

CHAPTER ONE

JURISDICTION, JUSTICIABILITY, AND SUBSTANTIVE NORMS

JURISDICTION

Over the years Israeli governments pursued policies aimed at integration of the Occupied Territories with Israel while refraining from formally annexing the West Bank and Gaza or applying the Israeli legal system in those areas. In theory, at least, the applicable law in those parts of the West Bank and Gaza that are still under IDF control is the law that prevailed when the IDF entered the area, subject only to changes introduced by military order.¹

The Supreme Court of Israel is not an international forum. It stands at the pinnacle of the judicial branch of Israel's institutions of government; its jurisdiction and powers are defined in the laws of the State of Israel. It is not self-evident that the Court's power of review extends to actions carried out by the military in areas that are not part of Israeli sovereign territory and in which the Israeli legal system does not apply. There is precedent for the view that military commanders in occupied territory are not subject to the jurisdiction of the courts in their home country.²

When residents of the Occupied Territories first petitioned the Supreme Court, sitting as a High Court of Justice, the government's legal advisors had to decide whether to contest the Court's jurisdiction over such petitions. Meir Shamgar, attorney-general in the formative years of the Court's jurisdiction over the Territories, decided on a policy that was

to guide government counsel in years to come: the authorities would ask the Court to rule on the merits of the petition without entering into the question of jurisdiction.³ The reasons for this policy were probably varied. Mr. Shamgar has written that his basic idea was to ensure some form of external control over the actions of the military so as to prevent arbitrariness and maintain the rule of law.⁴ This would be in line with the prevailing philosophy of the Court that “in areas in which the Court does not intervene the principle of rule of law is flawed.”⁵ It is fair to assume, however, that a further reason could well have been the notion that petitions to the Supreme Court of Israel by residents of the Occupied Territories would imply the recognition of Israel by the petitioners, as well as political legitimization of Israeli rule over the Territories.⁶

In the first reported decision dealing with the legality of actions taken by the military authorities in the Occupied Territories, the *Christian Society* case,⁷ the jurisdiction question was not even mentioned by the Court. This was somewhat surprising, as the question of jurisdiction is an issue that a court will raise on its own initiative. From the Court’s remarks in later cases, however, it seems that the authorities had in fact declared that they did not contest the Court’s jurisdiction.⁸ In the *Electricity Corporation* case, decided shortly after the *Christian Society* case, the Court simply stated that as in “previous matters that have come before this court (recently, for example, H.C.337/71 [the *Christian Society* case—D.K.]) counsel for the first two respondents (the minister of defense and the commander of the area) did not contest the jurisdiction of this court, to entertain petitions relating to the activities of an Israeli military commander in the area of his military rule.”⁹

Resting jurisdiction solely on the respondent’s failure to contest the issue was not a path the Court was eager to follow, for it implied that if at some future stage the authorities were to contest the issue, they could undermine the status of the Court’s previous decisions. Thus, it was only a matter of time before the Court chose to discuss the jurisdiction question. In the *Rafiah Approach* case, Justice Landau mentioned that the authorities had once again refrained from contesting the Court’s jurisdiction. He explained that the Court would therefore assume

without ruling on the matter, that the jurisdiction exists on the personal level against functionaries in the military government who belong to the executive branch of the state, as “persons fulfilling public duties according to law,” and who are subject to the review of this court under section 7 (b) (2) of the Courts Law, 1957.¹⁰

As judicial review of IDF acts in the Territories became a permanent feature of Israeli legal and political life, the legal basis for this jurisdic-

tion suggested by Justice Landau lost its tentative nature and was adopted as the authoritative view of the Court.¹¹ Since the military commander and those acting on his behalf are public servants, who fulfill a public duty under law, they are subject to the statutory jurisdiction of the Supreme Court, acting as a High Court of Justice.

Resting the Court's jurisdiction over acts of the military in the Occupied Territories on interpretation of an Israeli statute has important implications. The jurisdiction is not dependent on the consent of the parties or on theories of natural or international law. Hence, the military authorities could not avoid judicial review by withdrawing their consent to the Court's jurisdiction. On the other hand, even though legislative power in the Occupied Territories is concentrated in the hands of military commanders, the *Knesset*, Israel's legislature, could redefine the Court's jurisdiction so as to exclude or limit review over decisions relating to the Territories.

JUSTICIABILITY

Jurisdiction is a necessary, but not always sufficient, condition for a court to decide a case on its merits. In countries following the Anglo-American system of law, courts have developed the doctrine of justiciability, under which a court may decline to exercise its jurisdiction in certain cases. As opposed to jurisdiction, which is determined by *external* constraints on the power of courts imposed by a constitution or legislation, justiciability involves an *internal* constraint placed by courts on their own decision-making power. It is a constraint employed by the courts to protect themselves from encroaching on the territory of other branches of government.

A number of features of petitions relating to the Occupied Territories could have made the justiciability doctrine relevant. The centrality of the Occupied Territories in the Israel-Arab conflict and the fact that West Bank residents are usually citizens of Jordan (which was in a formal state of war with Israel until 1994) could mean that governmental actions are "acts of state," one of the classic grounds of nonjusticiability in the English legal system.¹²

Second, some of the petitions challenged government policies that were highly controversial on both the domestic and international levels. Such petitions could arguably have been covered by the "political question doctrine," recognized in the United States as grounds for nonjusticiability.¹³

Third, when the occupation began, most Palestinian residents of the West Bank were citizens of Jordan, at the time a country in a formal state of war with Israel. It could have been argued that they lacked standing to challenge government actions before the courts of Israel.

“Act of State” Doctrine

Accepting the argument that all acts of the military in the Occupied Territories are covered by the “act of state” doctrine would have prevented substantive judicial review over those acts, thereby frustrating the policy of accepting the Court’s jurisdiction. Hence the authorities never raised this argument in relation to the West Bank or Gaza.¹⁴ Nevertheless, it is one of the theses of this study that even though the formal doctrine of “act of state” has never been considered as grounds for dismissing a petition, perception of acts by the authorities as acts of state is one of the factors explaining the Court’s reticence in intervening. This perception remained hidden until Justice Cheshin articulated it in a house demolition case.¹⁵

Political-Question Doctrine

The political-question doctrine has been most relevant in cases relating to establishment of civilian settlements in the Occupied Territories, since the government’s settlement policy has been highly controversial in Israel itself and has met a great deal of opposition on the international level, even by states usually supportive of Israel, such as the United States.¹⁶ Most cases dealing with civilian settlements were brought by Palestinian landowners who contested the legality of the taking and use of their land for this purpose. In these cases the Court distinguished between an individual’s claim that his or her property was taken illegally and the legality of establishing civilian settlements in the Occupied Territories. The political sensitivity of the latter question could make it nonjusticiable, but this did not affect the justiciability of individual property rights.

The *Beth El* case was heard while intensive peace negotiations were going on between Israel and Egypt. Nevertheless, Justice Witkon stated that he was not at all impressed with the argument that the “question before the Court is not justiciable as it is one that will be dealt with in peace negotiations and the Court does not deal with political questions that are in the government’s sphere.”¹⁷ He explained: “On the assumption—that was not proved in this case—that a person’s property has been damaged or taken illegally, it is difficult to believe that the Court will refuse a remedy to that person, because his right is likely to be the subject of political negotiations.”¹⁸

Hence the Court was prepared to examine whether the individual’s land had been requisitioned for security reasons, and within the framework of this argument to examine whether the authorities’ grounds for establishing that settlement were indeed security grounds. On the other hand, it was not prepared to consider the argument that under article 49,

paragraph 6, of Geneva Convention IV, establishing any civilian settlements in occupied territory is illegal. The main reason given was that the Geneva Convention is not enforceable in Israel's domestic courts.¹⁹ However, one of the judges, Justice Landau, remarked that he had decided not to deal with the said argument more readily since he was aware that the issue of civilian settlements in occupied territory was internationally controversial and likely to be on the agenda of fateful international negotiations being conducted by the government. He added:

It is better if matters, which by their very nature pertain to the international political plane, should be dealt with only on that plane. In other words, even although I agree that the petitioners' complaint is generally justiciable in court, since property rights of the individual are involved, this particular aspect of the matter should be regarded as non-justiciable upon application of an individual to this Court.²⁰

In the *Elon Moreh* case, counsel for the authorities tried to persuade the Court that as the general question of civilian settlement was nonjusticiable, the Court should refrain from dealing with a petition that challenged a government decision to requisition uncultivated land for such settlement. The Court rejected the argument. Justice Landau conceded that the Court's decision would be highly controversial; it would meet with acclaim by those who supported the Court's conclusion and total and emotional rejection by those who did not. However, because the argument was that the authorities had acted illegally in taking the land of a specific individual, the Court had no choice but to examine the argument on its merits. Justice Landau explained that since private property rights were involved, an argument based on the "relativity" of the right was unacceptable. A military government wishing to affect property rights of an individual must show that it is acting within its legal powers, "and cannot exempt itself from judicial review by pleading non-justiciability."²¹

This stance of the Court on the justiciability of individual complaints, as opposed to general issues of policy, is not confined to questions of land rights. On the eve of the outbreak of hostilities in the Gulf in 1991, the military authorities had distributed gas masks to Israeli residents of the West Bank but not to Palestinians residing there. In an action brought by a Palestinian resident of the West Bank, the Court refused to accept that the political nature of the decision could make an argument of discrimination nonjusticiable.²²

The distinction between a general issue of policy and expropriation of individual rights became relevant in a petition submitted in 1991 by the *Peace Now* movement challenging the legality of the Likud government's settlement policy.²³ The petitioners did not refer to any particular

settlement, but asked for an order to stop all settlement activities not grounded in essential security considerations. The Court dismissed the petition on the preliminary issue of justiciability without hearing argument on the merits of the case. Justice Shamgar, president of the Court, held that a number of factors made the petition nonjusticiable: it called for intervention in policy matters in the domain of another branch of government, there was no concrete dispute, and the predominant nature of the issue was political. He added that, even if the issue was a mixed legal-political one, it was nonjusticiable because its dominant nature was political.²⁴ Justice Goldberg went further and stressed that even if the Court could decide the issue on legal grounds, it should not do so. He explained that “a judicial determination, which does not pertain to the rights of an individual, must give way to the political process, which is so important and meaningful.”²⁵ Any decision of the Court on the merits could be seen as direct interference with the peace process; the case was therefore one of those rare cases that a court must refuse to hear so as not to undermine public trust in the law. Justice Goldberg ended his opinion with the following words: “The petitioners have the right to place a ‘legal mine’ on the Court’s threshold, but the Court does not have to step on a mine that may destroy its foundations, which are the public trust in it.”²⁶

Standing

There is some support for the idea that the standing of aliens to challenge the legality of government action before domestic courts is restricted. In *Johnson v. Eisentrager*,²⁷ German prisoners held by the American military authorities in Europe attempted to bring a habeas corpus action before courts in the United States. In response, the U.S. Supreme Court distinguished between the standing of resident and non-resident aliens. The former are deemed within the jurisdiction of the Court and have limited standing to sue in domestic courts, though they will be precluded from use of the courts to accomplish a purpose that might hamper the war effort or aid the enemy. In contrast, nonresident aliens do not have access to the courts and may not bring action against the authorities during hostilities or a war. On the basis of this analysis, the Court held that as nonresident aliens who were not within its territorial jurisdiction, the German prisoners lacked standing to sue for habeas corpus. Relying on the approach in *Johnson v. Eisentrager*, the authorities could conceivably have argued that residents of the Occupied Territories are nonresident enemy aliens who may not bring suit before the Israel Supreme Court. Obviously such an argument would have been incompatible with the policy decision to accept jurisdiction of that

court. As part of the policy not to challenge the jurisdiction of the Supreme Court, the authorities therefore also decided not to challenge the standing of residents in the Occupied Territories to bring suit.²⁸ The Court has never mentioned this issue.

SUBSTANTIVE LAW

Once the obstacles of jurisdiction, standing, and justiciability had been resolved, the Court was forced to decide what substantive law was pertinent. When the IDF entered the Territories in 1967, the military commanders published proclamations stating that the prevailing law would remain in force, subject to changes made by military order or proclamation. The norms of the local legal system were therefore clearly relevant. However, three other questions arose.

1. Is international law relevant in proceedings before a domestic court? If so, would the government raise the arguments that it had raised in the domestic and international political arenas, namely, that the West Bank and Gaza should not be regarded as occupied territory, and that the law of belligerent occupation was therefore not relevant to the specific situation there?
2. The Court's jurisdiction rests on the notion that the military authorities "perform public functions under law." Does this mean not only that these authorities are subject to the Court's jurisdiction as a High Court of Justice, but that they are also subject to the substantive rules and principles of Israeli administrative law that apply to all branches of government?
3. What is the status of the military orders, which, under the above proclamations, can amend local law? Are such orders subject to judicial review?

The first question will be discussed in the next chapter. The rest of this chapter will be devoted to a discussion of the second and third questions.

Rules of Israeli Administrative Law

The Supreme Court adheres to the theory that governmental powers are to be exercised by authorized governmental authorities and not by the Court itself. Sitting as a High Court of Justice, rather than a court of appeal, the Court's function is to examine the *legality*, rather than *correctness*, of government decisions. In carrying out this function the Court has created a body of law that has been described as Israel's common law.²⁹ This body of law rests on three principles: (1) no administrative

authority may perform an act, especially if that act affects the liberties of the individual, unless specifically empowered by law to do so; (2) in exercising their powers, administrative authorities are bound by rules of procedural fairness, such as the duty to afford a hearing to a person likely to be adversely affected by an administrative decision; and (3) administrative discretion must be exercised reasonably, without discrimination, for a proper purpose and on the basis of relevant considerations.

In the initial cases relating to the Occupied Territories petitioners based their arguments either on international law or on the local law. The Court addressed only the first principle—the existence of legal power to perform the challenged act—and failed to examine whether that act was compatible with the other principles of Israeli administrative law.³⁰ The change came in the *Al-Taliya* case.³¹ After mentioning the duty and powers under international law of the military authorities to maintain public order, Justice Shamgar added: “The exercise of powers by the respondents will be examined according to the criteria which this court applies when it reviews the act or omission of any other arm of the executive branch, while taking into account, of course, the duties of the respondents that flow from the nature of their task, as explained above.”³²

This dictum expresses the *theory* of the Court regarding the applicability of Israeli administrative law presented in many cases since the *Al-Taliya* decision. The theory is that all the rules of administrative law that apply to governmental authorities acting in Israel apply to the military acting in the Occupied Territories.³³ However, these rules must be applied in the light of the special status of the military authorities in the Occupied Territories, *as perceived by the Court*.³⁴

The Court has been fairly receptive to arguments of procedural fairness, especially those invoking the hearing requirement. It has been more reticent in rigorously applying the rules restraining use of administrative discretion. Nevertheless, in a few cases by applying these rules the Court has intervened in decisions of the military authorities.³⁵ In some cases in which the principles of administrative law should clearly have been relevant, the Court has simply ignored them.³⁶ In many other cases, especially those dealing with demolition or sealing of houses, the Court has mentioned the test of reasonableness but failed to apply the test in the way the Court itself has claimed that it should be applied, namely, to examine the balance between the various considerations taken into account by the administrative body.³⁷

In summarizing this brief discussion of the Court’s attitude to application of administrative law to decisions of the military commander, it should be noted that this law has provided the Court with a potent weapon with which to challenge decisions of the authorities

that meet standards of local and international law. Extending grounds of judicial review beyond the rules of belligerent occupation has allowed the Court to argue that in protecting the rights of residents in the Territories it has gone much further than required by international law.³⁸ Furthermore, because administrative law may be regarded as an internal constraint, whereas international law may be seen as an external constraint, the political implications of overturning an act of the military on the grounds of Israeli administrative law are less threatening than overruling the same act on grounds of international law. This may explain why, when alternative grounds exist for overruling an act, the Court has sometimes seemed to place greater emphasis on administrative law.

Military Orders

Under the rules of international law, when an army occupies enemy territory all governmental power, including legislative power, is concentrated in the hands of the military commander. This principle was expressed in Proclamations issued by the commanders of the Israel Defense Forces when they took control of the West Bank and Gaza in June 1967. Section 3 of the Proclamation on Law and Administration stated: "Any power of government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf."³⁹

Military commanders have used their legislative powers extensively, promulgating military orders in a wide range of areas, including security and fiscal matters, administrative affairs, education, and the status of civilian settlements. Exercise of these legislative powers raised a number of fundamental legal questions. These relate to the limitations placed by international law on legislative powers of an occupying power. When may a military commander introduce changes into the local law? May the commander promulgate legislation that has long-term effects or produces fundamental changes in the occupied territory? The attitude of the Supreme Court on these questions will be discussed in chapter 4. The question examined here relates to the scope of judicial review over legislative acts of the military commander.

The question of judicial review over military legislation in the Occupied Territories must be discussed in light of the Israeli constitutional system that, following the British model, long regarded primary legislation as beyond the pale of judicial review. The issue the Court had to contend with is whether the legislation of the military commander should be regarded as parallel to primary legislation and thus

immune from review, or as parallel to subordinate or delegated legislation, hence subject to review under the rules of administrative law previously reviewed.

The Court first expressly discussed this question in the *Rafiah Approach* case. Counsel for the government argued that legislation of the military commander should have the same status in the Court's eyes as primary legislation of the *Knesset*. Justice Witkon articulated the case against judicial review of military legislation, namely that in exercising legislative power the military commander was acting as the sovereign legislator in the Occupied Territories. As opposed to an administrative authority, whose power to promulgate subordinate legislation must rest on a mandate granted by the sovereign legislative body, the military commander is not dependent on such a mandate. Justice Witkon's conclusion was that military legislation should be regarded by the Court as primary legislation that is not subject to judicial review, either under the standards of Israeli administrative law or those of international law.

Justice Witkon's view received no support. Indeed, in the *Rafiah Approach* case itself the other justices on the bench adopted a different approach. Justice Kister suggested that while a military commander in occupied territory is in effect the source of his own power, in all his actions he is subject to orders from his superiors. In every "enlightened country" he is also bound to comply with the rules of international law that limits his authority.⁴⁰

Justice Kister's view soon became the accepted approach of the Court. In the *VAT* case,⁴¹ the issue concerned military orders that imposed value added tax (VAT) in the Occupied Territories. The Court did not doubt its power to review these orders so as to decide whether the military commander had exceeded the legislative powers of a belligerent occupant under international law. However, it added a gloss: because the military commander is part of the Israeli administration, all his acts, including his legislative acts, are subject to review under Israeli administrative law.⁴²

Since the *VAT* case, it has become the accepted practice of the Supreme Court that legislative acts of the military commanders are subject to review both under the rules of Israeli administrative law and the rules of public international law.⁴³ The Court regards the position of the military commander as a member of the Israeli public administration as the decisive factor that subjects all his actions to judicial review under Israeli administrative law. The Court strongly presented this view in the *Hamas Deportation* case, when it stated: "Security legislation may not effect changes in general, well-established norms of administrative law, which our law regards as principles of natural justice."⁴⁴

While in exercising their powers the military authorities are bound by the rules of administrative law, the Court has held that the source of those powers lies in public international law. In the *Ja'amait Ascan* case, after reviewing the precedents on this question, the Court said: "This review reveals that from the legal point of view the source of the authority and power of the military commander in an area subject to belligerent occupation lies in the rules of public international law that deal with *occupatio bellica*, and that are part of the laws of war."⁴⁵

Given the Court's view that the military commander derives authority and powers from the rules of public international law dealing with belligerent occupation, it would seem that each and every act of the military should be examined to see whether it complies with these rules. In reviewing the jurisprudence of the Court, it becomes apparent that the Court has not consistently carried out such an examination. On the contrary, in many cases it has done its utmost to avoid resort to standards of international law. Moreover, as we shall see in the following chapters, even when the Court has been prepared to look to international law, the way it has applied and interpreted it has often prevented it from serving as a meaningful constraint on the powers of the military.