Keele Law Review, Volume 2 (2021), 45-62

ISSN 2732-5679

'Hidden' Regulations and the Rule of Law: A Look at the First decade of Israel

Gal Amir*

Abstract

This article reviews the history of issuing regulations without due promulgation in the first decade of Israel. 'Covert' secondary legislation was widely used in two contexts – the 'austerity policy' and 'security' issues, both contexts intersecting in the state's attitude toward the Palestinian minority, at the time living under military rule. This article will demonstrate that, although analytically the state's branches were committed to upholding the 'Rule of Law', the state used methods of covert legislation, that were in contrast to this principle.

I. Introduction

Regimes and states like to be associated with the term 'Rule of Law', as it is often associated with such terms as 'democracy' and 'human rights'.[1] Israel's Declaration of Independence speaks of a state that will be democratic, egalitarian, and aspiring to the rule of law. Although the term 'Rule of Law' in itself is not mentioned in Israel's Declaration of Independence, the declaration speaks of '... the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948.'[2] Even when it became clear, in the early 1950s, that a constitution would not be drafted in the foreseeable future, courts and legislators still spoke of 'Rule of Law' as an ideal.

Following Rogers Brubaker and Frederick Cooper, one must examine the existence of the rule of law in young Israel as a 'category of practice' requiring reference to a citizen's daily experience, detached from the 'analytical' definitions of social scientists, or the high rhetoric of legislators and judges.[3] Viewing 'Rule of Law' as a category of practice finds Israel in the first decades of its existence in a very different place than its legislators and judges aspired to be.

One of the basic elements of 'Rule of Law' is the principle of the publicity of the law. John Locke asserted that government power '... ought to be exercised by established and promulgated laws; that ... the people may know their duty and be safe and secure

---

* Dr. Gal Amir, Faculty of Law and Jewish-Arab Center, University of Haifa. Research for this study was supported by the Israel Science Foundation (grant no. 1831/18), which I acknowledge with gratitude. I am grateful to Iris Agmon, Na'ama Ben-Ze'ev, Rawia Abu-Rabi'a, Sharon Maftzir, Avi Rubin, Anat Leibler, Ido Shahar, and Nir Kedar for their valuable suggestions and insights.

[1] Judith Shklar has demonstrated that the term 'Rule of Law' can also be used by oppressive regimes, therefore she sees no point in discussing the term if it is not linked to the protection of human rights and the prevention of arbitrary violence by the state. See: Judith N. Shklar, 'Political Theory and the Rule of Law' in Allan Hutchinson and Patrick J. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1, 16.

[2] *Official Gazette*: Number 1; Tel Aviv, 5 Iyar 5708, 14.5.1948 Page 1

[3] Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29 Theory and Society 1, 4.

within the limits of law.'[4] Following Locke, most formal definitions of 'Rule of Law' include due promulgation of legally binding norms as the basis of the rule of law. Indeed, when discussing binding legal norms, the principle of publicity is universally accepted as the solid foundation of a democratic, liberal state, based upon the principle of legality, as opposed to a totalitarian, arbitrary tyrannical regime.[5] This is true for the promulgation of primary legislation, but even more so for the promulgation of secondary legislation, which is broader in extent, and issued by the executive, rather than the legislature.

Two provisions of Israeli law – Article 10(c) of the Law and Administration Ordinance (LAO),[6] and Article 17 of the Interpretation Ordinance[7] – state that secondary legislation is valid only as long as it was published in the official records.

However, from the day the state was established, deep into the first decade of its existence, and even thereafter, state officials issued and enforced secondary legislation without publishing it in the official records. Thus, as a 'category of practice', the way in which the executive operated during this period shows that whatever the state's analytical perception of the rule of law was, the actions of the executive emptied this concept of all content.

The issuing of secondary legislation without due promulgation in an official record took two forms. An order or decree could have gone unpublished and practically covert. This article will refer to this kind of legal norm as a 'hidden regulation'. But in many cases a regulation would be published in a Hebrew daily newspaper, rather than the official gazette. This kind of regulation would be referred to as a 'low-salience-regulation'.

Hidden regulations were mainly used in a 'security' context. The use of extraordinary measures in this context is almost self-evident in Israel, in the 1950s as well as today. 'Low-salience regulations' were mainly used in enforcing food control rules, control of commodities evidently being of great importance during the 'austerity' period in the early 1950s. The two contexts in which hidden and low-salience regulations served as a tool of government intersected in the state's attitude toward the Palestinian minority.

Primary sources for examining this issue include official documents, such as laws, regulations (duly promulgated, hidden or low-salience), correspondence from the State Archives, rulings of Israeli courts in all instances, and protocols of the Knesset deliberations. The Hebrew daily press in Israel serves as an important source for investigating the issue, as low-salience regulations were published in these newspapers.

Drawing on these sources, this article will review the history of the use of hidden and low-salience secondary legislation by Israeli authorities in the first decade of Israel. The article opens with a brief theoretical review, connecting the practice of promulgation to the theoretical foundations of the rule of law, continuing with an overview of the way Israeli branches of government interpreted the concept of 'Rule of Law' in the early years of the state. The article will then continue to review the history of the promulgation of secondary legislation during the British Mandate on Palestine,

---

[4] John Locke, *Second Treatise of Government* (first published 1689, Crawford B. Macpherson (ed) Hacket Publishing Co. 1980) 72.
[5] For a broad review see: Christopher Kutz, 'Secret Law and the Value of Publicity' (2009) 22 Ratio Juris 197.
[6] Law and Administration Ordinance, 1948, IR No. 2 Suppl. I P. 1.
[7] Interpretation Ordinance [New Version], 1954, NV No. 1 P. 5.

placing the issue in a proper historical context. The article will continue to examine the way Israeli officials issued hidden and low-salience regulations in the 1950s, often as a measure of control aimed at its Palestinian population. The article will examine the legal background to the issuing of these regulations, the Supreme Court's attempt to stop this practice, and the way the executive has continued to issue hidden and low-salience regulations, using bypassing legislation to overcome the Supreme Court's rulings. The review will end with the enactment of the Commodities and Services (Control) Law in 1957,[8] ending the legal possibility to issue low-salience regulations regulating food control. The article will then provide a brief overview of the current legal situation in Israel regarding the validity of hidden and low-salience regulations, both historic and current.

II. Promulgation and the Rule of Law

The idea of the rule of law is closely related to the practice of promulgation. Lon L. Fuller describes the ruler's duty to make his laws public as 'a problem of legal morality that has been under active discussion at least since the Secession of the Plebs.'[9] Joseph Raz gives a more formal, less value-based connection between the rule of law and promulgation. He describes the rule of law as having two aspects: '(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.'[10] Simply put, one cannot be guided by secret law.

Obviously, one cannot be guided by a hidden regulation, therefore the issuing of hidden regulations is clearly incompatible with Raz's basic idea of the rule of law. What is the case with low-salience regulations?

The case of the low-salience food control regulations, described in this article, involved publishing the regulations randomly in one or two out of eight Hebrew language papers (except for a single entry in the English daily *Jerusalem Post*).[11] Why is this different, from the point of view of an Arabic-speaking Israeli in the 1950s from promulgating the same regulations in the official *Gazette,* translated into Arabic months after the regulation came into effect, and distributed to a limited number of lawyers and officials?[12]

The answer is that when a regulation is duly promulgated, in an Arabic language official publication, however late, a Palestinian citizen has a reasonable chance to comply with the law. One simply cannot expect a Palestinian citizen to read eight Hebrew dailies and look for food control regulations. It is almost the equivalent of not publishing these regulations at all. Even if the said Palestinian citizen is fluent in Hebrew, locating a particular regulation had an element of randomness, and locating

---

[8] Commodities and Services (control) Law, 5718-1957, SH No. 240 p. 24.

[9] Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 651.

[10] Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 210, 213.

[11] The regulations were published in the Hebrew dailies *Haaretz, Davar, Haboker, Al Hamishmar, Hatzofeh, Herut* and *Hador*, and at least once in the English daily *The Jerusalem Post* ('Food Control Order (Prohibition of Use of Bread as Fodder) 5711-1951' *The Jerusalem Post* (Jerusalem, 10 Jan. 10, 1951)). The regulations would often be published in two or three papers, sometimes in more papers, seldom in only one paper. The author of this article has tried to locate any such publications in the Arabic press, but failed.

[12] These practices will be detailed in section six of this article, reviewing the *Azzam* case (CrimC (Haifa) 18/51 *Attorney-General v. Azzam* 5 PM 179 (1951)).

it after weeks or months was almost impossible in the pre-Internet era. The official *Gazette* was both comprehensive (including every new regulation) and indexed. Daily Hebrew newspapers were neither comprehensive (as the regulations were published randomly in either newspaper), nor indexed.

Theoretically, in the context of promulgating legislation, Christopher Kutz views 'secrecy' as equivalent to 'low-salience', as both methods of obscuring the law are subject to similar moral evaluations.[13] Yet, moral evaluations are not sufficient to fully realize the full impact of low-salience regulations on Palestinian citizens in Israel in the early 1950s. One must take into account the unique conditions under which Palestinian citizens lived at the time.

With the establishment of the State of Israel, the government began to enforce a strict policy of rationing, supervision of food supplies and other basic products, and their prices. This policy came to be known as 'Austerity'.[14] At the same time, strict rules of supervision and movement prohibitions were enforced on the remaining Palestinian minority within the borders of the state of Israel. These rules were known as the 'Military Rule'.[15] Both policies, the Military Rule and the Austerity, required constant enforcement, as many citizens resisted them in various ways. In this enforcement, hidden and low-salience regulations were used.

The military rule was in its essence arbitrary, as the right of movement (as well as many other rights) of Palestinian citizens was dependent upon personal decisions taken by military officers and state officials. The military governor of each 'zone' (the military rule was enforced on predefined 'zones' in which the Palestinian population lived) had limitless powers within his zone. There was no administrative review of his decisions, and judicial review was limited to petitioning the high court.[16] Enforcing the austerity policy with low-salience regulations created another layer of arbitrariness. One could never know whether one's most basic actions – the selling or purchase of food – was legal, or whether one has crossed some invisible line, and will be punished for it.

This kind of arbitrary rule stands in contradiction to the concept of the rule of law. Raz clarifies this point:

> The rule of law is often rightly contrasted with arbitrary power. Arbitrary power is broader than the rule of law. Many forms of arbitrary rule are compatible with the rule of law. A ruler can promote general rules based on whim or self-interest, etc., without offending against the rule of law. But certainly many of the more common manifestations of arbitrary power run foul of the rule of law. A government subjected to the rule of law is prevented from changing the law retroactively or abruptly or secretly whenever this suits its purposes.[17]

---

[13] Kutz (n 5) 204.

[14] The Austerity policy was formally in force between 1949 to 1959. For a review of the 'Austerity' policy see: Orit Rozin, 'The Austerity Policy and the Rule of Law: Relations between Government and Public in Fledging Israel' (2005) 4 Journal of Modern Jewish Studies 274.

[15] The Military Rule was in force between 1949 to 1966. For a general description of the military rule see: Yair Bäuml, 'The Military Government' in Nadim M. Rouhanna and Areej Sabbagh-Khoury (eds) *The Palestinians in Israel: Readings in History, Politics and Society* (Haifa: Mada-al-Carmel, 2011) 47.

[16] Sarah Ozacky-Lazar, 'Ha-Mimshal Ha-Zvai Kemangenon Shlita Baezrachim Ha-Arvim: Ha-Asor Ha-Rishon 1948-1958' [The Military Government as a Mechanism of Controlling Arab Citizens: The First Decade, 1948–1958.] (2002) 43 Hamizrah Hehadash 103.

[17] Raz (n 10) 219.

As we shall see in the following parts of this article, in 1950s Israel the official rhetoric spoke highly of the rule of law, but the government practiced arbitrary rule through low-salience and hidden regulations.

III. The 'Rule of Law' in the Early Years of Israel – Rhetoric and Practice

Beginning with the founding of the State of Israel, the official rhetoric of the three branches of government was committed to the idea of the rule of law. This idea was related to David Ben-Gurion's ideal of *Mamlakhtiyut*[18] – seeing the state as the sole and sovereign source of power. According to Nir Kedar, this included 'awareness of society's needs to function as a civilized, independent polity that demonstrates civic responsibility, respects democracy, and upholds law and order.'[19]

In a 1950 speech, given in the Knesset discussion of the drafting of the Israeli constitution,[20] Ben-Gurion gave his interpretation of the ideal of 'Rule of Law':

> The freedom of the individual and the freedom of the people do not depend on the declaration of liberties, nor a constitution, even the best constitution in the world, but on one principle: the rule of law. Only in a state where everyone - a citizen, a soldier, a clerk, a minister, a legislator, a judge, and a policeman - are subject to the law and acts according to the law; only in a state that has no arbitrariness, not of ministers and governors, not of representatives of the people and state officials, nor individuals and political leaders - only in such a state is freedom guaranteed to the individual and the multitude, to the person and the people. In a country that does not have the supremacy of the law – there is no freedom, even if its constitution incorporates the most vigorous and advanced declaration of freedom in the world.[21]

Ben-Gurion spoke as the head of the executive branch, holding at the time the two most powerful posts in Israeli politics – Prime Minister and Minister of Defense. A few months after this speech, he used his post as Minister of Defense to dismiss a high-school teacher, Dr. Israel Sheyb (Eldad), for promoting right-wing radical ideology. Sheyb appealed to the High Court of Justice, claiming that Ben-Gurion had no legal authority to terminate his employment, being the Minister of Defense. The Supreme Court ruled in favor of Sheyb, basing the ruling on the principle of the rule of law. Judge Yitzhak Ulshen wrote:

> It seems to me that if we had refused to address the applicant's petition, we would have made null and void the principle of 'Rule of Law' that governs the state. The fundamental meaning of this principle is that the restrictions that must be imposed on the freedom of the individual so that this freedom may not infringe on the choices of others or in the interests of society should be determined by law, i.e., by society reflecting its opinion in laws enacted by the legislature, and not by the executive whose sole duty is to enforce these restrictions per the above laws. This principle means that individual rights

---

[18] *Mamlakhtiyut* – can be roughly translated as 'statehood'. This was a central concept in Ben-Gurion's political thought.
[19] Nir Kedar, 'Jewish Republicanism' (2009) 26 Journal of Israeli History 179, 179.
[20] The Knesset's main function, as stated in the declaration of independence, was to draft a constitution. By mid-1950 this was deemed politically impossible, and abandoned in favor of enacting 'basic laws' that would, when completed, serve as a constitution. As of 2021, the enacting of basic laws is still being undertaken by the Knesset.
[21] DK (1950) 817 (translated from Hebrew by the author).

> cannot be restricted or deprived by a clerk or a minister, just because they think – even correctly – that the state would benefit from these restrictions. They must convince the legislature that the restrictions are necessary, and only after the legislature has given them its seal, are they allowed to carry them out.[22]

This concept of 'Rule of Law' was not far from Ben-Gurion's principle of 'statehood.' Kedar argues that the *Sheyb* ruling does not draw a dichotomy between a judiciary dedicated to the defense of human rights and the 'arbitrary public administration'. He views the *Sheyb* ruling as a tale of two branches of government each trying to serve the public fairly, uniformly and equally while maintaining civic consciousness, and that both Sheyb's dismissal and the Supreme Court's ruling are based on the importance of respecting the law.[23] It may well be, though, that the distinction between 'categories of practice' and 'categories of analysis' is reflected in this matter in the fact that although all parties paid lip service to the rule of law, Sheyb was unable to get back his job as a schoolteacher. In his memoirs, he said that the judges asked, outside the formal protocol, who would dare hire him as a teacher, knowing that Ben-Gurion was opposed to it.[24]

The third branch of government, the legislature, has also demonstrated vigorous support for the idea of 'Rule of Law', in particular when it came to opposing covert legislation. In 1949 it was discovered that in the last two weeks of British rule 36 laws were enacted. These laws were not promulgated, as the first of these laws purportedly eliminated the need to publish laws in the Official Gazette. A booklet containing these laws was printed at the Jewish 'Goldberg Press' in Jerusalem, and thus its existence was probably known to legal entities in Israel during the early days of the state. Only a few months later, at the beginning of 1949, Israeli sources came to a booklet printed in London, apparently some-time after the end of the mandate, which included six additional laws. These included politically sensitive and economically meaningful legislation, such as a law that gives effect to changes in agreements with the Iraqi oil company, or a law that exempts the Jerusalem Electric Corporation from liability for non-supply of electricity.[25]

Israeli officials were worried about the potential damage that could be caused by the laws that had already been discovered, and fearful of discovering more booklets containing more covert laws. The Justice Department decided to propose a bill to repeal this covert legislation altogether. Initially, Attorney-General Yaakov Shimshon Shapira thought that at least some of the laws, such as laws dealing with municipal boundaries of local authorities, should be allowed to remain valid.[26] For this reason, the Justice Department drafted the Covert Laws (validation) Bill,[27] which ordered the

---

[22] HCJ 144/50, *Dr. Sheyb v. The Minister of Defense*, 5 PD 399, 411 (1951) (translated from Hebrew by the author).

[23] Nir Kedar, 'Ha-Mamlakhtiyut Harepublikanit Shel Shoftey Bagatz Ve-Shel Ben-Gurion: Khazara Le-Bagatz 144/51 Sheyb Neged Sar Habitachon' [The Republican Mamlakhtiyut of Israeli Justices and Ben-Gurion: HCJ 144/51 Sheyb v. Minister of Defense Revisited] (2004) 14 *Yiunim Bitkumat Yisrael* 131.

[24] Nir Kedar, 'Al Haformalizm Hamekhanekh Shel Beyt-Hamishpat Haelyon Hamukdam: Iyun Mekhudash Bepiskey Hadin Beparashot Bejerano Ve-Sheyb' [The Educating Legal Formalism of the Early Israeli Supreme Court: Revisiting the Bejerano and Sheyb Rulings], (2006) 22 Mehkarey Mishpat 385, 397.

[25] The history of the discovery of these covert laws, the booklet containing these laws, correspondence and bills regarding these laws can be found of file C/1/390 in the Israel State Archives entitled – 'Law and administration – Covert Laws Law'.

[26] Letter from Yaacov Shimshon Shapira, Attorney-General to Ze'ev Sherf, Secretary of the Government (23 March, 1949) ISA C/1/390.

[27] Draft Bill for Covert Laws (validation), 5709-1949. ISA C/1/390.

repeal of all covert laws, but gave the government the opportunity to issue a decree validating any of them from the date of their enactment by the British Mandate government, giving effect to any action taken under these laws until the date of the issue of the decree. Ben-Gurion disagreed, and ordered to draft a bill to repeal all the covert legislation without the possibility of retroactive adoption.[28] Shapira did not accept Ben-Gurion's decision, but eventually the matter was decided due to an urgent diplomatic need. Among the covert laws were laws affecting the property of the Russian Church, which could create friction between the State of Israel and the USSR. As relations with the USSR were of great importance during this period there was a need to repeal these laws even before the Knesset went on its leave for the summer of 1949. Thus, The LAO was summarily amended, repealing all British covert laws without the possibility of retroactive validation.[29]

The motives behind the amendment were described to the Knesset as high democratic and legal principles based on the rule of law. The Minister of Justice, Pinchas Rozen, presenting the bill to the Knesset said, during the first reading: 'A citizen is allowed to know the laws that exist in a state. One cannot demand from a citizen to live in fear that there might be some document somewhere, that may seem as a valid law.'[30]

We have seen how the three branches of government adopted the basic principles of the rule of law, and spoke against arbitrary action by the state based on hidden motives and unpublished legislation. But all of these statements were made on the analytical level. On the practical level, officials issued secondary legislation affecting the daily life of the ordinary citizen, and the lofty principles of the rule of law receded from practices of covert legislation, and the use of arbitrary force.

IV. Promulgation of Secondary Legislation in the British Mandate on Palestine

In order to understand legal issues concerning the issuing of hidden and low-salience regulations in Israel, one must examine the legal infrastructure that enabled this practice, beginning in the British Mandate era.

In 1929, British Mandate authorities enacted the Interpretation Ordinance.[31] Article 7(c) of the Ordinance stated: 'All regulations having legislative effect shall be published in the Gazette and, unless it be otherwise provided, shall take effect and come into operation as law on the date of such publication.' This Article gave a simple test, still valid today in Israeli law. A rule can be titled 'Order', 'Decree', or 'Regulation'. This does not matter. If it 'has legislative effect' it is secondary legislation that must be promulgated in the official records as a condition to its validity.

The Food and Essential Commodities (Control) Ordinance[32] was enacted in August 1939, just days before the outbreak of World War II. The ordinance provided for regulation of the price and the consumption of food and the essential commodities, a reasonable step in a state of war that could lead to food shortages and acts of

---

[28] Letter from The Secretary of the Government Ze'ev Sherf to Attorney-General Yaacov Shimshon Shapira (11 April, 1949). ISA C/1/390.

[29] Law and Administration Ordinance (Amendment), 5709-1949, SH No. 20 p. 159.

[30] DK (1949) 1335 (translated from Hebrew by the author).

[31] The Interpretation Ordinance, 1929, No. 34 of 1929. The ordinance was revised several times during the Mandate, and in 1954 it was unified into a 'New Version' by the Israeli legislator (cf n 7). Article 7 of the 1929 ordinance is today Article 17 of the Israeli New Version.

[32] Food and Essential Commodities (Control) Ordinance, 1939, No. 34 of 1939.

profiteering. The ordinance enabled the High Commissioner to declare products as supervised products, and to allow an official titled the 'Food Controller' to oversee their prices.

This ordinance was superseded in 1942 by the Food Control Ordinance (FCO),[33] which gave the Food Controller more extensive powers of supervision and punishment. Article 4(2) of this ordinance stated that: 'It should not be necessary to publish in the Gazette an order made under this section.'

This was not a single clause in this spirit in the emergency legislation, in the twilight of the British Mandate. In 1945, the Defense (Emergency) Regulations[34] were issued. These regulations gave the British Mandate authorities extensive search and detention powers. Article 3(2) of the Regulations stipulated that certain articles of the Interpretation Ordinance would not apply to the Regulations, including the article that provided that secondary legislation is only valid as long as it was published in the gazette.[35]

This legislation was not repealed when the State of Israel was founded. Article 11 of the LAO provided that the law that was in effect during the Mandate period would remain in effect, thus keeping valid both the Defense Regulations and the FCO, enabling the Israeli government the issuing of hidden and low-salience regulations.

V. Hidden Israeli Secondary Legislation – The Beginning

The first of the low-salience regulations was issued less than a month after the state was founded. On 11 June 1948, an Order Restricting Saccharin Trade was published in *Haboker* daily Hebrew newspaper, signed by El. Perlson and Dr. H. Freder, Food Controllers.[36] The order declared saccharin as a supervised product, stipulated that any person holding a quantity of saccharin greater than one kilogram must report it to the Food Controller, and that one was not permitted to sell, deliver, transfer, use, process or buy saccharin except under a special license. This order was not published in the official gazette. Further orders in this vein continued to be issued in subsequent months. On 28 July 1948, regulations published in the official gazette, issued under the Defense (Emergency) Regulations[37] announced price control. The new prices, it was decreed, would be delivered to the citizen through advertising 'in at least two daily newspapers, or in street ads, or in any other way deemed appropriate or delivered directly to the person concerned.' The regulations were signed by the Food Controller, Eliezer Perlson.

Obviously, an order regulating a price for a basic product, is a regulation 'having legislative effect' that is required to be published in the official gazette according to

---

[33] Food Control Ordinance, 1942 No. 4 of 1942.

[34] Defense (Emergency) Regulations, 1945, *Palestine Gazette* No. 1442, supp. 2 P. 1055.

[35] The Interpretation Ordinance was replaced by a different version in 1945. Article 7 of the 1929 ordinance was numbered Article 20 in the 1945 version. Article 3(2) of the Defense Regulations provided that: 'The provisions of the Interpretation Ordinance, 1945, other than those of paragraphs *(b)* and *(d)* of Article 19 and those Articles 20, 35, 36 and 37 thereof, shall apply, save as otherwise provided, to all emergency legislation and, for the purposes of such application, Regulations made under the Order in Council shall be deemed to be Ordinances.'

[36] 'Food Control Order (Restricting Saccharin Trade), 5708-1948' *Haboker* (Tel-Aviv, 11 June 1948) 7.

[37] Defense (Prevention of Profiteering Order) (Setting Maximal prices for Food Products) Regulations 5708-1948 IR No. 11, supp. B p. 41.

Article 20 of the Interpretation Ordinance.[38] Relying on the Defense Regulations, and on the FCO, Perlson believed that this was bypassed. Various orders in this vein continued to appear in the Hebrew daily press in subsequent years.[39] These orders were of two types. One is 'Defense' orders based on the Defense (Prevention of Profiteering) Regulations, 1944 and the other is orders based on Article 4 of the FCO. These two laws explicitly included clauses that exempt regulations from publication in the official gazette. It stands to reason that during this period many orders were drafted according to the Defense (Emergency) Regulations. These were not published in the newspapers or records, but were executed without publication in the manner described below when discussing the *Aslan* ruling.[40]

To the extent that Perlson and his staff (soon afterwards, Avinoam Halevy (Epstein) was appointed Food Controller and his name appears on most of the regulations issued in these matters) relied on the mandate legislation on the matter, their action contravened an explicit provision in the LAO. As mentioned, Article 11 of the ordinance adopted most of the legislation that preceded the establishment of the state. Article 10(c) provided that the duty of publicity, which was applied by Article 10 (a) with respect to primary legislation, also applies to 'regulations and emergency regulations.' This created a legal tangle. On the one hand, the provisions of article 20 of the Interpretation Ordinance and Article 10(c) of the LAO, which stipulated the duty to publish, were in effect. On the other hand, the provisions of the FCO and the provisions of the Defense (Emergency) Regulations exempted certain regulations from this duty . The question which legislation has the upper hand, which legislation is in force and which is repealing which, has been debated in Israeli courts several times, and by the end of 1951 it was not decided.

The High Court of Justice addressed this issue at a fairly early stage, discussing the *Lyon v. Gubernik* case.[41] This case examined a 'hidden' confiscation order issued under the Defense Regulations, that was not published. The High Court ruled that the order is exempt from publication due to the exclusion of the Defense Regulations according to Article 20 of the Interpretation Ordinance but did not address Article 10(c) of the LAO. When another action by the same official (Yehoshua Gubernik, the Tel-Aviv District Commissioner) was put to the test, the High Court referred to Article 10(c) but refrained from deciding on its applicability because the order in question was not 'having legislative effect'.[42] Lower instances, ruling in criminal cases relating to

---

[38] This legal question was not clearly answered for several years and courts gave somewhat arbitrary rulings, based on vague criteria. In 1956 the Supreme Court ruled that any such regulation is valid only if it is published in the Gazette. CA 213/56 *Attorney-General v. Alexandrovich* 11 PD 701 (1957). For a detailed analysis see: Baruch Bracha 'Pirsum Hakikat Mishne: Bdikat Ha-Din Ha-Kayam Ve-Ha-Mutsa Be-Mishkafayim Hashva'ati'im'[Promulgation of Secondary Legislation: an Examination of the Existing and Suggested Law in Comparative Perspective] (1969) 7 Iyuney Mishpat 168.

[39] The first order that I have managed to locate was an order regarding maximum prices for various food products, which was published in the Hebrew daily newspaper *Davar* in April 1949. ('Al Teshalem Yoter' [Do Not Pay More] *Davar* (Tel-Aviv, 29 Apr. 1949) 9). The orders have evolved from simple adverts that sometimes carry a slogan such as 'Do not pay more' with the signature of a government official identified by office but not by name, to legally drafted regulations, baring a name based on the authorizing law (for example: Food Control Regulations (...), 1950), signed by an official recognized by his name and office (for example – Herbert Fredder, Food Controller). The April 1949 Order was the first to appear as a decree or regulation, but it was preceded by various publications, that were even less formally drafted, beginning at the end of 1948.

[40] HCJ 220/51 *Aslan v. The Military Governor of the Galilee*, Nazareth 5 PD 1480 (1951).

[41] HCJ 5/48 *Lyon v. The Acting Administrator of the Municipal Area, Gubernik,* 1 PD 58 (1948).

[42] HCJ 10/48 *Ziv v. The Acting Administrator of the Municipal Area, Yehoshua Gubernik,* 1 PD 85 (1948).

offenses against these regulations, generally tended to go this way, did not address the express language of Article 10(c), and considered these regulations, not published in the records, valid.[43]

VI. The *Azzam* Case

On 29 and 30 May 1951, an order regarding restrictions on the marketing of fodder grains was published in the Hebrew dailies *Davar* and *Hador*.[44] Palestinian traders in the Nazareth area seem to have violated the order, and as a result, they have been indicted and tried before the profiteering tribunal in Haifa.[45] The Tribunal considered the issue of whether Hebrew advertising in two daily newspapers could bring the new restrictions to the attention of Palestinian traders in the Nazareth area, and concluded that this was not the case. As a result, the tribunal acquitted the defendants, stating:

> As far as we want to give a very broad interpretation to the controller's authority to publish his orders, the legislator did not intend for these orders not to reach the general public to which they apply. We take note that the aforementioned Hebrew newspapers do not reach this village at all, and do not even reach Nazareth. Even if they did, the defendant did not know what was written in them, nor was it alleged and proven that the village elders were warned by the authorities as to the prohibition of trading fodder without a license. In earlier rulings, we have warned that the Arab region of Nazareth must be dealt with in a more reasonable, practical, efficient and logical manner.[46]

The Attorney-General opposed the acquittal, and appealed to the Haifa District Court. In a long, well-reasoned ruling, the District Court convicted the merchants. First, the judge ruled, it does not matter whether or not the merchants knew about the order, since ignorance of the law is no excuse. The judge then proceeded to discuss the legality of unpublished regulations, issued under the FCO. In accordance with Supreme Court rulings of the same period, the judge concluded that the provision of Article 10 (c) of the LAO does not provide that such orders should be published in the records, since it refers, according to article 8 of the ordinance, only to regulations that were 'issued by a minister for the purpose of carrying out an ordinance within his authority' thus excluding regulations that were issued under ordinances enacted by the Mandate authorities, such as the FCO. The court continues to ponder into the legal tangle arising from the various legal provisions that determine a duty to publish regulations, and then concludes that there was no duty to publish. But that was not the end of this specific ruling.

The defendants were represented by the famous Palestinian lawyer Mohammad Nimr al-Hawari, a public figure espousing political aspirations. It was clear that al-Hawari would not be satisfied by the legal argument regarding the duty to promulgate secondary legislation. He raised the question – how can legal norms published only in Hebrew be imposed upon an Arab-speaking population?

---

[43] For a review of the lower instances' rulings see: cf Bracha (n 40) 169.

[44] 'Food Control Order (Fodder Grains) 5711-1951' *Hador* (Tel-Aviv, 30 May 1950), *Davar* (Tel-Aviv, 30 May 1950) 3 (The Azzam ruling gives different dates. These dates are obviously erroneous as they are late to the date the ruling was given).

[45] According to the Prevention of Over-Pricing and Profiteering law, 5711-1951, special tribunals were founded. The jurisdiction of these tribunals was to try any offense against 'the economy' and any offense listed in the first addendum to the law, including the Defense Regulations and the FCO.

[46] *Azzam* case (n 12) 182 (translated from Hebrew by the author).

Indeed, regulations published in the records have been translated into Arabic per Article 82 of the Palestine Order in Council.[47] This translation was done by the Department of Records Translation at the Ministry of Justice, headed by Dr. Itzhak Shamosh. The unit's files in the State Archives[48] reveal that the translation was non-continuous, and was usually published a long time after the regulations came into effect. However, a genuine effort was made to distribute it among the general population, and certainly among Arabic speaking lawyers and government employees.

This situation was not ideal, and in 1965 al-Hawari himself was damaged by this delay in translation, when he was prevented from running for mayor of Nazareth, due to a technical change in the Local Authorities Law (Elections) that was translated into Arabic a few months after the law came into effect. Al-Hawari appealed to the High Court of Justice, but the appeal was denied, and the High Court ruled that the law went into effect with the publication of the Hebrew version.[49] But even in these less-than-ideal terms of translation and distribution of the Arabic version of the regulations, the Palestinian citizens were still given the opportunity to comply with the law. Such a possibility was denied in the case of regulations published only in the Hebrew daily newspapers. Therefore, al-Hawari argued, a regulation that is not published in Arabic, contrary to the Palestine Order in Council setting Arabic as an official language, cannot be valid. The Haifa District Court was not impressed with this argument, stating:

> We share Mr. Hawari's opinion that it is desirable for the authorities' orders to be brought to the citizens' attention. Most of these orders contain an absolute prohibition, and criminal intent is not a necessary component for conviction. A strange situation is created. The rule is that ignorance of the law does not exempt from criminal liability. Criminal intent is not necessary for conviction. Therefore, a loyal citizen who has no criminal intent can be found guilty of an offense without having any knowledge of the existence of the law. But the court cannot take the powers of the legislature. In 1942 the Legislature considered, and enacted Article 4(2) of the Food Control Ordinance. Whether it is justified or not, whether it stands the test of reason or not, it is not for us to decide. This matter is in the legislature's authority and not in the authority of the court. It is not our authority to make proposals to the Legislature, but we have drawn the Attorney-General's attention to this issue. We think it right that directives be given to the authorities to publish their orders in the records, even without this obligation being imposed, and to the extent that special circumstances do not preclude the possibility of such publication … given this conclusion, it is unnecessary to discuss Mr. Hawari's second argument, for if there is no duty to publish the law at all, there is no duty to publish it in all official languages.[50]

As will be demonstrated below, the District Court could have taken a different route, but chose not to. The orders continued to be published in Hebrew newspapers. Towards the end of 1951, the matter came yet again to a decision by the Supreme Court.

---

[47] Article 82 of the Palestine Order in Council stated that – 'All Ordinances, official notices and official forms of the Government and all official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner, shall be published in English, Arabic and Hebrew'.

[48] ISA file C-2216/26 'Management – 'records' in Arabic'; ISA file C-1322/32 'Official Gazette in Arabic'; ISA file C-304/9 'Official Gazette in Arabic'.

[49] HCJ 297/65 *al-Hawari v. The Chairman of the Elections Committee to the Nazareth Municipality,* 19(3) PD 279 (1965).

[50] *Azzam* case (n 12) 185 (translated from Hebrew by the author).

That decision, too, could not stop the practice of issuing hidden and low-salience regulations.

VII. The Ghabisiya Affair and Its Aftermath

Ghabisiya[51] was a Palestinian village in the western Galilee region, in the north of Israel. During the 1948 war, its Palestinian inhabitants were expelled, and found refuge in neighboring villages inside Israel. In the following years, they have tried to return to their homes, against the will of the military commanders of the area who would deport them any time they resettled the village. On 2 August 1951, the military governor of the Galilee issued an order, under the Defense Regulations, in which the village (along with 11 other villages in the Western Galilee region) was declared a closed area. This order was not published in the records, or in any other way. The villagers, who tried to resettle the village, and were accused of being in breach of the order, claimed that the order is 'of legislative effect', and therefore has to be published in the records as a condition to its validity. A group of them petitioned the High Court of Justice.[52]

Unlike the Haifa District Court, which ruled in the *Azzam* case but a few weeks earlier, the High Court was prepared to address the question directly, and to undermine the practice of issuing hidden or low-salience regulations. The military commander claimed that he relied on Article 3(2) of the Defense Regulations, exempting him from the obligation under Article 20 of the Interpretation Ordinance to publish the regulations which he is issuing in the records, as a condition for their validity. Such a claim has so far been accepted. However, the High Court was now prepared to try and confront Regulation 3(2) and Article 10(c) of the LAO. In a brief, well-reasoned judgment, Judge Sharshevsky held that the provision of Article 10(c) of the LAO is superior to Regulation 3(2) of the Defense Regulations, by force of Article 2(a) of the Law and Administration Ordinance (Further Provisions) that states: 'Where any law enacted by or on behalf of the Provisional Council of State is repugnant to any law which was in force in Palestine on the 5th lyar, 5708 (14 May, 1948), the earlier law shall be deemed to be repealed or amended even if the new law contains no express repeal or amendment of the earlier law.' In other words, later Israeli legislation repeals early Mandate legislation, the LAO trumps the Defense Regulations, and the provision of Article 10(c), obliging the promulgation of the regulations is valid. The order itself, not being published, is invalid. Therefore, the petition was accepted, and the inhabitants of Ghabisiya may enter their village.

From a theoretical point of view, this was an excellent outcome. The executive has acted arbitrarily and in contrast to the rule of law, and the court overruled this action. Raz describes the court's part in securing the rule of law as 'to ensure that the legal machinery of enforcing the law should not deprive it of its ability to guide through distorted enforcement and that it shall be capable of supervising conformity to the rule

---

[51] The village's name in Arabic is غابسية, a name that can be transliterated in many ways. In this article I will follow the transliteration in Benny Morris *The Birth of the Palestinian Refugee Problem* (Cambridge, 2004).

[52] The history of the village is detailed in the HCJ's ruling (HCJ 220/51) *Aslan v. The military Governor of the Galilee* 5 PD 1480 (1951). For more detail see: Morris, ibid 515; Adel Manna, *Nakba Ve-Hisardut: Sipuram shel Ha-Falastinim Shenotru Be-Haifa Ve-Ha-Galil 1948-1956* [Nakba and Survival: The story of the Palestinians Who Remained in Haifa and the Galilee 1948-1956] (Van-Leer Institute Press/Hakibbutz Hameuchad Publishing House, 2017) 246.

of law and provide effective remedies in cases of deviation from it.'[53] This is exactly what the court failed to do in the *Azzam* case, and what the Supreme Court has done in the *Aslan* case. However, in 1950s Israel, the balance of power was such that the government, aided by a submissive Knesset, was able to quickly nullify the court's ruling, and not only restore the illegal order, but create the legal basis for the continued issuing of hidden and low-salience regulations.

The *Aslan* ruling was a blow to Ben-Gurion's government. The possibility given to the villagers of Ghabisiya to return to their village could serve as a precedent for the residents of other villages who were 'internal refugees'. In the early 1950s there were some 25,000 such refugees, who were denied access to their villages, even though they were recognized as Israeli citizens.[54] This was a major political issue in 1951, as well as today. The government acted quickly and decisively. Within a week of the High Court's ruling, the military governor issued a new order prohibiting entrance to the village, this time bothering to publish it in the records, thus resolving the immediate 'situation'.[55] But this did not solve the legal problem of not being able to continue issuing hidden and low-salience regulations. The ruling has repealed all hidden and low-salience regulations, and the very basis of the 'austerity' regime, and countless 'security measures' backed by hidden and low-salience regulations were now declared illegal. The possibility that these orders and regulations would become void, frightened the government officials and encouraged them to act swiftly and efficiently to bypass this ruling.

The High Court of Justice gave its ruling on 30 November 1951. Soon afterwards, on 10 December 1951, Prime Minister Ben-Gurion published, under his authority under Article 9(a) of the LAO, 'Emergency Regulations Regarding the Validity of Certain Provisions.'[56] According to these Regulations:

> Any provision of the law that enables the issue of regulations without publication in the records, which was in effect on Iyar 5th 5708 (14 May, 1948)[57] shall remain in force from that day on, notwithstanding the provision in article 10 of the Law and Administration Ordinance, 5708-1948.

The explanatory notes to the regulations stated that: 'There is a dire necessity to uphold orders and regulations that were legally issued but not published in the records, hence the need for issuing these regulations for the sake of the state's Defense, public security and maintaining vital services. The government will bring forth to the Knesset a bill suitable for solving the above problem, and these regulations come only to prevent a vacuum the Knesset would be able to discuss and enact such a law.' It is doubtful if these *contra legem* regulations, which stand in direct contradiction to the law by which they were supposedly issued, would indeed be able to validate the hidden and low-salience regulations, contrary to the HCJ's ruling, surely not retroactively. It

---

[53] Raz (n 10) 218.

[54] The estimate of 25,000 refugees is made by Hillel Cohen. Hillel Cohen, 'Ha-Plitim Ha-Pnimi'im Bi-Mdinat Israel: Ha-Ma'avak Al Ha-Zehut' [The Internal Refugees in Israel: The Struggle Over Identity] (2004) 43 Hamizrah Hahadash 83. See also Manna (n 58) 229.

[55] Order regarding closed places, 5712-1951, KT No. 225, p.284. This order has prevented further attempts to resettle Ghabisiya. In the following years most of the village was ruined. See Manna (n 58) 226.

[56] Emergency Regulations (Validity of Provisions), 5712-1951, KT No. 226 p. 286. (regulations and explanatory notes translated from Hebrew by the author).

[57] This is the Hebrew and Gregorian date of the founding of the State of Israel.

seems that those who were involved in issuing these regulations were well aware of their dubious legality.

On 25 January 1952, the Ministry of Justice published a bill to amend the LAO and to retroactively validate the hidden and low-salience regulations, as well as enable the issuing of additional regulations of that kind.[58] The bill was simple, where Article 10(c) in its original wording applies to 'Emergency Regulations and Regulations', the amendment narrows its applicability to 'Regulations within the meaning of Article 8 and Emergency Regulations within the meaning of Article 9', that is, if a regulation is issued by a Minister acting under his authority under Articles 8 or 9 of the LAO, there is a duty to publish. If the regulation is issued by any other official – there is no such obligation. The amendment would be applied retroactively from the establishment of the state, 14 May 1948.

The first reading of the bill took place on 5 February 1952.[59] The bill was presented by Justice Minister Dov Yosef. In the early days of the state Yosef served as Minister of Supply and Rationing, a special ministry designed to enforce the 'austerity' policy. In November 1950 this ministry was deleted and its authorities were delegated to other ministries, including the Ministry for Industry and Commerce, headed by Yosef parallel to being Minister of Justice. This made Yosef the personality most associated with the 'austerity' policy.

After Yosef introduced the bill, the opposition members replied, raising questions about the need for hidden legislation. MK Hanan Rubin from the socialist party MAPAM bluntly raised the question: "I do not know why the government does not want to publish its orders and regulations in the Records. Is there a problem? Will advertising cause such a big expense? Isn't it possible to issue a special issue of the records if urgent publicity is needed? What's the problem here? Why won't binding regulations be published in the records?"[60] Knesset Member Yochanan Bader, of the right-wing Herut party, blatantly attacked the bill. He criticized all the problematic components of the bill – the use of hidden legislation, retroactive legislation, and how hurried legislation was passed to contradict a Supreme Court ruling, saying: "I argue that a regime basing criminal cases upon retroactive laws – which no regime did before the fascist regime was established – is totalitarian and fascist."[61] Those words, uttered less than a decade after the Holocaust, had a harsh and acute meaning. The opposition did not succeed in opposing the law, and it was passed by the Knesset on 5 March 1952.

The fact that the High Court ruled that issuing hidden and low-salience regulations is illegal, and that the regulations intended to clog the breach were clearly illegal, even in the opinion of Justice Minister Yosef, did not prevent the Food Controller, Halevi, who was subordinate to Yosef in the latter's post as minister of Commerce and Industry, to continue issuing regulations without due promulgation during the interim period between the Supreme Court ruling and the enacting of the amending law. On 17 January 1952, Halevi published in the Hebrew dailies *Haboker* and *Herut*[62] regulations dealing with the transport of bread. On the same day and the next, he

---

[58] Draft bill Amending the Law and Administration Ordinance (Amendment No. 2), 5712-1952, HH No. 104, p. 118 (translated from Hebrew by the author).
[59] DK (1952) 1202 (translated from Hebrew by the author).
[60] Ibid 1203 (translated from Hebrew by the author).
[61] Ibid 1204 (translated from Hebrew by the author).
[62] 'Food Control Order (Transportation of Bread), 5712-1952' *Haboker* (Tel-Aviv, 17 Jan. 1952) 4, *Herut* (Tel-Aviv 17 Jan. 1952) 4.

similarly published an amendment to the regulations regarding uniform milk.[63] On 25 February 1952, the Traffic Commissioner, Michael Barr, published in daily Hebrew newspapers, but not in the records, two additional regulations regarding taxi fare.[64] Obviously, this low-salience legislative activity continued after the law was amended in a way that made this activity legal.

VIII. Mid 1950s – Low-Salience Regulations at High Tide

In the five years following the amendment of the LAO, 1952 to 1957, dozens of low-salience regulations were issued under the FCO alone (not taking into account numerous regulations that were issued under the Defense Regulations). One of the failures in issuing low-salience regulations is the difficulty in locating them later. There is currently no way of knowing how many regulations were issued during this period, even those published in the newspapers. *Kovetz Hatakanot,* the Hebrew name for the official record of regulations, is a volume of limited (albeit extensive) scope that includes an index. There was never any problem locating a regulation published in the records, even before the invention of search engines. Finding low-salience regulations published in daily Hebrew newspapers, requires searching in many daily newspapers. Even with the help of search engines, there is no certainty that all the regulations were indeed found. In preparation of this Article, 58 regulations issued per the FCO between June 1948 and August 1956 were located. Regulations issued under various Defense Regulations are apparently far more numerous. An interesting side effect of not being able to locate these regulations is that many of them have not been repealed and may still be in effect, as described below.

These regulations had tremendous power over the population and sometimes purported to change basic living arrangements. A good example is the regulations concerning the olive oil market, particularly aimed at the Palestinian olive growers in the Galilee. Since the early 1950s, Palestinian olive oil growers in the Galilee have struggled with the Food Controller, demanding to market olive oil freely and at a fair price. This struggle sometimes deteriorated into violence, and took place in several arenas - in the Knesset and its committees, in the High Court, and in military courts that judged the Palestinian civilians who transgressed the emergency regulations, or the rules and regulations of the military rule.[65]

On 24 October 1952, the Food Controller issued an order in two daily Hebrew newspapers regulating the marketing of olive oil.[66] The order was another step in the Food Controller's struggle with Palestinian olive oil growers, and included the following provision: 'The Controller will allocate, during the year beginning 1 November, 1952, for a grower who gave olives to be pressed, and to his family live with him in the village, an amount of 24 Kg. per person, for self-consumption, instead of the usual amount.' The regulations also stated that the owners of the presses could only market the olive oil to a 'certified merchant.'

[63] 'Food Control Order (Uniform Milk) (Management of Production and Marketing) (Amendment) (No. 9), 5712-1952' *Davar* (Tel-Aviv, 18 Jan. 1952) 4, *Hatzofeh* (Tel-Aviv, 17 Jan. 1952) 3.
[64] 'Defense Order (Prevention of Profiteering) (Raising Taxi Fair in Metropolitan Taxies) 5712-1952'; 'Defense Order (Prevention of Profiteering) (Raising Transportation Fees), 5712-1952', *Davar* (Tel-Aviv, 25 Feb. 1952) 2, *Al Hamishmar* (Tel-Aviv 25 Feb. 1952) 2.
[65] For a general outline of this struggle see: Jeffrey D. Reger, 'Olive Cultivation in the Galilee, 1948–1955: Hegemony and Resistance' (2017) 46 Journal of Palestine Studies 28.
[66] 'Food Control Order (Olives, Presses and Olive Oil) 5713-1952' *Davar* (Tel-Aviv 24 Oct. 1952), *Hatzofeh* (Tel-Aviv, 24 Oct. 1952) 7. (Regulations translated from Hebrew by the author).

This regulation aimed at breaking the traditional structure of the olive oil market in the Palestinian society, in which growers bring their produce to the press owner, the press owner charges a certain amount of the oil as his fee, and gives the rest of the oil to the grower for using and marketing. The regulation created a new structure, that has transformed press owners into marketers, and complied them to sell their produce to 'certified merchants' (large Jewish-owned factories) at controlled, and artificially low, prices.

The growers petitioned to the High Court of Justice in the hope that the legal way, which proved efficient in the past phases of this struggle, will now succeed as well. But the amendment to the LAO proved fatal for their petition, since it could no longer be argued that the regulations are invalid because they were not published in the records, and that the publication of orders in the Hebrew dailies discriminates the Arabic-speaking population, an argument that was explicitly raised in the public activity conducted by olive growers in parallel with their petition.[67]

Unsurprisingly, in a two-page ruling, the High Court rejected their petition, stating that: 'This court does not express an opinion as to the legality or illegality of orders and regulations made by authorized public officials and public institutions, unless the request is brought before it, addressing not only a specific complaint, but concrete facts relating to certain transactions.'[68]

In January 1953, these regulations were replaced by almost identical regulations, which were published in the records,[69] and were in effect until their repeal in October 1955.[70] The publication of these regulations in the records indicates that there was no impediment to publishing in this way in the first place. The struggle of the olive growers was a complicated one, and its results were not clear. This example is shown to illustrate that in the toolbox used by the state to impose the rules of the military regime on the Palestinians, and the 'austerity' rules on the general population, hidden and low-salience regulations served as a tool that the state did not hesitate to use. However, as the 1950s approached their end, and the first decade of the State of Israel at the doorstep, the desire for normalization of life and modern legislation seemed to prevail over the need to use these tools, at least in the context of food control.

IX. The Enactment of Commodities and Services (Control) Law.

In 1957, the Commodities and Services (Control) Law was enacted.[71] The law replaced the outdated FCO and did not include a provision enabling the issuing of regulations without publication in the records. Article 44(b) of the Law included a transitional provision whereby 'any order made under one of the expiring laws which having effect on the date of commencement of this Act shall be deemed from that day forth, as if issued by a Minister on the date of commencement of this Act'.

With the legislation on the Commodities and Services (Control) Law, the possibility of issuing unpublished regulations, awarded by the now repealed FCO, has ended, although such regulations can still be issued under Defense Regulations. It also appears that the regulations published in the daily newspapers have been repealed,

---

[67] 'Baaley Mataey Ha-Zeytim Ba-Galil Ha-Ma'aravi Dorshim Ha'alat Mechirim' [Olive Grove Owners in Western Galilee Demand a Raise in Prices] *Davar* (Tel-Aviv 7 Nov. 1952) 8.
[68] HCJ 312/52 *Dabbah v. The Food Controller,* 6 PD 916 (1952) (translated from Hebrew by the author).
[69] Food Control Order (Olives, Olive Oil and Presses), 5713-1953, KT No. 391 p. 588.
[70] Food Control Order (Presses), 5716-1955, KT No. 561 p. 169.
[71] Commodities and Services (Control) Law, 5717-1957, SH No. 240, p. 24.

because they must be regarded as 'given by a minister' and in this case the revised wording of Article 10(c) of the LAO provides that they must be published as a condition of their validity. However, this interpretation is uncertain, and from time-to-time trade and industry ministers found it appropriate to explicitly repeal the regulations published in the newspapers. The latest was issued by the Minister of Trade and Industry Haim Bar-Lev in 1976, repealing a 1951 low-salience regulation.[72]

If these regulations were indeed somehow valid after the repeal of the FCO, a strange situation was created. It seems that due to the scattering of the regulations among a large number of daily newspapers, many of them remained undetected, never repealed, and seemingly still in force. These regulations govern a large number of issues, from saccharin trade, through coffee substitute production, to the lamb trade.[73]

Following the enactment of the Commodities and Services (Control) Law, the daily Hebrew newspapers were no longer used to promulgate regulations. The end of the 'austerity' policy in 1959 and the end of military rule over Israel's Palestinian citizens in 1966, signaled that these undemocratic methods are a thing of the past. However, the 1944 Defense (Emergency) Regulations continued to apply and were used. In 1993, the High Court ruled, in an appeal dealing with an unpublished order installed under the Defense Regulations, that such an order was valid.[74] When the Counter-terrorism Law, 5776-2016 was enacted,[75] a large number of Defense Regulations were repealed, but the legislature chose not to repeal regulation 3(2) and left it in effect. It seems that even in the 21st century, the executive has the opportunity to issue regulations without publishing them in the records.

X. Conclusion

This article presented the practice of issuing hidden and low-salience regulations in Israel's first decade. This was practiced in two contexts: 'security issues' and food

---

[72] Commodities and Services Control Order (Manufacture of Tomato Juice) (Repeal), 5726-1976, KT No. 3508 p. 1352.

[73] The regulations located by the author that were never repealed are: 'Food Control Order (Restricting Saccharin Trade), 5708-1948' *Haboker* (Tel-Aviv, 11 Jun. 1948) p.7; 'Food Control Order (Coffee) (Standard Mix), 5710-1950,' *Haaretz* (Tel-Aviv, 9 Feb. 1950) 4, *Davar* (Tel-Aviv 9 Feb. 1950) 3, *Haboker* (Tel-Aviv, 9 Feb. 1950) 4; 'Delivery of Fresh Fruit and Vegetables for Marketing Order, 5710-1950,' *Al Hamishmar* (Tel-Aviv, 15 March 1950) 3; 'Food Control Order (Candy Wrapping) 5710-1950' *Davar* (Tel-Aviv 12 Apr. 1950) 3, *Hador* (Tel-Aviv 12 Apr. 1950); 'Food Control Order (Coffee Substitutes) 5710-1950' *Davar* (Tel-Aviv, 30 May 1950) 3; 'Food Control Order (Marketing of Agricultural Products) (Assignment), 5710-1950', *Al Hamishmar* (Tel-Aviv, 20 Jun. 1950) 3; 'Food Control Order (Marketing of Agricultural Products) (Tomatoes) (Assignment), 5710-1950', *Al Hamishmar* (Tel-Aviv, 27 Jun. 1950) 3; 'Food Control Order (Lambs) 5710-1950,' *Haaretz* (10 Jan. 1951), *Davar* (Tel-Aviv 11 Jan. 1951) 3, *Al Hamishmar* (Tel-Aviv, 10 Jan. 1951) 3; 'Food Control Order (Retailer Assignment), 5711-1951' *Davar* (Tel-Aviv 26 Feb. 1951) 3; 'Food Control Order (Marketing of Agricultural Products) (Assignment), 5711-1951', *Haaretz* (Tel-Aviv, 8 May 1951) 4, *Al Hamishmar* (Tel-Aviv, 7 May 1951) 3; 'Food Control Order (Producing Tomato Extract For Export), 5711-1951', *Haaretz* (Tel-Aviv 26 Jun. 1951) 4; 'Food Control Ordinance (Marmalade) (Production and Trade), 5711-1951', *Herut* (Tel-Aviv 23 Jul. 23) 3; 'Food Control Order (Ice-Cream) (Production), 5711-1951', *Al Hamishmar* (Tel-Aviv, 7 Aug. 1951) 3; 'Food Control Order (Bread) (Assignment), 5711-1941' *Haboker* (Tel-Aviv, 26 Aug. 1951) 4; 'Food Control Order (Mayonnaise and Mayonnaise sauce), 7511-1951', *Herut* (Tel-Aviv, 10 Oct. 1951) 3; 'Food Control Order (Olive Conserve) (Production and Trade), 5712-1952', *Haaretz* (Tel-Aviv, 7 Aug. 1952) 4, *Al Hamishmar* (Tel-Aviv, 7 Aug. 1952) 3; 'Food Control Order (Sales Hours for Consumers) (Summer Leave), 5713-1953' *Davar* (Tel-Aviv 25 Jun. 1953) 4, *Haboker* (Tel-Aviv, 25 Jun. 1953) 4.

[74] LCrimA 1127/93 *State of Israel v. Klein* 48(3) PD 485 (1994).

[75] Counter-Terrorism Law, 5776-2016, SH No.2556 p. 898.

control. These two contexts intersected in the way the government dealt with the Palestinian minority in Israel.

Low-salience regulations that allocate an oil quota to 'a person and his family living with him in his village' are obviously in contrast to the idea of the 'Rule of Law', being low-salience regulations. But they are also a discriminatory tool, separating two categories – the Jewish residents of the cities (or in the *zeitgeist* of the 1950s, the collective agricultural settlements - the kibbutz and moshav) and the Palestinian residents of the villages. The use of the word 'village' actually creates distinct Orientalist categories and applies to those in the 'rural' categories a different law. Yet, using low-salience regulations to create ethnic categories seemed natural to the official issuing the regulations, even though he was an organ of a state whose judiciary, executive and legislator all spoke very highly in favor of equality before the law, the 'Rule of Law', and against the use of hidden legislation.

The almost casual use of low-salience regulations in the context of food control is very hard to explain. The very same outcome could be achieved by promulgating these regulations legally, publishing them in the official gazette. What was it that the clerks in the Food Controller's office were trying to achieve? Was publishing regulations in the newspapers cheaper? Was it faster? Was it a way to reward 'good' newspaper editors, and punish 'bad' newspaper editors? It might have been, but can all these 'pros' weigh against the obvious 'con' that this practice is in stark contrast to the principle of the 'rule of law', that was a part of the official '*mamlakhtiut*' ideology?

As this article demonstrated, the use of hidden and low-salience regulations creates an atmosphere of arbitrariness, in which one can never be sure of the legality of one's actions. Can I enter my village, or is there a secret order prohibiting my entrance? Can I sell two pounds of fodder, or was there a publication in a newspaper whose language I do not understand, limiting the sale of fodder to one pound? The combination of the 'austerity' regime and the military rule has made daily life for the Palestinian citizen in Israel in the 1950s very uncertain.

Creating a continued psychological sense of uncertainty may be an effective means of control over the Palestinian minority, a problem that challenged all Israeli governments, from 1948 on. As Rachel E. Stern and Jonathan Hassid demonstrated, the link between uncertainty and control is well established.[76] In the case of Ben-Gurion's government it seems that the prospect of controlling Palestinians effectively may have led to abandoning the government's well-meaning intentions of acting in accordance with the 'Rule of Law' and resorting to means like issuing hidden and low-salience regulations.

This article gives a legal and chronological description of the use of hidden and low-salience regulations in 'security' and food control contexts, especially when both contexts intersect in the way these tools were used against Palestinian citizens. Supplemental research may shed light on the way the use of these tools effected the subordinate Palestinian population or give the various considerations and conflicting ethical and moral objections, from the side of those in the Israeli government who used these methods, thus give a rich and complex description of the strategies and tactics used by both sides, and of the fluid front lines between them. In this respect, this article is a call for future research going beyond the political and legal perspective.

[76] Rachel E. Stern and Jonathan Hassid 'Amplifying Silence: Uncertainty and Control Parables in Contemporary China' (2012) 45 Comparative Political Studies 1230.