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The Fluid Jurisprudence of Israel's Emergency Powers: Legal Patchwork as a Governing Norm

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Israel's long-standing state of emergency has had considerable bearing on the state's governance. Less known, but equally important, is the fact that Israel's legal system features several overlapping and incoherent emergency legal mechanisms that exist side by side. This article demonstrates that Israel's ever-shifting body of emergency law has been used to suit its governing authorities' political ends. A chief goal has been to create flexibility in the application of law in order to systematically discriminate against Palestinians while maintaining a degree of legitimacy as a government by law. With these various emergency legal mechanisms available, Israel's governing officials can extend the authorities of discrete emergency regulations by mixing and matching laws or by moving freely from one legal mechanism to the next to serve desired ends. This article argues further that what may have started as a pragmatic solution quickly became programmatic and concerted. Thus, contrary to the conception that Israel's convoluted emergency jurisprudence is the accidental outcome of trying times, Israel's complex emergency jurisprudence is in fact a governing tool. This reality compels us to consider new analytical frameworks in which a state of emergency is an enduring condition. To this end, this article draws on the work of colonial law scholars. By analyzing jurisdictional complexity in contexts where emergency is dominant, these studies explain the political motivation for maintaining structured ambiguity.

Emergency Powers as a Governing Tool

Since its establishment in 1948, Israel has been under a state of emergency.[1] This long-standing state of emergency has had considerable bearing on Israel's governance, chipping away at its rule of law and democratic institutions. Less known, but equally important, is the fact that Israel's legal system features several overlapping and incoherent emergency legal mechanisms that exist side by side. As a legal patchwork of sorts, Israel's complex system of emergency enactment has cobbled together various emergency legal mechanisms that sometimes overlap and sometimes comple-

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[1] The original declaration of emergency was made on May 21, 1948.

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ment one another. Two of the three main emergency legal mechanisms are quite comprehensive—some would argue excessive—and need no additional emergency apparatus. But during the years of its establishment, Israel's legislative body has never unified these various legal emergency procedures, nor has the judicial branch challenged this legal complexity.

The fact that Israel has failed to bring coherence to the system begs the question of whether maintaining such a complex legal structure serves its political purposes. In this article, I ask why Israel's emergency legal system is structured as it is. Indeed, regardless of security threats, emergency powers should still be based on an original, unified, and coherent legal source. Further, one can assume that a unified, original, and coherent system of emergency laws would consolidate the sovereignty of the state and simplify the application of these laws.

I argue that Israel's ever-shifting body of emergency law has suited its governing authorities' political ends: a systematic discrimination against Palestinians. With these various emergency legal mechanisms available, Israel's governing officials can extend the authorities of discrete emergency regulations by fusing them or moving freely from one legal mechanism to the next to serve desired ends. If one legal mechanism might be challenged or might meet the limits of its authority, another is available instead. The result is governing flexibility that extends sovereign power. All the while, the state maintains a degree of legitimacy by operating behind a veil of legality.

Moreover, I argue that contrary to the conception that Israel's convoluted emergency jurisprudence is the accidental outcome of trying times, it has a political purpose, and what may have started as a pragmatic solution quickly became programmatic and concerted. As such, Israel's complex emergency jurisprudence is not a mere exception, but is in fact a governing tool.

To illustrate this problem, this article first outlines the structure of Israel's emergency powers. I trace each legal source to its origin. The reach of this article is thus the scope of the law available to Israel's authorities. Thus, it encompasses shared emergency laws that apply in Israel itself (or Israel proper)—the territory of the pre-1967 state of Israel inside the Green Line—and in the Occupied Palestinian Territories, military orders in the Occupied Palestinian Territories, and legal mechanisms that bridge Israel itself and the Occupied Palestinian Territories. This framework follows Baruch Kimmerling's *control system* concept (1989), which refers to *all* the territory under the Israeli sovereignty.

I offer a structural analysis that looks inward, into legal order and its logic. As such, I avoid the subjective trap of trying to identify whether a certain application of emergency powers is the direct

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outcome of security necessities or merely a tool to implement political will. My objective is to analyze the existing structure rather than to divine its executors' intention.

The point of departure for this article is that Israel's emergency regime is an enduring fact. This reality, I argue, forces us to consider an analytical framework that regards exceptional measures, which stem from a state of emergency, as dominant apparatuses. For this reason, I draw on the work of various scholars who study the application of law in the colony, sometimes known as legal imperialism. Their work analyzes domains of jurisdictional complexity in a political context in which emergency plays a dominant role. Indeed, rather than solely operating in a "might makes right" mode, colonizers opted to achieve their discriminatory agenda partly through a kind of Weberian rational authority, in which legitimacy is a question of legality.

Colonizers, therefore, struggled to force their will through legal mechanisms, however awkward. Thus these scholars reveal several legal mechanisms that enabled colonizers to achieve discriminatory aims and still operate within the bounds of law. As I demonstrate, colonial law and Israel's emergency enactment share acute similarities in terms of structural complexity, the existence of a continuous state of emergency, and the administration of personal law on particular groups. What these studies offer, therefore, is an analytical framework in which to consider the Israeli condition.

A Fluid Jurisprudence

Scholars including Margit Cohn (1998) have identified the convoluted nature of Israel's legal system. But few have connected its convoluted structure to the Israeli regime's intentions. Indeed, for the most part, I pick up where Cohn's analysis leaves off. Cohn defines Israel's overarching emergency legal structure as a complex one that "patches together" various legal authorities. But Cohn never explores why the system is structured this way to begin with.

To understand the complexity of this structure, we must recognize the political benefits that this loose structure accords. Israel's ambiguous legal system creates a flexibility that extends political power, which in turn enables an unequal divide between different populations. This fluidity allows the state to achieve otherwise impossible-to-attain political ends while maintaining a degree of legitimacy.

As previous studies have outlined (Bracha 1978; Cohn 1998; Dowty 1988; Goldstein 1978; Hofnung 1996; Klinghoffer 1962; Rubinstein 1996; Saltman 1982; Shetreet 1984), Israel's law books

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house three distinct legal bases for enacting emergency powers: mandatory emergency defense regulations (henceforth, mandatory regulations); administrative emergency orders (henceforth, administrative orders); and primary emergency laws, which I refer to as formal emergency laws (henceforth, formal laws). Because my frame of reference is Israel's control system (Kimmerling 1989), I also consider a fourth category, belligerent occupation, whose foundation stems from international law. This fourth category is key to understanding Israel's governing powers in the Occupied Palestinian Territories.

The array of legal mechanisms underlying Israel's emergency powers is even more complex than this description suggests. Formal emergency laws, for example, are in fact made up of several clusters of laws:

(1) renewed administrative emergency orders (or renewal laws), which demonstrate the fluidity between legal mechanisms insofar as secondary orders are transformed into primary laws
(2) laws dependent on a declared state of emergency (dependent laws)
(3) laws that do not depend on a declared state of emergency (independent laws)

Moreover, while some formal laws are explicit in the authority they give to an administrative agency, others simply grant legislative power to use at the discretion of the authorized party.

To make the system additionally complex, mandatory regulations and administrative orders feature the same complementary relationship. Whereas mandatory regulations are independent of an official declaration of a state of emergency, administrative orders are conditioned by it. Moreover, because of a court decision, while mandatory regulations are *explicit* in the authority they grant, administrative orders carry a legislative power by which ministers can issue regulations as they deem necessary. Further, mandatory regulations and administrative orders authorize different agencies. The mandatory regulations stem from a British colonial enactment and follow this tradition by authorizing a military commander. In contrast, administrative emergency orders, which are original Israeli enactments, authorize a minister who can then delegate power to an administrative agency. On the other hand, mandatory regulations and administrative orders overlap. Mandatory regulations and administrative orders can stand on their own; each mechanism grants comprehensive emergency powers, and, thus, each makes the existence of the alternative emergency legal mechanism redundant.

Table 1 summarizes the relationships among these legal mechanisms; their sources, their status as primary or secondary laws,

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Table 1. Israel's overlapping and complementary emergency legal sources

	Source		Status		Dependency on a State of Emergency		Authorities		Authorized Authority	
	Foreign	Original	Primary	Secondary	No	Yes	Explicit	Legislative	Military Commander	Minister
Mandatory Emergency Defence Regulations	✓		✓		✓		✓*		✓	
Administrative Emergency Orders		✓		✓**		✓		✓		✓
Formal Emergency Laws										
Renewal		✓	✓			✓	NA	NA	NA	NA
Dependent		✓	✓			✓	✓	✓	NA	NA
Independent		✓	✓		✓		NA	NA	NA	NA
Belligerent Occupation	✓		✓		✓		✓	✓	✓	

*Originally the mandatory emergency regulations also had legislative powers, but after a court's ruling, new emergency regulations must be enacted through administrative emergency orders (AEOs).

**But AEOs can override primary laws.

their dependence on a declared state of emergency, the type of authorities they grant (explicit or legislative), and the parties who are authorized to use or issue emergency regulations.

Table 1 thus illustrates the immense complexity and ambiguity in the relationships among these various emergency legal mechanisms. Unlike a well-constructed system that is organized in different chapters, each of which defines a separate section of law, the legal sources of Israel's complex emergency enactment define and redefine similar legal sections (Cohn 1998: 633). Further, with respect to emergency law, only a few clauses in the Israeli law book define a legal hierarchy whereby contradictory procedures take precedence over others.[2] But Israel has made little effort to solve these internal contradictions. Augmenting this problem, Israel lacks a formal constitution[3] with a comprehensive bill of rights.

Lauren Benton (2002) offers a framework to explain the political motivation for maintaining such structured ambiguity. In her book *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, she demonstrates the interaction of law, property, power, and culture in the charged interaction between the colonizers and the colonized in the Americas, Africa, the Indian Ocean, and Europe. Benton argues that this dynamic shaped multiple systems of law and complex, ambiguous jurisdictions. The interplay of various cultures fostered legal pluralism. As she refers to it, legal pluralism is a system of "stacked" legal systems and cultures with unfixed boundaries. In the realm of legal study, this phenomenon is known as a *conflict of laws*.

While the relationship between law and culture is beyond the scope of discussion here, Benton's concept of legal patchwork is useful to explore Israel's similarly "stacked" emergency legal mechanisms, which create a fluid structure as well. Just as the colonial era's legal patchwork proved effective in separating populations and in dividing resources unequally, Israel's ambiguous structure does so as well. In both the colonial context and in Israel's, maintaining a nonunified legal foundation—rather than replacing it with a well-constructed one—enables the sovereign's imposition of will.

[2] These clauses are the following: Section 9(b) of the Law and Administration Ordinance of 1948; Section 39(3) of the Basic Law: The Government, and Section 46(b) of the Control of Products and Services Law, 1957.

[3] Israel's constitution is intended to be built chapter by chapter in such a way that each will constitute a separate Basic Law. This process was never completed, however. The already enacted Basic Laws' status compared with regular laws varies and is yet to be securely defined.

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The Mandatory Emergency (Defense) Regulations

Expansive Power

Mandatory emergency regulations have an inauspicious foundation. They stem from British enactments between 1937 and 1945, during Britain's mandatory rule over Palestine. Born in the context of a colonial regime whose aims were to suppress Palestinian and Jewish insurgency and to consolidate British control during World War II, these laws are sweeping in scope and delegate emergency powers for nearly any foreseeable emergency need. Still, while these laws are more than all encompassing enough to stand on their own, Israel has coupled them with additional emergency mechanisms, creating overlap and redundancy in its emergency legal regime.

Mandatory regulations have the status of primary laws; they apply notwithstanding any law, and they may amend any law with and without modification. They also remain in force with no time limit, and they are valid regardless of whether a state of emergency has been formally declared. Mandatory regulations can be divided into three kinds of emergency regulations:

1. *execution* authorities, such as arrests, inspections, and road and traffic and business control (i.e., the ability to open and close roads and businesses)
2. *prevention* authorities, such as limiting or preventing movement or speech
3. *punishment* authorities, such as the demolition of houses

These categories of enforcement cover a broad swath of emergency powers and provide authorities with a wide range of possibilities for action.

Mandatory regulations are not only comprehensive but also excessive. Indeed, their authority applies to multiple areas of daily life, from business operations to road closings, as well as to detentions and other punitive measures. Because mandatory regulations grant such vast authority, it is impossible to restrict their power by arguing that a particular action goes beyond the law's actual authority. The use of mandatory regulations can easily become capricious and arbitrary.

The final set of mandatory regulations—the Emergency (Defence) Regulations of 1945—came in response to Jewish insurgency, and at the time they were highly criticized by leaders of the Yishuv (the prestatehood Jewish political community). However, in May 1948, Israel incorporated mandatory regulations, along with the mandatory law in general, into its domestic legislation. Indeed, the first act of the Provisional Council of the State, which later

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became the first Knesset,[4] was to declare that, by force of Section 11 of the Law and Administration Ordinance (1948), the mandatory law in effect in Palestine would continue to be in force with limited adjustments. It is worth noting that the same statute also gave birth to administrative emergency orders, Israel's original emergency powers. This legal patchwork thus began as a temporary arrangement during challenging times. But later it became the governing norm.

Maintaining Fluidity

Despite opposition, Israel justified incorporating mandatory regulations into its system of governance because of the hasty establishment of the state during a time of war. The attorney general argued that while mandatory regulations were indeed despicable given their history, there was simply no time to replace them with new, original law. While Britain has removed or replaced mandatory regulations, Israel has kept them in place—long after the end of the war, which was the source of their temporary "patchwork" justification—and they continue to apply today. Out of a total of 162 sections, some with subarticles, the Knesset formally canceled or replaced only a handful.[5]

Given their history as British colonial orders, mandatory regulations met substantial challenge. Early on, the Israeli Supreme Court, sitting as the Israeli High Court of Justice, decided on the legal status and validity of mandatory regulations. In its decision in the *Altalena*[6] case, the court denied the argument that mandatory regulations were foreign colonial laws and thus contradicted Israeli law (*Cook v. the Minister of Defence* 1948). Soon afterward, in the canonic *Levon v. Gubernik* (1948) case, the Israeli High Court of Justice reaffirmed its decision. The court ruled that only regulations that have been explicitly revoked are no longer part of Israeli law. Over time, the Israeli High Court of Justice has introduced some procedural limitations on mandatory regulations.[7] But more

[4] Israel's Parliament.

[5] The main set of regulations removed by the Law and Administration Ordinance in 1948 were Sections 102–107(c), which dealt with restricting Jewish immigration. In addition, Sections 114 to 118 were replaced by an original Israeli law, the Emergency Land Requisition (Regulation) Law, 1949. In 1950, Section 33: flagellation or flogging was removed. Section 138: explosives and Section 111(a) (e.g., going out of state) were replaced by original laws in 1954 and 1961, respectively.

[6] Menahem Begin's Irgun (Etzel) made an independent arms deal, and the weapons arrived on the *Altalena* cargo ship. The leaders of the forming state, headed by the Mapai party and its leader, Ben-Gurion, denied its access. In the crossfire, the ship sank. The army commander at the site was future prime minister Yitzhak Rabin.

[7] The main restriction introduced by the court was that before executing mandatory regulation 111(4) (Detention), an advisory committee had to be appointed (*El Karbutli v.*

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significant, the court has also ruled that mandatory regulations and the way the commissioned authority uses them are not subject to judicial review.[8]

Prior to 1967, various attempts to remove mandatory regulations from the Israeli law books failed. Since 1967, however, no serious effort has been undertaken. The fact that there has been no attempt to revoke mandatory regulations since 1967 is not mere coincidence, I argue. Despite Jordanian opposition, Israeli officials have insisted that mandatory regulations are in force in the Occupied Palestinian Territories because the region is also historically part of the British mandate and has had no other recognized sovereign since that time.

This line of reasoning served Israel's purposes. It gave Israeli's occupation authorities a comprehensive, ready-made set of emergency powers in the form of "local" laws. In this regard, Israel coupled the Occupied Palestinian Territories with "Israel proper" as the old territory of the British mandate to which mandatory regulations apply. Hence, revoking the powers in one region but not the other could have posed a problem that Israel wanted to avoid.

Indeed, removing these colonial-based mandates only from Israel proper might have raised more questions about unequal treatment of the occupied territories. When it came to power in 1977, the Likud party—which in its previous incarnation as Herut consistently voted to revoke mandatory regulations—did not attempt to remove mandatory regulations from Israeli law. The Likud party made one concession and enacted only the Emergency Powers (Detention) Law (1979), which replaced two mandatory emergency regulations that addressed detention and deportation (mandatory regulations 111 and 112).[9] Nevertheless, the bulk of mandatory emergency regulations—including mandatory regulations 111 and 112—not only remained in place but also was applied more extensively in the Occupied Palestinian Territories.[10]

Despite the open challenges to mandatory regulations, their introduction—and curiously long-standing survival—helps explain the nature of Israel's intentionally ambiguous system. Their inclu-

Minister of Defence (1949)). Advisory committees are required for mandatory regulations 108–110 as well. The Israeli High Court of Justice introduced an additional limitation, which involved the commonly used mandatory regulation 125 (Closed Areas). The court asserted that mandatory regulation 125, as opposed to an execution order, is a "regulation having legislative force" and as such has to be published in an official gazette (*Aslan v. Military Governor of Galilee*, H.C., 220/51 5 P.D. 1480 (1951)).

[8] *El Karbutli v. Minister of Defence* (1949).

[9] Some of the Likud members were themselves targeted by mandatory regulations, and the memory was perhaps still vivid.

[10] A military order copied the practices of this law onto the Occupied Palestinian Territories, but events in 1985 rolled back the provision; thereafter, mandatory regulations 111 and 112 were back in force in the Occupied Palestinian Territories.

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sion in the Israeli legal system echoes Benton's analysis, in which conquerors retained parts of the local law alongside their new legal system. "Conquest and colonization created conditions that pulled at the boundaries of legal order and often enhanced jurisdictional fluidity," Benton writes (2002: 81).

Thus, instead of forcing their own legal system on the colonized as the only valid law of the land, the colonizers accepted separate—and often overlapping and conflicting—jurisdictions. In other words, in the pursuit of control and in the course of struggles over authority and property, the colonizers were not monolithic in their application of law. In the Iberian Peninsula after the Christian conquest, for example, sections of Muslim law existed alongside the new legal system, which itself was not monolithic (it included both canon and secular law), and together established a plural legal order. These overlapping authorities jockeyed for jurisdiction between secular and religious law as well as between local and centralized law (2002: 33–45).

Israel's integration of mandatory regulations is similar to colonizers' maintaining local law. In both cases, these clusters of laws represent the token of an old regime, which the new, established authority wanted to remove completely. And yet, in both cases, the new authority retained sections of existing law. Jockeying between separate jurisdictions paid tribute to the old regime while enabling the new regime to establish control and to appropriate property.

Administrative Emergency Powers

The Overlapping and Complementary Power of Administrative Orders

In the Israeli legal system, administrative emergency orders create further convolution and redundancy. Unlike mandatory regulations, which were inherited from British colonial rule, these emergency legal mechanisms stem from original Israeli law. They carry legislative power, enabling ministers to issue emergency decrees as they deem necessary. Insofar as administrative orders have a status of secondary legislation, they are distinct from the other emergency legal sources. Yet their status as secondary legislation does not dilute their power because they can trump primary law. Unless a primary law or a section of it has been specifically and expressly entrenched, these secondary laws can override primary law.[11]

[11] The Basic Law: The Knesset (only by a special majority of 80 Knesset members or more); the Basic Law: The Government; the Basic Law: The President; and a small number of entrenched paragraphs: Section 3 of the Customs and Excise Duties (Variation of Tariff)

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Similar to mandatory regulations, the administrative emergency legislation is excessive in the power it grants, yet for different reasons. Administrative orders' expansiveness lies in the extensive legislative power these orders delegate to the ministers. Once commissioned by the government, ministers can issue emergency orders at their own discretion. In May 1948, in the days that followed the declaration of the state of emergency, the government commissioned ministers in key positions, such as the minister of defense and the minister of finance, to enact emergency regulations. Since then, most ministers—other than the foreign minister and the minister of religion—have been granted this power.[12] None of these general powers have been revoked. Because administrative orders can serve virtually any emergency need, alternative emergency legal mechanisms are redundant.

Restrictions on Administrative Emergency Orders

The restrictions on administrative orders are rather slim, with only three limitations all told. The first states that an administrative order can be issued only during a state of emergency. But this condition is only a theoretical limitation because the state of Israel has been under a continuous state of emergency since its establishment. Thus, in terms of enforcement and practical application, this limitation is hollow and has no effect.

Even the 1992 amendment of the Basic Law: The Government, which replaced the Law and Administration Ordinance of 1948 as the administrative orders' legal source, did not change this situation. Indeed, the amendment's most important additional restriction was a limit on the duration of a state of emergency to one year unless the Knesset votes to renew it. In the prior arrangement, according to Section 9 of the Law and Administration Ordinance of 1948, there was no need for periodic renewal; the state of emergency remained in force as long as the Knesset did not formally revoke it. Still, this shift in the applicability of the state of emergency did not produce thoroughgoing change. Since that time, the state of emergency has been renewed annually almost automatically.

The second restriction outlines the objectives of administrative orders and stipulates that they must be in accordance with "the

Law, 1949; Section 11 of the Second Knesset (Transition) Law, 1951; Section 20(a) of the Elections (Modes of Propaganda) Law, 1959; Section 22 of the Judiciary; Section 4 of the Basic Law*:* Freedom of Occupation, 1992; and Section 12 of the Basic Law*:* Human Dignity and Liberty, 1992.

[12] Until the 1970s, administrative orders were used relatively infrequently, and usually in times of war. Since the 1970s, administrative orders have been used more often in the context of economic policies and labor disputes. For more on emergency powers in labor disputes, see Mironi (1986).

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defence of the State, public security and the maintenance of supplies and essential services." Hans Klinghoffer (1962: 87, 93) argues that, like the first constraint on administrative orders, this limitation is also only theoretical because the objectives are so broad. Therefore, almost any administrative order can be positioned as linked to these objectives. As with mandatory regulations, it is difficult to argue that enacted administrative orders exceed their granted authority. In addition, administrative orders have been drafted to grant general authority as opposed to particular powers, and it remains unclear whether ministers can issue administrative orders that relate only to their jurisdictions. In the past, ministers have issued administrative orders that extend beyond their ministerial responsibilities.

The third restriction limits administrative orders' validity to a three-month duration. This restriction is crucial to the democratic character of the state (Klinghoffer 1962: 89). Otherwise, the emergency regulations can simply trample over the normative governmental rule. Yet in Israel, even this restriction has loopholes that neutralize its sting: by copying administrative orders and reissuing them as new orders, the government can renew old orders endlessly without the Knesset's direct approval—so long as the Knesset has not ended the state of emergency. This procedure is generally regarded as stepping outside the renewal protocol, but in the past the Israeli government has used it.

The crudest use of such "renewal" took place in 1957. During the Suez crisis, the government published a corpus of 222 administrative orders, which were due to expire three months later. Yet just two days before their expiration date, the minister of defense issued new administrative orders that basically copied the previous set of administrative orders (with only minor changes). To date, some administrative orders that were enacted during the 1948 war have been reissued as "new" administrative orders, others have become renewal laws, and still others have been replaced by original formal law.[13] These various instances of administrative orders' renewal indicate the fluidity of this emergency legal mechanism. If an authority wishes, an administrative order never need die; instead, it can be reissued as a new order. All in all, the control mechanisms over administrative orders are weak. For the most part, it is the Knesset that should set limits on the government's use of administrative orders, but because in Israel the government's coalition controls the Knesset, the government has the power to ratify its own actions.

[13] For example, the Prevention of Terrorism Ordinance, 1948.

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With the state of emergency constantly in force, and thus with administrative orders perpetually activated,[14] and with the renewal mechanisms of existing administrative orders, these emergency powers can be safely defined as governing norms. In *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003),[15] Nasser Hussain notes that in colonial India, under British rule, emergency was an elastic category and exceptional emergency powers became the governing norm. He describes the ever-present state of emergency, which suspended law and enabled colonizers to exert their political will through legal channels.[16] Indeed, we should note that the rationale behind a state of emergency is to suspend law in order to save law. Under a state of emergency, law is suspended, which is not to be confused with a condition of lawlessness. Thus, emergency power enables regimes to manifest sovereign will and yet stay within the framework of law.

So, too, in Israel the concept of security is elastic. As David Kretzmer argues, "There can be little doubt, however, that the concept of 'security' as understood by the authorities in the Israeli context, encompasses a wider range of activities" (1990: 136). Rather, Israel's use of emergency powers is also for political, rather than strictly for security, reasons. Kretzmer introduces the "conflict management model" (1990: 137), in which administrative uses of emergency powers are not responses to security necessities but means to achieve political ends. This further reinforces the argument that emergency powers are governing norms. And the process is self-perpetuating: once Israel's law books accumulate a vast number of dependent enactments, sustaining the state of emergency becomes a question of maintaining a legal foundation that will enable effective governance. Lifting the state of emergency would, in effect, create a legal void.

Mandatory Emergency Defense Regulations and Administrative Emergency Regulations: An All-powerful Legal Patchwork

As early as 1948, the ambiguities of mandatory regulations and administrative orders came under fire. In *Ziv v. Gubernik* (1948),

[14] Administrative emergency orders are a kind of a "sleeping mechanism," whereby their potential can be translated into practice at any moment. See Cohn (1998: 642). Moreover, because the state of emergency is constantly in force, mandatory regulations' "advantage" over administrative orders is actually meaningless.

[15] Hussain's work is an intellectual history of the interplay between normative law and the legal exception. Since my discussion does not focus on the use of emergency powers, my analysis refers only to a limited part of Hussain's historical and analytical framework.

[16] In the final analysis, all laws manifest sovereign will through formal legal channels. But emergency regulations stand out in terms of their extent, the role of the acting sovereign, and the lack of review mechanisms.

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the Israeli High Court of Justice had to decide whether the overlapping powers of administrative emergency orders and mandatory emergency regulations contradicted each other. The court ruled that Section 9 of the Law and Administration Ordinance of 1948 (administrative orders' original legal source) does not, in fact, override or contradict mandatory regulations. In its holding, the court further validated the patchwork relationship between mandatory regulations and administrative orders by requiring that any *new* emergency regulations be enacted through administrative orders, not through mandatory regulations. Following the decision, sections of mandatory regulations that granted the authority to enact new regulations were invalidated, but all pre-1948 regulations—unless explicitly revoked—remained valid. Hence, the court sanctioned a highly flexible legal mechanism that preserves all explicit power in mandatory regulations and coupled it with the legislative power of administrative orders to issue new emergency regulations.

With sanction from the court and because the 1992 amendment (The Basic Law: The Government) had virtually no effect on the affiliation between administrative orders and mandatory regulations (where the 1992 amendment was itself a Band-Aid), this patchwork relationship has become a powerful tool for Israel's authorities and grants great political flexibility. First, mandatory regulations complement administrative orders; mandatory regulations are a complete set of emergency regulations that remain in force with no time limit and also apply in the Occupied Palestinian Territories. On the other hand, administrative orders' legislative power complements that of mandatory regulations. For example, administrative orders have been used to validate mandatory regulations retroactively. In 1951 the military governor of the Galilee used his authority under mandatory regulation 125 to close 13 Palestinian villages and essentially evacuate these villages of their Palestinian residents. The Palestinians appealed to the high court and claimed that the government had abused due process because the decree was not published. Ruling in the Palestinians' favor, the court asserted that the unpublished decree was indeed invalid (*Aslan v. Military Governor of Galilee* 1951). Fearing that other unpublished mandatory regulations would also be nullified, the Israeli government issued an administrative emergency order (Emergency Regulation [Continuance in Force of Validity of Provisions] 1951)[17] that retroactively legalized all mandatory regulations

[17] Despite opposition from both right and left, this emergency regulation was later replaced with a law: The Order for the Extension of the Validity of Emergency Regulations (Temporary Provision), S.H., 11, 1951.

issued since the establishment of the state. This incident illustrates the flexibility of jurisdictional complexity that is based on the complementary relationships among different emergency authorities. Conveniently, whenever one emergency legal mechanism is challenged, another is available.[18]

Moreover, at times, mandatory regulations and administrative orders have been patched together, and the combination is an all-powerful emergency mechanism. The legal foundation for the military government between 1948 and 1966 is yet another example of this legal patchwork. Administrative orders and mandatory regulations sat side by side as the hybrid legal pillars of this emergency regime. In April 1949, the military government attained its first legal foundation with the enactment of an administrative order called the Emergency (Security Zones) Regulation.[19] This regulation delineated secure territories and forbade people from entering or leaving these territories without a permit from a military commander (Korn 2004). Yet, it did not authorize the restriction of movement of those living inside the territories—just those traveling in and out of them. In January 1950, to control movement inside these security zones as well, military governors were appointed as military commanders in accordance with mandatory regulations.

The official Israeli justification for these security zones was that Palestinians were considered a hostile population. An armed clash between the parties had just occurred, and Israel's officials feared that the Palestinians who lived near the borders might support enemy forces. Yet even Israeli officials eventually refuted the claim that the military government was needed for security purposes. "The military government contributed absolutely nothing to security," Shmuel Toledano, the prime minister's adviser on Palestinian affairs, said later. "Even one infiltrator was not captured due to the military government."[20] Moreover, under the veil of the military government, the Israeli authorities massively expropriated Palestinian land.[21] Israeli officials admitted that much as well—for example, David Ben-Gurion argued in front of the Knesset that "[t]he Military Government came into existence to protect the right

[18] I thank the anonymous reviewer for articulating this point.

[19] Though the military regime ended in 1966, these regulations continued to be renewed until 1972.

[20] David Shalit, "Even Menachem Begin was Opposed," *Ha'aretz*, August 30, 1996, p. 48 (Hebrew); quoted in Peleg (2004: 417).

[21] After the 1948 War, 13.5 percent of the land of pre-1967 Israel was controlled by the Jewish community. By the 1960s, the Jewish community controlled 96.5 percent of the land. (See Kretzmer 1990: 137; Kedar 2001.)

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of the Jewish settlement in all parts of the State (K. D., vol. 36, February 20, 1963: 1217).[22]

Indeed, hybrid constructions of administrative regulations and mandatory regulations were used to achieve this objective (i.e., to expropriate Palestinian land and to transform it into Jewish possession). For example, in 1949, the minister of agriculture issued the following administrative emergency order: Emergency (Exploitation of Uncultivated lands) Regulation, 1949. This administrative order authorized the minister to capture land declared uncultivated. Actually, this emergency regulation was fairly redundant because a previous administrative emergency order, the Emergency (Absentees' Property) Regulation, 1949, had already dealt with all abandoned lands. However, it seems that the motivation for this new administrative emergency order was different. Coupled with mandatory regulation 125 (Closed Areas), it became a mechanism to capture Palestinian land that was actually not abandoned. As it worked, mandatory regulation 125 denied accesses to land, thus making it uncultivated. Then, with the administrative emergency order of uncultivated lands, these lands were then given to neighboring Jewish settlements (kibbutzim and moshavim) for cultivation. Hence, they were transferred into Jewish hands. Thus, by fusing administrative regulations and mandatory regulations, the Israeli authorities expanded their power. Each regulation on its own was rather limited and set to achieve, by and large, a logical end, but put together, they became a powerful political tool.

This chain of events reflects Benton's notion of the politically enabling effect of fluid jurisprudence: fluid legal boundaries became a tool to "structure the division of resources and constituted a framework of the 'articulation' of different ways of organizing labor and property" (2002: 22).

Formal Emergency Laws

Lost Opportunities for Cohesion

Israel's formal emergency laws illustrate the state's lost opportunity to unify its convoluted legal system. Israel's law books contain yet another class of emergency laws formally enacted by the Knesset; thus, as noted, I title them *formal emergency laws* (henceforth, formal laws). Yet other than being formal and pertaining to some emergency condition, nothing classifies them as a single cat-

[22] Moreover, Shimon Peres in the daily *Davar* stated, "It is by making use of mandatory regulation 125, on which the Military Government is to a great extent based, that we can directly continue the struggle for Jewish settlements and Jewish immigration" (January 26, 1962).

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egory of laws. The Israeli legislator could have used formal laws to unify Israel's emergency law by signing into law a body of statutes that would replace and unify all the existing dispersed emergency legal mechanisms. Instead, over the years, random formal emergency laws were enacted as a continued legal patchwork

Fewer in numbers, formal laws perpetuate Israel's legal complexity by replicating the complementary relationship between mandatory regulations and administrative orders (explicit/legislative and dependent/not dependent on a state of emergency) and by redefining similar authority already outlined by mandatory regulations without replacing them. Formal laws also augment the fluidity of Israel's emergency legal structure, because the majority of formal laws are in fact renewed administrative orders.

It is difficult not only to recognize formal laws, but also to sort them into categories. Indeed, over the years scholars have suggested different divisions, some of which contain further subcategories. Previous scholars have put forward several modes of categorizing formal emergency laws. Alan Dowty (1988), for example, divides formal laws into *dependent laws* (laws that are conditioned by the existence of a state of emergency) and *independent laws* (laws whose function is related to emergency or security matters but that are not conditioned by the existence of a state of emergency). Shimon Shetreet (1984) subdivides the dependent category into *explicit* dependent laws (which provide detailed arrangements for the execution of the law) and *legislative* dependent laws (which provide secondary legislative power to the authorized authority to promulgate regulations). Huns Klinghoffer (1962) and Menahem Hofnung (1996, 2001) provide a third category of formal laws, titled *renewal laws*. My division will include renewal laws, dependent laws, and independent laws as well as all their subcategories.

Renewal Laws

Renewal laws represent one of the system's most flexible elements and illustrate the fluidity of the system as a whole. Originating from administrative orders, renewal laws form the majority of formal laws. According to the convention, administrative orders can remain in force after they expire (three months from the day of their enactment) only if the Knesset renews them. Once renewed, these emergency arrangements take on primary, rather than secondary, legislation status. Thus, a regulation born as a temporary, emergency exceptional act becomes a formal bill. As a consequence, the hierarchy between primary and secondary legislation changes and allows the latter to take on greater power. Indeed, if Israel's authority so wishes (note that the government controls the Knesset

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in Israel), it can convert temporary laws into primary emergency powers. As a result, to a significant extent, emergency powers do not fade away but instead simply change status and, in doing so, become more powerful.

The superiority of renewal laws over regular laws was affirmed by the Israeli High Court of Justice. In 1953, the court affirmed that renewal laws have the status of formal laws (*Bilar v. the Minister of Finance* 1953). This decision (the Bilar precedent) came under harsh criticism (Acktzin 1953–1954). In that ruling the court also decided that renewal laws are not subject to judicial review.

Renewal laws also illustrate Israel's ambiguous legal structure. The terms of duration of renewal are inconsistent, and administrative orders can be renewed any number of times without restriction. Some renewal laws have no expiration date, but rather stay in force as long as the state of emergency continues. Other renewal laws prolong administrative orders for short periods. In addition, some administrative orders are renewed periodically. Administrative orders can also be renewed by a correction law. A lack of fixed time frames enables the state to stack emergency powers in Israel's law books and provides an even greater array of options for action. Not only is Israel's law repository piled with emergency enactments, but also, because of their volume, removing them would create a legal void with no available normative statutes to fill the gap.

Dependent Laws

During emergency situations, the ability to call on a stack of formal laws that are activated only during a state of emergency keeps the state primed for crisis while also enabling it to stay within the boundaries of the rule of law. But in Israel, because these laws are a layer on top of mandatory regulations or administrative orders—rather than replacing them—and because they are also constantly in force given the continued state of emergency, Israel's dependent formal laws actually hamper Israel's normative system of governance.

As they stand, dependent formal laws are yet another legal patchwork that demonstrates that in Israel emergency powers are governing tools. Indeed, in Israel, the mechanism that is supposed to protect normative legality (i.e., conditioning emergency laws by a declaration of a state of emergency) actually violates lawfulness. The existence of such laws (in combination with administrative orders) is a key reason for keeping the state of emergency in force. Indeed, the Israeli government admitted that ending the declaration of a state of emergency would prevent the government from functioning effectively because so many of its laws depend on a state

of emergency and the process of replacing them with normative laws is still ongoing.[23] Thus, part of the logic of sustaining the state of emergency is to prevent a legal vacuum, rather than simply to ensure security.

Independent Laws

Independent emergency laws, which organize matters related to a time of emergency but are not conditioned by a declared state of emergency, represent yet another patch in Israel's complex emergency legal structure. If such laws were enacted to replace rather than to sit alongside mandatory regulations, they could bring coherence to Israel's complex emergency legal structure. But as additional primary legislation, they add to or simply repeat orders already encompassed by mandatory regulations. The Penal Law 1977[24] is the most overt legal source that overlaps with mandatory regulations. This code and mandatory regulations overlap with respect to matters such as censorship and unlawful association (Tzor 1999).[25] Almost every felony addressed by mandatory regulations has a counterpart in the penal code. In fact, in limited cases, the penal laws' penalties are more severe than those imposed by mandatory regulations. This duplication provides an opportunity to revoke the mandatory regulations (Ibid. 1999), but the state has not seized this opportunity. Moreover, as confusing add-ons, they only augment an already convoluted system.

Most independent emergency laws have no unique features that separate them from normative laws. Thus, most can be recognized not according to their form, but only according to their content. As such, one can only recognize them by considering the historical context in which they were enacted or by reading their content (Hofnung 2001: 66, 75–76).

To make matters even more complicated, independent emergency laws are not a homogeneous group of statutes. Some have a clear connection to security necessities, while others have only a loose or indirect association with emergency. Some independent laws are ordinary laws but are not subject to judicial review.[26] Others assert *independent* volumes of states of emergency that allow Israel's authorities to go outside the normative instructions in a

[23] *The Association for Civil Rights in Israel v. Israel's Government and Knesset*.

[24] *S.H.*, 226, 1977.

[25] See a full list at Tzor (1999).

[26] Carrying and Presenting Identification Law (1982).

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time of emergency (Hofnung 2001: 75–76).[27] In addition, some independent formal laws are similar in form to normative laws, but their rationale is nonetheless based on emergency conditions and security necessities.[28] Some of these independent formal laws rehabilitate retroactive actions that took place during emergency times (Hofnung 2001: 65).[29] Moreover, in the Israeli law books, some mandatory laws (that are separate from mandatory regulations) authorize emergency powers. The Press Ordinance, 1933, for example, states, among other prohibitions such as censorship, that all newspapers must obtain a press license. Finally, some independent formal laws carry dual instructions: normative and emergency. In the body of these laws, each instruction has two versions, one for normative times and another for times of emergency.

The Occupied Palestinian Territories: A New Level of Jurisdictional Complexity

A Convoluted Legal System

The Occupied Palestinian Territories brings jurisdictional complexity to an even higher level. Because the political stakes are higher than they are inside the Green Line, so too is the degree of legal patchwork, structured ambiguity, and fluidity. In the Occupied Palestinian Territories, two populations live side by side but are subject to different legal systems and, thus, live in a complete divide. Despite their residence in a common location, Palestinians are governed by a military regime, whereas Jewish settlers are governed by Israeli law. By exploiting flexibility in law, Israeli authorities can achieve desired political ends—in this case, maintaining dual, unequal legal systems. Thus, the Occupied Palestinian Territories exemplifies the interplay between law and power.

Formally speaking, the Occupied Palestinian Territories is under a state of *belligerent occupation*: a legal condition that stems from international law. In a belligerent occupation, an occupying state—or a belligerent occupier—is not the sovereign of an occupied territory but temporarily acts as one until sovereignty has been restored. International law prohibits the occupying state from

[27] The Civil Defence Law (1951); in Paragraph 21 of this law there is a whole section of "Stand by State in Civil Defence" that is conditioned by a declaration of the minister of defence.

[28] For example, Sections 44 and 46 of the Evidence Ordinance (New Version) (1971) do not mention emergency but allow the authorities not to present evidence that may threaten the security of the state.

[29] In this category, we find the General Amnesty Ordinance (1949), which pardons those who could be accused of crimes during a war.

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annexing the territory or creating another state from it. Still, it may establish military administration over the territory and its population. Further, during the occupation, a military commander simultaneously serves as the legislative, executive, and judicial branches. International law provides the belligerent occupier with a set of emergency powers to ensure the "security of the population or [for] imperative military reasons."[30] Thus, according to international law, an occupying force may employ such measures as curfews, control of movement, school closings, restrictions on free speech, and economic sanctions.

But in addition to belligerent occupation, the Occupied Palestinian Territories is governed by other legal sources. This structure enables Israeli authorities to jockey among various sources to suit desired outcomes. These legal foundations include Jordanian law,[31] Ottoman law, British mandatory law (including mandatory regulations), and sections of Israeli law. With this convoluted legal base, Israel's occupying authorities have managed not only to maintain a long occupation regime, but also to establish civil settlements and govern their own citizens who reside in the Occupied Palestinian Territories according to Israeli law.

Because these various emergency legal foundations apply simultaneously, the legal system of the Occupied Palestinian Territories is immensely convoluted. Indeed, similar emergency ordinances are defined and redefined by different jurisdictions. Thus, for example, we find emergency power for the demolition of houses in Jordanian law, in international law (article 53 of the Geneva Convention), and in Israel's mandatory regulation 119.

Thus, despite the available emergency powers granted to a belligerent occupier (though they are less expansive than are mandatory regulations), Israel's authorities have insisted on preserving mandatory regulations in the Occupied Palestinian Territories. In some cases, the overlapping authorities of mandatory regulations and powers granted to a belligerent occupier are patched together into one decree, exemplifying the jurisdictional jockeying that pulls at the boundaries of legal orders (Benton 2002: 81). The following

[30] Article 49, the Fourth Geneva Convention. As we can see, international law has dual objectives. On the one hand, it seeks to protect the occupied population, but on the other, it allows the belligerent occupier to use emergency powers when it concerns security necessities.

[31] According to international law, and as the Israeli occupying force recognized, the law previously in force in the Occupied Palestinian Territories is still valid. Indeed, the first military decree that was issued in the Occupied Palestinian Territories asserts that the Israeli occupying force had accepted that the law in force in the Occupied Palestinian Territories prior to June 5, 1967, would remain in force with the exception that "security enactments take precedence over all law, even if they do not explicitly repeal it." See Benvenisti (1987: 145). And, in fact, Jordanian emergency law allows for draconian measures against political unrest or opposition. See Dowty (1988: 41–42).

excerpt of a decree demonstrates this perfectly: "By the power vested in me as the military commander of the region and according to regulation 86 of the Emergency (Defence) Regulations, 1945 . . ." In this decree, two sources of authority exist alongside each other. The first refers to the authority given to a military commander in a state of a belligerent occupation by international law, while the latter rests on Israel's mandatory regulations.

In fact, the dynamic between international law and mandatory regulations goes even further and highlights a complementary relationship that extends the power of the Israeli authorities. Military orders, which stem from the authority given to a military commander in a state of a belligerent occupation, have been used to reassert the validity of mandatory regulations in the Occupied Palestinian Territories.[32] Hence, Israel's authorities have used one legal source to validate another. This practice echoes the use of administrative orders by the Israeli government to validate retroactively mandatory regulations that were not made public. Thus, by conveniently drawing on different legal systems as needed, Israel's authorities can extend their power. In fact, this legal maneuver with military orders is not restricted to mandatory regulations but is used in general to insert Israel's state law into the Occupied Palestinian Territories. This is one of two mechanisms by which Israel's authorities govern settlers in its occupied territories.

State Law as Personal Law: A Case Study

In focusing on the legal administration over Jewish settlers in the Occupied Palestinian Territories I skip over important and contested aspects of the occupation—for instance, the legality, or, rather, the illegality, of the settlement project, which required Israeli authorities first to gain control of land.[33] I am allowing myself to skip these rather essential elements since my objective here, again, is to illuminate the administration of personal law on the settlers and settlements, and more significantly, the application by which the Israeli authorities are able to capitalize (so to speak) on legal complexity by using one legal authority to extend the validity (and power) of another.

Because Israel is a belligerent occupier in the Occupied Palestinian Territories, its own laws do not directly apply in the territo-

[32] Military Order 224, 1968, explicitly reaffirms the validity of mandatory regulations in the Occupied Palestinian Territories, and Military Order 378, 1970, repeats the provision concerning administrative detentions.

[33] See, for example, B'Tselem—The Israeli Information Center for Human Rights in the Occupied Territories—report, "The Plunder of Land: The Settlements' Policy in the Occupied Palestinian Territories" 2002 (in Hebrew).

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ries. Hence, governing Jewish settlers in the Occupied Palestinian Territories presents a problem: how do authorities apply Israel's state laws only to Jewish settlers in the Occupied Palestinian Territories? Israel's innovative solution—which some would simply deem illegal—is based on two legal mechanisms that serve as a bridge between the Israeli legal system and the Occupied Palestinian Territories. Both—one directly and one indirectly—are based on the administration of personal law. This legal device was common under colonial rule, particularly in colonial India.

With the increasing entrenchment of Jewish settlements, Israel's authorities have inserted Israeli state law into the Occupied Palestinian Territories as an extension of personal law. In the colonial world, this practice was well established. As Benton writes in her review of the Iberian Peninsula and the Atlantic world, "In the narrow sense, surely, the Iberian empires were imposing state law; in a broader sense, they were formulating state law as an extension of personal law" (2002: 49).

Israel's authorities, too, have used personal law to apply Israel's state law in the Occupied Palestinian Territories. The application of these state laws is based on an exterritorial administration of personal law on settlers; these laws apply to individuals, not to the territory as a whole. Figuratively speaking, this setup means that settlers carry on their backs Israel's state laws and are protected by a shield of sorts that isolates them from the legal system of the territory in which they reside. In practice, several Israeli laws now apply to settlers living in the Occupied Palestinian Territories because the meaning of an "Israeli resident" has been extended to include "any person whose place of residence is in the region and who is an Israeli citizen or entitled to acquire Israeli citizenship pursuant to the Law of Return, 1950."[34]

As a result, Israeli citizens' services and obligations—including military service, population registration, social security, health care services, and more—were applied to Israeli settlers in the Occupied Palestinian Territories. The outcome is an almost impossible situation in which, for example, settlers can vote for Israeli Knesset members from within the occupied territories.[35] This is rather remarkable because, unlike other countries, Israel does not allow its citizens to vote from outside the borders of the state.

A second mechanism that extends Israeli law to apply to Jewish settlers exemplifies how this jockeying between legal sources enables the implementation of political will. By using military orders, which stem from the authority given to a military

[34] Sec. 6(b), Criminal Jurisdiction and Legal Aid Law. See also Shehada (1985: 66).

[35] Paragraph 147 of the Knesset Election Law, *S.H.*, 1969: 103.

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commander in a state of a belligerent occupation, the Israeli authorities copied Israeli state laws regarding, for example, budgets, urban planning and infrastructure, and education, and applied them in the Occupied Palestinian Territories. This mechanism is based on territorial law. But because it applies only to Jews, it functions as personal law as well.

The difference is that the Israeli authorities have now created territorial enclaves of Israeli law in the Occupied Palestinian Territories and have extended the validity of some laws beyond the territory of Israel. Thus, the territory of the settlements—and not just the settlers as *individuals*, as before—are governed by Israeli law. Like the shield of personal law that applies to individual settlers, these settlements are governed by a shield that separates them from the laws that govern the rest of the territory. To ensure that this domain is governed solely under Israeli law, these military orders explicitly assert that Jordanian law is not in force in Israel's designated territories.

Enabled by the structured ambiguity and fluidity of the legal system, these mechanisms establish a wide, unequal gulf between settlers and Palestinians in the Occupied Palestinian Territories. Whereas Jewish settlers enjoy the protection of the Israeli law, Palestinians live under military occupation. In colonial rule, this practice has a long history. In the essay "Codification and the Rule of Colonial Difference," Elizabeth Kolsky (2005) joins Hussain (2003) in illustrating how the British colonial regime in India fused its discriminatory policies into law to justify its own unequal administration.[36] Both scholars describe the application of personal law to a select populace (Hussain 2003: 79; Kolsky 2005: 673, 677). As they demonstrate, this legal mechanism helped separate Europeans from natives. With personal law applying only to Europeans, this group was exempt from the legal system that governed the territory in which Europeans resided.

A principal element of the "Englishman's personal law" was that it disallowed European felons to be brought to trial in courts administered by Indian magistrates. As in colonial India, Jewish settlers are not tried for criminal offenses in local courts (in the Occupied Palestinian Territories, these are military courts), but rather in Israeli courts. In fact, this was the first implemented policy

[36] Both Kolksy and Hussain demonstrate further what Partha Chatterjee coined as the "rule of difference" (Chatterjee 1993: 16), which justifies Europeans' discrimination, by law, against natives. At the center of this conception lies the assertion that the universal application, which is at the heart of the formality of the rule of law, cannot be applied to the natives in the colony. The reasoning is that given the natives' culture and the fact that they did not experience a historical development similar to that of Europeans, they are unfit or at least not ready to be governed by the rule of law. Until they mature culturally, the colonizers must rule through legal exceptions.

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of the Israeli occupying forces. As early as July 2, 1967, even before the extensive development of Jewish settlements in the territories, the minister of justice enacted the following administrative order: Emergency Regulation (Areas held by the Defence Army of Israel—Criminal Jurisdiction and Legal Aid), 1967.[37] This emergency regulation enabled the Israeli court to try anyone for any act that took place in any region and that was considered an offense under Israeli law. But section 2(c) excludes persons who at the time of the act or omission were residents of the region. Thus, this section of the regulation applies only to Israelis, not to Palestinians.

This case study demonstrates how jockeying among various legal systems fuels the use of exceptional legal mechanisms to extend legal flexibility and enables the governing authority to give some groups preferential treatment or to achieve other desired ends. Some may deem the application of Israeli law only to Jewish settlers as simply illegal, but this view is beside the point. What is significant for this discussion is to understand that Israel's authorities have worked hard to remain within the realm of law. In fact, they have insisted on implementing their political will through legal channels, however awkward or roundabout they may seem.

Discussion and Conclusion

This article argues that emergency powers in Israel not only protect the state and its people but also ensure that Israel can pursue its political ends while maintaining legitimacy as a democracy. Israel's convoluted emergency jurisprudence has forwarded these political goals and legitimated unequal treatment of the Palestinians. In terms of Israel's convoluted and overlapping emergency jurisprudence, what might have emerged as a pragmatic and temporary solution during trying times in 1948 to 1949 quickly became a systemic and permanent mechanism of legal control in the hands of the Israeli authorities.

By analyzing Israel's emergency legal foundation, this article demonstrates that Israel's governing authorities use the state's emergency legal structure as a tool to create flexibility in the application of law. Without probing into the intentions of Israel's

[37] K.T. 2069, 1967, p. 2741. Later this administrative order was renewed as a renewal law, the Law for the Correction and the Extension of the Validity of Emergency Regulations (Judea, Samaria and the Gaza Strip, Criminal Jurisdiction and Legal Aid), 1977. An additional administrative order, which was extended by renewal law, was the Emergency Regulation (Areas Held by the Defence Army of Israel—Service of Documentation), 1969 (K.T., 2482: 460), which helped organize legal procedures among settlers, and between Israeli citizens and Palestinians.

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governing authorities in using emergency powers, we can establish that Israel's authorities have maintained and exploited the emergency regime's structured ambiguity and fluidity to achieve political ends that were otherwise impossible.

The Israeli authorities' manipulation of the state's ambiguous emergency jurisprudence has proved effective and not too costly in terms of Israel's legitimacy as a rule-of-law nation. When discriminatory, and even oppressive, political ends are administrated by legal mechanisms—however awkward—the administration can maintain its character as a government by law. So, as it turns out, this unstable and frantic apparatus is in fact a source of the relative stability of Israel's political regime.

Ultimately, a stacked legal system and fluid jurisprudence enable governing flexibility in Israel. The ability to jockey among different legal sources extends the power of the authorities, since the inner boundaries between discrete juridical orders are basically being lifted. While each of the regulations, on its own, is limited and established to organize a more specific task, these restrictions dissolve when the regulations are put together. In addition, one emergency legal authority can extend the validity of another legal enactment or simply be activated when the alternative has met its limits. Moreover, with renewal laws, emergency powers can switch legal sources, which grants these renewed laws even greater power. Thus, we can conclude that complexity rather than a focused clear authority is the source of greater sovereign power. With legal fluidity and structured ambiguity, the sovereign can switch freely from one juridical order to the next rather than be hemmed in by a well-defined legal structure.

Moreover, this article's systematic analysis of Israel's emergency jurisprudence contributes to the intensive ongoing debate about Israel's confusing political regime. First, it demonstrates how Israel's authorities have exploited the complexity of an emergency structure to hamper human and civil rights. But at the same time, because the state operates via legal mechanisms, it can claim legitimacy as a democratic, rule-of-law state. This dynamic is at the heart of difficulty to define the Israeli regime, I argue.

Second, this article outlines the mechanisms by which Israel's authorities have capitalized politically on Israeli's emergency powers and is thus a complementary exploration to Nadim Rouhana's (1997) work. In this respect, Rouhana argues that, in Israel, security has rationalized activities that extend well beyond emergency necessities and, in fact, reflect the Jewish majority's supremacy aspirations.[38] Yet Rouhana's analysis remains at the

[38] See also Kretzmer, David, *The Legal Status of the Arabs in Israel* (1990).

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level of ideology. He does not, therefore, address the specific emergency mechanisms by which the Jewish majority gains ethnic dominance over the Palestinians. This article thus pairs with Rouhana's work by illuminating the security-based mechanisms that enable Israeli authorities to forge a gulf between Jews and Palestinians.

In addition, a body of work by different scholars asserts that in the contest between Jewish hegemony and democracy, the latter is always secondary (Azoulay & Ophir 2008; Bishara 1993; Lustick 1978, 1980).[39] This article further extends these lines of argument by illustrating the ways in which Israel's complex emergency legal structure enables such a system of control (Lustick 1978) and allows the implementation of policies that support the Jewish hegemony.

A Final Note

As a governing tool, Israel's complex emergency jurisprudence is not about to disappear. In fact, it is the only means by which the Israeli regime can sustain itself given its current operation. Its juridical complexity was shaped by political conflicts and ultimately came to serve a political purpose. Today, Israel lacks the political will and the agency to advocate a formation of a true liberal constitution that would end the political use—or, more accurately, abuse—of Israel's complex emergency structure. As long as Israel's political stance remains the same, both inside and outside the Green Line, we should not expect a change in outcome anytime soon. Only a revamping of Israel's political structure would enable such a development.

Guide to Abbreviations of Official Publications of the State of Israel

D.K.: Protocol of the Knesset Proceedings

I.R.: Iton Rishmi—official Gazette during the Provisional Council of State (before the Knesset)

K.T.: Kovetz Ha-Takanot—regulations issued by ministers of the government

S.H.: Sefer Hahukim—Statute Book.

[39] This is only a partial list. Another way to say it is that (Jewish) nationalism precedes equal citizenship.

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Guide to Abbreviations of Court Materials

H.C.: case materials, Israeli High Court no.
P.D.: Piskei Din—law reports of the Supreme Court of the State of Israel

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