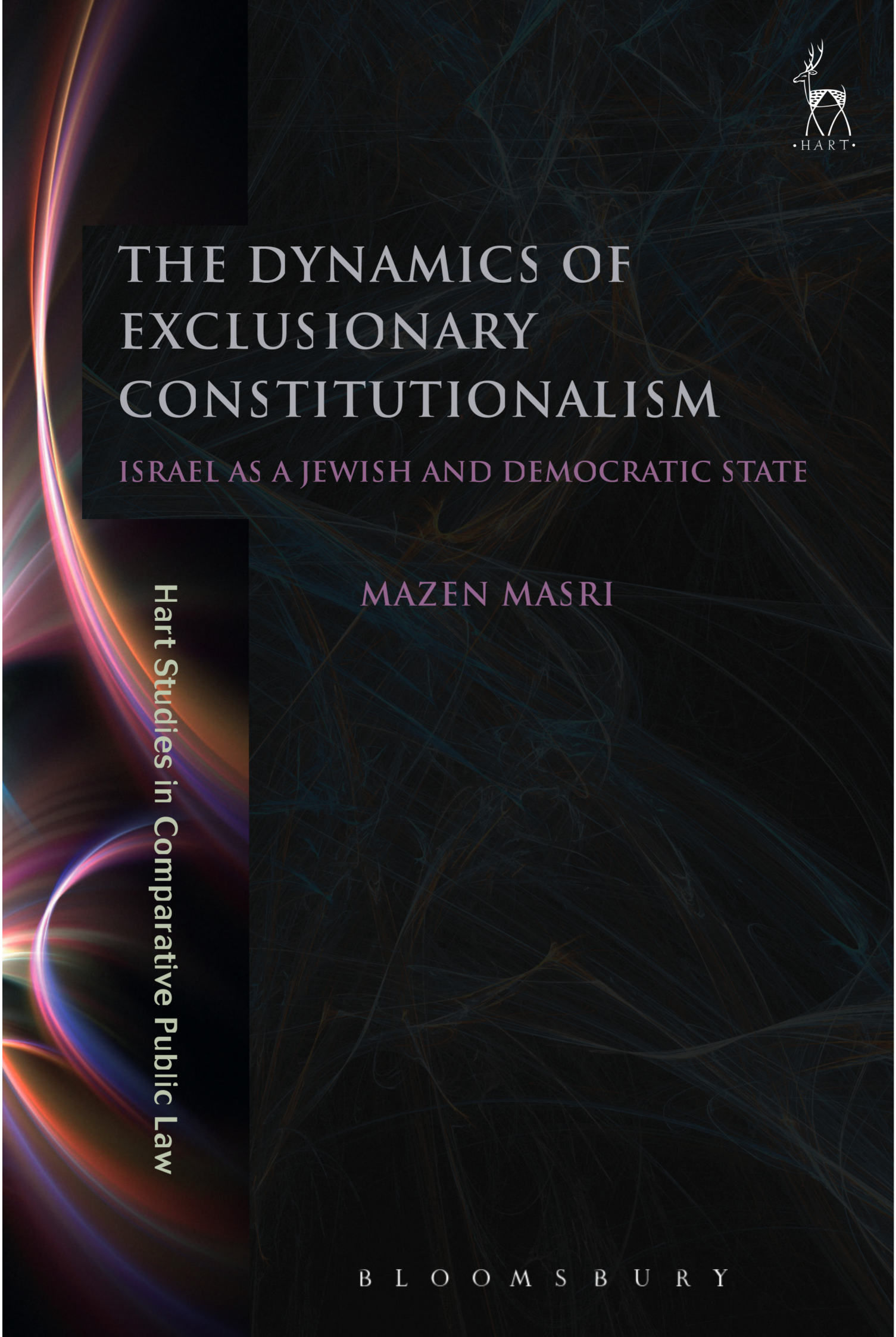
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ISRAEL AS A JEWISH AND DEMOCRATIC STATE
MAZEN MASRI
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Israel as a Jewish and Democratic State

Mazen Masri

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List of Abbreviations

CA	Civil Appeal—appeals in civil matters
CEC	Central Elections Committee
CLA	Civil Leave for Appeal—leave for appeal in civil matters
CrimA	Criminal Appeal—appeals in criminal matters
CrimFD	Criminal Further Hearing—a second hearing at the Supreme Court after an appeal has already been decided
CrimVR	Criminal Various Requests—criminal motions
EA	Elections Appeal
EC	Elections Confirmation
FH	Further Hearing—a second hearing at the Supreme Court after an appeal has already been decided
HCJ	High Court of Justice—the Supreme Court sitting as a court for constitutional and administrative matters
HP	*Hamratsat Ptiha*—a simplified civil action
IsrSC	Supreme Court of Israel
MK	Member of Knesset
NDA	National Democratic Assembly Party

1

Introduction

ATIR-UM AL-HEIRAN IS a village in the Naqab (Negev) in the south of Israel. It is home to 1,000 members of the Abu Al-Qi'an Bedouin tribe. It has been so since the Israeli Military Governor ordered them to move to that area in 1957 after they were expelled from their original village in 1948/1949. Atir-Um Al-Heiran is an 'unrecognised village'—a village that exists, where people live, but whose existence the state does not acknowledge. The village does not appear on any official map, and no road signs announce the dirt side-road that leads to it. It is not connected to the electric grid, the water supply system or a sewage system. Healthcare and education services are a bare minimum. The only official recognition the village receives is on planning maps as 'the area designated for demolition' to make room for what will be the town of Hiran, which is officially designated as a Jewish town to be built on the current location of Atir-Um Al-Heiran.[1] The rest of the area is designated for forestation. A few kilometres away stands another 'unrecognised' village, Al-Araqeeb, with a population of 300. In 2010, this village was destroyed, all 45 structures were demolished, and 4,500 olive trees were uprooted. The area was officially designated for forestation to be carried out by the Jewish National Fund.[2] The residents of the village rebuilt some tents, huts and ramshackle dwellings, which were subsequently destroyed. As of June 2016, the Ministry of Interior has demolished Al-Araqeeb 99 times.[3] The residents of both of these villages are Israeli citizens.

Not far away from these villages are 'individual settlements' or 'single family settlements'. These large tracts of land, usually hundreds or thousands of acres, are allocated by the state to an individual or a single family

[1] Suhad Bishara and Haneen Naamnih, 'Nomads Against Their Will: The Attempted Expulsion of the Arab Bedouin in the Naqab: The Example of Atir Um Al- Heiran' (Adalah, 2011), www.adalah.org/eng/publications/Nomads%20Against%20their%20Will%20English%20pdf%20final.pdf.

[2] Nadia Ben-Youssef, Suhad Bishara and Rina Rosenberg, 'From Al-Araqib to Susiya: The Forced Displacement of the Palestinians on Both Sides of the Green Line' (Adalah, 2013), http://adalah.org/Public/files/English/Publications/Position_Papers/Forced-Displacement-Position-Paper-05-13.pdf.

[3] 'For the 99th Time: The Bulldozers of the Ministry of Interior Demolish the Village of Al-Araqeeb', *Arab48* (Haifa, 9 June 2016) (Arabic), http://goo.gl/uUemfx.

for the stated purpose of the development of agriculture and tourism. In reality the main objective is to 'protect' state land from use by the Arab population.[4] These tracts have been allocated to Jewish citizens only, and are connected to the water and electricity networks despite the fact that most of them were built in breach of planning laws.[5] Some of the legal defects were retroactively rectified by legislation enacted in 2010.[6] Like the 'unrecognised villages', the residents of these settlements (or ranches) are also Israeli citizens.

The Israeli state acts, using law and through legal channels that include planning authorities, courts and enforcement bodies, to demolish villages and replace them with other (Jewish) towns. At the same time, the state enacts law that is used by the same planning bodies, courts and enforcement bodies to justify and legitimise the grant of vast tracts of lands to other citizens. This takes place despite numerous decisions by the Supreme Court declaring that in Israel all citizens are ostensibly equal. 'The State of Israel', former Chief Justice Aharon Barak stressed in the *Ka'dan* ruling, 'is a Jewish state in which minorities live, including the Arab minority. Everyone who belongs to these minorities enjoys full equal rights'.[7] He further added that 'equality of rights between humans in Israel, whatever their religion or national belonging is, is derived from the values of the state as a Jewish and democratic state'.[8] How can this stated commitment to equality be reconciled with the situations described above? How can the law and the institutions that make, adjudicate and enforce it, displace one group of people, grant favourable land rights to others, and still be seen as neutral and impartial and fulfilling the requirements of equality among citizens which is at the heart of democracy?

This quandary is only one example in the curious case of the Israeli constitutional system in which the state is defined as 'Jewish and democratic'. The state, loyal to the 'democratic' part of the definition, has the main markers of democracy. It has a government that is drawn from an elected parliament, and most civil and political rights are guaranteed by basic laws and other instruments such as Israeli 'common law'. Election results have always been respected. The legislative branch supervises the actions of the executive branch, and the judiciary has the power to review the actions of the other two branches. Equality is officially a constitutional right, as expressed

[4] Hana Hamdan, 'Individual Settlement in the Naqab: The Exclusion of the Arab Minority', *Adalah Newsletter* 10 (February 2005), http://adalah.org/newsletter/eng/feb05/fet.pdf.

[5] Human Rights Watch, 'Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages' (Human Rights Watch, 2008) 33–36, www.hrw.org/reports/2008/iopt0308/iopt0308webwcover.pdf.

[6] The Negev Development Authority Law (Amendment no 4) 2010.

[7] HCJ 6698/96 *Ka'dan v Land Administration of Israel* (2000), IsrSC 54 (1) 258 at 282 (Hebrew) (translated by author).

[8] ibid.

in the quote by Barak. External bodies also seem to view these markers favourably. In 2015, Freedom House classified the country as 'free', and gave it the score of 1.5 for freedom, 2 for civil liberties, and 1—the highest score available—for political rights.[9] In 2010, Israel joined the Organization for Economic Cooperation and Development (OECD), an exclusive club of states that are, according to its convention, committed to democracy.

At the same time, the state adopts many policies that could be described as settler-colonial: where the state acts as the tool of a settler society in conflict with an indigenous population. Moreover, the definition as a Jewish state means, among other things, that the state promotes Jewish immigration, Jewish nationalism, Jewish culture and heritage, Jewish settlement, and a special role for the Jewish organisations such as the Jewish Agency and the Jewish National Fund.[10] The Supreme Court further asserts that this definition means that there should be a Jewish majority in Israel, and that Israel *must* preserve a Jewish majority so as to remain a Jewish state. Discrimination, in many cases as a matter of law and policy, can be identified in almost all aspects of life in Israel. Adalah, a human rights organisation dedicated to achieving equal individual and collective rights for Palestinians in Israel,[11] counts more than 50 Israeli laws that discriminate against the Palestinian citizens of Israel.[12] The number of statutes on this list seems to be constantly on the rise. This legal discrimination permeates the social, economic and political spheres. In almost all conceivable areas including health, education, income, employment, budget allocation, social welfare and development, Israel's Palestinian citizens fare worse, and in some cases, much worse than the Jewish citizens.[13] Palestinians, who are almost 20% of the population,[14] are significantly underrepresented in all branches of

[9] 'Freedom in the World 2015: Israel', *Freedom House* (2015), www.freedomhouse.org/report/freedom-world/2015/israel.

[10] *Ka'dan* (n 7).

[11] The focus of this book is Israel's constitutional law and not its policies in the West Bank and Gaza Strip—also known as the Occupied Palestinian Territory (OPT). Therefore, unless otherwise mentioned in the text, 'Palestinians', 'Arabs', 'Palestinian minority' or 'Palestinian citizens' will refer to the group of Palestinians who are also Israeli citizens, described by the state as 'Israeli Arabs'. Reference to other groups of Palestinians, such those who live in the OPT, or refugees in the *shatat* (diaspora) will be explicitly mentioned in the text.

[12] For a database of discriminatory laws in Israel see, 'Discriminatory Laws in Israel', *Adalah*, www.adalah.org/en/law/index.

[13] For a good summary of all of these policy areas, see Katie Hesketh, 'The Inequality Report: The Palestinian Arab Minority in Israel' (Adalah, 2011), http://adalah.org/upfiles/2011/Adalah_The_Inequality_Report_March_2011.pdf.

[14] As of May 2016, the population of Israel was approximately 8.5 million. The Jewish population was approximately 6.37 million (74.8%), while the Arab population was 1.77 million (20.8%). This figure includes the Palestinians of East Jerusalem and the Syrian population of the Golan Heights, both of which are occupied territories, and where the residents are mostly Israeli permanent residents and not citizens, except for individual cases. 374,000 (4.4%) are

government, the civil service and public sector,[15] despite legislation that mandates 'appropriate representation' in the civil service and legislation that protects equality in employment in general.[16]

Does the fact that the state is defined as a 'Jewish and democratic' state have anything to do with this outcome? What does this definition mean? How is it used to justify certain features of constitutional law in Israel and the constitutional order in general? What does it say about the nature of the regime in Israel? This book seeks to tackle these questions and examine the meaning and implications of Israel's definition by focusing on its relationship with certain aspects of the constitutional regime such as sovereignty, constituent power and the idea of the People.

I. ISRAEL AS A JEWISH AND DEMOCRATIC STATE

The idea of a Jewish and democratic state combines two concepts that are extremely rich theoretically, conceptually and empirically. Debates on what democracy and Judaism are, and the question of who is a Jew, seem to be unending. Discussions on the combination of Jewish and democratic are even more complicated. A democratic state is understood to be one that is based on the idea of equal citizenship, an inclusive attribute that guarantees equal membership to all members of the polity included in the state. However, the concept of a Jewish state is more ambiguous, and it could carry a number of meanings depending on the different approaches to Jewishness.[17] In the context of a significant indigenous non-Jewish population, and where the vast majority of the Jewish population have migrated to the country after the creation of the state, the definition of the state as Jewish may carry several risks: the risk of exclusion on the basis of religion and/or ethnicity, or the risk of homogenisation by designing the polity along religious and ethnic lines, as well as a problematic role for religion in shaping the state. Prima facie, the Jewish and democratic elements are at odds, or at least in tension, with each other.

categorised as 'Others', who are 'non-Arab Christians, members of other religions, and persons not classified by religion'. See Central Bureau of Statistics. 'Media Release: 68th Independence Day—8.5 Million Residents in the State of Israel' (Central Bureau of Statistics, 9 May 2013), www.cbs.gov.il/www/hodaot2016n/11_16_134e.pdf.

[15] As of 2011, only 7.78% of workers in the civil service were Arab. While this figure is low, it is an improvement on the 5.92% rate in 2006. See *Appropriate Representation for the Arab Population including the Druze and Circassians: Report for the Year 2015* (State Service Commission, 2016), www.csc.gov.il/DataBases/Reports/Documents/representation2015.pdf.

[16] See s 15A of the State Service Law (Appointments) 1959; s 18A1 of the Governmental Companies Law 1975; Equal Opportunities in Employment Law 1988.

[17] Some may view Jewishness or Judaism as a purely religious idea. Others may view it as a national or ethnic idea, or a combination of the three conceptions. Some may conceive of it as a matter of culture. Others may think of it as a set of moral and humanist teachings.

The idea of the Jewish state found its first significant explicit expression in written law in 1985 when the Israeli parliament (the Knesset) amended Basic Law: The Knesset. This relatively late articulation of the character of the state in a basic law does not mean that it only took root in 1985. On the contrary, this idea—which goes back to the mid-nineteenth century[18]—was so axiomatic and taken for granted that there was no need to declare it in any statute or basic law. After all, Israel is the product of the Zionist movement—a predominantly European movement influenced by the rise of nationalism in Europe which posited that the 'solution' for the 'Jewish problem' in Europe was 'the creation of a home for the Jewish people in Palestine to be secured by public law'.[19] As a natural outcome of these efforts, the 1948 Declaration on the Establishment of the State of Israel declared 'the creation of a Jewish state in *Eretz Yisrael* (land of Israel) to be known as the State of Israel'. Even before the explicit positive written expression of this idea in law, the Supreme Court used the idea as a guiding principle in deciding some cases, as will be discussed in Chapter 3.

As a Jewish state, the state associated itself with Jews (in the state and abroad) and adopted Jewish symbols. It embarked on the creation of a distinctly uniform Jewish identity out of the myriad identities the Jewish immigrants had. The process of nation-building was focused on the Jewish population, which was mostly an immigrant population from different places with different languages, customs and cultures. It did not focus on the population as a whole. The nation which the state—or the nation-state (the term many politicians and academics prefer to use)—was associated with was the Jewish nation which was being shaped and produced by the state.

But the population was not Jewish only. After the creation of Israel, the Palestinians were reduced from a majority to a minority of approximately 12%. Most were granted citizenship in 1952 and participated in parliamentary elections, but they were also seen as outsiders and a threat to the state. Their citizenship did not guarantee equal treatment. From 1948 until 1966, the Palestinian population was placed under a Military Administration that interfered with all aspects of life. Freedom of movement was significantly limited and about 70% of the land that the Palestinian community owned was confiscated by the state, mostly for the construction of Jewish towns or for military use. Even after the end of the Military Administration, the state's approach to the Palestinian minority did not change significantly. Historically, the Palestinians in Israel are part of the Palestinians who lived in pre-1948 Palestine. In some cases, the Green Line—the border line between the area that became Israel and the area that became the West Bank

[18] Moses Hess, *Rome and Jerusalem: A Study in Jewish Nationalism* [1862] (Bloch Publishing Company, 1945); Theodor Herzl, *The Jewish State: An Attempt at a Modern Solution of the Jewish Question* published [1896] (Henry Pordes, 1993).

[19] David Vital, *The Origins of Zionism* (Oxford University Press, 1980) 368.

(currently known also as the Occupied Palestinian Territory (OPT)—cuts some villages in half. Despite holding Israeli citizenship, most Palestinians in Israel choose to identify as Palestinians in Israel rather than as Israeli.[20]

The enactment of the two basic laws which include the 'Jewish and democratic' definition (Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation), and the subsequent decision of the Supreme Court of Israel affirming the constitutional nature of these basic laws, have put these two terms at the centre stage of Israel's constitutional politics.[21] The definition became an essential element in the shaping of Israeli law and policy generally. The adoption of the phrase 'Jewish and democratic' as a constitutional definition creates tensions on at least three levels. The first one is the national level: the contradiction between the inclusiveness of democracy and the potential exclusion by the nation defined in an ethno-religious manner. This level could be divided into two sub-levels, the symbolic—dealing mainly with culture and symbols which are almost exclusively Jewish—and the material level which focuses on the impact on the allocation of political power and rights by law and in practice. The second level is the religious level: the tension between Jewish theology and democracy which tends to limit the role of religion and is based on a secular foundation. The third level is territorial, relating to the geographical reach of the Jewish state, and which includes the debate over the status of the OPT.

This book is a contribution to the debates on the meaning of the Jewish and democratic definition on the national level. I focus more on the practical and material implications of the definition and less on the cultural and symbolic aspects such as the flag, the anthem and language rights. This does not mean that the cultural and symbolic aspects are unimportant. But in some sense, although they are important and have a significant impact, they are representations of more deeply embedded and multifaceted understandings of the constitutional order as a Jewish state. I am more interested in the way these understandings are embedded in the constitutional order, and how they influence the internal ordering of the state, the operation of constitutional law, and the different ways in which law affects the life of the citizens as individuals and as collectives. My aim is to explore how the definition is entrenched, maintained and constantly regenerated within the constitutional order. In this sense, I view the definition not just as a textual expression in basic laws, legislation or court decisions, but also as the embodiment and representation of an ideology that informs the mindset, policies, and practices in the laws and institutions of the state.

[20] Nadim N Rouhana, *Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict* (Yale University Press, 1997) 8.

[21] CA 6821/93 *Bank Mizrahi HaMe'ouha v Migdal Kfar Shitofui* (1995), IsrSC 49 (2) 221 (Hebrew).

Most articulations of constitutionalism focus on the idea of limiting government and the rule of law. But before government is limited it should be established according to a constitution which sets out the rules for how public power is exercised and the relationship between the different organs of the state.[22] These are the aspects that this book examines: the operation of the constitution in generating, exercising and limiting political power, and I do so through the prism of the People.[23]

II. THE PEOPLE AND THEIR CONSTITUTION: THEORETICAL APPROACHES

Modern constitutional theory views the People that exercises sovereignty as a central component of the constitutional order. Democratic states usually base their legitimacy on the consent and the acceptance of the People. The constitution, situated at the top of the hierarchy of the legal order, is often regarded by theories of constitutional law as representative of the will of the People who, through the constitution, create the norms and institutions that shape the legal order. Thus, governmental power is generated by the consent of the People through the constitution. In Thomas Paine's words, 'the individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist'.[24] The People, often thought of as 'the authors' of the constitution, or as those who consented to it, agreed to give the state the authority to establish and maintain the legal order. It comes as no surprise, therefore, that many constitutions around the world contain a clause in the preamble attributing the constitution to the People.[25]

The People as such, however, exercise very little power in the state, if any at all. The powers of the state, as governed by the constitution, are exercised by its different branches, leaving very little power in the hands of

[22] See eg: Martin Loughlin, 'What Is Constitutionalisation?', in Martin Loughlin and Petra Dobner (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010) 47; Jeremy Webber, 'Democratic Decision Making as the First Principle of Contemporary Constitutionalism', in Richard Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 411.

[23] I use the word People (People with an upper-case 'P') to refer to the political concept of the political community within a state that is thought of to be the source of political power; People as the demos. I refer to it in singular form and use the upper case to distinguish it from people in common usage as an unspecified group of humans. In Hebrew, 'People' would be *aam'* (עם), while 'people' would be *anasheem* (אנשים).

[24] Thomas Paine, *Common Sense and Other Writings* [1776] (WW Norton & Company, 2012) 68.

[25] See, for example, the US, Indian and South African constitutions which begin with the words 'We the people'. See also Art 3 of the French Constitution of 4 October 1958.

those who constituted it. This situation, where the People has the power to constitute the legal order, and then become subject to the constituted form which exercises power over the People, has been described as the 'paradox of constitutionalism'.[26] This paradox also leads to another question: who is the People? How does the People come to possess the power to make the constitution?

The question of 'who is the People?' goes to the core of the democratic legitimacy of the state. Democracy can be seen as encompassing two dimensions. The first dimension is democratic governance which deals with a range of issues related to governance and legislation. The second dimension is democracy at the foundational level: the level of fundamental law.[27] An assessment of democracy in any given constitutional order should start with the question of who is included in the People. This will allow for an interrogation of who is included in the 'self' of self-governance, for self-government, or government of the People by the People, is often held as the essence of democracy.[28]

As a matter of constitutional theory, the question of who is the People is not simple, and different theories provide different formulations. In practice, however, in most states, the People is usually seen as the collective of citizens who live in the area of the state and have the right to vote—the electorate. Although it is a rather restrictive understanding,[29] it is common. In Israel, the state is constitutionally defined as a Jewish and democratic state, or in other variations, the state of the Jewish people. Given this definition, the answer to the question 'who is the People?' is not as clear. Is it the citizens? Is it the Jewish citizens? Is it all Jews? This ambiguity highlights the need to discuss democracy at the constitutional level in order to address some foundational questions prior to the examination of the traditional standards for measuring democracy. The question 'who is the People?', or 'who is included in the People?', is not just a purely theoretical question. Exclusion from the People also means lack of control, or lack of 'ownership' or 'partnership' or influence over the constitutional order. This is likely to translate into discriminatory laws and policies, or, at best, laws and policies that ignore the needs and interests of different parts of the population.

[26] Martin Loughlin and Neil Walker, 'Introduction', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).

[27] Joel Colon-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012).

[28] See eg: Frank I Michelman, 'Brennan and Democracy: The 1996–97 Brennan Center Symposium Lecture' (1998) 86(3) *California Law Review* 399.

[29] This is a rather restrictive category and to some extent arbitrary since citizenship itself is constructed by law.

The idea of the People is closely related to constituent power: the power to make the constitution, and by extension, to dictate fundamental norms of the political and legal order. As Antonio Negri puts it, constituent power 'is the power to establish a new juridical arrangement, to regulate juridical relationships within a new community'.[30] Since it is perceived to predate the constitution, ie to have existed before the creation of law and the legal system, it is essentially political in nature rather than legal, which may explain why jurists are sometimes reluctant to engage it or even tend to suppress it.[31] Because of its political nature and the power to create and reorder, constituent power is often related to revolution, as revolution destroys and replaces the legal and political order.[32]

Theories of constituent power rely on the distinction between constituted power, generally presented as the constitutional power of the state cast in a formal form (constitution, institutions, law, etc), and constituent power. This distinction, Martin Loughlin notes, is the distinction 'between the formal and the material, between competence and capacity, between the distributive and the generative, between the legal and the political'.[33] Constituent power is best understood by reference to the constituted power (form of government). There is a reflexive dynamic between the constituent and the constituted, and the constituent continues to affect the constitutional form.[34] It finds expression mostly when the formal constitution needs maintenance to accommodate to changes.

Constituent power is often identified with sovereignty in its internal sense which deals with the ordering of power within the state.[35] Elements of this identification can be traced back to the seventeenth and eighteenth centuries, as can be seen in the writings of John Locke, James Madison and, more comprehensively, in the work of the Abbé Sieyès, Thomas Paine and Carl Schmitt.[36] All of them derived the power to create a legal and political order, or the government (constituted power), from a prior and supreme power described as the People, or the nation. In all of these articulations, the right of the constituted body to make law is inextricable from the political nature of the act of creating the constituted body. Highlighting the significance of

[30] Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press, 1999) 2.

[31] Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 99.

[32] Negri (n 30).

[33] Loughlin (n 31) 100.

[34] Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 227.

[35] For the distinction between internal and external sovereignty, see Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999) 129.

[36] Andreas Kalyvas, 'Popular Sovereignty, Democracy and the Constituent Power' (2005) 12 *Constellations* 223, 226; Joel Colon-Rios, 'The Legitimacy of the Juridical: Constituent Power, Democracy and the Limits of Constitutional Reform' (2010) 48 *Osgoode Hall Law Journal* 199, 210; Loughlin (n 34) 70–71.

this relationship, Martin Loughlin argues that sovereignty is political power which is expressed through law. For him, as for Neil Walker, sovereignty cannot be understood from a purely legal or purely political point of view.[37] It is formed in the process 'in which a group of people within a defined territory is moulded into an orderly cohesion through the establishment of a governing authority that can be differentiated from society and which is able to exercise an absolute political power'.[38] This approach situates sovereignty in the relationship between the People and the institutional framework of political power. On the one hand, its legal conception (the authority to give law, or its distributive aspect) is expressed in the relationship between the office entrusted to make law and the subjects of this law; on the other hand, its political conception (political power, or the generative aspect) could be located in the capacity of the People to constitute, abolish or change the existing political and legal order.

Writers with liberal inclinations also accept a variation of the idea of popular sovereignty as the source of the legitimacy of the constitutional order and agree that it is exercised by the People. For Jeremy Waldron, for example, sovereignty 'requires that the people should have whatever constitution, whatever form of government they want'.[39] This is also palpable in Bruce Ackerman's work where he discusses 'constitutional politics', which occur when 'we the people' speak and exercise popular sovereignty causing a fundamental change to the constitution through extra-constitutional means.[40] Akhil Reed Amar takes this idea one step further, arguing that the very idea of republican rule rests on popular sovereignty.[41] Despite the fact that more critical accounts of the idea of popular sovereignty of the People suggest that historically it may have more to do with benefiting the elites rather than common people,[42] many modern constitutions today locate sovereignty in the People.[43]

As a concept that explains the creation or replacement of constitutional orders, constituent power is closely related to democracy at the foundational

[37] Loughlin (n 31) 73; Neil Walker, 'Disciplinary Perspectives', in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) 20.

[38] Martin Loughlin, 'Ten Tenets of Sovereignty', in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) 56.

[39] Jeremy Waldron, 'Precommitment and Disagreement', in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998) 272.

[40] Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991).

[41] Akhil Reed Amar, 'The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem' (1993–94) 65 *University of Colorado Law Review* 749, 749.

[42] Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (WW Norton & Company, 1988) 304.

[43] See eg: Art 1 of the Constitution of the Italian Republic; Art 3 of the French Constitution. The German Grundgesetz (Basic Law) provides in its preamble that it was adopted by the 'German people in their exercise of their constituent power.'

stage or at the level of fundamental law. In a democracy, constituent power is premised on the idea that the constitutional order is created by the People exercising popular sovereignty. Antonio Negri, for example, starts his book on constituent power by declaring: 'To speak of constituent power is to speak of democracy.'[44] Similarly, Loughlin sees constituent power as the 'juristic expression of the democratic impetus'.[45] If we understand democracy as rule by the People, then constituent power is what creates the framework for making this rule possible. This power, however, can find its expression as a democratic will of the People only through representative forms which entail institutional arrangements. The constitution is thus seen as an institutional framework for organising and generating political power.[46]

How does democracy play a role at the level of fundamental laws? Different commentators address this question using a number of frameworks emphasising different aspects. Some, like Andreas Kalyvas, focus on the democratic origins of the constitution: a constitution is democratic if it was the result of a genuine act of popular sovereignty/constituent power of the People.[47] Andrew Arato also sees wide public discussion and participation as essential for the democratic legitimacy for a constitution.[48] Other theorists highlight the democratic openness of constitutions: a constitution gains democratic legitimacy if it provides mechanisms that facilitate the exercise of constituent power. For a constitutional regime to be democratically legitimate, Colón-Rios argues, 'it must not mystify, displace, legalise, or hide constituent power; on the contrary, it must provide a real possibility for its exercise'.[49] Liberal theorists, however, do not seem to be concerned about the democratic foundation or openness of the constitution. While some see the democratic legitimacy of a constitution to be based on the political authority of the People,[50] the main debates on democratic legitimacy either highlight the democratic procedures prescribed by the constitution,[51] or the substantive outcome of its operation. Ronald Dworkin, representing the substantive approach, sees that the defining aim of democracy is 'that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect'.[52]

[44] Negri (n 30).
[45] Loughlin (n 31) 100.
[46] Ibid 112–13.
[47] Kalyvas (n 36) 235.
[48] Andrew Arato, 'Forms of Constitution Making and Theories of Democracy' (1995–96) 17 *Cardozo Law Review* 191, 224–27.
[49] Colón-Rios (n 36) 235.
[50] See eg: Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9(4) *Law and Philosophy* 327.
[51] See generally: Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).
[52] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996) 17.

Democracy, sovereignty and constituent power, all refer to the People. But who is the People? What makes a group of individuals a People? Two strands of thinking about the relation between the People and the creation of the political order distinguish themselves in constitutional and political theory. The first one is based on contractarianism: the idea that the state and the constitutional order are formed as a result of a covenant or a contract among individuals. This approach could be identified in the works of a long list of distinguished political philosophers from Thomas Hobbes to John Rawls.[53] Naturally, with many of these philosophers living in different places and epochs, and theorising from various contexts, contractarianism tolerates a range of perspectives with each perspective having different emphases. Hobbes, for example, highlights the submission to the absolute authority of the sovereign or Leviathan.[54] Jean Jacques Rousseau sought to reconcile freedom with authority, and emphasised membership in the body politic and the formation of the general will.[55] John Locke, on the other hand, places emphasis on the idea of consent—whether the People gave, or were thought to have given, consent to the government.[56] Consent need not be explicit, and there are multiple ways of providing tacit consent. Consent for Locke is also conditional: the People has the right to rebel against the government if 'they shall be so foolish, or so wicked, as to lay and carry on designs against the Liberties and Properties of the Subject'.[57] Kant also supports a consent theory but sees no need for actual consent as long as it is rational to consent.[58] Similarly, John Rawls's theory of justice rests mostly on reasonable pluralism and not actual agreement.[59]

Of course, contractarianism is not without its critics.[60] The common problem for the adherents of the contract theory is that the contract itself cannot decide who the parties are or should be. The social contracts cannot be decided without a higher-order contract that decides who can participate.[61] Contractarianism may help explain how an existing society could determine

[53] Most prominent among those, in addition to Hobbes and Rawls, are John Locke, Emmanuel Joseph Sieyès, Jean-Jacques Rousseau, Samuel Pufendorf and Immanuel Kant.

[54] Thomas Hobbes, *Leviathan* [1651] (Cambridge University Press, 1991).

[55] Jean Jacque Rousseau, *The Social Contract* [1762] (Penguin Books, 1968).

[56] John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government* [1689] (Yale University Press, 2003).

[57] Ibid 149.

[58] Immanuel Kant, 'On the Common Saying: "This May be True in Theory, but it Does Not Apply in Practice"', in Hans Reiss (ed), *Kant: Political Writings*, 2nd edn (Cambridge University Press, 1991) 61–92, 79.

[59] John Rawls, *A Theory of Justice* (Belknap Press, 1971); John Rawls, *Political Liberalism* (Columbia University Press, 1993).

[60] See generally, Jeremy Webber, 'The Meanings of Consent' in Jeremy Webber and Colin M Macleod (eds), *Between Consenting People: Political Community and the Meaning of Consent* (University of British Columbia Press, 2010) 3.

[61] Bert Van Roermund, 'Sovereignty: Unpopular and Popular', in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) 40.

its political order, but it does not explain who is included and who is not. In addition, this conception of the People is open to manipulation and could be used (usually through creative interpretation) to exclude individuals and groups deemed undesirable. The infamous *Dred Scott* decision of the Supreme Court of the United States is a case in point.[62]

The second strand of thinking about the People is one that sees the People as a homogenous collective that predates the state. As an exemplar of this approach, Carl Schmitt's starting point is that 'the concrete existence of the politically unified people is prior to every norm'.[63] The People are above and outside the constitutional norm,[64] and their identity is based on distinction between friend and enemy. Once a decision is made on this distinction, this grouping becomes so strong that it pushes aside any other criteria:

> This grouping is therefore always the decisive human grouping, the political entity. If such an entity exists at all, it is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there.[65]

This grouping is defined by elements such as 'ideas of common race, belief, common destiny, and tradition'.[66] As such, the People's national homogeneity is important because lack of homogeneity is 'abnormal' and seen as a threat to the peace. Homogeneity is a condition for substantive equality and democracy.[67] Schmitt recommends the 'elimination of the alien component through suppression or exile of the heterogeneous population'[68] in order to achieve 'democratic' equality, which is essentially similarity among the People.[69] Schmitt's People are not a product of fiction; they are real and genuinely present—they can be seen in public assemblies that are not controlled by procedure, street demonstrations, public festivals and stadiums.[70] The People for Schmitt are a homogenous ethnos. This conception of the

[62] *Dred Scott v Sanford*, 60 US 393 (1857) (the Court held that people of African descent could not be considered citizens, because, among other reasons:

> [n]o one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery, and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union (411–12).

[63] Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008) 166.
[64] Ibid.
[65] Ibid 38.
[66] Ibid 258.
[67] Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans Ellen Kennedy (MIT Press, 1985) 9–15.
[68] Schmitt, *Constitutional Theory* (n 63) 262.
[69] Ibid 263.
[70] Ibid 272.

People could justify a number of actions against those who do not belong, ranging from apartheid and ethnic cleansing to genocide.[71]

Hans Lindahl and Martin Loughlin suggest an approach that focuses on the collective nature of the act of 'self-constitution'. 'The collective self', Lindahl posits, '"exists" in the form of *self-attributive* acts by individuals. By exercising their constitutional rights, they retroactively take up the first-person plural perspective of a "We" that has (already) enacted a constitution in its own interest.'[72] The continued existence of this collective self relies on the renewal of such acts. This unity is therefore finite, and it only exists as a possibility. This provokes a constant question of 'who are we?' which opens up the realm of collectivity.[73] Adopting this reflexivity, Martin Loughlin suggests that understanding the constitution as the product of self-attribution by the People allows us to acknowledge the authority of the constitution, and at the same time to recognise its conditional and qualified character which leaves room for flexibility and change. This understanding, Loughlin argues, allows for reflexive constitutionalism.[74] Reflexivity also allows us to look at the constitution in order identify who is included in the People.

Despite the importance of the theoretical debates—which were not limited to one theoretical approach, but rather considered how different schools of thought (liberal, republican, critical) approach these topics—one should bear in mind that the reality is more complicated and many note that the notion that the People is self-governing remains an ideal to aspire to. The idea has been diminishing in practice due to many factors.[75] This

[71] See, for example, Joseph Weiler's description of how Schmitt's ideas were used to justify the exclusion and then genocide of German Jews: Joseph Weiler, 'Demos, Telos and the German Maastricht Decision' (1995) 1(3) *European Law Journal* 219, 251. It is important here to note Schmitt's anti-Semitism and his relations with the Third Reich. He was one of the main intellectuals who provided the 'intellectual' grounds for the atrocities that were committed. Indeed, one can draw a direct line between his friend–enemy distinction and the emphasis on homogeneity and the Holocaust. On Schmitt's anti-Semitism, see David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Clarendon Press, 1997) 98–101.

[72] Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (University Press, 2007) 19–20 (emphasis in original).

[73] Ibid 22.

[74] Loughlin, *Foundations of Public Law* (n 34) 311.

[75] For many reasons, which include biased electoral laws, concentration of wealth, control of the media, biased campaign funding regulation, political parties and their flawed structure, and the increase of the influence of lobbyists, pressure groups and think-tanks, many writers observe that the ideas of self-governance and liberal democracy are being eroded. See eg: Noam Chomsky, *Profit Over People* (Seven Stories Press, 1999); Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press, 2010), Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015). Another reason for the erosion of the role of self-governance is globalisation. The state no longer has

highlights the need to measure state performance against idealised theories both in practice and theory. But while most states will fail in some aspects of practice, in the case of Israel, many questions arise at the level of theory even before examining the state practice.

III. SETTLER-COLONIALISM

Law in general, and constitutional law in particular, cannot be understood in isolation from the political context. The relevant political context here is settler-colonialism and its relationship with law. This is another theme that I explore in this book. As a distinct form of colonialism, settler-colonialism has emerged as a new field of study in the past four decades. This area of study emerged from the realisation that colonialism has many strands, and that the types of colonies differ according to a number of factors.[76] While some colonies were colonies of 'occupation', others were colonies of settlement. Settlement colonies are 'characterised by a significant and permanent—or at least long-lasting—population of Europeans'.[77] Settlers in such colonies 'had some expectation of transplanting "civilization" (basic aspects of the way of life that they had left behind in their countries of origin) to the new environment'.[78]

Settlement colonies share many features with other forms of colonialism, but they have their own dynamics and unique characteristics. In settler-colonies, settlers come with the intention to stay.[79] They form societies distinct from the native population and seek to control land and resources and establish their own economy and modes of governance. Thus, as Caroline Elkins and Susan Pederson argue, settler-colonialism is marked by 'a particular structure of privilege'.[80] The privilege is expressed in deep and pervasive inequalities between the settler and indigenous populations. Such divisions are usually 'built into the economy, the political system, and the law'.[81]

exclusive control on many of the functions and processes that were previously seen as the state's domain. See generally Antje Wiener et al, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1(1) *Global Constitutionalism* 1.

[76] David K Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century*. (Delacorte Press, 1967).

[77] George Fredrickson, *The Arrogance of Race, Historical Perspectives on Slavery, Racism and Social Inequality* (Wesleyan University Press, 1988) 219.

[78] Ibid.

[79] Lorenzo Veracini, *Settler-Colonialism: A Theoretical Overview* (Palgrave Macmillan, 2010).

[80] Caroline Elkins and Susan Pederson 'Settler-Colonialism: A Concept and its Uses', in Caroline Elkins and Susan Pederson (eds), *Settler-Colonialism in the Twentieth Century* (Routledge, 2005) 4.

[81] Ibid.

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

> The primary object of settler-colonization is the land itself rather than the surplus value to be derived from mixing native labour with it. Though, in practice, Indigenous labour was indispensable to Europeans, settler-colonization is at base a winner-take-all project whose dominant feature is not exploitation but replacement. The logic of this project, a sustained institutional tendency to eliminate the Indigenous population, informs a range of historical practices that might otherwise appear distinct—invasion is a structure not an event.[82]

The logic of elimination does not necessarily mean actual physical or violent elimination. Wolfe sees it as having positive and negative dimensions: 'Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base.'[83] Highlighting that it is a structure and not an event, Wolfe emphasises that in its positive dimension 'elimination is an organising principle of settler-colonial society rather than a one-off (and superseded) occurrence'.[84] It could be pursued through a range of practices that could include actual physical elimination, displacement or assimilation, which targets the cultural identity, heritage and institutions of the indigenous population.[85]

As part of the development of settler-colonialism as an academic discipline, many scholars argue that the Zionist colonisation project is a form of settler-colonialism and that Israel should be classified as a settler-colonial state. The Arabic language literature on the issue started as early as the 1940s. Writing in 1948, Constantin Zureiq distinguished between colonialism that other countries in the region suffered from and Zionist settler-colonialism, which 'aims to substitute one homeland for another, and eliminate one group so that another can settle in its place'.[86] The scholarship developed further in the 1960s,[87] 1970s and 1980s,[88] and reached a

[82] Patrick Wolfe, *Settler-Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassel, 1999) 163.

[83] Patrick Wolfe, 'Settler-Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387, 388.

[84] Ibid.

[85] Ibid.

[86] Constantin Zureiq, *The Meaning of the Nakba* (Dar Al-Ilm Lilmalayeen, 1948) 21 (Arabic) (translated by author).

[87] See eg: Fayez Sayegh, *Zionist Colonialism in Palestine* (Palestine Liberation Organization Research Center, 1965); George Jabbour, *Settler Colonialism in Southern Africa and the Middle East* (University of Khartoum and Palestine Liberation Organization Research Centre, 1970); Trabulsi, Fawwaz 'The Palestine Problem: Zionism and Imperialism in the Middle East' (September–October 1969) *New Left Review* 53.

[88] Maxime Rodinson, *Israel: A Colonial Settler State?* (Monad Press, 1973); Elia T Zureik, *The Palestinians in Israel: A Study in Internal Colonialism* (Routldge & Kegan Paul, 1979); Edward Said, *The Question of Palestine* (Times Books, 1979); Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882–1914* (California University Press 1989).

critical point in the early 2000s. Since then, the use of settler-colonialism as an analytical framework has intensified, and a substantial literature on the issue has emerged with academics from a variety of disciplines examining a diverse range of questions through the lens of Israeli settler-colonialism. The literature covers almost the full spectrum of the social sciences and the humanities, including history, sociology, anthropology, gender and women studies, religion, sexuality studies, literature, geography, and citizenship studies.[89] This scholarship highlights the fact that the Zionist movement started in Europe with the majority of Israeli society having been recent immigrants from mostly European states. It also emphasised features that are characteristic of settler societies such as the effort to control the land at the price of dispossessing and displacing the native population, deep antagonism and conflict with the native population, and separation between the settler society and the native society.

This perspective has been rejected by other academics who highlight the historical, cultural and religious ties between the Jewish people and the region. They argue that Jewish settlement in Palestine cannot be seen as colonialism since it is the Jewish ancestral land.[90] Some writers distinguish Zionist colonisation from other forms of colonisation, arguing that the Zionist immigrants were not sent by a colonial power as in, for example, North America or Australia. In between the two approaches, some, like

[89] See eg: Joseph Massad, *The Persistence of the Palestinian Question: Essays on Zionism and the Palestinians* (Routledge, 2006); Lorenzo Veracini, *Israel and Settler Society* (Pluto Press, 2006); Gabriel Piterberg, *The Returns of Zionism: Myths, Politics and Scholarship in Israel* (Verso, 2008); Shira Robinson, *Citizen Strangers, Palestinians and the Birth of Israel's Liberal Settler State* (Stanford University Press, 2013); Nadera Shalhoub-Kevorkian, 'The Grammar of Rights in Colonial Contexts: The Case of Palestinian Women in Israel,' (2012) 4 *Middle East Law and Governance* 106; Nadera Shalhoub-Kevorkian, *Security Theology, Surveillance and the Politics of Fear* (Cambridge University Press, 2015); Nadim Rouhana and Areej Sabbagh-Khoury 'Settler-Colonial Citizenship: Conceptualizing the Relationship between Israel and its Palestinian Citizens' (2015) 5(3) *Settler-Colonial Studies* 205; Nur Masalha, *The Zionist Bible: Biblical Precedent, Colonialism and the Erasure of Memory* (Routledge, 2013); Ahmad Amara, Ismael Abu-Saad and Oren Yiftachel, *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev* (Harvard University Press, 2013); Brenna Bhandar, 'Possession, Occupation and Registration: Recombinant Ownership in the Settler Colony' (2016) 6(2) *Settler-Colonial Studies* 119; Brenna Bhandar and Alberto Toscano, 'Representing Palestinian Dispossession: Land, Property, and Photography in the Settler-Colony' (forthcoming, 2016) *Settler-Colonial Studies*; Elia Zureik, *Israel's Colonial Project in Palestine: Brutal Pursuit* (Routledge, 2016).

[90] See eg: Derek Penslar, 'Zionism, Colonialism and Post-Colonialism' (2001) 20 *Journal of Israeli History* 84; Alan Dershowitz, *The Case for Israel* (John Wiley, 2003); Tuvia Frilling (ed), *An Answer to a Post-Zionist Colleague* (Yedi'ot Aharaonot Publisher & Sefrei Hemed, 2003) (Hebrew); Amnon Rubenstein and Alexander Yakobson, *Israel and Family of Nations* (Routledge, 2009); Ruth Gavison, 'The Jews' Right to Statehood: A Defense' (2003) *Azure* 70; Ran Aaronsohn, 'Settlement in Eretz Israel: A Colonial Enterprise? "Critical" Scholarship and Historical Geography' (1996) 1(2) *Israel Studies* 214.

Baruch Kimmerling adopted the settler–native distinction but without using the term settler-colonialism.[91]

As contested as this question may be, it is hard to escape the observation that what happened in the area of historic Palestine in the past hundred years fits the definition of settler-colonialism as theorised by scholars such as Patrick Wolfe or James Tulley, who uses the term 'internal colonisation' to describe the appropriation of land, resources and jurisdiction for the benefit of the settler society.[92] The creation of Israel, the events preceding it, the mobilising ideologies, and the laws and policies adopted afterwards, all share more with settler-colonial states than any other type of states. This is also evident in the writings of the founding fathers of Zionism. Theodore Herzl used the language of colonisation to describe his vision of the Jewish state.[93] Ahad Ha'Am, who preferred 'cultural Zionism' to political Zionism, also used the language of colonies and colonialism to describe Jewish settlements in 1891, and warned that immigration in this manner will lead to conflict with the native population.[94] On the right, Vladimir Jabotinsky described the Zionist project in his famous 1921 essay 'Iron Wall' as one of colonisation, and warned that the native Arab population will inevitably resist colonisation.[95] Colonialism even featured in the names of some institutions, such as the 'Jewish Colonial Trust', which was formed in 1902 by the Second Zionist Congress.[96]

Since its inception, the Zionist movement has tried to achieve its goals by creating alliances with imperial powers of that era. The convergence of interests between the Zionist movement and the British Empire led the latter to adopt the cause of Zionism.[97] This paved the way for the Balfour Declaration of 1917, promising the creation of a Jewish homeland in Palestine even though, at the time, Palestine was not under British control, and less than 10% of the population was Jewish. Prominent backers of the Zionist movement saw it as a colonial endeavour and through the prism of the 'civilising mission'. Winston Churchill, for example, in dismissing the concerns

[91] Baruch Kimmerling, *Clash of Identities: Explorations in Israel and Palestinian Societies* (Columbia University Press, 2008).

[92] James Tully, 'The Struggles of Indigenous Peoples for and of Freedom', in Duncan Ivison et al (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000).

[93] Herzl (n 18).

[94] Ahad Ha'Am, 'Truth from Eretz Yisrael', in *On a Junction: A Collection of Essays by Ahad Ha'am*, vol 1 (Judischer Verlag, 1921). The essay was first published in *HaMeleetz* (24 Sivan 5651, 30 June 1891) 13.

[95] Vladimir Ze'ev Jabotinsky, 'The Iron Wall', *Rassvyet* (4 November 1923) (Russian). It was published in English in the *Jewish Herald* (6 November 1937) 3.

[96] David Vital, *Zionism: The Formative Years* (Oxford University Press, 1982).

[97] Ibid.

of the Arab population in 1938, compared Zionism with colonialism in North America and Australia. He explained:

> I do not admit, for instance, that a great wrong has been done to the Red Indians of America, or the black people of Australia. I do not admit that a great wrong has been done to those people by the fact that a stronger race, a higher grade race, or, at any rate, a more worldly-wise race, to put it that way, has come in and taken their place.[98]

The Balfour Declaration was adopted by the League of Nations, and the creation of a Jewish home became one of the goals of the Mandate over Palestine that was facilitated by the mandatory power, the United Kingdom. While this plan was strongly resisted by the local Palestinian Arab population in various ways that included bouts of violent revolts, one of which lasted for three years (1936–39), Jewish immigration to Palestine during the Mandate period increased, in part as a result of the rise to power of the Nazis in Germany and the subsequent war and genocide.

Many features of settler-colonialism, such as the political domination over the native population and the need to control the land, became central themes defining the relationship with the native population in settler states. As Wolfe notes in the case of Australia: 'The determination "settler-colonial state" is Australian society's primary structural characteristic rather than merely a statement about its origins.'[99] The notion that settler-colonialism does not 'end' with the creation of the settler-state but rather becomes one of its defining feature is also shared by Elkins and Pederson, who remark that settler-colonialism is 'not the past—a violent but thankful brief period of conquest and domination—but rather the foundational governing ethic of this "new world" state'.[100] As such, the political domination, the structure of privilege and the logic of elimination are carried on into the settler state even if they operate and manifest themselves in varying ways.

In this book, I do not aim to prove that settler-colonialism applies to Israel, but rather, relying on the self-definition of the early founders of Zionism as well as the considerable academic literature on the topic, I take this as a premise. Out of this premise, I focus on the relationship between settler-colonialism and the law: how settler-colonialism shapes the development of Israeli constitutional law, and how law, in turn, operates to give effect to the logic of settler-colonialism in the form of establishing and reinforcing the

[98] As quoted in Martin Gilbert, *Winston Churchill: Companion Documents*, vol 5, part 3 (Heinemann, 1982) 616. For similar attitudes in the British Labour Party, see Paul Keleman, *The British Left and Zionism: History of a Divorce* (Manchester University Press, 2012).

[99] Wolfe (n 82) 163.

[100] Elkins and Pederson (n 80) 3.

settler-nation and dissolving the native population. While the overarching argument of the book does not hinge on viewing the situation of the Palestinian citizens through the lens of settler-colonialism, such a lens is helpful for understanding the logic behind many laws and policies in Israel.

Of course, as in other cases, there are some differences between settler-colonialism in Israel and other settler-colonial situations. One such difference is the question of the relationship with a mother country or a metropole.[101] Another difference is the fact that Israel has a significant proportion of the settler population who are non-European immigrants from Arab countries. Usually known as *Mizrahim*, this group was culturally close to the native population at the time of the migration. Nevertheless, emphasising the religious identity of the group, the founding elites of the state thought of this group as part of the settler group, and it served the role of bolstering the demographic preponderance of the settler nation.[102] However, as in other settler-colonial situations, diversity and differences among the settler population did not blur the settler–native distinction; nor did it affect the structure of privilege that distinguishes between the two populations.[103] This highlights a distinct feature of settler-colonialism in Israel but does not negate it; on the contrary, observing that Zionist logic of elimination is more exclusive, Wolfe argues that 'Zionist policy in Palestine constituted an intensification of, rather than a departure from, settler-colonialism'.[104]

IV. THE ARGUMENT IN A NUTSHELL

Based on constitutional theories that ground the democratic legitimacy of a constitutional order on the idea that the People governs itself through the exercise of popular sovereignty, this book examines Israel's constitutional order and democracy by addressing the question 'who is the People in Israel?' The People in this context is the 'self' in the exercise of self-governance, which is one of the most basic ideas in democracy.

One approach is to see the People as the citizenry. This is the approach that the Supreme Court and liberal-Zionist (or liberal-national) academics such as Amnon Rubenstein take. But on many other occasions, the Supreme Court indicated, and sometimes clearly stated, that sovereignty in Israel is

[101] Ilan Pappe, 'Zionism as Colonialism: A Comparative View of Diluted Colonialism in Asia and Africa' (2008) 107(4) *South Atlantic Quarterly* 611. See also Rodinson (n 88).

[102] Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge University Press, 2004).

[103] Patrick Wolfe, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis* 93, 94.

[104] Patrick Wolfe, 'Purchase by Other Means: The Palestinian *Nakba* and Zionism's Conquest of Economics' (2012) 2(1) *Settler-Colonial Studies* 133, 136.

'Jewish sovereignty'. Similarly, the Court and liberal-Zionist scholars see Israel as the state of the Jewish people (including non-citizens) where they enjoy exclusive national rights. The idea of who is the People in Israel, and by extension, who has sovereignty, is at best ambiguous.

In this book I reject the facile assertion that all citizens are effectively part of the People, and offer a different way of examining who is included in the People. By doing so, I provide a new approach to the Jewish and democratic definition, its meaning, its role, and its capacity for maintenance and regeneration within the constitutional regime. Guided by insights from constitutional theories that link the People to the constitution, rather than posit that the People in Israel is the citizenry as a whole, I examine who is included in the People through the prism of the existing constitutional order. An examination of the different facets of the constitutional regime focusing on how political power is generated and exercised by the state and its organs can help identify the source of ultimate political power that exercises sovereignty and holds constituent power, and thus who the People is.

I argue that the Jewish and democratic definition—despite the right of the Palestinian citizens to vote and other civil and political rights—means, in theory and in practice, that in the Israeli constitutional order sovereignty and constituent power are exclusively concentrated in the hands of the Jewish citizens (and in some cases non-citizens). In this sense, the People—who are empowered to define the fundamental political and juridical structure—does not include all citizens. Given the centrality of the People and given the embeddedness of the Jewish and democratic definition in the constitutional order, this finding has serious implications for democracy and the extent to which Israel can truly be seen as a democracy. Moreover, I argue that in order to understand many features of Israeli constitutionalism, especially (but not exclusively) the relationship between the state and Palestinians who are also Israeli citizens, we need to analyse the constitutional order through the lens of settler-colonialism. Such an examination illustrates how settler-colonialism is one of the central features that animate Israeli constitutional law and how the definition of the state as a Jewish and democratic state essentially encapsulates the negative and positive dimensions of settler-colonialism.

This book is part of the tradition of critical scholarship which aims to point out the flaws in the definition and its impact on human rights and democracy. I continue in the same tradition and build on the work of these writers, develop some of the themes they present, and develop my own themes and approach. My approach relies on constitutional theory, and at the same time builds on and borrows from studies from other disciplines, making this study socio-legal in nature rather than purely legal. I introduce and discuss some ideas that have received almost no attention in the existing debates, such as constituent power, sovereignty (in its internal sense) and the concept of the People as a constituent element of constitutional regimes.

Some writers, such as Hassan Jabareen and Raef Zreik, have used constitutional theory in their work and provided important analytical and critical contributions to the literature.[105] But most of their contributions have come in the form of short pieces, many of which are focused on particular areas. This book uses and applies constitutional theory to provide a broader and more thorough evaluation of the Israeli constitutional order.

One of the goals of the book is to provide a comprehensive and multifaceted analysis of the ways the definition is used to exclude Israel's Palestinian citizens from political power. In one sense, the generation of political power from the People, and its transformation into the political authority of the state through the constitution, legislation and state institutions could be seen as a cycle. The book offers a critical analysis of the deployment and embeddedness of the definition at the different junctures of this cycle. This distinguishes the book from most of the literature: I combine an in-depth analysis of discrete areas related to the constitutional order, such as immigration and political participation, while at the same time I step back and situate these discrete areas in the broader mosaic of the constitutional order in its entirety. This way, I demonstrate how the constitutional order (with all of the values, actors, institutions, contradictions, tensions) operates to produce and regenerate the dynamics of exclusionary constitutionalism. Furthermore, in discrete areas, such as constitutional beginnings, immigration policies, constitutional amendments, in addition to engagement with the existing literature, I also elaborate and develop new ideas that are specific to those areas.

Another contribution is the introduction of settler-colonialism as a tool of analysis that is helpful for understanding the development and the operation of the constitutional order. Despite the marked increase in academic research that uses settler-colonialism to inform analysis about the Israeli state and society with an impressive number of studies that encompass a wide range of disciplines, lawyers and law as a discipline are lagging behind. This book rectifies this situation by incorporating an analysis of settler-colonialism to inform some of the existing legal arrangements and the reasoning behind them.

While the aim of the book is to provide a comprehensive analysis of how the different pieces of the puzzle come together to produce the dynamics of exclusionary constitutionalism, the book is limited geographically to pre-1967 Israel. Indeed, there is a lot of value in approaching Israel and the

[105] Hassan Jabareen, 'The Constitutional Conception of the "Jewish and Democratic" State' in Honaida Ghanim and Antwane Shalhat (eds), *The Meaning of a Jewish State* (MADAR The Palestinian Forum for Israeli Studies, 2011) 33 (Arabic); Raef Zreik, 'The Persistence of the Exception: Some Remarks on the Story of Israeli Constitutionalism', in Ronit Lentin (ed), *Thinking Palestine* (Zed Books, 2008) 131; Raef Zreik, 'Notes on the Value of Theory: Readings in the Law of Return—A Polemic' (2008) 2(1) *Law and Ethics of Human Rights* 13.

Occupied Palestinian Territory as part of the same unit for the purpose of conducting legal research. The separation in many cases is mostly artificial, since practically, it is one territorial unit governed by a legal system based on differential allocation of rights. Such studies would also engage other relevant areas of law such as international law, and raise questions such as the applicability of apartheid. But this is not the aim of this book, which is an intervention in a specific set of debates related to Israeli constitutional law.

V. OUTLINE OF THE BOOK

The inquiry into who is the People in Israel is explored through different questions and dimensions spanning six chapters. The dynamics of inclusion in and exclusion from the People, and the role of settler-colonialism, is the common thread that runs through the six chapters. It demonstrates that while the trend is to accord a measure of inclusion in the People to the Palestinian minority, this inclusion is nominal. More material and effective are the dynamics of exclusion. This exclusion encompasses all levels of the constitutional order, including in areas where the Jewish and democratic definition is not specifically mentioned.

Chapter 2 homes in on the question of the Jewish and democratic definition. Here I review the academic literature on the topic, and classify the different approaches to the definition, and the different ways these approaches view the idea of the People. While in many cases the concept of the People is not directly addressed by the different writers, one can discern trends in the different ways the definition and the tension inherent in it are approached.

The exploration of 'who is the People?' through the prism of the constitutional forms begins in Chapter 3. The chapter opens with a focus on the idea of the social contract and the *Grundnorm*—two theories that are put forward by the Supreme Court as underpinning the constitutional order in Israel. An assessment of the constitutional beginnings follows. I focus on the first foundational constitutional document, the Declaration of the Establishment of the State of Israel. The examination combines a close textual interpretation with an examination of the role that the Declaration plays in the constitutional edifice.

The People, of course, is not a natural body. It is made and unmade by different social and political actors and institutions reflecting various interests and forces that shape and influence the operation of the constitution and the law. Important factors that contribute to shaping the People are citizenship and immigration laws and policies which play an important role in shaping the political community, its composition and image, and, by extension, in determining the contours of the People. These laws and policies are discussed in Chapters 4 and 5. Chapter 4 examines Israel's population and immigration laws and policy as they apply to Palestinians, while Chapter 5

focuses of the Law of Return 1950 and the centrality of demography in Israeli constitutionalism.

The focus turns to the idea of representation in Chapter 6. Representation is important in shaping the relationship between the governors and the governed. The power of the government (the state writ large) is legitimated through representation. It is one of the ways in which the power of the People is harnessed to be exercised as the political authority of the state. The discussion here focuses on section 7A of Basic Law: The Knesset and other associated statutes which set recognition of the Jewish and democratic definition of the state as a condition for participation in parliamentary and local elections, and registration of political parties. The way the definition of the state affects the political activities of the elected members is also discussed.

While representation is the way political power is generated from the People, this power is exercised by the state through legislation and executive power that are governed by the constitution. An examination of the ways the constitution is shaped and amended, and how legislation is enacted, interpreted and reviewed by courts, is in essence an examination of the constitution in action. This is the main theme of Chapter 7, where the role of the definition is examined on the various levels of constitution-making and law-making in order to assess who is included in the People when it comes to these processes.

The concluding chapter brings together the different elements of the book and demonstrates the role of the definition in the dynamics of exclusionary constitutionalism and the relationship with settler-colonialism. It also highlights the implications for democracy. This chapter also discusses the potential of applying it to other areas of law beyond public law and to other contexts.

While the book's main contribution is in advancing the scholarly debate on the topic of Israel's definition as a Jewish state, it also deals with timely questions. There has been an increased interest in the question of Israel's definition in the past few years, and this interest is not limited to academic and legal circles. This interest arises both on the level of controversial Israeli laws and policies, and also in the context of the negotiations between Israel and the Palestine Liberation Organisation (PLO) where Israel demands that any peace agreement should acknowledge Israel's character as the Jewish nation-state. The book provides a scholarly context for understanding such timely questions, the background necessary to assess them, and some tools for analysis.