racy and the Israeli party system have become more pluralist, which allows smaller organizations, particularly if they are united, mobilized, and expanding, to gain a foothold. The settler lobby benefited from a polity in which no single party (or non-party actor) could veto its agenda and from the increasing opportunities produced by maneuvering between the multiple power centers emerging in Israel.

The process of de-alignment, unlike that of realignment, shifted power away from the parties in general, rather than away to certain parties and toward others. As the political parties lost some power to competing organizations, and as their grand coalitions immobilized the government, the settler lobby was able not only to become an important actor in Israeli politics but also to use successfully its relative strength vis-a-vis the other emerging actors. Also, most of these new actors were not strongly opposed to the settlers, and those that were (such as Peace Now) were not powerful enough to constrain successfully the influence of the settler lobby. By then the party system lacked the power to oppose the shift from building new settlements to expanding the existing ones, and the viable alternative actors in Israeli politics generally did not see settlement expansion as a major concern of their limited agendas.

Two final points illustrate the relative strength of the settler lobby in a party system where the pivotal party does not oppose them and in a democracy undergoing a process of power diffusion. First, the settlers and their political allies were willing to topple coalitions dominated by the right if they did not support the settlers, even if this would bring the left to power. No competing organization on the left was willing to take such an extreme position, so this stance helped foster an environment of acquiescence to the policies of the settler movement in order to avoid dire political consequences—particularly since the majority in the Knesset, including the pivotal party, did not oppose the settlements. Second, the policies espoused by the settlers were unilateral in nature, while those advanced by the peace camp were dependent on the Palestinians’ willingness to reach and to implement agreements. When international pressure came to bear on Israel in the mid- to late 1980s, the shift from settlement building to settler expansion was also unilateral and became possible because of developments in both the party system and the political system.

See also GREATER LAND OF ISRAEL; MOVEMENTS, GUSH ENUNIM; ISRAELI REGIME AND THE QUESTION OF DEMOCRACY; ISRAELI SUPREME COURT; PALESTINIAN CITIZENS OF ISRAEL; SETTLEMENTS

Bibliography


Israeli Regime and the Question of Democracy

The Israeli regime has actively facilitated an ethnic (and religious) project of Judaeization. This political and historical setting, and the associated Jewish colonization of the contested land, present structural pressures to the implementation of many democratic principles. The lack of genuine democratization has had powerful consequences for Jewish-Palestinian relations both in the OCCUPIED TERRITORIES, and within Israel Proper (the recognized Israeli sovereign area, within the 1949 Green Line). A recent process of liberalization is yet to make a significant impact on the attainment of full democratic rights by Palestinians, other non-Jews, and women.

Since 1967 Israel has been deeply involved in its colonial rule in the Occupied Territories. Nearly half a million Jews have settled in the territories, while the state has imposed military rule over the local Palestinians. Jewish colonization has eroded the level of democracy within Israel, by exacerbating the Zionist-Palestinian conflict, deepening racism toward Palestinian citizens of Israel, and reinforcing the impact of militarism on Israeli society. Jewish colonization has also sharpened the Orthodox-sectular conflict within Jewish society over such divisive issues as the future of the biblical and religious lands in the WEST BANK and JERUSALEM, the fate of the Jewish settlements (inhabited by large numbers of Orthodox Jews), women’s rights, and the Jewishness of Israel. The colonization of the West Bank has also imposed considerable costs on the Israeli public, thereby shifting resources away from social welfare and causing long-lasting economic and political inequalities—especially among Israel’s ethnic minorities.

Democracy

Democracy is a form of rule established "by the people, for the people." Modern democratic regimes developed after generations of political struggle that broadened the boundaries of citizenship and political participation to previously excluded sectors, such as women, slaves, immigrants, and the poor. There is no one, absolute definition of democracy, which is a regime that can never fully attain its lofty goals. However, most political thinkers agree on a few key principles—aimed at promoting the two fundamental democratic values of equality and liberty. These include the following:

- Equal citizenship for all the state's permanent residents
- Universal and free elections at regular intervals or according to a regular process
- Protection of the rights of all citizens, especially minorities, from "tyranny of the majority"
- A range of civil liberties, such as freedom of expression, religion, movement, political organization, and demonstration

In most democratic states these principles are established by a stable constitution and are overseen by an accountable government, an elected legislature, and an independent judiciary. A debate exists whether democracy should be limited to the protection of individual personal liberties or can be extended to the facilitation of collective and substantive (social) rights. Most scholars

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agree that a reasonable balance needs to be maintained between the rights and responsibilities of individuals, on the one hand, and those of collectivities (minorities, workers or women), on the other. Advanced democracy, most agree, should also include substantive rights such as housing, health care, and education. Because no state fulfills its principles completely and thus no state is a perfect democracy, it is preferable to measure the democracy of a state by assessing key issues such as civil equality, minority and gender rights, theocratic impositions, and legal inequalities. By placing these on a continuum extending between the poles of advanced democracy and authoritarianism, regimes can be characterized as "more" or "less" democratic in the various fields of governance.

Despite inevitable deviations in certain spheres, most Western states fit into the "advanced democratic" classification. The situation in Israel is more problematic, for there are structural deviations on almost all of the democratic principles listed, which raise questions about its common classification as a democracy. Accordingly, recent critical scholarship has challenged Israel's classification as a democracy and has instead proposed such categories as "ethnocentric," "colonial state," "ethno-nationalistic democracy," or "deeply flawed democracy."

The democratic achievements of Israel are significant. Defining itself as "Jewish and democratic," Israel holds relatively open elections at regular intervals, which have led to multiple changes in government (though Palestinians residing in the Occupied Territories are not enfranchised). There is almost full freedom of political organization, relatively high levels of freedom of expression, an open media, and numerous civil rights anchored in laws, regulations, and conventions. The judiciary is relatively independent and exercises judicial review of legislative and executive authorities. The state also ensures basic protection of its citizens and extends (basic) economic assistance to needy population sectors.

The Role of Judaisation

However, structural barriers to full democratic rule exist. The central one is the colonial process of Judaisation (and the associated process of de-Arabization), which has been a central pillar of Zionism since its inception and continues through this day. This process tries to deepen and broaden Jewish control over state institutions, territory, economy, and public sphere. In the early years of Zionism there were compelling (if controversial) reasons for promoting Jewish domination, namely to secure the survival of a small Jewish community in a state of war with local and neighboring Arabs and to facilitate the absorption of Jewish refugees and immigrants after the Holocaust. Today circumstances are different, so that the ongoing Judaisation project seriously impedes the consolidation of a democratic regime. Judaisation is based on the conception that Israel "belongs" to world Jewry with a mission of concentrating Jews in Israel. Because the Jewish state was created in a territory that had a Palestinian-Arab majority, the goal could have been achieved only by the creation of an immigrant-colonial Judaisation society, and by jealously guarding the outcome of the 1948 War, which saw the ethnic cleansing of large parts of historic Palestine, the erasure of hundreds of Palestinian villages and towns, and the creation of the refugee problem and the denial of their right of return.

A central problem to democracy therefore derives from the definition of the polity as "Jewish." Given the geopolitical and ideological circumstances, a Jewish state must continue the Judaisation project, which undermines two major principles of modern democracy: civil equality and minority protection. The definition of the state has produced legal and institutional discrimination against the state's Palestinian-Arab minority, which is enshrined in a series of laws. First among these is the Law of Return, which grants any Jew in the world a permanent right of immigration to Israel. At the same time immigration of Arabs to Israel—including those (refugees) born in the country before 1948—has been largely prohibited. A range of other discriminatory legislation exists, including two notable examples in Israel's Basic Laws: Israel's Lands and the structure of the Knesset. Both ensure Jewish control over the territory and government while curtailing political representation to citizens opposing the Jewish nature of the state. Several additional discriminatory laws include those regulating the state's military and security apparatus, public education, national broadcasting, and state religious services.

In addition Israel has used several discriminatory executive practices, such as applying the British Defense Emergency Regulations (used almost entirely against Arabs, most recently to prevent family reunification with Palestinians from the Occupied Territories), preferential mortgage and child allowances to (predominantly Jewish) ex-soldiers, budget allocations skewed in favor of Jewish festivities and projects, and severe constraints on Palestinian land control and housing mobility. Judaisation is the reason scholars have described the Israeli regime as "ethnocentric." In such a regime a dominant ethno-national group uses the state apparatus to expand its influence and control while maintaining a democratic facade. In Israel the dominance of one ethno-national group is buttressed by a hegemonic regime structure, which reinforces the state's Jewish character through immigration, land policy, development and flow of capital, constitutional settings, public culture, and the role of the armed forces.

Israel's land and planning systems have constituted a central pillar of its ethnocentric regime. The state expropriated, nationalized, and transferred the vast majority of previously owned or held Palestinian lands, and then made it subject to exclusive Jewish control by incorporating the Jewish National Fund (a body representing the world Jewry) as an equal partner in the Israeli Lands Administration. At the same time laws and regulations controlled the sale or lease of state land, in most areas, to non-Jews. Although Israel established more than 700 Jewish communities, no Arab communities were established except for twenty-two small towns built for the coerced urbanization of the Bedouin. Judaisation also explains the official role played in Israel by international Jewish organizations such as the Jewish Agency and the Jewish National Fund. These organizations, which have a semiofficial role in Israel, function solely for the benefit of Jews as determined by several laws, including the 1952 World Zionist Organization-Jewish Agency (Status) Law between Israel and these two global Zionist organizations. These arrangements allow "discrimination by proxy" on behalf of the state and accelerate Judaisation, mainly by aiding Jewish immigration, allocating land to Jews alone, establishing hundreds of Jewish communities, promoting afforestation, and protecting Judaised "open spaces" from Arab settlement.

Undemocratic practices are also prominent in housing and development rights. Because of the legal and institutional involvement of the Jewish Agency and Jewish National Fund and the total Jewish domination of the land and planning systems, Arab citizens are effectively prevented from residing in over 80 percent of Israel's territory. In those same areas of Diaspora, Jews can purchase or lease land even if they are not citizens of the state. In its Qar'aan decision of 2000 the Israeli Supreme Court ruled that the allocation of state lands to Jews alone, in certain circumstances, is illegal. However, later institutional and governmental alignment by the Land Authority has enabled Jewish communities to continue to exclude Arabs, and the landmark Qar'aan decision has to date had little impact on Israel's ethnic geography.

Other, less conspicuous, policies facilitate the unequal distribution of public resources between Jews and Arabs. Among these are the classification of Jewish localities as "frontier regions" (which results in beneficial budget allocations), the methods of funding local authorities, the exclusion of Arabs from various employment fields (such as Israel's Electric Company and high-tech industries connected to the armed forces) for security reasons, and wide disparities in the funding of Arab and Jewish schools and community facilities. Several studies suggest, however, that these gaps in public allocations are narrowing.

In addition, the state's security forces and pervasive militarism constitute a central pillar of the regime. These are totally identified with Jewish society (except for the participation of Druze and a few Bedouins), thereby causing pervasive inequalities in access to the centers of power and legitimacy. While Jewish secular women are drafted for a short military service, the security services are totally male dominated, causing further marginalization of women in Israel. Finally, ultra-Orthodox Jews are exempt from military service, and are hence also excluded from the important centers of power associated with state security, its apparatus, and surrounding institutions and culture.

Ethnonational Sphere

As noted, a modern democracy is synonymous with a state and thus must be territorial—that is, limited to a well-bounded space. All who live in this space—the demos (the people)—have equal civil rights and are subject to the same laws. Thus the basis for sovereignty and self-determination is territorial. Accordingly France belongs to the French (those who live in France). Italy to the Italians, and Great Britain to the British. This structure ensures that only the body politic of all
citizens in a given territory—who are ruled by the government of that territory—have the right to participate in the political process. But in Israel the principles of sovereignty and self-determination are ethnic, not territorial. The state belongs to all the Jews in the world, not necessarily to its own inhabitants, among them the Arabs, whose lives are affected daily by the regime. A manifestation of this is the "nationality" category in the Israeli registration of citizens, which lists various ethnic-religious groups (Jewish, Arab, Druze, non-Jewish Russian, etc.) and thus prevents through institutional means the creation of a Palestinian nationality.

Was the "Jewish and democratic" concept—so dominant in Israeli political and legal thinking—doomed to failure from its very inception? The answer to this question is unequivocal, despite the structural problems outlined above. Many believe it would be more democratic to transform Israel into a secular (multicultural, binational, but not Jewish) state. But if we return to the definition of democracy as a complex set of rules and institutions, even within the structure of "Jewish and democratic," there is room for much democratic improvement. Just as Finland is defined as a Lutheran democratic state and a Catholic-democratic state, so too can Israel be Jewish but at the same time more democratic. But a clear difference exists between a "Jewish" and a "Judaizing" state. Israel cannot aspire to become a democracy while continuing its colonial strategies both within and beyond the Green Line. It cannot democratize while maintaining and deepening disproportionate Jewish control over demography, land, resources, and institutions of Israel/Palestine, because those produce a clearly undemocratic condition of second- and third-class citizenship for Palestinians in Israel proper and in the West Bank, respectively.

For genuine democracy Israel must therefore put an end to the Occupation, and change its discriminatory laws and practices, by treating all the citizens of the state as equals. The state can still form the main organ of Jewish self-determination while maintaining civil equality and protecting the collective rights of the Arab national minority—that is, its identity, representation, property, resources, and autonomy.

The Religious Sphere

A basic democratic principle that is absent in Israel is religious freedom (including freedom from religion). Although well-established democracies do not coerce religious affiliation, in Israel such affiliation is inscribed at birth. The law specifies four religious communities based on the Ottoman millets (communities of minorities). Unless there is religious legislation on personal matters, citizens are subject to the rule of their religious communities in matters such as marriage, divorce, custody, and burial. This practice causes widespread violation of civil rights, especially among women and the some 300,000 immigrants who belong socially and ethnically to the Jewish majority but are denied religious recognition of their Jewish affiliation.

Officially, intermarriage between Jewish-Israeli citizens and citizens belonging to other religions is prohibited by Israeli law (although the state accepts intermarriages registered elsewhere). Also prohibited are marriages conducted by non-Orthodox Jewish authorities such as those from the Reform and Conservative movements, which are not recognized in Israel. Recent years have witnessed an erosion of this religious monopoly over personal matters, in part from the growing popularity of offshore civil marriages (recognized by Israel) and the establishment of a Civil Court of Family Affairs. However, the religious establishment still holds considerable power over personal matters of the vast majority of citizens.

In addition to its influence over marital issues, the religious establishment was instrumental in establishing a series of laws and practices that impinge on basic liberties. First, it uses exclusively Orthodox criteria to determine who is a Jew. In Israel this is not just a religious issue but a legal one: a person that determines if a person is entitled to full citizenship. Orthodox laws and regulations impose Sabbath observance on public companies, prevent the Sabbath opening of private businesses, enforce Jewish dietary laws (Kashrut) in public institutions, prohibit the import of nonkosher meat, and provide funding for nondemocratic Orthodox education. How can one explain the success of a religious establishment in imposing undemocratic measures on the lives of the vast majority of non-Orthodox citizens? Most secular Jews accept the undemocratic characteristics of religious control because they believe the religious establishment strengthens the Jewish character of the state vis-a-vis the Arab-Palestinian challenge. The influence of the religious establishment is seen in concrete legal structures (such as rabbinical control over Jewish identity and hence the identity of immigrants) and in Jewish control of public spaces and state culture. For these religious groups, then, democratization would neutralize their political powers, though not necessarily their cultural or faith-based influence. The examples of Finland and Britain demonstrate that stable democracies can thrive even in states with "national churches" (Lutheran and Anglican, accordingly). A key factor is ensuring that religious institutions lack coercive political or institutional power. In addition, the existence of a state-supported church does not impinge on the religious freedom or freedom from religion of Finns or British citizens. This model could provide a realistic option for democratization of the governmental apparatus in Israel.

Liberalization

Since the early 1990s a number of important human rights were secured by new Basic Laws that have semiconstitutional status. The new rights include human dignity, liberty, property, and freedom of employment. (Such laws do not apply in the Occupied Territories, however.) There has also been much discussion regarding the drafting of a constitution. If such a constitution were enacted several provisions would become dormant. For example, several laws of the 2006–2009 period, aiming to produce a draft in the near future. In addition, the economy and capital markets have been significantly deregulated, and key assets of the state, including large tracts of land and key infrastructures, have been gradually privatized. Liberalization has also been evident in the increased activity of civil society organizations and in the growing freedoms enjoyed by Arab citizens, in terms of both political organization and access to some domains in Israeli society, particularly culture, sports, and media. However, this freedom is largely confined to individual mobility or to civil society activities that do not challenge the Jewish nature of the state, typically in fields such as the environment, welfare provision, and women's rights.

But this process is partial and incomplete. First, most of the changes promote liberalization rather than democratization, although there are links between the two. In other words, the individual has more rights and liberties, but the ethnoreligious definition of the state remains unchanged. Second, many of these changes have been produced by economic forces that have privatized public resources and the name of the free market, not by a drive for civic equality. In addition the liberalization of the economy, especially the privatization of public assets and services, has significantly widened socioeconomic gaps and increased poverty, thus weakening an important foundation of substantive democracy—the equitable distribution of public resources.

Finally, since the second Lebanon War, and more intensely since the election of a right-wing Likud-led government in 2009, a plethora of new legislation and policies have been launched by the new government, with the aim of marginalizing and weakening the state's Palestinian citizens. These have demonstrated again the deeply ethno-religious nature of the Israeli regime and its substantial distance from genuine democracy.

See also ABANDONED AREAS ORDNANCE; ABSENTEE PROPERTY LAW; BEDOUIN IN ISRAEL; CUSTODIAN OF ABSENTEE PROPERTY; DEVELOPMENT AUTHORITY; ISRAELI MILITARISM; ISRAELI LANDS ADMINISTRATION; JEWISH AGENCY FOR ISRAEL; JEWISH NATIONAL FUND; PALESTINIAN CITIZENS OF ISRAEL; PRESENT ABSENTEES

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Israel Supreme Court and the Occupation


Israel Supreme Court and the Occupation

The West Bank and Gaza were conquered by the Israeli Defense Forces (IDF) during the 1967 armed conflict among Israel, Egypt, and Jordan. As territories captured by a hostile party during an international armed conflict, these territories became subject to a regime of belligerent OCCUPATION. Hence the main international instruments dealing with such a regime, the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907 (Hague Regulations), and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (Geneva Convention IV), were applicable. Recognizing this, the first military order promulgated when the IDF entered the areas annexed to Israel was established and where a curfew was imposed, the military courts established there would observe the provisions of Geneva Convention IV, and that in case of a conflict between the Convention and military orders, the Convention would prevail.

Soon after military operations ended in June 1967, some in Israel began questioning whether the West Bank and Gaza should indeed be regarded as occupied territory. They argued that neither area was part of the sovereign territory of the two belligerents in the 1967 conflict (Jordan and Egypt), so their status was unclear. The provision in the military order referring to Geneva Convention IV was revoked, and the government of Israel adopted the political position that the West Bank and Gaza were “disputed territories.” It challenged de jure application of Geneva Convention IV, but declared that the Israel Defense Forces would respect its humanitarian provisions from others in the Convention.

The government’s approach was rejected by most experts in international law, foreign governments, and international organizations. On a number of occasions the United Nations Security Council has declared that Geneva Convention IV applies to the West Bank and Gaza. In its advisory opinion on the Legal Consequences of Construction of a Wall (2004) the International Court of Justice also affirmed that the Convention applies to the West Bank.

Soon after Israel’s Occupation of the West Bank and Gaza, Palestinian residents of these territories submitted petitions to the Supreme Court of Israel challenging the legality of actions of the Israeli military authorities. Although there was no precedent for judicial review by a national court over actions of the state’s military forces in occupied territories, Israeli authorities did not question the Court’s jurisdiction to entertain the petitions. At first the Court accepted the government’s acquiescence as sufficient basis for its jurisdiction, but later it ruled that its statutory jurisdiction as a high court of justice to issue writs against all authorities in Israel “exercising public functions under law” covers review of IDF actions, whenever they are performed.

Alongside the issue of jurisdiction, petitions by Palestinian residents could potentially have met two other procedural obstructions. First, Palestinian residents of the West Bank and Gaza are not Israeli nationals and given the ongoing conflict they could be regarded as enemy aliens who may not challenge the actions of Israel’s authorities before its own courts. This argument, which was recently raised to avoid judicial review of actions by another occupying power, never came before the Supreme Court of Israel. Second, the political nature of some Israeli actions in the West Bank and Gaza arguably made them nonjusticiable (i.e., unsuitable for resolution in a court of law), either as “acts of state” or under a “political-questions doctrine.” In a few cases the Israeli authorities did indeed try to avoid judicial review by claiming that the specific issue before the Court was nonjusticiable. The Court was not receptive to the argument. It has consistently held that acts which have allegedly harmed the rights of specific individuals are always justiciable.

Having established its jurisdiction to entertain petitions relating to the West Bank and Gaza, the Court had to decide whether to resort to international law relating to belligerent occupation in assessing the legality of acts performed there by Israeli authorities. In the first cases to reach the Court, government counsel asked it to refrain from ruling on the status in international law of the West Bank and Gaza. They declared that the military authorities were convinced that they had complied with norms of belligerent occupation and were thus prepared for the Court to assess their actions according to these norms, even if they were not formally binding. Initially the Court went along with this approach. However, later it ruled that the West Bank and Gaza are indeed subject to a regime of belligerent occupation. The one exception relates to East Jerusalem, which was annexed by Israel in 1967 pursuant to a statute enacted by the Knesset. The Supreme Court regards itself as bound to apply this statute, even if it is incompatibility with Israel’s international obligations.

In enforcing international norms relating to belligerent occupation, the Supreme Court’s approach was shaped by the role of international law in Israel’s domestic legal system. Following the British approach, courts in Israel enforce customary international law unless it is incompatible with a statute passed by the Knesset, Israel’s parliament. On the other hand, because the power to make binding treaties on behalf of the state is in the hands of the executive branch of government, the courts do not enforce international treaties unless they have been incorporated in domestic law by parliamentary legislation. They will, however, interpret a statute in a way that it will avoid incompatibility with Israel’s international obligations.

Applying that approach, the Supreme Court ruled that the Hague Regulations reflect customary law, while not all provisions of the Fourth Geneva Convention are reflective of such law. Provisions that do not reflect customary law will not be enforced, since even though the Geneva Convention was ratified, it was not incorporated by Knesset legislation. The distinction between customary and conventional international law allowed the Court to avoid confronting the government’s contention that the Fourth Geneva Convention is not formally applicable. After violence erupted in September 2000, the Court gradually modified its approach and used the standards of the Fourth Geneva Convention to assess the legality of government action, without formally ruling that the Convention applies.

Respecting Local Law

The primary duties of an occupying power are contained in Regulation 43 of the Hague Regulations. According to this provision, the occupying power should take all the measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country. The meaning of this provision was the focus of a number of Supreme Court decisions valid during the first two decades of the Occupation.

Regulation 43 deals with two issues: the duty to restore and ensure public order, and the duty to respect the laws in force when the Occupation began. Although these were originally regarded as two separate issues, the Supreme Court forged a strong connection between them, holding that the occupying power’s duty to respect the local laws is subject to its obligation to restore and ensure public order. When changes in the local law are required for reasons of public order and civil life, they cannot be “absolutely prevented.”

The Court has given a wide interpretation to the term “public order and civil life” (an interpretation of the original French "l’ordre et la vie publique"). It has ruled that any measures whose motive is to benefit the local population may be regarded as promoting public order and civil life, even if this is not their sole, or even dominant, motive, and if they also further Israeli interests, including those of the Israeli settler population. Thus, for example, in 1982 the Court upheld the imposition of a new sale tax (VAT) in the Occupied Territories, when the same tax had been instituted in Israel. Given the free flow of services and goods at the time, this was clearly in the economic interests of Israel. However, in upholding the tax, the Court held that if VAT had not been imposed, restrictions would have been required on the free flow of goods and services between Israel and the Occupied Territories and that these restrictions would not have been beneficial for the local population (i.e., the Palestinians).

Under the Court’s jurisprudence, the actions of military commanders in the Occupied Territories must be guided by one or both of two considerations: security and the good of the local population. As both of these considerations have been broadly defined, the Court has rarely interfered with decisions or actions of the military. This has been especially noticeable in the field of lawmaking. While in theory the prevailing law when the Occupation began remains in force, even before the Oslo Accords and the changes in law and administration effected under those accords and subsequent agreements, there had been wide-scale changes in many fields of law.