predominantly Jewish wing and the more radical, predominantly Arab wing. It should also be understood in the context of the revival of the Palestinian national movement outside Israel. *El Ard* thus established itself as the first Arab national and pan-Arab political movement in Israel. Its platform should be understood in these contexts as one that aimed to distinguish itself not only from mainstream communism but also from RAKAH, the more radical, anti-Zionist and Arab branch of communism; at the same time it aimed at affiliating *El Ard* with the rising pan-Arab and Palestinian nationalism.

#### IV. The Party's Objectives

The legal discussion of the objectives of *El Ard* generally focused on the "Objectives" section in the articles of organisation of the *El Ard* association, and primarily 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

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<sup>19</sup> See, e.g., Palestinian National Charter arts. 2-4, 6-7, 16-17, available at <http://www.un.int/palestine/PLO/PNA2.html> (last visited July 18, 2008).

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 denied the right of the State of Israel to exist and sought to establish an Arab-Palestinian state in the entire territory of Mandatory Palestine. *El Ard*'s attorney in the *Jirys*<sup>20</sup> and *Yeredor*<sup>21</sup> cases (to be discussed below), Dr. Yaakov Yeredor, offered an entirely different interpretation, according to which the State of Israel already existed and hence there was no need to recognise its right to exist; on the other hand, the Arab people had not yet obtained their state and it was for this reason that their right to a political existence was mentioned. But Dr. Yeredor, in his interpretation, did not address the question of what the boundaries of the Palestinian political entity would be, and the nexus between it and the Arab nation as a whole.<sup>22</sup>

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."<sup>23</sup> In the *Yeredor* case, Chief Justice Agranat reiterated the

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<sup>20</sup> The *Jirys* case, *supra* note 13.

<sup>21</sup> The *Yeredor* case, *supra* note 16.

<sup>22</sup> For a similar commentary, *see also* the actual text of the articles of organisation as submitted to the Supreme Court in the *Jirys* case, quoted by *Jirys*, *supra* note 9, at 118-119.

<sup>23</sup> The *Jirys* case, *supra* note 13.

argument unequivocally: "Before us is a list of candidates whose aim is the liquidation of the State of Israel."<sup>24</sup>

The available sources regarding *El Ard's* objectives are quite limited. Most standard sources that are usually used to evaluate the platforms and objectives of political movements and parties were either not created or not preserved with respect to *El Ard*.<sup>25</sup> 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 towards the end of 1959 and the beginning of 1960, for the publication of which several *El Ard* members were tried. The general tone of the pamphlets was of appreciation for 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."<sup>26</sup> The Jewish national movement was 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

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<sup>24</sup> The Yeredor case, *supra* note 16.

<sup>25</sup> Three standard types of records are not available in the case of *El Ard*: party newspapers, Parliamentary 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 party newspaper which is an important source. 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 formalisation 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 any such).

<sup>26</sup> Israel State Archives 7.10.59.



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.”<sup>27</sup> The refugee question received great attention in the pamphlets, with a demand for the recognition of the right of return. The writer dismissed 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 level of a female cook at Sde Boker” (a reference to Ben Gurion’s wife, who lived in kibbutz Sde Boker). The writer dismissed the claim that there was 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 answered the claim that the refugees hated 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.”<sup>28</sup> The sheets contained some comparisons between Jewish and Nazi rule, and threats as to what was 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!”<sup>29</sup> The sheets did not specify who would bring these threats to fruition and what was required of the Jews, other than the return of the refugees, to remove the threat. They mentioned the foreignness of the Jews in the Arab east; furthermore, there was no recognition of the existence of a Jewish state, so that it appeared that even after the right of return was implemented, the Jews would not have a right to exist within the framework of a state – Jewish, bi-national, or democratic – that was not part of the Arab nation, and it was possible that there would be no place for them in the Arab world as individuals either.<sup>30</sup>

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<sup>27</sup> *Id.* at 7.12.59

<sup>28</sup> *Id.* at 28.12.59

<sup>29</sup> *Id.* at 7.12.59

<sup>30</sup> *Id.*

The political commitment of *El Ard* to pan-Arab and Palestinian nationalism should guide us in attributing concrete meaning to the somewhat vague objective clauses and pamphlets. I believe that the political platform and objectives of *El Ard* should be deduced from a combination of the general political context discussed in the previous section, and the formal legal documents and pamphlets discussed in the present section.

To summarise *El Ard's* objectives and connections: 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. It spoke loosely about the right of the State of Israel to exist, but did not specify the conditions subject to which this state would be recognised. In its statements, it supported Nassir'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. Egypt supported *El Ard* in its statements and called on its constituents to vote for its list. 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 reject it or 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; however, its members do not seem to have been involved in violence and did not make preparations for such involvement.

## V. The Choice of Litigation as a Pre-eminent Political Tactic

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. 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, some of which were discussed in earlier sections of this paper.

At the same time, *El Ard* chose to pursue a 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.<sup>31</sup> *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 *El Ard* 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.<sup>32</sup>

*El Ard* was able to raise before the Supreme Court difficult questions of principle (not an easy matter). Under the military administration, Arab political activity in Israel was controlled through the Mandatory Defense (Emergency) Regulations. The Regulations granted broad powers to the security agencies and 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, whose benches were composed of officers who were not jurists.<sup>33</sup> It was a difficult task to attack the implementation of these

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<sup>31</sup> See, e.g., the Kardosh case, *supra* note 11; the Jirys case, *supra* note 13; the Yeredor case, *supra* note 16.

<sup>32</sup> This pattern of operation resembles that of civil rights organisations 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*, 347 U.S. 483 (1954), which ruled racial segregation in education to be illegal and paved the way for frequent litigation by organisations representing the black population and other minorities for the improvement of their conditions.

<sup>33</sup> As of July 18, 1963, it was possible to appeal decisions of the military administration courts through the regular military courts. See Jirys, *supra* note 9, at 40.

Regulations through the High Court of Justice, because the Court had repeatedly stated in its decisions (since the establishment of the State of Israel) 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.<sup>34</sup> *El Ard* reached the Supreme Court despite the barrier posed by the Defense Regulations,<sup>35</sup> by succeeding in testing government actions that were not based on the authority of the Defense Regulations<sup>36</sup> but on that of the Company Law and the Ottoman Association Law, or were without legal authorisation, as when the Central Elections Commission disqualified the *El Ard* list.

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 academic 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.<sup>37</sup> 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, e.g., in his book *Arabs in Israel*, he demonstrates a thorough understanding of the legal methods of action of Israeli authorities towards the Arab minority. The group also enjoyed the continuous support of Dr. Yaakov Yeredor, an attorney and founder of the Semitic Action group, and one of the former leaders (before 1948) of the left-wing of the Fighters for the

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<sup>34</sup> MENACHEM MAUTNER, *THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW* 40-44 (1993); RON HARRIS, *ISRAELI LAW: THE FIRST DECADE – 1949-1959* 152 (1998); DAPHNE BARAK-EREZ, *FIRST JUDGMENTS* 273 (1999).

<sup>35</sup> Defense (Emergency) Regulations, *supra* note 15.

<sup>36</sup> *Id.*

<sup>37</sup> LANDAU, *supra* note 9.

Freedom of Israel group (*Lehi*). Yeredor represented the movement in the *El Ard Ltd.*,<sup>38</sup> *Jirys*,<sup>39</sup> and *Yeredor*<sup>40</sup> cases. In the *Kardosh* case,<sup>41</sup> the movement was represented by attorney Hanna Nakara, a leader of *Maki* and one of the prominent Arab lawyers of that time. Attorney Arie Marinsky represented Qa'uqji, a party activist, and his five colleagues in the case bearing the latter's name. It appears, therefore, that the leaders of *El Ard* were able to see the potential of the legal battle, and were able to mobilise, in a variety of ways, 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. They played a role resembling that of Thurgood Marshall's in the black civil rights movement in the U.S.

In the manner of political interest groups representing blacks, women, and other minorities in the U.S, 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.<sup>42</sup> Its tactics involved filing various requests with the authorities, and when these responded to the challenge by rejecting the requests and imposing 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, and proceeding to the court of 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

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<sup>38</sup> The *El Ard, Ltd* case., *supra* note 10.

<sup>39</sup> The *Jirys* case, *supra* note 13.

<sup>40</sup> The *Yeredor* case, *supra* note 16.

<sup>41</sup> The *Kardosh* case, *supra* note 11.

<sup>42</sup> LANDAU, *supra* note 9.

mechanism of the government, and to present before the Arab public a higher level of activity than that of competing parties.<sup>43</sup> The legal campaign of *El Ard*, and the Israeli state's attempt to suppress the movement, forced the Supreme Court to address central constitutional and identity issues. I will begin, in accordance with Samuel Issacharoff's scheme<sup>44</sup>, with freedom of expression, then move to freedom of association, and finally arrive at the right to be elected.

## VI. Freedom of Expression

*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 defending the *Qa'uqji* case,<sup>45</sup> 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,<sup>46</sup> which addressed the legality of the refusal of the Registrar of Companies to register a company whose objective was the publication of newspapers; *third*, in petitioning the case of *El Ard Ltd.*,<sup>47</sup> in which the Interior Ministry's Supervisor of the Northern District refused to grant the company a permit to publish a weekly newspaper, even after it had been allowed to incorporate.

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. While awaiting a response, the movement started 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 considerable attention. Consequently, the Advisor to the Prime Minister

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<sup>43</sup> *Id.*

<sup>44</sup> Samuel Issacharoff, *supra* note 2.

<sup>45</sup> CrimA 228/60 *Qa'uqji v. Attorney General* [1960] IsrSC 14(3) 1929 [hereinafter the *Qa'uqji* case].

<sup>46</sup> The *Kardosh* case, *supra* note 11.

<sup>47</sup> The *El Ard, Ltd.* case, *supra* note 10.

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 publication 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.<sup>48</sup> The District Supervisor eventually rejected *El Ard's* request.

Despite *El Ard's* attempt to place freedom of expression and of the press in the centre of legal discussion, and despite the wide protection that this freedom was laced with by virtue of the *Kol Ha'am* ruling of 1953,<sup>49</sup> (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'uqji* case<sup>50</sup> before the Supreme Court 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 offences 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 offence. 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. It was claimed that in the lower instances the content of these sheets was not discussed based on facts, and that the content in itself was not illegal. Refusal of the licence, it was claimed, denied one of the basic rights of citizens of the state, and the severe punishment

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<sup>48</sup> MAUTNER, *supra* note 34.

<sup>49</sup> HCJ 73/53 *Kol Ha'am Company, Ltd. v. Interior Minister* [1953] 1stSC 7(1) 871 [hereinafter the *Kol Ha'am* case].

<sup>50</sup> The *Qa'uqji* case, *supra* note 45.

reflected the political views of 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.<sup>51</sup>

In the *Kardosh* case, all the justices except Justice Agranat chose to address the issue in the context of corporation and administrative law: the extent of the authority and discretion of the Registrar of Companies. In the case of *El Ard, Ltd.*,<sup>52</sup> 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 freedom of speech. But here again, the Supreme Court sitting as High Court of Justice framed the question as one that came 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.<sup>53</sup> The Court refused to intervene in the decision to refuse 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 would have to be addressed to the legislators, who were 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?

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<sup>51</sup> 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 Israel State Archives, Container B 4141 CrimA 228/60. See also the decision itself, the Qa'uqji case, *supra* note 45.

<sup>52</sup> The *El Ard, Ltd.* case, *supra* note 10.

<sup>53</sup> See the petition and the protocol in the Supreme Court file at Israel State Archives, Container B 5149, HCJ 39/64.



The *El Ard, Ltd.*<sup>54</sup> case is different from *Kol Ha'am*<sup>55</sup> in that the discussion did not extend to newspapers that had been published legally and the dissemination of which had been suspended (based on Section 19 of the Press Ordinance),<sup>56</sup> but was limited to newspapers for the publication of which no licence had been issued, as required under regulation number 94 of the Defense (Emergency) Regulations of 1945.<sup>57</sup> 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 licences 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 *ex post facto*. By contrast, the freedom of expression of Arab political movements, which had to obtain licences, 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 licence.<sup>58</sup>

The separation between the two frameworks was not entirely dichotomous. *Mak's* Arabic publication, *Al-Ittihad*, fell into the first legal category, intended apparently for Jewish publications, as it served a binational party; however, its publication continued unencumbered even after it became *Rakab's* newspaper. The same attorney, Hanna Nakara, represented both *Al-Ittihad* in the *Kol Ha'am* case<sup>59</sup> and *El Ard* in the *Kardosh* case<sup>60</sup>, in which *El Ard* asked for recognition of its right to incorporation for the purpose of publishing its newspaper; however, he 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.

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<sup>54</sup> The *El Ard, Ltd.* case, *supra* note 10.

<sup>55</sup> The *Kol Ha'am* case, *supra* note 49.

<sup>56</sup> Press Ordinance, 1933, §19(2)(a).

<sup>57</sup> Defense (Emergency) Regulations, *supra* note 15.

<sup>58</sup> Ronen Shamir, *Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity – The Case of Israel*, 19 INT'L J.L. SOC'Y 45 (1991).

<sup>59</sup> The *Kol Ha'am* case, *supra* note 49.

<sup>60</sup> The *Kardosh* case, *supra* note 11.

Moreover, the regional and international context within which the freedom of expression of the two movements was discussed, in 1953 in the first case, and in 1959–64 in the second, was vastly different. Between the two time frames, dramatic changes had taken place: in the Soviet Union, 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-Ittihad* created problems in Israel's relations with a great power; and *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.<sup>61</sup>

It appears that between the middle of the first and second decades after the creation of the Israeli state, there was a change in the way the Supreme Court balanced freedom of expression with the security threat to the state. It gave state security greater consideration, but without explicitly changing the balancing formula that it created with the *Kol Ha'am* case.<sup>62</sup> It was easy for the Court to effect this change because in the *El Ard, Ltd.* decision<sup>63</sup> 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 the *Kol Ha'am* decision<sup>64</sup> at all, and the centrality of freedom of expression and of the probabilistic test which were at the centre of Justice Agranat's ruling in the *Kol Ha'am* case. *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, although not in affecting in the Supreme Court's decision.

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<sup>61</sup> LANDAU, *supra* note 9.

<sup>62</sup> LAHAV, *supra* note 9; PNINA LAHAV, THE NEW VERSION OF THE PRESS ORDINANCE: ANACHRONISM IN ELEGANT HEBREW 18 (1978).

<sup>63</sup> The *El Ard, Ltd.* case, *supra* note 10.

<sup>64</sup> The *Kol Ha'am* case, *supra* note 49.

## VII. Freedom of Association

At the time in Israel, two main types of corporate associations were available by law. The first was the corporation and the second was the Ottoman association. The first was based on the 1929 British Mandatory Companies Ordinance, and was used primarily for business purposes. The second was based on the 1909 Ottoman Associations Law, and was used primarily for the formation of NGOs and other non-business entities.<sup>65</sup>

The *Kardosh* case<sup>66</sup> raised the question of *El Ard's* freedom of associating into a corporation. In April 1960, several *El Ard* members submitted to the Registrar of Companies the forms required to register a company named "El Ard Company, Ltd." 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. However, it decided that this was one such case on the ground that 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 of 1933 which granted the authority to issue licences 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* case<sup>67</sup> about the high social value associated with freedom of expression, which could be curtailed only by those whom the legislation has explicitly empowered

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<sup>65</sup> A third form was the Cooperative, but it is not relevant for consideration here.

<sup>66</sup> The *Kardosh* case, *supra* note 11.

<sup>67</sup> The *Kol Ha'am* case, *supra* note 49.

to do so. The Registrar of Companies was not authorised by law to restrict the freedom of expression and to protect the security of the state. Therefore, in this case, it was held that 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 authorised 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 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 then Attorney General, asked the Supreme Court for a further consideration of this decision. It is important to note that Israel’s Supreme Court did not rule *en banc*. It normally sat in panels of three justices out of the nine to eleven presiding justices. A further consideration was held by an extended panel, usually by adding two justices and making a panel of five justices. The Chief Justice was well positioned to influence the final outcome both by deciding whether to allow further consideration and by deciding who would be the justices that would be added to the panel. In this further consideration, in which the Attorney General Hausner personally represented the Registrar of Companies, Justice Sussman added his vote to the majority and Chief Justice Olshan to Justice Cohn’s minority opinion. It is apparent that in this case the Chief Justice did not manipulate the final decision. 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*<sup>68</sup> and *Further Consideration The Registrar of Companies v. Kardosh*,<sup>69</sup> given in 1961 and 1962, are often treated independently of the sequence of decisions relating to the *El Ard*. Legal scholars regard the *Kardosh* decision as a declaration of the principle of freedom of association in Israel.<sup>70</sup> None of these scholars mention the fact that in November 1964, El Ard Company, Ltd. was declared an illegal association by the Ministry of Defense.<sup>71</sup> 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.<sup>72</sup> 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, the *Kardosh* ruling did not affect significantly the status of freedom of association in Israel.<sup>73</sup> It turns out that in 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 of Companies only after he obtained, as instructed by the Attorney General, the approval of the Ministry of Justice. The Ministry of Justice in turn obtained the

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<sup>68</sup> The *Kardosh* case, *supra* note 11.

<sup>69</sup> The *Kardosh Further Consideration* case, *supra* note 12.

<sup>70</sup> See SMADAR OTTOLENGHI, COOPERATIVE SOCIETIES: LAW AND PROCEDURE 34 (1995); AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 1116-1124 (5th ed. 1957); IRIT HAVIV-SEGAL, *Freedom of Incorporation: A Right, Not a Favor*, in THE COURT: 50 YEARS OF JUDGMENT IN ISRAEL 66-67 (David Chassin et al. eds., 1999); IRIT HAVIV-SEGAL, CORPORATE LAW IN ISRAEL 82 (1999).

<sup>71</sup> The declaration was carried out by virtue of the Defense (Emergency) Regulations, *supra* note 15.

<sup>72</sup> LANDAU, *supra* note 9, at 117.

<sup>73</sup> The *Kardosh* case, *supra* note 11.

approval of the military administration, which quite likely obtained the approval of the General Security Services.<sup>74</sup>

Apparently, the *Kardosh Further Consideration* 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.<sup>75</sup> 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 (a future Supreme Court Justice), reached an opposite conclusion.<sup>76</sup> 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.<sup>77</sup> The bottom line of the opinion is that even after the *Kardosh Further Consideration* 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 authorised to refuse to register companies if "there is a reasonable basis to suspect that behind the objectives listed in the articles of organisation an illegal objective is being concealed."<sup>78</sup>

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<sup>74</sup> *Supra* note 26, at 20.7.62.

<sup>75</sup> The *Kardosh Further Consideration* case, *supra* note 12.

<sup>76</sup> *Id.*

<sup>77</sup> *Supra* note 26, at 8.5.62.

<sup>78</sup> 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. In the end, in 1966, with the abolition of the military administration, it was neither the judiciary nor the legislative branch that stopped the practice. The military authorities in a trivial internal note ordered the companies registrar, through the Ministry of Justice, to stop the practice of reviewing incorporation applications by Arab citizens of Israel.

Approximately two years after the right of members of *El Ard* to form an organisation 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, after the fact, about the association 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 *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 was 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.<sup>79</sup> 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 organisation in opposition. Critics maintained that the Supervisor should have used Section 4 of the law, which prohibits political organisations founded on the basis of nationality and race.<sup>80</sup> But use of this section would also have been problematic, because many of the political organisations 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

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<sup>79</sup> A. NEEMAN, THE PLACE OF FREEDOM AND THE ‘EL ARD’ GROUP 342,344 2(10) (1964).

<sup>80</sup> *Id.*

make the *El Ard* people the standard bearers in the struggle for the freedom of democratic association in Israel.”<sup>81</sup>

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 *Jirys* case, stemmed from a legal approach of unclear origin whereby limited liability companies, as business organisations, warrant lesser state intervention in their affairs than associations of a more political and social nature.<sup>82</sup> 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.<sup>83</sup> Already at that time there was talk about the movement contemplating participation 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 organisation 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 itemised 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. Furthermore, 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

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<sup>81</sup> *Id.*

<sup>82</sup> LANDAU, *supra* note 9.

<sup>83</sup> *Id.*



objectives that were included. The objectives 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 wanted to include two other objectives which discussed the mode of the solution of the Palestinian problem and supported a certain movement in the Arab world. These objectives were at the centre of the discussion in the High Court of Justice, and eventually caused the prohibition of the association.<sup>84</sup> The *El Ard* people were interested in including these objectives, although in a somewhat hazy formulation, to test the authorities.<sup>85</sup> They did not place their hopes in the District Supervisor, given his past record.<sup>86</sup> The more meaningful test seemed to be that before the Supreme Court. Following the *Further Consideration of Kardosh*, the Supreme Court looked like the right arena. If they could not secure the support of the High Court of Justice, they could at least embarrass it and expose its Zionist leanings.<sup>87</sup>

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.<sup>88</sup> The change is manifest in the Court’s shift from a formal or even formalistic discussion in the *Kardosh* case to a discussion of

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<sup>84</sup> The Jirys case, *supra* note 13.

<sup>85</sup> *Id.*

<sup>86</sup> LANDAU, *supra* note 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

values in the *Jirys* case. It is a mistake to maintain, as some jurists do,<sup>89</sup> 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 Companies Ordinance. In the *Kardosh* case, the rights are in the margins. In the first round, only Justice Agranat attaches importance to the freedom of expression and association on his way to a decision. Here the Supreme Court gives the authorities a lesson on dealing with *El Ard*. It states that rather than prohibiting its incorporation, they must deny it a licence 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,<sup>90</sup> however, the objectives of *El Ard* are at the centre 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 Justice 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.<sup>91</sup>

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<sup>89</sup> See sources cited *supra* note 70.

<sup>90</sup> The *Jirys* case, *supra* note 13.

<sup>91</sup> *Id.* at 680 [emphasis added].

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.<sup>92</sup>

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* decision that signaled the shift in the Supreme Court's attitude towards *El Ard*. In the *Yeredor* case,<sup>93</sup> the justices merely continued that line, relying heavily on the *Jirys* discussion of the objectives of the movement.

### **VIII. Liberty to Contest Election**

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.<sup>94</sup> 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

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<sup>92</sup> *Id.*

<sup>93</sup> The *Yeredor* case, *supra* note 16.

<sup>94</sup> Israel State Archives 7.10.59.

of the *El Ard* movement, presented to the Elections Commission to the Sixth Knesset a list of ten candidates that chose the deluding name "The Socialists List." First on the list were Salih Baransi, Habib Qa'ujji, and Sabri Jirys, and the last one was Mansur Kardosh – all of them known figures from earlier legal confrontations of *El Ard*. 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 in the *Kardosh* case,<sup>95</sup> 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 Knesset Election Law.<sup>96</sup>

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 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 had pulled the plug on all other activities of the movement. A related 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.

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,<sup>97</sup> as well as the Basic Law: The Knesset,<sup>98</sup>

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<sup>95</sup> The Kardosh case, *supra* note 11.

<sup>96</sup> The original list of candidates, with the signatures, is found at the Israel State Archives in the folders of the Elections Commission to the Sixth Knesset, Folder 3. 7062, Box 33, Book 1-7.

<sup>97</sup> Knesset Elections Law, 1959, S.H. 138.

<sup>98</sup> Basic Law: The Knesset, 1958, S.H. 69.

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 that arose was whether the Commission had the authority to discuss the matter and rule on it.

Although the issue of the legitimacy of Jewish and Arab political movements arose for the first time soon after the establishment of the State of Israel, no substantive restrictions on the right to vote and to be elected were specified in the Elections Ordinance for the Constituent Assembly<sup>99</sup> (which became the first Knesset). Neither have such restrictions been specified in subsequent election laws. Even when the Knesset passed permanent legislation in this area (Basic Law: Knesset,<sup>100</sup> in 1958 and the Knesset Elections Law,<sup>101</sup> 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.<sup>102</sup> 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 was already under way 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.<sup>103</sup> It is possible that the

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<sup>99</sup> Elections Ordinance for the Constituent Assembly Elections Ordinance, 1948, 2 LSI 24 (1948-49) (Isr.).

<sup>100</sup> Knesset Elections Law, *supra* note 97.

<sup>101</sup> Basic Law: The Knesset, *supra* note 98.

<sup>102</sup> 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 at the Israel State Archives in Section 43, Office of the Prime Minister, Folder 3 6278.

<sup>103</sup> *Id.*

hidden assumption was that *El Ard* and similar movements would not reach the stage of submitting lists of candidates to Knesset elections because the authorities would be able to stop them during their formative stage through the Ottoman Association Law, the Mandatory Defense Regulations,<sup>104</sup> and the Israeli Prevention of Terror Ordinance.<sup>105</sup>

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 *Rakab* in the commission opposed the disqualification of *El Ard*, although *Rakab* people claimed that *Maki's* opposition to the disqualification was only lip service. Others claimed that *Rakab* 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 *Rakab* 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, *Rakab* did not appear to fear that the disqualification of *El Ard* would lead to its own disqualification later.<sup>106</sup> For several reasons, the authorities treated *Rakab* with less hostility.<sup>107</sup> Injury to the party could have had 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 with respect to Middle Eastern affairs and matters relating to Soviet Jewry. *Rakab* was a faction of a movement that had contested 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.

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<sup>104</sup> Defense (Emergency Regulations), *supra* note 15.

<sup>105</sup> Prevention of Terrorism Ordinance, 1948, 1 LSI 76 (1948) (Isr.).

<sup>106</sup> LANDAU, *supra* note 9.

<sup>107</sup> *Id.*

The chairperson of the Central Elections Commission, Justice Landau, played a key role in the Commission's decision to disqualify *El Ard*.<sup>108</sup> It appears that Justice Landau not only chaired the discussions of party representatives, but also led and structured them. He reached the conclusion that the commission was authorised to disqualify a list, offered criteria for disqualification, and maintained that *El Ard* met those criteria. He said:

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.

He also created the legal pattern which, in his opinion, granted the Commission the authority to disqualify a list of candidates by a combined interpretation of the Basic Law: The Knesset,<sup>109</sup> the Knesset Elections Law,<sup>110</sup> and the Ottoman Association Law. He summarises the case thus:

“Organisations 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.”

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<sup>108</sup> 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.

<sup>109</sup> Basic Law: The Knesset, *supra* note 98.

<sup>110</sup> Knesset Elections Law, *supra* note 97.

Justice Landau made frequent references to the *Jirys* decision<sup>111</sup> during his presentations before the Commission; he was the Senior Justice on that case. He had known the *El Ard* members for at least five years since he wrote the decision in the *Qa'uqji* case<sup>112</sup> towards the end of 1960. He did not hesitate to express his opinion regarding the manner in which the Supreme Court was expected to react to the Commission's decision. There is no doubt that the authority with which he presented his factual position and legal conclusions influenced the Commission's decision. He also influenced the Attorney General who adopted his position and reasoning in his arguments before the Supreme Court in the *Yeredor* case.<sup>113</sup> It is likely that Justice Landau's opinion has helped form the positions of his colleagues in the Supreme Court.<sup>114</sup> Landau's central role in the *El Ard* affair has not been properly assessed.

The *El Ard's* decision to run in the elections to the sixth Knesset presented the toughest challenge till date to the Supreme Court. The primary reason for this was that no restrictions had been enacted on the right to be elected. Second, the High Court of Justice had not been asked previously to decide on the matter. 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, Justice Landau had put the weight of all his prestige behind the decision of the Central Elections Commission. Fourth, owing to the proximity of the elections, the Court had only four days, including the Sabbath and a holiday, to decide. Fifth, 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

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<sup>111</sup> The *Jirys* case, *supra* note 13.

<sup>112</sup> The *Qa'uqji* case, *supra* note 45.

<sup>113</sup> The *Yeredor* case, *supra* note 16.

<sup>114</sup> The *El Ard, Ltd.* case, *supra* note 10.



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 judges, 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 to Congress<sup>115</sup>, lessons from the history of the Weimar Republic, and literature on statehood theory.

Justice 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 Justice 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 Justice Landau's position, who proposed a standard interpretation of the election laws<sup>116</sup> in combination with the association law.

Justice Haim Cohn, in his minority view, interpreted the Knesset Election Law literally and found no authorisation for the Elections Commission or the Supreme Court to disqualify a list of candidates based on its objectives. He maintained that the disqualification should be voided and added a recommendation to the legislators to define by law the authority to disqualify a list of candidates, in the manner done by the German Constitution after the Second World War.<sup>117</sup>

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<sup>115</sup> See HENRY J. RAYMOND, *THE LIFE, PUBLIC SERVICES AND STATE PAPERS OF ABRAHAM LINCOLN* 9 1865.

<sup>116</sup> The El Ard, Ltd. case, *supra* note 10.

<sup>117</sup> The El Ard, Ltd. case, *supra* note 10.

Most of the above discussion of *El Ard's* objectives is not 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, material from Israeli newspapers, including those of *Maki*, *Rakab*, and *El Ard*.<sup>118</sup> 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. 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 whether *El Ard* supported the continued existence of Israel or recognised 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. If it were to join with external Arab forces at the time of war, would it make the

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<sup>118</sup> 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, 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.

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.<sup>119</sup> The question was: What is the threshold beyond which a movement cannot participate in the state's political process because the gap between its values and those of the state is too great? The answer of majority 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 dialogue of the election campaign and the Knesset. But the courts didn't specify where exactly the borderline was.

Are only such movements that propose the establishment on the entire territory of Mandatory Palestine of an Arab Palestinian state, which is part of the Arab nation to be disqualified? 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.<sup>120</sup>

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<sup>119</sup> Ruth Gavison, *Twenty Years to Yeredor Ruling – The Right to Be Elected and the Lessons of History*, in *ESSAYS IN HONOUR OF SHIMON AGRANAT* 145, 145-213 (Ruth Gavison & Mordechai Kremnizter eds., 1986).

<sup>120</sup> The *Yeredor* case, *supra* note 16.

The interpretive move used in the *Yeredor* ruling<sup>121</sup> points towards 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 did, it interpreted the legislations 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 authorised the Commission only to examine the technical compliance of the documents 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 recognising 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. It only interpreted the laws with reference to these principles. To disqualify the *El Ard* list, the Court effected towards the end of the second decade of its existence, a dramatic shift in the constitutional theory and interpretation canons 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.

It is possible that the shift in the Court's attitude towards *El Ard* resulted not from the movement's objects and actions, or from the appointment of Justice Agranat as President, 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 analysing Israel's strategic position: its military strength,

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<sup>121</sup> *Id.*

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.

## **Afterword**

*El Ard's* political activities came to an end with the ban on its participation in the 1965 elections. Shortly thereafter two of its leaders left Israel. The symbolic dismantling of the military rule in 1966 and more than this the 1967 war that brought under Israeli military rule the West Bank and the Gaza strip with their large Palestinian population, dramatically changed the position of the Arab minority in Israel.

The next attempt by an Arab nationalist party to participate in the general election took place only nineteen years and five election campaigns later, in 1984. One of its two leaders, Muhammad Miari was a former activist in *El Ard*. The party *Hareshima Hamitkademet Leshalom* ("The Progressive List for Peace") was different from *El Ard* in the sense that it had also a Jewish leader and that it favoured a two states solution. Yet it shared with *El Ard* the aim to form an Arab nationalist party that would have no Communist or Zionist affiliations. Several Jewish parties challenged its right to participate in the elections; the Central Elections Commission decided to ban it from participation, but the Supreme Court overturned that decision and approved its participation.<sup>122</sup> In

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<sup>122</sup> The same happened to the racist, Jewish *Kakh* movement, headed by Meir Kahana, that was banned by the Commission but approved by the Supreme Court. *Kakh's* ban was upheld in 1988 by the Court.

1985, the Basic Law that sets and regulates elections to the Knesset was amended to allow the banning of parties on the grounds of denial of the State of Israel as the State of the Jewish People, denial of its democratic character or incitement to racism. The banning of Arab political parties based on the amended Basic Law has been suggested by right wing Jewish parties before most elections since 1984.<sup>123</sup> It has not been upheld by the Supreme Court so far.

Few movements and organisations, 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, with scarce financial or other resources. The case of *El Ard* is arguably the most interesting case in the history of banning of political parties in Israel. It is also a crucial episode in the history of freedom of speech and freedom of association in Israel. Presenting the story as interplay between an active and initiating political movement and the Supreme Court gives rise to a constitutional narrative quite different from the traditional one in which the Supreme Court, on its own initiative, expands rights and protections. It also emphasises the role of the Arab minority and the conflict in shaping Israel's Constitution. This is a case study that can be used for a revision of Israeli constitutional history.

The case of *El Ard* illuminates a profound question: should there be an undisputable core identity to democratic states? That asserted identity can be secular or liberal. It can be cultural, ethnic or national. It can be one of attachment to specific historical narratives, to collective memory, or to the correcting past injustice. This question is presented in its boldest form when the disputant political movement does not intend to use violence in order to bring about the change in core identity and when it does not wish to democratic form of government in that state. The complexity of *El Ard's* story and the thickness of the narrative provide valuable insights for policy discussions. These can be used with respect to the analysis of the objectives of parties, the means

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<sup>123</sup> For a discussion of these later cases see Barak Medina, *Forty Years to the Yeredor Decision: The Right to Political Participation*, 22 BAR-ILAN U.L. REV. 327-383 (2006).

they intend to use, the relevance of their success prospects, their attitude towards the use of violence, towards external political entities, and the different sets of issues in various realms in which they are being restricted and banned.

The case of *El Ard* demonstrates the difficulties in identifying whether parties reject violence and whether they adhere to democratic form of government. It shows that it is hard to find a pure case of an attempt to change the core identity of a state with full commitment to democracy and with full rejection of violence. Yet it demonstrates that the focus on banning parties that aim at changing the identity of a state touches a very sensitive nerve, one that at the same time exposes the identity of the state and the limits set on it democratic participation. *El Ard* was a forerunner of the third generation of banning issues, issues of state identity. These issues will occupy democracies for years to come.