Transcending the Impasse:
Towards an Indigenous Vision of Legality in Palestine

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A Thesis Submitted to the Faculty of Graduate Studies in Partial Fulfillment of the Requirements for the Degree of Master of Laws

Osgoode Hall Law School

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Toronto, Ontario

April 2021

Abstract

This thesis attempts to demonstrate that the international legal impasse surrounding Palestine is animated by incommensurable visions of legality. It argues that in portraying the Palestinian struggle for liberation as a struggle for state sovereignty, international law subjects the indigenous worldview to a violent and perpetual erasure. The thesis employs Aaron Mills' theoretical framework to argue for an incommensurability between Palestine's indigenous conception of legality and the dominant conception of legality underlying international law. Further, the thesis offers a reading of Ghassan Kanafani's novel *The Other Thing* to explore the consequences and normative implications of an impasse characterized by incommensurability. The key finding is that cultural artefacts are important sites of the Palestinian legal memory and are capable of uncovering Palestine's silenced vision of legality. Finally, the paper concludes that acknowledging incommensurability paves a way towards a more holistic legal imagination that contains the seeds of transcending the impasse in indigenous Palestine.

Dedication

To all those who gifted their lives, across time and space, for liberation from despotism.

To all those who continue to gift their lives for love, freedom, and hope.

Acknowledgements

I would like to sincerely thank my supervisor Jennifer Nadler for her patience and for helping with the focus and clarity of this project. I sincerely thank my committee member Jennifer Nedelsky, who effectively served as a co-supervisor, for helping enhance this project. I thank them both for their active engagement and critical yet constructive guidance. I would also like to thank Ardi Imseis for his willingness to participate as the external examiner on the defense committee.

I wish to thank the Osgoode Graduate Program team — Sonia Lawrence, Chantel Thompson, Ammad Khan, Heather Moore, and Prina Wong — for their assistance as well as Jeffery G. Hewitt and my colleague Scott J. Franks for directing me to useful resources. Further, thanks to York University and Harley D. Hallett scholarships for funding support.

I extend my thanks to Anis Kassim and Amar Bhatia for their comments on early drafts of this thesis, Osama Al-Qassem for his valuable insight, and Rifʿat Audeh for his diligent proofreading. Special thanks to Amani Ṣaleh and Ḥanna Naṣir at Birzeit University and Fady ʿAsleh at Kẖazaaen for helping me access otherwise unavailable materials. Also, many thanks to the numerous individuals who opened their doors (virtual or literal) to me as I was developing my ideas.

A million orange groves worth of gratitude and appreciation to: my parents, for being my school of life, and for raising me to stand up to injustice at any cost; DM, for her unwaning enthusiasm and without whose support completing this project wouldn't have been possible; FH, my friends, and family for their care and encouragement; and OBD, for igniting my legal imagination and watering the plants of inspiration when the seeds of this project began to surface many years ago.

Last but not least, I would be remiss if I didn't acknowledge the source of Creation as well as all the variety of life-forms that have inspired me especially my native homeland, Palestine; my host land, Turtle Island; and the mother of all lands, Earth — from whom I was created and into her soil I shall inevitably return.

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CHAPTER 1: INTRODUCTION

Our souls are high
our pastures sacred
and the stars are
illuminated speech...
if you stared into them you would read
our story entire

— Mahmoud Darwish, The "Red Indian's" Penultimate Speech to the White Man[1]

1.1. Research Question

The Palestinian struggle is marked by a history of contested truths. While many of those truths are moral and political in nature, they have been largely narrated, assessed, and adjudicated through legal means. For example, the starting point of the popular Palestinian view presupposes that Israel, or what is regionally referred to as the Zionist entity,[2] is an illegal entity. This presupposition is treated as a truth in popular consciousness in much of the Middle East and North Africa. Where "Israel, *ipso facto*, is non-Palestine,"[3] the conceptual presumption of illegality is itself an act of resistance against colonial erasure. On the other hand, this axiom is denied in much of the Western world, where the legality of the Israeli settler state is presupposed. Moreover, questioning that dominant presumption is heavily censored or penalized across many spaces in the West, including academia — a space that claims to be a beacon of free speech and thought.[4] Crucially, these legal contestations are themselves founded on presumptions that are treated as truths. For instance, the view that the nation-state is a universally valid mechanism for constituting political community or

[1] Mahmoud Darwish & Fady Joudah, trans. "The 'Red Indian's' Penultimate Speech to the White Man" (2009) 36 Harv Rev 152.
[2] Place-names denote more than just nomenclatures and involve mythologies and truth presumptions embedded in historical, political, and moral imaginative connotations. As Steven Salaita explains: "In situations of ongoing colonialism, geographic terminologies are simultaneously ambivalent and politicized." in Steven Salaita, *Inter/Nationalism: Decolonizing Native America and Palestine* (Minneapolis: University of Minnesota Press, 2016) at xi. On Israel's appropriation of Palestinian place-names see Chapter 10 in Nur Masalha, *Palestine: A Four Thousand Year History* (London: Zed Books, 2018).
[3] Joseph A. Massad, *The Persistence of the Palestinian Question* (New York: Routledge, 2006) at 68.
[4] Examples abound, but generally see David Landy, Ronit Lentin & Conor McCarthy, eds, *Enforcing Silence: Academic Freedom, Palestine and the Criticism of Israel* (London: Zed Books, 2020).

that sovereignty is a prerequisite for exercising agency treat constructs like the nation, the state, and sovereignty as meta-truths, that is, truths that are presumed or taken for granted.

Meta-truths act as structural impediments to representing the reality of the Palestinian struggle in terms of its own legal paradigm; meta-truths have silenced the truth of the indigenous people of Palestine. In turn, the indigenous narrative has been narrowly filtered by the dominating Western lens[5] of which international law is part.[6] In many instances, the Palestinian finds herself *responding* to these dominant presuppositions rather than *initiating* a speech that begins from her own axioms. Thus, the starting point of my thesis is that which is being silenced. I endeavor to speak from the marginalized view and its internal presuppositions rather than in response to the dominant one.

Here, one might ask: who are the indigenous people of Palestine? It is important to emphasize that indigeneity in this context does not answer or negate questions of firstness. As Victor Kattan asserts, dwelling on figuring out who Palestine's first inhabitants were is a futile endeavor not only because it cannot be proved, but more importantly because it is irrelevant to "resolving today's conflict which is a modern political phenomenon that began in the late nineteenth century during the heyday of European colonial expansion."[7] Kattan explains the plural composition of the indigenous people of Palestine as follows:

> It is said that the ancestors of today's Palestinians included the Canaanites, Hittites, Philistines, Phoenicians, Egyptians, Hebrews, Samaritans, Persians, Greeks, Assyrians, Armenians, Romans, Arabs, Crusaders, and Turks. Over the past millennia, Jews, Christians, Muslims, and peoples of other faiths, and those of no faith, have inhabited that land. In the course of time its inhabitants were Judaised, Christianised and Islamised, their language being transformed into Hebrew, then to Aramaic, and then to Arabic. However, without question, Palestine has been a predominantly Arab

[5] Along the same lines of the comment in *supra* 2, the Western imagination pertaining to Palestine is crowded with Eurocentric and European-biblical claims and narratives about civilization and backwardness in the Orient. See Edward Said, *After the Last Sky* (New York: Pantheon Books, 1986); Hatem Bazian. "The Indigenous Palestinians: Twice Dispossessed by the Biblical Text" (2014) 35:3 Harv Int'l Rev 40. On Western cultural representations and perception see Edward Said, *Culture and Imperialism* (New York: Vintage Books, 1994) and *Orientalism* (New York: Routledge, 1978). For a psycho-philosophical discussion on the function of language and the hear-ability of speech in crowded discourses see Ellie Ragland-Sullivan & Mark Bracher, eds, *Lacan and the Subject of Language* (New York: Routledge, 1991).

[6] Laura Ribeiro. "International Law, Sovereignty and the Last Colonial Encounter: Palestine and the New Technologies of Quasi-Sovereignty" (2009) 15 Pal YB Int'l L 67. See also Antony Anghie. "The Evolution of International Law: Colonial and Postcolonial Realities." (2006) 27:5 Third World Q 739.

[7] Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab–Israeli Conflict, 1891–1949* (London: Pluto Press, 2009), at 2.

> country for the greater part of its modern history, and Sunni Islam has been the religion of the overwhelming majority of its inhabitants, prior to the Zionist conquest.[8]

As such, my use of the term "indigenous people of Palestine" refers to the plurality of the people — of diverse ancestries and varying religious affiliations — who inhabited Palestine, shared a common heritage, and had a continuous ancestral connection to the land before the arrival of the early Zionist settlers during the first *Aliyah* at the beginning of the 1880's. The term indigenous today naturally extends to their descendants, whether at home or in refuge. Additionally, my use of the term "indigenous Palestine" refers to the whole of Palestine to distinguish it from international legal connotations that reduce Palestine today to merely the Occupied Palestinian Territories (OPT).[9]

With the above conceptual and historical starting points in mind, the target of my inquiry is neither the Israeli settler state nor its legality or lack thereof. I am interested in drilling into the infrastructure that lies beneath that question of legality. The target of this inquiry is the legality of legality. In other words, by whose *legal* standards or criteria do we assess and adjudicate questions of legality?

What we call International Law (or what I refer to as the dominant international legal form)[10] has been the primary site of truth contestation in relation to Palestine; its purportedly universal standards of legality have dominated the narration, assessment, and adjudication of the "conflict". Antony Anghie argues that colonialism was central to the formation of *jus gentium* and that the concept of sovereignty emerged from the colonial encounter with the native. Anghie contends that the current international legal framework we have today is a continuation of that imperial era from which international law emerged, albeit constantly camouflaging into new clothing and using new language. The basic tenet of his argument is that international law's colonial history "is concealed

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[8] *Ibid.*

[9] To its people, Palestine today is still the same geographic area that it was before the founding of the settler state of Israel in 1948. I alternate between the term indigenous Palestine and Palestine, and both usages are intended to denote the same thing. I deliberately avoid the alternative commonly used reference "historic Palestine" because it echoes the sentiment of a past existence, which may unconsciously contribute to narratives of erasure.

[10] I use a variation of the terms "hegemonic international legal order" and "dominant international legal form" interchangeably. My purpose is to differentiate the international legal framework in operation today from International Law as an abstract concept with open possibilities to be something other than the dominant form inherited from an imperial past.

even when it is reproduced."[11] Understood this way, international legal doctrines and institutions were generated not merely by establishing order between sovereign states but rather by the problems arising from colonization. The dominant international legal order and its standards of legality are embedded in an essentially colonial and Eurocentric paradigm. It is thus important to locate international law's approach to the Palestinian struggle within this paradigm.

From nearly 150 years of ongoing Zionist encroachment[12] to almost three decades of a so-called peace process, the legal contest surrounding Palestine has hit a deadlock. While there are many concerned parties in this tragedy, the stakes are not equal. This is not only in reference to the notorious imbalance of power and external support between the native and the settler. From extrajudicial killings to mass incarceration to home demolitions, Palestinian lives, bodies, souls, minds, talents, lands, homes, schools, resources, and all parts of our being endure, minute-by-minute, a reality of unspeakable violence. More importantly, Palestinians, at home and in refuge, are enduring an ongoing conceptual violence rendering our identity, legality, and memory under a constant threat of erasure.[13] It is an existential erasure, arguably the most dangerous kind of erasure. Thus, as the party bearing the brunt of this "conflict", the indigenous people of Palestine have the highest stake in resolving the impasse.

The legal impasse this thesis addresses is multifaceted. The impasse surrounding Palestine may initially look like a deadlock in negotiations between Israel and the Palestinians in reaching a "settlement" or the failure of international legal mechanisms to resolve what, *prima facie*, appears to be a territorial disagreement. However, as we shall see, what underlies this failure is a deeper, structural and existential problem. It is the clash between two visions of legality that belong to constitutively different or incommensurable worldviews where this clash is further complicated by the denial of such incommensurability.

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[11] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 268.

[12] Zionism is the political ideology that guided the World Zionist Organization led by a group of colonial European Jewish leaders who conceived the conceptual foundations for the colonization and conquest of Palestine and founding the settler state of Israel.

[13] On erasure and memoricide, see generally Ahmad H. Sa'di & Lila Abu-Lughod, eds, *Nakba: Palestine, 1948, and the Claims of Memory* (New York: Columbia University Press, 2007) and Nahla Abdo & Nur Masalha, eds, *An Oral History of the Palestinian Nakba* (London: Zed Books, 2018).

Thus, the question that this thesis asks is whether it is possible to overcome the legal impasse in indigenous Palestine? Arguing that the impasse involves a clash between incommensurable[14] legalities, I contend that its resolution may be possible if treated outside the hegemonic standards of legality presumed by the dominant international legal form. The hypothesis underlying my research is that if incommensurability is acknowledged as the root cause of the legal impasse in indigenous Palestine, then it would pave a way towards a more holistic legal imagination and creative resolution.

While Palestinian scholars in fields such as sociology,[15] anthropology,[16] political theory,[17] history,[18] or Middle Eastern studies[19] have sought to address this impasse from alternative paradigms, previous *legal* analysis addressing this impasse, and the Palestinian struggle more broadly, have, to my knowledge, been pursued largely with the dominant standards of legality as the starting point. This has been done in two ways.

The first approach has assumed the validity of those standards and their underlying conceptual presumptions and sought to skillfully formulate and represent the Palestinian struggle on the terms of the hegemonic international legal paradigm. This approach can be viewed as a direct response to the proactive role that international law, through the United Nations and European imperial powers, played in colonial erasure in Palestine especially at a time when principles like self-

[14] I take incommensurability to mean irreconcilable propositions. In this context, the irreconcilable propositions are the conflicting understandings of legality. However, their irreconcilability does not stem from the conventional usage of the term "incommensurable" denoting the lack of a common ground of comparison or measuring value. But rather, incommensurability denotes a real conflict or clash between similar notions that share grounds for comparison but are concretely incompatible with, or diametrically opposed to, one another. See Julen Etxabe's general usage of the term "incommensurable conflicts" and his fantastic discussion on incommensurability in Julen Etxabe, *The Experience of Tragic Judgment* (Abingdon: Routledge, 2013) at 69 - 91.
[15] Mark M. Ayyash. "A Pandemic in an Age of Omnipresent Sovereign Power: The Plight of Palestine" (2020) 41:1 TOPIA 123.
[16] Amahl Bishara. "Sovereignty and Popular Sovereignty for Palestinians and Beyond" (2017) 32:3 Cult Anthropol 349; see also Lila Abu-Lughod. "Imagining Palestine's Alter-Natives: Settler Colonialism and Museum Politics" (2020) 47 Crit Inquiry 1. For a problematization of the dynamic between the nation and the state see Randa Farah. "Palestinian Refugees: Dethroning the Nation at the Crowning of the 'Statelet'?" (2006) 8:2 Interventions-UK 22.
[17] Leila Farsakh. "The Right to Have Rights: Partition and Palestinian Self-Determination" (2017) 47:1 J Palestine Stud 56. Note that Farsakh still maintains the dominant element of the "state" but challenges the "nation" while also arguing for a popular conception of sovereignty.
[18] Rana Barakat. "Writing/Righting Palestine Studies: Settler Colonialism, Indigenous Sovereignty and Resisting the Ghost(s) of History" (2018) 8:3 Settler Colon Stud 349.
[19] Joseph Massad. "Against Self-Determination" (2018) 9:2 Humanity 161.

determination and universal rights were sufficiently established but deliberately dismissed.[20] The persistence of this doctrinal approach, which was especially crucial around the time of the *Nakba*,[21] stems from an ongoing need to address the immediate reality of persistent colonial erasure and international legal exceptionalism. As such, scholars have sought and still seek to critique international law, expose its shortcomings, and utilize its opportunities on the terms of its own paradigm.[22]

The second approach has utilized alternative frameworks, such as TWAIL,[23] Decolonization,[24] and Hegelian Dialectics[25] to deconstruct and reconstruct the conventional analysis while accepting the conceptual presumptions of the hegemonic international legal order. I will elucidate these presumptions in Chapter 4, but they include, for example, accepting notions like the nation, the state, sovereignty or self-determination as uncontested starting points.

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[20] For a thorough examination of the legal history surrounding the international legal origins of the conflict, see Henry Cattan, *Palestine, The Arabs and Israel: The Search for Justice* (London: Longman, 1969).

[21] The term *Nakba* in Arabic means "catastrophe" where *Al-Nakba* refers to The Palestinian Catastrophe that was the result of Zionist terror leading up to May 15, 1948. The term captures the totality of ethnic cleansing, mass dispossession, and atrocities waged by European Zionist Jewish militias against indigenous people, institutions, and lands culminating in the Palestinian Exodus and the establishment of the Israeli settler state in 1948 on the ruins of indigenous Palestine. For a history of the *Nakba*, see Nur Masalha, *The Palestine Nakba: Decolonising History, Narrating the Subaltern, Reclaiming Memory* (London: Zed Books, 2012); and Walid Khalidi, *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, DC.: Institute for Palestine Studies, 1992). See also Illan Pappe, *The Ethnic Cleansing of Palestine* (Oxford: OneWorld Publication Limited, 2006); and Shai J. Lavi. "The Use of Force Beyond the Liberal Imagination: Terror and Empire in Palestine, 1947" (2005) 7:1 Theor Inq L 199.

[22] Examples of this approach are too many to list, but a few examples of contemporary contributions include Mutaz M. Qafisheh. "What Is Palestine? The *de jure* Demarcation of Boundaries for the ICC's *ratione loci* Jurisdiction and Beyond" (2020) 20:5 Int'l Crim L Rev 908; George Bisharat. "Maximizing Rights: The One State Solution to the Palestinian-Israeli Conflict" (2008) 8:2 Glob Jurist 1; In monographs, see Victor Kattan, ed, *The Palestine Question in International Law* (London: British Institute of International and Comparative Law, 2008); Noura Erakat, *Justice for Some: Law and the Question of Palestine* (Stanford: Stanford University Press, 2019). Some notable non-Palestinian legal works include John Reynolds. "Anti-Colonial Legalities: Paradigms, Tactics and Strategy" (2015) 18 Pal YB Int'l L 8; John Dugard & John Reynolds. "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 EJIL 867; John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge: Cambridge University Press, 2010).

[23] i.e., Third World Approaches to International Law. See Ardi Imseis. *The United Nations and The Question of Palestine: A Study in International Legal Subalternity.* PhD. University of Cambridge (2018) available at <https://www.repository.cam.ac.uk/bitstream/handle/1810/290775/PhD%20Thesis%20to%20be%20Bound%20Imseis.pdf?sequence=1&isAllowed=y>

[24] Nadim N. Rouhanna. "Decolonization as Reconciliation: Rethinking the National Conflict Paradigm in the Israeli-Palestinian Conflict" (2018) 41:1 Ethnic Racial Stud 643.

[25] Raef Zreik. "A One-State Solution? From a 'Struggle unto Death" to 'Master-Slave' Dialectics" (2011) 17:6 Soc ID 793.

On this front, I hope that my thesis will contribute to a body of legal analysis concerned with advancing a vision of legality representative of indigenous Palestine and representing our struggle on our own terms. Nonetheless, no words can sufficiently stress that the only reason my research is possible today is owed to the rigorous work, documentation, and analysis done by a great many Palestinian legal scholars on whose shoulders I stand and whose work challenged, and continues to challenge, not only Israel's international impunity but the dominant legal paradigm on its own terms.

1.2. An Absent Presence — Palestinian Literature in Legal Studies

1.2.1. Why Kanafani?

Ghassan Kanafani is a Palestinian intellectual and activist who was born in 1936 in *ʿAkkā* (Acre), a coastal city in the north of Palestine. Kanafani produced four volumes consisting of novels, short stories, plays, and literary criticism as well as a wide range of journalistic politics and essays. His writings are deemed to have had a significant impact on Arabic Literature in terms of their literary contribution and aesthetic value.[26] He has been described as a prolific writer, visionary, genius, as well as a voice of Palestine, the voice of a nation in exile, a martyr and a revolutionary.

During the *Nakba* in 1948, Kanafani was a 12 year-old boy who overnight lost everything he had and knew, and found himself to have become a refugee. Sixteen years later, in his short story *The Land of the Sad Oranges*, he recounts:

> But whatever the fact of the matter, the picture gradually became clearer on the night of the great attack on Acre. That night passed, cruel and bitter amidst the silent despondency of the men and the prayers of the women. You and I and others of our age were too young to understand what the story meant from beginning to end. But, on that night, it began to fall into perspective.[27]

From this encounter, and the subsequent struggles of life in the camp and in exile, Kanafani developed both his political theory and literary aesthetics.

[26] Bashir Abu-Manneh, *The Palestinian Novel: From 1948 to the Present* (Cambridge: Cambridge University Press, 2016).
[27] Barbara Harlow, *After Lives: Legacies of Revolutionary Writing* (London: Verso Books, 1996) at 45.

Barbara Harlow sums up the core question driving Kanafani's passage as "why had we become refugees?"[28] It is a single question with multifaceted dimensions and trajectories that manifest across his writings. The oscillation between the layers of this question and the multitude of answers to it is an existential dialectic because it confronts conceptual erasure. This dialectic is best understood as part of the broader historical project that tells the story of Palestine and narrates the reality of the Palestinian struggle from within its own paradigm. Kanafani's task was to locate the Palestinian perspective within that history through literature, in which he vividly represented the multifold lived experiences that shaped, and continue to shape, the collective Palestinian consciousness. It is important to note that while his inquiry is partly concerned with historical questions such as dispossession and exile, it is equally concerned with an anxious present of resistance and steadfastness, as well as a hopeful future of liberation, justice and return.

Kanafani's characters bring to life the diversity of the Palestinian lived experience through the perspective of its children and parents, students and teachers, men and women, young and old, rich and poor, revolutionaries and apaths, professionals and laborers, villagers, Bedouins, refugees, metropolitans and more. As Adil Ahmed observes, those stories are like a "fair sampling of the population."[29] Ahmed further observes that while Kanafani describes the realities of an intimate past, present, and future of the Palestinian cause through the lived experiences of individual characters, Kanafani "refuses to impose a specific political ideology on his fiction; in his works, politics are suggested in the most general terms."[30] Ahmed further adds that "he makes no overt attempt to sway the reader to make a political stand or take sides; he asks only for understanding."[31]

It is worth noting that this pattern of leaving the answer about a story's question up to the reader without imposing a prescribed conclusion reflects Kanafani's sharp understanding of the literary method and the distancing demanded by aesthetics from his own political ideology. This is not to say that Kanafani believed that literature and politics (or public affairs) should, or even *could*, be

[28] *Ibid*.
[29] Adil A. Ahmed. *Theme and Technique in Ghassan Kanafani's Short Fiction*. PhD. Oklahoma State University (1989) at 169. See also Edward Said, *The Question of Palestine* (New York: Vintage Books, 1980) at 153.
[30] *Ibid,* Adil A. Ahmed at 167.
[31] *Ibid.*

separated. On the contrary, he believed that there could be no meaningful political project of liberation without an equally meaningful cultural project.[32] One of the important themes underpinning Kanafani's life and writings is the idea of *al-adab al-multazim*, denoting committed fiction,[33] wherein one's thoughts and actions are consistent with one another. This take on holism, as we shall see, appears in Kanafani's fiction.

As an organic intellectual, Kanafani was not an ivory-tower writer who observed society and critiqued its structures from afar; Kanafani rather practiced what he preached, and gifted his life for the dream to which he had committed — the Palestinian dream of liberation and return. In that sense, Kanafani was an activist as well as a writer. He was a member and later a spokesman of the Popular Front for the Liberation of Palestine (PFLP). However, he insists that contrary to common perceptions, his political commitment stemmed from his literary commitment. He explains this positionality in the following passage excerpted from an interview:

> My political position springs from my being a novelist. Insofar as I am concerned, politics and the novel are an indivisible case and I can categorically state that I became politically committed because I am a novelist, not the opposite. I started writing the story of my Palestinian life before I found a clear political position or joined any organization.[34]

Kanafani's formidable literary productions were interrupted when he was assassinated, along with his niece, by the Israeli *Mossad*[35] in a targeted car bombing in Beirut in July 1972. One of the most illuminating descriptions of him is this widely cited sentence from his obituary, which stated that "Ghassan was the commando who never fired a gun. His weapon was a ballpoint pen and his arena newspaper pages."[36]

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[32] Ghassan Kanafani, *al-āthār al-kāmilaẗ: al-dirasat al-ādabiyya (al-mujallad al-rabiʿe) [The Complete Works: Literary Studies (Volume IV)].* (Beirut: Ghassan Kanafani Cultural Foundation, 1977).
[33] See Lana Walid & Fatima Muhaidat. "Probing Ghassan Kanafani's Committed Fiction: A Study of Two Novellas" (2017) 13:8 Can Soc Sci 26; see also Hilary Kilpatrick. "Commitment and Literature: The Case of Ghassān Kanafānī" (1976) 3:1 Brit Soc Middle E Stud 5. For a discussion on Palestinian committed and engaged literature generally, see Ibrahim Taha, *The Palestinian Novel: A Communications Study* (New York: Routledge, 2002) at 22.
[34] Interview conducted by *Al-Seyassah* (a Kuwaiti daily newspaper) cited in Barbara Harlow, *Ghassan Kanafani, Palestine's Children.* (Washington, D.C.: Three Continents Press, 1978) at 8.
[35] Israel's security intelligence agency.
[36] The obituary in *The Daily Star* (a Lebanese, Beirut-based newspaper) cited in Barbara Harlow, *supra* 27 at 39 and 57.

1.2.2. Why The Other Thing?

The Other Thing (Who Killed Layla Al-Ḥayek),[37] completed in 1966, is one of Kanafani's least famous novels and, in my view, its value is underestimated. It was the author's only novel that was not included in the first edition of Kanafani's novel's collection[38] and was not published as a consolidated novel until 1980.[39] On the academic front, I was not able to find a single academic publication in English about *The Other Thing* in any field of study. Further, the only two academic references available in Arabic briefly discuss the novel in the context of bringing to light Kanafani's more personal and romantic, rather than political, life and emphasized his literary techniques in this novel.[40] In general, the tendency is to view *The Other Thing* as peripheral to Kanafani's core theme and thus as an anomaly in Kanafani's body of work.

The tendency to see *The Other Thing* in this way is not surprising. One might justifiably wonder about the value that a legal fiction surrounding a love affair and an inheritance scandal could add to the "hardcore" political genre that Kanafani is known for. However, I contend that *The Other Thing* engages, in a subtle yet sophisticated way, with the heart of the legal impasse in indigenous Palestine. Through a figurative aesthetic, Kanafani creatively paints the problem of incommensurability and the conceptual violence that follows the irreconcilable encounters between conflicting paradigms in the novel. I will discuss the novel in Chapter 3, where I will provide an analysis that I hope will relocate *The Other Thing* within the general context, and specifically the legal context, of the Palestinian struggle.

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[37] Ghassan Kanafani, *al-sha'ii al-akẖar (man qattala Layla Al-Ḥayek) [The Other Thing (Who Killed Layla Al-Ḥayek)] 2nd ed* (Nicosia: Rimal Publications, 2014).

[38] Ghassan Kanafani, *al-āthār al-kāmilaẗ: ar-riwayat (al-mujallad al-awwal) [The Complete Works: Novels (Volume I)].* (Beirut: Dar Al-Lateef for Printing and Publishing, 1972).

[39] One possible explanation for this gap may be that the novel was initially published over 9 weeks as part of a series in a weekly magazine and was completed just before the *Naksa* in 1967 where the political climate and cultural mood were tense. Additionally, Volume I was published immediately after Kanafani's assassination and the compilation of his works — given their magnitude, the circumstance, and the Palestinian condition of dispersal — was a challenge. As noted by Youssef Idris in the foreword to Volume II, see Ghassan Kanafani, *al-āthār al-kāmilaẗ: al-qissas al-qasiraẗ (al-mujallad al-ṯhani) [The Complete Works: Short Stories (Volume II)].* (Beirut: Arab Studies Institute, 1973).

[40] One paper discussed the Dialectic of Connection and Separation and the other explored the Dialectic of Construction and Deconstruction. See ʿAttalah Al-Ḥajaya & Sanāʾ Shaʿlan. "jaddaliyat al-etiṣal wal-infiṣal fe al-ḥub: riwayat al-sha'ii al-akẖar (man qattala Layla Al-Ḥayek) namuḏajan [The Dialectic of Connection and Separation in Love: The Other Thing (Who Killed Layla Al-Ḥayek)" as a Case Study]" (2016) 43:6 Dirasat 2613; and Muḥammad ʿAbdelqadir, *Ghassan Kanafani: juḏur al-ʿabqariyya wa tajalyyatihā al-ibdaʿiya [Ghassan Kanafani: The Roots of Genius and its Creative Manifestations]* (Beirut: Arab Scientific Publishers, Inc., 2015).

1.2.3. Why Literature?

Some of Kanafani's works have received great attention in academia across diverse fields from Language,[41] Comparative Literature,[42] and Literary Theory,[43] to Economics,[44] Politics,[45] and History,[46] as well as in more specialized areas such as Postcolonial Studies,[47] Refugee Studies,[48] Decolonization,[49] Gender,[50] and even Psychoanalysis[51] and Ecologism.[52]

Despite Kanafani's insistence on the close affinity between literature and public life, his works (and Palestinian literature more broadly) are absent from the study of law. Perhaps this absence can be partly attributed to the fact that the law and literature movement in Western academia began to gain traction only over the past few decades. And perhaps the absence can also be attributed to the fact that the legal questions that Palestine raises involve immediate, on-the-ground violations

[41] Omer E. H. Elmahdi & Abdulrahman M. M. Hezam. "Deep Meaning of Symbolism Significance in Men in the Sun" (2019) 10:1 TPLS 33; Ibrahim A. El-Hussari. "The Symbolic Conflation of Space and Time in Ghassan Kanafani's Novel *Ma Tabaqqa la-Kum* (All That's Left to You)" (2009) 45:6 Middle E Stud 1007.
[42] Barbara Harlow, *supra* 27; Barbara Harlow, *Resistance Literature* (New York: Methuen, 1987); Joe Cleary, *Literature, Partition and the Nation-State: Culture and Conflict in Ireland, Israel and Palestine* (Cambridge: Cambridge University Press, 2002).
[43] Bashir Abu-Manneh, *supra* 26; Bashir Abu-Manneh. "Palestinian Trajectories: Novel and Politics Since 1948" (2014) 75:4 Mod Lang Quart 511; Hilary Kilpatrick. "Tradition and Innovation in the Fiction of Ghassan Kanafānī" (1976) 7:1 J Arabic Lit 53.
[44] Ellen McLarney. "Empire of the Machine: Oil in the Arabic Novel" (2009) 36:2 Boundary Two 177.
[45] Elias Khoury. "Remembering Ghassan Kanafani, or How a Nation Was Born of Story Telling" (2013) 42:3 J Palestine Stud 85; John Collins. "Explore Children's Territory: Ghassan Kanafani, Njabulo Ndebele and the 'Generation' of Politics in Palestine and South Africa" (1996) 18:4 Arab Stud Quart 65l Joseph R Farraj, *Politics and Palestinian Literature in Exile: Gender, Aesthetics, and Resistance in the Short Story* (London: I.B.Tauris & Co. Ltd, 2017).
[46] Ahmad H. Sa'di. "Catastrophe, Memory and Identity: Al-Nakbah as a Component of Palestinian Identity" (2002) 7:2 Isr Stud 175.
[47] Dania Meryan & Sumaya Alhaj Mohammad. "Ghassan Kanafani's Returning to Haifa: Tracing Memory Beyond the Rubble" (2020) 61:3 Race Class 65.
Waïl S Hassan. "Postcolonialism and Modern Arabic Literature: Twenty-First Century Horizons" (2018) 20:2 Interventions-UK 157.
[48] Nasser Abourahme. "Nothing to Lose but Our Tents: The Camp, the Revolution, the Novel" (2018) 48:1 J Palestine Stud 33.
[49] Maha Nassar. "My Struggle Embraces Every Struggle: Palestinians in Israel and Solidarity with Afro-Asian Liberation Movements" (2014) 22:1 Arab Stud J 74.
[50] Khalid Hadeed. "Late Modern Arabic Literature: Gender as Crucible of Crisis." (2015) 11:2 J Middle E Womens St 250; Amy Zalman. "Gender and the Palestinian Narrative of Return in Two Novels by Ghassan Kanafani" in Yasir Suleiman & Ibrahim MuhawI, eds, *Literature and Nation in the Middle East* (Edinburgh: Edinburgh University Press, 2006); see also Joseph Farraj supra 45 and Laura Khoury, *infra* 300.
[51] Ahmad Harb. "Death, rebirth, and the 'night journey': Jungian analysis of Ghassan Kanafani's novel All That's Left To You" (2004) 13:1 Critique 65.
[52] Andreas Malm. "This is the Hell That I Have Heard of: Some Dialectical Images in Fossil Fuel Fiction" (2017) 53:2 Forum Mod Lang Stud 121.

and atrocities or substantive legal questions about statehood, apartheid, or war crimes.[53] It may also be that, consciously or unconsciously, conventional legal scholarship deals with Palestine as a site of a problem to be solved rather than a site where indigenous knowledge, wisdom, and lived experiences are a source for resolving the problem.

But the foregoing provides only a partial answer to the questions of why Palestinian literature has been absent from legal studies and why Kanafani's only work of legal fiction has been overlooked and narrowly construed. There may be deeper reasons for this neglect, reasons that relate to the relationship between law and literature and the treatment of this relationship by the dominant and marginalized legal paradigms.

Language forms and literary arts play an important role in the Arabic-speaking world. Arabic is the only Semitic language that has continued to be uninterruptedly alive for thousands of years and the only living language which has remained entirely unchanged for the last fourteen centuries.[54] The two key sources of the Arabic language are pre-Islamic poetry and the Holy Qurʾān.[55] However, to be able to truly comprehend such texts, it is argued that one must know the life and spirit-sense of the language and be familiar with its worldview. It is not sufficient to learn its grammar, syntax and rich vocabulary or even its peculiar system of verbal roots and numerous stem-forms that derive from those roots.[56] In other words, understanding the Arabic language and the wisdom of its authoritative texts is a holistic endeavor.

Before the emergence of the Arabic novel, poetry had been the most substantial literary genre given its historical trajectory starting in the Arabian Peninsula. But, even long before the existence of the Arabic language, literature had deep roots in the region. For example, The Epic of Gilgamesh, written in Sumerian in ancient Mesopotamia, is thought to be the earliest recorded written literary text in the history of humanity.[57]

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[53] Rinad Abdulla. "Colonialism and Apartheid Against Fragmented Palestinians: Putting the Pieces Back Together." (2016) 5:1 State Crime J 51; Virginia Tilley, *Beyond Occupation: Apartheid and colonialism in International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012).
[54] Muhammad Asad, *The Message of the Qurʾān* (London: The Book Foundation, 2003) at ix.
[55] Jonathan Owens, *A Linguistic History of Arabic* (Oxford: Oxford University Press, 2006).
[56] Muhammad Asad, *supra* 54.
[57] The Independent, "First Lines of Oldest Epic Poem Found" *The Independent* (16 Nov. 1998), online: <https://www.independent.co.uk/news/first-lines-oldest-epic-poem-found-1185270.html>

Across much of the Arabic-speaking world, poems form a core component of the educational curriculum and are taught from elementary school through high school not only for linguistic or literary purposes, but also as a source of cultural wisdom. Unlike the ancient debate surrounding the usefulness of poetry in Western thought,[58] there is less controversy about the status of poetry and poets in the Arabic-speaking world. Arabic poetry is often regarded as a reference of normative behavior not only on political commitments such as resisting oppression, steadfastness, and justice, but also on virtues like courage, honesty, and generosity and societal values like hope, humility and caring for the elderly. These poetic expressions circle back to connect those virtues to political ideals of liberation, human worth and dignity.

Cultural productions are thus rich and holistic reservoirs of normative rules of language, ethics, and aesthetics as well as existential meanings. Cultural artefacts, no less than legal artefacts, play a critical role in the public and political sphere.

While this is a regional pattern, it is especially true in the Palestinian context given its history of ongoing erasure. Palestinian poetry, literature, and song has played and continues to play an important role, not only in nurturing political consciousness and popular mobilization against oppression, but also in defining our pursuit of justice and shaping and holding together our identity.[59] As such, it comes as no surprise that the Israeli *Mossad* should assassinate a visionary writer like Ghassan Kanafani; or that the Defense Minister and other Israeli politicians should concern themselves with the poetry of Mahmoud Darwish;[60] or that the Israeli state should continue to persecute Palestinian poets and writers under its jurisdiction today.[61]

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[58] A debate which has been two sided, starting from Aristotle's response to Plato to Percy Bysshe Shelley's defense of poetry to many modern literary critics and academics in the law and literature movement and beyond championing the defense of literature's place in society. For example, see Robin West, *Caring for Justice* (New York: New York University Press, 1997) and Martha C. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990).

[59] Bashir Abu-Manneh, *supra* 26.

[60] Noreen Sadik, "Liebermann Worried About Darwish's Poetry" *The Arab Weekly* (07 Aug. 2016), online: <https://thearabweekly.com/lieberman-worried-about-darwishs-poetry>; see also MEMO, "Israel MK Calls Performance of Darwish Poem a 'Provocation'" *Middle East Monitor* (12 June 2017), online: <https://www.middleeastmonitor.com/20170612-israel-mk-calls-performance-of-darwish-poem-a-provocation/>

[61] Yoav Haifawi, "Political Poetry as a Crime: Inside the Surreal Trial of Dareen Tatour" *+972 Magazine* (16 Mar. 2016), online: <https://www.972mag.com/political-poetry-as-a-crime-inside-the-surreal-trial-of-dareen-tatour/>; Al

The Arabic language and its sources offer a conceptual framework that shape modes of thought and impacts how we perceive and make sense of the world. Given that Arabic is the language of the indigenous inhabitants of Palestine and the language of Palestine prior to Zionist usurpation, [62] language and its literary manifestations thus form a core component of Palestine's indigenous worldview from which our normative understanding of legality stems.

Against this backdrop, it becomes easier to understand why many Palestinians regard Law,[63] or more appropriately dominant legal orders, as a site of colonial encounter while simultaneously regarding other authoritative and holistic cultural frameworks as a site of decolonial encounter. Many Palestinians are critical of the role of law — whether domestic Palestinian[64] and Israeli[65] or international[66] — in facilitating colonial interest and maintaining the structures of oppression and power. Literature thus empowers us with a more just and holistic medium through which to explore incommensurable conflicts and decolonize their adjudication. It also represents and narrates the Palestinian struggle in terms of its own paradigm. All of this is critical in crafting creative legal solutions to the impasse in indigenous Palestine.

Jazeera, "Dareen Tatour Sentenced to Five Months in Prison Over Poem" *Al Jazeera* (31 Jul. 2018), online: <https://www.aljazeera.com/news/2018/7/31/dareen-tatour-sentenced-to-five-months-in-prison-over-poem>

[62] Victor Kattan, *supra* 7.

[63] Law here refers to the externally imposed foreign legal systems that are the dominant frameworks in operation today, such as those inherited from the Ottoman/British Empires, or later designed by Israel or the dominant international legal order.

[64] E.g. Emilio Dabed. "A Constitution for a NonState: The False Hope of Palestinian Constitutionalism, 1988 - 2007" (2014) 43:2 J Palestine Stud 42; Emilio Dabed, "Toward a Constitutional Dictatorship in the West Bank?" (09 Jun. 2016) online (blog) *Nakba Files* <http://nakbafiles.org/2016/06/09/toward-a-constitutional-dictatorship-in-the-west-bank/>; Nadera Shalhoub-Kevorkian, "Politics, Tribal Justice and Gender: Perspectives in the Palestinian Society" in Hans-Jörg Albrecht et al., eds, *Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity* (Berlin: Duncker & Humboldt, 2006).

[65] E.g. Nadera Shalhoub-Kevorkian & Bella Kovner. "Child Arrest, Settler Colonialism, and the Israeli Juvenile System: A Case Study of Occupied East Jerusalem" (2018) 58:3 Brit J Criminol 709; Mazen Masri. "Colonial Imprints: Settler-Colonialism as a Fundamental Feature of Israeli Constitutional Law" (2017) 13:3 Int'l J L Cont 388; Ahmad Amara et al., *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev* (Cambridge, MA: Harvard University Press, 2012).

[66] E.g. see Henry Cattan, *supra* 20; Noura Erakat, *supra* 22; Victor Kattan, *supra* 22.

1.3. Methodology & Roadmap

The overarching approach guiding this thesis is "Law and Literature."[67] More specifically, I apply the law *in* literature[68] method rather than the law *as* literature method.[69] Both law and literature can be seen as means of ordering and portraying reality through language.[70] My research question stems from the legal issues that *The Other Thing* problematizes and unsettles in relation to the reality of the Palestinian struggle, namely: the standards of legality, the (ir)resolvability of incommensurable conflicts, and the contest between dominant and marginalized truth narratives in law.

Throughout the thesis, I refer to three primary texts to further elucidate the legal problems that *The Other Thing* deals with. The first of these texts is the novel, which I explore in Chapter 3. The second and third texts are a letter by Palestinian *fellaḥin*[71] relating to land norms and traditions and the Balfour Declaration, both of which I discuss in Chapter 4. I employ three techniques to interpret and understand these texts. The first technique is Close Reading where I analyze brief passages of these texts, examining their linguistic details and microstructures from idea formation to their use of specific terminologies and syntax.[72] The second is Deconstruction[73] which I use mostly to offer a multi-layered interpretation of the characters, signifiers, and symbols in the novel. However, it

[67] Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge: Cambridge University Press, 2007); James Boyd White, *The Legal Imagination* (Chicago: The University of Chicago Press, 1985).
[68] E.g. Karla FC Holloway, *Legal Fictions: Constituting Race, Composing Literature* (Durham, NC: Duke University Press, 2014); Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (New York: Routledge, 2012); Desmond Manderson. "HLA Hart, Lon Fuller and the Ghosts of Legal Interpretation" (2010) 28:1 WYAJ 81; Nicola Lacey, *Women, Crime, and Character: From Moll Flanders to Tess of the D'Urbervilles* (Oxford: Oxford University Press, 2008); Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press), 1995). See also Julen Etxabe, *supra* 14.
[69] E.g. Parker B Jr Potter. "Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka" (2005) 3:2 Pierce L Rev 195; Martha C Nussbaum. "Poets As Judges: Judicial Rhetoric and the Literary Imagination" (1995) 62:4 U Chicago L Rev 147; Desmond Manderson. "Literature in Law: Judicial Method, Epistemology, Strategy and Doctrine" (2015) 38:4 UNSW L J 1300; David Ray Papke & Kathleen H McManus. "Narrative and the Appellate Opinion" (1999) 23:4 Leg Studies Forum 449.
[70] Richard Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (New Haven: Yale University Press, 1984) cited in Jennifer Nadler. *A Life of One's Own: Freedom and Obligation in the Novels of Henry James*. SJD. University of Toronto (2012). Available at: <https://tspace.library.utoronto.ca/bitstream/1807/34819/6/Nadler_Jennifer_MB_201211_SJD_Thesis.pdf >.
[71] Arabic for tillers or farmers. While the term generally refers to the Palestinian Peasantry, I use it to refer more generally to the rural community in indigenous Palestine. See comments in *infra* 341 and 344.
[72] The Johns Hopkins University Press. "Close Reading: A Preface" (2009) *38:2* SubStance 3.
[73] Jacque Derrida & Bass Alan, trans, "Structure, Sign, and Play in the Discourse of the Human Sciences" in Jacque Derrida, *Writing and Difference* (London: Routledge, 2011).

is important to note that I explore, not only the novel's content, but also its literary form.[74] Thirdly, I employ Textual Analysis as a means to gain insight about the modes of thinking and the existential assumptions about the world portrayed by the texts.[75] Two of the three texts are deeply rooted in the Holy Land and are in Arabic language, which, as I have already discussed, has a normative influence on the indigenous worldview in Palestine. Through this lens, I attempt to uncover the logic and presumptions that form part of the indigenous philosophy of legality in Palestine.

Additionally, the translation of the novel and the *fellaḥin* letter are my own. While strictly not a method, I have tried to the best of my ability to preserve the integrity of the Arabic text while offering a contextual translation for the English reader.[76] However, as Muhammad Asad notes, something sentimental and integral is inevitably lost in the act of translation beyond eloquence and aesthetic value, namely, the coherence of the worldview in which the Arabic language is embedded.[77] This reiterates my earlier assertion about the intimate and holistic interaction between language and normative orders in the indigenous worldview in Palestine.

To recap, my research question asks whether it is possible to overcome the legal impasse in indigenous Palestine? I address this question in three main chapters. My hypothesis is that if incommensurability is acknowledged as the root cause of the legal impasse in indigenous Palestine, then it will pave a way towards a more holistic legal imagination and creative resolution.

In Chapter 2, I introduce Aaron Mills' theory of Rooted Constitutionalism[78] and his Legality Tree, which is a model that consists of four levels of legality.[79] Mills argues that indigenous legal orders

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[74] Susan Sontag, *Against Interpretation, and Other Essays.* 3rd ed (New York: Farrar, Straus & Giroux, 1967).
[75] Alan McKee, *Textual analysis: A Beginner's Guide* (London: Sage Publications, 2003).
[76] For a problematization of domesticating and foreignizing translations see Lawrence Venuti, *The Scandals of Translation: Towards an Ethics of Difference.* (New York: Routledge, 1998).
[77] Muhammad Asad, *supra* 54. Asad — otherwise known as Leopold Weiss and originally born to an Austro-Hungarian Jewish family — makes this comment in the context of offering an English translation of the Qurʾān.
[78] Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teaching* (Toronto: University of Toronto Press, 2018); Aaron Mills. "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill L J 847.
[79] Aaron Mills. *Miinigowiziwin: All That Has Been Given for Living Well Together One Vision of Anishinaabe Constitutionalism*. PhD. University of Victoria (2019) available at:

in Turtle Island belong to a *rooted* legality while settler legal orders belong to a *liberal* legality. Those legalities are not only different substantively but are also *constitutively* different. In other words, they are incommensurable or different in kind. The Legality Tree enables the comparison between legalities that are different in kind without reducing one in terms of the other. Chapter 2 is thus divided into two main parts. In the first part, I introduce how Mills' theory responds to the problem of incommensurability. As for the second part, it is divided into four sub-headings in which I explore each level of the Legality Tree, namely the lifeworlds, lifeways, traditions, and laws. The Legality Tree serves as the theoretical framework of my thesis, which I employ in Chapters 3 and 4 to contrast the indigenous legality of Palestine and that of the hegemonic international legal form.

In Chapter 3, I begin to uncover the questions about law and legality that *The Other Thing* unsettles. The legal conflict in the plot, I suggest, is predicated on an impasse triggered by incommensurable worldviews. The novel reveals to us that the failure to acknowledge constitutive incommensurability leads to the conceptual subjugation of the two main characters: Ṣaleḥ and Layla. The Chapter is divided into four main parts. The first part provides a basic summary of the plot. The second part is divided into five subheadings, in which I first unpack the nature of the legal impasse portrayed in the novel followed by an exploration of what I identify as four stages of subjugation that Ṣaleḥ endures as a result, which are fragmentation, dissonance, alienation, and elimination. I attempt to show how these four stages of subjugation correspond to the incommensurability arising at each of the four levels of legality espoused in Mills' theory. I refer to this experience as vertical subjugation because it denotes the law's subjugation of Ṣaleḥ.

Then, in the third part of Chapter 3, I turn to what I refer to as horizontal subjugation because it invites lateral and multi-layered interpretations of the novel. This third part is thus divided into three subheadings. In the first subheading, I explore Layla's experience of subjugation. In the second and third subheadings, I use my analysis of Layla and Ṣaleḥ's experiences of subjugation to draw parallels between the Palestinian condition and the symbols and characters in the novel. This analysis connects *The Other Thing* to the core theme in Kanafani's other writings: the

<https://dspace.library.uvic.ca/bitstream/handle/1828/10985/Mills_Aaron_PhD_2019.pdf?sequence=1&isAllowed=y>.

Palestinian condition of dispossession, exile, resistance, and return. In the last part of Chapter 3, I discuss the significance of the novel as a literary form. I conclude that truth conflicts arising from an unacknowledged worldview-difference (constitutive incommensurability) are animated by a dialectic of denial (exclusion) and affirmation (inclusion) which leads to the conceptual subjugation of the subaltern by the hegemonic paradigm.

In Chapter 4, I attempt to narrate and analyze Palestine's experience of conceptual subjugation by international law from within Palestine's indigenous paradigm. Chapter 4 is divided into two main parts. In the first part, I employ Mills' framework to explore the two conflicting legalities at the heart of the impasse, namely the international legal form's liberal vision of legality (which is territorial in nature) and Palestine's rooted vision of legality (which is relational in nature). In the second part of this Chapter, I employ the novel's four stages of subjugation to elucidate the epistemic violence to which the Palestinian struggle is subjected. I conclude that international law's current form has transformed our struggle for liberation into a sovereignty struggle. This transformation has not only failed our plight for justice, liberation, and return but has also subjected our conceptual frameworks of legality to a process of erasure.

Finally, in my closing remarks, I conclude that relying on the hegemonic international legal form to articulate and represent the Palestinian struggle leads to a violent and perpetual conceptual subjugation that will eventually eliminate indigenous legality in Palestine. Based on this conclusion, I urge Palestinian legal scholars to turn to cultural artefacts — as the multitude of sites that hold our normative orders and understanding of existence — to uncover our erased, silenced, or otherwise subjugated legality. I propose that the Palestinian legal (as well as moral and political) imagination is embedded in the broadest definition of indigenous culture which includes, but is not limited to, literature, music, poetry, traditions, archives, oral history, and religion.

I consider this thesis a modest and preliminary thought experiment on what uncovering our rooted legality might look like. I contend that reinvigorating our cultural reservoir — which contains the seeds of our rooted legality — broadens an otherwise narrow legalistic perspective that is sustaining the cycle of subjugation. The broadening of this perspective creates space for a more

holistic legal imagination which, in turn, invites creative solutions that could help resolve the legal impasse in indigenous Palestine.

1.4. Positionality

I do not think that any scholarship can be neutral or objective. Objectivity presumes the disinterested pursuit of knowledge when the academic rigor of critical inquiry in fact demands active engagement, if not passion. Further, the claim of taking no position is itself a moral and ethical statement of a certain kind. In the worldview to which I belong, this kind of neutrality in relation to any injustice amounts to complicity. If this holds as a general assertion, then it is particularly true in relation to the Palestine struggle where objectivity "aims among other things to create balance or equity where none in fact exists."[80] As Sara Roy notes:

> Every individual involved with the Palestinian-Israeli conflict, to whatever extent, has a position. Any claim to neutrality, or, for that matter, objectivity, is in my experience nothing more than calculated indifference. In any case, the concern should not be with the position but with how it was formed, how it evolved, and on what it is based.[81]

Instead, Roy urges us towards a commitment to accuracy.[82] As such, I do think that academic research could aspire to integrity and intellectual honesty. Like Kanafani's committed fiction, rooted in the broader body of Palestinian literary ethics and values, in this research I aspire towards a morally responsible and ethically engaged academic commitment.

In acting upon my responsibility towards intellectual honesty, it is important that I locate myself in relation to my research project. My positionality begins with my identity as a Palestinian refugee in pursuit of the Palestinian Dream; the dream to return to and live in peace in my ancestral homeland. It is an identity that I was born into and a reality in which I, like all children of the

[80] Sara Roy. "Humanism, Scholarship, and Politics: Writing on the Palestinian-Israeli Conflict." 36:2 (2007) Journal of Palestine Studies 54, at 57.
[81] *Ibid,* at 58.
[82] *Ibid.*

homeland, carry our intergenerational trauma, hope, and responsibility. It is also a position that taught me that my belonging to Palestine is a sub-identity and a sub-dream of a bigger inter-creational, cosmic existence and that my responsibility extends towards justice, liberation, and peace, not only in Palestine, but in and for all creation. This is why I could not, and cannot, separate my own struggle from the different kinds of ongoing violence and erasure in Turtle Island. After all, Palestinians have been called the "Indians of the Middle East."[83] But, indigeneity is not our only, nor is it the main, tenet of solidarity; it is our belonging to mother earth — a sentiment echoed by Palestine's national poet, Mahmoud Darwish in his lyric epic *The "Red Indian's" Penultimate Speech to the White Man*.[84]

As such, my positionality is manifest in my choice of terminology and nomenclature, of places, verbs, and historical events. It is manifest in my narrational starting point and the modes of reasoning underlying my writing style. It is also reflected in the scholarship within which I ground my research, namely in scholarship largely from the Global South and the works of indigenous scholars from Palestine and Turtle Island.

Finally, as a visitor on this land, and in this transient life more generally, I acknowledge my responsibility towards speaking truth to power regardless of the kind of backlash this research may bring. Anyone who has engaged critically with the kinds of questions that my thesis raises is subject to such reaction. If my research is met with an engaged and critical academic response, especially in disagreement, then it would have achieved its purpose. It is my intention to invite such an engagement. Alas, if it is met with the familiar hostility and attempted censorship, then it reinforces my argument about the conceptual subjugation exercised by the hegemonic paradigm to erase the subaltern paradigm and silence the truths it carries.

[83] In the words of Former AIM leader Russell Means cited in Steven Salaita. "Inter/nationalism From the Holy Land to the New World: Encountering Palestine in American Indian Studies" (2014) 1:2 NAIS at footnotes 2 & 3 and by Lee Maracle cited in Dana Olwan & Mike Krebes. "'From Jerusalem to the Grand River, Our Struggles are One': Challenging Canadian and Israeli Settler Colonialism" (2012) 2:2 Settler Colon Stud 138 as well as through comparative references in Robert Warrior. "Canaanites, Cowboys, and Indians: Deliverance, Conquest, and Liberation Theology Today," (1989) 11 Christianity and Crisis 261.
[84] Fady Joudah. "Mahmoud Darwish's Lyric Epic" (2009) 7 Hum Archit Special Issue, 7.

CHAPTER 2: THEORETICAL FRAMEWORK

The narrow epistemic violence of imperialism gives us an imperfect allegory of the general violence that is the possibility of an episteme.

— *Gayatri Chakravorty Spivak, Can the Subaltern Speak*[85]

2.1. Rooted Legality — A Response to Incommensurability

The past decades have seen increased talk across Canadian legal and political platforms emphasizing the importance of integrating indigenous legal orders and ways of life in the paths towards reconciliation. The Final Report of the Truth and Reconciliation Commission has called for the need to "reconcile Aboriginal and Crown constitutional and legal orders [...] including the recognition and integration of Indigenous laws and legal traditions."[86] From *Tsilhqot'in*[87] to *Uashaunnuat*,[88] the Supreme Court, too, has witnessed notable developments in this regard, the latter case specifically noting that Aboriginal title should be understood beyond civil law and common law conceptions of property and rather from an Indigenous perspective. Academic debate on Legal Pluralism and the reconciliation of legal orders has also grown.[89]

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[85] Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Rosalind Morris, *Can the Subaltern Speak?: Reflections on the History of an Idea* (New York: Columbia University Press, 2010) at 257.
[86] Truth and Reconciliation Commission of Canada, Final Report (2015), Calls to Action, Section 45(iv) at 5, online <http://www.trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.
[87] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44; but see also Fraser Harland. "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in Tsilhqot'in Nation v British Columbia" (2018) 16/17:1 Indigenous L J 21 and John Borrows. "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48:3 UBC L Rev 701.
[88] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4
[89] See for example, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Simon Roberts. "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain" (1998) 30:42 J Leg Pluralism 95 at 105; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Law Commission of Canada, ed*, Indigenous Legal Traditions* (Vancouver: UNB Press, 2007); Colleen Sheppard. "Diversity, Dialogue and the Role of the State: Articulating the Values of Democratic Constitutionalism" (2008) 2 J Parliament Polit L 99; René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism, Ius Gentium: Comparative Perspectives on Law and Justice, Volume 17* (Dordrecht: Springer, 2013); James (Sa'ke'j) Youngblood Henderson, "Incomprehensible Canada" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress* (Toronto: UTP, 2013) 115; Michael Asch, John Borrows, & James Tully, eds, *Resurgence and Reconciliation: Indigenous−Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

Amidst these conversations, Aaron Mills' theory blows a loud horn motivated by a deep and serious concern about state-centric reconciliation methodologies and mainstream discourse of integrating indigenous laws into the Canadian legal infrastructure. Mills' theory effectively amalgamates the concerns of many indigenous scholars, lawyers, writers, artists, and elders. By building on this rich scholarship, he shows us that this concern is a common thread that weaves together a diverse system of thought on indigenous laws. Specifically, Mills warns us that there is an unacknowledged incommensurability that lurks underneath the discourse of reconciliation. It is the incommensurability between the liberal constitutional order within which state's law is embedded and the rooted constitutional order within which indigenous law is embedded. These constitutional orders are not merely substantively different, but they are constitutively different. They belong to two different *kinds* or *species* of legality.[90]

With this difference in mind, Mills' inquiry questions whether this integrative and pluralistic approach is indeed an adequate path towards genuine reconciliation in Turtle Island. Mills stresses that colonialism is not a historical fact with contemporary effects, but rather a contemporary relationship.[91] Furthermore, colonialism is inherently violent to indigenous persons, peoples, and worldviews.[92] The "inherent" nature of this violence is owed to settler supremacy, which is the key principle animating colonialism. Given the embeddedness of settler supremacy in the colonial paradigm, indigenous ways are always rendered secondary to the interest and benefit of the settler.[93]

Mills outlines three types of subjugation that flow from settler supremacy. The first involves "individual-centered violence" against indigenous persons' bodies, minds, and spirits.[94] The second involves a "group-centered violence" against indigenous peoples as peoples, which targets, for instance, their language, ceremonies, medicine, and child-rearing practices.[95] The third type of subjugation is more abstract. Its target is not specific indigenous practices, norms, or groups but is rather a violence that targets, in Mills words, "indigenous peoples' capacity *to understand the*

[90] Aaron Mills, *supra* 79.
[91] *Ibid,* at 2.
[92] Aaron Mills (2018), *supra* 78.
[93] Aaron Mills, *supra* 79, at 3, 52, 62, and 194.
[94] Aaron Mills (2018), *supra* 78, at 136.
[95] *Ibid.*

world on our own terms and to organize ourselves accordingly."[96] Mills explains that the "third kind of violence can accomplish indigenous erasure even if we recognize ourselves and are recognized by others as unique peoples. We might achieve recognition as peoples, *but in a sense not our own*; we might retain all the substantive trappings of peoplehood, but lose something much more profound."[97] This third type of violence is analogous to the conceptual subjugation that we will explore in *The Other Thing* in relation to Palestine. It is also analogous to what Spivak refers to as epistemic violence and what Leanne Simpson labels as cognitive imperialism.[98]

The underlying argument in Mills' theory is that for genuine reconciliation to occur, settler-indigenous relationships must grow from a nonviolent ground.[99] However, one of the main obstacles towards genuine reconciliation is the failure to take worldview-difference seriously by reducing it to a substantive difference in cultural sensibilities.[100] This systematic denial of the constitutive disagreement, Mills argues, causes indigenous peoples to "experience violence in the suppression and attempted erasure of their unique legalities."[101] In turn, it renders the problematic nature of the settler-supremacy principle not only moral or political, but also constitutional.[102] Because of the hegemonic nature of colonialism, the nature of any such interaction between the hegemonic legal form and the marginalized legal form is skewed in favor of settler interests.[103]

In sum, the failure to acknowledge that incommensurability involves conceptual differences between the liberal and the rooted constitutional orders refracts indigenous legalities through the lens of the hegemonic legality. This dynamic renders indigenous legalities comprehensible only if framed on the terms of the dominant, liberal paradigm rather than on their own, rooted terms.

Adding a further layer of complexity, Mills observes that attempts to remedy this violence using the terms of reference of the dominant legal form — for example through the recognition of

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[96] Aaron Mills, *supra 79*, at 5, emphasis added.
[97] *Ibid*, emphasis added.
[98] Spivak, *supra* 85; Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011), at 12, 34, 36.
[99] Aaron Mills, *supra 79*, at iii.
[100] *Ibid,* at 16, 21-22, 38, 271.
[101] *Ibid,* at 8.
[102] *Ibid,* at 5.
[103] *Ibid.*

peoplehood — serves as a strategy to contain constitutional difference between the two legalities rather than properly engage with this difference.[104] This gives rise to the problem of 'constitutional capture.'[105] Constitutional capture is the erasure of difference between distinct systems of laws where one constitutional order is translated out of its own context and becomes understood on the terms of the other. This loss of legality, or the loss of one's own terms of reference, is the "more profound" loss that Mills warns against.

Rooted Constitutionalism invites us to acknowledge, understand and engage with Indigenous peoples' unique ways of conceptualizing "persons, freedom, belonging, community, constitutionalism and legal process — all of which one must have at least begun to learn about before she can begin to learn about an indigenous people's system of law."[106] In order to avoid constitutional capture and transcend the conceptual violence inherent to colonialism, not only do we need to acknowledge the constitutive incommensurability between indigenous and settler legalities, but we must also seek to re-orient how we think about and understand legality. As Mills puts it, we "must learn how to learn."[107]

Mills addresses the problem of incommensurability by developing a comparative method that eschews constitutional capture. He calls this method the "Legality Tree", which in my opinion is one of the most important innovations in Mills' work so far. The Legality Tree offers a new theoretical framework that enables comparative understanding and analysis across different species of legality without claiming a universal legality analytic. Thus, Mills evades constitutional capture by overcoming the universality claim. This is crucial in enabling us to engage in a constitutional dialogue, rather than a refracted monologue, and this in turn allows us to evade the violence inherent in constitutive incommensurability.

The Legality Tree maps four levels of legality. The first level, which is the roots, represents the lifeworlds of the law. The second level is the trunk and represents lifeways. The third and fourth levels are the branches and the leaves, which represent legal traditions and laws respectively. The

[104] *Ibid,* at 8.
[105] *Ibid,* at 8, 35.
[106] *Ibid,* at 8.
[107] *Ibid,* at 7.

first two levels are considered the *constitutive* elements of a constitutional order and the second two levels are *substantive*. Thus, when a change occurs at the substantive levels of legality (i.e. traditions and laws), the founding nature of the constitutional order is still preserved.[108] However, when the constitutive elements are changed, the essence of the legality becomes distorted or mutated. The structure of the tree is progressive in the sense that each level of legality influences the level succeeding it but is not entirely determinative of it. In other words, the function of each tree level is to condition and empower what stems from it within a certain range of possibility. Thus, each level of legality is neither totally free and unconstrained nor is it predetermined by the preceding level.[109]

Understanding legality through these four levels enables us to map different kinds of constitutionalisms (e.g. Indigenous and Settler in the Canadian context — or what Mills call Rooted and Liberal) without resorting to understanding one through the lens of the other. As Mills puts it, the purpose of this framework is to "demonstrate just how different each kind of legality is, and that each retains integrity on its own terms."[110] I think the emphasis on protecting a legality's "own terms" is one of the most crucial products of acknowledging constitutive incommensurability. Acknowledging constitutive incommensurability is like the fluorescent that lights up the exit sign, allowing us to spot the available paths to escape conceptual subjugation.

2.2. The Legality Tree — A Path Out of Conceptual Subjugation

2.2.1. First Level of Legality: Lifeworlds

If roots are the deepest part of the tree, then creation stories are the deepest layer of legality. Mills analogizes roots to creation stories, explaining that "at a macro level, creation stories disclose lifeworlds, the ECO-systems which order the world."[111] Lifeworlds, then, refer to the

[108] *Ibid,* at 21 - 26.
[109] *Ibid,* at 40 - 41.
[110] *Ibid,* at 39.
[111] *Ibid,* at 41.

Epistemological (E), Cosmological (C), and Ontological (O) presumptions, or meta-truths, that give meaning to existence and structure how we make sense of and relate to the world.

Mills argues that each legal system is embedded in a unique lifeworld and explains the contrast between rooted and liberal lifeworlds. The first core difference between the two is how each one thinks of persons. The rooted lifeworld conceives of persons as radically interdependent while the liberal one conceives of persons as individually autonomous.[112] In turn, these divergent conceptions of persons influence the ECO-system from which our understanding of the world stems. A legal system, embedded within a specific lifeworld assumes, rather than interrogates, these ECO-systems. The legal system's assumptions unify the constitutive and substantive components of any given legality thereby maintaining its coherence.[113]

The liberal lifeworld presupposes that the individually autonomous person possesses a certain kind of rationality (epistemology), personhood as a condition of agency (ontology), and a minimal level of intra-social consent that orders belonging which Mills calls "Contractarianism" (cosmology).[114] The three components are organically connected to each other and read together make the world coherent if one subscribes to this lifeworld. While this may be the dominant lifeworld, especially in Western societies,[115] there are communities all over the world that subscribe to a different, subaltern lifeworld and endorse a different set of presumptions about creation. Mills suggests that for indigenous[116] communities in Turtle Island, the radically interdependent nature of persons in a rooted lifeworld presupposes an epistemology based on multiple modalities of reasoning, an ontological interconnection to the entirety of the Earth community rather than just humans, and a cosmology based on *Miinigowiziwin* (giftedness in Anishinaabemowin).[117] Where the cosmology

[112] *Ibid,* at 58 and 78.
[113] *Ibid,* at 28 - 30 and 38.
[114] *Ibid,* at 50 – 58; to be able to consent requires agency and since agency is vested in personhood, it is assumed and expected that rationality facilitates humans' exercise of their agency.
[115] But not only Western societies, because this lifeworld was instilled as universally valid with European colonization, occupation, or otherwise imposition of their governance and mandates across the majority world. So much of the dominant lifeworlds are colonized, at least in the sense of formal structures of governance and especially where liberal legal systems have been imported as well as in international legal structures.
[116] While Mills discussion utilizes Anishinaabe resources and legalities as its first resource, he relies on other indigenous communities across the Island and demonstrates that while traditions and laws may vary amongst them, they share the same essence. See also cautionary note, *infra* 273.
[117] Aaron Mills, *supra* 79, at 68.

of a liberal lifeworld presupposes the lawlessness of the state of nature, a rooted lifeworld presupposes the existence of an inherent order of creation.[118]

Mills further adds that a lifeworld becomes constitutive of a community when the creation stories that make up this lifeworld present a "belonging analytic" which "establishes the internal relationship between a conception of persons, of freedom, and of belonging."[119] The significance of this constitutive component of the lifeworld is that it spells out the "internal relationships between persons, freedom, and belonging, the belonging analytic explains why belonging in any given community takes the particular form that it does."[120]

As such, an ECO-system invariably shapes a community's vision of freedom and its members' form of belonging to that community. Because the Liberal and the Rooted conceptions of persons are essentially different, so are their respective visions of freedom and forms of belonging. The Liberal vision of freedom consisting of Liberty[121] and Equality as core tenets is centered around realizing individual autonomy and free choice, thus securing the conditions of justice.[122] In the Rooted vision of freedom, it is Co-creativity[123] that is paramount to achieving and sustaining *bimaadiziwin* (the Good Life)[124] and thus securing the conditions of harmony and balance in life within an inherent order of creation structured through giftedness as intended by *Gizhe Manido* (the Creator).[125] The structure of belonging in the Liberal lifeworld is a constituted and bounded political community governed through some form of Contractarianism.[126] In the Rooted lifeworld,

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[118] *Ibid,* at 57 and 69.
[119] *Ibid,* at 42.
[120] *Ibid*, at 44.
[121] Mills argues that the liberal legality heavily emphasizes negative liberty. For a discussion on the relationship between negative liberty, individual autonomy and the liberal ECO-system, refer to Aaron Mills, *ibid* at 50 – 53,
[122] *Ibid,* at 57 - 58. In the simplest sense, the conditions of justice revolve around enabling individual choice while simultaneously limiting these within the terms of the social contract, hence facilitating respect for self-rule to all citizens of the political community. In Mills' words: "the relevant conditions are those which safeguard the dignity of autonomous persons", see *ibid* at 64.
[123] Co-creativity captures the radical interdependence of members of the political community where it consists of the capacity to gift and be gifted. Gifts are not only material and are not owned individually but rather belong to all people and it is the community's responsibility to train its members to partake in this cooperative exchange. The rationale behind co-creativity is that the stronger the individual, the stronger the community and vice versa. See *ibid*, at 83 – 86.
[124] *Ibid,* at 84, 96, and 104. In basic terms, *Bimaadiziwin* is a religious concept that means the "Good Life". See Lawrence W Gross, "Bimaadiziwin, or the 'Good Life,' as a Unifying Concept of Anishinaabe Religion" (2002) 26:1 Am Indian Cult Res J 15 cited in Aaron Mills, *ibid* at 96 footnote 496.
[125] *Ibid,* at 104.
[126] *Ibid,* at 43 - 45, 59, 121, 233.

belonging is active and contingent, in the sense that the community is always becoming, and is governed by cooperative coexistence — or what Mills calls networks of Mutual Aid.[127]

The core difference then between a liberal and a rooted lifeworld is that one assumes the supremacy of human autonomy and therefore endorses what Mills calls the "Sovereignty Thesis", while the other assumes the supremacy of the inherent order of creation and therefore endorses what Mills calls the "Humility Thesis".[128] The settler and indigenous laws are incommensurable not because of the difference in their substantive laws, but rather because the presumptions that underlie their substantive laws are irreconcilable.[129]

However, it is important to emphasize that a shift away from this irreconcilability is possible. It does not entail the fusion of the two lifeworlds or some form of hybridity or parallel co-existence.[130] Given the violence inherent in the dominant, liberal paradigm, a fusion is likely to subsume the rooted, subaltern paradigm into the hegemonic structure, bringing us back to the initial problem of failing to understand the subaltern view *on its own terms.* Worldviews are acquired and people may possess them in varying degrees across varying cultures. Thus, at the core of this shift is a decision and a choice to endorse a different worldview.[131] Reconcilability cannot take place within the liberal lifeworld, Mills argues, because it internalizes two core notions — the principle of settler supremacy[132] and the thesis of sovereignty — that are inherently violent to The Other (humans and the rest of the Earth community). Mills suggests that endorsing the rooted worldview, which internalizes the notion of humility, is one possible pathway that could

[127] *Ibid,* at 96 - 98, 118 - 121.
[128] *Ibid,* at 15, 192 - 197, 205 - 207.
[129] This mapping, and the mapping that will follow, is not intended to give a thorough and nuanced account of liberalism to which all liberals will agree. However, it is intended to demonstrate what Mills calls "structural features" of liberalism. *Ibid,* at 59. Such features (i.e. autonomy, equality, negative liberty), despite the differences within the tradition, are still accepted as underlying assumptions by variant strands of liberalism. For example, Nedelsky's notion of relational autonomy, which makes a crucial departure from the classical conception of radical individualism, nonetheless emphasizes the importance of individual autonomy and negative liberty. See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Toronto: Oxford University Press, 2013).
[130] Aaron Mills, *supra* 79*,* at 28.
[131] *Ibid,* at 43.
[132] Liberalism's claim to universality systematically denies the worldview difference with which Mills' theory is concerned. In the context of colonization, liberalism's internalization of settler supremacy is two-fold: a) it renders the interests of indigenous peoples secondary to the interests of the settlers as discussed above (see paragraph ending with footnote *supra* 103 on page 23 above) and b) it presumes that that which stands outside it is essentially different and inferior per Peter Fitzpatrick *infra* 285 (see discussion on page 74 – 75 below).

serve as the basis of such non-violent reconciliation and enable transcending constitutive incommensurability.

2.2.2. Second Level of Legality: Lifeways

Recall that lifeworlds are analogous to the roots of the Legality Tree which entail epistemological, cosmological, and ontological presumptions and are concerned with community's belonging *analytic*. The belonging analytic establishes the relationship that connects a community's conceptualization of persons, freedom, and belonging. As for the lifeways, they are analogous to the trunk of the tree. [133] Lifeways entail a community's constitutional order and are concerned with the community's *logic* of belonging, or what Mills calls the 'constitutional logic analytic' which Mills explains as follows:

> In my view, stripped to its bare essentials, constitutionalism means nothing more than persons practising governance together (which entails a notion of community) to secure their freedom. If this is so, then all constitutionalism requires is a logic of belonging which respects its community's vision of freedom (i.e. which follows from its belonging analytic), and a correlate structure through which to practise it.[134] [...] This explanation is meant to unpack my earlier assertion that a narratively-grounded ECO-system constitutes persons as community through a particular *logic* manifest within a particular *structure*, and the resulting statement that constitutionalism exists as legality's logical-structural level.[135]

Thus, the constitutional order, or constitutionalism, is a form of governance that follows a particular logic. Governance functions to establish a "positive social order which secures the freedom of its members."[136] Recall that this vision of freedom is facilitated by the belonging analytic embedded in the lifeworlds. Lifeworlds empower and condition — but do not strictly determine — the lifeways and their logic. To be sure, belonging necessitates a form of governance, but it does not necessitate a governmental structure.[137] Hence, the belonging *analytic* is accompanied by a constitutional *logic* that shapes how the political community governs the

[133] Aaron Mills, *supra 79,* at 41.
[134] *Ibid,* at 43 - 44.
[135] *Ibid,* at 44.
[136] *Ibid.*
[137] *Ibid,* at 43.

structure of belonging of its members. This summarizes what Mills calls the 'constitutional logic analytic'.

I have previously opined that the theoretical framework captured by the Legality Tree is one of Mills' most innovative productions, and here I would add that the constitutional logic analytic is one of the most important elements of this theory because it enables a comparison between logical-structures that are different in kind without subsuming one into the *logic* and structure of the other. To reiterate, where the Legality Tree allows us to study legalities of a different kind each on its own terms, the constitutional logic analytic allows us to study the logical-structural elements of legality while preserving the unique logic and structure embedded within each kind of legality. The constitutional logic analytic is also the most complex concept in Mills' theory and therefore a full exploration of this element is beyond the scope of this section, and I encourage readers to refer to Mills' work[138] for a deeper understanding of its subtle complexities. But, for the purposes of using it in my analysis, I will summarize the relevant points as best as I can, and I hope that I do so fairly.

In abstract terms, the constitutional logic analytic involves three steps: extension → reception → response. In Mills' words:

> The story a community tells of its constitution will necessarily account for individuals reaching out to others for the purpose of community creation and continuity (extension); a reception of these offers amongst other possible community members (reception), and their manner of response which follows (response).[139]

The significant shift that we acquire when we see a constitutional order flowing within these steps is the clarification that constitutionalism is a verb not a noun. It is dynamic, not static. It is something done iteratively rather than something acquired linearly and different communities "do it in a remarkable variety of ways."[140]

[138] Aaron Mills, *supra 78* and *supra 79*. I would like to thank Aaron Mills for engaging with my inquiries and helping me better understand his theory.
[139] Aaron Mills, *supra 79*, at 44.
[140] *Ibid*.

Mills suggests that the liberal constitutional logic analytic follows the [Offer → Acceptance → Internal correspondence] formula and its structure involves the state with its three branches of government where members belong to that political community by citizenship and the will of the political community is vested in the Sovereign. Its governance is legitimated through the Rule of Law and the goal of this structure is to maintain order and stability within the polity by securing the conditions of justice.[141] This is not intended to give a full account of otherwise complex political orders, but rather, for the purposes of my thesis, the intention is to map the most basic elements of liberal and rooted forms of governance in which the constitutional logic analytic manifests.

The rooted constitutional logic analytic is twofold; a positive analytic that follows the [Gift → Gratitude → Reciprocity] formula and a negative analytic that follows the [Need → Responsibility → Reciprocity] formula. The applicability of each depends on the nature of the relationship between the members of the community in question.[142] The rooted structure involves the inter-relational network of all creation where members belong to that political community by kinship and the will of the political community is vested in *Gizhe Manido* (the Creator).[143] Its governance is legitimated through a grounding of law and the goal of this structure is to promote equilibrium and harmony in order to maintain peace in the community.[144]

Where the liberal constitutional order is based on contractarian logic, the rooted constitutional order is based on a logic of mutual aid. The former presumes self-interest, self-sufficiency and a zero-sum logic where reciprocity is linear because it involves a direct exchange between community members.[145] The latter presumes generosity and humility, mutual flourishing and the infinite multiplying of wealth through circular reciprocity because there is no expectation of a direct return or exchange of gift.[146] Other key features of liberal constitutionalism involve democracy as a dialogue between the citizen and the state, a public (procedural)-private

[141] *Ibid,* at 59, see also note *supra* 122.
[142] *Ibid*, at 100; where the negative analytic is invoked where the relationship involves a higher level of responsibility, such as parent-child or siblings, etc…
[143] *Ibid,* at 69 - 75.
[144] *Ibid,* at 127.
[145] *Ibid,* at 101.
[146] *Ibid,* at 108 – 109.

(substantive) divide, and private substantive freedoms supported by contract and property regimes in which relations function in a transactional sense.[147] In contrast, under a rooted constitutional order, land is relational. Additionally, members have a spiritual commitment with the Creator to create new kinship relations that are organized through familial assignations. The rationale is that there are no territorial boundaries. The community's relational boundaries are open, in that they transcend ethno-national boundaries, and dynamic, in that they are always changing.[148]

Again, each constitutional order makes sense when read in light of its corresponding ECO-system. It is this empowering-conditioning function of the tree that maintains the coherence of the overall elements of legality. If a constitutional order is understood through the lens of a different ECO-system, it becomes inharmonious. It gives rise to an apparent conflict.

2.2.3. Third Level of Legality: Traditions

The third level of legality analogizes the branches of the Legality Tree to legal traditions. Mills' definition of traditions differs from the more conventional usage of the word, which focuses on cultural appeals and the social context within which law operates. The reason for this departure, argues Mills, is that the conventional sense of the word does not account for the problem of constitutional capture[149] we discussed earlier. Building on Borrows' usage,[150] Mills uses the word traditions to refer to authoritative sources of the law, or more explicitly the "assemblage of processes and institutions a society uses to generate or adopt, interpret and modify, and destroy law."[151]

Liberal legal traditions serve to achieve an impartiality standard intended to sustain the integrity of the social contract, thereby allowing individuals to enjoy the minimum conditions of justice

[147] *Ibid,* at 135.
[148] *Ibid,* at 121 - 123.
[149] Mills provides several grounds of objections to the conventional usage of "Traditions" in the legal contexts pertaining to incommensurability. For a more detailed discussion refer to *ibid*, at 45 - 46.
[150] In which each legal tradition consists of unique methods by which law is developed and applied, John Borrows, *Canada's Indigenous Constitution* (Toronto: UTP, 2010), 7.
[151] Aaron Mills, *supra 79*, at 45.

(Liberty and Equality) that enable persons to realize their individual autonomy. With this view, a legal system's capacity to operate independently of its broader "economic, political, cultural and spiritual"[152] context is often considered a pillar of liberal societies' ideals.[153] Such independence is facilitated through liberal ideals like the separation of powers and the state's supposed monopoly on coercion and violence.[154] Legal education and practice are heavily regulated and restricted by and form a part of this tradition. Since Canada is a formally bi-juridical entity, both Common Law and Civil Law traditions are recognized.[155]

On the other hand, in rooted legal traditions, law is regarded as a "total social phenomena" where "all kinds of institutions are given expression at one and the same time – religious, juridical, and moral, which relate to both politics and the family; likewise economic ones."[156] In rooted societies, the processes of law production and application do not depend on specialized institutions like courts, legislatures and law schools and are not run by elite members of society.[157] Rooted legal traditions serve to teach *all* members of the community to establish and maintain healthy relationships. Traditions enable the Earth community to realize their Co-creativity and enjoy harmony and balance thereby sustaining the inherent order of creation.[158] In rooted legal traditions, holistic judgments engage the mind, body, heart, and spirit (four modalities of judgment as opposed to just the mind) and are thus embedded in the totality of the social phenomena.[159]

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[152] *Ibid,* at 46.
[153] While this summary of the liberal tradition suggested by Mills is concerned with how the state or the polity operates, it is important to note that there are theoretical and academic disagreements within the liberal tradition around this view. Such debates are rich, intriguing and important, yet they invite questions about the extent of their influence on the state's mode of operation. For counterarguments on law's independence and separation from its broader context see for example Robert M. Cover. "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983) 97:4 Harv L Rev 4 and James B. White. "Law as Rhetoric and Rhetoric as Law: The Arts of Cultural and Communal Law" (1985) 52 U Chi L Rev 648.
[154] *Ibid*, at 60.
[155] *Ibid*, at 46.
[156] Marcel Mauss, "The Gift: The Form and Reason for Exchange in Archaic Societies" in WD Halls, trans, (WW Norton & Company, Inc, 2000) at 3, 79 cited in Aaron Mills, *supra 79*, at 46.
[157] Aaron Mills, *supra 79*, at 130 - 133.
[158] *Ibid.* Recall that what constitutes this inherent order of creation is the gift-ordering of the world (*Miinigowiziwin*), which, as Mills explains, forms a core constitutive presumption in the lifeworlds and is reflected in the lifeways as discussed earlier.
[159] Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard (2013) *supra* 89.

2.2.4. Fourth Level of Legality: Laws

Lastly, the leaves in the Legality Tree are analogized with laws.[160] Like traditions, Mills' definition of law departs from the conventional usage. Law coordinates the interactions within the positive social order of a constituted community, the viability of which depends on aligning this coordination with that community's vision of freedom. This is accomplished through specific "forms of normative interaction [...] with force."[161] Mills adds that "which particular forms of claim and what kind of force transforms a general normative claim into a specifically legal one varies across legalities."[162]

In certainty-privileging societies, and in alignment with the impartiality standard of liberal legal traditions, abstraction and generality are important features of laws which often take the form of determinate rules (e.g. Bills, Acts of Parliament, Legislations, etc.) as well as precedents and tribunal decisions.[163] Laws are often organized thematically according to the subject matter such as criminal law, property law, contract law, etc...[164] This conception of normative interaction is further supported by legal reasoning and processes.[165]

In contingency-privileging societies, and in alignment with the aspiration for holistic judgment in rooted legal traditions, emphasis on stories, narratives, individual conduct and behavior are important features of laws.[166] In the Anishinaabe context, laws take the form of an indeterminate judgment centered on the exercise of responsibilities and are organized in categories outlining relationships (specifically kinship) such as younger sibling, grandfather, stranger, etc…[167]

Mills' theory of Rooted Constitutionalism paves a way to transcend the impasse between irreconcilable legal orders. The Legality Tree offers a comparative framework to discuss this incommensurability in a way that eschews conceptual violence. In the next chapter, I explore the

[160] Aaron Mills, *supra 79*, at 41.
[161] *Ibid,* at 47.
[162] *Ibid.*
[163] *Ibid,* at 63 and 275.
[164] *Ibid,* at 135 and 153 - 155.
[165] *Ibid.*
[166] *Ibid,* at 136 - 137.
[167] *Ibid,* at 115.

problem of incommensurability and conceptual subjugation that Ghassan Kanafani's novel, *The Other Thing,* unsettles and I locate the problem vis-à-vis the impasse in indigenous Palestine. Then, in the chapter that follows, I draw parallels between liberal constitutionalism and the dominant international legal order on the one hand, and rooted constitutionalism and the nature of the indigenous legal order in Palestine on the other.

CHAPTER 3: THE OTHER THING

A long time will pass for our present to become a past like us.
But first, we will march to our doom, we will defend the trees we wear
and defend the bell of the night, and a moon we desire over our huts.
We will defend the imprudence of our gazelles,
the clay of our pots and our feathers in the wings of the final songs.
In a little while you will erect your world upon our world: from our cemeteries
you will open the road to the artificial moon
[...]
so grant the earth respite until it tells the truth, all the truth

— Mahmoud Darwish, The "Red Indian's" Penultimate Speech to the White Man[168]

In exploring whether it is possible to overcome the legal impasse in indigenous Palestine outside the hegemonic international conception of legality, I begin by offering a reading of this problem through the lens of *The Other Thing*. The novel, like international law, is a site of truth contestation. I argue that the contestations of truth that we find in the novel reveal a deeper problem, which is the incommensurability of worldviews. More specifically, we see an incommensurability between a dominant or hegemonic paradigm and a consequently marginalized or subaltern paradigm. The force that sustains this legal incommensurability is a dialectic of exclusion and inclusion that subjects the protagonist Ṣaleḥ, who stands outside the law's dominant paradigm, to a conceptual or epistemic violence. I characterize this violence as a condition of conceptual subjugation that unfolds in four stages: fragmentation, dissonance, alienation, and elimination. I argue that these four stages of subjugation correspond to the incommensurability arising at each of the four levels of legality espoused in Mills' theory.

We will see that Ṣaleḥ's experience can be seen as a *vertical* subjugation by the law. However, as we analyze the novel and engage with the circular and multi-layered nature of this condition, we become aware of another experience of subjugation endured by another key character in the novel, Layla. Layla's experience can be seen as a *horizontal* subjugation at the hands of Ṣaleḥ. We also begin to draw parallels between both Ṣaleḥ and Layla's experiences in the novel and the Palestinian struggle for liberation.

[168] Mahmoud Darwish & Fady Joudah, *supra* 1.

This chapter is divided into four sections. I begin by providing a summary of the plot followed by an analysis of Ṣaleḥ's monologue where I unpack his problematization of incommensurability and the law's quest for truth. Then, I extend the analysis of subjugation to Layla's experience, which is followed by multi-layered interpretations of the novel, its symbols, and characters. In the last part, I discuss the significance of the novel's form.

3.1. Plot Summary

The four primary characters in the novel are Ṣaleḥ and his wife Dima, and Layla and her husband Saʿid. The protagonist and narrator Ṣaleḥ, who is a top-notch criminal defense lawyer, finds himself accused of murdering Layla, an old-time friend of Dima. And it seems that all the evidence coalesces to convict him.

The novel tells us about a wealthy father on his deathbed who built his fortune from scratch in Argentina before returning to his hometown, refused to remarry after his wife passed away, and dedicated the rest of his life to his only daughter Layla. It tells us about Layla's perplexingly jealous yet deeply loving husband, Saʿid, who meddles in her financial affairs for fear of losing her. A foreign imposter claims a share in the inheritance following the father's death on the basis that he is his estranged Argentinian child, although with hints from Saʿid we are led to understand that this claim is dubious and the accompanying paperwork is somehow fabricated. Despite his love for Dima, Ṣaleḥ develops a secret lust for Layla — a fact that remains unknown to Saʿid.

A couple of weeks before the father's death, Saʿid entrusts Ṣaleḥ, due to his reputation as a lawyer, with his fear of losing Layla if she inherits her father's fortune and asks him to represent the imposter. He tells Ṣaleḥ to "push [the case] into the weeds of complex legal proceedings [...] until I'm dead."[169] When Ṣaleḥ asserts that the inheritance is Layla's natural right and there seems to be no way of complicating a simple matter, Saʿid produces an unsigned letter, strangely written using

[169] Ghassan Kanafani, *supra 37,* at 31-32.

newspaper clippings, that outlines the Argentinian boy's claim to the inheritance. Saʿid claims to have received the letter by anonymous mail.

Saʿid further explains, with a sly smile indicating that he doesn't believe the tale, that some rumors have it that Layla's father had an "illegitimate son"[170] with an Argentinian woman during his long years abroad and before returning back home he made a good deal with her to keep the matter behind closed doors. Saʿid assures Ṣaleḥ that the boy's paperwork is incomplete and that, because he is an imposter, he will be willing to accept a small bribe — offered only at the right time — to drop the case. As for Ṣaleḥ, with his secret pursuit of Layla in mind and his belief that "the husband is the only route to an easy wife,"[171] he agrees to represent the imposter. Ṣaleḥ rushes to file the lawsuit as soon as the father dies.

Although this arrangement remains unknown to Layla throughout the course of the proceedings, the two men's plan takes an unexpected turn when Layla claims to have a "decisive document"[172] that will bring the lawsuit to an end. She refuses to tell them anything further about it.

On the day of the murder, Saʿid travels to Argentina to negotiate a settlement with the imposter. At noon, Ṣaleḥ asks his assistant, Hanāʾ, to connect him with Layla who in turn tells Ṣaleḥ that she will be expecting him at her house at 7pm. Ṣaleḥ leaves his office at 6pm, which is the usual end of working hours. It is a cold and rainy evening. He cruises around in his car for a while and remembers that he forgot the perfume which he had bought for Layla as a gift. On Ṣaleḥ's return to the office, the doorkeeper walks into the room wondering why the office is lit after working hours, and sees Ṣaleḥ "placing an elongated item in his coat."[173] As the doorkeeper apologetically walks out, he also sees Ṣaleḥ putting on his gloves.

Ṣaleḥ arrives at Layla's building on time for their rendezvous. To avoid suspicion of their love affair, Ṣaleḥ parks his car at a far distance from Layla's building and walks the rest of the way. He takes the elevator to the 10th floor, knocks on the door and waits for a while. Ṣaleḥ knows from

[170] *Ibid,* at 30.
[171] *Ibid,* at 24.
[172] *Ibid,* at 49.
[173] *Ibid,* at 94.

an earlier visit that when Layla is not home she keeps her keys at the top edge of her apartment door. So when he reaches for the keys and doesn't find them there, he assumes that she is home but unwilling to receive him as planned and becomes irritated. He intentionally drops a nearly empty pack of cigarettes to let her know that he had come, but upon exiting the building he realizes that dropping the pack was "a boyish behavior"[174] and decides to go back. This time, three neighbors join his wait for the elevator, causing Ṣaleḥ to change his mind and leave, reasoning that the neighbors would raise an eyebrow at the visit of a man to a married woman whilst her husband is out of town. "Angry and confused,"[175] he stops by the beach on his way back home, throws the perfume into the sea, and then buys a new pack of cigarettes from the kiosk nearby.

The next morning, Ṣaleḥ is arrested as a suspect for the murder of Layla Al-Ḥayek.

During the first hours of the investigation, Ṣaleḥ answers the investigative committee's questions about his relationship with Layla, Saʿid, and the lawsuit. Ṣaleḥ tells them that Layla was an old friend of his wife whom they had met one night by coincidence at a nightclub and that Layla and her husband visited him thereafter several times at his office concerning the lawsuit. The committee asks whether Saʿid offered him a bribe. He informs them that Saʿid had offered him a bribe once in exchange for relinquishing his power of attorney over the Argentinian claimant. Ṣaleḥ says that he refused to take the bribe and that Layla was satisfied with Ṣaleḥ's promise to handle the case "in absolute adherence to law and honor."[176] He tells them that she visited him separately at some point to ask him to steer her husband away from any attempts to reach a compromise settlement with the imposter and allow "justice to take its course."[177] But, she later became keen to settle because she was tired of the proceedings and didn't mind sharing a small amount of the inheritance with the Argentinian boy.

Suddenly, the more questions Ṣaleḥ answers the more he finds himself "drowning in an uncharted, unbounded desert."[178] Realizing that there is no way to prove his innocence, he stops talking from

[174] *Ibid,* at 53.
[175] *Ibid.*
[176] *Ibid,* at 59.
[177] *Ibid,* at 37.
[178] *Ibid,* at 62.

that point in the investigation onwards and remains silent until the end of the trial, never disclosing his relationship with Layla.

The novel is an interior monologue. It takes the form of a letter that Ṣaleḥ writes to his wife Dima as he awaits the implementation of his execution decree. He tells Dima that he is ready to face his fate, to be punished for a crime that he did not commit, but that he could not leave without passing on the truth to her after he saw a "glimpse of doubt"[179] in her eyes when the verdict was announced. He also tells her that he embraced utter silence because what killed Layla was an 'Other Thing', something that is difficult to articulate unless you have experienced it; something that lives in the periphery of, or even outside, the law, something that the law is incapable of comprehending. And any attempt to make this thing comprehensible to the law, Ṣaleḥ warns Dima, will lead to an endless whirlpool of horror and confusion like the one he has endured.

3.2. Vertical Subjugation — Ṣaleḥ's Experience

3.2.1. Unrecognized Force

Ṣaleḥ encounters the 'Other Thing' during the investigation. He answers one question after the other only to realize that his answers are in vain.

> A moment of silence passed. The [lead] investigator threw the pack of cigarettes in front of me:
> - How did you drop this pack?
> - I threw it because it was…
>
> I wanted to say because it was empty, but I noticed from its clipped side that it still had two cigarettes so I stopped. And suddenly, a shut-door opened inside my forehead, and within its edges, an uncharted, borderless desert revealed itself before me, swamps of invisible sand in which I was drowning to my neck — and the room, the men, the past days, and everything in this life began spinning in a groundless whirlpool — a diabolic tornado that smashed itself onto my skull like a spiral of steel, and I started hearing an infinite screech of [prison] cells, and indistinct squawking and crying and drum rolls, and beastly barking, and the wailing of mad winds, and a deity named coincidence filling its bare jaws with a boisterous laughter…
>
> And behind the three investigators, the law, the wall, and all speech sat that deity on a roaring, bloody throne. By now, it has become an antagonist, and in a moment as brief as a glimpse of a

[179] *Ibid,* at 8 and 154.

> lightning, it became clear to me that I am battling something above law and reason, but just as enduring, and more real than both, because — simply — it is a reality, just like them or maybe more. [180]

Ṣaleḥ's realization of this parallel reality is described not only as sudden, but also as both overwhelming and reorienting. Is it overwhelming because it had already been distantly known to him? If so, what effect does this reorientation have on his perception? At this point, Ṣaleḥ still has no accurate conceptualization of this force, for it is something he came to understand through lived experience, something he sensed and felt. It is not an understanding he attained through a purely rational thought process. In the passage cited above and elsewhere in the novel, Ṣaleḥ refers to this phenomenon as coincidence, a deity, an antagonist, the strongest force in our lives, a parallel reality or more comprehensively just the 'Other Thing'.

Yet, understanding the novel, it seems to me, requires an understanding of the 'Other Thing.' If this is the reader's task, however, it sometimes seems as though Kanafani has made it impossible to achieve. There is no definitive statement of what the 'Other Thing' is or its role in Layla's murder and Ṣaleḥ's being framed for it. Nevertheless, the question is whether there is a defining feature, in Ṣaleḥ's narrative, of the 'Other Thing.' It seems to me that there is.

Contrasting his experience with the law prior to and after his encounter with the 'Other Thing', Ṣaleḥ reflects on this phenomenon from the perspective of an insider to the world of law:

> Coincidence, gentlemen, [has] a real value in our lives, like law, justice, and crime [...] and despite that, this matter is something that cannot be explained through a cold mathematical equation, and now I pay a fair price for this unrecognized coincidence, in which I have discovered, as someone who spent my last ten years amidst the articles of a strictly computed law, that this coincidence is an established [...] *de facto* force, above us all. [181]

From the two excerpts above, we notice that the first recurrent theme characterizing this 'Other Thing' is its dual nature. It is intangible, but with a certain shift in perspective becomes visible. The 'Other Thing' is not cognizable through pure logic, but may become cognizable through other means. It has a parallel, *de facto* existence, that is just as or even more enduring than law and

[180] *Ibid,* at 62 - 63.
[181] *Ibid,* at 45 - 46.

reason, whether we acknowledge it or not. By acknowledging this marginalized force, Ṣaleḥ is suddenly able to see what was unfamiliar to his fellows and unrecognized by the law. Ṣaleḥ's previously narrow horizon broadened and he is now able to see what had previously been excluded from his vision. Instead of seeing just one reality, he can now see two. This is the effect of reorientation experienced by Ṣaleḥ. He explicitly reveals this abrupt shift on multiple occasions,[182] including when he tells Dima in the letter that his silence was "a thundering announcement about an "other thing" that exists from which we have lived our lives in isolation until it suddenly became the strongest force in our lives."[183]

The second recurrent theme of this 'Other Thing' is the fact that it goes unrecognized. In the opening paragraph of the novel, Ṣaleḥ asserts that "this entire case had been above our capacities and beyond our reason, long before the judicature discovered it and [well] after delivering its judgment."[184] These utterances reveal that this *de facto* force remained unseen by the law even when the case was legally processed and concluded. Ṣaleḥ later further elaborates that he "became convinced that what arranged this whole setup was a 'thing' bigger than a logical pattern of unfolding events, and that the only hero [in this story] is a force in whose existence the law is incapable of believing — unless it came as a proof negating a certain occurrence, but not when it is in itself the force behind that occurrence."[185]

To answer our earlier question, then, the defining feature that seems to be constant in the 'Other Thing' is that it is an unrecognized force of a dual nature. But why is this force unrecognizable? Why is the law incapable of comprehending it and why would its recognition matter?

It seems that the 'Other Thing' is shut out from the purview of the law because a structural limitation prevents its recognition. When Ṣaleḥ tells us that the law is *incapable* of believing in the existence of this phenomenon, he is signaling an underlying issue about the law that is separate from the nature of this 'Other Thing'. I suggest that he is signaling an underlying infrastructure — or in Mills' terminology an underlying ECO-system — that makes law *predisposed* to not

[182] *Ibid,* for example at 6, 8, 65.
[183] *Ibid,* at 7.
[184] *Ibid,* at 5.
[185] *Ibid,* at 70.

acknowledging this force. In other words, it is an issue internal to the law. Crucially, it seems that Ṣaleḥ's recognition of the 'Other Thing' and its nature is what allowed him to acquire a more holistic or inclusive vision. Without this recognition, seeing beyond the limits of his previously held worldview would not have been possible.

Based on the above discussion, I take the 'Other Thing' to be a floating signifier that reveals a process of exclusion and inclusion, a dialectic between two forces. One force symbolizes a dominant paradigm recognized by the law and the other symbolizes a marginalized paradigm whose existence is denied. More importantly, it is a dialectic between two forces that are different in *nature* or *kind*. One is cognizable through pure logic and the other requires more than just the faculty of the mind; one privileges what is seen and tangible and the other engages what is invisible yet perceptible. Does this in-kind difference render the two paradigms essentially incommensurable? If they are, is there any possibility for reconciliation?

3.2.2. First Stage of Subjugation: Fragmentation

To answer these questions about incommensurability and reconcilability, we need to understand the context within which the confrontation between the two paradigms arises. In the opening paragraph of Ṣaleḥ's monologue, he frames the issue as follows:

> I did not kill Layla Al-Ḥayek..
> I say that to you, the beloved, the wonderful Dima..
> And I say it to all of you.
> I shall say it for the last time with anticipation of nothing in return; neither in retribution nor in restitution. That is precisely what makes it sincere: alas, there is no verdict more truthful than one which a dead man pronounces upon himself!
> I did not kill Layla Al-Ḥayek..
> And I do not want anyone to bestow pity upon me if this word convinced them that an innocent man has been hung. Nor does saying it serve [me] any purpose. Nor is this truth capable of affecting [the course of] justice. For this entire case had been above our capacities and beyond our reason, long before the judicature discovered it and after delivering its judgment. That is why, as you all know, I have accepted [the case], minute by minute, in silence. [186]

[186] *Ibid*, at 5.

From the outset, the reader of the novel confronts a clash between two unequivocal yet contradictory statements of truth. On the one hand, Ṣaleḥ's statement of his innocence is unequivocal yet denied by the law. On the other hand, while Ṣaleḥ's guilt is unequivocal in the court's final verdict, it is disputed from his own point of view. As readers, we confront a truth clash arising out of this legal impasse and we are invited to exercise a judgment. Yet, Ṣaleḥ's conditional statement "if this word convinced them" is a warning against taking his claim to innocence at face value. The tension between this warning and the un-equivocality of his declaration of innocence is critical to the kind of judgment we are invited to make. Ṣaleḥ is not calling upon us to believe his innocence, as he no longer has a pragmatic interest at stake. For all he knows, by the time this letter is read, he is already a dead man.

If it is neither pity nor any retribution or restitution that Ṣaleḥ is after, what is it? Ṣaleḥ seems to be concerned with truth for its own sake. In other words, Ṣaleḥ is inviting us to understand that his problem is much deeper than a question of guilt or innocence (i.e. the *substantive* contents of the verdict); he invites us to see that the *constitutive* criteria through which the court is adjudicating this conflict are themselves disputed. Ṣaleḥ is inviting us to engage with the 'Other Thing' — the unrecognized force that brought to his attention this dialectic of exclusion and inclusion — and is urging us to make a judgment about the *nature* of the conflict.

This warning is similar to that of Mills. Recall that Mills' objection to reconciling indigenous legal orders with that of the settler state is that the incommensurability between the constitutive layers of legality (i.e. the lifeworlds and lifeways) must be acknowledged and addressed before the tension between the equally conflicting substantive layers (i.e. traditions and laws) can be addressed. Also, Mills cautions that reducing the conflict to a substantive difference in cultural sensibilities results in a failure to take the underlying worldview-difference seriously, thereby hindering genuine reconciliation.[187] These concerns intersect with Ṣaleḥ's plea for his readers to take his claim of the 'Other Thing' seriously rather than accepting his substantive claim of innocence at face value. Like Mills, Ṣaleḥ here warns us that there is an unacknowledged constitutive incommensurability that is lurking underneath the conflict we, as readers, must first address. Here, we begin to understand that the conflict between the competing claims of truth in

[187] See *supra* 100.

the novel, of guilt and innocence as the court frames the battle, actually involves a deeper impasse between two conflicting paradigms.

This leads me to the imperative question: what is the constitutive difference that he wants us to see? Where do the two paradigms conflict?

The first difference is the clash between the law's presumption of a purely material existence and the unrecognized immaterial reality that Ṣaleḥ now sees. The duality of existence that Ṣaleḥ alludes to can be seen as the **cosmological** presumption at the heart of the difference between Ṣaleḥ's paradigm and the dominant paradigm of the law. In the novel, the law presumes the existence of a material world and operates on the basis of this presumption whereas Ṣaleḥ tells us that there is something beyond the material, the physical, the seen, and the known that exists regardless of our recognition. This structural exclusion is expressed most clearly when Ṣaleḥ says:

> "Who, then, killed Layla Al Hayek?
> My answer is simple: an 'other thing' is what killed Layla Al-Ḥayek. A thing that the law does not, nor does it want to, know. Something that exists within us, within you, me, her husband, and in everything that has surrounded us all since the day we were born."[188]

With this cosmological difference, other differences follow suit.

Earlier, Ṣaleḥ told us that this case is beyond the law's assumed "logical pattern of unfolding events" and that "the only hero [in that story] is a force in whose existence the law is incapable of believing."[189] A disruption seems to occur where something illogical or irrational is being rationalized, which is to Ṣaleḥ what the court seems to be doing. Ṣaleḥ is alluding to a felt, sensed, and lived reasoning that goes beyond the cold, mathematical equations of pure logic. This is the second clash between Ṣaleḥ's paradigm and that of the law.

> Can Law get angry? Can it get jealous? Feel the bitterness of betrayal? Understand the logic of deviating from the norm? It cannot because we say that law is not subjective. [If this is so] then why does it make external judgments on those phenomena and then assigns provisions from its logic? Do you understand gentlemen? Law rejects the commitment of a crime by an angry man, but, to punish him, it kills him — as though this law is itself an angry man. Why does it denounce

[188] Ghassan Kanafani, *supra 37*, at 7 - 8.
[189] *Ibid,* at 70.

> anger and at once allows itself to use the tools of anger? Why gentlemen? Why does it reject coincidence and at once uses it as a proof of fact? Why, gentlemen, does it treat coincidence as an evidence of fact and does not treat it — that which in its perspective is above or beyond reason — [as] a void in reasonableness?[190]

In the above paragraph, Ṣaleḥ unsettles the law's **epistemological** presumption that the world is governed by a certain kind of rationality. Ṣaleḥ is problematizing the disruption that is caused by law's assumption of a certain kind of rationality while excluding other modalities of reasoning. This objection touches on a similar point of discontent expressed by Trish Monture with the kind of rationality presumed by the liberal legality in Canada when she says:

> In ten years of being at university, I have not spent one single day in any of those institutions where I was dealt with as a complete person. I was merely a mind. No one wanted to address my spirit, or my emotions, or my sexuality.[191]

In my view, when Ṣaleḥ asks whether the law can get angry, he is not expecting that emotions or other modalities of reasoning should excuse a person of a crime (if they had actually committed one). He is rather signaling a gap. This gap is unrelated to anger, jealousy, or bitterness *per se* but is rather related to epistemic philosophy. This gap is manifest in Ṣaleḥ's objection to the law's insistence on rationality as the primary form of knowing, and its insistence on subjecting knowledge to pure reason rather than accepting that human reason, alone, is insufficient. It signals the absence of a more sophisticated and interconnected web of the epistemological process that exceeds mere rationality but, unlike rationality, is not assumed by the dominant paradigm to form part of the human pursuit of knowledge and truth. Recall that Mills alerts us to a similar gap when he tells us that from the rooted paradigm, modalities of reasoning include rationality as well as emotional, spiritual, and sensory forms of knowing.

Thirdly, Ṣaleḥ tells us that his "affair with Layla was nothing but a coincidence".[192] Throughout the novel, Ṣaleḥ reiterates that all the occurrences surrounding the case — from meeting Layla at the nightclub and being asked by Saʿid to get involved in the inheritance lawsuit, to dropping his

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[190] *Ibid,* at 104 - 105.
[191] Patricia A Monture-Okanee, "The Violence We Women Do: A First Nations View" in Constance Backhouse & David H Flaherty, eds, *Challenging Times: The Women's Movement in Canada and the United States* (Montreal & Kingston: MQUP, 1992) 195 cited in Aaron Mills, *supra 79*, at 131.
[192] Ghassan Kanafani, supra 37, at 45.

packet of cigarettes at her door and being seen by the doorman wearing his gloves on a cold rainy day — are all nothing but a series of formidable coincidences.[193] Yet, the law, Ṣaleḥ told us earlier, does not accept coincidence as an appropriate excuse for refuting an occurrence but nevertheless accepts it as a proof if it confirms the occurrence. He adds:

> Why does [law] reject coincidence and at once uses it as a proof of fact? Why, gentlemen, does it treat coincidence as an evidence of fact and does not treat it — that which in its perspective is above or beyond reason — a void in reasonableness? [194]

Through his problematization of the law's contradictory treatment of coincidence, Ṣaleḥ unsettles deeper truths presumed by the law. Generally speaking, coincidence is defined as "a notable concurrence of events or circumstances without apparent causal connection"[195] or "an occasion when two or more things happen at the same time, especially in a way that is unexpected or unlikely."[196] The inexplicable nature of coincidences — the way they convey a seemingly chaotic or random interconnectedness of life — stands at odds with the orderly logic of the law. However, Ṣaleḥ tells us that these coincidences were cunningly crafted, framed him in advance, and inconceivably persistent.

In response to this tension, Ṣaleḥ wonders: "The Law. But, where is the Law that can engage with matters that humankind wasn't able to subject to order?" [197] Here, we can see that Ṣaleḥ unsettles the law's **ontological** assumption of the supremacy of a human order (stemming from a supreme human rationality) as opposed to humbly accepting that certain things are beyond power and reason. Where the law presumes an ontology of human agency centered around individual autonomy and thus around the supremacy of the human will, Ṣaleḥ signals an ontology of finitude or fragility.

If I were to put Ṣaleḥ's reflections in Mills' terminology, Ṣaleḥ — as a result of the paradigm shift arising from his encounter with the 'Other Thing' — comes to reject the 'Sovereignty Thesis' and accept the 'Humility Thesis'. From Ṣaleḥ's newly acquired worldview following his

[193] *Ibid*, at 103.
[194] *Ibid*, at 105.
[195] "Coincidence" in oed.com, Oxford English Dictionary. April 27, 2020.
[196] "Coincidence" in dictionary.cambridge.org, Cambridge Dictionary. April 27, 2020.
[197] Ghassan Kanafani, *supra 37*, at 104.

acknowledgement of the 'Other Thing', he sees these coincidences as part of a *de facto* order of existence. In contrast, presuming the supremacy of human order, the law interprets these coincidences as a logical pattern of events — as manifestations of autonomous human agency — and thus refuses to treat them as a "void in reasonableness" or as something that falls beyond human order. In line with Mills' theory, perhaps the beyond-human law that Ṣaleḥ is wondering about signals the inherent order of creation, happening in parallel to our human order, with and without our recognition.

The final presumed truth that Ṣaleḥ seeks to unsettle is reflected in the following paragraph:

> All this will appear to you now, gentlemen, as having nothing to do with the subject matter, but in fact that's not entirely the case. Any incident — even if it was an ugly crime of murder — is nothing but one loop in the story, and perhaps Law's biggest fault was attempting to dissect it in as much isolation from everything else [surrounding it]. At that point, whatever the law discovers [from that isolated loop in the story] is no more than a laboratory's discovery of [the existence of] a human being from a piece of skin. […] Crime for the judiciary is a linear story, whereas in reality it is three-dimensional, just like everything else in life.
>
> You cannot sentence Hamlet to death, now, because he was able to convince you for 400 years that the crime he committed is not but one loop in a story that cannot be dissected. And if they brought before you a man who killed his father to marry his own mother you would have executed him without hesitation, and yet you would think a thousand times before you'd touch a single hair on Oedipus' head. [198]

Here, Ṣaleḥ unsettles the law's atomized as opposed to holistic treatment of a truth, reality, and crime. Recall that Ṣaleḥ, once a top-notch lawyer, had spent his life amidst precedents and statutes and had mastered the art of persuasion and legal argumentation. Yet, when he visualizes himself presenting his case through what he now sees as the refracted lens of the dominant paradigm, he concludes that it would have become a mockery in the courts of law.[199] That is because that court and law are not concerned with questioning their own underlying presumptions. This echoes Mills' argument that a legal system embedded within a certain lifeworld takes its ECO-system elements as uncontested starting points rather than interrogating them.[200] The courts just want the facts of the case. But to state his facts without an acknowledgement of the worldview-difference at the heart of the conflict is going to be a dead-end regardless of whether he speaks or remains silent.

[198] *Ibid,* at 25 - 26.
[199] *Ibid,* at 102.
[200] See *supra* 113.

Although I will return to the point of silence later, I'm compelled to connect this reversion to silence to a real-world experience recounted by John Borrows:

> When I went to law school, I once again sat very quietly. I don't think I spoke in class more than ten times. Unlike before though, my silence wasn't because I didn't want to disturb; *I was quiet because what I heard was disturbing.* The stories were so different. Everything seemed cold, lifeless. The people we spoke about were detached from any context. Case after case piled one upon another, where background barely mattered and facts were only shadows of the reasons for decision. The places we studied had no spirits: only uses, divisions, and remainders. And the dead were, well, ... dead. They could only seemingly be relevant vicariously, through criminal law and civil remedies. The stories did not connect me to any place; in fact, they seemed to sever me from the world. They created a realm of interchangeable and abstract concepts that concealed Canada as I knew it. Law, I discovered, had the power to hide many things.[201]

Borrows' experience not only captures the impetus of silence — the absence of audible sound in the presence of intense, non-audible energy — but further, the problem of what I called atomization, which Ṣaleḥ claims is "Law's biggest fault." **Atomization** can be understood in Mills' terminology as the separation of facts from their broader epistemological, cosmological, and ontological contexts, or in Ṣaleḥ's terminology as separating a three-dimensional story, like Oedipus*,* from an intimately interconnected web of incidents and treating each one as a single, linear and independent occurrence.[202] Whatever truth law is capable of discovering from a dissected part of a story, says Ṣaleḥ, is "no more than a laboratory's discovery of [the existence of] a human being from a piece of skin."[203] At that point, truth becomes linear, losing its holistic identity. This contrast between atomization and holism is similar to the contrast that Mills identifies between the liberal focus on individualistic autonomous existence and the rooted focus on a radically interdependent existence.

The epistemological, cosmological, and ontological differences that Ṣaleḥ elucidates is what makes the legal impasse one of constitutive incommensurability. It is that each of the diametrically opposed claims of guilt and innocence are predicated on two worldviews that are different *in* kind. Further, this difference is denied by the dominant worldview of the law, which leads to shutting out Ṣaleḥ's perspectives *a priori* and reinforcing what it is predisposed to believe. The exclusion

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[201] John Borrows. "Indian: Forming First Nations Law in Canada" (2001) 24:2 PoLAR at 9 [emphasis added] cited in Aaron Mills, *supra 79*, at 131.
[202] Ghassan Kanafani, *supra 37*, at 25.
[203] *Ibid,* at 25 - 26.

of Ṣaleḥ's worldview from the dominant paradigm results in a condition of conceptual subjugation which forces, or attempts to force Ṣaleḥ, to relinquish his own logic and adopt the dominant paradigm's presumed truths to represent himself through its lens. This is the first effect of conceptual subjugation and is what I call Fragmentation. **Fragmentation** is the annihilation of the possibility of Ṣaleḥ narrating his truth on the terms of his own paradigm. It occurs when the lifeworlds of incommensurable legalities encounter one another. However, the consequences of conceptual subjugation do not end here. This is where they begin.

3.2.3. Second Stage of Subjugation: Dissonance

Because he refuses to speak, the court assigns Ṣaleḥ a defense attorney to speak on his behalf and the trial begins.[204] Having stepped into a new paradigm enabled by his encounter with the 'Other Thing', Ṣaleḥ brings to surface the conflicting ECO-systems of his worldview and that of the law's. Ṣaleḥ now questions the technical process by which the court approaches its truth-finding endeavor. In the course of the competing submissions, he says that briefly it appeared to him that:

> the entire issue is a tournament of excellence, and that my innocence depends on my lawyer having more formidable skills than the prosecution regardless of the truth… and that between the two, whoever is able to invent the most convincing story, rather than the most 'realistic' one, will win my head: they either send [my head] home or to the gibbet. [205]

What are the implications of portraying the truth-finding endeavor in this legal system as a tournament? The first implication seems to concern the court's emphasis on adjudicating the dispute rather than *resolving* it.[206] By adjudicating the dispute, the courts seek closure of the substantive question that comes before them, in this case the question of Ṣaleh's guilt or innocence. Moreover, this closure is pursued regardless of whether it comes to a just end.[207] Recall that Ṣaleh's problem is not substantive; it is constitutive. Thus, in order to resolve the dispute, the court needs to address its root cause, which is the incommensurability of the worldviews upon which each

[204] *Ibid,* at 67.
[205] *Ibid,* at 129.
[206] For a philosophical discussion on resolvability and justice, see Jacques Derrida & Gil Anidjar, trans, *Acts of Religion* (New York: Routledge, 2010).
[207] As captured in Ṣaleh's earlier assertion that truth is incapable of affecting the course of justice *supra* 186.

claim is predicated. However, as we have seen, the structural limitations in the law's paradigm prevent the court from asking these deeper questions. The result is a legal impasse rather than a legal resolution.

The second implication of the tournament metaphor is that the court's worldview is not entirely inaccessible. One can learn to maneuver one's way through it, appeal to its logic, and refine one's submission to meet its expectations of reasonableness; whoever does so more skillfully will be able to convince the court of their truth. Establishing truth thus becomes a matter of skill and a matter of willingness to represent oneself through the court's paradigm. Thus, an attempt to win in such a system requires one to relinquish one's own worldview to the extent that it clashes with that of the court. But Ṣaleḥ is not seeking the believability of his substantive claim, suggesting that although relinquishing his worldview in favor of the legal worldview might make his claim more believable, it would nevertheless constitute a loss. It would constitute the profound kind of loss that Mills cautioned against earlier.

In the excerpt above, Ṣaleh questions the technical process by which the court assesses a claim to be believable, convincing, or reasonable. Yet, Ṣaleh goes on to question not only the capacity of the court to ascertain truth, but also the credibility of what it deems to be true:

> The roundup of the matter, then, is that 'something else' has framed me of a crime I didn't commit. It is a crime in which I am responsible for all the actions except the stabbing, which was a very brief element in the aggregated sum of the crime and probably took less than 30 seconds to commit, yet I cannot prove that I wasn't the one who did it…
>
> So, what is Truth, gentlemen?
>
> Is it a collection of evidence? Is it a mathematical equation? Law does not recognize intention, except when it assumes it, and [law] assumes intention based on the sequence of evidence presented. But, to what extent are evidence and intention actually connected? Yet more than that, to what extent is the evidence [actually] true? [208]

Here, Ṣaleḥ problematizes the logical constructs that constitute law's method of discerning truth. These constructs disclose the lifeways of the law, which we know from Chapter 2 entails the logical-structure underlying a certain legality. Ṣaleḥ wonders whether evidence, which is a

[208] Ghassan Kanafani, *supra 37,* at 101.

material element of truth, is an adequate site from which to excavate intent, an immaterial element of truth. He also wonders whether the relationship between truth and evidence is as linear as the legal process assumes it to be. This assumption of linearity and the contradictions it brings to surface, as we saw before, are a product of the law's logic of atomization. This logic reappears as Ṣaleḥ ponders about law's ability to ascertain a more holistic truth in the context of constitutive incommensurability when he says that:

> "[while] the law remains interested in looking for causes and correlations [...] this interest acquires value only when those causes and correlations are closely and directly linked to the crime."[209]

The linear, material, and quasi-scientific process by which the court establishes facts and the standards by which it validates truth are conditioned by the ECO-system internal to the law's paradigm. This process is what enables the court to assume Ṣaleḥ's intention from a set of facts it has constructed based on the available evidence. However, Ṣaleḥ warns us that if we accept the court's process then the logical constructs that the court utilizes to discern the truth are skewed in favor of the ECO-system embedded in its paradigm.[210] In turn, Ṣaleḥ questions whether the logical constructs that the human order has invented are a credible means of validating or rejecting truth claims.

By now, it can be said that the court's view adopts a skewed *center* of a finite human reason and employs a skewed process of atomization in its search for truth. This leads to the foregrounding of certain elements of the truth, such as causes and correlations, and the exclusion of others, such as coincidence. The truth that the court ascertains thus fits into what it is already predisposed to believe. In this case, the truth the court sees is the truth that fits within an ECO-system that acknowledges only material existence. In turn, when Ṣaleḥ questions the validity of the link between evidence and standards of reasonableness on one hand and truth on the other, he is signaling a conflict between the logical structure that underlies the court's determination of his

[209] *Ibid*, at 26.
[210] Note that the claim that the ECO-system influences the technical process by which law pursues its truth-finding endeavor in the novel reiterates the function of Mills' legality tree, which is to empower and condition subsequent levels within a range of possibility.

guilt and the reality of Ṣaleḥ's actions and behaviors.[211] Assuming that Ṣaleḥ is innocent, the second effect of conceptual subjugation is this disharmony or *dissonance* between truth and the perception of truth.

Let us further unpack how this dissonance, triggered by the court's logical constructs, discloses incommensurability at the lifeways level (corresponding to a legality's constitutional order). Ṣaleḥ's reflection on the court's quasi-scientific constructs seems to allude to an alternative constitutional logic analytic revealed by the 'Other Thing':

> They all left and I remained seated, drowning in that uncharted realm which cannot be known to any man who thinks that the world is contained in a cage with defined dimensions and meanings. We are now playing a ludicrous game. We measure the whole world using a ruler that we [collectively] agreed upon but without consulting it. We designate nomenclatures and descriptions to all phenomena without defining what they are, their truth and motivations, and then we believe that all this has empowered us with the whole truth. We are stupid, gentlemen, extremely arrogant and impudent. And I wouldn't have been able to say all that [in the court] knowing what I know about how rules in human life become a new primitive deity that interprets everything and judges everything, so I opted for silence, leaving your tiny incapacitated deity[212] that you have enthroned as the apex of this life to battle [life] on its own.[213]

What is most striking about this reflection is the recurrence of the theme of duality. There is "us" (humans) and "it/the whole world" (existence). Where we, humans, have engineered logical artifacts by which to understand our immediate, tangible world, there seems to be another logic — whether acknowledged or unacknowledged[214] — that is less tangible but parallel to ours. The reference to "without consulting it" suggests that we either assume that this parallel order does not

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[211] Although it might seem that Ṣaleḥ colludes in the court's ultimate determination by refusing to reveal the context of the affair and his unprofessional dealings, there are scenes in the novel — a discussion which proved to be beyond the scope of this chapter — that give us insight into why this information was unlikely to affect the outcome. For example, the defense attorney ponders upon the possibility of Layla and Ṣaleḥ's affair and the possibility of Sa'id's culpability but dismisses the possibility on the grounds that it will not hold as a credible or believable narrative in the eyes of the court (for several reasons some pertaining to circumstantial evidence and some, which I think are implied, are related to character and culture). The attorney further speculates that it might actually serve to prove Ṣaleḥ's guilt. Ṣaleḥ is of the same view as the attorney and believes that not only is disclosing the affair (or his unprofessional dealings) capable of providing further evidence that affirms the court's determination of guilt, but it will also cause further damage to many people such as his wife and family (but also possibly Layla and Sa'id). See Ghassan Kanafani, *supra 37* pp. 57 – 58, 69 – 70, 142 – 144, and 147 – 151. On crime and character, see Nicola Lacey's book *supra* 68.

[212] In reference to their man-made Law.

[213] Ghassan Kanafani, *supra 37,* at 65.

[214] Acknowledged because Ṣaleḥ saw and experienced its presence through the encounter with the 'Other Thing' but which remains unacknowledged by the dominant paradigm.

exist or dismiss it in favor of our narrowly defined and material perception of existence. By constructing legal fictions to regulate a presumed lawless state of nature, the dominant worldview in the novel centers the supremacy of human reason as the ultimate factor in determining the truth.

To problematize this further, Ṣaleḥ brings us into a temporal contrast surrounding the whole set of events in his story. He contrasts his position prior to the trial — which was informed by the dominant worldview that he himself lived by — and his position after his encounter with the 'Other Thing' — which by now we know caused a shift in his perception. He tells us:

> Whether I like it or not, I was part of the crime and a building block of that sanguinary structure. I was used by an unknown force par excellence. Was it truly an unknown force? Didn't I myself choose — for a reason beyond us all — to enter into it and play my part which has led to such a tragic ending? Didn't I plan the story myself without external influences? Would it have been possible for [this situation] to take place with the same ending if I wasn't there and if I didn't choose that strange entry into the crime's blood-filled structure? [215]

I argue that what Ṣaleḥ reveals in this reflection is a critical component of the logical analytic of his worldview. Here, Ṣaleḥ emphasizes free choice and seeks to understand his past actions through it. Throughout the letter, Ṣaleḥ shares with us his innermost thought processes and feelings about some of his most intimate moments. He tells us how his pursuit of an affair with Layla was based on lust and desire and how this extra-marital affair unexpectedly revived his relationship with his wife, Dima. He tells us that he understood that the Argentinian boy's claim in the inheritance lawsuit was a bluff and yet admits that his motive behind conspiring with Saʿid was to succeed in his pursuit of Layla. Ṣaleḥ further tells us that he had once, during intercourse, imagined Layla dead, not because he hated her, but because in his imagination that was the only way he could at once keep his love for both Layla and Dima.[216] What we notice in these actions and decisions, which took place before his encounter with the 'Other Thing', is a pattern of self-centered reasoning. Moreover, it is a reasoning that is concerned primarily with satisfying Ṣaleḥ's own interest without regard to consequences or to any other interest (whether that of the individuals involved, or society as a whole, or more abstract concepts like the code of honor of the legal profession).

[215] Ghassan Kanafani, *supra 37,* at 66 - 67.
[216] *Ibid,* at 12.

However, Ṣaleḥ's decisions and actions after his paradigm shift seem to follow a different pattern. For example, Ṣaleḥ decides not to disclose his relationship with Layla for fear that it would harm Layla's reputation. Ṣaleḥ laments the fact that he left his family with a dishonorable legacy, apologizes to Dima, and encourages her to pursue a new marriage.[217] Further, Ṣaleḥ vows to tell Dima "the whole truth and nothing but the truth"[218] and acts upon his promise by sparing no detail in his letter.

Here, we begin to connect the elements of the constitutional logic analytic that the novel elucidates. Prior to the encounter with the 'Other Thing', Ṣaleḥ endorsed a wrong center (self-interest) in his decision-making endeavor akin to the court's emphasis on a skewed center (a finite human reason) in its truth-finding endeavor. Like the dominant presumption, Ṣaleḥ acted contrary to the parallel order of creation that he came to acknowledge only in retrospect. He failed to recognize the supremacy of its inherent order as opposed to that of humans. He also failed to adopt its correct center, which is the entirety of creation and not the individual self. Ṣaleḥ's past choices trapped him into what he describes as a series of coincidences set up by this force that transcends the "logical pattern of unfolding events" assumed by the dominant perception of reality.

How, then, does one reconcile free choice with coincidence? While there is an inherent order of creation that runs in parallel to our lives as Ṣaleḥ claims, each member of the community to which Ṣaleḥ belongs seems to have the choice to acknowledge this order or not. If one acknowledges, it becomes one's responsibility to attune oneself to it and seek to understand it, like Ṣaleḥ attempts to do after his encounter. To decide to go against this order or to refuse to acknowledge it is thus a choice and more importantly is a choice with consequences. Recall that in lifeways, the constitutional logic analytic[219] follows the [extension → reception → response] equation in abstract terms and is shaped by its preceding level of legality. I suggest that the link between

[217] *Ibid,* at 155.
[218] *Ibid,* at 8.
[219] "The story a community tells of its constitution will necessarily account for individuals reaching out to others for the purpose of community creation and continuity (extension); a reception of these offers amongst other possible community members (reception), and their manner of response which follows (response)." see Aaron Mills, *supra 79*, at 44.

coincidence and free choice reveals to us another element of the constitutional logic analytic emanating from the lifeworld to which the novel signals.[220]

Based on the analysis in this subsection, I argue that the constitutional logic analytic that I have synthesized from the novel is as follows:

Center → Free Choice → Outcome

I will attempt to employ this formula in the discussion on the Palestinian struggle in Chapter 4. In short, for now, the adoption of a certain center amounts to the invitation or extension to create a community and maintain its continuity in relation to this center. Additionally, the exercise of free choice to recognize and attune oneself to this parallel reality or inherent order of creation amounts to reception of this invitation. Finally, outcome denotes the consequence that responds to the interaction between the invitation and its reception.

To recap, the exclusion of Ṣaleḥ's worldview gave rise to a condition of conceptual subjugation, the first effect of which was Fragmentation where Ṣaleḥ was denied the possibility of narrating his truth on the terms of his own paradigm. In this section, we explored the second effect of subjugation which I call **Dissonance**, referring to the dissonance or gap between the truth of who actually killed Layla and the court's perception of the truth as a result of the logical constructs that the court employs in its truth-finding endeavor. Dissonance occurs where the lifeways (i.e., the second level of Mills' legality tree) of the conflicting paradigms are incommensurable.

3.2.4. Third Stage of Subjugation: Alienation

So far, we have seen Ṣaleḥ's inability to narrate his truth in terms of his own worldview, resulting in that worldview's marginalization. We further saw how the court's atomization of Ṣaleḥ's actions fragmented his otherwise indivisible story. This logic of atomization reappeared in the court's utilization of logical constructs which predisposed the truth-finding endeavor in favor of the ECO-

[220] Which is the ECO-system that Ṣaleḥ signals to as discussed under Fragmentation above.

system in which it is embedded. Now, Ṣaleḥ tells us that all this happens in accordance with a claim of impartiality demanded by justice:

> Let's look at the justice affair from its end rather than its beginning as is otherwise commonly done. I will clarify what I mean. It has been the norm that the [court's] judgment is the end of the story. Let's try to look at it with the assumption that this judgment is just the beginning. We usually say that a certain crime demands a corresponding verdict, and resolve the case accordingly. So, what will happen if we ask whether that verdict [itself] amounts to a crime?
>
> Crime is a subjective act, and if justice's unique [vantage point] is its impartiality, as we claim, then why does it resort to revenge which is subjective in nature? Is justice a vindictive measure? We say that it isn't. But, if we kill a man in the name of justice because he had killed another man in the name of subjective behavior so what else have we done other than revenge, and more so a revenge with subjective standards.
>
> […]
>
> It will appear as though I consider myself a murderer debating the verdict and its justness, and the truth is that I don't consider myself as such. But what is my value as an individual subject before that complete skeleton of proofs built on coincidences that almost [look like] logically sequenced material facts, [all of which happen] in the heart of that sacred deity that we call "Law", and that we use indirectly to represent our purely subjective opinions? [221]

In this excerpt, Ṣaleḥ unsettles the third element of legality, which is legal traditions. Recall that the state's supposed monopoly on coercion forms part of the institutions that Mills explains are part of the liberal legal tradition's means of sustaining the social order. First, by equating punishment to revenge and emphasizing that it is done in the name of justice,[222] Ṣaleḥ is effectively questioning the coercive measure used to respond to a crime. Secondly, by equating the verdict with a crime, Ṣaleḥ is unsettling the underlying logic by which the dominant legality resolves conflicts. Thirdly, and perhaps most importantly, by proclaiming that the impartiality standard is a mere cover for subjective opinions, Ṣaleḥ is bringing us back to the ECO-systems that operate as uncontested meta-truths in which law is embedded. He is also bringing us back to Mills' explanation that impartiality and objectivity are considered of utmost importance in preserving the integrity of the liberal legal tradition. Fourthly, when Ṣaleḥ invites us to think of the final judgment as the beginning rather than the end, he is raising doubts about the legal process' claim to certainty

[221] Ghassan Kanafani, *supra 37*, at 102 - 103
[222] For an interesting interdisciplinary legal discussion on equating punishment with crime, see Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (Berkley: University of California Press, 1996), at 6.

and conclusiveness, which is a feature that Mills ascribes to "certainty-privileging societies".[223] Ṣaleḥ is reopening this static process towards a more dynamic interpretation enabled by the acknowledgement of the 'Other Thing'. In many ways, the excerpt above unsettles what Mills describes as the liberal legal tradition, which resonates with the dominant legal tradition in the novel.

Ṣaleḥ continues with what I identified as a thread of finitude to critique this legal tradition. The Fragmentation stage revealed to us the finitude of human existence, the Dissonance stage revealed to us the finitude of human reason, and here Ṣaleḥ signals again finite human knowledge. When he tells us that even "Two thousand years of jurisprudence was incapable of ordering the human element in an amphora…"[224], he is questioning the human attempt to order the vastness of human existence, an endeavor beyond our limited capacity and finite knowledge.

Yet, courts do have to make a conclusive judgment, in the name of justice, between multiple probable yet conflicting narratives of truth. Between the submissions of his attorney and the prosecution, Ṣaleḥ's story is refracted through the lens of the dominant paradigm, which he rejects, using its logical tools and constructs, which he doubts are adequate or credible mechanisms for uncovering the truth. In the courtroom, competing narratives about who really killed Layla are put forward; to Ṣaleḥ's surprise all the narratives put forth sound like they could be true. As we shall see, the prosecution and the defense construct versions of reality that fit into the linear formula of the law in order to convince the court of the believability of their submissions. Each of them asserts their own representations of truth, but all of them, Ṣaleḥ tells us, are works of fiction.

The prosecution argues that Ṣaleḥ cunningly prearranged a plot to get a share of the inheritance as soon as the news of the dying father broke out. The prosecution supports its claim with Ṣaleḥ's admission, during the investigation, that he was going through financial difficulties. It is further supported by the speed and preparedness with which Ṣaleḥ proceeded in filing the lawsuit

[223] Aaron Mills, *supra 79*, at

[224] Ghassan Kanafani, *supra 37*, at 104. I suspect here the reference is to ancient Roman Law as one of the oldest legal systems known to humanity. Of course there are some older codes or texts such as Sumerian laws and Babylon codes but perhaps the Ancient Roman Law is a more integrated jurisprudential body than those that preceded it with a continuing influence.

immediately after the father's death. The prosecution alleges that Ṣaleḥ was responsible for establishing contact with the imposter through anonymous mail, prompting the boy to make a claim to the inheritance. The prosecutor deduces that Layla's acquisition of a decisive document was unaccounted for in Ṣaleḥ's plan and took him by surprise. When his plan took this unexpected turn, Ṣaleḥ decided to get rid of Layla and get hold of that decisive document that would have refuted the Argentinian boy's claim and left Ṣaleḥ with nothing.[225]

Based on the evidence, the prosecutor constructs the facts of the matter as follows. He suggests that Ṣaleḥ left the office at 6:00, and Hanaa' closed the office at 6:05. Sometime between 6:00 and 6:30, Ṣaleḥ arrived at Layla's house, where he looked for the keys at the top edge of the door. Since the key wasn't there, he knew[226] that Layla was inside. Occupied with his decision to get rid of Layla and get hold of the decisive document, he forgot about the traces of his fingerprints. He went back to the office to grab "an elongated item"[227] that the doorkeeper reported looked like a knife, put on his gloves, and went back to Layla's apartment. The prosecutor reasons that Layla was surprised by his unannounced arrival, but out of courtesy to her old-time friend Dima, and based on Ṣaleḥ's highly regarded reputation, she allowed him to enter. [228]

The prosecutor postulates that when Ṣaleḥ realized that he had no leverage to get Layla to show him the document, he threatened her and ultimately stabbed her as she was running towards the phone.[229] It was a single, precise and fatal stab, says the prosecutor, that only a professional criminal or an expert in such matters could have done. When Ṣaleḥ couldn't find the document, he took some jewelry to make the incident seem like a robbery and left quietly. He discovered that he had dropped his cigarette pack only after leaving the building, so he went back. When the three neighbors joined him whilst waiting for the elevator, he had to retreat to avoid being discovered. He went to the beach to dispose of the murder weapon and the jewelry. Had he not bought a new pack of cigarettes from the kiosk, the prosecutor claims, the vendor may not have recognized the unique way in which Ṣaleḥ clips the side of his pack, and wouldn't have come forward to testify

[225] *Ibid,* at 81 - 96.
[226] According to Dima's witness statement, Ṣaleḥ knew this about the keys because he drove Layla home once when she visited them one day for dinner when Saʿid was out of town for work.
[227] *Ibid*, at 75.
[228] *Ibid,* at 94.
[229] *Ibid;* Her body was found between the phone and the chair on which she usually sits when receiving a guest.

upon reading about the murder in the newspaper. Based on these facts, the prosecutor claims that during the investigation, the accused realized that he had been trapped and thought he could hide the truth with his silence. But the "vigilant eyes of justice were more than vocal"[230] in bringing forward the truth.

In his letter to Dima, Ṣaleḥ praises the prosecutor's skills, saying that "the brilliance by which he constructed [the evidence] is worthy of appreciation, and if I were him, I would not have crafted a better and a more logical story."[231] Then Ṣaleḥ adds: "I reviewed the prosecutor's story again but, once more, I have found nothing to be said. Just now, the only thing I can tell you is — beyond the logic of the law and the measurement devices of the judiciary — that the story is not real."[232]

On the other hand, the defense argues that the prosecution's submission contains fatal contradictions. First, the defense suggests if Ṣaleḥ truly was a professional criminal and his act was a premeditated crime, then Ṣaleḥ would not have left behind so many traces at the crime scene. Therefore, the prosecutor's assumption of the crime being premeditated contradicts the facts. Secondly, the defense contends that the anonymous mail fails to prove that Ṣaleḥ was the one who actually established communication with the imposter. These two assumptions, argues the defense attorney, are the basis upon which the prosecutor built his argument although there is no way that they can be sufficiently proven. The defense attorney argues that the truth of the matter is that an unknown criminal sent two copies of the strange letter by anonymous mail to Saʿid and Layla Al-Ḥayek and to the imposter. This criminal possessed the decisive document all along and when the time was right, the criminal bargained over it with both Layla and the imposter hoping to sell it to whomever was prepared to pay the better price. The defense attorney postulates that Layla knew that Ṣaleḥ finished work at 6 and that he lived on the other end of town and yet she asked him to meet her at 7 rather than at an earlier, more convenient time. This, reasons the defense, means that she was scheduled to meet with the real criminal at 6, suggesting that the crime took place before Ṣaleḥ arrived at the scene. The fact that the decisive document was found amongst Layla's books, claims the defense, was due to the criminal who placed it there after having committed the murder.

[230] *Ibid,* at 96.
[231] *Ibid.*
[232] *Ibid,* at 101.

If the court finds Ṣaleḥ guilty, it would be allowing a cunning criminal — a fugitive from justice who left no traces behind — to walk away.[233]

Again, Ṣaleḥ evaluates the argument of the defense, telling us that it had exceeded his expectations. Ṣaleḥ says "I must admit, even I would not have thought of such a twist; playing the note of an "unknown criminal" in his defense was a skillful way of finding a container for the details that remained ambiguous."[234]

As Ṣaleḥ grapples with the realities constructed by the defense and the prosecution, noting that they "could be an almost absolutely real story!"[235], Ṣaleḥ simultaneously questions the measure of reality:

> The most realistic story? What is reality, gentlemen?
> You may assume that reality is that which is reasonable and logical. But how many real events fit within what's reasonable and logical? What is the relationship between the real and the reasonable? Is war, for example, realistic or [is it] reasonable… You see, we are fooling each other. We falsify the world in order to comprehend it. What misery… [236]

All these false constructions of reality, then, seem to be products of our limited reason's attempts to fill a void of reasonableness, to fill that which our reason deems inexplicable. We try to comprehend the world through the lens of an orderly logic that we have constructed. It is in the above series of denunciations that the third effect of incommensurability becomes clearest, and that is Ṣaleḥ's *alienation* from his reality:

> Yes - I said to myself - I did visit Layla Al-Ḥayek. Yes, this is my pack of cigarettes. Yes the doorkeeper saw me wear my gloves and put an elongated item in my coat's pocket. Yes I tried to take the elevator up again to Layla's house. Yes I asked for two thirds of the inheritance for the Argentinian inheritor. Yes. Yes. Yes. [237]

However, Ṣaleḥ noted earlier that the criminal component of the story (the stabbing) — which probably was 30 seconds in the whole story — was not done by him. I suggest that this is what he

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[233] *Ibid,* at 114.
[234] *Ibid.*
[235] *Ibid,* at 76 - 77.
[236] *Ibid,* at 129 - 130.
[237] *Ibid*, at 79.

means when tells Dima in the letter: "Yes: I am part of this crime, and so are you… But the one who implemented the crime is a mysterious monster that remains — and will remain — unleashed."[238] What we have seen in this section is that Ṣaleḥ's lived experience doesn't meet the criteria of believability internalized by the court, which leads to a distortion of his reality. This distortion of reality does not merely offer a description of what happened; as Spivak has put it in another context, it rather shows "how an explanation and narrative of reality was established as the normative one." [239]

The result of the court's adherence to the tradition's standards of impartiality and objectivity in adjudicating a conflict predicated on constitutive incommensurability is that Ṣaleḥ's experience becomes a *constructed reality*. This constructed reality is established as a *normative narrative* by the ultimate decision-making and truth-finding body in the justice system, causing Ṣaleḥ to experience a total alienation from his actual, *lived reality.* Assuming Ṣaleḥ's innocence, the problem here is that while both the defense and prosecution's narratives were seemingly believable and logical, they are in fact works of fiction. This disjuncture between Ṣaleḥ's lived reality and the law's constructed reality amounts to what I call **Alienation** and is the third effect of conceptual subjugation corresponding to incommensurability at the third level of legality. Recall that per Mills' theory, the third and fourth elements of legality (traditions and laws) are its substantive elements. At this stage, the conflict surpassed the constitutive elements of legality, and we saw that Ṣaleḥ was grappling with its substantive elements, which made the conflict appear as a battle of narratives. Crucially, the narratives put forth by the lawyers, and the narrative upheld by the court at the end, belong to a different worldview and begin from a different starting point than that of Ṣaleḥ's narrative.

3.2.5. Fourth Stage of Subjugation: Elimination

In the end, the court rejects Ṣaleḥ's statements, made at the beginning of the investigation, that he knew nothing about the inheritance before meeting Saʿid and that all these events happened by

[238] *Ibid,* at 8.
[239] Gayatri Spivak, *supra* 85, at 249.

mere coincidence. The court is not convinced of the defense's "presumptive constructions [...] of the established evidence"[240] and as such rejects the existence of the unknown criminal for lack of proof. Based on the evidence and the witness statements of the doorkeeper, Hanaa', the neighbors, the kiosk vendor, Saʿid, and Dima, the court upholds the prosecution's submission. The court is satisfied that the elongated item that Ṣaleḥ placed in his coat pocket is the knife he used to commit the murder, which the kiosk vendor saw him dispose of into the sea. It is also satisfied that his fingerprints at the edge of the door prove his knowledge that the victim was inside the house, and that his presence at the crime scene during the time of the murder is confirmed by the neighbors and the cigarette pack which he had confessed belonged to him. The court finds Ṣaleḥ guilty.[241]

Readers may blame Ṣaleḥ for this result given his utter silence during the course of the trial. This is the view of the prosecutor, who asserts that Ṣaleḥ's silence is "an attempt to embarrass the judiciary and force justice into a predicament."[242] He further adds that the only logical explanation for the silence of an adept lawyer like Ṣaleḥ is in being an honest confession to himself.[243] The court shares the prosecution's deduction, Ṣaleḥ tells us:

> The presiding judge announced that the bench is absolutely convinced that my silence is a form of admittance of guilt prompted by the multitude of available evidence that I didn't account for. Then, he went on to count in a tone of exalted grandeur, with everyone [else] standing, an endless series of legal clauses. [He] then looked at me directly while ruling that the sentence will be — as I had expected while listening to the particularities of the judgment — execution by hanging.[244]

The death sentence amounts to the fourth, and last, stage of conceptual subjugation which in this case is **Elimination**. Of course, the death sentence signifies Ṣaleḥ's literal elimination. But it signifies more than that as well.

Recall that Ṣaleḥ is no longer concerned about the practical impact of our judgment as readers (or the court's for that matter), but is concerned with the unacknowledged clash of worldviews underlying the conflict. Despite his physical elimination, his worldview now has been passed on

[240] Ghassan Kanafani, *supra 37*, at 152.
[241] *Ibid*, at 154.
[242] *Ibid,* at 83.
[243] *Ibid*, at 96.
[244] Ghassan Kanafani, *supra 37*, at 154.

to Dima (and to the readers). If Ṣaleḥ is concerned with truth for its own sake, then he has done his part to ensure that even if he is eliminated, his truth is not. He warns Dima that if she chooses to re-open the case before the law after his death she will enter into the same dead-end,[245] as though warning her of the futility of fighting for truth using the paradigm and the tools that structurally lack the capacity for attaining a holistic truth.

While the court's judgment is conclusive, the novel remains open-ended. Ṣaleḥ tells Dima that he doesn't claim to be courageous and that he doesn't know if his words will slip from his tongue despite his will at the moment of execution.[246] He further tells her that he hopes the defense attorney's curiosity doesn't lead him to open the letter before Ṣaleḥ faces his fate. The certainty-contingency contrast that Kanafani chooses to ascribe to the dominant-marginalized paradigms here echoes Mills' contrast between certainty-contingency privileging societies. While the form of elimination Ṣaleḥ is about to experience, i.e. death, is imminent and material, the contingency that Kanafani attaches to the occurrence can be interpreted metaphorically as a form of perpetual elimination — a phase that is always happening. The elimination here is thus not just of Ṣaleḥ, but of his worldview; moreover, the elimination is a dynamic feature of the conceptual subjugation, not a single event.

While narrating the events at the trial, Ṣaleḥ announces to the reader that "As for me, I knew I was, like you, an outsider to this whole matter!"[247] How could he be an outsider when he is the only defendant and primary subject of the trial? Ṣaleḥ seems to have removed himself *conceptually*, rather than materially, because he is convinced that how the course of justice is unfolding does not concern him anymore and that these proceedings are incapable of ascertaining the truth. After having questioned the tradition of impartiality earlier, Ṣaleḥ now goes on to unsettle the abstraction of the law:

> I have now waned (or perhaps elevated?) from a person to an abstraction in the eyes of the prosecution and the defense at once, and I was happy that this happened quickly given that I had considered myself, through silence, an abstraction that justice cannot deal with.[248]

[245] *Ibid,* at 9.
[246] *Ibid,* at 155.
[247] *Ibid,* at 65.
[248] *Ibid*, at 106.

Notice how silence, abstraction, and elimination are intimately connected to one another in both this excerpt and the previous one. In this excerpt, we notice a reference to a dual abstraction. The first abstraction is the court's treatment of Ṣaleḥ, like any other defendant, as an abstract person. The second is Ṣaleḥ's assessment of his own silence as a manifestation of abstraction. Curiously, he instinctively refers to the first abstraction as "waning" as seen from his perspective and immediately captures the court's perspective which regards this abstraction as an elevation. Either way, Ṣaleḥ is convinced that justice — unlike law — is incapable of dealing with such abstraction. In the previous excerpt, the judge's invocation of the articles and statutes in which he grounds the conviction and the death sentence come immediately after the judge's assertion that Ṣaleḥ's silence is an admission of guilt. We were told how the judge recited the articles and statutes in a "tone of exalted grandeur." The depiction of reciting "endless series of legal clauses" captures both the form of liberal laws as being general and abstract and the grandeur or elevation that the dominant paradigm attaches to this form.

Recall that Mills explains that the liberal tradition of impartiality conditions and empowers the abstraction and generality of liberal laws.[249] As such, with every level of legality, it becomes clearer that the law Ṣaleḥ is unsettling in the novel is embedded in a similar kind of legality that Mills described as liberal. By now, it can be said that the kind of law Ṣaleḥ is unsettling cannot justly resolve a legal impasse when the conflict involves constitutive incommensurability. However, although Ṣaleḥ seems to have given up on law's material justice as rendered by the court, he doesn't seem to have given up on all forms of justice altogether when he says:

> I don't care whether this coincidence was disguised as a thief, or an infernal criminal that had been after me from the start. What concerns me is that my opponent in this miserable case is the coincidence, which pushed me with an inconceivable persistence, to the dock. And it — alone — must now step forward, if it wishes to set me free![250]

Here, Ṣaleḥ seems to be appealing to, or at least vesting any remaining hope in, a transcendental force beyond the human constructed processes and mechanism. Here, again, it is my interpretation that Ṣaleḥ is signaling the finitude of human justice and its application. With the finitude of human

[249] Aaron Mills, *supra 79*, at 64.
[250] Ghassan Kanafani, *supra 37*, at 151.

justice in mind, Ṣaleḥ tells us that at this point it was no longer important what the real story was because we "were entering a translucent, counterfeit world that didn't concern anyone of us."[251]

One can better understand Ṣaleḥ's seemingly pessimistic outlook when it is read alongside the following reflection about the purpose of life:

> "Only time will reveal to the person isolated amidst four walls that these values [love, relationships, work, life] are in fact a game that we ourselves have invented to cross this path without much boredom, and what would be the meaning of life then?"[252]

My analysis is that, while this may seem like a pessimistically rhetorical question, it could also be seen as a genuine, provocative question. I suggest that when Ṣaleḥ comes face-to-face with the prospect of his imminent death, that is the moment where his narration becomes raw, naked and uncensored, for he no longer has anything left to lose. It is arguably the moment where he is most honest and genuine with himself as well as with Dima and the reader. In the opening paragraph of the novel, Ṣaleḥ told us that he expects nothing in return, which suggests that he is telling the truth for its own sake. He represents his truth in a story-based narrative. Recall that rooted laws emphasize stories and individual responsibility and are organized in relational categories. This echoes the kind of responsibility that Ṣaleḥ himself exercised once his paradigm shifted. He recognized that even with the limited tools and options available to him, he still had a choice and he chose silence arguably for reasons not informed by self-interest.

With this view in mind, I would argue that to accept the proposition that Ṣaleḥ is at fault for choosing silence is to fail to take his ordeal seriously. Why, then, does Ṣaleḥ choose silence? We gather some insight from the submission of the defense:

> Many times we have seen innocent defendants embarking on a deadly hunger strike, thereby choosing death for themselves before being forced into it by a miscarriage of justice. Silence is a cry [against injustice], only deeper and more befitting for human dignity.
> [...]
> What evidence is more powerful [to attest] to this man's innocence than choosing to be silent when his life is on a knife-edge?
> [...]

[251] *Ibid*, at 136.
[252] *Ibid,* at 137.

Why would he choose to be silent if silence itself was not the deepest human defense of life?[253]

On the defense's reading, Ṣaleḥ's silence is an exemplary protest against the injustice inflicted by the law. Nonetheless, if we take Ṣaleḥ's invitation seriously, we will see that his silence has a deeper rationale. I suggest that in his silence, Ṣaleḥ is resisting the conceptual subjugation of the dominant paradigm. He is refusing to relinquish his logic, to assimilate his existential conceptualization of reality with that of the dominant paradigm, and to represent his case using the master's tools. He is refusing to represent truth through the lens of the dominant paradigm. Ṣaleḥ's silence is a refusal to voluntarily walk into the very first stage of subjugation (Fragmentation) triggered by the denial of constitutive incommensurability, which silenced his truth claims *a priori*. While silence is often regarded as a passive act, if we accept that his silence was a protest to conceptual subjugation, Ṣaleḥ's protest amounts to a proactive exercise of his responsibility to confront incommensurability and erasure.

Prima facie, the court's process may seem like a dialogue, or an invitation for a dialogue, in which parties put forth their competing claims and in which Ṣaleḥ declines to participate. Nonetheless, understanding that the nature of the conflict involves a constitutive incommensurability allows us to understand that had Ṣaleḥ spoken, he would not have entered into a dialogue. He would have been subsumed into the court's monologue because the root cause of the conflict (i.e. the worldview difference) is excluded from the conversation. In turn, through the letter, Ṣaleḥ tells his truth in a monologue of his own, addressed to those who may be willing or able to take what the 'Other Thing' reveals seriously.

To take Ṣaleḥ's claim seriously we should attend to the function that Kanafani assigns to the 'Other Thing. Let us assume that we recognize this force and acknowledge that the dispute, at its root, is predicated on incommensurable worldviews. Then, we ought to realize the multi-layered and dynamic nature of this exclusion. If the 'Other Thing' is a floating signifier that, in Ṣaleḥ's case, uncovers the effects of incommensurability as a quadripartite conceptual subjugation, then we ought to ask: what does the 'Other Thing' reveal about Ṣaleḥ's own narrative? Shouldn't

[253] *Ibid*, 107 - 108.

acknowledging the 'Other Thing' lead us to question what Ṣaleḥ is excluding and therefore lead us to unsettle some of his presumptions? This is what I intend to do in the following section.

3.3. Horizontal Subjugation — Multi-Layered Interpretations

3.3.1. Silencing Erasure: Layla's Experience

Ṣaleḥ's encounter with the 'Other Thing' brought to his attention an unrecognized force that revealed to him a dialectic of inclusion and exclusion; and it was this shift in perception that positioned Ṣaleḥ outside the dominant paradigm and its linear treatment of the truth. However, it is the recognition of this exclusionary effect — which we, as readers, engage with as we move with Ṣaleḥ through his reflective journey — that enables us to see the inclusive potential of the 'Other Thing'. Realizing this potential places a responsibility on the reader to problematize Ṣaleḥ's truth.

This responsibility is somewhat complex. On the one hand, the reader has many reasons to be sympathetic to Ṣaleḥ, if not because of his conceptual subjugation then at least because an innocent man is about to be hanged. Further, the reader is persuaded by the idea that Ṣaleḥ has nothing left to gain or lose which also suggests that Ṣaleḥ is being honest. The reader is further inclined to believe that Ṣaleḥ is honest as he transitions towards humility and fragility triggered by his imminent death. However, the reader's sympathy stands in tension with the reader's responsibility not to settle for a linear truth and rather pursue a more holistic truth as demanded by the novel. The reader's responsibility is heightened when Ṣaleḥ discloses an incident from his teenage years whereby he committed rape against the house helper in broad day light with the shutters and windows wide open.[254] Ṣaleḥ tells us that he had made amends with his victim, but discloses this story to further problematize the dominant paradigm's treatment of truth. It was her word against

[254] *Ibid*, 130 - 132.

his. His parents concluded that the helper's claim was unreasonable and unconvincing considering the circumstances, despite the fact that her claim was, in fact, real.[255]

This confession is strikingly honest; but the confession of the crime nevertheless forces upon the reader a divergence between her own point of view and Ṣaleḥ's. The reader must now evaluate the reliability of Ṣaleḥ as a narrator. In the reader's view, Ṣaleḥ has not only cheated on his wife and acted immorally and illegally in relation to the inheritance lawsuit, but now further admits to having committed a horrific crime in the past. But the reader faces a challenge. How can she form a judgment about Ṣaleḥ without reverting to the court's logical and linear constructs, without relying on the same evidence that builds an incomplete story?

The deconstructive form of the novel gives us insight. Let us go back to where we began: the 'Other Thing'. Confronted with the need to form a judgment of Ṣaleḥ, the reader now has her own encounter with the 'Other Thing'. Just as Ṣaleḥ searched for and discovered the law's blind spots, the reader must search for and discover Ṣaleḥ's. Ṣaleḥ may have successfully persuaded the reader to accept that the hegemonic power of the dominant paradigm marginalizes that which stands outside it. Taking Ṣaleḥ's claim seriously on its own terms, the critical and conscientious reader cannot now but ask: What about Layla? After all, while Ṣaleḥ may be a victim of a tragic miscarriage of justice, Layla is the primary victim in the story. And, if we believe that Ṣaleḥ is innocent, then Layla's real murderer remains unknown and her truth becomes not only misrepresented but erased. Even when the case was fully processed and concluded, and after Ṣaleḥ processed his own trauma and concluded his monologue, Layla's reality remains unseen not only by the law but by Ṣaleḥ as well.

With the exception of some utterances that Ṣaleḥ quotes from his conversations with her, we mostly hear Layla's experience as a subject through Ṣaleḥ's (and Saʿid's) representations of her subjectivity. This bears a certain resemblance to the prosecution's and defense's representations of Ṣaleḥ's experience whilst he remained silent. However, a crucial difference is that Ṣaleḥ *chose silence*. Even if we interpret his silence an act of resisting conceptual subjugation, silence was still a choice that he made. Layla, on the other hand, is *being silenced*.

[255] *Ibid.*

The first act of silencing involves the denial of Layla's subjectivity in the inheritance lawsuit. Despite being the sole lawful beneficiary of her father's wealth, both Saʿid and Ṣaleḥ undermine her lawful status and yet find ways to justify their actions. Not only do the two men give themselves an unwarranted right to meddle with Layla's inheritance, but they further agree that "a massive fortune falling upon a woman could have unforeseen ramifications".[256] The two men thus conspire to control Layla's lawsuit. In so doing, they fail to treat Layla as a competent subject; indeed, they treat her as a cog in their plan, a tool to be manipulated to suit their purposes. Effectively, Layla becomes a quasi-subject.

Saʿid rationalizes his interference under the pretext of his love for Layla and his fear of losing her.[257] And earlier, Ṣaleḥ told us of his observation about Saʿid at the nightclub that he is one of "this type of men who suffers from a mysterious feeling that he hasn't completely *owned* his lover, yet."[258] Here, we now notice a second shift that explicitly moves Layla from a quasi-subject to an object of possession. Having denied her subjectivity, Ṣaleḥ, himself acting as a full subject, now speaks on behalf of the subjected as we shall see.

Ṣaleḥ represents Layla — the object of his desire — as "half pretty, but kindled with an enticing flame and not any sane man could stop himself from thinking of her as a mistress"[259] and further that she was "simpler than I expected."[260] He says that "Layla is an easy woman"[261] and at a later point he rationalizes his agreement to represent the imposter in the lawsuit because "the husband is the only route to an easy wife."[262] After parting ways at the nightclub, to make sure that Dima doesn't become suspicious, Ṣaleḥ tells us that "I told my wife that [...] Layla was a dull woman. But, deep inside me, I was certain that I implanted myself in her depths."[263] What is striking is that Ṣaleḥ seems to have gathered all this about Layla from their first and brief encounter at the

[256] *Ibid,* at 29.
[257] *Ibid*, at 28 - 29.
[258] *Ibid,* at 21, emphasis added.
[259] *Ibid,* at 22.
[260] *Ibid,* at 24.
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid,* at 25.

nightclub. Here, Ṣaleḥ has objectified Layla and further entitled himself to judge, narrate and assess her being with certainty and through his own lens.

This representation does not only concern the inheritance lawsuit. Ṣaleḥ makes several assumptions about Layla's innermost consciousness including her reasons for having an affair with him,[264] her feelings during their sexual encounter,[265] and her conceptualization of the affair in relation to her husband.[266] Ṣaleḥ imposes his viewpoint in narrating Layla's experience, not only without having heard how she actually reasoned, felt, or thought, but all the while with an ungrounded sense of entitlement. What the law does to Ṣaleḥ, Ṣaleḥ does to Layla. He reduces her lived experience to a reality constructed within the frames of his own paradigm.

How should we characterize the paradigm that Ṣaleḥ (and Saʿid) impose on Layla? I would argue that this paradigm has roots in patriarchal presuppositions about women and a denial of their agency. With such meta-truths underlying the patriarchal paradigm, Ṣaleḥ and Saʿid find a logic that triggers (constitutes) their entitlement to interfere with, objectify, and narrate Layla and concurrently justifies (reinforces) their treatment of Layla as a woman.

Having explored some aspects of Ṣaleḥ's silencing of Layla, I now explore what else may be silenced in Kanafani's novel. I have discussed in Chapter 1 that *The Other Thing* is often considered an anomaly within Kanafani's genre and I have suggested that perhaps readers have underestimated the novel's relevance to Kanafani's core theme. In two upcoming sections, I develop that suggestion by showing how the novel is intimately connected to Kanafani's broader work. I will do so by drawing parallels first between Layla's experience and the Palestinian experience and then between Ṣaleḥ's experience and that of Palestine.

[264] *Ibid,* at 44 - 47.
[265] *Ibid*, at 41 - 42 and 98 - 99.
[266] *Ibid,* at 47.

3.3.2. Drawing Parallels I: The Native-Settler Dichotomy

Though the Palestinian experience of exile, erasure, and ethnic cleansing spans over several decades and is still ongoing, the 1948 *Nakba*[267] remains the most important memory in Palestinian consciousness. In a sense, it is like Layla's death, which stands as an event in the middle of a past of subjugation and a future in which her real murderer remains free. The *Nakba* was how the settler-colonial state to-be paved the way for its creation atop 78% of indigenous Palestine.[268] Israel, deemed illegal and illegitimate in the collective Palestinian consciousness, was founded in 1948 on the ruins of destroyed indigenous villages, a blood-filled structure of scores of massacres, and the expulsion of 750-900,000 Palestinians in that year alone.[269] Different forms of violence and subjugation continued post-1948, including the forced expulsion of another 400,000 Palestinians[270] in the 1967 *Naksa* when Israel usurped that remainder of indigenous Palestine.[271] The atrocities and displacements that happened prior to and after 1948, without redress or accountability, are too many to list; the radical transformation of landscape and demography is persistent. Crucially though, the indigenous people of Palestine have repeatedly emphasized that the *Nakba*, just like settler-colonialism in Turtle Island, is not a past event but a "history of the present."[272]

Despite the severity of the tragedy and trauma, the *Nakba* and the lived experiences of the indigenous people of Palestine remain poorly known outside the Middle East and North Africa. Like Layla, and similar to the natives' experience in Turtle Island,[273] as the indigenous people of

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[267] See note *supra* 21.
[268] Nur Masalha. "Remembering the Palestinian Nakba: Commemoration, Oral History and Narratives of Memory." (2008) 7:2 Holy Land Stud 123, at 124.
[269] Nihad Boqa'i, "Patterns of Internal Displacement, Social Adjustment and the Challenge of Return" in Nur Masalha, ed, *Catastrophe Remembered* (London: Zed Books, 2005) at 73.
[270] Approximately half of them dispossessed for the second time in under two decades. See Nur Masalha (2012), *supra* 21.
[271] *Ibid.* Note: The *Naksa (or Naksa* Day) in Arabic means "setback" and commemorates the 1967 Six Day War after which Israel occupied the West Bank, Gaza Strip, Jerusalem, Sinai and the Golan Heights. See Mazin B Qumsiyeh, *Popular Resistance in Palestine: A History of Hope and Empowerment* (London: Pluto Press, 2011).
[272] Lena Jayyusi, "Iterability, Cumulativity, and Presence: The Relational Figures of Palestinian Memory" and Lila Abu-Lughod, "Return to Half-Ruins: Memory, Postmemory, and Living History in Palestine" in Ahmad H Sa'adi and Lila Abu-Lughod, eds, *Nakba: Palestine 1948, and the Claims of Memory* (New York: Columbia University Press, 2007) 77 107 & 107-135, at 128.
[273] It is important to note that the experiences of First Nations, Inuit and Métis people in Canada and other indigenous peoples across North America are diverse and unique. My comparison is neither intended to make any

Palestine we have not only experienced physical violence against our bodies and lands, and not only collective violence against our peoplehood and culture, but more importantly epistemic violence against how we conceptualize our lives, roots, and relationships with one another and with the land. The erasure of our narrative through memoricide and cognitive displacement from our history is one of the forms of subjugation that is inflicted against every Palestinian today.[274]

Edward Saʿid asserted that understanding the silencing and erasure of Palestine and the Palestinians from history requires understanding, amongst other things, the contest of affirmation and denial within which Palestine/Palestinians are situated.[275] Interestingly, there seems to be an intersection between what Saʿid calls an affirmation/denial contest and the novel's inclusion/exclusion dialectic revealed by the 'Other Thing'. I will return to this contest surrounding Palestine in greater detail in Chapter 4. For now, I want to offer a brief summary of some key international affairs that have impacted the Palestinian experience and demonstrate the parallels with Layla's experience.

At the turn of the 20th century, a European-based nationalist movement known as Zionism emerged with the objective of creating a purely Jewish state in Palestine with two announced motives. The first motive was to escape anti-Semitism, rendering Israel partly a product of "religious and racial intolerance of the Europeans"[276] which was later exacerbated by the Holocaust in Europe.[277] The second motive, in the words of the founding father of modern Zionism Theodor Herzl, was to serve as Europe's "wall of defense against Asia: we could serve as an

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pan-indigenous claims across the continent nor reduces the experiences of Palestine and Turtle Island in terms of one another.

[274] Rashid Khalidi, *The Hundred Years' War on Palestine: A History of Settler Colonial Conquest and Resistance* (London: Profile Books Ltd, 2020), at 323.

[275] This contest is complicated first by a struggle between presence and interpretation where, in the Western mind, Palestine was controlled not by the present realities of the Palestinians as the indigenous community of the land but rather by an Orientalist imagination and gaze on Palestine's past and future. In Saʿid's words: "Palestine was seen as a place to be possessed *anew* and reconstituted". See Edward Said. "The Idea of Palestine in the West" (1978) 70 MERIP Rep 3, at 4. Secondly, this contest is further complicated by an underlying Western prejudice towards the Middle East, Arabs, and Islam generally and an underlying discourse of civilization convoluted with Euro-colonial biblical imageries about the Holy Land. See Edward Said (1978) *supra* 5. See also, Steven Salaita, *The Holy Land in Transit: Colonialism and the Quest for Canaan* (New York: Syracuse University Press, 2006).

[276] Nur Masalha and Lisa Isherwood, eds, *Theologies of Liberation in Palestine-Israel: Indigenous, Contextual, and Postcolonial Perspectives* (Cambridge: The Lutterworth Press, 2014), at 194.

[277] *Ibid;* see also Bashir Bashir & Amos Goldberg, eds, *The Holocaust and the Nakba: A New Grammar of History and Trauma* (New York: Columbia University Press, 2019).

outpost against barbarism. As a neutral state we would remain in contact with all of Europe, which would have to guarantee our existence."[278] More than a century later, the same Eurocentric discourse persists, reiterating the representation of Israel and its indigenous Other as "an outpost of the West, as they see it and as we also see ourselves, in a largely Islamic, backward and in some ways even barbaric area."[279]

This discourse of civilization resonated with imperial European powers and in particular Britain which first occupied Palestine in 1917 and later "ruled" it under the League of Nation's colonial Mandate System from 1922 until 1948.[280] Britain, lacking legal presence and status, promised the Zionist movement the creation of a Jewish homeland in Palestine (under the Balfour Declaration) despite having had a different, contradictory agreement with Arab representatives (under the Hussein-McMahon Correspondence).[281] Simultaneously, Britain crafted a secret treaty with France (the Sykes-Picot Agreement) to divide and conquer the Levant and parts of Mesopotamia.[282]

What parallels does the novel invite between Layla's experience and Palestine?

Firstly, Ṣaleḥ's descriptions and objectification of Layla, the lust driving his pursuit, and his portrayals of her as a target of his desire reproduce some features of European colonialism. However, I must caution that the experience is not identical. Unlike the victims of colonialism, Layla is a willing participate in her extra-marital affair with Ṣaleḥ. Her reasons for doing so remain unknown to us, but are assumed by Ṣaleḥ. Nevertheless, Ṣaleḥ's approach to his pursuit of Layla captures the greed of conquest underlying the expansionist logic used to justify the invasion and appropriation of indigenous lands across the world.[283] Much of the early European colonization was justified under *jus gentium* on the grounds of universality that concealed its underlying

[278] Theodor Herzl & Harry Zohn, trans, *The Jewish State* (New York: Herzl Press, 1970), at 52.
[279] Nur Masalha (2012), *supra* 21, at 198.
[280] Henry Cattan, *Palestine and International Law,* 2nd ed. (London: Longman, 1976), at 13 – 16.
[281] *Ibid,* at 52 - 57; see also Abdul Latif Tibawi, *Anglo-Arab Relations and the Question of Palestine 1914 - 1921,* 2nd ed (London: Luzac & Company Ltd, 1978).
[282] *Ibid,* Tibawi; see also, The Sykes-Picot Agreement 1916, online (archive) Yale Law School Avalon Project <https://avalon.law.yale.edu/20th_century/sykes.asp>.
[283] Judith Butler, "Restaging the Universal: Hegemony and the Limits of Formalism," in Judith Butler et al., *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London: Verso, 2000), at 35.

Eurocentric worldview.[284] Peter Fitzpatrick explains that "with the creation of modern European identity in Enlightenment, the world was reduced to European terms and those terms were equated with universality."[285] Ṣaleḥ, too, appeals to the logic of universality in his justification that not "any sane man could stop himself"[286] from coveting Layla.

Ṣaleḥ and Saʿid's underlying patriarchal presumptions reduced Layla from a subject to a quasi-subject and then to a non-subject. Here, the treatment of non-European subjectivity by European powers becomes relevant. Fitzpatrick adds that whichever "stood outside of the absolutely universal could only be absolutely different to it. It could only be an aberration or something other than what it should be."[287] As such, under the "all-defining gaze of Enlightenment, the enslaved were purposively constructed as essentially different and strange."[288] Lacking European subjectivity, indigenous peoples were stripped of a subjectivity of their own. Centuries later, in the case of Palestine and under a similar gaze masquerading as "civilization", European powers justified the imposition of a Mandate system on what were deemed quasi-nations[289] for purportedly lacking complete European subjectivity demanded by universality.

Further, Ṣaleḥ's objectification of Layla captures the presumptions embedded in the colonial worldview that treat land as a commodity and both the land and its people as objects of territorial conquest. It also mirrors the self-entitled presumptions of the conqueror's superior knowledge over the native's and the capacity to judge, narrate, and assess the native's being, reality, and way of life from their colonial paradigm.

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[284] See generally Antony Anghie *supra* 11; see also James Tully, *Public Philosophy in a New Key: Volume II, Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008).
[285] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), at 65.
[286] Ghassan Kanafani, *supra 37,* at 22; also *supra* 259.
[287] Peter Fitzpatrick, *supra* 285.
[288] *Ibid,* at 66.
[289] It is important to note, and especially in the context of sovereignty, that the marginalization of subjects is not binary. While full subjects were regarded as sovereign and others were denied sovereignty for lacking subjectivity, much of the imperial dealings with third world nations in postcolonial contexts and the context of postcolonial nationalism was informed by this view of quasi-subjectivity, which afforded these nations quasi-sovereignty. Antony Anghie (*supra* 11) and Joseph Massad (*supra* 19) discuss some aspects of this phenomenon. You can also refer to Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996) cited in Joseph Massad, *supra* 19, at 186.

Secondly, the image of Ṣaleḥ and Saʿid meddling in Layla's inheritance and making decisions without permission or consultation echoes imperialistic dealings surrounding Palestine. There is a striking similarity between the behavior of Ṣaleḥ and Saʿid in the novel and the role of imperial powers at the League of Nations. This self-appointed body classified conquered colonies under a three-tiered (A, B and C) Mandate System, effectively ranking nations from the most civilized to least civilized according to standards of presumed universality under the selfsame Eurocentric gaze.[290] Such standards, including conceptions of sovereignty, territory, and political community, were part of the meta-truths of the emerging hegemonic international legal order.

Just like Ṣaleḥ and Saʿid vis-a-vis Layla, these powers were deciding the world's fate singlehandedly without input by or the knowledge of those impacted by these decisions, and above all claiming to do so under the claim of the "sacred trust of civilization."[291] Lord Balfour explained at the creation of the Mandate System that "a mandate is a self-imposed limitation by the conquerors on the sovereignty which they obtained over conquered territories".[292] However, this was to be done not in accordance with the will of the inhabitants, but according to what the occupiers "conceived to be the general welfare of mankind."[293] Like the two men in the novel who assumed superior knowledge of Layla's own good, and assumed the authority to better manage her family's wealth and resources, so did imperialist powers in relation to indigenous people and their ancestral lands. The United Nations proposal in 1947 to divvy up Palestine is no different. Viewed as unlawful from the Palestinian perspective, a majority of European and European settler-colonial offshoots voted in favor of the division despite its vehement rejection by Palestine's majority indigenous inhabitants.[294]

There are further resemblances that echo Britain's cunningness in its dealings whether in relation to Palestine or even, by comparison, to Turtle Island.

[290] Antony Anghie *supra* 11, at 121.
[291] Covenant of the League of Nations, Article 22; see also Natasha Wheatley. "Mandatory Interpretation: Legal Hermeneutics and the New International Order" (2015) 1:227 Past & Present, 205.
[292] UNSCOP, Report to the General Assembly, Second Session, Volume I, A/364 (03 Sep. 1947), at 72.
[293] *Ibid.*
[294] Henry Cattan, *supra* 280.

In the Hussein-McMahon correspondence, Britain promised the Arabs that all the countries under the Ottoman Empire including Palestine would gain liberation if they would join the fight against the Ottomans.[295] It was on the basis of protecting their land and achieving their liberation that the Arabs supported the British. Entering into this agreement and acting upon it was a material exercise of their legal subjectivity. Yet, unbeknown to them, Britain crafted a secret arrangement with imperial France to slice up the Levant and split the region amongst themselves after the fall of the Ottoman Empire.[296] By parity of reasoning, in Turtle Island, the Crown entered into agreements with (some) First Nations without intending to uphold their part of the deal.[297] In the context of broken agreements, Georges Erasmus and Joe Sanders reflect that "it was quite amazing to our people — and it took them a long, long time to realize — that they could sit with other people whose religious leaders were present, and who would be virtually lying to our people as they were executing the treaty. Even before the document reached London or Paris or Ottawa, they were already forgetting the solemn promises they had made."[298]

When Britain promised the Zionist Organization that it would designate Palestine as a "national home to the Jews", neither Britain nor incoming European Jewish settlers had *de facto* or *de jure* sovereignty over Palestine.[299] The overwhelming majority of the land was owned by the indigenous people of Palestine, who were also the vast majority of inhabitants. Just as Britain and the United Nations were not entitled to dispose of Palestine against the will of its inhabitants, neither Ṣaleḥ or Saʿid's were free to dispose of Layla's inheritance without her permission. And just as the foreign imposter was wrongfully claiming a share of Layla's inheritance, the Zionists were conspiring with imperial European powers to lay claim on lands and resources to which they had no entitlement.

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[295] *Ibid,* at 105. Note that, while much of the literature has generally treated this as a disagreement of equal merit, the available evidence suggests that the Arabs were correct in their understanding that post-war Arab independence included Palestine, a conclusion that British archival materials now show the United Kingdom agreed with in private. See Ardi Imseis, *supra* 23, at 32 and Kattan, *supra* 7, at 98.
[296] For a thorough examination on the founding documents leading up to the Palestinian Catastrophe, see Ardi Imseis, *supra 23*.
[297] Georges Erasmus & Joe Sanders, "Canadian History: An Aboriginal Perspective" in Diane Engelstad & John Bird, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Toronto: Irwin Publishing, 1999).
[298] *Ibid*, at 3.
[299] Ardi Imseis, *supra 23*, at 35 noting that "at the time the Declaration was issued, neither the British nor the Zionists actually had physical possession or legal title to Palestine."

3.3.3. Drawing Parallels II: The Hegemon-Subaltern Dichotomy

Just as the 'Other Thing' is a floating signifier, so are the targets of subjugation in the novel. So far, *The Other Thing* has helped us unsettle the validity of the criteria for assessing truth, and explore the subjugation and exclusion that arise under the dominant truth paradigm. Kanafani weaves the multi-layered development of subjugation throughout the novel, which is complicated by the circular and dynamic nature of the 'Other Thing'. But, acknowledging that both Layla and Ṣaleḥ are subjugated enables us to see that marginalized subjects are heterogeneous. This brings us to the following questions: what is the significance of analogizing Palestine to Layla, the main female figure in the novel, rather than with Ṣaleḥ? How does that help us understand the meaning of Ṣaleḥ's subjugation by the law? Does it illuminate at all the roles of Saʿid, the foreign imposter, Layla's father and Dima?

In the Palestinian context, the formation of women's gender identity both deeply influenced, and was influenced by, the Palestinian struggle for liberation. Gender identity became understood through the metaphor of "Palestine as a woman and women as Palestine."[300] This entanglement is not surprising as Palestinian women have been systematically targeted by Zionist colonization and violence.[301] Like many settler-colonial strategies of dispossession, gender oppression cannot be isolated or separated from the violence against the land or the broader colonial oppression.[302] Palestine is not different from other indigenous struggles where women are well understood, by both the native and the oppressor, to be the thread that sews the fabric of society together. In such a context, it is virtually impossible to make a separation between the private and the public because

[300] Laura Khoury & Seif Dana. "Palestine as a Woman: Feminizing Resistance and Popular Literature" (2013) 16:2 Arab World Geogr 147, at 147.
[301] Nadera Shalhoub-Kevorkian. "Voice Therapy for Women Aligned with Political Prisoners: A Case Study of Trauma Among Palestinian Women in the Second Intifada" (2005) 79:2 Soc Serv Rev 322; Rosemary Sayigh, *The Palestinians: From Peasants to Revolutionaries* (London: Zed Books, 2007).
[302] Examples abound, see Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005); Bonita Lawrence. "Gender, Race, and the Regulation of Native Identity in Canada and the US: An Overview" (2003) 18:2 Hypatia 3; Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford: Oxford University Press, 2019); Patricia Monture, "Race, Gender, and the University: Strategies for Survival" in Sherene Razack, Malinda Smith, & Sunera Thobani, eds, *States of Race: Critical Race Feminism for the 21st Century* (Toronto: Between the Lines, 2010); Brenna Bhandar & Rafeef Ziadah, eds, *Revolutionary Feminisms* (London: Verso Books, 2020). See also the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019, online: <https://www.mmiwg-ffada.ca/final-report/>.

a domestic act by a Palestinian woman is as much an act of resistance as her public participation in the struggle for liberation.

Kanafani was amongst numerous renowned Palestinian intellectuals who contributed to the development of this gender identity and whose literary writings constantly engaged with the struggles of Palestinian women. For example, in a novel called *Um Sa'ad*[303] named for the protagonist of this masterpiece, Kanafani tells the story of an old woman, a revolutionary elder who takes care of liberation warriors. She is among the "ordinary Palestinian women who do extraordinary things. She is a woman who struggles to sustain the basic daily needs, socializes her children to join the resistance, and at times acts as a philosopher of the revolution."[304] Some have suggested that Um Sa'ad "herself is the Palestinian revolution."[305] Just as the Palestinian revolution allegorically appears as Um Saʿad, so does it appear as Layla in *The Other Thing*. Layla's death can be seen as the metaphorical and literal death of the Palestinian revolution broadly understood as Palestine, Palestinian revolutionaries, and past Palestinian elders and generations.

How, then, do we understand Ṣaleḥ's subjugation in the context of Palestine? I have so far analogized between the law in the novel and the dominant paradigm that has normative power and hegemonizing effect. Throughout the monologue, we saw that Ṣaleḥ insists that he did not kill Layla. He insists that he is not accountable for the crime, in that he is not criminally culpable. However, Ṣaleḥ does acknowledge some level of responsibility when he tells Dima that "Yes: I am part of this crime, and so are you… But the one who implemented the crime is a mysterious monster that remains — and will remain — unleashed."[306] The depiction of Ṣaleḥ as a figure who is complicit but not culpable, subjugated but also a subjugator, tragically captures the reality of Arab leaders, and later the Palestinian leadership, and their role in the tragedy that has befallen Palestine, the Palestinians and the Palestinian revolution.

Acknowledging his responsibility, Ṣaleḥ writes his letter to the person he hurt the most yet whom he says he loves the most and is his only family: Dima. This may be a gesture of handing over the

[303] Ghassan Kanafani, *supra* 37.
[304] Laura Khoury, *supra* 300, at 165.
[305] *Ibid,* 166.
[306] Ghassan Kanafani, *supra 37,* at 8.

truth to the next generation, trusting that they will continue to fight injustice as long as they live. His fear at the doubt in Dima's eyes is symbolic of each Palestinian's fear that future generations may give up on the struggle for liberation. The future generations of Palestine are central in both Palestinian and Zionist consciousness. On one hand, in the words of Ben Gurion, Zionists thought that "the old will die and the young will forget." [307] On the other hand, just like Ṣaleḥ's fear is accompanied with trust, Palestinians' hope rests with the young to hold onto their relationship with the land despite exile and dispossession and onto their memory and narrative. Yet, Ṣaleḥ warns Dima that if she chooses to re-open the case before the law — to use the master's tool — after his death, she will face the same dead-end, as though warning us of the futility of fighting for justice using the tools of the oppressor.

To continue my analogy, the United Nations, the champion of human rights and international law appears in the novel as the court, the champion of law and justice subjugating Ṣaleḥ. Its structural limitations and truth-finding tools during the trial lead not only to the distortion of Ṣaleḥ's lived experience but also to the erasure of Layla's reality. I suggest that Saʿid in the novel symbolizes Britain (or more broadly imperialist powers), unlawfully meddling in someone else's inheritance (i.e. Palestine or more broadly the Levant); and the foreign imposter who makes a false claim to the inheritance and whose incomplete paperwork is a fabrication symbolizes the Zionist Organization, which coveted Palestine, was supported by meddling imperial powers, and whose claim was incorporated into legal documents. Finally, Layla's father symbolizes our ancestors who left behind a great wealth — our land, our relationships, our ways of life.

Whereas Ṣaleḥ is a marginalized subject, Layla is marginalized and objectified. If Ṣaleḥ is the silent subaltern, Layla is the silenced subaltern. Together, the two reflect the multitude of marginalized Palestinian subjects. In Spivak's words: "the colonized subaltern subject is irretrievably heterogeneous."[308]

Layla, like Palestine, becomes an absent-present. The entire proceedings revolve around her, yet in the version of truth upheld by the law her voice is silenced and her reality is erased. Although

[307] Mona Al-Farra, "The Young Do Not Forget" in Nahla Abdo & Nur Masalha *supra* 13, at 266.
[308] Gayatri Spivak, *supra* 85, at 253.

Ṣaleḥ may not have been the one to stab Layla, by narrating her experience through a refracted lens that distorted her subjectivity, Ṣaleḥ metaphorically did kill Layla Al-Ḥayek. Similarly, as we shall see in the next chapter, while the international legal contest of affirmation and denial revolves around Palestine, the voices and realities of its people and the unique legality rooted in the land are also silenced. Neither Layla nor Palestine have seen any redress, and the true criminals remain unleashed.

The significance of Layla, her symbolism and her erasure, can best be summarized by Spivak's assessment:

> "If, in the context of colonial production, the subaltern has no history and cannot speak, the subaltern as female is even more deeply in shadow."[309]

3.4. The Novel's Form

The significance of *The Other Thing* lies in its form as much as in its content. There are several constitutive elements of the novel's form and are all crucial to the subject of its inquiry: the truth.

The Other Thing has been categorized as a mystery fiction; but in a skillful twist, Kanafani subverts the mystery genre by keeping the identity of the murderer unknown. Yet, the answer to the question of who killed Layla Al-Ḥayek is in the very title of the book. We are told from the outset who killed Layla; it is the 'Other Thing'. But Kanafani avoids attaching any precise meaning to the 'Other Thing', leaving it as an figurative device with a shifting and complex meaning. Perhaps uncovering the meaning of the 'Other Thing' is the true mystery.

As we accompanied Ṣaleḥ in the reflective journey of his monologue, we found ourselves on a reflective journey of our own as we evaluated our position vis-à-vis the characters and the symbols, and as we evaluated the position of the characters and the symbols in relation to one another. We began by accepting the invitation to engage with the 'Other Thing' when Ṣaleḥ called upon us to

[309] *Ibid,* at 257.

exercise a judgment about the nature of the conflict rather than taking his claim to innocence at face value. Our engagement took the form of seeking to understand Ṣaleḥ's truth on his own terms through uncovering the meanings as well as the blind spots of the law, Ṣaleḥ, and the reader. Taking Ṣaleḥ's claim seriously amounted to our acknowledgment of the dialectic of exclusion and inclusion that the 'Other Thing' reveals.

Curiously, we notice that we wouldn't have been able to benefit from the 'Other Thing' had we not acknowledged it. This is because recognizing that there is a constant exclusionary force is what opened the path for us to expand our perspective and to search for what is being excluded in the first place. Recall that Ṣaleḥ's paradigm shift was made possible through his encounter with the 'Other Thing' and his recognition of the parallel reality it disclosed. Once we moved from recognition to expansion, a new horizon (or potentially a new set of horizons) appeared before us and allowed us to perceive an even more encompassing truth than Ṣaleḥ himself perceived. Taking the 'Other Thing' seriously enabled us to see past the traditional reading of the novel as peripheral to Kanafani's core theme.

Moreover, a more elaborate engagement with the 'Other Thing' encourages us to question our own limitations, to ask what truths our own worldviews may exclude, what blind spots we may have. For example, just as I questioned the reliability of Ṣaleḥ's narration, I may question the reliability of my own translations or interpretations.

Firstly, I bring the 'Other Thing' to bear on my interpretation of Ṣaleḥ's silence. I have argued that it is an act of resisting submission to conceptual subjugation. But what other symbolic interpretations may I have excluded by analyzing silence through this lens? The fact that silence pushes Ṣaleḥ towards capital punishment may reveal Kanafani's deeper worries, as someone who was preoccupied with the trajectories of the Palestinian exodus and struggle for liberation. It may reveal to us Kanafani's resistance to the narratives of hopelessness, signifying that silence will lead to our annihilation. Alternatively, one could look at Ṣaleḥ's silence as being contingent, rather than final, when he tells Dima at the end of the letter that he is ready to face his fate, but he is not sure how he will react at the moment of execution. Further, recall that Ṣaleḥ becomes convinced that he is battling a mighty force and towards the end of the letter he tells us that only that force

"and it — alone — must now step forward, if it wishes to set me free."[310] This may lead us to read silence as a wake-up call urging us not to wait for a transcendental force to save us. In the context of resisting hopelessness, Kanafani may be problematizing placing the hope of redemption in a Godly-sent messiah or in the voice of a singular savior or leader, reminding us of the need for our collective voices to confront this intense, overpowering force of silencing and erasure.

This brings us to yet another question. In his silence, Ṣaleḥ yearns for another kind of justice, a transcendental kind of force, as powerful as the force of the 'Other Thing'. What is that transcendental force that Ṣaleḥ thinks is capable of setting him free? Does this other force resemble the power of popular, grassroots resistance? Does it resemble a shift in the political power structure? Does it resemble literature's power to decolonize dominant legal paradigms? This is an example of how the novel engages the reader in deconstructing multifaceted dimensions of a seemingly linear concept like silence, constructing striking juxtapositions where silence may be seen at once as representation of agency and its absence, as well as responsibility and the lack thereof.

Secondly, there may be another exclusion present in my interpretation of horizontal subjugation. Recall that the colonized subaltern subjects, in Spivak's words, are irretrievably heterogeneous. Just as both Ṣaleḥ and Layla are targets of subjugation, so are the multi-layered Palestinian actors. I bring this entanglement to bear on the complicity of the Palestinian Authority (PA), which is a colonial construct of the Oslo Accords, in the complex subjugation of the Palestinian people, both at home and in refuge. The PA plays a dual role in which it aids and abets the Israeli subjugation of the Palestinian people and simultaneously practices a localized form of oppression through its quasi-state institutions including, but not limited to, legal apparatuses like local courts and law enforcement units.[311]

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[310] *Ibid,* at 151. See quote *supra* 250.

[311] Edward Said, *Peace and Its Discontents* (New York: Vintage Books, 1996); Sa'ed Atshan. "Complicity, Dissent, and the Palestinian Intellectual" (2019) 21:3 CLCWeb-Comp Lit Cult; See also Emilio Dabed, *supra* 64; Amnesty International, "Palestinian Authority Must End Use of Excessive Force in Policing Protests" (23 Sep 2013) online, *Amnesty International* <https://www.amnesty.ca/news/news-releases/palestinian-authority-must-end-use-of-excessive-force-in-policing-protests>; Nusayba Hammad & Thayer Hastings, "On Basel al-Araj's Assassination: End Security Coordination Between the Palestinian Authority and Israel" (18 Apr. 2017) online (magazine) *Jadaliyya* <https://www.jadaliyya.com/Details/34204>; Alaa Tartir, "The Palestinian Authority Security Forces: Whose Security?" (16 May 2017) online (policy brief) *Al Shabaka* <https://al-shabaka.org/briefs/palestinian-authority-security-forces-whose-security/>.

Through the symbols and characters of *The Other Thing*, one could dig deeper and uncover countless vertical and horizontal subjects of subjugation and subjugators within Palestine's complex reality of colonization, conquest, and erasure. The form of the novel is thus open-ended, experiential, reflective, and reflexive. These constitutive elements of the novel supplement the protagonist's appeal to the reader to exercise her literary judgment in discerning the truth. The form and the content of the novel complement one another to place a responsibility on the reader to be an active participant, rather than an observer, as the novel unfolds.

The questions that the novel's form and content raise are not merely speculative but are pertinent in attempting to resolve the legal impasse in indigenous Palestine. If the 'Other Thing' moves us from linearity to a more holistic truth in the novel, then what insights can it offer to our understanding of the hegemonic international legal form and the truth contestations it adjudicates in relation to Palestine? How does the novel supplement our legal imagination in addressing this impasse? I will explore this question in the next chapter.

CHAPTER 4: INCOMMENSURABLE SOVEREIGNTIES

"If our struggle is anything it is the struggle for sovereignty and if sovereignty is anything it is a way of life."

— Robert Warrior, Intellectual Sovereignty and the Struggle for an American Indian Future[312]

4.1. Mutating the Struggle

In this chapter, I will explore how international law reduced the Palestinian struggle of liberation to a struggle of sovereignty embodied in its correlate structure of statehood. I will argue that this mutation is a product of an epistemic violence that denies Palestinians the ability to present their struggle in terms of their own paradigm and to live by their unique conceptualizations of existence, persons, community and freedom. As we discussed in Chapter 1, the current international legal framework is embedded in a Eurocentric logic and a history of colonialism and, as we saw in Chapter 2, colonialism is predicated on the principle of settler-supremacy. This entanglement renders the dominant international legal order inherently violent to the indigenous people of Palestine and their rooted legality. I will develop my argument in three parts.

In the first part, I will unpack the worldview within which the dominant international legal order is embedded and uncover that in which the indigenous legal order is embedded. I will do so by examining the United Nation's Partition Plan and a letter by Palestinian *fellaḥin* surrounding land traditions. We will encounter conflicting conceptualizations of land, one territorial and the other relational. However, as we shall see, the conflict between the territorial and relational approaches is not only substantive but also constitutive. Building on the theoretical framework in Chapter 2, I suggest that the current form of international law belongs to a liberal legality while the indigenous legal form in Palestine falls under a rooted species of legality.

[312] Robert A. Warrior. "Intellectual Sovereignty and the Struggle for an American Indian Future" (1992) 8:1 Wicazo Sa Rev 1, at 18.

Divorced from a rooted constitutionalism, the Palestinian struggle as a liberation struggle is doomed to the four phases of subjugation that we saw in the novel, namely fragmentation, dissonance, alienation, and elimination.

In the second part of this chapter, I will explore the four stages of conceptual subjugation in the context of Palestine. I will do so by examining the Balfour Declaration and key historical legal events as experienced by the indigenous people of Palestine. I suggest that although representing our struggle through the lens of the dominant international legal paradigm may at times yield short term results, it constitutes a more profound loss; it is the erasure of our unique legality.

Critically though, as the dominant worldview continues to dominate, elimination as understood by the novel is never totally complete but is rather ongoing, resulting in a perpetual violence and the perpetual deferment of justice in indigenous Palestine. This, however, should not be read as nihilism, pessimism or even a loss of hope in law or international law as abstract concepts. It is rather a call to acknowledge and consequently attend to the effects of incommensurability. The motive behind highlighting and emphasizing the depth of incommensurability is not to argue for irreparability or inevitability. On the contrary, it is the same kind of appeal that Ṣaleḥ made to his reader and the same kind of perceptive shift that readers were able to make when they acknowledged and engaged with the 'Other Thing'.

With that in mind, in the last part, I conclude that after having exhausted all hegemonic legal means to resist Zionist, and later Israeli, usurpation of and despotism in Palestine to no avail, it would be madness to insist on repeating the same cycle over and over expecting a different result. I suggest that acknowledging this unaddressed constitutive incommensurability surrounding the legal impasse in Palestine could facilitate a legal dialogue that may transcend the violence embedded in the *current* international legal apparatus[313] and pave the way for a more inclusive and hopeful legal imagination.

[313] To emphasize, my argument is that the current form of international law is inherently violent given the Eurocentric and settler-colonial context within which *jus gentium* evolved (as discussed in Chapter 1). However, that does not mean that it needs to be like that. In other words, it is not a claim of inevitability. This is also why I differentiate between International Law as a concept and the current international legal framework. See note *supra* 10.

4.2. Irreconcilable Legalities

4.2.1. The United Nations and Territorial Legality

In September 1947, the United Nations Special Committee on Palestine (UNSCOP) submitted its report[314] to the United Nations General Assembly (UNGA) whose membership at the time consisted of fifty-five sovereign states, only fifteen of whom were neither a European state or a European settler-colonial offshoot.[315] The report was debated for two months and then, on November 29, 1947, UNGA passed Resolution 181(II) recommending a territorial partition of Palestine.[316] As for the UNSCOP, the committee was composed of eleven members,[317] only two of whom were not European or settler-colonial states and neither of these two were Arab states. The committee was established at the behest of imperial Britain who was ruling Palestine under a Class A Mandate. No longer able to deal with the situation[318] for which it was largely responsible, Britain referred the specific question of "the future *government* of Palestine"[319] to the United Nations. As Ardi Imseis argues, Palestine's independence "invariably meant the establishment of the country as a unitary democratic state, the Jewish national home having already been established within it."[320] Imseis grounds his argument doctrinally in the principles of the "consent of the governed" and self-determination,[321] which affirm that Palestine "would have to follow other class A mandates by having its independence recognized and being admitted to membership in the UN if it so wished".[322]

[314] UNSCOP Report Vol. 1, *supra* 292.
[315] Ardi Imseis, *supra 23*, at 65.
[316] United Nations General Assembly, GA Res. 181(II), UN Doc. A/RES/181(II), 29 November 1947.
[317] These were Australia, Canada, Czechoslovakia, Netherlands, Sweden, Yugoslavia Guatemala, Peru, Uruguay, India, and Iran.
[318] Where the UK representative noted that "We have tried for years to solve the problem of Palestine. Having failed so far, we now bring it to the United Nations, in the hope that it can succeed where we have not." UNSCOP Report Vol. 1, *supra* 292, at 7, para 12.
[319] UNSCOP, Report to the General Assembly, Second Session, Volume II, A/364 (09 Sep. 1947), emphasis added.
[320] Ardi Imseis, *supra 23*, at 51 - 52.
[321] Self-determination of peoples was sufficiently established in 1947 to justify application to the Palestinian people, *Ibid*.
[322] *Ibid.*

The proposal entailed partitioning Palestine into two states, one Jewish and one Arab, with economic union[323] and Jerusalem under a special status.[324] Note that at the time, the European Jewish settler population in Palestine had increased[325] to only 33% and the registered ownership possessed by the settler population was just 5.6%.[326] Yet, Resolution 181(II) allotted 57% of the total area of Palestine to its minority settler population wherein 84% of all "irrigated, cultivable areas" would be in the Jewish State and 16% in the Arab State.[327] Imseis observes that "based on its own terms, it is impossible to escape the conclusion that the partition plan privileged European colonial interests over those of Palestine's indigenous people and, as such, was an embodiment of the Eurocentricity of the international system that was allegedly a thing of the past."[328]

Thus, guided by a Eurocentric attitude, the UNSCOP and consequently the UN not only fundamentally distorted the question of the future *government* of Palestine into vaguely "The Question of Palestine."[329] It also internalized the principle of settler supremacy thereby, in Mills' formulation, rendering indigenous ways of life secondary to the interest and benefit of the European settler.[330]

A number of Arab Member States proposed to pursue an advisory opinion by the ICJ "on, *inter alia*, the competence of the General Assembly to recommend the partition of Palestine without the consent of its people."[331] But the proposal was narrowly defeated, once again, by the GA's largely

[323] Although the commission itself confessed that the way the Arab state was structured would not be economically viable so from its very formation the committee set up the Arab state for failure, see UNSCOP Report Vol. 1, *supra* 292, at 55.
[324] UNGA Res. 181(II), *supra* 316, at 131 - 133.
[325] Owing to systematic mass immigration — to facilitate Zionist colonization — which became particularly prevalent under the British Mandate and was accelerated in the 1940's due to the horrors of the holocaust in Europe. See Henry Cattan, *supra* 280, at 19.
[326] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Session, Annex 25, Report of Sub-Committee 2, UN Doc. A/AC.14/32 and Add.1 cited in Ardi Imseis, *supra* 23, at 53. See also, Walid Khalidi, ed,. *From Haven to Conquest: Readings in Zionism and the Palestine Problem until 1948* (Beirut: Institute for Palestine Studies, 1971).
[327] Statement of Sir Mohammed Zafrullah Khan (Pakistan), UN GAOR, 2nd Session, 126th Plenary Meeting. at 1374, A/PV.126, 28 November 1947, cited in Ardi Imseis, *ibid,* at 43.
[328] *Ibid*, at 54.
[329] Note that the very term "The Question of Palestine" captures what is excluded and included from the scope of its inquiry. From the creation of the UN until today, the "Question of Palestine" rendered Israel's existence a presumed truth while, from the rooted Palestinian perspective, the conflict in indigenous Palestine surrounds the "Question of Israel" since Palestine, as opposed to the future of its government, was never in question.
[330] See *supra* 93.
[331] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Session, Annex 15 cited in Ardi Imseis, *supra 23*, at 59.

Eurocentric membership. Other, mostly non-European member states, dissented from the majority vote, invoking arguments of morality and justice.[332] A wide range of scholarship is available on the (il)legality of the partition plan under international law — some arguing for illegality on the basis of it being inequitable,[333] *ultra vires,*[334] contravening natural rights and its substantive violation of the UN Charter's own terms, including the requirement of the consent of the governed and the self-determination principle in the context of Class A Mandates pursuant to Article 22 of the League of Nations.[335] On the Zionist side, some have argued that the Resolution was illegal on the basis that it violated an alleged Zionist entitlement to the entirety of Palestine not just a part of it.[336] Imseis concludes that the resolution "was illegal under international law, not because it purported to impose a decision that went beyond its powers of recommendation, but because its substantive content – namely, partition against the will of the subaltern people of Palestine – was *ipso facto* in violation of the Charter and the international rule of law."[337]

Six months after the vote on Resolution 181(II), Zionist terrorism, led by Jewish paramilitary organizations like the Haganah which later formed the core of Israel's military apparatus, engulfed Palestine and its indigenous population leading to what is known as the *Nakba* (i.e. Palestinian Catastrophe or the Palestinian Exodus).[338] Following the *Nakba*, and despite lacking legal basis even on the terms of the dominant paradigm, European Zionist settlers unilaterally superimposed their settler state on the ruins of indigenous Palestine. In spite of that, Israel was recognized by an international community largely dominated by European and European settler powers. Herzl was right when he asserted that Europe had to guarantee the Zionist colonial existence in indigenous Palestine.[339] As such, Zionist colonialism, and consequently Israel as a settler state, cannot be understood in isolation from European settler-colonialism and the Eurocentricity of the hegemonic international legal form.

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[332] See for example the Colombian, Cuban, and Iraqi delegations' statements examined in Ardi Imseis, *ibid* at 60.
[333] See for example, Victor Kattan, *supra* 22, at xxxv – xxxix. Note that Kattan maintains that the plan, on international law's own terms, was valid because it was merely a recommendation and not a legally binding decision.
[334] See for example, Henry Cattan, *supra* 280, at 75.
[335] *Ibid,* at 78; see also The Palestinian National Charter, *Resolutions of the Palestine National Council: 1–17 July 1968,* online (archive) Yale Law School Avalon Project <http://avalon.law.yale.edu/20th_century/plocov.asp>.
[336] Howard Grief, *The Legal Foundation and Borders of Israel Under International Law: A Treatise on Jewish Sovereignty Over the Land of Israel* (Jerusalem: Mazo, 2008) cited in Ardi Imseis, *supra 23*, at 55.
[337] Ardi Imseis, *supra 23*, at 59.
[338] See resources cited in Chapter 1, specifically *supra* 21.
[339] See notes *supra* 278 – 279.

Here, we find several intersections between the liberal species of legality that Mills outlines and the hegemonic legality that *The Other Thing* elucidates on one hand and the dominant international legal apparatus on the other.[340]

Firstly, both paradigms are embedded in the principle of settler supremacy, which is a core tenet of colonialism, rendering that paradigm inherently violent to indigenous ways of life in Palestine. Secondly, the territorial approach culminating in the partition of Palestine replicates the liberal paradigm's treatment of land as a commodity. Thirdly, the logic of atomization that the novel problematizes appears here in the form of partitioning the land as well as separating its peoples from it and from one another. Fourthly, the insistence on the nation-state as *the* organizing model of the political community replicates the liberal logical-structure of a geographically enclosed and ethnically bounded political community. Fifthly, the presumption of sovereignty, implied in the statehood structure, echoes the presumption of the supremacy of the human will; here, this presumption is projected onto the supremacy of the will of the state as a legal entity. Lastly, the international legal language of self-determination and independence — while for many Global South peoples meant freedom from colonial subjugation and imperial oppression — is still at its heart grounded in a liberal ECO-system that presumes individual self-sufficiency and autonomy.

Furthermore, like liberal legality, this apparatus is held together by a contract and property rights regime, manifesting in international conventions and territorial divisions. It is also supported by principles like non-intervention, which echo the negative liberty component of the liberal ECO-system. This regime serves to uphold the international social contract established and consented to by European imperial powers. The dominant international legal form, much like the liberal paradigm, internalizes a Contractarian presumption governed by a largely positivistic order dictated by rules, treaties, and precedents.

[340] For example, see Tarik Kochi, *Global Justice and Social Conflict: The Foundations of Liberal Order and International Law* (New York: Routledge, 2020); G. John Ikenberry, *A World Safe for Democracy: Liberal Internationalism and the Crises of Global Order* (New Haven: Yale University Press, 2020); Anne-Marie Slaughter. "International Law in a World of Liberal States" (1995) 6 EJIL 503.

Having argued that the hegemonic international legal form cannot be understood separately from the liberal worldview within which it is embedded, I now proceed to examine some elements of the rooted legality in indigenous Palestine. Despite the availability of ample evidence of the illegality of the partition plan, I am not interested in exploring the question of legality from within the dominant paradigm of international law. It is my pursuit to demonstrate how the partitioning of Palestine is illegal *on the basis of a rooted legality* and to show how this species of legality is constitutively incommensurable with that of the dominant international legal order — even if the latter indeed confirms the illegality of partition.

4.2.2. Palestine's *Fellaḥin* and Relational Legality

From the onset of the struggle against European Zionist usurpation of Palestine, the indigenous people of Palestine were defending their existence against the imminent threat (and later ongoing reality) of forced expulsion, despotism, and elimination. Their relationship with the land of Palestine expressed a way of life, and when they defended their land it was not in defense of a commodity or a mere ownership. Rather, their resistance was in defense of their ways and means of life, organized around a relationship with the land that was passed on from generation to generation. This existential threat was first sensed by rural communities before it became clear to urban communities in Palestine. Rural communities were largely agrarian composed of peasants and Bedouins.[341] The following excerpts from an 1890[342] letter by residents of *Khirbat Duran* to the Ottomans exemplifies how Palestine's indigenous people viewed the nature of the legal impasse in Palestine:

> "Our clan consists of 32 families, 200 individuals, all of whom are loyal to the Empire, living in tents in *Khirbat Duran* [...] This clan, since the time of our ancestors, has not known any land except *Khirbat Duran*, [the clan] lives off it and has no other habitation apart from it.

[341] Note that, my use of this letter is intended to exemplify the philosophy or worldview underlying land norms and land relations as understood by the rural community in Palestine, which is composed of both peasants and Bedouins. I argue that all children of the homeland are the indigenous people of Palestine — despite their local differences — as opposed to a recent trend that employs UNDRIP tactically in the context of Palestine. The latter approach, to which I object, tends to separate Bedouins from their broader, Palestinian social fabric in attempt to argue for the indigeneity of Palestinian Bedouins in international law.

[342] Just short of a decade from the first Zionist *Aliya* which began in 1882.

> The esteemed state has recently sold [the land of] this *Khirba* to rich people who are from *abnāaʾ al-waṭṭan* [children of the homeland].[343] [We] have shown no objection to that, because the new owners of the land knew too well that we are the tillers and caretakers of the estate since time immemorial. They didn't attempt to stand in our way nor expel us from our dwelling or even from our estate [...] But, as we were, the farm was sold to foreigners, who have arrived with great budgets and vast economic resources. They succeeded to buy the estate with the help of Ali Afandi Haykal, a member of the Administrative Council of the sub-district of Jaffa and the Commerce Commission, who has a notorious reputation in [conducting] such affairs. Afterwards, the rich Jewish purchasers were not content with just that [...] But rather, they started expelling us from our habitation and preventing us from tilling the land and working it […] the person accused to have caused us this injury and humiliation cannot be any other than the abovementioned Afandi of the inadmissible affairs."[344]

This is quite a remarkable letter. It seems to capture at least three critical elements of the indigenous legal understanding of the struggle in Palestine. The first and most important element surrounds the land. The second, which flows from the first, is the way of life that is the central ground of their objection to the second sale of the estate. The third element is the legality against which they address questions of land and life.

As for the land element, I have two remarks that touch on land ownership and land as a relationship. It is clear from the letter, and from other historical accounts of land ownership at the time in Palestine,[345] that many tillers of cultivated land were not necessarily the formal 'owners' of the 'property' in the liberal sense of these words. However, because they did not view their land as property, but rather as their source of history, pride and livelihood, they seemed more concerned

[343] The term *abnāaʾ al-waṭṭan,* which I translated as children of the land could alternatively be translated as fellow homelanders or fellow natives of the homeland but the first captures the more literal essence of the term. Either way, the term is used in the letter to distinguish those natives who belonged to Palestine (the homeland) as opposed to foreign settlers.

[344] After this thesis was concluded but before its submission, it came to my attention that an alternative translation of this letter and a discussion surrounding its particularities is available. Ben-Bassat provides an account of the incident as portrayed by the settlers and then compares it to the indigenous account, revealing "the disparity between their perception of the issue of land ownership and rights on the ground and Ottoman law and the policies the government promulgated." For Ben-Bassat's discussion, alternative translation, and a copy of the original letter, see Yuval Ben-Bassat. "Conflicting Accounts of Early Zionist Settlement: A Note on the Encounter between the Colony of Rehovot and the Bedouins of Khirbat Duran" (2013) 40:2 Brit J Middle E Stud, 139. Ben-Bassat observes that this clan is originally from the South of Palestine and hence refers to them as Bedouins. However, in spite of their Bedouin origins, the clan have clearly been tillers for generations and in this context, I refer to them as *fellaḥin.* This example testifies to the difficulty in making a hard separation between Palestine's rural community, as noted in my comment *supra* 341.

[345] Naʾela Al Waʿari, *mawqif al-wulaẗ wal ʿulamaʾ wal aʿyan wal ʾiqtaʿeyeen fi falastin min almashrouʿ alṣahyouni 1856 – 1914 [The Position of Governors, Scholars, Notables, and Feudal Lords in Palestine from the Zionist Project (1856 – 1914)]* (Beirut: Arab Institute for Research and Publishing, 2012).

about protecting that relationship with their land rather than the formalities of title. It is clear that regardless of how the proprietary formalities were organized, they nonetheless considered themselves the rightful holders of the land. Notice the use of the noun caretaker, which invokes a proactive responsibility and guardianship owed by the people to the land. As such, their lived reality of care since time immemorial — where they took care of the land and it took care of them — forms part of the legal basis of their claim. If we contrast these two approaches, we will notice that they are constitutively incommensurable. Where, from a rooted perspective, land is relational and this relationship is embedded in care, any competing formulation in which land is transactional and embedded in ownership and title is thus excluded from the scope of a rightful legal claim.

The second element concerns their indigenous way of life. The peasants were able to maintain this relationship, which was passed on and protected from ancestor to ancestor, even when the land was sold under the first transaction to other fellow natives. It seems that they had no legal grounds for objection to the first sale because the new Palestinian owners observed their way of life. This was made clear when specified that the reason they didn't object was because these new owners "knew too well" that this clan was the (collective) rightful caretaker of the land and did not stand in their way. This shows us that the change of title was, to them, merely nominal and did not affect their lived reality or way of life. It thereby did not amount to a violation according to their legality.

Significantly, the reason why the first transfer maintained the integrity of their legality was because the owners of the land were *abnāaʾ al-waṭṭan* — children of the homeland. As their fellow natives, they subscribed to the constitutive values of belonging shared by their community. This indicates that they belonged to a constituted community of a homeland, Palestine, and they were aware of the quality of this belonging despite their socio-economic differences.[346] This belonging differentiated the first purchasers from the second foreign purchasers who treated the sale in a purely transactional manner and who disrupted the natives' way of life — in violation of the rooted legality shared amongst children of the homeland. The disruption of the relational value of the land disrupted, and violated, their way of life. The disruption of this existential relationship not only

[346] The new Palestinian owners were rich and oftentimes that is an indicator of one's social status being not from the village for example, likely to have been city-dwellers or from an urban Palestinian community.

amounted to *ḏul* (humiliation, dishonor, or degradation in Arabic) but formed part of the legal basis of their claim.

This brings me to the third element captured by the letter. The disruption of their relationship and way of life was not only characterized as humiliation, but further as injury, giving rise to the substantive question of legality. Here, it is important to notice the distinction that they clearly articulated whereby the clan's reference to the Empire indicated a political alliance but their reference to the homeland invoked a constituted, collective community that belonged to one another beyond the pretext of a mere pragmatic political arrangement. With *abnāʾ al-waṭtan* they shared some deeper and more fundamental meaning and commitment to common values where this *waṭtan* (homeland) was distinct in nature from the Empire. This distinction makes clear that the indigenous inhabitants' conceptualization of legality was different from, perhaps even irreconcilable with, the legality of the Empire.

Thus, we can see that the legal basis of their claim as the rightful holders/caretakers of the land comes from their continued, ancestral connection to the land and is rooted in a *relational* logic. On the other hand, the legal claim of the Empire and the foreigners alike was centered on purchase and land title and stemmed from a *transactional* logic. Whereas the first sale did not violate their rooted legality because it appeared to them as a mere cosmetic change, the second purchase had direct and violent ramifications for the constitutive elements of their legality — hence their objection. Notice their insistence that this approach, and Ali Afandi's affairs more broadly rather just that incident concerning their own situation, violated the collectively held view of legality and was therefore *legally* "inadmissible" (as opposed to morally, socially, or politically objectionable).

In isolation, this letter may appear as a private matter or a civil, rather than a public, dispute. Perhaps, if this incident was a one-off occurrence or if such occurrences were happening on an ad-hoc basis, one might be persuaded by this view. However, ample other objections and confrontations that historians have documented either through written archives or oral histories, [347] make clear that dispossession was not only systematic but also essential to laying the ground

[347] See for example, Rosemary Sayigh *supra* 301 and Benny Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881-2001* (New York: Vintage Books, 2001).

for the then upcoming project of colonizing Palestine. Mark Ayyash observes that this existential relationship with the land is still upheld by Palestinian *fellaḥin* until today. Ayyash argues that the interplay between space and place "cannot be tamed within a bounded nation-state" where this dynamic interaction sustains a "a decolonial resistance that sees the displacement of people from the land as the displacement of life itself."[348]

The Zionists realized early on that in order to triumph in their colonial conquest they had to disrupt this land-based relationship. This view was explicitly espoused by one of the most important land experts of the Jewish Agency, Dr. Arthur Ruppin, who stated:

> "Land is the most necessary thing for our establishing roots in Palestine. Since there are hardly any more arable unsettled lands in Palestine, we are bound in each case of purchase of land and its settlement to remove the peasants who cultivated the land so far, both owners of the land and tenants."[349]

In addition to the emphasis on disrupting indigenous land-based relationships, such a statement brings to the surface conflicting truth narratives. On one hand, the facts on the ground show that the vast majority of Palestine had been inhabited by its indigenous people prior to the arrival of European Jewish settlers. On the other hand, the Zionist propaganda was centered around the well-known slogan of "A land without a people for a people without a land". This narrative of erasure continued well after the *Nakba* where Golda Meir bluntly asserted in 1969 that "they [the Palestinians] did not exist".[350]

As we saw, this erasure was not only physical, but existential. It is the same kind of erasure endured by Palestine and its indigenous people under the dominant international legal order. So far, I have argued that the indigenous legality in Palestine belongs to a species of legality that treats the land relationally and that the international legal order belongs to a species of legality that treats the land territorially. Now, I will explore how these two paradigms are incommensurable and will examine the conceptual subjugation arising from this unacknowledged constitutive incommensurability.

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[348] Mark M. Ayyash. "An Assemblage of Decoloniality? Palestinian Fellahin Resistance and the Space-Place Relation" (2018) 12:1 Stud Soc Justice 21, at 21.
[349] Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 2010), at 102.
[350] Edward Said, *supra* 275, at 3.

4.3. Conceptual Subjugation — From Liberation to Sovereignty

4.3.1. Incommensurability

Just like Layla's murder, the legal impasse in Palestine involves an 'Other Thing'. Edward Sa'id characterizes the impasse in Palestine as one animated by "a contest between an affirmation and a denial."[351] This characterization echoes the dialectic of exclusion and inclusion that the 'Other Thing' in the novel brought to our attention. Edward Sa'id observes that "Palestine is a much debated, even contested notion. The very mention of the name constitutes for the Palestinian and his partisans an act of importance and positive political assertion. For the Palestinian's enemies, however, it is an act of equally assertive, but much more negative and threatening, denial."[352] Just as I contended in my analysis of the novel that the 'Other Thing' alerts us to a perpetually silenced subaltern paradigm, here I argue that the impasse in Palestine, triggered by an international legal contest, involves the affirmation of the hegemonic liberal paradigm and the denial of the subaltern rooted paradigm by the international legal form.

Imperial Britain was the primary actor. In this contest, I bring under the microscope a void in legality, the Balfour Declaration, which was later reified into the League of Nations, promising the Zionists a Jewish national home in Palestine.[353] In 1917, Lord Balfour, on behalf of Britain, wrote the following to the head of the Zionist organization:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[354]

The denial and affirmation at play in this Declaration, as in the UN Partition Plan, is the selfsame dialectic that underpins the hegemonic international legal order's dealings with Palestine. Both

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[351] *Ibid*, at 4.
[352] Arthur James Balfour, *Balfour Declaration* 1917, online (archive) Yale Law School Avalon Project <http://avalon.law.yale.edu/20th_century/balfour.asp>.
[353] Henry Cattan, *supra* 280, at 51 - 62.
[354] Balfour Declaration, *supra* 352.

imperial Britain and the UN engage in the territorial dismemberment of Palestine in favor of a settler-colonial project promised to a people who were not physically present in the land.

Firstly, in the Declaration, Britain assumes that it has the capacity to make such a promise despite the problematic fact that in 1917 it had no legal presence in or over Palestine. This void in legality is captured by the most commonly used Arabic description of the Declaration as "the promise of who doesn't own to who is not entitled". This description reflects the assumption that legality requires ownership and entitlement. As we have seen earlier, ownership from a rooted perspective is a relational rather than a transactional matter, and entitlement is not a matter of formal title but rather of an ancestral bond of care with the land that enabled the inhabitants' way of life. Just as the United Nations dismissed Palestine's preexisting *relational* legality in the proceedings surrounding the Partition Plan and treated the land from a *territorial* view, so imperial Britain acted without consultation or any regard for the consent or wishes of the indigenous inhabitants of Palestine. The Declaration thus lacks any basis not only under the dominant liberal legality, but more importantly under Palestine's rooted legality.

Secondly, over time, the hegemonic paradigm has centered the conflict around the government of Palestine, then the partition of Palestine, and in recent times the State of Palestine. Despite lacking legality, Britain's 'sovereignty' and international law's hegemony over Palestine were presumed, by the dominant paradigm, as undebatable truths. In contrast, the subaltern paradigm centered the conflict around a way of life and rejects the legal and political impositions — whether by Britain, the United Nations, or Israel — that disrupt those indigenous ways. We can now see that the very categorization of the conflict is disputed. Where international law treats the conflict as a *territorial* dispute pertaining to *statehood*, Palestinians treat the conflict as an *existential* dispute pertaining to *liberation from despotism* and foreign subjugation.

Shin Imai captures this problem in the context of explaining the gap between settler and indigenous conceptualizations of the self-determination in Turtle Island. Imai explains that "the parties may come to the negotiating table for very different purposes [...] The difference between the parties

does not lie only in the different expectations of the process. *The parties may also conceptualize 'difference' itself in different ways*."[355]

As such, similar to the multi-layered ordeals in *The Other Thing*, the first gap between the rooted and the liberal international paradigm here is that the latter predefines the nature of the conflict and presumes its means of adjudication. More importantly, it does so under the guise of universality. Starting from the presumption that the rules of the game are universal, the liberal international paradigm denies the worldview difference and thus fails to acknowledge the incommensurable nature of the conflict. In other words, neither the definition of the conflict nor the validity of the terms of its adjudication are open to question. The first step, then, towards addressing the legal impasse in indigenous Palestine is to acknowledge this constitutive incommensurability.

Failing to address the root cause of the conflict, international law, like the law Ṣaleḥ describes in the novel, merely adjudicates the impasse in perpetual deferment of a just resolution and sustains the perpetuity of violence.

4.3.2. Fragmentation

From a rooted perspective, neither Britain nor the United Nations were legally entitled to dispose of Palestine or engage in its territorial dismemberment. Whereas the Zionists pragmatically accepted the partition plan given that it privileged their position despite having coveted the whole of Palestine, the Palestinians rejected it. However, not only did the plan privilege the settlers' interests but in doing so, it affirmed the validity of the criteria established by the hegemonic paradigm. As such, my argument here is that Palestinians did not *only* reject the plan because it was unfair and biased, and not only, as Imseis argues, because they took a more principled approach according to international law's own terms.[356] They rejected the plan because it violated the terms of their own legality; because in their own worldview they could not conceive of dividing

[355] Shin Imai, "Indigenous Self-Determination and the State" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law,* (Oxford: Hart Publishing, 2009), at 9. Emphasis added.
[356] Ardi Imseis, *supra 23*, at 54.

up that which was an indivisible whole or giving up an ancestral bond — both physical and emotional — that formed the basis of their existence. Thus, the very presumption of divisibility, from the indigenous view, is oxymoronic.

By rejecting the partition, Palestinians welcomed sharing the land under a single, unitary, non-denominational, democratic entity.[357] They insisted that the land remains a holistic entity. This would protect them from the imminent existential colonial erasure they were facing while simultaneously offering refuge to those escaping the horrors of the holocaust. Palestinians were, of course, aware of European crimes against European Jews. Despite having no hand in those crimes, the Palestinians were paying the price of a crime that they did not commit. In this context, by supporting the Zionist project, the mainly Western bloc at the United Nations were motivated by finding a solution to Europe's "problem" of the Jewish question.[358] Contrary to Europe, religious harmony was conceivable in indigenous Palestine. The indigenous people of Palestine — Muslims, Christians, and Jews — have lived in substantial harmony amongst each other.[359] However, the archetypical Western prejudice against the Jews was projected onto Palestine's native inhabitants and this projection seems to have made this possibility of harmony inconceivable to the European mind.

The inconceivability of harmony can be seen in the zero-sum logic manifest in UNSCOP's approach. Presuming that existence in Palestine was mutually exclusive, rather than a matter of mutual flourishing, the UNSCOP rejected the vision proposed by the indigenous majority of a unitary, democratic and non-denominational entity. It further characterized this unitary proposal as an "extreme" demand.[360] It is hardly surprising that this was the attitude of a committee formed of member states whose political and legal heritage had been centuries of disregard for the rights

[357] UNSCOP, Report to the General Assembly, 2nd Session, Volume IV, A/364 (03 Sep. 1947), at 43 cited in Ardi Imseis, *ibid*, at 78.
[358] See for example Herzl's 1906 book, Theodor Herzl, *The Jewish State: An Attempt at a Modern Solution of the Jewish Question* (London: H. Pordes, 1972). See also Charles D. Smith, *Palestine and the Arab-Israeli Conflict* (New York: St. Marten's Press, 1992); and UN records on the matter specifically Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Session, 7th Meeting. at 36-37, 7 October 1947 cited in Ardi Imseis, supra 23, at 70.
[359] Ussama Makdisi, *Age of Coexistence: The Ecumenical Frame and the Making of the Modern Arab World* (Oakland: University of California Press, 2019).
[360] UNSCOP Report Vol. 1, *supra* 292, at 42.

of non-Europeans and contempt for their unique conceptualizations of the world under the pretext of savagery, backwardness, barbarity, or some other variation.

The underlying difference, then, is one of conflicting worldviews. In the context of Palestine, the liberal worldview presumes a zero-sum game where existence of different peoples is mutually exclusive. In contrast, the rooted worldview presumes a holistic existence where mutual flourishing is possible.

Now, let's excavate a deeper layer. Recall that in the novel, law's biggest fault was atomization — the logic by which an intimately interconnected web of connections is dissected, and each element thereafter is treated as a singular and independent component. Similarly, international law's biggest fault, from the rooted perspective, is the dissection of the region which was made possible precisely because of international law's territorial logic. While a unique Palestinian identity was already forming at the turn of the century, the indigenous people of Palestine also viewed themselves as part of a bigger whole. They belonged to one another as children of the homeland, but they also belonged to the broader Arab-Levantine community.[361] Similar to the rooted legality of indigenous peoples in North America, Palestinian belonging transcended the linear belonging contained within ethno-national boundaries. This unbounded and dynamic form of belonging is articulated by Joanne Barnaby in speaking about culture and sovereignty in Turtle Island:

> Before aboriginal peoples came into contact with Europeans, their cultural distinctiveness was relative only to other aboriginal peoples. At the time they perceived these differences as great. But after the arrival of the Europeans, it became clear that aboriginal peoples had more in common with each other than they did with Europeans. It is especially the values shared across different aboriginal cultural groups that aboriginal peoples still struggle to maintain today.[362]

Acting on the basis of an aspiration towards a collective governance that would fulfill this dynamic mode of belonging, it was clear that the atomized model of the nation-state was not the appropriate,

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[361] See generally, Wajih Kawtharani, *bilād al-shām fi matlʿa al-qarn al-ʿishreen [The Levant at the Turn of the 20th Century]* (Beirut: Arab Centre for Research and Policy Studies, 2013); See for example popular sentiments towards a unified "Greater Syria" documented in Tom Segev, *One Palestine, Complete: Jews and Arabs under the British Mandate* (New York: Henry Holt, 1999); see also Rashid Khalidi, *supra* 349.
[362] Joanne Barnaby, "Culture and Sovereignty" in Diane Engelstad & John Bird, *supra* 297, at 39.

nor the acceptable, model of belonging amongst Levantine communities in the region. This aspiration was echoed as early as 1915 in the McMahon-Hussein correspondences. Yet, without consent and with a total disregard of the possibility of an alternative conception of constituting community, the British and the French sliced up the Levant under Sykes-Picot as we discussed in Chapter 3. Levantine attempts to establish their governance in accordance with their own aspirations and their conceptualization of constituting community were quashed by brute force and military power.[363]

As such, insisting on a single, unitary and democratic state in Palestine, from a rooted view, is best understood as a compromise by the indigenous community of their dynamic mode of belonging and their presumptions about collective governance. However, to mitigate further losses, the indigenous people of Palestine seem to have conceded to the dominant idea of a state. This move from a dynamic belonging to a more linear Palestinianism can be understood as a political tactic to protect their land and identity — a concept that Spivak, in a different context, termed "strategic essentialism."[364] Perhaps it was a practical concession to the hegemonic power-structure of the post-War reality, made in order to defend what was left of their way of life. This move can also be seen as a temporary arrangement until these communities had gained freedom from despotism and foreign subjugation, after which they assumed they would be free to re-organize themselves in accordance with the vision and way of life they had originally aspired to and conceptualized.

In tandem with the nation-state came the claim of sovereignty. While the notion of sovereignty, in international law, has changed over time,[365] its different definitions — including self-

[363] Rashid Khalidi, *supra* 349, at 164; see also Malcom Russel, *The First Modern Arab State: Syria Under Faysal, 1918 - 1920* (Minneapolis: Biblioteca Islamica, 1985) and Philip Khoury, *Syria and the French Mandate: The Politics of Arab Nationalism, 1920 - 1945* (Princeton: Princeton University Press, 1987).
[364] Strategic essentialism in postcolonial theory can be understood as an attempt to deliberately, albeit with a temporary intent, reify identities in order cultivate a common cause that would enable the voices of the subaltern to be heard. See Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (Oxford: Oxford University Press, 1988).
[365] See for example, Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State – The Evolution and Application of the Concept of Sovereignty* (Pennsylvania: Pennsylvania State University Press, 1995); Kevin Bruyneel, *The Third Space of Sovereignty* (Minneapolis: University of Minnesota Press, 2007); Hendrik Spruyt, *The Sovereign State and its Competitors* (Princeton: Princeton University Press, 1996). But see also, Mark Rifkin, *Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination* (Durham: Duke University Press, 2017); Joanne Barker, ed, *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska, 2005); John Quigley, *The Case for Palestine: An International Law Perspective*.

determination and self-government — remain premised on liberal assumptions like autonomy and negative liberty manifest in principles like independent rule or non-intervention.[366] If the nation-state is premised on a logic of atomization thus contradicting the unitary and relational logic in indigenous Palestine, then how might the rooted perspective treat sovereignty?

As Robert Warrior puts it "if sovereignty is anything it is a way of life."[367] And as Patricia Monture argues, if there were to be a conception of sovereignty from a rooted perspective, it would mean the ability to live according to one's way of life.[368] Warrior and Monture's conceptions touch on precisely what the indigenous people of Palestine were struggling to defend and protect: their *relational* way of life. Let's, temporarily, call this Relational Sovereignty. In contrast, the liberal conception of Territorial Sovereignty is "a peoples-level articulation of an autonomous, not a relational, conception of self."[369] By definition, then, Relational Sovereignty contradicts the liberal, dominant conception of sovereignty under *jus gentium* and as assumed by imperial European powers at that time including Britain. Presupposing the universality and validity of a liberal legality precludes the substantive formulation of Relational Sovereignty. Universality presumes the absence of another kind of legality, so how could there be an alternative conception of sovereignty? On a deeper level, it also precludes the *constitutive* question of whether the notion of sovereignty meets the rooted Palestinian standards of legality. I will return to this point in the part 4.4. below.

The effect of this denial (of another kind of legality) is that international legal actors imposed on Palestine a liberal framing of the struggle, rendering it a contest over sovereignty per the hegemonic terms along with its correlate structure of a nation-state.[370] At this point, the Palestinian struggle was fragmented. The indigenous people of Palestine were denied the possibility of

[366] Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010); Stéphane Beaulac, *The Power of Language in the of International Law* (Leiden: Koninklijke Brill NV, 2004); James Crawford, *Brownlie's Principles of Public International Law,* 9th ed (Oxford: Oxford University Press, 2019).
[367] Robert Warrior, *supra* 311.
[368] Patricia Monture, "Panel Three - Ways Forward: The Search for Just Solutions" in Andrea P Morrison & Irwin I Cotler, eds, *Justice for Natives: Searching for Common Ground* (Montreal: McGill-Queen's University Press, 1997), at 197.
[369] Aaron Mills, *supra 79*, at 160.
[370] As Yezid Sayigh argues, the UN partition plan prompted Palestinians towards a pragmatic approach centered on territorial control and thus pushed them to "territorialize" their claims. See Yezid Sayigh, *Armed Struggle and the Search for a State: The Palestinian National Movement 1949 - 1993* (Oxford: Oxford University Press, 2004), at 10.

framing their struggle on the terms of their own relational worldview. They were subsumed into a monologue in which they were forced to present their struggle on the terms of the hegemonic paradigm. They were also subsumed into the linear identity of ethnic nationalism that stands in tension with their dynamic regional belonging.[371] The first stage of conceptual subjugation is thus Fragmentation. The struggle against despotism that prevented them from exercising their way of life was transformed into a struggle for a sovereign nation-state.

Interestingly, Palestinians called for boycotting what the UNSCOP committee named a fact-finding mission to write its report.[372] Just like the court in the novel misconstrued Ṣaleḥ's silence as an admission of guilt, and failed to see beyond what it was predisposed to see, so does orientalist literature misconstrue the boycott as "exceedingly inept diplomacy".[373] Instead of questioning the limits of its own paradigm, the committee opted for blaming the victim.[374] However, in their boycott, Palestinians were objecting to the systematic erasure of their existence and resisting being subsumed into the dominant paradigm that would only misrepresent their truth and distort their reality. The decision to boycott was a proactive response. As explained earlier, for them Palestine was never in question. The logic of the boycott is explained in the leadership's statement:

> "The Arabs of Palestine could not understand why their right to live in freedom and peace, and to develop their country in accordance with their traditions, should be questioned and constantly submitted to investigation. [...] The rights and patrimony of the Arabs in Palestine had been the subject of no less than eighteen investigations within twenty-five years, and all to no purpose. Such commissions of inquiry had made recommendations that had either reduced the national and legal rights of the Palestine Arabs or glossed over them. The few recommendations favourable to the Arabs had been ignored by the Mandatory Power. It was hardly strange, therefore, that they should have been unwilling to take part in a nineteenth investigation."[375]

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[371] Even the use of the label "Palestinians" is misleading if understood from the hegemonic nationalistic frame, because it fails to properly account for the dynamic mode of belonging. My use of the term is intended to simplify the reference to the indigenous people of Palestine, many whom live in refuge and exile across the world but who still maintain their bond, even if not physically, with the land of Palestine and who still belong to the community that is "children of the homeland". To avoid its linear, national sense and yet capture the multiple modes of belonging as understood from a rooted perspective, I alternate between various labels, using Palestinians, children of the homeland, native inhabitants, fellow natives, indigenous people of Palestine, and Palestine's indigenous community interchangeably.

[372] UNSCOP, *supra* 292, at 59, para 121. See also Mazin B Qumsiyeh, *supra* 271, at 93.

[373] Ardi Imseis, *supra 23*, at 72.

[374] On this point generally, see Edward Said & Christopher Hitchens, eds, *Blaming the Victims: Spurious Scholarship and the Palestinian Question* (New York: Verso, 1988).

[375] Ad Hoc Committee on the Palestinian Question, Summary Records of Meetings 25 September – 25 November 1947, UN GAOR, 2nd Session, 3rd Meeting. at 6, 29 September 1947 cited in Ardi Imseis, *supra 23*, at 72.

4.3.3. Dissonance

By defining the indigenous inhabitants as simply "non-Jewish" in the Balfour Declaration, their existence was reduced to a mere negation that stands in relation to the Other. This negation at once affirmed the identity of Jewish people as benefactors of a homeland in Palestine and denied Palestinians both their identity as a constituted political community and their relationship with their homeland. Curiously, the fact that in 1917 the indigenous people of Palestine constituted 90% of the population[376] didn't seem to stop Balfour from implying this negation. More than fifty years after Balfour, when Golda Meir claimed that the Palestinians did not exist, she was echoing that same erasure of Palestinian subjectivity. While this narrative of erasure is ongoing, even the most ardent Zionist today would not argue that there were no people physically inhabiting Palestine. This fact is not disputable. The erasure thus surrounds the *nature* of these inhabitants and the kind of truths that this fact carries.

Had Balfour acknowledged the demographic reality on the ground, that acknowledgement would have stood in conflict with the purported Zionist entitlement to Palestine. The negation of subjectivity of the people of Palestine was necessary in order to enable the imagined reality on the basis of which a Zionist colonial project was to be successfully superimposed on Palestine. It did not seem to matter what the reality was because either way, as Edward Sa'id correctly observed, the *idea* of Palestine in the Western imagination was constructed outside Palestine. The clash between truth and its perception echoes the previously mentioned contradictions between Zionist reports on Palestine and their propaganda of a "land without a people". Thus, despite the facts on the ground, the indigenous people of Palestine were absent from the Western imagination.

The reference in Balfour's letter to only "civil and religious" rights of the "non-Jewish communities" indicates yet another layer of erasure. It is the erasure of the political rights that constitute the Palestinians as a political community. The denial of the political constitution of the Palestinian people was tantamount to the denial of their sovereignty in hegemonic terms because only a nation-state was eligible for sovereignty. So, where in the first encounter the Declaration denied Palestinians their *relational* conceptualization of sovereignty on the terms of their own

[376] Noura Erakat, *supra* 22, at 16.

rooted legality, they were now being denied the dominant *territorial* sovereignty as their peoplehood was negated. They could enjoy merely religious and civil liberties; that *was* the extent of their rights as conceived by the Declaration.

This denial of Palestinians' legal subjectivity was formalized by the Mandate system and further replicated in the UN's affairs surrounding the partition plan. The UNSCOP was determined to impose "any feasible plan which does not place the whole of Palestine under the present majority of the Arabs".[377] This assertion was made by Balfour nearly 30 years prior to UNSCOP when he had the audacity to say that "in the case of Palestine we deliberately and rightly decline to accept the principle of self-determination."[378] We can get further insight into the foregrounding of this predetermined attitude, embedded in the Western imagination of Palestine, from the committee's reasoning in the following paragraph:

> "With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the 'A' Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the sui generis Mandate for Palestine run counter to that principle."[379]

Imseis succinctly sums up the problematic nature of this statement:

> "Instead of taking issue with the *sui generis* nature of the mandate and its presumptive violation of the *Charter* principle of self-determination of peoples, as the liberal rights-based ethos of the day would require, UNSCOP adopted an approach evocative of the erasure of non-European legal subjectivity of the past."[380]

In light of this denial, like Layla, Palestine became an object of a territorial conquest. Also like Layla, Palestine's indigenous people, present as the majority inhabitants with a continuing, ancestral bond with the land but largely absent from the Western imagination of Palestine, became an absent center in the legal contest surrounding their own land.

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[377] UNSCOP Report Vol.1, *supra* 292*, at* 52.
[378] Victor Kattan, *supra* 7, at 121.
[379] UNSCOP Report Vol. 1, *supra* 292*, at* 35.
[380] Ardi Imseis, *supra 23*, at 77.

This absent-presence brings out the tension between truth and its perception as we saw in the Dissonance stage in the novel. While Western legal actors attempted to represent the Palestinians as lacking subjectivity, they were confronted with a people acting as full legal subjects in their three-fold resistance against British imperialism, international Eurocentric hegemony, and Zionist settler-colonialism. They were resisting, with complete subjectivity, those foreign powers in defense of their preexisting way of life and were exercising their responsibility to protect their land and their relationships. In other words, they were exercising relational sovereignty.[381]

For example, there was a unified discourse amongst the Palestinian press which the British attempted to shut down and silence on multiple occasions. There was a Palestinian-led political unit (known as the Arab Higher Committee for Palestine) that directed and led popular resistance. This extension of leadership was received by a wide popular compliance culminating in the 1936-39 Revolt,[382] the Boycott of the UNSCOP, the rejection of the Partition Plan, and more. These facts indicate a constituted political community with normative governance acting collectively to secure their vision of freedom. They were, for a lack of an alternative term, a relationally sovereign people in action. They did not need a formal stamp by a foreign body or set of imperial powers whose legitimacy they did not recognize to tell them whether they were or were not a politically constituted community.

This reality in Palestine resonates with the indigenous struggle in Turtle Island where:

> It is a matter of historical record that before the arrival of Europeans, these First Nations possessed and exercised absolute sovereignty over what is now called the North American continent.[383]

In line with this view, John Borrows argues that "the term 'self-government' does not require a legal or technical definition because I do not refer to self-government as an abstract, futuristic institution. I identify self-government with particular events in which our people have *exercised*

[381] Again, while arguments have been made about the sovereignty of the Palestinian people from within the dominant paradigm (see for example, Henry Cattan *supra* 280, at 75 and 105 - 126), here I'm concerned with representing these issues through the lens of Palestine's rooted legality.
[382] Which was met by violent repression by British forces leading to the "killing, wounding, imprisonment or exile of over 10 percent of the Palestinian male population and the decimation of the Palestinian political elite heading into WWII" see Ardi Imseis, *ibid,* at 41.
[383] Georges Erasmus and Joe Sanders *supra* 297, at 3.

specific instances of control in their internal and *external* societal relationships."[384] Borrows gives an example of this alternative but material exercise of a rooted understanding of sovereignty when indigenous leaders fought against the Americans alongside the Crown. They did not fight as British subjects, but rather as sovereign peoples who were protecting their land.[385]

In sum, the clash between the subaltern truth presuming a rooted indigenous subjectivity and the colonial perception of truth negating it amounts to the second stage of subjugation which is Dissonance. The primary problem of this dissonance, in line with the constitutional logic analytic synthesized from the novel,[386] was that the dispute revolves around the wrong focal point or center. Rather than rightly centering the majority indigenous inhabitants, whose very existence was under threat, as the focal point of their reasoning, Britain, UNSCOP and the majority of the Euro/settler-colonial bloc placed their colonial interests and desire to solve what they perceived as Europe's "Jewish question" at the center. This dismissal of the Palestinians, and of the violence that the Zionist movement explicitly expressed to the international community as necessary for establishing their state, was a choice that these actors made. This choice had consequences: mass dispossession, massacres, and ethnic cleansing at the hands of terrorist Jewish militias — and the sustenance of a mad reality of daily violence and crimes against humanity that continue to this day.

4.3.4. Alienation

Entrapped by dispossession and a new settler-colonial reality of Israeli despotism, the children of the homeland, once a collective body, suddenly found themselves being categorized into divided identities. Those remaining in what is called 1948 lands (the lands on which Israel superimposed itself during the *Nakba* in 1948) became Arab citizens of Israel. The remainder of the land became the West Bank and Gaza Strip. Then, there are the Jerusalemites who live under a peculiar and

[384] Borrows, John. "A Genealogy of Law: Inherent Sovereignty and First Nations Self-government" (1992) 2:30 Osgoode Hall L J 291, at 294.
[385] *Ibid.*
[386] Recall that the constitutional logic analytic (that forms part of the lifeways) revealed by the novel was Center → Choice → Outcome, see part 3.2.3 above.

constantly changing demographic, geographic, and political status of Jerusalem. And finally, the refugees.

Over time, these four categories were further divided into subcategories. Palestinians in 1948 were suddenly being classified as Druze, Bedouins, Muslims, and Christians. The West Bank was further divided into Areas A, B, and C. Gaza has been besieged and geographically disconnected, and Jerusalem divided into East and West. A large portion of these 'territories' are separated today by what Palestinians call an Apartheid wall and what Israel calls a security fence. Palestinian refugees were predominantly divided into internally displaced persons and refugee communities of Jordan, Syria, and Lebanon. Even then they were further divided into passport holders and non-passport holders as well as camp residents and urban refugee communities. This is in addition to the diaspora that lives elsewhere near and far around the globe. This is what we call *shataat*; a compound condition denoting that which is dispersed, scattered and separated.

Yet, despite our *shataat*, a strong identity of, and a belonging to, a single constituted community that belongs to indigenous Palestine persists. The reality of dispossession perhaps served to further strengthen, in belonging though clearly not in geographic proximity, this collective sentiment. However, it is precisely this political unity that has been denied, and this denial has been reified over and over, by the dominant international legal form from Balfour and the Partition to the perpetual condition of *shataat* to today's legal contest of statehood.

With a denied legality, an erased legal subjectivity, disrupted relations and way of life culminating in a condition of *shataat*, the children of the homeland found themselves forced to pursue recognition on international legal terms. Their case, like Ṣaleḥ's, was subsumed by the dominant paradigm and their reality was constructed in a legal tournament. The pursuit of recognition was spearheaded by the leadership of the Palestine Liberation Organization (PLO) as early as 1973.[387] If one was to interpret these efforts charitably, it could be said that the PLO tried their best to present their arguments on the basis of international law, using a tactic-based strategy, as a

[387] The shift towards a transitionary or temporary approach of reaching settlement through negotiation or diplomatic means is evident in the PLO's 10-point program where some demands were explicitly grounded in reference to international legal instruments like Resolution 242.

desperate attempt to protect whatever remaining rights and lands they could now protect through negotiation.

However, this created a disjuncture. On one hand, there was the lived experience of the people of Palestine whose *shataat* and subjugation amounted to a continuation of the *Nakba* and naturally a continuation of the European imperialism of Sykes-Picot, Balfour, the Mandate system, and the Partition Plan. On the other hand, international law employed logical tools and constructs that treated each incident of subjugation *post-Nakba* as a temporally and contextually atomized incident.

For example, the refugee crisis was seen as a separate matter, in response to which the UN issued Resolution 194[388] without addressing the *Nakba* as the trigger of this crisis. The UN viewed the 1967 usurpation of further Palestinian land as an isolated incident of "occupation" therefore invoking International Humanitarian Law and Geneva Convention IV.[389] The same effect extends to the so-called 'peace process' — the Oslo Peace Accords — which, from a rooted perspective, effectively amounts to dispossession by negotiation and thereby a continuation of the original existential threat that began as early as the 1880's.[390] Numerous Israeli military assaults on Palestinians are justified by the legal construct of self-defense.[391] From a rooted view, this is a perplexing concept that defies logic. How could an aggressor be thought to act against its victim in self-defense? This contradiction, I suggest, is owed to international law's failure to address the root cause of the problem: constitutive incommensurability.

As such, these fictional legal constructs invented by the dominant legality continued to fill in the gaps in narrating the experience of the absent-center on its own hegemonic terms. The disjuncture

[388] United Nations General Assembly, GA Res. 194, UN Doc. A/RES/194 (III), 11 December 1948.
[389] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; See also Ardi Imseis. "On the Fourth Geneva Convention and the Occupied Palestinian Territory" (2003) 44:1 Harv J Int'l L 65; John Reynolds (2015), *supra* 24.
[390] Henry Cattan, *supra* 280; Nur Masalha, *supra* 2.
[391] Jean d'Aspremont. "The International Legal Scholar in Palestine: Hurling Stones under the Guise of Legal Forms?" (2013) 14 Melbourne J Int'l L 1 cited in John Reynolds (2015), *supra* 24, at 27 and Yousef Shandi. "Israel's Claim of the "Legitimate Right of Self-Defence" regarding the Gaza Strip in Light of International Law: A Palestinian Lawyer's Position" (2010) 3:2: JEAIL 387. Also, see generally John Quigley, *supra* 365 and Nicola Perugini & Neve Gordon, *The Human Right to Dominate* (Oxford: Oxford University Press, 2015).

between the Palestinians' lived experience and the constructed reality captures the third stage of conceptual subjugation, which I called Alienation.

With this gap between lived reality and constructed reality, truth is lost and refracted into a battle of narratives like the competing submissions of the defense and prosecution in the novel. And just like in Ṣaleḥ's case, the imperative force of the law invariably has the upper hand in institutionalizing whatever truth it has arrived at regardless of any defects in its process. Edward Sa'id captures this point when he says:

> Today Palestine does not exist, except as a memory, or more importantly as an idea, a political and human experience, and an act of sustained popular will. That there had been such an entity as Palestine until 1948, or that Israel's "independence" was the result of the eradication of Palestine: of these truths beyond dispute most Westerners who follow events in the Middle East are more or less ignorant, or unaware.[392]

4.3.5. Elimination

More than a century after Balfour, the erasure of Palestinian subjectivity continues. The United Nations has rejected Palestinian Statehood three times. The Palestinians' return to their ancestral land has been transformed into a deferred right to return. The Palestinian claim to sovereignty and its correlate structure of the state has been subsumed into a peace process negotiated in perpetuity. A just resolution of the legal impasse has been substituted with a mere adjudication that sustains the impasse. By now, we know that the claim for Palestinian sovereignty is doomed to fail before it arises, because this substantive claim is embedded in a constitutive criterion that denies our existence, our collective identity, and more importantly our legality. At this point, Palestine and the Palestinians are subjected to a perpetual silencing. This is the fourth stage of conceptual subjugation.

As the 'Other Thing' reveals, the problem is structural. Trying to win according to the dominant rules of the game in this context — whether as a pragmatic decision or from the point of view of strategic essentialism — forces you to relinquish your worldview. And even when you do

[392] Edward Said, *supra* 275, at 3.

relinquish your difference in an attempt to appeal to an allegedly universal principle, your truth is distorted before it is told thereby making your core claim destined to fail. This structural limitation is captured by Diom Romeo Saganash speaking at a conference after the Oka crisis where he explains that:

> "*A priori,* the way law is conceptualized condemns us to lose. For the law presumes that this land is not ours. It holds that the theft of our lands was no theft at all, but was in fact a valid legal claim. So, for Indigenous Peoples, the law is racist and fundamentally flawed since it legitimizes the theft of our lands and denies our fundamental rights. Canada has stated that there is no legal basis for Indian claims to land. I must agree. There is no legal basis *under Canadian law*. Canadian law says that our land was never ours, so how can there be a legal claim?" [393]

When Saganash asserts that the indigenous peoples are "condemned to lose" *a priori*, he is, like Ṣaleḥ, interrogating the law's credibility and capacity to ascertain a deeper, more holistic truth. He is elucidating the truths that the law is incapable of comprehending. The Canadian court cannot accept the Aboriginal vision of legality or the non-state vision of decolonial conceptions of sovereignty and simultaneously maintain the coherence of its very existence as an entity that originates from a settler-colonial, Eurocentric conception of sovereignty. Equally, the United Nations and its hegemonic international legal form cannot acknowledge the core claim underlying the Palestinian struggle and the relational belonging of its collective body of people to an indivisible land and simultaneously maintain its territorial conceptions of sovereignty, its territorial framing of the dispute, and its recognition of an otherwise illegal settler state of Israel.

Similar to Saganash, when Kanafani asks through the voice of his protagonist whether war is reasonable or realistic, he is questioning the validity of the measures against which one's lived reality is assessed. From his lived experience during the *Nakba*, Kanafani knows that war is real — its imminent and material consequences separated him from his home forever. But, in posing such a question, Kanafani is not looking for facts. He is not looking for the historical timeline of the European Zionist colonization of Palestine, or the record of every Palestinian village that the Zionist forces razed, or every atrocity committed by Israel thereafter. Just like Saganash's rhetorical question that "Canadian law says that our land was never ours, so how can there be a

[393] Diom R Saganash, "James Bay II: A Call to Action" in Andrea P Morrison, & Irwin Cotler, *supra 368*, at 204.

legal claim?"[394] Kanafani is probing for truth, for questions that challenge the gap between truth and its perception and between lived and constructed reality.

Those are the kind of questions that this thesis has sought to problematize. According to whose worldview are the Balfour Declaration and the UN Partition Plan reasonable? By whose standards is it reasonable to deem Israel acting in self-defense? Or, for example, according to whose logic does it seem reasonable to recognize the unilateral declaration of sovereignty of an illegal entity that had dispossessed the vast majority of a people living peacefully in their ancestral homeland?

The Wet'suwet'en uprising is a more recent example of such a binary categorization that casts the same colonial discourse of civility under the guise of universality.[395] For the Wet'suwet'en Nation, Canada has no sovereignty over their lands, the pipeline crossing their land is illegal, and their resistance against this violation is a defense of, and an obligation to protect, their ancestral land. From the colonial perspective, the Indigenous truth is inverted where the blockades become illegal, the Wet'suwet'en nation becomes in violation of the rule of law, and land defenders are arrested and criminalized.[396]

These are the kinds of questions that one can only interrogate if the incommensurability of the two conflicting legal paradigms upon which each claim is predicated is acknowledged. Until then, the deferment of engaging with these underlying questions is bound to sustain the hegemon's perpetual violence against the subaltern.

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[394] *Ibid*.

[395] See the 5-part interview by Matt Gurney with indigenous law professors titled "Whose Law is it Anyway", (Feb 2020) online: *TVO* <https://www.tvo.org/article/whose-law-is-it-anyway-part-1-wetsuweten-and-indigenous-rights>

[396] There are interesting intersections between the criminalization of Palestinian and indigenous resistance in Israel and in Canada. In Canada, see Shiri Pasternak, Sue Collis & Tia Dafnos. "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims" (2013) 28:01 Canadian Journal of Law and Society / Revue Canadienne Droit et Société 65. For an interesting parable albeit during the British Mandate over Palestine, see the infamous execution of three Palestinian warriors, a story with an important legacy in the Palestinian resistance context in Rana Barakat. "Criminals or Martyrs? Let the Courts Decide! British Colonial Legacy in Palestine and the Criminalization of Resistance" (2018) 1:1 Arab Center for Research & Policy Studies 84; and Rosemary Sayigh, *supra* 301.

4.4. Beyond Sovereignty — Prefigurative Liberation

Reflecting on the discussion in this chapter as well as the previous ones, we can notice a thread of existential questions. In the novel, Ṣaleḥ struggles with the law's denial of what he called the *de facto* existence of a parallel reality. In Turtle Island, Mills uncovers a path that could lead to genuine reconciliation where this path necessitates an understanding of the existential differences, disclosed as ECO-systems, between two essentially different species of legality. In Palestine, children of the homeland struggle against not only a physical erasure but an existential and ongoing erasure that was persistent across international legal dealings with Palestine.

Today, we stand at a critical juncture, and it is not only because the dominant international legal form has been of no genuine help for our plight against oppression nor because it is structurally a part of the machinery of conceptual subjugation. But more importantly, because the demand for statehood — though a perpetually deferred one — amounts to entering the elimination phase, that is, the elimination of our rooted legality and the perpetuity of conceptual violence.

Many Palestinian lawyers, legal scholars, politicians, and human rights defenders and activists remain preoccupied with the substantive and procedural particularities of international law: from rights and violations of UN Resolutions and International Conventions to lobbying, advocacy, and litigation. This preoccupation prevails despite the widespread frustration amongst Palestinian actors with the structural limits of the dominant international legal form and despite that many are critical of its active role in the Zionist usurpation of Palestine. Practically speaking however, some consider this preoccupation justified, at least temporally. Given the lack of military power or support in the face of Israel's heavily funded and high-tech military might, international law, despite Israel's international impunity, was, ironically, one of the few available avenues.

In parallel to temporal justifications for utilizing the hegemonic international legal form, Palestinian scholars have sought to offer alternative, non-colonial visions of Palestinian sovereignty from decolonial and indigenous conceptions to shared and popular formats.[397]

[397] See for example, Amahl Bishara, *supra* 16; Randa Farah, *supra* 16; Leila Farsakh, *supra* 17; Rana Barakat, *supra* 18. On the contrary, see Joseph Massad's critique of self-determination, Joseph Massad, *supra* 19.

However, these departures do not necessarily problematize the very notion of sovereignty which is embedded in an ECO-system that contradicts our relational existence and our ontology of finitude. I have labelled the acts of indigenous people of Palestine as relational sovereignty for lack of a readily available alternative conception. While a further exploration into the lifeworlds and lifeways of Palestine's rooted legality is needed to make such an assessment, I doubt that such a conception of sovereignty appropriately captures the mode of governance as understood by the indigenous people of Palestine. Sovereignty internalizes an ontology of supremacy, self-sufficiency, and self-conceit and thus, as Khaled Furani puts it, impoverishes our "attunement to human fragility" and obscures the fragility of human reason.[398] Sovereignty also diverts us from the real issue at stake: liberation.

To disrupt the perpetuity of conceptual subjugation that we have been experiencing for over a century, it is important to represent our struggle on its own terms. One path that this approach may direct us towards is letting go of the sovereignty and statehood contest, and returning to liberation which was the focal point of the Palestinian struggle as early as the 1880's. To do so after decades of mutation, we must re-articulate what liberation means and looks like.

I have suggested that the rooted understanding of the struggle means seeking liberation from despotism. By now, it is clear that liberation is a question that is "non-reducible to [a] state."[399] This suggestion should not be conflated with the Zionist formulation of a "Zero-state solution" or the anarchist "No-state solution". The essentially colonial version of the Zionist proposal is that it envisions an Israeli state to be sure but no Palestinian state.[400] The solution is thus a zero

[398] Khaled Furani. "Questioning Modern Sovereignty: Reflections Towards a Palestinian Challenge from within the Leviathan" (2020) [unpublished, copy available on file]. I would like to express my gratitude to Khaled Furani for sharing with me his unpublished work.
[399] *Ibid.*
[400] The advocates of this position suggest a few approaches, all of which negate a Palestinian State. One position suggests reverting to a Jordanian-Egyptian-Israel rule over indigenous Palestine. See for example Daniel Pipes, "Solving the Palestinian Problem" *Jerusalem Post* (7 Jan 2009) online < https://www.jpost.com/opinion/op-ed-contributors/solving-the-palestinian-problem>. An alternative formulation is advocated by Ariel Centre for Policy Research (ACPR) which insists that Jordan is Palestine, and that Palestinians should be content with such political arrangement. See Arieh Eldad. "Two States for Two Nations on Two Sides of the Jordan River" (2004) Policy Paper No. 152, ACPR. For further insight on the variations of this position, see also Aharon Levran. "A Disaster Foretold: The Strategic Dangers of a Palestinian State" (2001) Policy Paper No. 56, ACPR and Yoash Tsiddon-Chatto. "After-Oslo — The Quest for Political Stability: A Politically Incorrect Paper on an Apparently Correct Solution" (1998) Policy Paper No. 48, ACPR.

Palestinian state, echoing the principle of settler-supremacy and the selfsame erasure of Palestinian existence. The anarchist version of Isocracy has some commonalities with the One State solution, although it privileges the interests of individuals within the polity as opposed to the interests of the polity as a state.[401] While the anarchist no-state proposal does not advocate for a state *per se*, the vision nonetheless arguably belongs to a liberal species of legality given its focus on individualism, atomization, and autonomous self-governance. Thus, the scope of the proposition that Palestinian liberation is not reducible to any statist solution is radically different in its constitutive as well as substantive elements than what the abovementioned Zero-state or No-state formulations envision.

If notions like sovereignty and the nation-state constitute a form of despotism in that they violate our relational approach to the land and our non-linear form of belonging to one another, then the question imperative to a prefigurative vision of liberation becomes: how do we organize relationships amongst people and between people and the land in indigenous Palestine *in light of the impasse*?

While answering this question is beyond the scope of my thesis, I suggest that my thesis offers some insight into how one could address such a question. Answering this question requires a more elaborate mapping of the various elements of our rooted legality. This is the most important gap that my thesis identifies. Just as *The Other Thing* and the *fellaḥin* letter broadened our horizon and revealed to us some elements of our rooted legality, we can dig deeper into the diverse sites of memory in which the indigenous legal imagination is kept alive. These sites are not limited to literature or land traditions. Treating law as a total social phenomenon, one can see the embeddedness of the moral, political, and legal Palestinian imagination in culture and folklore in their broadest definitions entailing literature, music, poetry, norms and traditions, oral history, archives, religion, and more. Approaching law holistically with the aim of decolonizing the worldviews that have been imposed on us by colonial powers and the legal systems they brought

[401] See for example Lev Lafayette, "The Country of Palestine: A Zero State Solution" (18 Jul 2010) online (blog) *The Isocracy Network* < http://isocracy.org/content/country-palestine-zero-state-solution> and James Herod, "Palestine: The No-State Solution" (Feb 2009) online (newsletter) *The Anarchist Library* < https://theanarchistlibrary.org/library/james-herod-palestine-the-no-state-solution>.

with them, therefore, requires us to fight for justice, and excavate truth, on extra-legal terrains and tap into the broader societal reservoir of knowledge and wisdom.

For example, the relational treatment of the land and the deep bond connecting this relationship to various aspects of our existence is a core theme in the Palestinian collective consciousness. Consider how many poems and songs revolve around the land and its formations like mountains, hills and valleys; elements like water, sun, and air; Palestine's thyme, sage, olive trees, and orange groves; its swallows, mules, gazelles; and beyond. Another example concerns the insistence on the indivisibility of the land that is manifest in journalistic productions, newspapers, political speeches, and the statements, affairs and calls to actions by Palestinian committees across different points in history.[402] Additionally, one may consider how many such cultural artefacts address, criticize and evaluate political events and legal orders whether from the time of the Ottomans and the role and conduct of the British Higher Commissioner during the British Mandate or later times.[403] Consider also how many such artefacts teach and remind us of appropriate normative conduct vis-à-vis liberation and our relationships including on courage, love, hope, solidarity, and the moral obligations or duties of resisting injustice. All these are manifestations of what may be considered substantive and constitutive elements of our normative order and will invariably influence how we answer the question of constituting community and organizing relationships from a rooted perspective in today's reality.

As such, I am of the view that, as Palestinian legal scholars, lawyers, and rights activists, we should shift our efforts towards uncovering our unique legalities that have been buried by this history of

[402] See Rashid Khalidi's examination of primary historical records, with particular attention on the Palestinian press and position statements by Palestinian leaders, *supra* 349. For general primary records, see the Palestinian societal archive Khazaaen, online (archive) <https://www.khazaaen.org/en/archive-items>.

[403] Ample examples exist and curating and analyzing such list is a research project on its own right. But see for instance spoken word and poetry denouncing the Ottoman *Seferberlik* order in which the Empire forcibly enlisted communities in the Levant (and the Arabian Peninsula) to join the army during WW1, resulting in the mass deportation of families and the execution of those who refused to comply with the order. Sentiments against the *Seferberlik* are still commemorated until this day, see for example the song "Safar Barlek" by the famous Palestinian artist Sanaa' Mousa. Another instance is the poetry of Noah Ibrahim generally, who was arrested by the British multiple times during the Mandate for his poetry, and I recount in particular his poem denouncing the High Commissioner and the judicial order to execute three Palestinian warriors (see paper by Rana Barakat on this incident, *supra* 396). That poem later became a popular song known as "*min sijn ʿAkkā"* (From the Prison of Acre) sung by al-Ashiqeen. Other examples here may include the works of music bands during the Palestinian revolution like al-Ashiqeen, or later bands during the *Intifada* like al-Funun, and even in more recent times bands like 47Soul.

erasure. Like Edward Said called upon us to extend our struggle into the realm of narrating and representing our history through our lens,[404] we ought to also extend this intellectual pursuit into the realm of law and legal philosophy. By acknowledging constitutive incommensurability, we can shift the monologue into a dialogue that engages with the rooted legality that existed in Palestine in parallel to *jus gentium*, in parallel to the Ottoman rule, and prior to the arrival of either the British or the Zionists to our homeland. In turn, this engagement could pave the way towards a more inclusive legal imagination that contains the seeds of transcending the impasse in indigenous Palestine.

[404] Edward Said. "Permission to Narrate" (1984) 13:3 J Palestine Stud 27.

CHAPTER 5: CONCLUDING REMARKS

"The kind of recognition we want is not the kind of self-government being advocated by the Department of Indian Affair [...] It is something that cannot be legislated."

— *Elijah Harper, Justice for Natives*[405]

As I was writing this thesis, there were two attempts of silencing Toronto-based legal scholars because they were vocal on Palestine. The first involved the University of Toronto Faculty of Law succumbing to lobbying pressure in relation to hiring human rights scholar Valentina Azarova, an incident which saw a series of resignations and denunciations in protest.[406] The second involved an attack by a Canadian Zionist organization on Osgoode's own Faisal Bhabha for speaking against settler supremacy in Israel and Canada.[407]

These incidents are better understood as part of a more violent and vehement attempt to silence the Palestinian truth. The silencing of Palestinian reality is not unique to Canada or the realm of academia, but is visible across many liberal jurisdictions and avenues.[408] Nonetheless, Canada is particularly relevant in the silencing of Palestine[409] given its own history of indigenous erasure and the kind of genesis narrative it shares with other settler colonial entities founded on terror and violence like Israel and the United States of America amongst others.[410] Crucially, this erasure is

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[405] Elijah Harper, "A Time to Say No" in Andrea P Morrison, & Irwin Cotler *supra 368*, at 223 – 224.
[406] Farida Deif, "A Human Rights Controversy at the University of Toronto: Case Raises Serious Concerns on Threats to Academic Freedom" (29 Sep 2020) online, *Human Rights Watch* <https://www.hrw.org/news/2020/09/29/human-rights-controversy-university-toronto>.
[407] Independent Jewish Voices York University Chapter, "Open Letter – IJV York Denounces Smear Campaign Against Faisal Bhabha" (25 Jun 2020) online, *Independent Jewish Voices* < https://www.ijvcanada.org/open-letter-ijv-york-denounces-smear-campaign-against-faisal-bhabha/>.
[408] See for example David Landy, Ronit Lentin, & Conor McCarthy *supra* 4 and David Edwards, *Propaganda Blitz: How the Corporate Media Distort Reality* (London: Pluto Press, 2018), at 127. See also Gideon Levy, "CNN fires Marc Lamont Hill for Criticizing Israel: In U.S. Media, Israel is Untouchable." (2019) 38:1 WRMEA, at 15; David Palumbo-Liu, "CNN fires Marc Lamont Hill for Criticizing Israel: Marc Lamont Hill and the Israeli Lobby On U.S. Campuses" (2019) 38:1 WRMEA, at 14; and Noura Erakat, "Marc Lamont Hill and the Legacy of Punishing Black Internationalists" (05 Dec 2018) online, *Washington Post* <https://www.washingtonpost.com/opinions/2018/12/05/marc-lamont-hill-legacy-punishing-black-internationalists/>.
[409] See the case of "Canada Park" built on the ruins of Imwas, Beit Nuba and Yalu (Palestinian villages destroyed by Israel in 1967) in Lee-Anne Broadhead. "Scales of Justice: Putting Remembrance Back on the Map in Palestine and Mi'kma'ki" (2020) 10:3 Settler Colon Stud at 331. Generally, see also Yves Engler, *Canada and Israel: Building Apartheid* (RED/Fernwood Publishing: Canada, 2010); and Michael Connors Jackman & Nishant Upadhyay. "Pinkwatching Israel, Whitewashing Canada: Queer (Settler) Politics and Indigenous Colonization in Canada" (2014) 42:3/4 Wom Stud Quart 195.
[410] Steven Salaita, *supra* 2.

not a past matter with ongoing consequences but is an ongoing present. However, as Darwish rightly notes in his poem,[411] it will be a long time, perhaps eternally, before our annihilation is ever complete given that indigenous peoples, whether in Palestine or Turtle Island, continue to resist, and future generations will continue to resist this conceptual subjugation. This is the kind of intellectual resistance against epistemic violence that marks the works of Ghassan Kanafani, including his novel *The Other Thing*.

With a focus on Palestine as a paradigmatic example, the dominant international legal form and its liberal standards of legality were the target of my inquiry. International law has long operated as a site of truth contestation and truth adjudication in relation to the Palestinian struggle for liberation from despotism. This thesis attempted to demonstrate that the international legal impasse in indigenous Palestine is animated by incommensurable visions of legality, where the denial of this incommensurability leads to a perpetual condition of conceptual subjugation. The subsumption of the Palestinian struggle into the dominant international legal framework has silenced the narration of the Palestinian truth through the lens of its own paradigm. In turn, this condition has not only mutated the Palestinian plight from a liberation struggle to a sovereignty quest but has sustained the ongoing annihilation of our rooted vision of legality.

While many rely on liberal standards of legality to confront this kind of erasure both domestically and internationally, this thesis sought to challenge the very criteria of legality that assess and adjudicate these issues, which are also the same criteria that deem such settler colonial entities as being legal. Despite their critical stance on the Eurocentric and colonial nature of today's international legal order, legal historians from Anghie to Kattan urge against abandoning international law. My initial stance has evolved as I was writing this paper, whence I was of the view that law was a hopeless tool for confronting despotism. Now, I cautiously agree that we must not give up on law, as a concept, altogether. But, it became important for me to distinguish which kind of international law aren't we giving up on?

I have argued that attempting to reform the dominant international legal form is doomed to failure due to its embeddedness in a paradigm that is inherently violent to the Other. However, it is not

[411] Mahmoud Darwish, *supra* 168.

too late to conceptualize a new kind of international law with standards of legality that are not embedded in a paradigm that is essentially violent to The Other. Yet, this kind of reform is a kind that cannot be legislated. No such change is possible without a cognitive shift that seeks to transcend Spivak's epistemic violence and Simpson's cognitive imperialism, as Sákéj Henderson asserts no change is possible without a transformation in the human consciousness.[412] My response to the legal impasse in the Holy Land, which is a rather modest and underdeveloped starting point, has been to acknowledge and address the underlying incommensurability. This acknowledgement allowed me to tap into some sites of the Palestinian legal imagination that elucidate some elements of a vision of rooted legality in indigenous Palestine.

[412] James Sákéj Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Ltd, 2008) at 100-101.

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