ARTICLE

# HOLLOW CITIZENSHIP: BETWEEN PRIVATE PROPERTY, RULE OF LAW AND DEMOCRATIC VISIONS FOR ISRAEL, 1948–1950†

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*The **Absentees' Property Law** (1950) was intended to regulate the status of the immense amount of property and land confiscated from Palestinians during the 1948 war, including that of Palestinians who became Israeli citizens. The law endowed the Custodian of Absentees' Property with wide discretion and draconian powers, limiting the judicial review of his actions. Legal literature has analyzed the law through the lens of property, highlighting its distributional effects on inequality and structural discrimination of the Arab minority in Israel. Legal historians have exposed the sources of inspiration for the law from a transnational perspective. Still missing is an understanding of the law as a building block in Israel's citizenship regime and its (un)democratic culture, which is the focus of this Article.*

*The Article will examine the early Knesset debates on the law, which elicited strong criticism both from Palestinian Knesset members (MKs) and from Jewish MKs from the opposition parties, in order to map their competing conceptions of citizenship and democracy. Even though both Palestinian and Jewish MKs were critical of the law, they understood its danger for the future democratic regime differently. Jewish opposition MKs focused on the concentration of legislative, executive, and judicial powers in the hands of the Custodian, arguing that this would create a "State within a State" and undermine the principles of the rule of law and separation of powers. Meanwhile, Palestinian MKs focused on the impact of the law on their civil rights, particularly on the relationship between the right to private property and democratic citizenship. Much of the Palestinian MKs' criticism was directed at the broad definition*

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*of "absentees" in the bill that encompassed a large number of internal refugees and displaced persons. They argued that since these Palestinian "absentees" were actually present in the State, given ID numbers, and allowed to vote and be elected to the Knesset, their "absentee property" should be removed from the guardianship of the Custodian and given back to them as a matter of right. In other words, they presented a civilian concept of citizenship that combines property rights with political rights. They rejected the hollow citizenship promoted by the Government via a "security" vision of Palestinian citizenship based on patronage, control, and collaborators.*



## INTRODUCTION

In this Article, I examine the Knesset debates on the Absentees' Property Law of 1950, but instead of considering it through the familiar lens of property and its distributional effects on the inequality and structural discrimination of the Arab minority in Israel, I propose to understand the law as a building block in Israel's citizenship regime and its (un)democratic culture.[1] These debates reveal lively discussions about

[1] A similar approach was proposed by Robinson. *See* SHIRA N. ROBINSON, CITIZEN STRANGERS: PALESTINIANS AND THE BIRTH OF ISRAEL'S LIBERAL SETTLER STATE 37, 41–42, 44 (1st ed. 2020); *see also generally* Hassan Jabareen, *The Nakba, Law, and Loyalty: The Hobbesian Moment of the Palestinians in Israel*, 42 THEORY & CRITICISM 13 (2014) (in Hebrew). Robinson did not analyze the debates over the Absentee Property Law, and Jabareen briefly discusses it only as one of four legal actions by the Knesset that undermined Israel's promise of universal territorial citizenship.

the nature of Israeli democracy and how it dealt in its early years with fundamental questions regarding the equality of rights promised to the Palestinian minority in Israel. The proposed law granted vast powers to the Israeli Custodian for Absentees' Property, who was entrusted with handling the assets of refugees, both external and internal refugees, that is, Palestinians who, following the 1948 Arab-Israeli War, remained within the borders of the newly established State of Israel yet were classified as "absentees" under the law.[2] These debates reveal an exceedingly different picture from the conventional approach that has developed over the years regarding democracy and the rule of law in Israel, which distinguishes between Israeli democracy (within the borders of the Green Line) and the regime in the occupied territories, and sees the possible infiltration of norms from the territories into the State of Israel as the main threat to democracy.[3] This approach rarely deals with the Nakba (the Palestinian catastrophe) and its effects on Israeli law and the democratic regime since 1948.

The debates in the Knesset on the Absentees' Property Law from 1949 to 1950 reveal that the Nakba and its consequences could not be ignored.[4] These debates focused on the material consequences of the Nakba—the transfer of enormous amounts of Palestinian land and property to the control and management of a Custodian.[5] As long as the war continued, and before the armistice agreements, it was possible to rely on British Mandate legislation and regulations concerning "enemy property" and attribute to the British the serious violations of the rule of law and democracy. However, the British emergency legislation, with its model of a Custodian of enemy property, was not suitable for regulating a permanent situation after the

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[2] *See* Sabri Jiryis, *Domination by the Law*, 11 J. PALESTINE STUD. 67, 84–85 (1981).

[3] S*ee* MICHAEL SFARD, OCCUPIED FROM WITHIN: A JOURNEY TO THE ROOTS OF THE ISRAELI CONSTITUTIONAL COUP (Kav-HaOfek, Berl Katznelson Foundation, 2025) (in Hebrew).

[4] The term "Nakba" refers to the events surrounding the establishment of the State of Israel in 1948, during which over 750,000 Palestinians were forcibly displaced, and more than 500 villages were depopulated or destroyed. *See* CONSTANTINE K. ZURAYK, THE MEANING OF THE DISASTER 2–3 (R. Bayly Winder trans.) (1956); *see also* Adel Manna, *The Palestinian Nakba and Its Continuous Repercussions*, 18 ISRAEL STUD. 86 (2013).

[5] The Palestinian refugees left behind extensive immovable property, including private and public buildings in Arab and mixed cities and approximately 500 villages, as well as vast agricultural lands and orchards. *See* Arnon Golan, The Role and Significance of Palestinian Refugee Property in Shaping Israel's Rural Space, *in* ECONOMY IN WARTIME: STUDIES ON THE CIVILIAN SOCIETY DURING ISRAEL'S WAR OF INDEPENDENCE 35, 37 (Mordechai Bar-On, Yitzhak Greenberg & Meir Chazan eds., 2017) (in Hebrew) (citing Memorandum from the Custodian to the Prime Minister, Mar. 24, 1949, and Letter from the Government Secretary to Cabinet Members, Feb. 16, 1950, Israel State Archives file AM 210.55-5440). An estimated 80 percent of the land owned by Palestinian refugees and internally displaced persons in the newly established Israeli state was either directly confiscated or placed under the management of the Custodian. *See* BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED (2d ed., 2003) (1987).

war ended. Hence, the first Knesset was required to enact a permanent law that would regulate the safeguarding, management, and sale of what was first called "abandoned property" and later "absentees' property."[6] Since these discussions preceded the enactment of the "Law of Return" (July 1950),[7] and the "Nationality Law" (stipulating conditions of citizenship?) (1952),[8] the Absentees' Property Law became the site where fundamental questions were first raised about citizenship, the rule of law, and the nature of democracy in the young State of Israel.

Absentees' property was initially dealt with by security and military officials (the Custodian of Enemy Property, Commissioner of Abandoned Property)[9] alongside the Ministry of Minority Affairs, which coordinated the handling of petitions by Palestinian residents of the State until its closure in June 1949, just before the establishment of the first Israeli Government.[10] Prime Minister Ben-Gurion declared that there was no need for a special ministry to represent minority affairs, as all would be treated as citizens with equal rights in the State of Israel. Nonetheless, the Emergency Regulations for Absentees' Property and the subsequent proposed law adopted a broad definition of who would be considered "absentees," confiscated their assets collectively and transferred them to the management of a Custodian of Absentees' Property. It also granted the Custodian extensive powers with almost no judicial or parliamentary review, along with broad discretion to decide on an individual basis which property would be released and returned to its owner.

Because the Absentees' Property Law primarily affected the rights of the Palestinian Arab minority, it could have been expected that the Knesset debate would reflect an ethnic/national division between Jews and Arabs.

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6 *See* COHEN, *infra* note 16; *see also* Arnon Golan, *The Transfer of Abandoned Rural Arab Lands to Jews During Israel's War of Independence*, 63 CATHEDRA 122, 148 (1992); § 4(a), Absentees' Property Law, 5710–1950, SH No. 20 p. 86 (Isr.).

7 Law of Return, 5710–1950, SH No. 51 p. 159 (Isr.).

8 Nationality Law, 5712–1952, SH No. 95 p. 146 (Isr.).

9 On June 16, 1948, the Provisional State Council adopted the first legal instruments intended to regulate the State's control over abandoned lands and property: *Emergency Regulations (Abandoned Property), 5708–1948 (June 23, 1948)* (Isr.), and *Abandoned Areas Ordinance, 5708–1948 (June 24, 1948)* (Isr.). Around the same time, the office of the Custodian of Absentees' Property, headed by Dov Shafrir, began operating. *See* SHELLY L. FRIED, THEY DO NOT RETURN: THE PALESTINIAN REFUGEE PROBLEM AND ISRAEL'S FOREIGN POLICY IN THE FIRST YEARS OF THE STATE (Pinhas Luzon & Ronit Rosenthal eds., Resling 2018) (in Hebrew), at 81–83.

10 The Ministry of Minority Affairs, established in 1948 to help integrate Palestinian residents, was undermined by the Military Government and internal opposition, leading to its closure in June 1949 and the transfer of Arab affairs to an advisor within the Prime Minister's Office. *See* Alisa Rubin Peled, *The Other Side of 1948: The Forgotten Benevolence of Bechor Shalom Shitrit and the Ministry of Minority Affairs*, 8 ISRAEL AFFAIRS 84, 85–87 (2002); ALAN DOWTY, THE JEWISH STATE: A CENTURY LATER 190–192 (1998); Alina Korn, *Good Intentions: The Short History of the Minority Affairs Ministry, 14 May 1948—1 July 1949*, 127 CATHEDRA 113, 140 (2008(in Hebrew).

However, a closer look at the debates reveals that Arabs and Jews from the opposition parties (and even some from the coalition) expressed fierce criticism of the law. The criticism crossed political lines and was shared by Knesset members (MKs) from the left (the communist Maki and socialist Mapam), as well as from the center (General Zionists) and the right (Herut) and also from the Sephardim and Oriental Communities Party (representing Jews from the Old Yishuv [Jewish communities in Ottoman Palestine] and North Africa). Although different material and ideological interests were involved, I argue that what made the joint criticism of Arab and Jewish Knesset members possible was the tacit agreement to conceptualize the issue not as a sectarian matter that concerned only the rights of the Palestinian-Arab minority but as a general matter relating to all Israeli citizens, the Israeli "demos."[11] It therefore became a principled discussion over the nature of Israeli democracy, which invoked legal concepts of equal rights, separation of powers, and the rule of law. The rule-of-law discourse made it possible to discuss the implications of the law for all citizens in the country. Nevertheless, as will be demonstrated, significant differences emerged in the emphasis placed upon, and the interpretation of, the concept of the rule of law: a formalist approach promoted by the government; an institutional "checks-and-balances" framework advocated by Jewish opposition MKs; and a civil rights approach advanced by Arab parliamentarians.

The first Knesset, which also served as Israel's Constituent Assembly, was endowed with the power to enact a constitution for the State, as promised in the Declaration of Independence of May 14, 1948. The Government was acutely aware of the need for the State of Israel to establish its legitimacy and status in the world. On December 10, 1948, the UN General Assembly passed Resolution 194 demanding the return of Palestinian refugees and their compensation.[12] Israel was still trying to be admitted to the UN, and its representative there (Abba Eban) reiterated the Government's commitment to protecting minority rights. Israel's first application for admission was rejected and only in May 1949, after signing the final armistice agreement with its Arab neighbors, was Israel admitted to the UN in a resolution that reiterated Resolution 194 and the

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[11] In ancient Greek, the word dēmos (δῆμος) primarily means "the people" or "the populace" and refers to the entire citizen body.

[12] *See* G.A. Res. 194 (III), U.N. Doc. A/810 (Dec. 10, 1948), https://digitallibrary.un.org/record/210025?ln=en&v=pdf [https://perma.cc/FC45-RAZ3] ("The General Assembly . . . [r]esolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible[.]").

1947 UN resolution on the partition of Palestine (181).[13] In this context, a bill for the extension of Absentees' Property Emergency Regulations (November 1949), which was changed into a proposed Law of Absentees' Property (February and March 1950) and which included the collective confiscation of the property of anyone defined as an "absentee" (including many Palestinian residents of Israel) and its transfer to the guardianship of a Custodian, undermined Israel's promises both in its declaration of independence and in the discussions for admission to the UN to establish a democratic regime based on equal rights for all its citizens.

Although the criticism of the law was shared by Arab and Jewish MKs, a closer look reveals an interesting split between two main lines of criticism. On the Arab side, the focus was on civil equality and the right to private property; on the Jewish side, the focus was on limiting the draconian powers of the Custodian that undermined basic guarantees of the rule of law, separation of powers and a democratic regime. As we shall see, this binary picture was further complicated by internal divisions and principled disagreements within each camp.

The three Arab representatives who were elected to Israel's first Knesset—MKs Tawfik Toubi from the Jewish-Arab party Maki (the Communist List), and Seif el-Din el-Zoubi and Amin-Salim Jarjoura from the Arab party known as the Democratic List of Nazareth[14]—focused on the blatant discrimination of the Arab minority, criticized the security discourse that treated Arab citizens as the enemy, and promoted a civil discourse instead of a military one. In particular, they criticized the broad definition of "absentee" in the proposed law, which unjustly included internal refugees (about 25 percent of the 100,000 Palestinians remaining in the country). Indeed, the original draft of the law, as proposed by the Ministry of Justice, defined the term "absentee" in its literal sense as anyone who was no longer present within the territory of the State. However, during the discussion in the Ministerial Committee, Foreign Minister Moshe Sharett demanded that it be amended to define as an absentee anyone who had left their home after November 29, 1947 (the date of the UN partition resolution), regardless of their subsequent whereabouts. The definition in the bill was accordingly revised to include anyone who had abandoned

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[13] *See* G.A. Res. 273 (III), U.N. Doc. A/RES/273 (May 11, 1949), https://digitallibrary.un.org/record/210373?ln=en&v=pdf [https://perma.cc/B5WY-8XZL] On the political context and commitments tied to Israel's admission to the UN, see ROBINSON, *supra* note 1, at 37.

[14] The "Democratic List of Nazareth" was a satellite list (created by Mapai to gain support of the Arab electorate) and enjoyed limited autonomy. Seif el-Din al-Zoubi, the party chairman, came from a Muslim family from Nazareth, and Amin-Salim Jarjoura, an attorney, came from a Christian family from Nazareth. In addition to Tawfik Toubi, Maki sent three Jewish representatives to the first Knesset. Toubi, from a Christian family from Haifa, was twenty-seven years old at the time of his election. *See* Jabareen, *supra* note 1, at 23.

their "usual place of residence," even if they remained within Israel.[15] Thus an oxymoronic category of "present absentees" was born—people who are physically present in the country but defined (via their property) as absent.[16]

The Arab MKs focused their criticism on the internal refugees ("present absentees"). This decision was not trivial. Each of the three spheres that shape Palestinians' citizenship in Israel—the property regime, the immigration regime, and the political participation regime—posed grave dilemmas for their representatives: regarding property—the question whether to deal only with the property of internal refugees or also with the property of all refugees and their compensation and restitution; regarding immigration—the question whether to insist on the right of Palestinian refugees to return in light of Israel's emerging decision to oppose their return at that time; and, regarding political participation—given the political right to vote and be elected to the Knesset, how to explain that this was second-class citizenship. They realized that under a political regime with one hegemonic party (Mapai) and under the draconian military rule that was imposed on areas heavily populated by Palestinians,[17] suffrage or political franchise without protection of their right to property was an empty façade.[18] Therefore, the debate over the Absentees' Property Law became a central platform for promoting an alternative conception of democracy that made respect of the right to private property a prerequisite for equal citizenship. Unlike Knesset debates on the abolition of the Military Government or the British Defense Regulations, the debate on the Absentees' Property Law pointed to a significant material dimension that was concealed behind ostensibly security considerations. The law created a regime of property dispossession through the practice of separating people from property. The Arab Knesset members pointed to the fundamental connection between citizenship and the protection of private property to expose the Israeli promise of equal citizenship as hollow. They therefore demanded an amendment to the law that would narrow the definition of absentee to exclude Arab residents of the State of Israel and restore the property of the "present absentees" as a matter of right, not left to the discretion or good will of the Custodian.

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15 *See* TOM SEGEV, 1949: THE FIRST ISRAELIS 93 (1984); *see also* Moshe Sharett to the Government Secretariat (Sept. 28, 1948), Israel State Archives, Prime Minister's Office, File No. 5431/17 (Isr.) (In this letter, Sharett noted that the Minister of Minority Affairs, Bechor Shalom Shitrit, opposed the expansion of the definition of "absentee.").

16 For the implications of this paradoxical legal status, see Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967*, 33 N.Y.U. J. INT'L L. & POL. 923, 945–47 (2001); HILLEL COHEN, THE PRESENT ABSENTEES: PALESTINIAN REFUGEES IN ISRAEL SINCE 1948 (2000) (in Hebrew).

17 In May 1949, roughly 90 percent of the Palestinians in Israel lived under military rule. *See* ROBINSON, *supra* note 1, at 39.

18 *See* Jabareen, *supra* note 1, at 14–15.

Jewish MKs from across the political spectrum endeavored to show that the harm of the proposed law was not limited to Arab citizens whose property had been confiscated but could affect all citizens because the Custodian would manage a huge amount of property for many years and influence the rights of many citizens who would interact with him. The Custodian could thus shape Israel's political economy in significant ways. However, instead of focusing on changing the law's definition of absentee, they focused on the unlimited powers of the Custodian, depicting it as a dictatorship within a democracy. They presented the institution of the Custodian as undermining the rule of law and the entire constitutional structure of separation of powers and checks and balances. They advocated amendments that would establish mechanisms to ensure procedural rule of law, such as access to courts, right of appeal, Parliamentary supervision, and so forth.

Legalism—the legal discourse about the rule of law, separation of powers, and civil rights—is what enabled the creation of solidarity between Arab and Jewish MKs in their criticism of the Absentees' Property Law. But beneath the shared discourse lay distinct sectoral, partisan, and material interests. The Absentees' Property Law transferred control over substantial economic assets to the Mapai Government, prompting concern among rival political parties that Mapai would leverage its dominance over the Ministry of Finance in a discriminatory manner. Conversely, Arab political representatives feared that the law would substantively undermine Israel's commitment to equal citizenship and be used to discriminatorily redistribute Arab lands to Jewish sectors. Legalism gave the opposition a common language and helped bridge sectoral differences. However, as we shall see, legalism was also the weak spot of the discussion since it allowed the Government to accept a number of formal amendments (such as adding a right of appeal to the court or the establishment of an advisory committee) without addressing the central problem—the use of law as a tool of "legal dispossession," creating a discriminatory regime of separate citizenship for Jews and Arabs.[19]

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[19] The disagreements in the Israeli Knesset debate over the relation of the rule of law to liberal democracy echoes the jurisprudential debate between Joseph Raz's positivist separation of legality from morality and Lon Fuller's argument that even formal legality is dependent on respecting the autonomy of the individual and reduces the risk of immoral governance. *See* Joseph Raz, *The Rule of Law and Its Virtues*, *in* THE AUTHORITY OF LAW 210, 211 (1979); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958). As we shall see, Attorney Jarjoura's understanding of the rule of law aligns closely with Fuller's approach, particularly in highlighting the interconnectedness of autonomy, private property, and the rule of law. *See* KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 9–11 (2012); *see also* Leora Bilsky & Natalie R. Davidson, The Judicial Review of Legality, 72 U. TORONTO L.J. 427 (2022).

### *A. A Query to the Minister of Finance*

On September 12, 1949, the Israeli Knesset discussed a query raised by MK Tawfik Toubi regarding the "Emergency Regulations Concerning Absentees' Property"[20] that had been enacted on December 12, 1948, by the Minister of Finance, according to his authority to enact regulations "in the interest of State defense, public security, and the maintenance of essential supplies and services."

Toubi asked: "Is there a need for these regulations, and in particular the definition of the word 'absentee,' for the sake of protecting the State, public safety, and maintaining essential supplies and services?" In addition, he wondered, "Why would an Arab citizen in Israel be considered an absentee, and why would the Custodian of Absentees' Property hold the property of this person, if he truly enjoys the same rights as any other citizen?"[21] Toubi thus pointed to the tension between the treatment of Arabs as citizens or as enemies. He sought to emphasize the gap between the promise of equal rights in the Israeli Declaration of Independence and the severe violation of their property rights under emergency regulations whose guiding logic was security—protection from the enemy. Now, after the signing of the armistice agreements, Toubi wanted to know when the Government would bring before the Knesset a bill on absentees' property that would replace the emergency regulations.[22]

Toubi's strategic choice to focus on the rights of internal refugees and not deal with the general issue of the assets of all Palestinian refugees who had lost their property due to Israeli legislation allowed him to develop a civic discourse regarding citizenship based on universal rights and equality:

> They [the "absentees"] are all citizens of the State of Israel who carry civil identification cards. Most of them participated in the Knesset elections and yet, in accordance with the above regulations, they are considered absentees, who will not be able to manage their property and use their lands.[23]

The regulations adopted and even expanded the British model regarding enemy subjects. They defined as absentee "anyone who on November 29, 1947 was a subject of the Land of Israel, and left his place of residence or place of usual dwelling in the Land of Israel without a

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[20] *Emergency Regulations (Absentees' Property), 5709–1948 (promulgated Dec. 12, 1948, expired Mar. 31, 1950, last amended Mar. 2, 1950)* (Isr.).

[21] *Knesset Debates*, 1st Knesset, Session No. 80, Sept. 12, 1949, at 1680 (Isr.) (question by MK Tawfik Toubi to the Minister of Finance) [*hereinafter* Knesset Debates No. 80].

[22] Toubi likely relied upon the enemy property model, according to which there is a prohibition against enacting permanent legislation aimed at the expropriation of assets.

[23] Knesset Debates No. 80, *supra* note 21.

written permit . . . ."[24] Behind this definition lay a national tragedy that affected a large part of the Arab population remaining in the State of Israel, as Toubi attempted to explain:

> I know personally that a large number of villagers in Israel cannot own their lands or groves, or even have access to them, due to the above-mentioned discriminatory definition, according to which they are considered absentees because they abandoned their villages of residence and moved to live in cities or other villages; I also know a number of Arab property owners who cannot manage their property or collect rent because they left Haifa after November 29, 1947, and moved to a nearby village or city that is now in Israeli territory . . . . Some of the above-mentioned property owners returned to their city of residence, Haifa, on the basis of travel documents issued by the IDF, and they live there permanently, and currently live a few steps away from their properties, while the Custodian of Absentees' Property still continues to hold their properties.[25]

In light of the difficult reality that the regulations created—the separation of Palestinian residents of Israel from their land and property, Toubi then addressed the "remedy" that they offered—the mechanism for releasing the property of an absentee:

> The procedure according to these regulations is long and tedious. For months on end, the person concerned goes from one official to another until he proves his ownership of the property. Once he does so, his file is transferred to the ministerial committee that meets once a year. If the latter decides to release a particular property, which happens very rarely, then the long procedure of delay by going back and forth [between officials] is repeated over and over again . . . .[26]

The procedure for releasing property, according to Toubi, was not intended to truly correct the overly broad definition of absentee in the law, but rather constituted another way for the Israeli bureaucracy to harass

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[24] Emergency Regulations (Absentees' Property), 5709–1948, § a(1), reprinted in U.N. Conciliation Commission for Palestine; *see* U.N. Conciliation Comm'n for Palestine, Emergency Regulations on Property of Absentees ("Absentee Property Act"), U.N. Doc. A/AC.25/W/10 (May 2, 1949) (prepared by the Secretariat), https://unispal.un.org/pdfs/1E1FE62FC7FADC9E85256F9A005927EF.pdf [https://perma.cc/8FAM-7FSL].

[25] Knesset Debates No. 80, *supra* note 21, at 1680.

[26] *Id.*

and humiliate Arab citizens.[27] He concluded by saying that in the eyes of the Arab minority, these provisions of the law amounted to "racial discrimination and national persecution, especially since these regulations apply only to Arabs and include only Arabs, and they were enacted only for that purpose."[28] The answer of the Finance Minister, **Eliezer Kaplan**, was based on three principles: a security approach; broad, case by case discretion; and formal equality. His security approach to Arab citizens deliberately blurred the distinction between an "absentee" and an enemy, relying on the logic of war and hostilities:

> There is no doubt that it was necessary to enact the regulations . . . . Due to the flight of the Arabs who did not want to remain under the rule of the State of Israel, their property was confiscated and it was necessary to appoint a custodian over it, who would ensure the preservation of the property and prevent it from being smuggled into enemy territory . . . . If it were not for the action of the Custodian . . . some of the property would undoubtedly have been sold . . . and the proceeds could have been smuggled out and used by our enemy.[29]

Kaplan refused to accept the fundamental difference between Israel's Arab citizens and the refugees who had left/been expelled from the country. Decades later, in an essay written following the amendment to the Citizenship Law of 2003 that prohibited the entry of Palestinians from the occupied territories into Israel for the purpose of family reunification, Attorney Sawsan Zaher wrote that "the doctrine of enemy subjects has always served since the establishment of the State of Israel as the basis that formed the State's attitude towards the legal status of Palestinian citizens of the State of Israel."[30] In the Knesset debate, the roots of that approach can be discerned in Kaplan's refusal to distinguish between enemy and

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[27] A document in the Israel State Archives indicates that Toubi was not far from the truth. Yehoshua Palmon, Advisor on Arab Affairs, wrote regarding the Absentee Property Law on September 5, 1948:

> Section 1—In anticipation of the possible return of Arab refugees and their acquisition of citizenship rights upon return, it is advisable: (a) that the Absentees' Property Law also encompass returning refugees; (b) that if a decision is made to return property, it should not result from a legal obligation but rather from the discretionary will of the government (or one of its ministries), and only after considerable efforts and lobbying.

*See* Israel State Archives, File Gal 17027-11 (Isr.) (on file with author).

[28] Knesset Debates No. 80, *supra* note 21, at 1680.

[29] *Id.*

[30] *See* Sawsan Zaher, *'The Enemy Aliens Doctrine' and the Palestinians in Israel*, *in* CONDITIONAL CITIZENSHIP: ON CITIZENSHIP, EQUALITY & OFFENSIVE LEGISLATION 1–21 (Sarah Ozacky-Lazar & Yousef Jabareen eds., 2016) (in Hebrew).

citizen, internal and external refugees. The Minister ignored the fact that the British defense regulations were based on a state of war, which no longer existed at the time of the Knesset debate after the signing of the armistice agreements. His words encapsulated the Zionist narrative that provided a moral justification for the confiscation of the property of the absentees by arguing that the "absentees" had chosen not to remain under the rule of the State of Israel.

Contrary to the hopes expressed by Toubi that a permanent law of the Knesset that would replace the emergency regulations would fundamentally change the treatment of Arab citizens, Kaplan stated that the definition of absentee would not change in the future law, since the release mechanism was sufficient to correct injustices in exceptional cases. In his opinion, "Experience has shown that property should be released carefully after examining each and every case, and not in a mass manner by releasing certain types of absentees . . . ."[31] The Minister relied on a concept of formal equality to categorically reject Toubi's claim of group discrimination:

> The regulations regarding absentees' property should not be seen as intentional discrimination against Arab citizens, and it should be noted that guardianship also applies to the property of Jews located in Egypt, Iraq, Syria, etc., and also to Persians, Armenians, etc., who are considered absentees in the sense of the aforementioned regulations.[32]

Indeed, the regulations refrained from making any formal ethnic or national distinction, but in reality this was a cynical claim, since, as is apparent from an earlier article written by Haim Bental, the legal advisor to the Custodian, the lack of formal distinction in the text was intended to create an appearance of equality for the purposes of public visibility. Therefore, the broad discretion given to the Custodian to decide on the release of assets enabled differential treatment of ethnic and national groups on an individual basis.[33]

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[31] Knesset Debates No. 80, *supra* note 21, at 1681.

[32] *Id.*

[33] Haim Bental, *Clarifying the Character of the Regulations Concerning Absentees' Property*, 5 HAPRAKLIT 151 (1949) (in Hebrew). This point is supported, for example, by the discussions in the Finance Subcommittee on the proposed Absentees' Property Law during two separate exchanges between MK Lam and Custodian Shafrir on December 13 and 22, 1949. Lam asked about Jews who had lived in Jaffa before the war and left their homes in the beginning of the war, but whose homes had not been returned to them. Shafrir answered that "there is no technical possibility to find a definition that will distinguish according to race, that is between Jews and Arabs. But I hereby announce that any Jew who left the country in this period of a year and a half will not be considered an absentee." *See Protocol No. B/2, Meeting of the Subcommittee on Absentees' Property Affairs, Nov. 8, 1949* (Isr.).

The opening of the Knesset debate on the treatment of absentees' property was thus characterized by a binary division between the approach of substantive equality presented by MK Toubi from the opposition, which aimed to remove the group discrimination suffered by the Palestinian minority, and a security approach advanced by Minister of Finance Kaplan, which treated all Palestinians as the enemy, advancing formal procedural equality while endowing the Custodian with broad discretionary powers to define who was an absentee and whose property would be released.

## I. THE FIRST READING OF THE LAW (NOVEMBER 22–23, 1949)

The Knesset discussions on the proposed law extending the validity of the emergency regulations on Absentees' Property show how opposition to the law took shape and how it overcame the national-ethnic divide by employing a legalist discourse that reframed the debate in terms of core issues of the rule of law, citizenship, and democracy.

Finance Minister Kaplan opened the first reading of the proposed bill with a survey of the activities of the Custodian for Absentees' Property in the various regions, in the mixed cities, and in the villages. He gave some statistics about the immense amount of property that had been transferred to the management of the Custodian: "The census of municipal properties under the supervision of the Custodian at the end of September 1948 shows that the total number of rental units was close to 52 thousand, of which close to 44 thousand were apartments and the rest were businesses and factories."[34] He explained the difficulty in evacuating tenants and settling new (Jewish) immigrants and discharged and disabled soldiers in their place. Regarding agricultural lands, he noted that over a million dunams had been seized for cultivation, and it was necessary to ensure their transfer to new Jewish agricultural settlements, as well as to provide for the Arabs working in them. All these required amendments to the British model that limited the powers of the Custodian to conservation of the status quo.

Regarding the "present absentees," he conceded that "This is a difficult and bitter problem." He mentioned various committees and programs designed to deal with it, but at the end of the day, he returned to the security approach: "We must take into account the security factors, the settlement plans, especially in the security zones."[35]

The Minister of Finance's main request to the Knesset was "to extend indefinitely, until the end of the state of emergency, the emergency regulations regarding absentees' property."[36] In other words, while the original regulations were based on the temporary logic of war and

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[34] *Knesset Debates*, 1st Knesset, Session No. 88, Nov. 22, 1949, at 136 (Isr.) [*hereinafter* Knesset Debates No. 88].

[35] *Id.* at 137.

[36] *Id.*

emergency (having to be extended every three months), Kaplan was now asking the Knesset to abolish the time limit, thereby bringing the regulations closer to a permanent arrangement.[37] To this end, a Knesset law was necessary. According to the Minister, the purpose of the regulations was "To collect the vast property left behind by its owners during the War of Independence and to preserve it, so that it does not get lost."[38] But for whose benefit was the law trying to "preserve" or safeguard the property? For the benefit of its original owners, or for the general benefit of the State as a whole? Kaplan did not elaborate. As the Knesset debate developed it became clear that the law aimed at facilitating a collective transfer of Arab property to State authorities in order to redistribute them only to Jewish sectors.[39] The original regulations were drafted according to the British model of a Custodian of enemy property, which severely limited the Custodian's actions and saw him primarily as a guardian of the property for a limited period of time.[40] Now, after the end of the hostilities, the Minister of Finance sought to give the Custodian powers of long-term management and development of the properties, alongside the possibility of their sale.[41] In this context, Kaplan mentioned similar legislation that had been passed in Pakistan and India:

> In India and Pakistan, too, there is a similar problem of abandoned property, the origin of which lies in the inter-communal riots that broke out with the establishment of these two countries. In 1947, laws were enacted there to regulate abandoned property, and now the Indian Government

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[37] *See* Alexandre (Sandy) Kedar, *Majority's Time, Minority's Time: Land, Nation, and Israeli Property Law*, 21 IYUNEI MISHPAT 665, 699–700 (1998) (in Hebrew).

[38] *Id.*

[39] *See* OREN YIFTACHEL, ETHNOCRACY: LAND AND IDENTITY POLITICS IN ISRAEL/PALESTINE 101–05 (2006).

[40] In the United Kingdom, the *Enemies of Britain (Amendment) Act 1914* established the office of the Custodian of Enemy Property, thereby authorizing the expropriation of assets—most notably land—owned by German nationals. Subsequently, the enactment of the *Trading with the Enemy Act 1939* empowered the British government to restrict access to property held by enemy nationals, including assets located in Mandatory Palestine, with a particular focus on impeding utilization by the Nazi regime. The role of the Enemy Property Custodian was dual: to prevent enemy states from utilizing the property to support their war efforts and to temporarily preserve property pending a peace settlement that would determine liabilities and facilitate post-war reparations. This model excluded permanent expropriation of property. *See* EYAL ZAMIR & EYAL BENVENISTI, THE LEGAL STATUS OF LANDS ACQUIRED BY ISRAELIS BEFORE 1948 IN THE WEST BANK, THE GAZA STRIP AND EAST JERUSALEM 52, 54–55 (1993); *see also* Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 318 (1995).

[41] The 1948 Emergency Regulations limited the powers of the Custodian, prohibiting the sale of the properties under his control. He was only permitted to lease them for a period not exceeding five years. Ownership of the refugees' property was not expropriated from them. The enactment of the Absentees' Property Law and the Development Authority Law was necessary to allow Israel to lease and sell refugee property. *See* Golan, *supra* note 6, at 39–40.

> about six months ago enacted a new and comprehensive law on the same matter . . . . There are many common lines and ideas between Indian law and Israeli regulations. When you read Indian law, the thought comes to mind, after all, we have nothing to be ashamed of in this law of ours, but it is far from being completely perfect.[42]

Immediately after the Finance Minister introduced the bill, MK **Yohanan Bader** from the right-wing Herut party rose to talk and presented the absurdity of the Minister's request to "authorize the Custodian . . . to sell all the land to an authority that does not exist, except with the good or bad intention of the Minister."[43]

Following Bader's opening shot, Jewish MKs from all opposition parties ascended to the Knesset podium and sought, each in their own way, to transform the debate from a sectarian question concerning only the Arab minority to a general problem that concerned all citizens of Israel. They sought to explain that the law's effects could not be narrowed down to issues of property since it posed a real threat to the young democracy and undermined the entire idea of the rule of law. Their shared concern was about democracy and the rule of law, but behind the principled arguments were huge material interests.

### *A. Between the Rule of Law and Rule by Bureaucrats*

**MK Ya'akov Klivnov (General Zionists)** began his remarks by criticizing the Minister of Finance's treatment of the property as "enemy property":

> We are not dealing with enemy property, but with the property of a significant portion of the population of our country, who have and can have very important rights. These people can come to us with very serious claims, both financial and moral, and we cannot look at their

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[42] *See* Knesset Debates No. 88, *supra* note 34, at 139; *see also* Bental, *supra* note 33, at 150 (Subsequent legal-historical scholarship has confirmed the assumption that the Israeli Absentees' Property Law was modeled on Pakistani legislation, including the establishment of the Development Authority as an entity authorized to purchase and redistribute absentees' assets). *See* Alexandre (Sandy) Kedar, *Expanding Legal Geographies: A Call for a Critical Comparative Approach*, *in* THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY 95–119 (Irus Braverman et al. eds., 2014); *see also* Alexandre (Sandy) Kedar, *The Jewish State and the Arab Possessor: 1948–1967*, *in* THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY: ISRAEL 1917–1967 311, 323 (Ron Harris, Alexandre (Sandy) Kedar, Pnina Lahav & Assaf Likhovski eds., 2002); Rephael G. Stern, *Uncertain Comparisons: Zionist and Israeli Links to India and Pakistan in the Age of Partition and Decolonization*, 39 LAW & HIST. REV. 451 (2021).

[43] *See* Knesset Debates No. 88, *supra* note 34, at 140.

> property as enemy property. This is the fundamental error of the Minister of Finance in this matter.[44]

Klivnov's main concern was the rule of law. He began by noting that "the fact that all those who registered to speak in the Knesset were lawyers and jurists shows that the law had a fundamental flaw." He argued that the law had the power to (mis)shape the nature of democracy in Israel since the sweeping powers that it granted to the Custodian effectively created "rule by officials" instead of the rule of the Knesset as an elected representative body. Klivnov explained that the law endowed quasi-judicial powers to a Government Official who was not even a lawyer but an official of the Finance Ministry who "has an eye for money." He claimed that his criticism was not directed personally against the current Custodian, but that "if an official is appointed and granted broad powers that far exceed . . . the powers of any official or any judge in his country, it is natural that we encounter phenomena of arbitrariness that harms the interests of many people."[45]

Since Klivnov's main concern was the rule of law and the arbitrary powers given to a Government Official, he suggested that the problem could be corrected by establishing an appeals committee "to which anyone who has been harmed, whether Arab or Jew, can turn and seek justice against that official."[46] MK **Ya'akov Gil (General Zionists)** joined this line of criticism, stating that "the framework of the law gives expression to the rule of the bureaucrat . . . the Custodian of Abandoned Property, according to the bill, is omnipotent."[47] This violated not only the rule of law, but also a fundamental principle of democracy—the principle of separation of powers:

> This bill regarding abandoned property . . . [is] typical evidence of the Government's perception of a fundamental question for this country, namely: the division of powers that characterize every democratic country, as well as the role of the official in the Executive Branch of Government and the important democratic principle, which guarantees civil equality in the enjoyment of state property.[48]

Gil concluded by saying: "Justice Brandeis once defined the essence of democratic law in this way: 'A law of the people, by the people, for the people.' But this law of abandoned property can be defined as: 'A law of

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[44] *Id.* at 141.

[45] *Id.* at 141–42.

[46] *Id.* at 141.

[47] *Knesset Debates*, 1st Knesset, Session No. 89, Nov. 23, 1949, at 160 (Isr.) [*hereinafter* Knesset Debates No. 89].

[48] *Id.* at 160.

the Treasury by the Custodian for the benefit of one party.'"[49] Here we see how concerns about the rule of law were merged with concerns about misuse of the Custodian's powers for the benefit of the ruling party Mapai.

From the left side of the political map, MK **Aharon Ziesling of Mapam** echoed the criticism about the rule of bureaucrats. He noted that the property that had been transferred to the Custodian amounted to a large part of the national property of the entire country: "And here, in such a grave, comprehensive and serious matter, the bill grants extensive and general powers . . . to the discretion of one individual . . . . In the proposal before us, the Custodian is above the law."[50]

MK **Moshe Ben Ami** of the Sephardim party, who had studied law at the Hebrew University, explained the problem in terms of the rule of law: "The Custodian is both the claimant and the judge; these two essentially contradictory things are united in his role, and this is wrong in every way."[51] However, unlike other Jewish MKs who were content with an abstract discussion of the rule of law, Ben Ami wanted to convey the human stories behind the law. He presented two cases of Palestinian residents of Jaffa who had chosen to stay ("did not abandon") and had even cooperated with the Israeli army, but this had not prevented the Custodian from harassing them. One family stayed in Jaffa and after they were removed for security reasons to a designated area (what the residents called a ghetto),[52] the Custodian suddenly needed an apartment and immediately issued a certificate that allowed him to turn the family out onto the street "without taking into account the fact that these people had been evicted from their homes by the military authorities before they had entered this apartment and lived in this place."[53] The other case concerned a Palestinian who had worked in the post office and during the army's occupation of Jaffa had "extended his help." After becoming unemployed he found a corner in one of the alleys to trade in. "The Custodian's wrath came upon him without any consideration for his past, his attitude, and his service to the State."[54] The many petitions submitted by Palestinian citizens of Israel to the Ministry of Minority Affairs regarding their confiscated property reveal that these were typical stories. Many of the petitioners emphasized their loyalty and cooperation with the Israeli authorities as the basis for restitution of their property and compensation for their damages.[55]

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[49] *Id.* In fact, this phrase was coined by Abraham Lincoln in his Gettysburg Address.

[50] *Id.* at 153.

[51] Knesset Debates No. 89*, supra* note 47, at 149.

[52] *See* SEGEV, *supra* note 15, at 69–73 (citing a transcript of a meeting between representatives of the Arab public in Haifa and the commander of the occupied city, in which Tawfik Toubi declared: "The intention is to create an Arab ghetto in Haifa.").

[53] Knesset Debates No. 89*, supra* note 47, at 149.

[54] *Id.*

[55] *See* Leora Bilsky & Liat Kozma, *Petitioning the Ministry of Minorities 1948–1949* (draft manuscript) (on file with author).

Ben Ami also strongly criticized the Finance Minister's reliance on the Indian/Pakistani model:

> We are a long way from India and Pakistan, and we do not know what happened there. We have not examined that law, nor is it in our possession to serve as a reference. In any case, I do not suppose for even a moment that the law in Pakistan and India entitles the Custodian to be only an heir of rights, and exempts him from paying debts. This is not acceptable in any country in the world.[56]

**MK Bader** (Herut), who was also an attorney in law, used legalist discourse to turn the problem into one that concerned every citizen in Israel: "Our friend Tawfiq Toubi thinks that this law is directed against the Arabs, against Arab refugees. But he is wrong. It is not so." The problem was, rather, the vast powers granted to the Custodian with regard to the property of Absentees. Bader's main criticism focused accordingly on the violations of the rule of law:

> When you want to take away someone's property, there is need for a trial, evidence, a magistrate's court, etc. . . . . This is not the case with the Custodian**.** He is above the law. He can write a certificate stating that a certain property belongs to an absentee, and based on this certificate he has the right to take it away . . . . There is no need for the Custodian to be convinced and believe . . . that the property is the property of an absentee, it is enough if the Custodian [merely] thinks that that's the case."[57]

The Absentees' Property Law, according to MK Bader, in effect created a tyrannical regime at the heart of Israeli democracy, and as such, endangered all citizens:

> Today [the Custodian] has . . . the authority of a Government, and he can use the authority of an absolute monarch, of a king of kings, of a caliph, of some sheikh or sultan, without any concerns and without any responsibility . . . . Gentlemen, according to this law the Custodian's hand will be upon us. I do not have many complaints against Mr. Shafrir [the Custodian] . . . but his office is the office of a tyrant . . . .[58]

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56 Knesset Debates No. 89, *supra* note 47, at 150.

57 *See* Knesset Debates No. 88, *supra* note 34, at 144.

58 *See also id.*

### *B. From "Rule of Law" to Constitutional Problem*

**MK Zerach Verhaftig** (United Religious Front) was also a jurist. He claimed that he wanted to raise only one problem—a constitutional problem. He pointed to the sections in the regulations that exempted the Custodian and his officials from civil or criminal liability for any consequences of receiving property into their hands and handling it, as long as they did not act maliciously, and claimed that this was not appropriate for a democratic state:

> In my opinion, this entire section is a legacy of a similar law of the Mandate Government regarding the responsibility of the Custodian in charge of enemy property, according to which the Custodian is exempt from any responsibility for any act of negligence or carelessness . . . . Perhaps there is room for exemption from responsibility for acts committed up to now, during the period of the establishment of the State and the beginning of its organization, but in no way for the future, when law and order is restored. Such an exemption is a hole that calls the thief, because there will be no caution, since the official knows that the law protects him and the law exempts him in advance. This could destroy discipline and order in our bureaucracy.[59]

Verhaftig argued that the transition from colonial rule to democracy should be expressed not only in form (from a temporary arrangement to a permanent one, and from regulations to law) but also in substance—a democratic regime required the rule of law to apply to officials as well; no one should be above the law.[60]

**MK Yisrael Rokach (General Zionists)** also took a broad historical perspective:

> Two tragedies have met here: the beginning of the end of the tragedy of one people and the tragedy of another people, who were our neighbors. And our vision should not become something harmful, and we should fix it for the sake of history.[61]

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59 Knesset Debates No. 88, *supra* note 34, at 143.

60 *Id.*

61 Knesset Debates No. 89, *supra* note, at 155.

This was the first time in the debate when a Jewish MK acknowledged the tragedy of the Palestinian people. Moreover, he insisted that it was the Knesset's responsibility to change their fate:

> There is a need for a humane attitude towards our neighbors in those many cases, because some of them were our friends, and they live with us and it is not so easy for them to manage. We should not think that because we have solved the issue of military security we do not need to be humane . . . . It would not hurt us to show a little more humanity . . . .[62]

Although he employed a humanitarian discourse, rather than a universal discourse of civil rights, he formulated the main problem in constitutional terms of the supervisory role of Parliament in relation to "abandoned property." Rokach was outraged that the Minister of Finance was turning the problem into an administrative matter, because he saw it as a constitutional issue of creating effective mechanisms of review and supervision over the administration:

> The Knesset should have authority over actions concerning abandoned property. This State of the Absentees' Property Law is much larger than the one in which we live and over which we have economic supervision. The matter should not be handed over to the Custodian, or to any other individual, or even to a group of representatives from the various ministries.[63]

### *C. The Criticism of the Arab MKs — from Custodian to Absentees*

The Arab MKs highlighted the blatantly undemocratic nature of the law by focusing on the Absentees. As **MK el-Zoubi** (Democratic List of Nazareth) explained,

> The absentee is absent, and even he who is present is absent. This is a discriminatory law, which has nothing to rely on, and the amendment is even more discriminatory. I do not see any sign of amendment in this proposal, and I believe that if it was called the Enemy Property Law, it would be closer to reality. I do not stand on this podium to protect the rights of the absentees, but I came to protect

62 *Id.* at 156.
63 *Id.* at 155.

> the property of those present, whom this law considers absentees.[64]

El-Zoubi condemned the law's treatment of Arab citizens as the enemy and urged the Knesset to clearly distinguish between enemy and citizen:

> It is not logical or fair to deprive a person . . . of his money and property because he was absent from his town or village for a period of one or two weeks after it was occupied by Israeli forces. This person returned home before the start of the census, registered at the registration offices and received an Israeli identification card, which is no different from the card that I carry. He also participated in the Knesset elections and voted and was elected.[65]

El-Zoubi believed that the franchise, the political right given to Arabs to vote and be elected to the Knesset, should not be separated from the civil right to own property; the two were intertwined, and equality meant respecting the right to own property as well. El-Zoubi gave examples of people who were considered absentees by this law, such as the residents of Tur'an, who had been absent from the village for only a few days when it was occupied, had hid nearby and returned immediately after the occupation, or residents of the city of Nazareth who had returned and even received identification cards. In contrast to the Minister of Finance, who sought to present all absentees as enemies who had deserted the country in a cowardly manner, el-Zoubi presented them as courageous people who had chosen to return to the State of Israel and live under its rule as loyal citizens:

> However, a person who managed to return and preferred to live in this country, under the protection of this State, and did not pay attention to the dangers that awaited him when he crossed the borders to reach his home, did not spare his life and the lives of his wife and children and did not think about what his fate would be, and the authorities knew about his arrival, such a person should not be thought of as an absentee . . . [but] as a loyal citizen . . . .[66]

El-Zoubi used the platform of the Knesset to paint a vivid picture of how the law affected the victims of the Nakba in specific cases: the people of the village of Ilut, those internal refugees who lived in the Al-Salesian

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64 Knesset Debates No. 89, *supra* note 50, at 148.

65 *Id.*

66 *Id.*

Monastery in Nazareth, were starving, while the Government continued to demand that they pay taxes on their confiscated property; the residents of Beit Shean, who had been transferred to Nazareth in army cars long after the town had been occupied by Israeli forces; the Arabs of Al-Keitna, who had collaborated with the authorities and yet had been evicted from their village by the army; the Arabs of Al-Halakhla, who had been transferred to the village of Akbara: "I visited that village, and how sad I was when I saw everyone, men, women and children, crying because they could not live in their destroyed houses and in their village that resembles hell."[67] He therefore demanded that the status of "present absentee" be abolished and that anyone who carried an official Israeli identification card should be recognized "as a rightful citizen and entitled to all the rights enjoyed by a citizen," and that their assets and property should be released.[68]

MK **Toubi** agreed that the most oppressive article of the law and the "most harmful to a large number of citizens of the country" was the definition of absentee. He cited, for example, the case of the residents of Ilabun who had been forced to evacuate the village when it was occupied, were allowed to return after two or three weeks, but "the Custodian firmly maintains that they are absentees, and demands that they pay their? wages to the Custodian for the use of their own lands that they are cultivating again."[69] This example showed that the definition of absentee did not serve security concerns but rather oppression and economic exploitation.[70]

Like the Jewish MKs, Toubi criticized the Custodian's broad powers, arguing that they were designed only to create obstacles to the release of assets. Therefore, he did not join proposals such as that of MK David HaCohen of Mapai to add an appellate instance to which those who had

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67 *Id.* at 149.

68 *Id.*

69 *Id.* at 152.

70 There is extensive scholarship on the political economy of the transformation of Palestinian society from rural landowners and farmers into laborers economically dependent upon the Israeli market. It shows that economic interests often underlay the security justifications that were made for the Custodian or for the Military Government imposed on the Palestinians. Gadi Algazi, for example, characterizes the Israeli military government not merely as a mechanism for controlling Palestinian citizens but also as an integral component of a colonial political-economic system that facilitated the appropriation of Palestinian property by various sectors within Israeli society, thus enabling their economic enrichment. *See* Gadi Algazi, *Colonial Profits in the Shadow of Military Government*, *in* SETTLEMENT AND RESISTANCE IN ISRAEL/PALESTINE 164 (Lev Grinberg & Daniel de Malach eds., Hakibbutz Hameuchad & Van Leer Institute, 2020) (in Hebrew). Similarly, Kabha and Karlinsky document the economic disruption and dispossession experienced by Palestinians, as exemplified by the destruction of their citrus industry, which had previously been central to Palestinian agricultural prosperity and economic autonomy. *See* MUSTAFA KABHA & NAHUM KARLINSKY, THE LOST ORCHARD: THE PALESTINIAN-ARAB CITRUS INDUSTRY, 1850–1950 (Resling, 2020) (in Hebrew); *see also* Yair Bäuml, *The Discrimination Policy toward the Arabs in Israel, 1948–1968*, 16 IYUNIM BITKUMAT ISRAEL 391 (2006) (in Hebrew); Benni Nurieli, *Foreigners in National Space: Jews and Arabs in the Lod Ghetto*, 1950–1959, 26 THEORY & CRITICISM 13, 15–42 (2005) (in Hebrew).

returned and received Israeli citizenship could complain that their property was not being released. He argued instead that the very authority of the Custodian to release the assets should be changed from discretionary to obligatory: "Logic and justice require that if it is determined that the owner of the property is not absent or has ceased to be absent, the Custodian must return his property to him."[71]

### *D. Loyalty & Trusteeship: To Whom Does the Custodian Owe Loyalty?*

The security approach towards Palestinians advanced by Minister Kaplan and his colleagues in Government was motivated by suspicions regarding their loyalty and demands that they actively demonstrate allegiance to the State as a precondition for citizenship. This perspective was exemplified in the Absentees' Property Law, which granted the Custodian discretionary authority to release property—even if the owner could technically be defined as an absentee—provided that the Custodian believed the applicant could effectively manage the property and that "he will not in so doing be aiding the enemies of Israel."[72] In contrast, Arab MKs sought to invert this discourse—instead of questioning their loyalty to the State they emphasized the breach of loyalty of the Custodian and the State towards the Arab citizens, the original owners of the property.

The Absentees' Property Law used legal terms such as custodian or guardian that have familiar legal meanings in the private law of trusts. In reality, the Arab public saw it as a means for stealing their property. How could such a law be squared with the commitment to uphold the rule of law? In the many petitions sent by Palestinian residents of Israel to the Ministry of Minority Affairs they criticized this breach of fiduciary duties of the Custodian. For example, Naim Halabi of Jerusalem wrote:

> [T]he ordinance dealing with absentees' property was made apparently with a view only to "take" and not to "give". If this law was intended to preserve the property of absentees, I am sure you will agree that it was definitely not intended to usurp the rights of those Arabs who are not absentees . . . .[73]

Halabi, who after 1948 became the guardian of the property of his deceased brother and his orphaned nephews, contrasted his understanding of a guardian's duties of trust with the cynical use of the term in the Absentees' Property emergency regulations. This amounted to a perversion of the idea of trusteeship.

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71 Knesset Debates No. 89, *supra* note 50, at 159, 152–53.

72 Absentees' Property Law, 5710-1950, § 27(b), SH No. 37 p. 86 (Isr.).

73 Letter dated May 27, 1949, cited in Bilsky & Kozma, *supra* note 55.

During the first reading of the law in the Knesset, this issue—to whom the Custodian owed a duty of trust—remained unclear. Should it be interpreted in accordance with the ordinary legal concept of guardianship or trusteeship, which is obliged to protect the assets for the benefit of the original owners, or should this duty of trust be expanded to include the State and the public at large? **MK Ziesling,** who served until March 1949 as the Minister of Agriculture, suggested that the fiduciary duties of the Custodian be expanded to include a dual loyalty:

> a) for the benefit of the absentee owners if and to the extent that it becomes necessary to return the property or its value to them in the future or to compensate them for it; b) for the benefit of the State—for the purpose of effectively implementing an economic development plan in the country, in order to expand its economy and absorb additional immigrants into it.[74]

Finance Minister Kaplan was quick to adopt this proposal: "We have two difficult tasks. One is to safeguard the property of absentees, and the other is to care for the development of the country." In contrast to the MKs who saw the law as undermining the democratic regime in Israel, he argued that the law should be treated as a necessity of bitter reality "not out of a desire for power, but out of loyalty to the State, out of loyalty to the 'absentee,' we must ensure that we have the possibility of rapid action."[75]

However, Justice Minister **Pinchas Felix Rosen** (Progressive party) firmly disagreed with the attempt to expand the concept of trust underlying the institution of the Custodian: "After all, the Custodian is the trustee of the absentees." The Minister added that although some MKs "defined the goals of the law according to their own interests, these definitions have no references in the body of the law." As a liberal jurist, Rosen relied on a formal-procedural understanding of the rule of law to dismiss various criticisms raised in the debate. For example, he relied on the narrow definition of fiduciary duty of trust for the benefit of the absentees to explain why the Custodian could not pay the absentee's debts because he did not know whether the "absentee," on whose behalf he held the property, might be able to counter the claimant's demands.[76] Thus, while the original owners were separated by law from their property, they were required to pay any debts it had accumulated.

The Justice Minister's legalistic approach led him, however, to doubt whether it was advisable to turn the emergency regulations into a permanent law, as several critics had suggested: "Emergency regulations

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74 Knesset Debates No. 89, *supra* note 47, at 153.

75 *Id.* at 165.

76 *Id.* at 166.

are used when you want to legally regulate things that have no place in normal times. It should be carefully considered whether it is wise to issue a permanent law in this area."[77] In other words, Rosen wanted to leave the issue of absentees' property as an exception in Israeli law, since he knew full well that these regulations amounted to a serious violation of the principles of the rule of law and could undermine the protection of property in the young State. However, Rosen's legalism also helped him dismiss the fundamental claims raised by critics about the law's broad definition of absentees' property and the injustice it created. Like the Finance Minister, he pointed to the mechanism for releasing assets as providing a satisfactory answer. Rosen justified the immunity enjoyed by the Custodian for his decisions in terms of protecting commercial life—a 'market overt' defense of bona fide purchase designed to protect a third party who relied on the certificates of the Custodian. As for the possibility that the guardian might issue an erroneous certificate that the property belonged to an absentee, the Minister of Justice explained that this was only prima facie proof, "but one can go to any court and claim that the certificate was issued unjustly and unlawfully."[78] In his formal justification the Minister ignored (or chose to ignore) the many obstacles that Arab citizens faced on their way to court, such as lack of knowledge of the language, lack of financial resources for legal representation, the paucity of Arab lawyers, and lack of familiarity with the new legal system.[79]

## II. THE SECOND READING OF THE LAW (FEBRUARY 27, MARCH 7 & 13)

Upon the conclusion of the discussions on the first reading of the bill, the law was transferred to the Knesset Finance Committee, which delegated it to a subcommittee consisting of members of the Finance Committee alongside members of the Constitution, Law and Justice Committee.[80] The committee decided, contrary to the position of the Minister of Justice, to change the emergency regulations into a law, thus rendering permanent the ostensibly temporary expropriation. This proposed law with various amendments was brought to the Knesset for a second reading. By 1950, Israel had gained United Nations membership, alleviating earlier concerns about its international legitimacy. This may explain the willingness of the Government to draft a permanent Absentees' Property Law, transferring

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[77] *Id.* at 165.

[78] Knesset Debates No. 89*, supra* note 50, at 166.

[79] *See generally* Ahmad Saadi, *The Incorporation of the Palestinian Minority by the Israeli State, 1948–1970: On the Nature, Transformation, and Constraints of Collaboration*, 87 SOCIAL TEXT 21 (2003); *see also* Gal Amir & Na'ama Ben Zeev, *Lawyers in Transition: Palestinian Arab Lawyers in the First Decade of the Jewish State*, 35 CONTINUITY & CHANGE 371, 375–92 (2020).

[80] Notably, Arab MKs were invited only to present arguments and were not part of the subcommittee that dealt with the Bill.

properties of displaced Palestinians to the Custodian and enabling him to confiscate and sell them to a development authority.[81]

The Chairman of the subcommittee, **David-Zvi Pinkas,** presented the main amendments that it had introduced into the law. He noted that, notwithstanding the criticism expressed in the Knesset debates, the mechanism for releasing absentee assets had not changed: "I emphasize that the return of a person who was previously an absentee to the State of Israel does not thereby exempt his assets from being absentee assets. The matter requires examination on a case by case basis." This was because "We have not found another way that would not jeopardize the protection of the state as well as the assets of the absentees."[82] Here we see how the understanding of the fiduciary duty of the Custodian had been expanded to include the State. He concluded by acknowledging that this was a "difficult law" in two senses: one, due to the need to regulate the fate of most of the assets in the State, mainly land—assets that might involve tens of thousands of owners; and second, due to the need to ensure that the assets were used efficiently, "so that they do not become dead assets." While in the first reading, there was still ambivalence between the Custodian's fiduciary duty towards the original "absentee" owners and a dual fiduciary duties to both the absentees and the State, in the second reading, the Government actively sought to distinguish between the original owners and their assets. As Yosef Lam on behalf of the Subcommittee explained, "This law intends to preserve the assets of absentees for purposes to be determined by the Knesset. I do not wish to enter here into the question of whether this is for the benefit of absentees or to their detriment; but the backbone of the law is undoubtedly—to preserve the assets of absentees."[83]

### *A. The Spirit of the Law*

The first to respond was MK **Jarjoura**. He wished to remind the Knesset of the original justification for the law:

> This law was enacted . . . to protect and safeguard the assets of absentees. It deals with vast and valuable property, since the legal owners of the assets are absentees, and are unable to express their opinions and protect their rights it was the duty of the committee that dealt with the Absentees' Property Law to adhere to the principles of justice and fairness, to distance itself from any spirit of

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81 *See Admission of Israel to Membership in the United Nations*, G.A. Res. 273 (III), U.N. Doc. A/RES/273(III) (May 11, 1949), https://digitallibrary.un.org/record/210373?ln=en [https://perma.cc/4MCD-EBSS]; *see also* Golan, *supra* note 6.

82 *Knesset Debates*, 1st Knesset, Session No. 119, Feb. 27, 1950, at 868 (Isr.) [*hereinafter* Knesset Debates 119].

83 *See Knesset Debates*, 1st Knesset, Session No. 123, Mar. 7, 1950, at 952 (Isr.).

> plunder and denial of the rights of absentees regarding their assets, from a desire to take revenge and impose severe penalties.
>
> However, to our great regret, the committee worsened the law to the point that it became a law of revenge, and went from bad to worse. It will harm both the "absentee" and those who are "present," and especially the Arab residents. It is impossible for a democratic and just State to agree to such a law, and anyone who examines the law will find that it is closer in spirit to a criminal law than to a law aimed at protecting and safeguarding the assets of absentees . . . .[84]

In contrast to the narrative presented by Finance Minister Kaplan, he described the absentees not as enemies, but as frightened citizens:

> The Arab residents of the country, who left their homes and property in the Land of Israel and went outside it out of fear and terror, in order to escape the catastrophe and to avoid the ravages of war and participation in its actions, they were mostly owners of firms and commercial establishments, merchants, homeowners and farmers, and peaceful citizens, who should not be considered enemies and fighters.[85]

His distinction between enemy and citizen led Jarjoura to demand the return of the Arab residents' property automatically as a matter of right:

> The assets of the absentees are kept in trust with the State until their case is decided, and therefore, it is natural and obvious that anyone who was allowed to return to the country and was accepted as a resident and registered as a citizen and was given an identification card and participated in the elections that were held and that will still be held in the country, and pays taxes and property taxes, it is only right that his property and the right to manage the property be returned to him like other citizens of the country.[86]

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84 *Knesset Debates 119*, *supra* note 82, at 870.

85 *Id.* (Jarjoura spoke in Arabic and relied on simultaneous translation by Moshe Piamenta that was provided to Arab MKs by the Knesset. The Knesset transcript uses the Hebrew word *Sho'ah* for "catastrophe" and "Land of Israel" instead of Palestine. I was unable to determine what terms Jarjoura originally used.)

86 *Id.*

### *B. Citizenship as Autonomy*

At the heart of Jarjoura's criticism lies an alternative vision of democratic citizenship, which links the protection of private property to autonomy, defined as "[n]ot to be present in fact, and absent according to the law. Not to be in need of the mercy of others, with permanent rights and the possibility of leading a constructive and fruitful life for his own benefit and the benefit of all residents."[87] His words echo the concept of citizenship upheld by Thomas Jefferson, one of the founding fathers of the American Constitution, according to which citizenship was based on the idea of the independence or autonomy of the person, even before the question of equality. If a person is dependent, he cannot become a full citizen. This is a positive understanding of liberty and rights. In the Israeli context, Jarjoura depicted the Custodian as responsible for leaving Arab citizens in a state of dependence and need. The restoration of their property, he insisted, would allow them to be autonomous not only in the formal sense of voting for the Knesset but also in managing their daily lives. [88] He concluded his remarks by saying that for this purpose, anyone residing lawfully in the country should be excluded from the status of "absentee."

If for Jarjoura, the problem with the Absentees' Property Law was its punitive nature—its treatment of the Arab citizen as an enemy who must be punished—for Toubi, the law itself was the problem, since it promoted a "policy of legal plunder of the assets of many Arab citizens in Israel . . . ." In his view, the law was criminal as it served the strong in order to plunder the weak. He therefore rejected the idea that the remedy for Palestinian citizens lay in simply preserving the rule of law since laws could serve oppressive or discriminatory policies.[89]

MK **Moshe Sneh** from Mapam was the first Jewish MK to join the call of Arab MKs to automatically return property to Arab citizens who lawfully resided in the country: "Gentlemen, the matter is quite simple,

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[87] *Id.*

[88] A similar approach can be detected in the Knesset debate over the 1951 Law for Equal Rights for Women. The representative of the Women's Party, Rachel Cohen-Kagan demanded equality in family property between men and women, seeing property as the basis for autonomy and equal citizenship for women. *See* Pnina Lahav, *When the Palliative Simply Impairs: The Debate in the Knesset on the Women's Equal Rights Law*, 46–47 ZMANIM 149, 149–51 (1993) (in Hebrew)

[89] *See* Raz, *supra* note 19, at 77, 211 ("A society may be committed to the formal features of legality . . . yet at the same time pursue a goal like racial segregation that perpetuates a great moral evil."). For a critical evaluation of legalism in the context of Palestinians in Israel, see Raef Zreik, *When Winners Lose: On Legal Language*, 17 INT'L REV. VICTIMOLOGY 49, 62–63 (2010). Theoretical literature on the "criminal rule of law" explores how legal frameworks can be manipulated to serve authoritarian/colonial ends. *See* ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (1941); *see also* NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 1–33, 35–68 (2003).

although quite serious. The question is, whether it is possible by law to define as absent someone who is not absent."[90] He suggested adding to the definition of absentees the phrase "if he did not return to the country *legally*," explaining that if a person had left the country during the war and received permission to return there was no longer any basis for the State to deprive him of control over his property.

Sneh, like Jarjoura, conceived of citizenship as autonomy:

> For what should be the attitude toward such a person? Should he be left in the country, without being able to use his property? Will such an attitude educate him to be a loyal citizen? He does not need a guardian; He is already here; He is his own guardian. If you allow him to return to the country, you are not allowed to put a guardian over him.[91]

Sneh added a utilitarian rationality, arguing that the restitution of the assets would help educate Arab citizens to be loyal citizens, and would also promote Israel's good name in the world.

Pinkas, the chairman of the Finance Committee was quick to retort:

> I would like to ask MK Sneh . . . if he really thinks that without any inspection it is possible to return property to a person who left the country, and for this reason to expel from these "abandoned villages" Mr. Sneh's friends who have been settling there meanwhile. We must be honest with ourselves and not preach justice and the brotherhood of peoples in public declarations as a lip service.[92]

These remarks exposed the contradiction or hypocrisy in Mapam's position, which ideologically opposed the refusal to permit the return of refugees but nonetheless supported policies transferring refugee lands to Jewish settlement, with the vast majority of the so-called "abandoned" lands leased to Mapam-affiliated kibbutzim.[93]

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[90] Raz, *supra* note 19, at 871.

[91] *Id.*

[92] *Id.* at 872.

[93] The leasing of abandoned lands became a point of political contention between the two leading labor parties (Mapai and Mapam). The majority of these lands were leased to settlements and kibbutzim affiliated with Mapam notwithstanding its criticism of the Government policy toward the Palestinian refugees. As noted by Golan,

> [I]t appears that the commitment of Mapam members to the ideal of returning Arab refugees, advocated by their party leadership, was diminished by their expectation that temporarily leased lands would become permanently available to them. They viewed this as essential, given the acute shortage of land facing many of these kibbutzim."

Golan, *supra* note 6, at 35.

In a similar vein, Pinkas responded to Jarjoura by pointing out that "many absentee Arabs will lose their property if we accept his proposal, because when they return to the country they will find their property not in the loyal hands of the Custodian, but in the hands of those who seized their property from among their own people."[94] He failed to mention, however, that it was the Government's policy to concentrate Arab citizens in certain areas and resettle them in the property of refugees.[95] Thus, he could conclude that the law did not undermine equal citizenship since it applied "equally to both Jews and to all members of all religions and nationalities present in the country."

### *C. From Exceptional Law to Basic Law*

When the Knesset deliberations resumed on March 7, **MK Elyashar** (Sephardim party) criticized the law from a different angle by presenting it as a de-facto constitutional law: "I must point out that this law is one of the *basic laws* of our country. This law severely violates the rights of the Israeli citizen."[96] A few months after this discussion, in June 1950, the first Knesset would accept the "Harari compromise" according to which individual chapters of the future constitution would be enacted gradually as basic laws, a policy that aimed to overcome the disagreement between secular and religious parties over the Bill of Rights, and especially the right to equality.[97] Elyashar chose to employ the term "basic law" already in this early debate to indicate the constitutional negative significance of the Absentees' Property Law. In contrast to the constitution to which the Israeli Government had committed itself, which was supposed to guarantee the equal rights of all citizens in the country, the Absentees' Property Law was a basic law that infringed the rights of Israeli citizens both Arab and Jewish. He warned that infringement on the property rights of Palestinians would inevitably lead to infringement on the rights of all citizens, a warning that was partly fulfilled. Legal historian Yifat Holtzman Gazit has shown how the Israeli courts, committed to formal equality, developed general doctrines based on the Absentees' Property Law that weakened the protection of private property of both Arabs and Jews for decades.[98]

Like his colleague Ben Ami from the Sephardim party, Elyashar did not limit himself to an abstract discussion of the rule of law but pointed

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94 *Id.*

95 SEGEV, *supra* note 15, at 69–73.

96 Knesset Debates 119, *supra* note 82, at 951.

97 *See 5 Knesset Debates 1743 (June 13, 1950)* (Isr.). This piecemeal strategy has led to an ongoing constitutional evolution, with debates persisting regarding the sufficiency and coherence of this framework. *See* Amnon Rubinstein & Barak Medina, *The Constitutional Law of the State of Israel*, *in* VOL. I: INSTITUTIONS 78 (6th ed. 2005).

98 YIFAT HOLZMAN-GAZIT, LAND EXPROPRIATION IN ISRAEL: LAW, CULTURE & SOCIETY (Ashgate Publishing, 2007).

to the concrete effects of the law on Jewish-Arab partnerships that had existed before 1948:

> This section [about partnerships and corporations] could cause harm to Jews and Arabs, who are now citizens of their country. After all, we had partnerships between Jews and Arabs . . . . If I appointed an Arab to manage my garage and that Arab fled, why would they come and take my garage from me . . . a citizen of Israel?[99]

Elyashar had a unique voice in the Knesset. As a member of the Sephardim party, he was among the first to expose the systematic discrimination against Jews who had immigrated from Arab and North African countries. During the discussions on the Absentees' Property Law, he chose to join the Arab MKs' criticism by pointing to the destructive effects of the law on Jewish-Arab coexistence in the mixed towns and cities. He concluded by saying that the law undermined not only democratic but also Jewish values: "This law is arbitrary and goes against all logic and the law of Jewish morality."[100]

For MK **Rokach** (General Zionists), the law was not just one of the basic laws, but "a Basic Law of the State" that could shape the entire constitutional regime. In his view, its harm lay not in the discrimination against Arab citizens, but in the institution of the Custodian who controlled immense economic assets without any review or supervision by the courts or by Parliament. He thought it would be a serious mistake to give one person the power to decide the fate of all this property. He reminded the Knesset of the democratic tradition of the Zionist movement regarding the management of the Jewish people's economic assets before the establishment of the State, a tradition that was based on representative, supervisory, and audit bodies:

> And now we are dealing with a more enormous enterprise than the one we established over two generations, and our national property then was under the directors of the Jewish National Fund and the directors of Keren Hayesod, there was the management of the Jewish Agency and there was the Congress and the Zionist Executive Committee . . . . It should be written into the law that the person managing these assets will be subordinate, will receive directives, and will report to the Finance Committee.[101]

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99 Knesset Debates 119, *supra* note 82, at 952.

100 *Id.*

101 *Id.* at 956.

Rokach advocated establishing a board of trustees to manage the vast assets that the law was now transferring to the Custodian. His approach was typical of that of the other Jewish MKs who criticized the law. Their emphasis on the rule of law, and even on constitutional constraints, led them to suggest oversight mechanisms without addressing the structural problem that the Arab members of Knesset pointed to—the creation of a category of second-class, dependent citizens who did not enjoy the protection of property rights. This approach had serious implications, since legal mechanisms can be created to safeguard and oversee the management of property by the Custodian without granting rights to its absentee owners.[102]

### *D. Separating People from Property*

**MK Bader** from the right-wing nationalist Herut party joined Arab MKs by criticizing the overbroad definition of absentees:

> There will be several thousand people in the country who are citizens—they will vote in the Knesset elections, they will vote in the municipal elections—but they will not be citizens, but absentees: in other words, all of these people's property will automatically pass, according to this law, to the Custodian.[103]

Bader explained that the confiscation of the absentees' property was ongoing. For someone who had been defined by law as absentee, all of his property, past, present and future, continued to be defined as "absentee property" as long as his status as absentee had not been revoked. "And this Arab—if he goes to work, and after eight hours of work he receives eighty grushes [cents] . . . he must take this money and bring it to the Custodian; because all his assets are automatically transferred to the Custodian."[104]

Bader's legalist analysis of the unintended consequences of the law provoked a strong response from **Finance Minister Kaplan**: "Yohanan Bader is alleging that someone lives in the country, works in it, and then they come and tell him that if he has earned money, he must lose it and hand it over."

Bader: So says the law.

Kaplan: This is not the legislator's intention.[105]

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102 Even after the enactment of Israel's Basic Laws in the 1990s, which elevated property rights to constitutional status, the Supreme Court did not alter its interpretation of the Absentees' Property Law. *See* Ronit Levine-Schnur, *Constitutional Property Rights in Israel and the West Bank*, *in* OXFORD HANDBOOK ON THE ISRAELI CONSTITUTION (Aharon Barak, Barak Medina & Yaniv Roznai eds., forthcoming).

103 Knesset Debates 119, *supra* note 82, at 955.

104 *Id.*

105 *Id.*

Kaplan explained that he could not remain silent after Bader's words, since he was using legal knowledge as provocation, as part of a political game meant to undermine the Government. For Kaplan, this was not a legal problem but a terrible human problem that the legislator must deal with: "What should be done about the residents of Nazareth and the residents of other places who were absentees? What should be done to bring them back into the flow of life?" Kaplan refused to adopt the remedy demanded by the Arab MKs—to revoke the absentee status of every citizen who was legally present in the country and return their property to them, opting instead to depict the issue as a difficult humanitarian problem that "perhaps the Government did not do enough to solve."[106]

Framing the problem as a humanitarian rather than a civil rights issue was made possible by the Government's effort to distinguish between people and property. As Kaplan explained: "The Knesset should draw a distinction between the absentees' property and the person, even when he now has equal rights. The Knesset should distinguish between concern for the person and concern for the property."[107]

**MK Moshe Aram (Mapam)** rejected this artificial distinction categorically:

> I do not hesitate to say that thousands of Arab citizens live with the feeling that they and their property are being abandoned [left outside the protection of the law].[108] There is no judge although there is certainly a law—the Custodian of Absentees' Property. People living in the country, Arab citizens who did not flee, did not leave or abandon the country, received, without asking for it, additional citizenship. They are not only citizens of the State, but also citizens of the Custodian of Absentees' Property. Their lands, their houses or apartments have been granted a harassing, oppressive guardianship, which bullies them daily, demanding from them certificates, permits, taxes and payments contrary to custom but according to a special practice, based on an almost unlimited authority given to the Custodian.[109]

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106 *Id.*

107 *Id.*

108 This was a word play on the semi-legal term "abandoned property." Aram pointed to the fact that the Arab citizens were in fact abandoned by the law. Their status was reminiscent of the Roman concept of Homo Sacer (the one who may not be sacrificed, yet may be murdered with impunity), a person that remains outside the protection of the law. *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER & BARE LIFE (Daniel Heller-Roazen trans., 1998).

109 *Id.*; Knesset Debates 119, *supra* note 82, at 947–48.

Aram was warning against creating a "Dual State" whereby Palestinians in Israel would live under two sovereigns and two normative systems.[110] He insisted that the law was problematic because it "undermined one of the pillars of the State: the equality of citizens, both Jews and Arabs." He therefore declared that "in the State of Israel the principle of equality of all citizens has not yet been fulfilled." Referring to Prime Minister Ben-Gurion's decision to abolish the Ministry of Minority Affairs on the grounds that there was no longer a need for special treatment of minorities, Aram noted that "[i]nstead of the Ministry of Minority Affairs, two guardians for the Arabs were established: the Ministry of Defense and the Ministry of the Custodian of Absentees' Property. And between these two authorities, the Arab community is condemned to abuse without any justification."[111]

The debate reopened on March 13 around Section 27 of the law, which concerned the mechanism for releasing absentees' assets. The Arab MKs demanded that the broad discretion that the law granted the Custodian be abolished and that the property be returned as a matter of right. **MK Toubi** opposed to the logic that saw Arab citizens as enemies, holding their property as future reparations for the war when a peace agreement would be signed with Arab countries, and asked:

> Who is the Arab enemy with whom we must settle accounts and demand compensation—is it the Arab people of Palestine? The majority of whom are peace-loving? The Arab citizens of Israel? Those who had no part in the attack on Israel? Those who did not want this war that was forced upon them? Do they have to pay compensation?[112]

Whereas at the outset Toubi had expressed the concern that the emergency regulations were based on the logic of "enemy property"—expressing hope that such discrimination would eventually be addressed through Knesset legislation—by the end of the deliberations he had

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110 This "dual state" structure was even more pronounced in the Military Rule imposed on the majority of Palestinians, which enacted a body of colonial emergency regulations over them. *See* ROBINSON, *supra* note 1, at 49–58. For coining the concept of "dual state" in the context of Nazi Germany, see FRAENKEL, *supra* note 99. This concept has been instrumental in understanding how authoritarian and colonial regimes can subvert the rule of law to maintain oppressive control.

111 Knesset Debates 119, *supra* note 82, at 948. Aram had been previously head of the Department for the Rehabilitation and Regulation of Jewish-Arab Relations in the short lived Ministry of Minority Affairs. *See* Ofer Aderet, *When Israel Placed Arabs in Ghettos Fenced by Barbed Wire*, HAARETZ (May 27, 2020), https://www.haaretz.com/israel-news/2020-05-27/ty-article/.premium/when-israel-placed-arabs-in-ghettos-fenced-by-barbed-wire/0000017f-db16-df9c-a17f-ff1e15390000 [https://perma.cc/XN74-9EJZ]; *see also* ILAN PAPPÉ, THE CONTRADICTIONS OF ISRAELI CITIZENSHIP: LAND, RELIGION & STATE 243–44 (Guy Ben-Porat & Bryan S. Turner eds., 2011).

112 *Knesset Debates*, 1st Knesset, Session No. 125, Mar. 13, 1950, at 982 (Isr.).

become convinced that the statute enacted by the Knesset was not intended to preserve the property of refugees until the signing of a peace treaty, but rather constituted an act of legalized dispossession and expropriation specifically targeting Arab citizens. He asserted that the injustice of the law, in its definition of the absentee and in the broad powers of discretion enjoyed by the Custodian in releasing it, amounted to "a policy of legal plunder and robbery of the assets of people who are lawful citizens." The only remedy was "to release the assets of every citizen residing in the country legally."

At this point an interesting discussion developed:

> Toubi: Why aren't the assets being returned to the people residing in Israel?
> Pinkas: I wonder about MK Toubi . . . . As far as I know, MK Toubi belongs to the Communist Party, which strives for all assets in the country to be in the hands of the Government; and in this case, they started with the assets of the absentees.
> Israel Bar Yehuda (Mapam): This is a cynical and not serious comment.
> Meir Yaari (Mapam): Maybe you'll start with your assets?[113]

Pinkas tried to undermine Toubi's demands by exposing the apparent contradiction between Toubi's demand to protect the right to private property, an approach that usually characterizes a liberal position, and his political affiliation with the Communist Party, which was ostensibly committed to the nationalization and redistribution of property. However, as we have seen, the problem with the Law was the opposite, since Mapai was using the power of the (Jewish) majority to seize the property of the (Arab) minority in order to redistribute it to Jews. In this inverted world, Knesset members from the socialist left found themselves defending a liberal concept of citizenship advanced by Arab MKs that was based on the protection of private property.

Finance Minister Kaplan summarized his approach to the law as a belated reply to the Arab MKs' accusation of a revengeful punitive law:

> We did not want to take revenge or retribution, not even towards those who left their places out of fear, and sometimes even joined the enemy. When we liberated the country, we gave them full and equal rights, and the right to vote in the Knesset, and we want them to be equal citizens. But is it possible to draw a conclusion from our

[113] *Id.* at 984.

> attitude towards these people that everything that happened can be erased with one stroke of the hand—and this is a terrible human tragedy—and the property immediately returned?[114]

Kaplan concluded that the law did not undermine the promise of equal citizenship since, "we must distinguish between the concept of 'person' and the concept of 'property.'"[115]

### *E. From Belongings to Belonging*

The debate opened once again around a particularly draconic section of the law that stated that "no claim shall be made that a particular person is not absent . . . merely because he had no control over the circumstances that led him to leave his place of residence . . . ."

MK Jarjoura based his criticism of this section on a liberal conception of the rule of law, pointing to its violation of the fundamental principle of any liberal legal system—the principle of choice. "It is accepted, both under civil law and under criminal law, that a person is not responsible for the result of an action that was done against his will and over which he had no control . . . ."[116] To demonstrate this point he retold the story of the Nakba from the Palestinian perspective:

> There are many who were exiled from their places of residence and their lands by orders of the Israeli army. They did not leave their place by choice but by force, and to this day, they are scattered all over as refugees, deprived of any right to settle permanently and return and cultivate their lands, although they are required to pay taxes on them.[117]

MK Meir Wilner (Maki) reinforced Jarjoura's argument:

> We know of cases where the peasants were forcibly removed from their villages, not during the war, but long after the end of hostilities, for example: in Faradiya, Kafr Einan, Iqrat, Kafr Bar'am, Zippori and other places. In these places there were peaceful Arabs who remained in their villages and were later forcibly removed from them by the army.[118]

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114 *Id.*
115 *Id.*
116 *Id.* at 985–86.
117 *Id.* at 986.
118 *Id.*

At this point, a heated debate erupted again:

> Abraham Elmaleh (the Sephardim party): Were there such peaceful Arabs in the Land of Israel?
> Toufik Toubi: Yes.
> Meir Vilner: There is enough legal theft in this law, why add another sin to the crime. This law has a whiff of the anti-Semitism against Jewish minorities abroad . . . .
> (A call from the Mapai benches: Are you talking about stealing on this podium? Is everything allowed?)
> Pinkas: I also do not believe that there has ever been a Jew or a Jewish community in the Diaspora in the situation that the Arab community, who fought us and wanted to murder us and throw us into the sea, brought upon itself. When did the Jews in the Diaspora try to do this to the Gentiles? How can you compare what we are doing here in order to preserve the assets of the absentees to what the cursed Gentiles did to the Jews in the Diaspora, to what the Nazis did to the Jews in the Diaspora? . . . It seems to me that with these words, you have detached yourself from the Jewish people!
> Meir Vilner: I think this law is anti-Israeli and disgraces us.
> Pinkas: You can say that the law is not communist . . . but the question of what is "Israeli" will be decided by the majority in this house, not by you.[119]

## CONCLUSION

Thus, amidst accusations that the law was a colonial legacy, anti-Semitic, or anti-Jewish, the Knesset discussions raised a crucial issue for the young State: who belonged to the Israeli demos? In the second year of the State of Israel, the most important discussion about its identity—the meaning of equal citizenship and the extent to which the State was committed to democracy and the rule of law—arose precisely in the context of a law that dealt with the assets of those it defined as "absentees." Along with other measures enacted by the First Knesset such as the imposition of military governance and the Law of Return, the Absentees' Property Law thus undermined the Government's declared commitment in the Declaration of Independence to establishing a State for all its citizens and promoting universal citizenship.[120] Together, these legislative actions in effect ensured that the citizenship of the Palestinian minority would remain substantively hollow.

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[119] *Id.*

[120] *See* Jabareen, *supra* note 1, at 17–21.