Settler Colonial Studies

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rset20

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To cite this article: M. T. Samuel (05 Sep 2024): 'Legal fictions and settler colonialism: the case of the Defence (Emergency) Regulations, 1945 in Israel and the Occupied Palestinian Territories', Settler Colonial Studies, DOI: 10.1080/2201473X.2024.2397900

To link to this article: https://doi.org/10.1080/2201473X.2024.2397900

Published online: 05 Sep 2024.

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SETTLER COLONIAL STUDIES
https://doi.org/10.1080/2201473X.2024.2397900

'Legal fictions and settler colonialism: the case of the Defence (Emergency) Regulations, 1945 in Israel and the Occupied Palestinian Territories'

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ABSTRACT
Since Israel's establishment, the Defence (Emergency) Regulations, 1945 has served as the primary law enabling the state's repression and dispossession of Palestinians, authorizing land confiscations, house demolitions, deportations, warrantless searches and arrests, administrative detentions, movement restrictions, surveillance, censorship, the outlawing of civil society associations, and the establishment of military courts. This article demonstrates that the law is invalid and that its artificial validity has been sustained by a legal fiction, thereby illuminating the indispensability of legal fictions to the legitimation of settler colonial conquests.

ARTICLE HISTORY
Received 31 January 2024
Accepted 20 August 2024

KEYWORDS
Settler colonialism; law; Palestine; Israel; legal fiction; emergency; dispossession

Introduction

Israel's perpetual reliance on the Defence (Emergency) Regulations, 1945 (DER)—the principal set of emergency regulations authorizing state-sanctioned violence in Israel-Palestine—for its governance of Palestinians in Israel and the Occupied Palestinian Territories (OPT) has been the subject of numerous studies focusing on the law's workings since its promulgation at the close of the Palestine Mandate. Early studies demonstrated how Regulation 125 of the DER enabled Palestinian dispossession from 'lands, villages and properties' they inhabited through their designation as closed military areas.[1] Others examined how Israel utilized the DER within such closed military areas to impose superjacent martial law regimes[2] that denied Palestinians their basic human rights, controlled their daily lives, and kept them 'dependent on the regime for [their] basic means of survival'.[3] In subsequent decades studies focused on the employment of the DER for the deportation of Palestinians; the holding of the bodies of Palestinians killed by the Israeli military; the monitoring and surveillance of Palestinians; the punitive demolitions of their homes; the outlawing of civil society associations; the establishment and operation of military courts; the maintenance of a military censorship apparatus in Israel and the OPT; and the development of an elaborate permit regime in the West Bank.[4]

Virtually all studies involving the DER illuminate two key reasons for Israel's continued dependence on the law: its versatile juridical toolkit enabling Palestinian repression and dispossession; and Israel's capacity to employ measures in furtherance of that goal legally

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under state law, thereby bolstering the perceived legitimacy of its actions. As Yoav Mehozay explained, 'the Israeli authorities' manipulation of the state's ambiguous emergency jurisprudence has proved effective and not too costly in terms of Israel's legitimacy as a rule-of-law nation. When discriminatory, and even oppressive, political ends are administrated by legal mechanisms—however awkward—the administration can maintain its character as a government by law'.[5] The contention that DER-based conduct is perceived as legitimate due to its anchoring in state law, however, is premised on the notion that the DER is a valid law of the legal systems of Israel and the OPT. But what if the DER is not valid? And what if Israeli leaders have been aware of its invalidity and have continued to rely on the law nonetheless? How should this state of affairs shape our understanding of Israel, its relationship with the rule of law, and the role of law in the legitimation of state-sanctioned violence targeting Palestinians and other Indigenous populations living under settler-colonial rule? Those are the questions this study explores.

The academic debate concerning the DER's legal validity began in the late 1980s but has been largely overlooked by subsequent studies and thus remains inconclusive.[6] As Mais Qandeel noted, although Israel has utilized the DER extensively since 1948, '[t]here are very few academics who have challenged' its validity.[7] Indeed, even Mehozay's comprehensive studies on Israel's emergency structure regarded the DER as a valid mandatory law that 'Israel incorporated along with mandatory law in general, into its domestic legislation' upon statehood.[8] They thus ignore one crucial question: Considering the facts that the British government revoked the DER shortly before Israel's establishment and that Israel never reenacted the law on its own, how did the DER come to be regarded as a valid state law?

This article brings the decades-old debate on the DER to a close by uncovering the extraordinary circumstances under which the DER was putatively incorporated into the legal systems of Israel and the OPT. It does so through an analysis of Israeli archival data, including minutes of government bodies, justice ministry records, classified military memoranda, draft legislation, and case law. The article demonstrates that David Ben-Gurion, Israel's first prime minister and defense minister (1948-1953; 1955-1963), together with Pinchas Rosen, the first minister of justice (1948-1951; 1952-1961), concealed their knowledge of the DER's invalidity from other members of the government and persuaded the state legislature, under false pretenses, to adopt a law supposedly invalidating the British order revoking the DER. That law, the article argues, consisted of a poorly crafted legal fiction that ultimately failed to fulfill its purpose, a failure that was rectified by the Israeli Supreme Court nearly forty years later on the basis of another legal fiction that to the present day has artificially maintained the DER as valid despite its unmistakable invalidity.

Although 'no consensus has yet emerged on the definition of a legal fiction', the contemporary discourse involving the concept is guided by Lon Fuller's classic conceptualization from the early 1930s.[9] Fuller defined legal fictions as 'either, (1) a statement [appearing in case law or statutes] propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility', as exemplified by the treatment of corporations as legal persons, the use of the reasonable person standard in the assessment of liability for negligence, etc.[10] Despite what the name may imply, Fuller contended that legal fictions do 'not intend[] to deceive and did not deceive anyone'.[11]

That characterization was subsequently challenged by Peter Smith, who argued that Fuller failed to recognize that judges often rely on legal fictions without acknowledging 'the falsity of their premises' in order to bolster the perceived legitimacy of their rulings.[12] Smith showed that judges regularly refrain from recognizing legal fictions as such (e.g. treating eyewitness testimonies as reliable evidence despite the scholarly consensus regarding their unreliability) when doing so 'would have delegitimating consequences' for the state's legal and political systems.[13] A century and a half earlier, the utilization of legal fictions for the legitimation of state conduct was similarly regarded by Jeremy Bentham not as an unintended byproduct of the concept but as its primary purpose, asserting that legal fictions amount to 'wilful falsehood[s], uttered by a judge, for the purpose of giving to injustice the colour of justice'.[14]

Given the lack of consensus on how legal fictions should be understood, and given particularly the unresolved yet critical question of how their legitimizing function should be assessed, the present study proposes that we distinguish between two types of legal fictions. The first, which we may call non-deceptive legal fictions, refers to those legal fictions whose falsehood is officially acknowledged. The second, which we may call deceptive legal fictions, refers to those legal fictions whose falsehood is not officially acknowledged.

The notion that deceptive legal fictions serve to legitimate illegitimate (i.e. illegal or immoral) state conduct has been underscored by multiple studies that examine the workings of law in settler colonialism. These studies have shown, for instance, how the legal fictions of the doctrines of discovery and terra nullius—on whose basis Indigenous Peoples now living in the United States, Canada, Australia, and New Zealand were violently dispossessed from their lands[15]—provided a 'legal veneer to [settler] colonial conquest[s]'.[16] Further, scholars have demonstrated how settler regimes employed legal fictions to both grant and deny recognition of Indigenous sovereignties over the territories they possessed, depending on whether the recognition/non-recognition facilitated the transfer of the territories to settlers.[17] Likewise, they have shown how the growing public condemnation of these legal fictions in recent years has not resulted in their repeal but, rather, in the employment of another legal fiction, non-justiciability, in order to 'dodge' the moral, legal, and political ramifications arising from the demise of the old fictions.[18]

In Palestine, as in the Anglosphere, legal fictions have continuously facilitated Indigenous dispossession. As I have discussed elsewhere, the legal foundation of Israeli sovereignty consists of the false claim that European Jews are the direct descendants of the ancient Hebrews who possessed Palestine in biblical times, and, as such, are entitled to national self-determination in that land.[19] Despite its falseness, the claim was integrated into the document legalizing Britain's mandatory government in Palestine and its support for Zionist settler colonialism therein. Following Israel's establishment, legal fiction was again used to enable the dispossession of about 30,000 internally displaced Palestinians from the land and property they owned by designating them, oxymoronically, as 'present absentees' who had forfeited their rights of ownership.[20] Indigenous dispossession in the OPT has also been advanced through the employment of legal fiction, namely, Israel's classification of these territories as 'sui generis' (unique), rather than 'occupied', in order to free itself from the restrictions international law imposes upon occupiers, the prohibition against the construction of settlements in occupied territories in particular.[21] This

article demonstrates that the DER, the primary law enabling Israeli settler colonialism in Palestine, is itself artificially maintained on the basis of two deceptive legal fictions.

Recognizing the centrality of deceptive legal fictions for the legitimation of Israeli settler colonialism begs the question Ronen Shamir posed thirty years ago: 'Legitimacy for whom?'[22] Shamir argued that landmark cases of the Israeli Supreme Court reversing governmental decisions pertaining to the OPT and the employment of the DER therein, even if rare, 'enhanced the court's own legitimacy and consequently legitimized Israeli rule over the territories'.[23] Shamir then qualified his argument by implying that although the Israeli (non-Native) public and foreign governments may perceive Israeli conduct in the OPT as more legitimate following the issuance of such landmark cases, it should not be assumed that Palestinians share that sentiment.

Indeed, although these legal fictions may enhance perceptions of legitimacy among Israeli Jews by appearing to comply with procedural justice requirements, for Palestinians these same fictions represent just one component of a broader and wholly illegitimate settler-colonial juridical structure that somehow 'justified and legitimated conquest and control' nevertheless.[24] As John Reynolds suggested, rather than legitimacy, for the Indigenous population the 'net effect' of these fictions is Palestinians' 'repressive inclusion' within Israel's juridical order as rightless subjects.[25] Israel's reliance on colonial '[e]mergency modalities' such as the DER, Reynolds continued, seeks to legitimate its maltreatment of Palestinians by mimicking 'European liberal legalism' and 'presenting itself as generally accepting of human rights obligations, save in circumstances where particular illiberal measures are necessitated on [national] security grounds'.[26] Stated differently, Israel has sought to legitimate its repression and dispossession of Palestinians on the basis of yet another deceptive legal fiction: that these actions signify an attempt to overcome a national emergency rather than a campaign to advance an ongoing settler-colonial conquest.[27]

Deceptive legal fictions thus represent yet another example of the numerous ways in which settlers exploit state and international law to facilitate the conquest of Indigenous lands. Understanding their purpose, therefore, further elucidates the workings of law in settler colonialism. As Patrick Wolfe explained, settler colonialism is 'an inclusive, land-centered project that coordinates a comprehensive range of agencies' sharing a singular aim: 'eliminating Indigenous societies' from territories conquered by settlers.[28] Wolfe theorized that this coordinated attack is driven by 'the logic of elimination', the settlers' unwavering commitment to seize as much land as possible, purge from it as many of the Indigenes as possible, and to do so with all of the means at their disposal.[29] Settler conduct undertaken in pursuit of the logic of elimination, Wolfe continued, ought to be understood as a manifestation of two interconnected dimensions of this logic, one 'negative' and one 'positive'.[30] The negative dimension is manifested in settler conduct seeking the 'dissolution' of the Indigenes, that is, their physical elimination, which takes place first during the initial genocidal stage of the conquest and then during 'genocidal moments', when settlers seek to expand their colony or suppress Native resistance to the ongoing dispossession.[31]

'Positive' manifestations of the logic of elimination are ordinarily anchored in law and may be regarded as the byproducts of two principal objectives settlers pursue while 'erect [ing] a new colonial society on the expropriated land base', objectives that often conflict with one another.[32] On the one hand, settlers seek to legitimize, both domestically and

internationally, their foundational violence; on the other, they seek to eliminate the Natives who remain within the conquered territory.[33] The manipulation of state and international law enables settlers to pursue these goals simultaneously; to conjure up a right to exclusive possession of the conquered territory and to the establishment of a sovereign nation-state within it; to absolve themselves of responsibility for the genocidal violence they inflict upon the Natives by recharacterizing that violence as unavoidable for the assertion of their territorial rights; and, crucially, to legalize the weaponization of the state apparatus against the Indigenes who remain within the conquered territory in order to bring about their social destruction through means other than mass killing.[34] These other destructive means—fragmentation, segregation, incarceration, assimilation, deportation, etc.—represent, according to Wolfe, manifestations of the 'positive' dimension of the logic of elimination.[35] The law, therefore, is the medium through which settler-colonial states seek to discursively legitimize their inherently immoral conduct through its legalization under state and international law.

The present article thus contributes to our understanding of several interrelated matters. First, it elucidates the concept of legal fictions. Second, it highlights settler colonialism's persistent dependence on deceptive legal fictions—both in state and international law—for the legitimation of Indigenous dispossession and the formation of settler sovereignties. Third, it illustrates how emergency powers are misused for the legitimation of illegitimate state-sanctioned violence, including that which targets Indigenous communities. And fourth, it helps conceptualize the distinctive legal culture settler colonialism engenders. The discussion that follows begins with the DER's legal history in Mandatory Palestine and Israel before proceeding to uncover and analyze the circumstances that produced the two deceptive legal fictions masking the DER's invalidity in Israel and the OPT. The final section of the paper assesses the article's theoretical and practical implications, including those that may be explored through future research.

The emergence of the DER in Mandatory Palestine

The DER embodies the ultimate aggregation of emergency regulations as consolidated and enacted within a single legal instrument by the British High Commissioner for Palestine on September 27, 1945.[36] The earliest version of these regulations was introduced in Mandatory Palestine after the Buraq Uprising of 1929, during which the country's Indigenous Palestinian Arab population violently protested Britain's facilitation of Zionist settler colonialism in its homeland. Following the uprising, the British established a commission of inquiry to assess its causes. The commission found, in short, that Palestinians rose against the 'Jewish colonization of Palestine', their dispossession from the land, and the 'political domination' that Zionists were trying to secure in the territory under British rule.[37] This conclusion, however, did not prompt Britain to end its support for Zionist colonization efforts. Instead, it resulted in the provision to the High Commissioner of an authorization to enact emergency regulations that would enable the suppression of Palestinian resistance.[38]

By the time the Great Palestinian Revolt of 1936–1939 was mounted, these emergency regulations had been expanded and revised to authorize an array of violent measures that enabled British and Zionist forces to efficaciously suppress the revolt.[39] The emergency

regulations proved so effective that by the end of the revolt Bernard Montgomery, the General Officer Commanding the British armed forces in Palestine, asserted that the military had gained 'such a strong hold of the country' that it made future Palestinian rebellions highly improbable.[40] This was not an overstatement. The mass violence sanctioned by the regulations enabled the killing of about 5,000 Palestinians, the wounding of 10,000 more, the demolition of 2,000 homes, and the deportation of most of the Palestinian political leadership.[41] This utter devastation suffered by the Palestinians, further, 'paved the way' for the Zionist conquest of Palestine that followed eight years later.[42]

When the DER was enacted in 1945, it 'integrated much of what had been included' in the emergency regulations that preceded it 'in a consolidated and more comprehensive form'.[43] Originally consisting of 147 regulations, promulgated in forty-one pages of the *Palestine Gazette*, the DER authorizes the erection of superjacent martial laws regimes governed by military commanders who were provided with 'almost dictatorial' powers.[44] Each of these powers, which could be used within a DER-based martial law regime or anywhere else in Mandatory Palestine, belonged to one of four categories of emergency executive authority: dispossession of individuals from moveable and immovable property; utilization of social control measures such as warrantless searches and arrests, deportations, administrative detentions, and curfews; criminalization of a wide range of civilian conduct and adjudication of offenders in military courts; and censorship of publications and communications.

In contrast to its predecessors, however, the DER's prime target was not the Palestinians but the Zionists who at that point believed they were strong enough 'to take as much of Palestine as [they] needed' for the establishment of their state and who rebelled against their colonial benefactor to ensure and expedite its departure from the country.[45] Yet in contrast to the brutal suppression of the Great Revolt, the British were 'reluctant' to deploy the emergency regulations against the Zionist community on the same 'scale and scope' because they 'viewed the Jewish settlers as a proxy for European colonizers' and thus as deserving of more lenient treatment.[46] Nevertheless, under the authority of the DER, the mandatory government imposed martial law on Tel Aviv; suspended the civil courts and established military courts in their stead; and utilized curfews, searches, arrests, detentions, deportations, movement permits, and censorship to suppress Zionist resistance.[47]

The Zionists vehemently objected to the promulgation and utilization of the DER against them. On February 7, 1946, for instance, nearly 400 members of the Jewish Bar Association held a meeting in Tel Aviv dedicated to the expostulation of the instrument, during which several prominent Zionist leaders spoke against it. In his opening remarks, Menachem Dunkelblum, the president of the association and future judge of the Supreme Court of Israel, contended that the DER 'violates elementary aspects of law and justice … [since it] revokes individual rights and provides the government with unlimited powers'.[48] The fiercest repudiation, however, was articulated by Ya'akov Shimshon Shapira, Israel's first attorney general and fifth minister of justice, who asserted that the DER brought about 'the destruction of the foundation of law in the country' and that 'even Nazi Germany did not have such laws'.[49] The meeting concluded with the adoption of a resolution that the Jewish Bar Association, together with Zionist national institutions, would use all the means at their disposal 'to abolish the [DER] and restore elementary individual rights' in the country.[50]

A year later the Zionists presented their grievances against the DER to the United Nations Special Committee on Palestine, criticizing its harsh measures and complaining that they were the law's primary target.[51] The mandatory government, for its part, justified the use of the law by pointing to the Zionists' ongoing 'campaign of lawlessness, murder, and sabotage' waged to ensure that 'nothing should be allowed to stand in the way of a Jewish State and free Jewish immigration to Palestine'.[52] It also reminded the Zionists that their principled objection to the DER rang hollow, as just a decade earlier they had pressured Britain to expand its use of emergency powers against the Palestinians.[53] Without Britain's support and the utilization of such measures, the mandatory asserted further, the Zionist 'national home would have never been established'.[54]

Britain's revealing rebuttal and its emphasis on the indispensability of emergency powers for the colonization of Palestine proved to be persuasive, as the following year, after statehood had been attained, the DER became the principal law sanctioning state-violence in Israel.[55] Israel did so in spite of the fact that the Zionists' earlier assertion that the DER effectively abolished individual rights in Mandatory Palestine was not an exaggeration. Britain's employment of the framework of emergency for the governance of its colonial possessions (including as a mandatory) on the basis of laws such as the DER was designed to authorize the governments it installed to carry out virtually any violent action that would safeguard Britain's rule of the given territories.[56] These emergency laws did so both by enabling specific governmental conduct *and* by stripping the colonized populations of pertinent due process protections—e.g. authority to arrest without a warrant, imprison without a trial, confiscate property without compensation or proof that it had been used in furtherance of a crime, etc.—which together amounted to the effective revocation of fundamental rights.[57]

Thus, once in power in Palestine, the Zionists' commitment to protecting individual rights became much less steadfast, as it was eclipsed by the more important aim of controlling the land and its peoples. Indeed, the primary reason for which Israel came to view the DER as an essential juridical tool of governance is the same reason for which Britain's mandatory government viewed its predecessor laws as such: its capacity to legitimate state-sanctioned violence targeting the Indigenous Palestinian population.[58] As then Military Advocate General of the Israel Defense Forces (IDF), former Irgun member, and future Chief Justice of the Supreme Court of Israel Meir Shamgar stated in a classified memorandum in 1963, the DER is a 'first-rate, essential legal instrument, … second to none in existing law, … for the establishment of a government system in the areas inhabited by minorities, the existence and actions of which deter and restrain [these minorities]'.[59]

The supposed incorporation of the DER into the Israeli legal system

1. 'These laws ended [and] we must enact [them anew]'.[60]

According to the conventional account of the DER's incorporation, the DER became Israeli law following the adoption of the Law and Administration Ordinance, 1948 (LAO), the law that incorporated all of the laws of Mandatory Palestine that were valid when Israel declared independence.[61] The problem with this account, as Martha Roadstrum Moffett and John Quigley noted, is that Britain revoked the DER shortly before Israel was established. Coming into force at midnight on May 13, 1948, a day

and a half before the establishment of Israel, the Palestine (Revocations) Order in Council, 1948 (Revocation Order) revoked the Palestine (Defence) Order in Council, 1937, which served as the legal basis of the DER, thereby revoking the DER at the same time.[62] The DER, therefore, was not valid when Israel was established and thus could not have been made a part of Israeli law via the LAO.

The discussion that follows demonstrates that David Ben-Gurion was aware of the fact that Britain had revoked the DER, that he concealed this fact from other members of the Israeli government, and that he sought to assume the DER's powers so he could utilize them via the state's armed forces. In this period, Israel's interim institutions of government included both executive and legislative bodies. Between April and Israel's establishment on May 14, 1948 these consisted of the People's Administration (PA) and the People's Council (PC), respectively. Subsequently, following israel's establishment and until the formation of its first elected government in March 1949, these interim bodies were renamed. The former became the Provisional Government (PG) and the latter became the Provisional State Council (PSC).[63] Yet, in practice, the separation between the executive and the legislature often proved meaningless, as through July 1948 Ben-Gurion served not only as the premier but also as chairman of the interim legislative bodies and controlled their agendas. Moreover, during the entire interim period, every single law that was enacted by the legislature originated in a bill that was drafted and debated by the executive.[64]

Ben-Gurion's quest for the assumption of the DER's powers under Israeli law began with the PA's May 13 debate on the draft of Israel's first law, the *minshar* (Proclamation).[65] The Proclamation was a short law, consisting of three articles, that was enacted by the PSC and entered into force immediately after Israel declared independence on May 14, 1948. Article 1 identified the PSC as Israel's legislative authority; Article 2 revoked mandatory laws that had limited Jewish immigration to Palestine and prohibited the sale of land to Zionists in some parts of the country; and Article 3 prescribed the wholesale incorporation of the existing laws of the Palestine Mandate into the Israeli legal system with the goal of ensuring stability during the Zionists' transition to independent rule.

During the debate, Ben-Gurion requested that Article 1 also prescribe that both 'the [legislature] and the [executive] will have the authority to enact laws'.[66] Pinchas Rosen, who became Israel's first minister of justice shortly after statehood, objected to the idea of granting the executive independent authority to enact primary legislation (state law created by the legislature as part of its intrinsic legislative function in an electoral democracy), stating plainly that 'the [executive] is not a legislative body'.[67] Rosen then suggested an alternative, which was to include a provision in the Proclamation that authorized the legislature to empower the executive to enact laws. Ben-Gurion, however, was not satisfied with the idea that the executive's power to legislate would depend on the will of the legislature. In an attempt to make Rosen reconsider his objection, Ben-Gurion stated that 'the government will not enact any laws until the [legislature] will authorize it to do so. However, we do not know what will happen between now and Sunday [when the PSC was scheduled to convene] and in case of a disaster we cannot find ourselves without a legal body [authorized to enact] urgent legislation'.[68]

The exchange between Rosen and Ben-Gurion concluded with the PA's decision that Rosen would revise the draft of the Proclamation and submit it to the legislature the next day. The text of that draft makes it clear that Ben-Gurion had been able to convince

Rosen to include in Article 1 the executive's authority to enact primary legislation independently of the legislature. The new revised draft stated that 'the [legislature] may empower, and is hereby empowering, the [executive] to enact urgent legislation'.[69] Their attempt to convince the legislature to approve the executive's legislative power, however, was not successful, and the final draft of the proclamation that was phrased by the PSC did not include Rosen's proposed language.

Following Rosen's presentation of his new draft on May 14, PC member Nahum Nir-Rafalkes, of the socialist Mapam party, raised his objection to the new language. 'Urgent legislation', he argued, was an ambiguous legal term whose meaning could be interpreted differently by the legislature and the executive.[70] Nir-Rafalkes then vehemently repudiated the request that the executive be granted the authority to enact laws concurrently with the legislature, stating that 'one of the principles of democracy is a separation between the legislative authority and the executive authority. And here [you ask us to] grant our ministers the power to legislate'.[71]

In an attempt to persuade Nir-Rafalkes to withdraw his objection, Ben-Gurion, seemingly inadvertently, revealed the true reason for which he sought to secure the PG's authority to enact laws. As Ben-Gurion stated:

> All ordinary parliaments, especially at times of emergency, provide such authority to the executive branch. … We ask that we will not be left without authority altogether. *These laws ended – we must enact [them anew] and we must give orders immediately*, and that is why we phrased [Article 1 of the Proclamation] in this manner.[72]

Thus, Ben-Gurion's insistence that the PG be granted the power to enact laws immediately was more than a general attempt to secure legislative authority for the executive body he led. Rather, he sought to use that authority for a specific purpose. Indeed, Ben-Gurion contended that without it he would not be able to reenact laws that had recently 'ended'; laws upon which 'orders' were to be given; orders that he now had no authority to give due to the fact that these laws were no longer in force. Ben-Gurion provided no additional information about these laws, their names, what brought about their invalidation, how they were connected to a state of emergency, what orders he must give, or to whom he needed to give them. Although he was careful not to state so explicitly, the laws to which Ben-Gurion referred were the emergency regulations of which the DER consisted.

As noted, Article 3 of the Proclamation prescribed the incorporation of all mandatory laws that were valid when Israel was established into the state's legal system. It did so by stipulating that 'the law in force in the State of Israel is the law existing in [Mandatory Palestine] on May 14, 1948'. Hence, although the above exchange between Ben-Gurion and Nir-Rafalkes took place a few hours before the termination of the Palestine Mandate and the establishment of Israel, Ben-Gurion need not have worried about the validity of any mandatory laws because Article 3 was designed to maintain and incorporate them all into the Israeli legal system. The only mandatory laws that were not to be maintained by Israel were those specifically invalidated by the PSC in Article 2 of the Proclamation and those that were invalidated by Britain in preparation for its departure from Palestine.

Therefore, when Ben-Gurion insisted that he needed the power to legislate so he could reenact emergency laws that had recently 'ended', what he implied was that the British

had recently invalidated the mandatory emergency laws under whose authority orders were given to the British armed forces in Palestine and that he wanted to enact these laws anew so he, too, could 'give orders' on their basis to Israel's armed forces.[73] The one and only law used by the British government to revoke emergency legislation at the conclusion of the mandate was the Revocation Order, which entered into force on May 14, 1948, the same day Ben-Gurion made the above statement.

Although Ben-Gurion avoided referring to the DER and the Revocation Order by their names, a careful examination of the statements he made before Israel's interim institutions of government reveals that Ben-Gurion, the 'architect' of the Nakba, was both aware of the DER's revocation and sought nonetheless to assume the DER's powers so he could employ them via the IDF.[74] Doing so, however, came at a significant risk. Should the Revocation Order be discovered, as it was in 1985, the legality of all state conduct that had been carried out under the DER could be challenged. This left him with two options: either persuade the legislature to reenact the mandatory DER anew as an Israeli law without exposing his awareness of its invalidation by Britain, or find a way to preemptively invalidate the Revocation Order without exposing his awareness of its existence. As we shall see, after he tried and failed to accomplish the former, he attempted to accomplish the latter—and failed again.

> 2. 'The proposed amendment … [prescribes] that there is no validity … to any hidden [mandatory] law [regardless of] whether there was an obligation to publish it in the [Palestine] Gazette, and even if it is possible to argue that there was no such obligation.'[75]

The earliest draft of the Israeli DER bill was finalized by Ben-Gurion and the Justice Ministry on August 29, 1948, circulated among the members of the PG a month later on September 21, and submitted to the legislature on June 24, 1949.[76] On July 12, 1949, Justice Minister Rosen appeared before the Knesset to present the bill, which was officially titled 'Defense and Security at a Time of Emergency Law, 1949'.[77] After a highly contentious debate during which he failed to gain sufficient support for the bill, Rosen concluded his remarks by reiterating the key question that had been raised by Knesset members, their inquiry about 'the need and urgency [to adopt the Israeli DER bill] at this time' considering that the 'government already has these powers under the 1945 Emergency Regulations'.[78]

The members' confusion made perfect sense given that the government appeared, in the legislators' understanding of the situation, to be calling for the adoption of a law that was already part of the Israeli legal system. They naturally thought that to be the case because the mandatory DER's revocation and invalidity had been concealed from them, and because Ben-Gurion had already been extensively employing the DER for more than a year following its supposed incorporation into the Israeli legal system together with all mandatory laws via the Proclamation. Rosen attempted to justify this deranged situation thusly:

> It is my opinion that the state confronts internal and external danger; the war is not over and I have no doubt that a fifth column may exist in the interior of the country. … [The Knesset] does not need to overly distrust the government, to the extent that it suspects that [the government] will use its emergency powers maliciously and not for the benefit of the state. … My opinion is that there is a need for the [proposed] law. … Such a foundational law, if we impose it upon the country, we want to do so [with the approval of the Knesset].[79]

As we can see, Rosen, tellingly, did not answer the question that had been posed, though he did confirm that the Palestinians, the 'fifth column' to which he referred, were the DER's primary target from the start. Rosen sought to persuade the Knesset to adopt the bill by claiming that 'such a foundational law'—a law, as Zionist leaders had asserted three years prior, that brought about 'the destruction of the foundation of law in the country', a law so abominable that 'even Nazi Germany' did not dare to enact it—required the consent of the Knesset.[80]

The fact that the Knesset did not consent to the adoption of the Israeli DER and rejected the bill with 34 votes against and 26 in favor did not prevent Rosen from finding an alternative path through which the DER was to be permanently imposed upon the state's inhabitants without the informed consent of the legislature. Eight days after the Israeli DER bill was voted down, Rosen submitted to the Knesset the government bill containing the Hidden Law Amendment, a law that sought to preemptively invalidate the Revocation Order through its designation as hidden and invalid under Israeli law.[81] The fact that it took Rosen so little time to do so suggests that this alternative strategy for safeguarding the DER under Israeli law was formulated at the same time that the justice ministry was working on the Israeli DER bill. Indeed, the record shows that the earliest draft of the amendment was finalized four days following Israel's establishment, after ministry officials discovered that Britain had passed a law revoking the DER.

On May 18, 1948, Haim Cohen, Israel's first state attorney, and Shabtai Rosenne, legal advisor to the Ministry of Foreign Affairs, discovered copies of a booklet titled 'Government of Palestine Legislation Enacted and Notices Issued which Have Not Been Gazetted' and containing thirty-six laws that had been promulgated by the mandatory government between April 28 and May 4, 1948. The eleventh law listed in the booklet, titled 'Certain Regulations (Continuation in Force) Order, 1948', prescribed the continued validity of specified emergency regulations that had been promulgated under the Palestine (Defence) Order in Council, 1937 (OIC), the legal basis of the DER. The exclusion of the DER from the list indicated to Cohen and Rosenne that the DER had been revoked.[82]

The two shared with Justice Minister Rosen their discovery and identified a path through which the DER could be protected from revocation, stating 'our urgent proposal is that Israeli law will consist of [mandatory laws enacted on or before] April 1, 1948 and not [May 14, 1948]'.[83] Their solution, in other words, was to introduce a new cutoff date for the incorporation of mandatory laws into the Israeli legal system by categorically excluding all laws that had been enacted after April 1. Doing so, they thought, would preemptively invalidate the law invalidating the OIC, thereby securing the DER's validity without exposing that this was their true aim.

Their proposed solution, however, faced a major challenge. Both the Proclamation and the draft of the LAO (which was under the legislature's consideration at the time) identified the day of Israel's establishment, May 14, 1948, as the cutoff date for the incorporation of valid mandatory laws. Any attempt to change that date to April 1 would have likely resulted in inquiries, especially by opposition parties, into the reasons for the change and the exclusion of these laws. This challenge was cunningly surmounted a year later by Ben-Gurion and Rosen through the Hidden Law Amendment. On August 15, 1949 Justice Minister Rosen presented the amendment's bill to the legislature in the following manner:

> Honorable Knesset, [before you] is a short bill that [introduces the Hidden Law Amendment]. … During the entire mandate period the unbreakable rule was that any law had to be published in the [*Palestine*] *Gazette* and [only following its publication therein] did it enter into force. … However, it turns out that during the short transitional period between November 29, 1947 and May 14, 1948, mandatory authorities deviated from the accepted rule and started to write documents, which they wanted to characterize as laws, without even publishing them in the [*Palestine*] *Gazette*. … We must not agree that we will always face the possibility that some hidden law, the existence of which we are not aware, … might surprise us by having some legal validity. The proposed amendment comes to remove this doubt and to prescribe once and for all that there is no validity, and that there has never been validity, to any hidden law [regardless of] whether there was an obligation to publish it in the *Official Gazette*, and even if it is possible to argue that there was no such obligation and that it was only customary to publish [it in the *Gazette*].[84]

As Rosen's remarks show, instead of a dubious proposal for the exclusion of mandatory laws, as suggested by Cohen and Rosenne, the amendment was depicted as necessary to protect the state from unknown hidden mandatory laws that 'may surprise' the government 'by having some legal validity'. Moreover, rather than prescribe the invalidation of all mandatory laws enacted after April 1, the amendment only sought the invalidation of mandatory laws enacted after the issuance of the United Nations Partition Plan for Palestine (on November 29, 1947) that were not published in the *Palestine Gazette* in violation of a legal obligation that they be so. The amendment, however, suffered from a key deficiency that rendered it wholly ineffectual for the invalidation of the Revocation Order. While it is true, as Rosen noted, that mandatory laws were ordinarily published in the *Palestine Gazette*, Article 20 of the Interpretation Ordinance, 1945, which governed where laws of the Palestine Mandate were to be published, authorized the government to publish laws in whatever place it chose.[85]

Justice Minister Rosen clearly indicated his awareness of this fact. When he began his presentation of the bill, he contended that the publication of mandatory laws in the *Palestine Gazette* was 'the unbreakable rule' of the 'entire mandate period'. By the time he concluded his presentation, however, Rosen conceded that it might be 'possible to argue that there was no such obligation' to publish mandatory laws in the *Palestine Gazette*, but that the amendment 'comes to remove this doubt'. How? By designating the false statement that such an obligation existed under mandatory law as a true statement under Israeli law without officially acknowledging the falsity of that statement, thereby creating a deceptive legal fiction. This legal fiction, however, could not stand up to scrutiny. Should the Revocation Order be discovered and should the executive argue against the order's validity on the basis of the amendment, the fact that the mandatory government was legally authorized to publish its laws anywhere would surely be raised to counter the executive's position.

Far more critically, though, the Revocation Order was not a law of the mandatory government but an English law enacted by King George VI under the authority of the Foreign Jurisdiction Act, 1890.[86] As such, the Order had to be published not in accordance with the mandatory Interpretation Ordinance, 1945, but in accordance with the procedural obligations prescribed under English law in the Statutory Instruments Act, 1946. Per Article 12(2) of that Act, the Revocation Order had to be published in the *London Gazette*, which is where it indeed appeared.[87] Hence, even if the mandatory government *was* obligated to publish its laws in the *Palestine Gazette*, the Hidden Law Amendment

was still inapplicable to the Revocation Order because it only applied to mandatory laws, not to English laws.

Not knowing its true aim, the Knesset approved the amendment. As the next section shows, both the mandatory government's legal authorization to publish its laws in places other than the *Palestine Gazette* and the amendment's inapplicability to the Revocation Order did not prevent the Supreme Court of Israel from designating the order as hidden and invalid under Israeli law. A new deceptive legal fiction was conjured up for this purpose.

> 3. 'British ministers have made it publicly clear that these Regulations have not been in force as a matter of English law since the making of the 1948 Revocation Order and that if the government of Israel seeks to apply the same or similar regulations, that is their decision for which they must take responsibility'.[88]

Astonishingly, it took nearly forty years and the extensive use of the DER within Israel and the OPT before the Revocation Order was finally discovered and used to challenge the DER's validity. That challenge came in a 1985 Supreme Court case argued by Leah Tsemel, the eminent Israeli human rights lawyer, who disputed a deportation order that had been issued against her client, Bahjat Jassi, under Regulation 112 of the DER.[89] Meir Shamgar, by then chief justice of the Supreme Court, whose own deportation to Eritrea by the British in 1944 was based on the emergency regulations that preceded the DER, denied the petition.

Shamgar's opinion, with which judges Menachem Elon and Mordechai Ben Dror concurred, rejected Tsemel's argument that the Revocation Order had effectively nullified the DER on the following grounds: 'The [Revocation Order] is an [invalid] "hidden law", meaning, legislation that the British central authorities in London pretended to enact during the last days of the mandate, without publishing it in the manner that was set for the publication [of such legislation] by law or custom, … [meaning] in the official [*Palestine*] *Gazette*'.[90] Shamgar then cited two laws in support of his ruling, the Hidden Law Amendment and the Hidden Law Order (the latter reenacted the amendment under the legal system of the OPT, which took place five months after the territories' conquest in the 1967 war).[91] Shamgar concluded his rejection of Tsemel's argument with the contention that even if the Hidden Law Amendment and the Hidden Law Order had not been enacted, he would still have found the Revocation Order to be invalid because hidden laws, categorically, are never valid.

By denying the validity of the Revocation Order on the basis of its purported hiddenness, Shamgar inadvertently revealed more than he sought to conceal. The prohibition against the use of hidden laws, a basic feature of a rule of law regime and a fundamental element of legality, is designed to protect individuals from their governments by requiring the latter to make their laws public, thereby ensuring that individuals know what is legally prohibited and do not unwittingly violate the law. Shamgar, in contrast, used the principle to justify the denial of individual rights by protecting the Israeli government's use of the DER for the deportation of Palestinians and, therefore, 'pervert[ed] the purpose of the principle against hidden laws'.[92] Further, Shamgar's contention that the DER must be shielded from the Revocation Order because the order's enactment violated the principle against hidden laws was illogical. One of the DER's key provisions provided the British armed forces with an exemption from publishing orders that were issued

under its authority (house demolition orders, deportation orders, etc.) in the *Palestine Gazette*, an exemption from publication that Israel has maintained.[93] Therefore, Shamgar relied on the principle against hidden laws to secure the validity of a law authorizing the violation of that very principle.

More significant was how Shamgar addressed the conceptual deficiency of the Hidden Law Amendment. As explained, the amendment, as a matter of law, could not invalidate the Revocation Order because the mandatory government was authorized to publish its laws in places other than the *Palestine Gazette* and because the amendment was only applicable to mandatory laws, not to English laws such as the Revocation Order. To bypass that deficiency, Shamgar simply asserted that even if the amendment did not exist he still would have found the Revocation Order to be hidden and invalid. How? By designating the Revocation Order as hidden and invalid irrespective of that designation's capacity to stand up to legal scrutiny, which is precisely what Shamgar did. Therefore, Shamgar designated the Revocation Order hidden and invalid on the basis of a false statement officially unrecognized as such, that is, on the basis of a deceptive legal fiction, thereby enabling Israel's continued employment of the DER to the present day.

Conclusion

This article has brought to a close the scholarly debate concerning the DER's validity, the principal law facilitating Palestinian repression and dispossession in Israel and the OPT, revealing that its invalidity has been known and concealed by the highest state authorities since Israel was established. It demonstrated that the DER has been artificially maintained as a valid law on the basis of a deceptive legal fiction insisting, baselessly, that the English law revoking the DER, the Revocation Order, is 'hidden' and thus invalid due to its publication in the *London Gazette* instead of the *Palestine Gazette*. By so doing, the article underscored the indispensable role deceptive legal fictions have in facilitating settler-colonial conquests.

Unlike non-deceptive legal fictions, the ones that do not seek to 'work an injury' on which Fuller focused in his examination of the concept, the deceptive legal fictions that sustain settler-colonial states are highly injurious to the Natives but are nonetheless regarded as legitimating the unceasing violence settlers inflict upon them.[94] This state of affairs highlights the settlers' continued reliance on, and manipulation of, law, both domestically and internationally, for the legalization and legitimation of the conquest of Indigenous lands and the perpetual violence through which their regimes are created, expanded, and maintained. Brian Tamanaha suggested that the law's capacity to legitimate the illegitimate may be derived from the popular belief that all laws retain an 'inviolable, built-in principled integrity' and a 'core of good and right' regardless of their content.[95] However, as previously noted, it is not the repressed and dispossessed Natives who are persuaded of the violence's legitimacy due to its anchoring in deceptive legal fictions. For them, such legal maneuverings remain 'genocidal in both [their] practice and [their] intent'.[96]

Moreover, the article further elucidated Wolfe's logic of elimination theory. As Wolfe explained, the settlers' drive to eliminate the Natives from the conquered territory is 'an organizing [principle] of settler-colonial society'.[97] The settlers' relentless attempts to 'extinguish Indigenous alterities' within the conquered territory was similarly

characterized by Veracini as a key characteristic of settler-colonial regimes.[98] Uncovering the historical circumstances under which the DER was unlawfully incorporated into the legal systems of Israel and the OPT underscores the centrality of elimination to the regime by illuminating the price it is willing to pay for securing and maintaining this law. As previously discussed, following Britain's employment of the DER against the Zionists in Mandatory Palestine, Zionist leaders who went on to serve as supreme court judges, justice ministers, and attorneys general argued that the promulgation of the DER effectively revoked individual rights in the country. Their fierce repudiation of the law, as explained, was justified. The DER enables the employment of largely unrestricted state violence through the effective suspension of due process protections from the arbitrary denial of individual rights by the executive. Therefore, the regime effectively sacrificed the individual rights of all Israelis so it could utilize a law that enables a wide range of eliminatory conduct.

Furthermore, the article showed that the invalid DER and the Hidden Law Amendment were fraudulently incorporated into the Israeli legal system, conduct that ought to render these laws invalid under contemporary Israeli jurisprudence.[99] The prospect that the Supreme Court of Israel may invalidate the DER raises an important question that could be explored in future research. As noted in the introduction, the DER has enabled the establishment and operation of martial law regimes in Israel and the OPT, including the issuance of hundreds of thousands of military court rulings and countless military orders for the deportation of Palestinians, their administrative detention, the demolition of their homes, and other repressive measures. Should the DER be struck down, what would be the legal ramifications of this action for such rulings and orders?

Finally, the foregoing discussion indicates that Russell Smandych's call for a conceptualization of a comprehensive 'transnational analytical framework' that 'locates and interrogates the role of law' in the enablement of settler colonialism is warranted.[100] This framework, Smandych implied, may enable an examination of the role of law not just in the legitimation of the genocidal violence settlers inflict upon the Natives, but in sustaining legal cultures that legitimate the 'politics of denial' through which settlers have evaded the legal and moral ramifications of their actions.[101] The settlers' manipulation of state and international law, as previously discussed, not only legalizes their protracted assault on Indigenous Peoples, it also self-servingly affirms a discourse of moral absolution for that violence. Considering the centrality of deceptive legal fictions to that discourse, the struggle against the politics of denial that have perpetuated the injustice suffered by Indigenous Peoples ought to view the dismantling of such fictions—from the doctrine of discovery to the ones sustaining the DER—as crucial for its success.

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82. ISA G-5671/24, 'Laws of the Mandatory Government', 106–29 [Hebrew].
83. ISA G-115/26, 'Laws Enacted by the Mandatory Government in Its Last Months of Rule', 67 [Hebrew].
84. Knesset Debates, August 15, 1949, 1335 [Hebrew]. David Ben-Gurion was directly involved in the drafting process of the Hidden Law Amendment, insisting that 'all hidden laws will be completely invalidated, leaving no option that some of them will be resuscitated'. ISA G-5390/1, 'Law and Administration—Hidden Laws Law', 46 [Hebrew].
85. Article 20 of the Interpretation Ordinance, 1945 prescribed as follows: 'All regulations having legislative effect shall be published in the *Gazette* and, unless otherwise provided, shall take effect and come into operation as law on the date of such publication' (emphasis added).
86. Article 5(1) of the Foreign Jurisdiction Act, 1890 prescribed the following: 'It shall be lawful for [His] Majesty the [King] in Council if [He] thinks fit, by Order to direct that all or any … enactments … shall extend … to any foreign country in which for the time being [His] Majesty has jurisdiction'.
87. Article 12(2) of the Statutory Instruments Act, 1946 prescribed the following: 'The publication in the London, Edinburgh or Belfast Gazette of a notice stating that a statutory instrument has been made … shall be sufficient compliance with the provisions of any enactment … requiring that instrument to be published or notified in that *Gazette*'.
88. T.R.V. Phillips [Chargé D'affaires at the British Embassy in Tel Aviv], '1945 Defense (Emergency) Regulations', *The Jerusalem Post*, March 18, 1993.

89. HCJ 513/85 *Nazzal v. Commander of the IDF in Judea and Samaria* (1985), IsrSC 39(3): 645–59 [Hebrew]. Two additional petitions challenging DER deportation orders, issued against Amin Maqbool and Walid Nazzal, were consolidated with Jassi's and adjudicated simultaneously in *Nazzal*.
90. Ibid., 652–3.
91. Order on Interpretation (Additional Provisions) (No. 1) (Judea and Samaria) (No. 160), 1967 [Arabic and Hebrew].
92. Kretzmer, *The Occupation of Justice*, 122.
93. Regulation 3(2), DER; CA 1127/93 *Israel v. Klein* (1994), IsrSC 38(3): 496 [Hebrew]; HCJ 6893/05 *Levy v. Israel* (2005), IsrSC 49(2): 894 [Hebrew]; CA (West Bank) 4869/07 *Military Prosecution v. Hudley* (2008), unreported, 9 [Hebrew].
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Disclosure statement

No potential conflict of interest was reported by the author(s).

Data availability statement

Data are available upon reasonable request by contacting the corresponding author.

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